

Office of the Director
of Corporate Enforcement
*Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach*



Paul Appleby, Director

Foreword

Pursuant to section 16(1) of the Company Law Enforcement Act 2001, I am pleased to present Mr Mícheál Martin, T.D., the Minister for Enterprise Trade and Employment, with my Office's Annual Report for 2005.

Last year's highlights for the Office included:

- a new focus on civil enforcement actions. 21 company officers were disqualified in 2005 following legal proceedings initiated by the ODCE. This represents a substantial increase on the three individuals disqualified by the Office in 2004;
- the improved recording in the Register of Disqualified Persons of persons deemed to be disqualified. Following co-operation between the ODCE, the Courts Service and the CRO in 2005, the Register now contains the identity of over 1,000 disqualified persons compared with just ten names at the end of 2004;
- the continuing success in prosecuting company law offences. 2005 saw 112 charges being determined by the District Court in 19 cases (99 charges and 20 cases respectively in 2004). These resulted in 49 convictions with an extra 28 charges being taken into account, while 35 other charges were thought proven in the context of the Court applying the Probation Act;
- the near 70% rise in the fines imposed by the District Court in conjunction with the convictions (some €35,700 in fines last year relative to €21,550 in 2004);
- the substantial pipeline of enforcement work (20 civil and nine criminal proceedings) which is now before the Courts;
- the continuing restriction of a minority of the directors of insolvent companies in liquidation. In 2005, a further 145 directors were restricted on foot of actions taken by liquidators in compliance with their company law duties;
- the 21% increase in the volume of alleged misconduct reported to the ODCE in 2005. Notwithstanding an improved throughput of cases last year, some 1,000 are now on hands for evaluation at year-end;
- the exponential growth in traffic to the ODCE's

website and its continuing value as an information resource for compliance and enforcement assistance. Visits increased by 53% in 2005 to almost 179,000;

- new market research suggesting that about 75% of company directors, accountants and liquidators rate the ODCE as effective in discharging its remit.

I want to thank in particular the marvellous contribution of my staff in achieving these significant results. Their commitment and hard work continue to support our ongoing efforts to improve the quality of the environment for corporate activity in the State.

There were many others who also contributed to this success. Professional auditors and liquidators and their professional bodies were again to the fore in fulfilling their statutory reporting duties to the Office and assisting us with follow-up enquiries. Regulatory authorities and the general public have also been availing of ODCE services to an increasing extent, and this is a welcome development in our efforts to extend the compliance and enforcement message to a wider constituency.

I also want to acknowledge the Oireachtas, the Government, the Courts and the Ministers and staff in the Department of Enterprise Trade and Employment who have supported our remit and ongoing work. Consistent with our ambition to do more as an Office, we are hoping that our request for 20 extra staff will receive a positive response shortly.

Finally, there were many other State, business and private interests who assisted us in 2005. We hope that this support will continue this year.

Our collective aim as an Office in 2006 is to improve further the standards of legal compliance with the Companies Acts in the overall public interest.

Paul Appleby
Director of Corporate Enforcement
31 March 2006

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Introduction

The present Strategy Statement of the Director of Corporate Enforcement for the 2003 - 2005 period identifies the following primary ODCE goals and related sub-goals

Goal 1: Encouraging Compliance with the Companies Acts

- Sub-Goal 1.1: Publishing Accessible Company Law Information
- Sub-Goal 1.2: Promoting Compliance
- Sub-Goal 1.3: Improving Company Law and Associated Corporate Practices

Goal 2: Uncovering Suspected Breaches of Company Law

- Sub-Goal 2.1: Developing Detection and Reporting Arrangements for Suspected Breaches of the Companies Acts
- Sub-Goal 2.2: Identifying Suspected Breaches of the Companies Acts
- Sub-Goal 2.3: Commissioning/Supporting Formal Company Investigations

Goal 3: Prosecuting Detected Breaches of the Companies Acts

- Sub-Goal 3.1: Developing a Balanced Enforcement Policy

- Sub-Goal 3.2: Upholding the Disclosure Requirements of the Companies Acts
- Sub-Goal 3.3: Sanctioning Parties Disregarding Company or Other Interests
- Sub-Goal 3.4: Acting against Parties Denying Accountability under the Law

