



Office of the Director
of Corporate Enforcement

*Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach*

Interim Review of ODCE Activity in 2006

January 2007

Interim Review of ODCE Activity in 2006 by Goal

Encouraging Compliance with the Companies Acts

In 2006, the Office continued its work of improving standards of compliance with the Companies Acts and with corporate governance requirements in general.

Publications

The Director finalised eight new publications during 2006, including the ODCE Annual Report for 2006 and a number of Information Notices. Newly published guidance materials were:

- the ODCE Guidance on Audit Committees. This document was prepared in advance of the commencement of legal provisions requiring certain companies to address the establishment of audit committees within their businesses. The Guidance took account of some 18 submissions received in response to an ODCE Consultation Paper on the same subject which was issued earlier in the year. These submissions also helped to shape the content of the Director's recent proposals to Mr Michael Ahern, T.D., Minister for Trade and Commerce, on the manner of implementation of the audit committee provisions;
- a Consultation Paper and Draft Guidance on the Governance of Apartment Owners' Management Companies arising from growing public concerns over the performance of this important element of Ireland's social and economic infrastructure. Submissions have been requested by 30 March 2007, and it is intended to publish Final Guidance in the area later in 2007.

In responding to public enquiries, the Office distributed in 2006 over 15,000 copies of its various publications to improve people's understanding of corporate governance matters. This was a substantial increase on the 12,000 publications issued in 2005.

Advocacy Work

ODCE staff made some 38 presentations in 2006 to over 2,700 people. Arising from the results of market research undertaken in late 2005, the ODCE targeted more of its advocacy work last year at the small and medium enterprise sector. For instance, presentations were made to City and County Enterprise Boards and to members of Chambers Ireland. The Office also took an information stand at the National Ploughing Championships for the first time.

The Director released eight statements to the press in 2006. These publicised new ODCE guidance materials, highlighted Court decisions which were noteworthy and discussed progress with respect to the Office's compliance and enforcement work. In addition, the Director and other Office staff participated in media interviews in support of the issue of ODCE publications. They also dealt with over 100 press queries during the year on various aspects of Office activity.

The Office also commenced work on the development of a Communications Strategy in order to improve the impact of the ODCE's advocacy message. This Strategy which is well advanced at year-end will necessarily take account of the restricted staffing resources currently available for compliance work.

The ODCE also made a number of policy submissions in 2006 on company law related issues. These included submissions to:

- the Business Regulation Forum on improving market transparency and regulation;
- the Department of Enterprise Trade and Employment on proposed company law changes;
- the Employment Rights Compliance Group on 'phoenix companies';
- the European Commission on future priorities for enhancing EU corporate governance and
- the Irish Auditing and Accounting Supervisory Authority on protecting the title 'accountant'.

Uncovering Suspected Breaches of Company Law Duties

The number of cases of possible corporate misconduct (other than annual return defaults) within the ODCE for evaluation in 2006 was 1,285, a slight increase on the equivalent figure of 1,231 for 2005. Over half of these were new cases. The general public was the source of more than 50% of these cases, although auditors and their professional bodies constituted some 40% of reported suspected company law defaults. [Appendix 1](#) contains further details. In all, about 16 offence types were brought to ODCE attention (20 in 2005).

Directors' Loans

Directors' loans continued to be a major focus of Office attention as a result of the continuing use by company directors and connected persons of company assets for personal purposes contrary to law. A further 237 cases were received in 2006 involving loan amounts to an aggregate value of €73 million.

During the year, 556 cases in respect of loans totalling €244 million were examined in detail. In the absence of evidence of wilful default, the Office has encouraged administrative rectification of the defaults, and it is aware of the repayment of over €160 million this year. As part of the ODCE's campaign to inform directors of the proper treatment of company assets in this area, almost 900 company directors were cautioned and advised that any further infringements would render them liable to enforcement action. With over 90% of these directors now recognising their duties in this area, the Office believes that its efforts to achieve a change of culture among directors with respect to the personal use of company funds is beginning to have a positive effect.

