

CHAPTER 3

CONFRONTING UNLAWFUL AND
IRRESPONSIBLE BEHAVIOUR INsofar
AS IT RELATES TO COMPANY LAW



STRUCTURE OF THIS CHAPTER

This Chapter is structured in a manner whereby, in the following three Parts, the Office's inputs, throughputs and outputs respectively are detailed.

PART A: INPUTS

EXTERNAL INPUTS

The Office's activities in confronting unlawful and irresponsible behaviour are driven to a substantial extent, both directly and indirectly, by inputs received from external sources. This is a function of the fact that:

- a number of parties, including liquidators, auditors, examiners and certain professional bodies, have statutory reporting obligations to the Office;
- the Office forms part of a broader statutory framework that provides for the referral of, otherwise confidential, information between regulatory and enforcement bodies where such information is considered to be relevant to those other entities' functions; and
- the Office receives a substantial number of complaints from members of the public annually.

In that context, the principal inputs received from external sources during the year were as follows:

Table 5 Inputs from external sources

		2015	%		2014	%
<i>Statutory reports</i>						
Liquidators' reports (initial) (s682)	875			973		
Liquidators' reports (subsequent) (s682)	394			539		
Total liquidators' reports (s682)		1,269	74.2		1,512	79.0
Liquidators' reports regarding possible criminality (s723)		2	0.1		0	0
Auditors' indictable offence reports (s393)		100	5.9		121	6.3
Examiners' reports (s534)		3	0.2		n/a ²²	n/a
Professional Bodies' indictable offence reports (s931)		4	0.3		2	0.1
<i>Referrals</i>						
Referrals from external parties		40	2.3		43	2.2
<i>Complaints</i>						
Complaints from members of the public		290	17.0		236	12.4
Total inputs from external sources		1,708	100		1,914	100

²² Statutory provision only came into effect during 2015 upon the commencement of the Companies Act 2014

The principal external sources of inputs driving the Office's activities over the year under review are elaborated upon below.

LIQUIDATORS' SECTION 682 REPORTS

Introduction – overview of the liquidator reporting regime

As can be seen from Table 5 above, liquidators' section 682 reports accounted for just over 74% of all external inputs received by the Office during 2015 (2014: 79%). In summary, liquidators of companies that are in insolvent²³ liquidation are required by law²⁴ to report to the Office on the circumstances giving rise to the company's demise and on the conduct of any person who was a director of the company during the twelve months preceding the entry of the company into liquidation. The liquidator must also proceed to apply to the High Court for the restriction²⁵ of each of the directors, unless relieved of that obligation by the Office²⁶.

The essential aims of this statutory reporting regime are to:

- afford the public a degree of protection by ensuring that persons who have been determined by the High Court as not having acted honestly and/or responsibly in the run up to a company's entering insolvent liquidation may, in respect of the mandatory five year period of restriction, only act as directors of other companies that meet minimum capitalisation requirements; and
- ensure that persons who, in the run up to a company's entering insolvent liquidation, have been judged to have acted honestly and responsibly can continue to engage in entrepreneurial activity through the medium of limited liability companies without sanction or penalty.

In discharging its role in this regard, the Office expects liquidators to provide it with all of the information which is relevant to the making of an appropriate decision. It also encourages liquidators to make evidence-based recommendations regarding relief/no relief by reference to the results of their investigations.

The Office considers granting relief where a liquidator advances an evidence-based justification in support of a claim that a director has acted honestly and responsibly in conducting the company's affairs. In making its decisions, the Office is keen to ensure that no director needlessly bears the burden of a High Court hearing where he or she has clearly demonstrated honest and responsible behaviour in the conduct of the affairs of the failed enterprise. In practice, the Office acts as a filter to remove the need for consideration by the High Court of those cases which do not appear to warrant its attention.

It is important to note, however, that ODCE decisions of 'no relief' or 'partial relief' do not constitute a finding of dishonesty or irresponsibility in respect of the directors concerned, and it would be inappropriate for any such inference or imputation to be drawn. It is solely a matter for the High Court (having heard the submissions of the liquidator and director(s) respectively) to determine if a Restriction Declaration should be made in respect of any particular company director.

Restriction and Disqualification Undertakings

The Act²⁷ introduced, for the first time, a statutory framework under which individuals who might otherwise face the prospect of Court proceedings can avoid having to go to Court by voluntarily agreeing to a restriction or disqualification as applicable (i.e., by providing a legal Undertaking to that effect). In March, 2015, the ODCE published a Consultation Paper setting out its proposed policy and procedures in this regard. Having considered the responses received, the ODCE provided advice to the Minister on the appropriate format and content of Undertakings. On 29 May, 2015, the Minister signed a Statutory Instrument²⁸ prescribing the form of Undertakings.

In summary, the Act provides the ODCE with discretion as to whether to offer an Undertaking. Where an offer is made by the ODCE, it must be made on the prescribed form, the layout and content of which is stipulated by the Statutory Instrument (the offer document being referred to as a "Notice"). The Notice must set out, inter alia, an outline of the circumstances, facts and allegations establishing the grounds for a restriction or disqualification together with details of the legal effects of an Undertaking for the person providing same.

23 A company is insolvent when it is unable to pay its debts as they fall due

24 Section 682 Companies Act 2014

25 Where an individual is restricted under section 819 of the Companies Act 2014, s/he may only act as the director or secretary of a company for a period of five years thereafter provided that the company concerned meets certain minimum capitalisation requirements. In the case of a public limited company a minimum called up share capital of €500,000 is required. In the case of any other company, the corresponding figure is €100,000.

26 The process and scope of liquidator reporting are outlined in three main ODCE publications, Decision Notice D/2002/3 as supplemented by Decision Notice D/2003/1 and Information Notice I/2009/1. These documents are available at www.odce.ie

27 Sections 849 to 854 of the Companies Act, 2014

28 Companies Act 2014 (Disqualification and Restriction Undertakings) Regulations 2015 (S.I. No. 222 of 2015)

There is no obligation on the recipient of a Notice to accept the offer (i.e., to provide the Undertaking). However, where the recipient intends to accept the offer, they must do so within 21 days (or within such longer period as may be allowed by the ODCE). During this offer period, neither the ODCE nor any other person who is aware of the issuing of the Notice may initiate proceedings for the restriction or disqualification of the recipient of the Notice on foot of the circumstances, facts and allegations as set out in the Notice.

Where a recipient of a Notice decides to accept the offer and to return a duly signed Undertaking Acceptance Form, they will be subject to a Restriction or Disqualification Declaration/Order on the same basis as if a restriction or disqualification had been imposed by the High Court. Therefore, any subsequent breach of the terms of the restriction or disqualification will constitute a criminal offence and will be the same as a breach of a Court-imposed restriction or disqualification.

Notwithstanding that company directors or other persons may have voluntarily provided Undertakings, they can, nevertheless, still apply to the Court – at any time during the currency of the restriction or disqualification – seeking to be relieved, in whole or in part, from the terms of the restriction or disqualification, as applicable. Whilst any such applications will be considered by the ODCE on a case by case basis in the context of the particular facts and circumstances, having regard to the need to uphold the integrity of the process, it is anticipated that the ODCE will, in most instances, oppose such applications.

