



Office of the Director  
of Corporate Enforcement

*Oifig an Stiúirthóra um  
Fhorfheidhmiú Corparáideach*

# **Interim Review of ODCE Activity in 2005**

**January 2006**

## **Interim Review of ODCE Activity in 2005 by Goal**

### **Goal 1 – Encouraging Compliance with the Companies Acts**

In 2005, the Director of Corporate Enforcement and his staff continued to work at improving general compliance with the requirements of the Companies Acts.

#### Directors' Compliance Statements

A significant portion of ODCE compliance work in 2005 continued to be related to the requirement<sup>1</sup> that certain company directors report annually on their companies' compliance with company law, tax law and certain other relevant obligations. The specific focus was the decision by Government to refer the scope of the obligation 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 on the Group to the development of its report. The Director's views are contained in the completed report which was forwarded to Mr Michael Ahern, T.D., 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.

#### Information Notices

The Office issued three Information Notices during the year. 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 (Information Notice I/2005/1);
- summarised the effect of the additions to the Companies Acts contained in Parts 3 to 6 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (Information Notice I/2005/2);
- informed auditors in particular that the requirement on them to report annual return defaults to the ODCE was extinguished with effect from 1 September 2005 (Information Notice I/2005/3).

#### Other Guidance Material

At year-end, work was well advanced on two further projects which will provide guidance on:

- the role of audit committees under Irish law and

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<sup>1</sup> Section 45 of the Companies (Auditing and Accounting) Act 2003.

- further planned revisions to the requirement on auditors that they report suspected indictable offences under the Companies Acts to the ODCE.

The former guidance will be published for consultation purposes in early 2006, while a draft of the latter has already been shared with the Consultative Committee of Accountancy Bodies – Ireland and will be the subject of bilateral discussion before being issued for public consultation in the coming months.

#### Advocacy Work

2005 saw a continuation of the Office's work in talking to business, professionals and regulatory and voluntary groups on the role of the ODCE and on company law duties and obligations. In total, Office staff made some 54 presentations to an aggregate audience of over 2,600 persons. A number of these presentations are available on the ODCE website for the information of interested parties.

While the first half of the year saw ODCE staff make a number of presentations on the subject of Directors' Compliance Statements, there was also a continuing demand for information on the responsibilities of company directors. As corporate governance, company law enforcement and the ODCE become a more prominent part of the curriculum on many business-related courses, the Office responded to requests from educational institutions for briefings for their students on the role and activity of the ODCE in particular.

#### Press Statements and Queries

The Director issued five press statements during the year, publicising the work of the Office generally and highlighting in particular its success in securing disqualification orders against a number of company directors.

The Office also continued to deal with press and public enquiries on company law related issues. For instance, some 12,000 copies of ODCE publications were distributed in hard copy form in 2005 in response to public requests (compared with about 8,000 in 2004).

#### Market Research

In October 2005, the ODCE commissioned market research on the current company law compliance environment and on the perceived impact of the ODCE since its inception. The initial results of this research are positive in suggesting that:

- 80% of company directors and accountants acknowledge the existence of an improved company law compliance environment and
- 75% of respondents rate the ODCE as effective in discharging its remit.

### **Goal 2 – Uncovering Suspected Breaches of Company Law Duties**

Overall, the number of cases of possible corporate misconduct obtained by the ODCE increased by over 21% from 2,362 in 2004 to 2,869 in 2005. Some 2,370 of these were new cases, and about 84% of these came from auditors reporting suspected indictable offences under the Companies Acts. The balance came mainly from members of the public who were concerned principally about the management of

company affairs. Notwithstanding the limitation of available resources, the Office improved its throughput performance by processing to a conclusion 74% of all cases on hands (up from 67% in 2004). **Appendix 1** contains further details of these figures.