Because of concerns that this phenomenon could give rise to a tax liability for the beneficiaries, the ODCE referred some 86 large cases to the Revenue Commissioners for attention for the first time pursuant to the information-sharing arrangements permitted by law. The aggregate amount of directors' loans involved was some €48 million. It is a matter for Revenue to determine if a tax liability arises in any of these cases.

Other Issues

Over 100 potential issues notified to the Office were referred in 2006 for detailed internal investigation. The Garda members attached to the ODCE are involved in progressing a good number of these cases. The issues include the use of falsified company documentation, unqualified or disqualified persons acting as auditors or directors and the failure of companies to maintain proper accounting records.

Administrative action was also taken to resolve other complaint types by use of formal ODCE powers where necessary. For instance, shareholders and some directors complained about being excluded from participation in their companies either by a failure to hold annual general meetings, a failure to inform them in good time of the holding of such meetings or a failure to disclose the company's latest financial accounts. This type of failing in property management companies prompted the Director to prepare and publish in December draft Guidance with respect to the governance of these companies in order to improve their performance in the public interest.

Information-Sharing

In May, the Office concluded a Memorandum of Understanding with the Irish Auditing and Accounting Supervisory Authority on the sharing of confidential information between both bodies. As exemplified by the cooperation shown with respect to directors' loan cases, the ODCE continued to work with fellow regulators to exchange information relevant to their respective roles in the manner permitted by law.

Sanctioning Improper Conduct relating to Insolvent Companies

Company directors have a duty to ensure that they act responsibly with respect to the interests of other company stakeholders and especially to those who may suffer financial losses in the event of a future insolvent failure of the company. Directors who fail in their duty face restriction, disqualification or even criminal sanction.

Companies in Insolvent Liquidation

The liquidator of a company in insolvent liquidation is required by law to report to the ODCE on its demise and on the conduct of any person who was a director of the company during the 12 months preceding its liquidation. The liquidator must also apply to the High Court for the restriction¹ of each of the directors, unless relieved of

¹ Where an individual is restricted, s/he may only act as the director or secretary of a company for a period of five years thereafter if that company meets certain capitalisation requirements. In a private company, a minimum called up share capital of €3,487 is required, and it must be fully paid for in cash.

that obligation by the ODCE². In 2006, 423 initial liquidator reports were considered or received (424 in 2005), and 319 were determined (317 in 2005). A further 849 later reports from liquidators were also addressed (819 in 2005), and 628 were determined (625 in 2005). Further information on the throughput of liquidator reports and insolvency-related issues in 2006 is contained in Appendix 2.

As to the nature of ODCE decisions with respect to initial liquidator reports, over 70% of the directors of insolvent companies in liquidation continued to avoid restriction proceedings following the granting of relief by the Office. Of the balance who faced such proceedings, the vast majority (over 80%) found themselves being restricted by the High Court.

The Director welcomes the success of a number of liquidators in 2006 in bringing disqualification proceedings against six directors of insolvent companies, because the nature of the indicated misconduct warranted, in their view, a more serious sanction than restriction. He hopes that further similar cases will be taken in 2007.

Number of Restricted Directors

Some 100 directors were restricted in 2006, most as a direct consequence of the above reporting regime. At end-2006, the Register of Restricted Persons contained details of 680 restricted directors.

Relief from Restriction

A restricted director may apply to the High Court for relief, in whole or in part, from a restriction within a period of one year from the making of the restriction declaration. The High Court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit³.

In the first judgement of its kind for some time, the High Court granted partial relief to a former director of Xnet Information Systems Ltd. who was restricted in 2004. The ODCE had opposed the relief application. In making its decision to reduce the company capitalisation requirement from €63,487 to €7,500, the Court attached a number of other conditions, including requiring the director to notify the ODCE of any new company to which he is appointed as director or secretary while subject to continuing restriction.

It is the Director's intention to continue to monitor planned relief applications and to seek to intervene in appropriate cases in order to maintain as far as possible the coherence of the present statutory restriction regime.