With reference to disqualification, the legislation provides that the maximum duration of disqualification that the ODCE can offer by way of Undertaking is five years. Therefore, in circumstances where the ODCE forms the view that a period of disqualification of in excess of five years is warranted (a determination that is made by reference to the particular facts and circumstances of each case and any relevant jurisprudence), an offer will not be made. Rather, the matter will be dealt with by way of an application to the High Court.

Companies entering liquidation

Albeit at a reduced level, company failures continued at a relatively high level during 2015. As can be seen from the Table below:

- during the year, insolvent liquidations (i.e. creditors' and Court liquidations combined) accounted for 44% of all liquidations (2014: 50%);
- following the two year period 2011-12, during which insolvent liquidations exceeded 1,300 annually, 2015 saw a third consecutive year in which the number has reduced - from over 1,100 in 2013 to just over 800 in 2015; and
- solvent (i.e., members') liquidations increased by 3% during 2015 (2014: increase of 18%), from 1,001 to 1,034.

Table 6 Companies entering liquidation: 2011 - 2015

	2011	2012	2013	2014	2015
Creditors' liquidations	1,311	1,210	1,043	929	746
Court liquidations	99	107	76	78	70
<i>Total insolvent liquidations</i>	<i>1,410</i>	<i>1,317</i>	<i>1,119</i>	<i>1,007</i>	<i>816</i>
Members' liquidations	1,054	919	848	1,001	1,034
<i>Total solvent liquidations</i> ²³	<i>1,054</i>	<i>919</i>	<i>848</i>	<i>1,001</i>	<i>1,034</i>
Total liquidations	2,464	2,236	1,967	2,008	1,850

²³ Whilst the Office has no role in solvent (i.e. members') liquidations, data in respect of same has been included in the interests of completeness.

Liquidators' s682 reports received – 2015

As can be seen from Table 5 above, a total of 1,269 liquidators' s682 reports were received during the year (2014: 1,512), of which:

- 875 were initial³⁰ reports (2014: 973); and
- 394 were subsequent³⁰ reports (2014: 539).

The 19% reduction in the number of insolvent liquidations compared to 2014 is welcome. Based on current indications, a further reduction, in the order of approximately 17%, is anticipated over the course of 2016.

The Table below provides details of the sectoral distribution of companies in respect of which liquidators' initial reports were received during the year.

Table 7 Sectoral analysis of liquidators' initial section 682 reports received - 2015

Sector	2015		2014	
		%		%
Construction ³¹	208	24	167	17
Wholesale & retail	181	20	222	23
Hotels, bars & catering	104	12	105	11
Community, social & other	103	12	93	10
Manufacturing & printing	93	11	121	12
Marketing & promotion	57	6	80	8
Technology & telecommunications	36	4	34	4
Transport & distribution	29	3	47	5
Financial & leasing	24	3	20	2
Real estate & renting	24	3	60	6
Agriculture, mining & marine	9	1	11	1
Recruitment & security services	7	1	13	1
Total	875	100	973	100

Timeliness of liquidators' reporting

Over the course of the year, the Office issued 124 (2014: 277) notices to 64 (2014: 124) separate liquidators advising them that they were in default of their statutory reporting obligations. The reduction in the number of notices during 2015 reflects some issues that arose as a result of the transition to the new Act with effect from 1 June, 2015. In particular, there were some transitional issues in relation to the new liquidator report form that constrained the Office's ability to issue notices to liquidators who were late in submitting reports. These issues had been resolved by year end.

Most of these defaults were promptly rectified as a result of this action and, as a consequence, 96% of the first reports due during the year had been received by year end (2014: 96%). However, a small number of liquidators have been observed to repeatedly fail to comply with their reporting obligations. Such cases have been designated as a particular area of focus for

³⁰ An initial report is the first report received from a liquidator and is required to be submitted within 6 months of his/her appointment. In the majority of cases, the decision as to whether or not to grant relief is made based on this report. However, in some cases a subsequent report is required from the liquidator when his/her investigations have progressed further. In circumstances where a subsequent report is considered to be necessary, 'relief at this time' is usually granted in respect of the initial report.

³¹ The figure for Construction includes a large number of companies that were connected to a small number of large groups.

the Office and appropriate enforcement action, up to and including criminal prosecution, may result from such persistent breaches of statutory obligations.

Standard of liquidators' reporting

The standard of liquidators' reports received during the year was considered to be broadly satisfactory. However, the quality of reporting in certain instances was not of the required standard. Contributory factors in that regard may include the relative lack of experience on the part of certain liquidators. In that context, Table 8 below provides an analysis of the profile of liquidators undertaking insolvency engagements over the period 2010 to 2015. As can be seen from the Table, 160 liquidators undertook less than three liquidations in 2015 while 42 liquidators undertook seven or more liquidations. The vast majority of those liquidators would be members of Prescribed Accountancy Bodies.

The foregoing issues necessitated a high level of engagement with relevant liquidators for the purpose of specifying Office requirements and clarifying aspects of reports submitted. In certain instances, it was considered necessary to request individual liquidators to attend the Office to discuss their reports and to review, inter alia, the basis for the conclusions set out therein.

Table 8 Profile of liquidators undertaking insolvent liquidations by number of engagements 2010 – 2015

Number of liquidators	Number of engagements				Total
	<3	3-6	7-12	>12	
2010	169	48	33	26	276
2011	182	57	30	27	296
2012	187	63	37	22	309
2013	203	46	16	21	286
2014	177	39	19	17	252
2015	160	63	19	23	265

Qualification for appointment as a liquidator or examiner

Also of relevance in the context of the foregoing is section 633 of the Act, which introduced new rules for qualification to act as a liquidator. The Act defines five categories of individuals who are entitled to act as a liquidator. These are:

- i. members of a Prescribed Accountancy Body holding a practicing certificate;
- ii. solicitors holding a practicing certificate;
- iii. members of any other professional bodies recognised for this purpose by IAASA (none currently);
- iv. persons qualified to act as a liquidator in another EEA³² state; and
- v. persons with practical experience of windings-up and knowledge of relevant law prior to the commencement of the Act who are authorised by IAASA. Before granting an authorisation of this type, IAASA has to be satisfied, having consulted the ODCE, that the person is a fit and proper person to act as a liquidator.

An individual who has applied to IAASA for authorisation under (v) above may continue to act pending the determination of their application. As of the end of 2015, IAASA had advised the ODCE of the names of 19 individuals who have applied for authorisation under this provision. It is understood that these applications are currently under consideration by IAASA.

In addition to the qualification requirements prescribed in section 633, section 634 provides that all liquidators must have in place adequate professional indemnity insurance ("PII"). IAASA has recently issued Regulations prescribing the required level of PII required and these Regulations are available on IAASA's website³³.

A related provision, section 519 of the Act, provides that a person can only act as an examiner if they are qualified to act as a liquidator.