Goal 4: Sanctioning Improper Conduct relating to Insolvent Companies

- Sub-Goal 4.1: Supervising Liquidators in the Proper Discharge of their Duties
- Sub-Goal 4.2: Assessing Directors' Conduct in Insolvent Liquidation Situations
- Sub-Goal 4.3: Sanctioning Fraudulent or Abusive Behaviour

Goal 5: Providing Quality Services to Internal and External Customers

- Sub-Goal 5.1: Securing and Managing ODCE Resources
- Sub-Goal 5.2: Developing Staff
- Sub-Goal 5.3: Developing and Maintaining Quality Customer Services

This Report reviews progress in 2005 by reference to each of these goals and sub-goals.

Goal I - Encouraging Compliance with the Companies Acts

Introduction

In 2005, the Director of Corporate Enforcement and his staff continued to promote compliance with the requirements of the Companies Acts, and they also contributed to the development of policy and practice vis-à-vis corporate governance frameworks.

Sub-Goal I.1: Publishing Accessible Company Law Information

Information Notices

It is the practice of the Director to bring to public attention significant developments in the company law field. The Office issued three Information Notices during the year¹. These:

- listed the companies in insolvent liquidation for which a liquidator's report was received by the Director of Corporate Enforcement and in respect of which a decision to grant full relief or relief "at this time" issued in 2004. The purpose of this Notice was to inform the public of the companies where the liquidators had been absolved of an immediate requirement to issue High Court proceedings for the restriction of the relevant company directors (Information Notice I/2005/1);
- summarised the effect of the amendments to company law contained in Parts 3 to 6 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (Information Notice I/2005/2). This Notice dealt in particular with:

- Miscellaneous Investment Fund Amendments to Part XIII (Investment Companies) of the Companies Act 1990 (Part 3 of the 2005 Act),
- Market Abuse, by providing a framework for the implementation in Irish law of recent EU market abuse legislation² in amendment of Part V (Insider Dealing) of the Companies Act 1990 (Part 4 of the 2005 Act),
- Public Offers of Securities, in particular the implementation in Irish law of recent EU prospectus legislation³ in amendment of Part III of the Companies Act 1963 (Part 5 of the 2005 Act) and
- Miscellaneous Company Law Provisions affecting in particular the remits of the Registrar of Companies and the ODCE (Part 6 of the 2005 Act);

- informed auditors in particular that the requirement on them to report annual return defaults to the ODCE was removed with effect from 1 September 2005 as a result of the commencement on that date of Section 37(d) of the Companies (Auditing and Accounting) Act 2003 (Information Notice I/2005/3).

The 2005 Act has conferred on the Financial Regulator primary responsibility for market abuse on the main ISEQ market and for prospectuses from mid-2005. However, the ODCE has temporarily retained responsibility for the investigation and enforcement of insider dealing in respect of the smaller Irish Enterprise Exchange (IEX) market, pending the application of the legal provisions on market abuse to the IEX under which it is envisaged that this function will in due course be transferred to the Financial Regulator.

Information Notice I/2005/3 was significant in that some 80% of indictable offence reports made by auditors to the ODCE have related to annual return defaults. However as these defaults were primarily a matter for enforcement by the Registrar of Companies, most of these reports were forwarded to him for attention.

¹These Information Notices are available at <http://www.odce.ie/publications/information.asp>. The primary and secondary legislation associated with a number of these Notices are also accessible via the ODCE website.
²The relevant instruments are Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003, Commission Regulation (EC) No. 2273/2003 of 22 December 2003 and three Commission Directives - 2003/124/EC of 22 December 2003, 2003/125/EC of 22 December 2003 and 2004/72/EC of 29 April 2004.
³The relevant instruments are Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 and Commission Regulation (EC) No. 809/2004 of 29 April 2004.

Accordingly while this provision will eliminate an unnecessary reporting obligation on auditors and thereby reduce over time the number of auditor reports made to the ODCE, it will otherwise have little effect on the real focus of enforcement activities in the Office.