Unliquidated Insolvent Companies

The ODCE continued in 2006 to target the phenomenon of 'struck-off' companies. These are companies which have never been placed in liquidation but which have been dissolved after being struck off the Register of Companies for failing to file annual returns. In order to curb abuses in this area, the directors of struck-off companies are eligible to be disqualified by the High Court unless they can show that the company had no outstanding liabilities.⁴

² Section 56 of the Company Law Enforcement Act 2001.

³ Section 152 of the Companies Act 1990.

⁴ Sections 160(2)(h) and (3A) of the Companies Act 1990 as amended.

During the year, the Office investigated a significant number of struck-off companies to establish if the companies had outstanding liabilities. In some cases, the directors were able to satisfy the ODCE that there were no debts at the time of strike-off or that those liabilities had since been discharged. In other cases, the Director decided to seek the disqualification of the directors concerned with some success as indicated below in the following section.

Number of Disqualified Persons

At end-2006, more than 1,600 persons were listed on the Register of Disqualified Persons. About 1,500 of these are deemed to be disqualified by virtue of their having been convicted on indictment in the last five years of any indictable offence in relation to a company or involving fraud or dishonesty⁵. Most of the balance comprises persons disqualified as a result of specific High Court proceedings.

Liquidators

The ODCE continued in 2006 to ensure that liquidators complied with their statutory obligations to report to the Office and in appropriate cases, to initiate High Court restriction proceedings. Correspondence issued to liquidators on more than 200 occasions during the year in an effort to secure voluntary compliance and so avoid the need for legal action against the defaulting liquidators.

Prosecuting Detected Breaches of the Companies Acts

The Director maintained an active enforcement policy in 2006. His Office continued to pursue a range of civil and criminal matters in significant areas of detected misconduct and made notable progress in some of these areas.

Civil Enforcement Proceedings

The ODCE secured 14 disqualifications and two restrictions in 2006 (21 disqualifications and no restrictions in 2005) as follows:

- one person was disqualified for nine years arising from the findings of the High Court Inspectors into Ansbacher (Cayman) Ltd;
- three disqualifications arose as a result of persons being convicted in the District Court of acting as company directors while restricted and in breach of the statutory conditions relating to company capitalisation;
- another person had his disqualification extended following conviction for acting as a director while disqualified (see further details on the next page);
- nine disqualifications and two restrictions were obtained in respect of directors whose companies had been struck off the Register of Companies for failing to file annual returns and who failed to show to the Court that the companies had no outstanding liabilities.

⁵ Section 160(1) of the Companies Act 1990.

A further 20 persons are the subject of ODCE disqualification actions at this time, eleven of which were commenced in 2006. The remaining nine proceedings were initiated in 2005 and remain ongoing at year-end. All but one of the proceedings relate to former senior managers of National Irish Bank Ltd. who were criticised by High Court Inspectors.

The ODCE was also involved in four proceedings in which High Court orders were sought requiring the correction of company law defaults. In one case, an estate management company held the required annual general meeting of its members, while the remaining three were taken against liquidators whose reports to the ODCE were outstanding. In one of these cases, the default was rectified, and the remaining two proceedings are ongoing at year-end.

Criminal Enforcement Proceedings

In 2006, the ODCE secured 48 convictions of companies, company directors and other persons for various breaches of the Companies Acts (49 in 2005). In a number of cases, quite substantial financial penalties were imposed with several in the €2,000-€4,000 bracket. Two suspended custodial sentences were also imposed. In all, some 103 charges were determined in 26 cases which broadly matched the previous year's outturn of 112 charges in 19 cases. Garda officers attached to the ODCE contributed to a number of these investigations making two arrests in 2006.