#### Character of Reported Non-Compliance

In all, about 20 offence types were brought to attention in 2005. The most frequently reported defaults related to:

- failing to file annual returns on time. As this suspected offence is primarily a matter for enforcement by the Registrar of Companies, the ODCE referred most cases to him for attention;
- excessive directors' transactions. The use by directors and connected persons of company assets for personal purposes in breach of company law limitations continued to be an area of significant concern. Some 332 new cases came to attention last year, and loan amounts of some €180 million were outstanding to companies in respect of all cases on hands in 2005 within the Office. The Office continued to engage in a process of seeking administrative rectification of the notified defaults in suitable cases.

The area of property management companies was the subject of regular public complaint in 2005. In one case, ODCE correspondence failed to secure the calling of a long overdue annual general meeting of a company, and it was only after the Director deemed it necessary to institute and serve notice of High Court proceedings on the defaulting directors that the AGM was held late in the year. The Court will deal with these proceedings in early 2006.

Where, following evaluation, the Director did not consider that the reported matters justified immediate legal action, the ODCE issued in 2005 a formal notice to the defaulting parties warning of such action in the future in the event of any detected recurrence of the default. The administrative rectification of defaults is often considered by the Director to be a satisfactory means of securing future compliance with company law obligations in some less serious cases.

#### Information-Sharing

The Office's detection and investigation of suspected company law offences was facilitated in 2005 by co-operation from other regulatory and investigation authorities, such as the Companies Registration Office (CRO), the Revenue Commissioners, the Garda Síochána, the Financial Regulator and the Irish Stock Exchange.

#### Company and Director Investigations

The Director employed his formal powers to demand company books and documents in a small number of cases in 2005. Members of the Garda attached to the ODCE interviewed some 120 witnesses during the course of ongoing Office investigations.

In addition to examining incoming reports of suspected breaches of company law or duty in 2005, the Office itself successfully identified non-compliant behaviours in some discrete areas, e.g., restricted directors breaching the minimum company capitalisation requirement of €63,487 in cash required by law.

### **Goal 3 – Prosecuting Detected Breaches of the Companies Acts**

The Director continued to develop his civil and criminal enforcement powers under the Companies Acts in 2005. His Office gave particular attention to the initiation of civil enforcement actions against defaulting directors or other parties while maintaining as far as possible the previous level of criminal enforcement activity.

#### Civil Enforcement Proceedings

A particular feature in the civil enforcement area was the successful disqualification proceedings taken against company directors or other officers. In all, 21 persons were disqualified as a result of ODCE actions in 2005. This compares with three for 2004.

During 2005, the Director initiated nine proceedings against former directors or officers of National Irish Bank Ltd. or National Irish Bank Financial Services Ltd. arising from the 2004 High Court Inspectors' Report into the companies. Only one of these proceedings was concluded during the year resulting in a ten year disqualification being imposed on one of those criticised in the Inspectors' Report.

The Director also secured the disqualification for five years of two directors of an insolvent building company (Barnroe Ltd.) arising from their misconduct of the company's affairs. The company in question has since been placed in liquidation by the High Court on the application of the Revenue Commissioners.

The ODCE also secured in 2005 the disqualification of ten directors whose insolvent companies had been struck off the Register of Companies for failing to file annual returns. This built on the first success achieved in this area in 2004. The periods of disqualification in these cases were five years (in six cases), three years (in two cases) and one year (in two cases).

#### Criminal Enforcement Proceedings

Notwithstanding the Director's new emphasis on civil enforcement actions, his Office maintained a high level of criminal enforcement work in 2005. Some 109 charges (101 in 2004) were determined in the District Court in 19 cases (20 in 2004) resulting inter alia in 49 convictions of companies, company directors and unqualified auditors (66 in 2004). The aggregate amount imposed in fines in 2005 rose by about 66% to over €35,700 (€21,500 in 2004) reflecting the seriousness with which the Courts viewed many of the convictions. In addition, one director received a suspended six months custodial sentence<sup>2</sup>, and eight directors were disqualified for terms ranging from three to five years as a direct consequence of their convictions.

ODCE prosecutions in 2005 were mainly directed against unsuitable persons acting as directors or auditors or against persons failing to meet important obligations imposed on companies, directors and others by the Companies Acts. These offences included in particular:

- persons acting as company directors while undischarged bankrupts;

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<sup>2</sup> This case is under appeal.