Decision Notices/Consultation Papers

In anticipation of a more substantive change to the auditor reporting requirement which would oblige auditors to assist the Director with information relating to any indictable offence report submitted to the ODCE, the Director initiated in 2005 an update of Decision Notice D/2002/2 dealing with the Duty of Auditors to Report to the Director of Corporate Enforcement. This guidance was originally issued in conjunction with the Auditing Practices Board⁴ (APB), and the Director and his staff are currently working closely with the Consultative Committee of Accounting Bodies - Ireland (CCAB-I) and the APB on revising this Notice. The updated Decision Notice will also reflect the recent move to International Standards on Auditing by the auditing profession.

Towards the end of 2005, the Office also developed a draft Consultation Paper on the pending legal requirement for certain public limited companies, large private companies and relevant undertakings to have an Audit Committee⁵. This Paper will be issued for public comment early in 2006.

The Director and his staff have also commenced a review of the seven Information Books forming part of Decision Notice D/2002/1. These outline the principal powers and duties of companies, company directors and various other parties under the Companies Acts. The Books are being updated to reflect a number of changes in Irish companies legislation since their original publication and to incorporate a number of helpful suggestions which users of the Books have made over the last three years to the ODCE as to how their content could usefully be enhanced.

Website Development

Throughout 2005, the Director and his staff continued to ensure that new legislative and other material of interest in a compliance and enforcement context was included promptly on the ODCE website.

⁴Auditing Practices Board Bulletin 2002/1.
⁵Section 42 of the Companies (Auditing and Accounting) Act 2003

Sub-Goal 1.2: Promoting Compliance

Advocacy Work

The ODCE delivered some 58 presentations in 2005 to a combined audience of over 3,000. The details are contained in Appendix 1.2.1 to the Report. These presentations are an important part of the ODCE's compliance efforts with respect to the requirements of Irish company law. An Office presentation, entitled "Corporate Health Check" and identifying a few key company law compliance issues has proven to be popular with company directors and was regularly given in 2005 on its own or as part of a wider presentation on the ODCE's role. The work of the Office was also outlined on occasion to an international audience, e.g., at the Ninth Annual Irish European Law Forum.

During 2005, the Office extended its target audience and included in its advocacy programme the community and voluntary sector whose members often deliver their activities through the medium of companies. As a result of the ODCE becoming part of the syllabus on business courses at third level and in postgraduate courses, Office staff also participated



The Contributors⁶ to the Ninth Annual Irish European Law Forum in Newman House, December 2005

⁶The pictured contributors are:
Back Row (L-R): Dan O'Keefe SC, Chairman, Irish Takeover Panel; Professor Klaus J Hopt, Director, Max Planck Institute for Private Law, Hamburg; Paul Appleby, Director of Corporate Enforcement; David Devlin, European Corporate Governance Forum; Professor Gerard Hertig, Swiss Federal Institute of Technology (ETH Zurich); Professor J A McCahery, University of Amsterdam; Professor Jonathan Rickford, British Institute of International and Comparative Law; Professor Paul Davies, London School of Economics.
Front Row (L-R): Dr Blánaid Clarke, UCD School of Law; Professor Janet Dine, Queen Mary University of London; Professor Paul O'Connor, Dean, UCD School of Law; Professor Eilis Feeran, University of Cambridge; Professor Irene Lynch-Fannon, University College Cork.

in 2005 in lecturing students on the background to the ODCE, as well as on its current activities and future plans.

A particular feature of ODCE advocacy work in 2005 was the number of presentations made to Revenue staff. This followed the Memorandum of Understanding which

was agreed between the Office and Revenue management in late 2004 which defined the operational arrangements for the sharing of confidential information between both Offices as permitted by law. An acknowledgement of the value of a closer working relationship between the ODCE and Revenue is contained in the accompanying recent letter from Revenue.



Press Statements, Briefings and Queries

The Director issued five press statements in 2005. The details are contained in **Appendix 1.2.2** to the Report.

The Director and his staff also dealt with about 100 press queries during the year on various aspects of the Office’s remit.