³² European Economic Area

³³ <http://iaasa.ie/getmedia/1a9c9ab1-994e-4491-8f6c-6d8a40d27f64/S-I-No-127-of-2016.pdf>

SECTORAL DISTRIBUTION OF OTHER EXTERNAL INPUTS (I.E. EXTERNAL INPUTS OTHER THAN LIQUIDATORS' SECTION 682 REPORTS)

As can be seen from Table 5, in aggregate those external inputs other than liquidators' section 682 reports accounted for over 25% (2014: 21%) of total external inputs received during the year. The Table below provides an analysis of the sectoral distribution of those other external inputs.

Table 9 Sectoral distribution of external inputs other than liquidators' section 682 reports

Sector	2015		2014	
		%		%
Real estate & renting	71	16	112	28
Construction	39	9	37	9
Wholesale & retail	39	9	35	9
Health & social work	33	7	12	3
Finance & leasing	30	7	17	4
Manufacturing & printing	21	4	32	8
Transport & distribution	18	4	11	3
Hotels, bars & catering	17	4	19	5
Technology & telecommunications	17	4	3	1
Marketing & promotion	14	3	5	1
Community, social & personal	12	3	32	8
Agriculture, mining & marine	11	3	11	3
Other business sectors	5	1	3	1
Recruitment & security services	4	1	2	0
Not a company	108	25	71	17
Total	439	100	402	100

COMPLAINTS

The Office receives substantial numbers of complaints annually from members of the public. During the year a total of 290 complaints were received (2014: 236), which accounted for 17% (2014: 12%) of all external inputs received. The Table below provides an analysis of the subject matter of complaints received.

Table 10 Complaints received (analysed by character of primary reported default)

	2015	%	2014	%
Directors' conduct	75	26	22	9
Audit/auditor related	38	13	28	12
Annual/Extraordinary General Meeting related	34	12	24	10
Allegations of forgery/furnishing of false information	24	8	7	3
Improper accounting records	20	7	8	3
Allegations of reckless/fraudulent/insolvent trading	20	7	65	28
Relating to the issue of unpaid debts	18	6	27	12
Register of members	13	4	4	2
Registered address	11	4	0	0
Access to accounting records/minutes of meetings	9	3	3	1
Relating to companies trading whilst struck off the Register	8	3	10	4
General shareholder rights issues	8	3	19	8
Other	12	4	19	8
Total	290	100	236	100

AUDITORS' INDICTABLE OFFENCE REPORTS

Introduction – overview of the auditor reporting regime

Section 393(1) of that Act provides that, where, in the course of and by virtue of their carrying out of an audit, information comes into the possession of a company's auditors which leads them to form the opinion that there are reasonable grounds for believing that an indictable offence under the Act has been committed by the company, or an officer or agent of the company, the auditors are required to report that opinion to the Office. The Office has developed and published guidance to assist auditors in complying with their obligations in this regard³⁴.

Nature of suspected offences reported

During the year, a total of 100 indictable offence reports were received from auditors (2014: 121). The Table below provides an analysis of the nature of suspected offences notified in those reports. It should be noted that the number of reports received does not accord with the number of suspected offences reported as, in a number of instances, reports included reference to more than one suspected offence.

³⁴ Decision Notice D/2006/2 – Revised Guidance on the Duty of Auditors to Report Suspected Indictable Offences to the Director of Corporate Enforcement. This was more recently supplemented by Information Notice I/2009/4 – Reporting Company Law Offences: Information for Auditors

EXAMINERS' REPORTS

Pursuant to section 534(6) of the Act, where an examiner is appointed to a company, s/he shall, as soon as may be after it is prepared, supply a copy of his or her report to the ODCE. Subsequent to the commencement of the Act on 1 June, 2015, the Office received 3 reports from examiners.

Table 11 Analysis of suspected indictable offences reported by auditors

	2015	%	2014	%
Directors' loan infringements	81	75	101	74
Failure to maintain proper accounting records	25	23	24	18
Provision of false statements to auditors	2	2	2	1
Persons not qualified to act as auditor to a company acting as such	0	0	3	2
Falsification of documents	0	0	1	1
Other miscellaneous offences	0	0	6	4
Total	108	100	137	100

REFERRALS

As alluded to earlier in this Chapter, the Office forms part of a broader statutory framework that permits the exchange of confidential information between regulatory, enforcement and other relevant bodies, subject to safeguards and appropriate limitations. In that context, the Office receives referrals from other statutory bodies and entities from time to time. During the year under review, the Office received 40 (2014: 43) such referrals from a variety of sources.

PROFESSIONAL BODIES' INDICTABLE OFFENCE REPORTS

Recognised Accountancy Bodies ("RABs")³⁵

Where a RAB's Disciplinary Committee or Tribunal has reasonable grounds for believing that an indictable offence under the Act may have been committed by a person while that person was a member of the RAB, the RAB is required to report the matter to the Office³⁶. Four such reports were received during the year under review (2014: 2).

Prescribed Professional Bodies ("PPB")

Similarly, where the Disciplinary Committee or Tribunal of a PPB finds that a member conducting a liquidation³⁷, examinership³⁸ or receivership³⁹ has not maintained appropriate records, or has reasonable grounds for believing that the member has committed an indictable offence under the Act during the course of a liquidation, examinership or receivership, the PPB concerned is required to report the matter to the Office.

³⁵ A RAB is an accountancy body that is permitted to authorise its members and member firms, subject to those members having satisfied certain criteria, to act as statutory auditors and audit firms respectively. There are six RABs, i.e., the:
Association of Chartered Certified Accountants (ACCA)
Institute of Certified Public Accountants (ICPAI)
Institute of Chartered Accountants in England & Wales (ICAEW)
Institute of Chartered Accountants in Ireland (ICAI)
Institute of Chartered Accountants of Scotland (ICAS)
Institute of Incorporated Public Accountants (IIPA)

³⁶ Section 931(4) of the Act

³⁷ Section 688 of the Act

³⁸ Section 558 of the Act

³⁹ Section 448 of the Act

Pursuant to the Company Law Enforcement Act (Section 58) Regulations 2002⁴⁰, the following were designated as PPBs (equivalent designations under sections 448, 558 and 688 of the Companies Act 2014 have yet to be given effect to):

- Association of Chartered Certified Accountants (ACCA);
- Chartered Institute of Management Accountants (CIMA);
- Institute of Certified Public Accountants in Ireland (ICPAI);
- Institute of Chartered Accountants in Ireland (ICAI);
- Institute of Incorporated Public Accountants (IIPA);
- Irish Tax Institute; and
- Law Society of Ireland.

No reports of this nature were received from PPBs during the year (2014: 0).

LIQUIDATORS' REPORTS REGARDING POSSIBLE CRIMINALITY

In addition to their reporting obligations under section 682 as detailed above, in accordance with section 723(5) of the Act, liquidators are required, in circumstances where it appears that any past or present officer of the company concerned has been guilty of any offence in relation to the company, to make a report to the DPP and also to refer the matter to the ODCE. This reporting obligation extends to all liquidations, solvent and insolvent (i.e. both Members' and Creditors' Voluntary liquidations and Court liquidations) alike. During the year, two such reports were received by the Office (2014: nil).

INTERNAL INPUTS

INTRODUCTION

Whilst, as will be evident from the earlier part of this Chapter, the volume of external inputs received is such that most case files opened within the Office are opened in response to external inputs received, the Office also generates internal inputs through a proactive approach to enforcement of the Act. Inputs in this regard include, for example, internal initiatives relating to:

- dissolved insolvent companies;
- the supervision of liquidators; and
- other investigations and enquiries commenced on own initiative.