- persons acting as company directors while restricted and in breach of the minimum statutory company capitalisation requirement of €63,487 in cash;
- persons acting as auditors of companies while not qualified to do so;
- companies and company directors failing to keep proper books of account.

**Appendix 2** contains further details on the nature and result of the ODCE's civil and criminal enforcement activity in 2005.

#### Cases on Hands

Some 18 civil and 16 criminal enforcement proceedings are before the Courts at end-2005 on which decisions are likely in 2006. In addition, the ODCE has some 360 cases under investigation at the end of 2005. A small number of these involve significant investigations, and it is hoped that it will prove possible to bring a number of these to Court in 2006.

### **Goal 4 – Sanctioning Improper Conduct relating to Insolvent Companies**

The Office continued its work of evaluating the circumstances in which some insolvent companies (whether unliquidated or in liquidation) ceased to trade.

#### Unliquidated Insolvent Companies

Reference has been made above to the success of the Office in 2005 in taking civil disqualification proceedings against the directors of a number of unliquidated insolvent companies which were effectively abandoned without having their affairs regularised in the interests of company creditors in particular. The Director is pleased to note that the Revenue Commissioners are also targeting this area for attention at present. Co-operation between the ODCE and Revenue in targeting abuses in this area will continue.

#### Companies in Insolvent Liquidation

The liquidator of a company in insolvent liquidation is required by law to report to the Director 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 proceed to apply to the High Court for the restriction of each of the directors, unless relieved of that obligation by the ODCE<sup>3</sup>. In 2005, 327 initial liquidator reports were considered or received (624 in 2004), and 317 were determined (529 in 2004). The drop in throughput is primarily attributable to the fact that the 2004 figures comprised reports covering a number of the preceding years, whereas the 2005 figures deal solely with the reports of insolvent liquidations for a single year.

Further information on the throughput of liquidator reports and insolvency-related issues in 2005 is contained in **Appendix 3**. The indicated figures are broadly consistent with the outcomes for 2004. The small reductions in the proportion of 'no relief' cases (from 18% to 16% between 2004 and 2005 respectively) and 'full relief' cases (from 67% to 61%) are balanced by the increase in 'relief at this time' decisions

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<sup>3</sup> Section 56 of the Company Law Enforcement Act 2001.

(from 10% to 18%). This primarily reflects an increasing number of liquidator requests for additional time to complete their examinations of the companies' affairs.

The Office also keeps under review ongoing liquidations, and further reports are regularly submitted by the liquidators of these companies. In 2005, 684 (639 in 2004) of these reports were received with 551 such reports being determined (555 in 2004).

#### Restricted Directors

In all, the Register of Restricted Persons, which is maintained by the CRO, now lists 581 restricted directors at end-2005 (487 at end-2004). Most restrictions are a direct consequence of the new reporting regime.

#### 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 fit<sup>4</sup>.

During 2005, the Office became aware of four relief applications and sought to intervene before the Court in all of them, in order to oppose the applications or to assist the Court in evaluating their merits. In two cases, the applications were withdrawn once the Director signalled his intention to intervene. In a third case, the application was withdrawn after the High Court ruled that the Director could be joined as a party to the proceedings. In a fourth case, the High Court also ruled in favour of the Director being joined as a party to the proceedings, and the hearing of the relief application is expected to proceed early in 2006.

It is the Director's intention to continue to monitor planned relief applications and to seek to intervene in appropriate cases. He does not wish to see these applications being used in any way to undermine the coherence of the statutory restriction regime.

#### Disqualification Actions brought by Liquidators

The Director welcomes the initiative of some liquidators in 2005 to bring disqualification proceedings against the directors of insolvent companies because the nature of the indicated misconduct warranted, in the liquidators' view, a more serious sanction than restriction. He is aware that liquidators succeeded in six cases in securing disqualifications, and the Director hopes that further similar cases will be taken in 2006 and beyond.