Public Enquiries

The Office dealt with an increasing number of public enquiries in 2005, the majority of these by phone or e-mail. Many enquiries were from members of the public with concerns as to the operation of companies in areas such as property management, as well as from company directors seeking more information about their rights and duties.

As a matter of policy, the Office does not dispense legal advice on an individual basis, but it does direct callers to relevant sources of information, including where appropriate the ODCE’s own Information Books. Demand for these Books continues to be strong, and over 12,000 copies were distributed in 2005 which represented a substantial increase on the 8,000 or so issued in 2004.

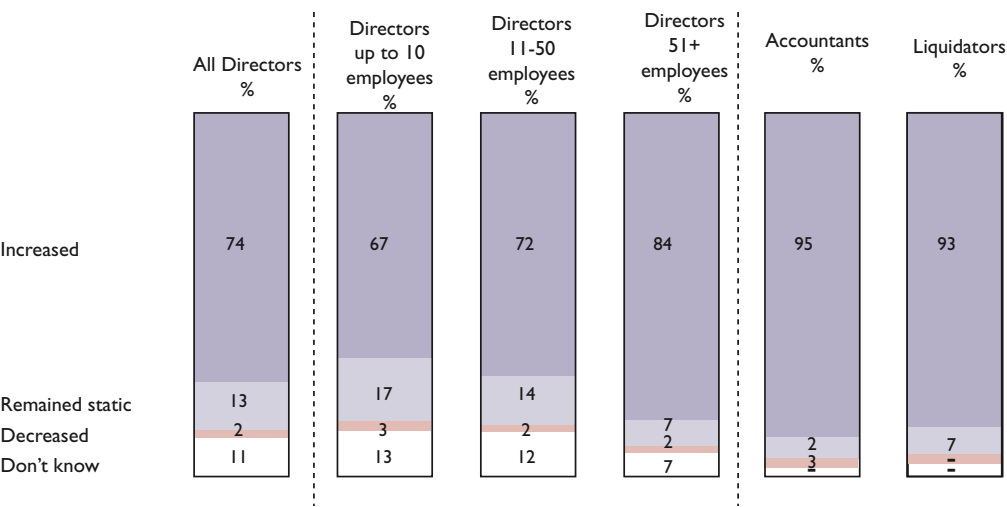
Market Research

The ODCE commissioned market research from Millward Brown IMS in late 2005. The research results indicated that 74% of all directors surveyed believed that the company law compliance environment has improved over the past five years. For accountants and liquidators, the corresponding figure was about 95%. **Illustration 1.2.1** contains further information on these results.

For directors, the research revealed that the main reason for the improved compliance was the increased publicity with respect to compliance and a greater awareness of the need to comply with company law. Accountants and liquidators primarily attributed the improvement to the establishment of the ODCE. The Director and his staff regard these results as encouraging and welcome.

Other findings of this research are contained in later sections of this Report.

Illustration 1.2.1 - Movement in Compliance Levels



Q. In your opinion, have levels of compliance with Company Law in Ireland increased, decreased, or remained static over the past 5 years?

Sub-Goal 1.3: Improving Company Law and Associated Corporate Practices

Directors’ Compliance Statements

Following the publication of the Revised Guidance on Directors’ Compliance Statements (DCS) in December 2004, the Office continued its work of publicising the DCS requirements in early 2005.

On 21 April 2005, the Government announced that it was referring the provision⁷ to the Company Law Review Group (CLRG) for a review of its “proportionality, efficacy and appropriateness”. The Group was asked to conduct its analysis and structure its report consistent with the model of regulatory impact analysis developed by the Working Group on Regulatory Impact Analysis.

During the CLRG’s work, the Director contributed with his colleagues to the development of the Group’s Report⁸. The Director’s views are contained in the completed Report which was forwarded to Mr Michael Ahern, T.D., the Minister for Trade and Commerce, by the deadline of 31 July. The recommendation of the majority of the CLRG subsequently formed the basis of a Government decision on 1 December to substantially modify the existing requirement.