DISSOLVED INSOLVENT COMPANIES

The Office characterises as "dissolved insolvent companies" those companies that:

- are struck off the Register for failure to file their annual returns; and which
- at the date of strike off, had liabilities, whether actual, contingent or prospective.

It is open to the Office to apply to the High Court for the disqualification of the directors of such struck off companies⁴¹. However, the law also provides⁴² that the Court cannot disqualify a person who demonstrates to the Court that the company had no liabilities at the time of strike off or that those liabilities had been discharged before the initiation of the disqualification application. In considering the sanction to be imposed, the Court may instead restrict the director(s) where it adjudges that disqualification is not warranted under the particular circumstances⁴³.

Where there is evidence to suggest that a company was insolvent at the date upon which it was struck off the Register, it is the Office's policy to consider seeking the disqualification of the company's directors. This is because, by allowing the company to be struck off the Register, the directors avoid bringing the company's existence to a conclusion in the appropriate manner, i.e., through the appointment of a liquidator. By not appointing a liquidator, the company's directors also avoid the scrutiny of their behaviour as provided for by section 682 of the Act.

Where it appears to the Office that a director is liable to be disqualified in these circumstances, it may offer the individual concerned the opportunity to voluntarily submit to a Disqualification Undertaking.

40 S.I. 544 of 2002

41 Section 842(h) of the Companies Act 2014

42 Section 843(3) of the Companies Act 2014

43 Section 845(3) of the Companies Act 2014

In the context of the foregoing, also worthy of note is the fact that, where a company is struck off the Register, its remaining assets are vested in the Minister for Public Expenditure & Reform in accordance with the provisions of the State Property Act 1954.

SUPERVISION OF LIQUIDATORS

One of the statutory functions of the Director is to:

"...exercise, insofar as the Director considers it necessary or appropriate, a supervisory role over the activity of liquidators and receivers in the discharge of their functions under this Act"⁴⁴.

Whilst the section 682 process, as outlined earlier in this Chapter, provides the Office with a means of indirectly supervising certain aspects of liquidators' work, from time to time the Office considers it appropriate or otherwise necessary to engage in more direct supervision of liquidators' work. This, more direct, supervision is effected through the exercise of the powers conferred by section 653 of the Act⁴⁵.

Section 653 of the Act provides that the Director may:

- either on his own initiative or on foot of a complaint from a member, contributory or creditor of a company, request production of a liquidator's books for examination – either in relation to a particular liquidation process, or to all liquidations undertaken by the liquidator; and
- seek the liquidator's answers to any questions concerning the content of such books, and all such assistance in the matter as the liquidator is reasonably able to give.

The powers conferred upon the Director by section 653 are accompanied by certain safeguards and limitations, i.e.:

- the Office must inform the respondent liquidator of the reason(s) as to why the request is being made; and
- a request may not be made in respect of books relating to a liquidation that has concluded more than six years prior to the request.

INVESTIGATIONS COMMENCED ON OWN INITIATIVE

As indicated above, the Office initiates enquiries and investigations on its own initiative where this is considered necessary or otherwise appropriate having regard to the underlying facts and circumstances. The triggers for such actions can include, for example:

- issues identified internally;
- issues referred internally;
- issues identified on foot of a review of material filed with the CRO or other relevant documentation;
- issues identified through monitoring of litigation;
- issues identified through a review of press reportage, the internet, social media etc.

By way of illustrative example, enquiries were initiated during the year where there were indications to suggest that:

- undischarged bankrupts may have been acting as company directors; and
- persons may have been acting as auditors whilst not authorised to do so.

Depending upon the nature of the underlying circumstances, the Office's enquiries and investigations may be furthered through the use of:

- the Director's civil powers;
- the Director's criminal powers; and/or
- the powers vested in the Gardaí seconded to the Office by virtue of those officers being members of An Garda Síochána.

QUANTUM OF INTERNAL INPUTS - 2015

During the course of 2015, a total of 69⁴⁶ (2014: 48) internal inputs were generated.

⁴⁴ Section 949(1)(e) of the Companies Act 2014

⁴⁵ Section 446 of the Act includes a similar provision relating to receivers

⁴⁶ Relating to the broad categories of bankruptcy, audit, fraud, disqualification and filing issues

PART B: THROUGHPUTS

Generally speaking, inputs, irrespective of whether from internal or external sources, result in the opening of a case file. In the case of liquidators' section 682 reports, cases generally reach a natural conclusion when a decision has been taken as to whether or not to relieve the liquidator of the obligation to seek the company's directors' restriction and, where relief is granted, the file is usually closed.

Where relief is not granted, or only partially granted (i.e., granted in respect of some, but not all, of the directors), the Office will usually invite the relevant director(s) to provide a Restriction (or Disqualification, if applicable) Undertaking. If the offer of an Undertaking is not accepted (or if the case is not one in which, in the Office's assessment, an Undertaking offer is appropriate), a Court application will have to be made by the liquidator. The Office monitors the progress through the Courts of the relevant restriction or disqualification proceedings and the outcome is recorded once the proceedings have been determined. However, the Office also reviews cases from time to time where concerns come to its attention regarding, for example:

- credible suggestions of excessive liquidators' fees;
- apparent failures to distribute assets on a timely basis; and
- apparent failures to conclude a liquidation within a reasonable timeframe.

In the case of other inputs, such as, for example, auditors' reports, complaints, referrals etc., a file is opened and the subject matter is examined to determine, in the first instance, whether the matter is one that comes within the Office's remit. Thereafter, cases are progressed on the basis deemed most appropriate to their individual circumstances, with methods of progression including, for example:

- meeting the complainant, typically with a view to obtaining an enhanced understanding of the issues being complained of;
- meeting the directors (for example, in a case relating to directors' loans);
- exercising civil powers, such as, for example, issuing demands to:
 - companies for the production of the company's books and records;
 - liquidators for the production of their liquidation books and records;
 - persons acting, or purporting to act, as auditors for the production of evidence of their qualifications;
 - bankrupts, seeking sworn statements relating to the insolvency status of directors and secretaries of companies who were, at the time, undischarged bankrupts;
 - liquidators requiring that they file outstanding section 682 reports;
- exercising criminal powers, such as, for example, executing search warrants, exercising the powers of arrest and detention etc.;
- liaising with other statutory authorities potentially being in a position to assist the Office's enquiries, for example through the sharing of relevant information.

Upon completion of the Office's enquiries, a decision is made as to the most appropriate course of action to be taken. This can include, for example:

- the decision to take no further action (for example, where enquiries suggest that there has been no breach of company law or where the breach is minor in nature and enforcement action would, as a consequence, be disproportionate);
- a decision not to take enforcement action on this occasion but, rather, to issue a warning that any recurrence will precipitate enforcement action (for example, where the breach has been rectified and/or remediated to the ODCE's satisfaction);
- referral to other statutory authorities or professional bodies of matters relevant to their respective remits;
- the initiation of civil proceedings;
- the initiation of criminal proceedings.