Two new offences were successfully prosecuted for the first time:

- one involved convictions under section 161 of the Companies Act 1990 of a company director who was disqualified from so acting. His disqualification arose because he failed to disclose his continuing UK disqualification when notifying the Companies Registration Office of his appointment as a director of two companies here. The UK disqualification followed a conviction for forgery and false accounting offences in a UK public limited company listed on the London Stock Exchange;
- the second involved the use by a company director of a set of financial statements which were falsely represented to the company's bank as having been audited for the purpose of renewing an overdraft facility, contrary to section 243 of the Companies Act 1990.

Also for the first time, District Court convictions in two cases were appealed by the defendants to the Circuit Court. In one, the Probation Act was applied in place of the original convictions, while in the other, the conviction, fine and consequential disqualification were confirmed although the associated suspended custodial sentence was set aside.

The ODCE has some 300 other cases on hands at the end of 2006. A small number of these involve suspected offences of some scale, and it is hoped to conclude the examination of some of these with a view to determining to what extent any of them merit legal action in 2007.

Appendix 3 contains further details on the nature and result of the ODCE's civil and criminal enforcement activity in 2006. The Director intends to continue to pursue a balanced mix of case types and proceedings in 2007.

Providing Quality Customer Services

The ODCE continued to provide quality services to its external and internal customers in 2006.

Financial Expenditure

Overall expenditure by the ODCE in 2006 amounted to €3.355 million, a 16% increase on the outturn of €2.899 million in 2005. Part of the increase was attributable to higher legal and other professional costs in support of the Office's remit. It is expected that current and anticipated legal proceedings will result in a further increase in the outturn for 2007.

Official Languages Act

During the year, the Office prepared its Draft Scheme under the Official Languages Act which outlines the ODCE's proposals for implementation of the Act. At year-end, the Scheme is under review within the Department of Community Rural and Gaeltacht Affairs.

ODCE Website

The Office's website at www.odce.ie/ once again attracted large numbers of people interested in corporate governance matters. In the January to November 2006 period, some 219,084 visits were made, a 32.8% increase on the equivalent figure of 164,977 achieved for the same period in 2005.

Work on the redevelopment of the website continued during 2006 and is now almost complete. This will bring it to the highest standards of accessibility. In addition, the website will contain much information in Irish as the Office moves towards compliance with the requirements of the Official Languages Act.

Staffing

The ODCE maintained its staffing close to its approved complement of 37 staff throughout 2006. Some further contacts took place during the year with the Department of Enterprise Trade and Employment in relation to the ODCE's May 2005 application for increased staffing resources. At year-end, a definitive decision on this submission was awaited.

Office of the Director of Corporate Enforcement
5 January 2007

Appendix 1

Throughput of Reports and Complaints of Possible Corporate Misconduct⁶

REPORTS/COMPLAINTS OF POSSIBLE MISCONDUCT	2005	2006	% Change
Total Cases in the Reporting Period	1,231	1,285	+ 4%
of which Cases on hands at the start of the Reporting Period	499	607	+ 21%
New Cases Received during the Reporting Period	732	678	- 7%
of which Auditor/Auditing Body Reports	351	287	- 18%
Public Complaints and Other Reports	381	391	+ 3%
Cases Closed during the Reporting Period	470	913	+ 94%
Cases Referred for Detailed Investigation during the Reporting Period	154	106	- 31%
Cases on hands at the end of the Reporting Period	607	266	- 56%

⁶ All figures are provisional at this stage. For validity of comparison purposes, the figures shown exclude any auditor reports dealing solely with annual return defaults. This reporting obligation was extinguished with effect from 1 September 2005. There were some 1,641 and 23 such cases in 2005 and 2006 respectively.

Appendix 2

Throughput of Liquidator Reports and Insolvency-Related Issues⁷

LIQUIDATOR REPORTS	2005	2006	% Change
Total Reports in the Reporting Period	1243	1272	2%
of which Reports on hands at the start of the Reporting Period	234	301	29%
Initial Reports received in the Reporting Period	327	316	-3%
Further/Final Reports received in the Reporting Period	682	655	-4%
Initial Reports Determined in the Reporting Period	317	319	1%
of which 'Full Relief' Granted	194	190	
'No Relief' Granted	49	40	
'Partial Relief' Granted	13	10	
'Relief at this time' Granted ⁸	58	78	
Other Decision	3	1	
Further/Final Reports Determined	625	628	0%
Reports on hands at the end of the Reporting Period	301	325	8%

Other Insolvency-Related Cases on hands at the end of the Reporting Period	214	175	-18%

⁷ All figures are provisional outturns at this time.