The Government decision will require an amendment to the current provision, and no definitive timetable for the enactment and commencement of the revised provision is yet available. The Director will consider the need for further Revised Guidance at a later date.

Company Law Review Group

Although the review of the Directors’ Compliance Statement took up a significant portion of the CLRG’s time in 2005, it also met on several occasions to further its wider remit. As a member of the CLRG, the Director continued to work with his fellow members in advancing its key project, the proposed Companies Consolidation Bill. The Group made good progress on this initiative in 2005.

Irish Auditing and Accounting Supervisory Authority - Interim Board

As a member of the Interim Board of the Irish Auditing and Accounting Supervisory Authority, the Director contributed to the deliberations of the Interim Board during 2005. Following the completion of a number of statutory and other preconditions, the Authority was formally established as a public company by year-end, paving the way for the start of its auditing and accounting supervisory activities in early 2006.

Restrictive Practices (Groceries) Order 1987

During 2005, Mr Mícheál Martin, T.D., the Minister for Enterprise Trade and Employment, launched a consultation process on the recommendation in the Consumer Strategy Group Report⁹ that the Restrictive Practices (Groceries) Order 1987 banning ‘below-cost selling’ be revoked. In a submission to the Minister’s Department in July, the Director drew attention to some of his concerns in relation to the reported practice of ‘off-invoice discounts’. He referred in particular to subsections (1), (2), (3) and (4) of section 202 of the Companies Act 1990 which specify the requirements for the keeping of proper books of account by companies.

The subsequent Report¹⁰ by his Department led to the Government deciding that the Order should be revoked. Section 6.14 of the published Report concluded by expressing the view that there was little doubt but that the Order encouraged the practice of off-invoice discounting and that particular weight should be attached to the views of the Director of Corporate Enforcement in this regard. The Director’s views, as quoted in section 6.10 of the Report, included the following:

“...if - as I understand it - a practice has developed whereby certain invoices are drawn up on a basis which suggests that a different form of transaction is recorded to that which actually occurs in practice, it seems to me that, in some instances at least, there may be potential breaches of Section 202. In other cases, it seems conceivable that even if no criminal breach of Section 202 occurs, the company’s books and records may be less than fully reflective of the true form and substance of the company’s

⁷Section 45 of the Companies (Auditing and Accounting) Act 2003.
⁸A copy of the CLRG Report on the Directors’ Compliance Statement is available at www.clrg.org.
⁹The Consumer Strategy Group Report entitled ‘Making Consumers Count’ is available at www.irishconsumer.ie/report/index.html.
¹⁰The Report entitled ‘Restrictive Practices (Groceries) Order 1987 – A Review and Report of the Public Consultation Process’ is available at www.entemp.ie/commerce/consumer/groceriesorderreport.htm.

transactions. From a company law perspective, it is difficult to see how that can ever be advantageous.

...it does seem desirable to us that if the Order is being retained, it should be amended to remove any direct or indirect inducements therein which may lead companies to cause their primary books and records (including invoices) to be kept on any form of artificial basis.”

International Association of Insolvency Regulators

As a member of the International Association of Insolvency Regulators (IAIR), the ODCE continued to contribute to the development of the Association as a forum for international research and co-operation in insolvency matters. In 2005, the ODCE contributed inter alia to the preparation of a Report on Assetless Insolvencies¹¹. The Report is a useful survey of the alternative approaches adopted in various jurisdictions to the need in the public interest to investigate and curb the development of insolvency situations constituting potential misconduct.

The IAIR Annual Conference in Helsinki which was attended by the Director and a staff member agreed a number of further research topics for the 2005/2006 period, and the ODCE contributed in late 2005 to that dealing with the treatment of student loans in personal insolvency situations. These reports will be considered at the IAIR's Annual Conference in 2006.

GRECO Review of Ireland's Capacity to Combat Corruption

The ODCE participated in two international peer reviews of Ireland's administrative and legal systems in 2005. One was undertaken by an evaluation team from GRECO (Groupe d'États contre la Corruption), a group of 40 Member States from the Council of Europe which is committed to improving its Members' capacity to combat corruption. One of the themes of the recent evaluation was legal persons and corruption. The subsequent Report on Ireland was adopted by GRECO in December 2005¹².