Set out in the following Tables are details of the various caseloads progressed by the Office during the year under review. Details of the outputs that flow from the processing of the Office's various caseloads are detailed in the next section of this Chapter.

Table 12 Throughput of liquidators' section 682 reports - 2015

Section 682 reports on hand at 1 January, 2015		576
New reports received during 2015	1,269	
Less: Reports in respect of which determinations made during 2015	1,367	
Section 682 reports on hand at 31 December, 2015		478

Detail regarding the Office's determinations on liquidators' reports is provided later in this Chapter.

Table 13 Throughput of other cases - 2015

Other cases on hand at 1 January, 2015		90
New cases opened during 2015	506	
Less: Cases concluded during 2015	526	
Other cases on hand at 31 December, 2015		70

PART C: OUTPUTS

OUTPUTS FROM THE SECTION 682 PROCESS

Decisions made on liquidators' reports

The Office made definitive decisions (i.e. decisions other than to grant 'Relief at this time') on 1,005 liquidators' reports during 2015 (2014: 1,174), with a further 362 decisions made to grant 'Relief at this time' (2014: 527).

Of the definitive decisions taken during 2015, a total of 784 were made in respect of initial reports (2014: 805), with a further 221 being made in respect of subsequent reports (2014: 369).

The decisions taken in respect of initial and subsequent reports respectively are analysed in the following two Tables.

Table 14 Analysis of decisions taken in respect of initial liquidators' section 682 reports

Decision type	2015	%	2014	%
Full relief ⁴⁷	744	79	753	68
No relief ⁴⁸	28	3	44	4
Partial relief ⁴⁹	12	1	8	1
Relief at this time ⁵⁰	156	17	293	27
Total	940	100	1,098	100

Table 15 Analysis of decisions taken in respect of subsequent liquidators' section 682 reports

Decision type	2015	%	2014	%
Full relief ⁴⁷	174	41	250	41
No relief ⁴⁸	33	8	90	15
Partial relief ⁴⁹	14	3	29	5
Relief at this time ⁵⁰	206	48	234	39
Total	427	100	603	100

Complete lists of the directors, and associated companies, in respect of which full relief and relief at this time respectively were granted during 2015 are available at www.odce.ie.

47 Full relief is granted in cases where the Office forms the opinion that, based on the information available (including the liquidator's report(s)), all of the directors of the insolvent company appear to have acted honestly and responsibly in the conduct of the company's affairs.

48 No relief is granted in cases where the Office forms the opinion that, based on the information available (including the liquidator's report(s)), there is insufficient evidence to demonstrate that any of the directors of the insolvent company acted honestly and responsibly in the conduct of the company's affairs.

49 Partial relief is granted in circumstances where, based on the information available (including the liquidator's report(s)), the Office forms the opinion that some, but not all, of the directors of the insolvent company appear to have acted honestly and responsibly in the conduct of the company's affairs.

50 'Relief at this time' is granted in cases where the Office is satisfied that the liquidator needs more time in which to progress/complete his/her investigations into the circumstances giving rise to the company's demise. Similarly, on occasion, the Office considers it necessary to postpone making a definitive decision due to the complexity of certain companies' affairs and the associated necessity for supplemental engagement with the liquidators concerned. Where 'Relief at this time' is granted, the liquidator will be required to submit a subsequent report.

Restriction and Disqualification Undertakings

As detailed earlier in this Chapter, following the commencement of the Act on 1 June, 2015, the Office introduced a new procedure whereby those directors, in respect of whom it is determined that the liquidator should not be relieved of the obligation to apply to the High Court for their Restriction, may be invited to voluntarily submit to a Restriction (or Disqualification, if applicable) Undertaking. The Table below sets out the number of Undertakings offers issued during the year under review, together with details of the number of Undertaking offers accepted and declined.

Table 16 Undertaking offers issued, accepted and declined

	Restriction		Disqualification	
	Cases	Directors	Cases	Directors
Number of cases eligible for the issue of Undertaking offers	26	49	0	0
Number of cases in which offers actually issued	22	39	0	0
Number of cases in which offers were accepted, i.e., one or more Undertakings provided	13	22	n/a	n/a
Number of cases in which offers were not accepted	4	7	n/a	n/a
Number of cases in which offers were still under consideration at year end	5	10	n/a	n/a
Total	22	39	0	0

Outcome of liquidators' Court applications

As indicated earlier in this Chapter, where not granted relief by the Office and where invitations to submit to Undertakings are not accepted, liquidators are required to apply to the High Court seeking the restriction of relevant company director(s). In certain instances, liquidators will, as a consequence of their own investigations, opt to seek to have directors disqualified rather than restricted. The Table below sets out details of the results of liquidators' Court applications as delivered by the High Court during the year.

Table 17 Results of liquidators' Court applications – 2015

	Cases	Directors
Restriction Declarations granted	83	150
Disqualification Orders granted	10	14
Declarations or Orders not granted	14	34
Total	107⁵¹	198

⁵¹ Total does not equate to the sum of the above due to the fact that, in five cases, some directors were restricted while others were disqualified.

On foot of Undertakings or Court Orders, a total of 172 directors were restricted and 14 directors disqualified. Further analysis of the Orders made by the Court on foot of liquidators' applications and Undertakings is provided in Appendices 3 to 5 of this Report.

Facts and circumstances considered by the High Court in making Disqualification Orders

Set out below, for illustrative purposes, are examples of the types of issues that were considered by the High Court in making the Disqualification Orders listed in Appendix 4 to this Report. These Orders were made on foot of disqualification applications made by the appointed liquidators following the submission of their respective section 682 reports to the ODCE:

- the directors of a freight company under-declared its tax liabilities for a period of five years, resulting in unpaid debts to the Revenue Commissioners of in excess of €341,000. The liquidator had concerns over the keeping of proper accounting records, incorrect information having been provided to the company's auditors, the failure to prepare a proper Statement of Affairs, the transfer of assets and evidence of phoenix activity;
- the directors of an investment company were operating a Ponzi scheme through the company, which is being investigated by GBFI, the Criminal Assets Bureau ("CAB") and the UK's Financial Services Authority. One of the directors was sentenced to 18 months jail in Northern Ireland for failure to comply with Court Orders directing him to disclose details of the assets of the company but had, by that point in time, left the jurisdiction. Significant balances in bank accounts had come under the control of the appointed liquidator or had been frozen by the Courts upon application by CAB. The liquidator is continuing his investigations and is seeking to ensure that all assets of the company are identified and secured;
- the Revenue Commissioners petitioned the High Court for the winding up of a company that had been operating a number of gyms under franchise. The petition was a response to estimated accumulated tax liabilities of in excess of €56,000. There was no engagement or co-operation by either director with the liquidator, who was not provided with any books and records of the company. The directors also failed to comply with Orders of the High Court to provide financial information;
- the Revenue Commissioners petitioned the High Court for the winding up of a company on foot of demands for unpaid taxes and interest of approximately €140,000. The company, which had failed to pay any taxes in its final two years of trading, had traded in high value motor vehicles as well as operating a parking and valeting service. The company failed to maintain proper accounting records, had a poor record of filing returns with the CRO, failed to co-operate with the liquidator and failed to comply with Orders of the High Court to provide financial information. Substantial company receipts (approximately €375,000) were not lodged to the company's bank account after a Revenue Attachment Order had been made against the account but were, instead, diverted to other bank accounts under the control of the disqualified director;
- the directors of a company involved in freight transport engaged in a systematic and deliberate under-declaration and under-payment of VAT⁵² for a period of at least six years, resulting in undeclared debts to the Revenue Commissioners of in excess of €277,000. The directors continued to trade whilst insolvent during these six years and operated for a period of 12 months without a road haulage licence;
- the directors of a company involved in operating a public house engaged in systematic and deliberate under-declaration and under-payment of VAT for a period of at least five years, resulting in undeclared debts to the Revenue Commissioners of in excess of €248,000. The directors continued to trade while insolvent during these five years. The liquidator had concerns over the maintenance of proper accounting records and evidence of phoenix activity (by transferring employee records to a new company);
- a company involved in the sale of advertising space in school journals and calendars engaged in a substantial under-declaration of VAT. The under-declaration was determined to be in the range of €165,000 to €270,000, depending upon the figures provided by the directors and sales invoices respectively. Moreover, no financial statements were prepared from the date of incorporation to the date on which the company entered liquidation;
- two companies that formed part of the corporate structure that operated an online gaming website were investigated by the U.S. Department of Justice in relation to money laundering charges. This resulted in a U.S. based director (also the CEO) signing a settlement agreement under the terms of which the companies in question were divested of all of their assets – amounting to in excess of €4m. The companies' third party creditors, who were owed in the region of €2m to €3m were left without any prospect of recovering any of the sums owed to them;
- a company involved in the publication of free regional newspapers failed to maintain proper accounting records. Cash withdrawals of the order of €538,000 were made from the company's bank account over a period of two and a half years and there was no record of what these withdrawals were for. In addition, incorrect VAT returns resulted

52 Value Added Tax

in an under-declaration of VAT of approximately €50,000. At the time of the company's entering into liquidation, the Revenue Commissioners were owed €254,000 in VAT and a further €32,000 in PAYE/PRSI. The directors had previously been involved in a company that had operated in the same sector and from the same address and transfers of the order of €31,000 were made from the company's bank account to one of the directors in the three months prior to liquidation.

Civil outputs from the section 682 process

For a variety of reasons, including an insufficiency of in-house accountancy expertise, the Office's civil power to examine liquidators' books and records was not exercised during the year under review.

Criminal outputs from the section 682 process

From time to time the Office's review of liquidators' section 682 reports identifies issues that are considered to warrant action over and above the making of a determination as to whether relief should be granted or not. Such actions typically include:

- making internal referrals of matters considered to warrant further investigation and/or enforcement action; and
- making referrals to other regulatory bodies.

During the year under review, the Office continued to address the failure, on the part of a small number of liquidators, to comply with their reporting obligations on a timely basis. At the beginning of the year, two prosecutions were in progress in that regard the outcome of which was:

- one liquidator, on a plea of guilty, had the Probation of Offenders Act 1907 applied to his offences and was fined €1,000 (in respect of his failure to deliver on time three separate section 682 reports). He was also ordered to pay the costs of the prosecution, which were measured by the Court in the sum of €1,250;
- in the second case, on a plea of guilty, a liquidator agreed to pay a sum of €1,000, as measured by the Court, to a nominated charity (in respect of the liquidator's failure to deliver two separate section 682 Reports). The liquidator was also ordered to pay the costs of the prosecution, which were measured by the Court in the sum of €1,250. On being satisfied that both amounts had been discharged, the proceedings were struck out.

OUTPUTS OF ENFORCEMENT WORK

The Office's enforcement work takes a variety of forms, including:

- engaging with company directors and other interested parties with a view to securing the voluntary rectification/remediation of instances of non-compliance;
- exercising the Director's civil powers to secure compliance;
- referring indications of possible breaches of regulatory provisions other than those relating to company law to other relevant regulators (incorporating also the referral of relevant matters to professional bodies);
- seeking civil remedies in the High Court, such as, for example, applying to the High Court for company directors' disqualification for stated reasons;
- taking summary criminal proceedings before the District Court; and
- where, having conducted a detailed investigation and concluded on the basis of same that the indications of suspected criminality are such that trial on indictment may be warranted, referring investigation files to the DPP for consideration as to whether the matters therein warrant criminal prosecution before the Circuit Court.

The principal outputs associated with the Office's enforcement activities are detailed below.

SECURING VOLUNTARY RECTIFICATION/REMEDIATION

In 89 cases (2014: 115) where suspected directors' loan infringements had been reported, or had otherwise come to attention, the Office's actions resulted in rectifications (including the repayment/reduction of loans) totalling €21m (2014: €66m). Actions taken by the Office in pursuit of the objective of securing rectification on a voluntary basis included the holding of meetings with company directors of seven (2014: 8) separate companies.

In all, cautions issued to a total of 73 companies. Cautions issued included those to the directors of 13 companies in relation to matters associated with the keeping of proper accounting records.

SECURING COMPLIANCE THROUGH THE EXERCISE OF THE DIRECTOR'S CIVIL POWERS

A variety of legislative provisions were successfully used during the course of 2015 in order to secure compliance with company law. These included:

- 18 demands issued under section 133 of the Act requiring a sworn statement relating to the insolvency status of a company director or secretary of a company where there was evidence suggesting that the individual may be an undischarged bankrupt;
- 2 directions under section 175(5) of the Act requiring the convening of companies' Annual General Meetings ("AGM") (2014: 2). These directions were issued following the consideration of complaints received from members of the companies concerned;
- 2 directions (2014: 2) under section 166(5) of the Act requiring production of the minutes of companies' AGMs as well as meetings of the directors/Committees of the directors. Similarly, these directions were issued following the consideration of complaints received;
- 128 directions (2014: 277), pursuant to section 797(1) of the Act, requiring liquidators to comply with their reporting obligations under section 682;
- 4 demands (2014: 4) under section 778 of the Act, requiring the production of companies' documents.

REFERRALS TO PROFESSIONAL AND OTHER REGULATORY BODIES

Whilst there is an obligation upon the Office to keep confidential information that comes into its possession, there is statutory provision⁵³ for the disclosure of information to certain third parties (including other regulatory bodies and certain professional bodies) provided that certain prescribed criteria are satisfied.

Pursuant to the foregoing provision, seven referrals (2014: 7) were made to RABs during the year. Having regard to its statutory remit vis-à-vis the RABs, such referrals are always copied to IAASA.

Issues typically referred to RABs include:

- suspected instances of members purporting to conduct audits whilst not authorised by their professional bodies to do so or where otherwise precluded from doing so by virtue of law or professional obligations;
- non-reporting, or delayed reporting, of suspected indictable offences;
- matters relating to the nature of audit opinions provided in respect of companies limited by guarantee;
- failure to respond to queries raised by the Office subsequent to receipt of indictable offence reports.

In addition to the foregoing, the Office makes referrals to other regulatory bodies as considered necessary or otherwise appropriate.

CIVIL ENFORCEMENT

Dissolved insolvent companies

As outlined earlier in this Chapter, in the case of companies that, at the time of being struck off the Register, were insolvent, it is the Office's policy to consider seeking the disqualification of such companies' directors in appropriate cases.