⁸ Of the 78 'relief at this time' decisions that issued on liquidators' initial reports, 18 decisions were subsequently made during 2006 on the basis of further reports received as follows: 'full relief' in 7 cases and 11 'no relief' or 'partial relief' decisions. The remaining 60 will be the subject of an additional report or decision in 2007.

Appendix 3

Throughput of Enforcement Proceedings relating to Suspected Breaches of the Companies Acts⁹

Character of Enforcement Cases	Type of Legal Action	No. of 2006 Cases	Outcome
Acting as a Company Director while disqualified	Prosecution	1	Convictions secured on two charges in respect of one individual; fines of €3,800 imposed; disqualification period extended to 1/1/2008
Acting as a Company Director while restricted and in breach of the statutory conditions	Prosecution	3	Convictions secured on three charges in respect of three individuals; fine of €700 and three year disqualification imposed on one person; suspended custodial sentences and five year disqualifications imposed on two others. Probation Act also applied to two individuals in respect of two charges thought to be proven.
	Appeal	1	Conviction, fine of €1,500 and five year disqualification upheld in respect of one person; the suspended custodial sentence was set aside
Acting as an Auditor while unqualified	Prosecution	1	Convictions secured on 14 charges in respect of one person; further five charges taken into consideration, and fines totalling €4,000 imposed
Acting as an Auditor while disqualified	Prosecution	1	Probation Act applied to four persons in respect of 12 charges thought to be proven, subject to €4,000 charitable donation
	Appeal	1	Probation Act applied to one person in respect of three charges thought to be proven, subject to €1,000 charitable donation; the convictions and fines of €2,250 were set aside

⁹ All figures are provisional at this stage. The information in the Table excludes enforcement cases where proceedings have concluded but where no judgement is yet available and cases where initiated proceedings have not concluded. It also excludes Court proceedings of an investigative character, e.g., applications for search warrants. In addition, it disregards other proceedings where the Director intervened in response to applications brought by third parties.

Acting as a Liquidator while disqualified	Prosecution	1	Charge against one person dismissed
Provision of false information to the CRO	Prosecution	2	Convictions secured against two persons in respect of three charges; three charges taken into consideration and one charge dismissed; fines of €4,000 imposed
Use of falsified document	Prosecution	1	Conviction of one person secured on one charge; fine of €500 imposed
Failure to keep proper books of account	Prosecution	13	Convictions secured on 25 charges in respect of ten companies and seven directors; five further charges against three directors were taken into consideration; fines of €10,350 imposed. Probation Act applied to one company and four directors in respect of eight charges thought to be proven, subject to charitable donations of €1,200. Four charges were dismissed against a company and its three directors.
Excessive directors' loans	Prosecution	2	Probation Act applied to two persons in respect of 11 charges thought to be proven
Breach of duty and unfitness to act as a company officer	Application for Disqualification	1	One disqualification secured for nine years
Failing as a company director to remedy a serious default in complying with company annual return obligations resulting in its dissolution	Application for Disqualification	9	In six cases, nine disqualifications and two restrictions were secured, each for five years. In a further three cases, proceedings were withdrawn following the resolution of the matters at issue to the Director's satisfaction
Failure of directors to call a company annual general meeting	Application for Remedial Order	1	Meeting held; costs order secured

Failure of a liquidator to report to the ODCE on time	Application for Remedial Order	1	Report received; costs order secured
Totals		39	14 Disqualifications 48 Convictions 13 Charges Taken into Consideration 36 Other Charges Thought Proven 6 Charges Dismissed Some €23,350 in fines 2 Costs Orders