In the company law field, the Report notes inter alia the respective roles of the ODCE and the Companies Registration Office (CRO), the requirement on auditors to report suspected indictable company law offences to the ODCE for investigation and the latter's success in prosecuting offences relating to accounts and other documentary irregularities. The Report also compliments the legal provisions which serve to restrict and disqualify persons from acting in leading positions in companies arising from findings of misconduct in court proceedings. It does however urge the Irish Authorities to consider:

- strengthening the material checking function of the Companies Registration Office with regard to confirming the accuracy of filed information, in particular with regard to the identity of persons behind a company;
- increasing the penal sanctions for accounts offences in order to ensure that the available sanctions are effective, proportionate and dissuasive.

Review of Ireland's Compliance with FATF Recommendations

The ODCE also participated in a peer review which was undertaken by the OECD's Financial Action Task Force (FATF). This review focused on compliance by Ireland with the FATF's 40 Recommendations and its nine Special Recommendations combating money laundering and terrorist financing respectively. Recommendation 33 urges access by competent authorities to adequate, accurate and timely information on beneficial ownership and control in respect of legal persons such as companies. The subsequent FATF Report on Ireland was adopted in February 2006¹³.

Having outlined the relevant provisions in Irish company law and elsewhere, the FATF Report states inter alia that the information on the directors and members of companies which is filed in the CRO is taken at face value and that no verification is carried out. It also notes that nominee directors and corporate/

trustee members are permitted so that the CRO Register will not necessarily disclose the true beneficial ownership and control of a company. While acknowledging that the Garda and the ODCE have certain legal powers at their disposal to investigate beneficial ownership and control and that these powers have been successfully employed in the past, the Report only rates Ireland as 'partially compliant' with Recommendation 33. It accordingly recommends that the Irish Authorities take measures to improve transparency in the area by providing for the recording of the requisite information, so that it can be made available to competent authorities on request.

Other International Visitors

The Office also briefed a number of foreign visitors on the role and activity of the ODCE. These included:

- a delegation from the Iraqi Government whose visit was facilitated by the Government at the request of the World Bank and
- a delegation from the Ukraine examining corporate governance structures which was also sponsored by the World Bank.

Conclusion

As evidenced by the market research undertaken by the ODCE in late 2005, the work of the Office in promoting compliance has helped to improve corporate governance standards and in particular compliance with the legal requirements of the Companies Acts. The following sections of this Report indicate however that there is still substantial work to be done before compliance with the law and duty can be said to be more or less universal.

Goal 2 - Uncovering Suspected Breaches of Company Law

Introduction

The Office continued in 2005 to receive a large number of reports and complaints of suspected corporate misconduct. Once again, those received from auditors, professional bodies and many State and regulatory authorities were quite specific in identifying the suspected company law offence(s). Unsurprisingly, those complaints made by the public tended to be less well defined in identifying the relevance of the alleged misconduct to the Companies Acts. In addition, ODCE staff themselves detected company law issues requiring attention. These included targeted enquiries in a number of areas (e.g., restricted directors acting in breach of the terms of their restriction and directors disqualified in other jurisdictions acting in the State in the absence of the registration of their disqualification) and the assessment of information in the public domain, such as media reports and filings in the Companies Registration Office. (See footnotes 54 and 55 in a later section of the Report for explanations of the terms restriction and disqualification respectively.)

Sub-Goal 2.1: Developing Detection and Reporting Arrangements for Suspected Breaches of the Companies Acts

Number/Sources of Suspected Breaches

Some 2,373 reports and complaints were received in 2005, a 21% increase on the equivalent result for 2004. As usual, the majority (1,965) were from auditors, although the general public continued to be the source of a significant minority. A breakdown of the reports by source is outlined in **Appendix 2.1.1**.

¹¹A copy of the Assetless Insolvencies Report is at <http://www.insolvencyreg.org>

¹²A copy of the GRECO Report is available at <http://www.greco.coe.int>

¹³The FATF Report is expected to be published in the first half of 2006.