Several thousand companies are struck off the Register in any given year. However, only some of these would actually be insolvent (i.e., unable to discharge their debts as they fall due). Many more would not have traded or would have discharged all outstanding liabilities prior to being struck off. Against this background, the Office seeks to identify companies where there is evidence of material unpaid debts having existed at the date of strike off.

During 2014, the Court declined to make disqualification Orders in two cases brought by the Office. The High Court Judgements in the aforementioned cases were of concern to the Office in that the Court departed from the guidance previously set down by the High Court in "*Re Clawhammer Ltd*" [2005] 1 I.R.503 ("the Clawhammer Judgement") in relation to the factors that the Court should take into account when exercising its discretion whether to make an Order. In declining to make the Disqualification Orders sought in the two cases in question, the Court took into consideration factors such as the scale of the enterprise, the qualifications of the directors, the context in which the transgressions occurred (to include the economic downturn) and the past behaviour of the directors.

⁵³ Section 956 of the Companies Act 2014

Having considered the above Judgements, the Office took the decision to:

- appeal the High Court decisions; and
- defer the making of any applications to the High Court in most cases, pending the outcome of those appeals.

The latter aspect of the aforementioned strategy gave rise to a significant drop off in such applications during the year under review. Whilst one of the aforementioned appeals was withdrawn, the appeal in the other case was heard in October 2015. The Court of Appeal subsequently delivered its Judgement in January 2016 ("*Director of Corporate Enforcement V Walsh & Ors*" [2016] IECA 2).

In its Judgement, the Court of Appeal overturned the decision of the High Court declining to make the Disqualification Orders against the directors and proceeded to make Restriction Declarations given the particular circumstances of the case.

Now that the principles previously laid down in the Clawhammer Judgement have been confirmed by the Court of Appeal, it is the intention of the Office to recommence seeking to identify cases where company directors have allowed companies to be struck off the Register while having considerable liabilities and to consider Court applications for the disqualification of the directors concerned (or to offer Disqualification Undertakings, where appropriate). The principles reaffirmed by the Court of Appeal are also likely to be an important guide to the future consideration of restriction applications and, accordingly, this Judgement will also inform the Office's consideration of liquidators' s682 Reports.

Given the significance of the Court of Appeal's Judgement for the ODCE's work, a summary of the key aspects of that Judgement is set out below.

Director of Corporate Enforcement V Walsh & Ors – summary of key aspects of the Court of Appeal's Judgement

The leading High Court Judgement on the meaning and application of section 160(2)(h) of the Companies Act 1990⁵⁴ is the Clawhammer Judgment, which has been followed in many cases and which has led over the years to the making of 114 Disqualification Orders and 9 Restriction Declarations respectively against company directors for failure to file Annual Returns leading to the striking off of insolvent companies.

The Clawhammer Judgement held, *inter alia*, that:

[absent] "*any exculpatory evidence to the Court either as to [the directors'] involvement in the company, the circumstances leading up to the striking off of the company or the outstanding liabilities of the company, an order of disqualification is probably, in general, justified. In any application where the respondent directors appear and offer evidence to the Court it will be appropriate to take that evidence into account in determining whether or not to make a disqualification order or a declaration of restriction.*"

Where the respondent directors adduce evidence of the likely quantum of the undischarged liabilities of the company or their role in relation to the company or other circumstances leading to the striking off of the company, it will be appropriate for the Court to take such facts into account in determining any period of disqualification. Similarly, it will be appropriate for the Court to take into account any impact on the respondent directors of the making of a disqualification order in the context of any evidence offered of future proposals to earn a livelihood."

Having considered the arguments advanced on appeal, the Court of Appeal unanimously rejected the approach taken by the High Court in the recent case and reaffirmed the approach taken in the Clawhammer Judgement. In allowing the ODCE's appeal and overturning the High Court Judgement, the Court of Appeal held that:

- a "*financial maelstrom*" did not change the purpose of section 160⁵⁵, which is the promotion of proper corporate governance. Neither did it alter the obligations upon directors in circumstances where companies under their control become insolvent. In such a circumstance, they should take the necessary steps to bring about the company's winding up. They cannot, as an alternative, fail to carry out their obligations by not making annual returns and waiting for the company to be struck off the Register. Difficult trading conditions or financial pressures do not provide a form of absolution from the statutory duties undertaken by persons when they decide to become directors of a company;
- the "scale of enterprise and qualification of directors" and the "context in which director transgression" occurred are not factors that could be regarded as relevant to the exercise of the Court's discretion when considering whether to make a disqualification Order. The whole thrust of the legislative provision is to ensure that all directors of all companies comply with their obligations and it does not matter whether they are directors of family companies or of large publicly quoted companies;
- neither the qualifications of the directors nor the economic challenges that the companies may be facing affect the obligations of directors to act responsibly in respect of an insolvent company;

⁵⁴ Subsequently replaced by section 842(h) of the Companies Act 2014

⁵⁵ Subsequently replaced by section 842 of the Companies Act 2104

- the past behaviour of the directors is not something which ought to be borne in mind in applications of this nature (in arriving at this view, the Court noted that each of the wrongdoings identified in section 160⁵⁶ are instances of conduct which warrant disqualification and opined that the intent of the legislature runs the risk of being frustrated if an obligation were to be placed upon the ODCE to put before the Court evidence of the entire past behaviour of directors); and
- it would be contrary to the whole notion of proper corporate regulation if passive directors could be exonerated from liability or relieved from disqualification or restriction on the basis of the passive nature of their role, noting that there were a number of cases where that had previously been made clear. All directors, whether passive or otherwise, are required to undertake all reasonable steps to file Annual Returns and there is no warrant to limit the disqualification or restriction of passive directors to one where there is a "real moral blame" on their part.

Other civil enforcement proceedings

National Irish Bank Limited (NIB)/National Irish Bank Financial Services Limited (NIBFS)

As has been outlined in previous Annual Reports, the Office has been involved in a series of inter-related civil cases, all of which stem from the Report of the Inspectors (appointed under, what was then, section 8 of the Companies Act 1990) to investigate the Affairs of NIB and NIBFS⁵⁷.

In July 2005, the Office commenced Disqualification proceedings against 9 persons who had formerly been directors and/or officers of NIB and/or NIBFS. At the beginning of 2015 the position was that eight of the cases had been fully concluded and a Supreme Court hearing date was awaited in respect of one appeal⁵⁸ from an earlier decision of the High Court.

During the year under review, the remaining appeal came before the Supreme Court. By consent, the Supreme Court made an Order vacating the High Court Order (which had imposed a disqualification for a period of nine years) and, in lieu thereof, made an Order disqualifying the Respondent for a period of four and a half years, commencing on 7 June, 2011, together with an Order directing the Respondent to pay a contribution to the ODCE's costs.

Applications for relief under section 152 of the Companies Act 1990

Section 152 of the Companies Act 1990 provided⁵⁹, inter alia, that:

- a person who is subject to a Restriction Declaration may, within one year of the Court making the Declaration, apply to the Court for relief, either in whole or in part, from the Restriction and the Court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit; and
- on receipt of a notice of the intention to make such an application for relief, the liquidator shall forthwith notify such creditors and contributories of the company as have been notified to him/her or become known to him/her, that s/he has received such notice.