#### Deemed Disqualifications

The law<sup>5</sup> provides that where a person is convicted on indictment of any indictable offence in relation to a company, or involving fraud or dishonesty, s/he is deemed to be disqualified for a period of five years from the date of the conviction or for such other period as the court, on the application of the prosecutor, may order. In cooperation with the Courts Service and the Registrar of Companies, the Office secured during 2005 the updating of the CRO's Register of Disqualified Persons to include those individuals subject to deemed disqualifications. This led to the

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<sup>4</sup> Section 152 of the Companies Act 1990.

<sup>5</sup> Section 160(1) of the Companies Act 1990.

identities of 985 individuals who were deemed to be disqualified during the past five years being notified to the CRO last year with the result that more than 1,000 persons are now listed on the Register. This is a substantial increase on the 10 individuals who were registered at end-2004.

#### Liquidators

The ODCE remained active in monitoring the compliance performance of liquidators. In 2005, the Office found it necessary to correspond formally with liquidators on 64 occasions (81 in 2004) drawing to their attention that they were in default with regard to their statutory reporting obligations to the Director.

The Director also corresponded with liquidators on 23 occasions in 2005 (52 in 2004) in respect of their failure to notify his Office that restriction applications had been taken where no relief was granted. Two liquidators (four in 2004) were issued with formal warnings that legal proceedings would be initiated against them should they continue to be in default in taking the necessary restriction applications.

### **Goal 5 – Providing Quality Customer Services**

The ODCE continued its drive to provide quality services for its customers in 2005.

#### ODCE Website

The Office's website at [www.odce.ie](http://www.odce.ie) attracted favourable comment for the quality and quantity of available company law information. In all, some 178,904 visits were made to the website in 2005, a 53% increase on the 116,783 figure achieved in 2004 (itself up 54% on the 2003 figure of 75,597).

During the year, the Office commissioned a website design company to assist in a fundamental overhaul of the ODCE website with a view to bringing it into line with the highest standards of accessibility. This was felt necessary following four years' experience with the website structure and the intervening exponential growth in visitor traffic. The new website, when ready in a few months' time, should allow users easier access to the available corporate governance information.

#### Customer Services

The Office published in 2005 its statement on the standards of service which ODCE customers may expect. A Customer Charter was also published, along with a Customer Complaints Form and information on Complaints Procedures in relation to ODCE customer services.

#### Database Development

An upgrade/expansion of the Office's database which records and tracks its insolvency, investigation and enforcement cases was carried out in 2005. The current implementation of this development should further enhance Office effectiveness.

#### Financial Expenditure

Overall expenditure by the ODCE in 2005 amounted to €2.89 million, a 5.9% decrease on the outturn of €3.07 million in 2004. Given current and anticipated legal proceedings, the figure for 2006 is likely to rise significantly.



### Staffing Resources

Having regard to the nature and extent of the ODCE's current workload, the Director deemed it necessary in May 2005 to seek from the Government an extra 20 staff comprising administrative, Garda and some specialist resources. No definitive decision is available on this Staffing Submission at year-end, and the Director will continue to press for a positive response in early 2006.

**Office of the Director of Corporate Enforcement**  
**6 January 2006**

## Appendix 1

### Throughput of Reports and Complaints of Possible Corporate Misconduct<sup>6</sup>

REPORTS/COMPLAINTS OF POSSIBLE MISCONDUCT	2004	2005	Change
<b>Total Cases in the Reporting Period</b>	<b>2,362</b>	<b>2,869</b>	<b>+21.4%</b>
of which Cases on hands at the start of the Reporting Period	406	499	
New Cases Received during the Reporting Period	1,956	2,370	
of which Auditor and Auditing Body Reports	1,594	1,991	
Public Complaints and Other Reports	362	379	
<b>Cases Closed during the Reporting Period</b>	<b>1,577</b>	<b>2,111</b>	<b>+33.9%</b>
of which Cases Referred to the CRO	1,226	1,641	
Other Cases	351	470	
<b>Cases Referred for Detailed Investigation during the Reporting Period</b>	<b>286<sup>7</sup></b>	<b>151</b>	<b>-47.2%</b>
<b>Cases on hands at the end of the Reporting Period</b>	<b>499<sup>8</sup></b>	<b>607</b>	<b>+21.6%</b>
<b>Closed Cases/Total Cases (%)</b>	<b>67%</b>	<b>74%</b>	<b>n.a.</b>

<sup>6</sup> All figures are provisional at this stage.