In late 2014, the Office became aware of an intended application for relief under section 152. The Office engaged with the Applicants' solicitors and advised them of the information that should, in the Office's assessment, be brought to the Court's attention. In May 2015, the application was withdrawn.

CRIMINAL ENFORCEMENT

Overview

During the year under review the Office continued the implementation of its strategic decision (detailed in previous Reports) to allocate a greater proportion of its overall investigative resources towards cases exhibiting more serious indications of wrongdoing.

The consequences of this strategic shift are twofold, viz:

- a reduction in the number of cases taken before the District Court, i.e., summary prosecutions. In 2015 the total number of these cases was three (2014: 10); and

56 Subsequently replaced by section 842 of the Companies Act 2014

57 The Inspectors were appointed by the High Court in March 1998 and carried on their investigations over a period of slightly in excess of 6 years. Their Report was published by Order of the High Court made in July 2004.

58 One of those appeals had been taken by the Office against a decision of the High Court rejecting the Office's contention that the relevant respondents should be disqualified. Three of the appeals had been taken by respondents against decisions of the High Court affirming the Office's contentions that the respondents should be disqualified.

59 Subsequently replaced, with effect from 1 June, 2015, by section 852 of the Companies Act 2014

- a substantial increase in the number of cases being investigated with a view to the referral of same to the DPP for consideration as to whether charges should be directed on indictment. The Office has established management information systems that capture and monitor such cases separately and, at year end, the Office had 18 individuals and companies under investigation with a view to possible prosecution on indictment.

Cases referred to the DPP for consideration as to whether to prosecute on indictment

Whereas the Director can initiate summary prosecutions before the District Court, the initiation of prosecution on indictment (i.e. before a jury in the Circuit Court) is a matter solely for the DPP.

During 2015, one file was submitted to the DPP. Following consideration of that file, the DPP indicated that, in principle, charges were to be directed against an individual concerned. Based on that decision, the Office was, at year end, in the process of drafting criminal charges for the DPP's consideration.

Other criminal investigations

As alluded to above, the Office was engaged in a number of other criminal investigations during 2015 with a view to forwarding files to the DPP. At year end, a number of those cases were approaching a point of readiness for submission to the DPP for consideration.

The former Anglo Irish Bank Corporation plc ("Anglo")

Previous Annual Reports have detailed the general nature of the issues that the Office has investigated over several years and the extent to which resultant files have been submitted to the DPP.

At the beginning of 2015 the position was that the DPP had directed that:

- Mr. Sean FitzPatrick, should be tried on indictment in respect of alleged breaches of the provisions of section 197 of the Companies Act 1990 ("the 1990 Act"); and
- Mr. William McAteer and Mr. Patrick Whelan should be tried on indictment in respect of alleged breaches of section 297 of the Companies Act 1963.

Regarding the first of these issues, the trial of Mr. Fitzpatrick commenced on 14 April, 2015. A jury was sworn in, before whom Mr FitzPatrick was arraigned on 21 alleged breaches of section 197 and 6 alleged breaches of section 242 of the 1990 Act. Following substantial legal argument, in the absence of the jury, the trial Judge delivered a ruling on a range of issues on 2 June, 2015, discharged the jury and set a new trial date in October, 2015. Subsequently, in August, 2015, the High Court ordered (in Judicial Review proceedings brought by Mr FitzPatrick) that the trial date should be deferred to 25 May, 2016.

Regarding the second of these issues, the trial of Mr. Patrick Whelan and Mr. William McAteer is scheduled to commence in the Dublin Circuit Criminal Court on 16 January, 2017.

During 2015, officers of the ODCE engaged closely with the Office of the DPP in respect of the charges on foot of which Mr. David Drumm was subsequently extradited from the United States of America to Ireland on 13 March, 2016. Of the 33 charges directed, 31 are based on matters which were the subject of investigations carried out by the ODCE. The aforementioned 31 charges in question can be summarised as follows:

- 1 alleged contravention of Regulation 76(2) & (4) of the Transparency (Directive 2004/109/EC) Regulations 2007, as applied by section 21 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006;
- 7 alleged contraventions of section 25 of the Criminal Justice (Theft and Fraud Offences) Act 2001;
- 7 alleged contraventions of section 243(1) of the Companies Act 1990 and section 240(1)(b) of the Companies Act 1990, as inserted by section 104 of the Company Law Enforcement Act 2001;
- 16 alleged contraventions of section 60(1) & (15) of the Companies Act 1963, as amended by section 15 of the Companies (Amendment) Act 1982 and section 240(8) of the Companies Act 1990, as inserted by section 104 of the Company Law Enforcement Act 2001.

No date has yet been fixed for the hearing of the trial of Mr. Drumm in respect of these charges.

Summary prosecutions

In accordance with the provisions of the Act, the Director can bring summary prosecutions before the District Court. During the year under review the Office brought and prosecuted summary proceedings on three occasions (2014: 10), resulting in:

- 7 convictions (2014: 19), with the Probation of Offenders Act 1907 being applied in respect of a further three charges in an additional case;
- aggregate fines of €8,500 (2014: €27,500) being imposed; and
- the Office being awarded costs of €2,500 (2014: €4,750).

Details of those prosecutions are summarised in the Table below.

Table 18 Summary prosecutions determined – 2015

Case	District Court hearing, date & venue	Charges	District Court Outcome
ODCE v John O'Connell	23 February 2015 Dublin Metropolitan District Court	3 offences contrary to Section 56(1) and (3) of the Company Law Enforcement Act 2001	On a plea of guilty Section 1(1) of the Probation of Offenders Act 1907 was imposed on the Defendant in respect of each of the three charges with the defendant being ordered to pay a sum of €1,000 to the Simon community and agreeing to paying prosecution costs of €1,250
ODCE v Thomas Colton	22 April 2015 Dublin Metropolitan District Court	2 offences contrary to Section 187(6) and (9) of the Companies Act 1990 3 offences contrary to Section 242(1) of the Companies Act 1990 3 offences contrary to Regulation 21 and 23 of the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulation 2010 Statutory Instrument No 220 of 2010	On a plea of guilty to three charges the Court convicted the defendant of two charges pursuant to Section 242(1) of the Companies Act 1990 and imposed a six month prison sentence on each suspended for twelve months. The charge of acting as a statutory auditor was taken into account.
ODCE v Brian Scannell of Brian Scannell & Co	20 May 2015 Cork District Court	4 offences contrary to Section 242(1) of the Companies Act 1990 1 offence contrary to Regulation 21 and 23 of the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulation 2010 Statutory Instrument No 220 of 2010	On a plea of guilty to 5 charges the court convicted the accused of all 5 charges and imposed fines totalling €8,500. Prosecution costs of €1,250 to be paid by the defendant.
ODCE v Jerry Beades	8 October 2015 Dublin Circuit Court	Appeal to Circuit Court	The convictions imposed in the District Court on 10 November 2014 were upheld with the associated fines being reduced from €10,500 to €3,750 on appeal.