<sup>7</sup> Revised figure vis-à-vis the ODCE Annual Report for 2004.

<sup>8</sup> Revised figure vis-à-vis the ODCE Annual Report for 2004.

## Appendix 2

### Throughput of Enforcement Proceedings relating to Suspected Breaches of the Companies Acts 1963–2005<sup>9</sup>

Character of Enforcement Cases	Type of Legal Action	No. of 2005 Cases	Outcome
Acting as a Company Director while an Undischarged Bankrupt	Prosecution	1	Convictions secured on two charges in respect of two individuals; fines of €1,500 imposed, and both disqualified for five years
Acting as a Company Director while restricted and in breach of the statutory conditions	Prosecution	5	Convictions secured on 15 charges in respect of six individuals <sup>10</sup> ; fines of €17,924 imposed; all six disqualified, four for five years each and two for three years each
Acting as an Auditor while unqualified	Prosecution	3	Convictions secured on 12 charges in respect of three persons; a further 13 charges taken into consideration, and fines of €5,250 imposed
Failure to keep proper books of account	Prosecution	9	Convictions secured on 20 charges in respect of seven companies and twelve directors; nine further charges taken into consideration; fines of €11,050 imposed; Probation Act applied in respect of 29 charges thought to be proven in respect of seven related companies in one case
Provision of false information to the CRO	Prosecution	1	Three charges taken into consideration in respect of one person convicted on other charges
Excessive directors' loans	Prosecution	1	Probation Act applied in respect of six charges thought to be proven

<sup>9</sup> 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.

<sup>10</sup> One of these convictions is under appeal.

Breach of duty and unfitness to act as a company director or officer	Application for Disqualification	2	Three disqualifications secured in respect of company directors or officers, one for ten years and two for five years each
Failing as a company director to remedy a serious default in complying with company annual return obligations resulting in its dissolution	Application for Disqualification	5	Disqualification secured in respect of ten directors, six for five years, two for three years and two for one year each
<b>Totals</b>		<b>26<sup>11</sup></b>	<b>21 Disqualifications</b> <b>49 Convictions</b> <b>25 Charges Taken into Consideration</b> <b>35 Other Charges Thought Proven</b> <b>Some €35,700 in fines</b>

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<sup>11</sup> The case figure of 26 is the number of separate cases. It is not a total of the figures in that column. The difference is explained by the fact that some cases involved the prosecution of multiple offences.

### APPENDIX 3

#### Throughput of Liquidator Reports and Insolvency-Related Issues<sup>12</sup>

LIQUIDATOR REPORTS	2004	2005	% Change
<b>Total Reports in the Reporting Period</b>	<b>1309</b>	<b>1236</b>	<b>-6%</b>
of which Reports on hands at the start of the Reporting Period	317	225	-29%
Initial Reports received in the Reporting Period	362	327	-10%
Further/Final Reports received in the Reporting Period	630	684	+9%
<b>Initial Reports Determined in the Reporting Period</b>	<b>529</b>	<b>317</b>	<b>-40%</b>
of which 'Full Relief' Granted	357	194	-46%
'No Relief' Granted	93	49	-47%
'Partial Relief' Granted	21	13	-38%
'Relief at this time' Granted	53	58	+9%
Other Decision	5	3	-40%
<b>Further/Final Reports Determined</b>	<b>555</b>	<b>551</b>	<b>-1%</b>
<b>Reports on hands at the end of the Reporting Period</b>	<b>225</b>	<b>368</b>	<b>+64%</b>

<b>Other Insolvency-Related Cases on hands at the end of the Reporting Period</b>	<b>214</b>	<b>169</b>	<b>-21%</b>
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<sup>12</sup> All figures are provisional outturns at this time.