

Office of the Director
of Corporate Enforcement

*Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach*

Foreword

I am pleased to present Mr Mícheál Martin, T.D., the Minister for Enterprise Trade and Employment, with the fourth Annual Report of the Director of Corporate Enforcement for the year 2004 pursuant to section 16(1) of the Company Law Enforcement Act 2001.

The Office made further tangible progress in 2004 with respect to its compliance and enforcement remit. Particular highlights included:

- the increase in successful enforcement activity. Some 66 convictions were obtained for company law offences in 2004, an increase of more than 50% on the 43 recorded for 2003. Two offences were successfully prosecuted by the ODCE for the first time (fraudulent trading and acting as a director while restricted and in breach of the statutory conditions);
- the restriction of more than 200 directors by the High Court. These were deemed to have acted irresponsibly prior to their companies being placed in insolvent liquidation;
- the imposition by the High Court of the sanctions of disqualification and restriction on the directors of unliquidated insolvent companies. These companies are now a particular focus of ODCE attention;
- the rectification of significant non-compliance in the area of directors' loans. Some €100 million of company assets has been repaid over the last two years to companies by the relevant directors and connected persons who appear to have been using much of these company funds for personal purposes;
- the development of Revised Guidance on Directors' Compliance Statements. This involved extensive work in association with business, professional and State interests and the general public;
- the making or publication of over 70 presentations, articles, press statements, etc. in support of the Office's advocacy work. This work seeks to secure improved company law compliance in the economy;
- the continuing success of the ODCE's website as a useful resource for compliance and enforcement information. Visits increased by 54% in 2004 to almost 117,000, compared with about 76,000 and 42,000 in 2003 and 2002 respectively.



Mr. Paul Appleby, Director

These results could not have been achieved without a committed and flexible staff, and I want to thank them publicly for their support and assistance in generating these impressive results last year.

In addition, I wish to acknowledge the continuing contribution of a large number of other parties to the development of the Office in 2004. These include the Oireachtas, the Minister for Enterprise Trade and Employment, the Minister for Trade and Commerce and their Departmental staff.

There were many individuals in business, professional and public bodies who also cooperated with us in our work in 2004. I want to thank in particular the contribution which the Companies Registration Office, the Courts, business and professional interests, especially auditors and liquidators, made during the year in supporting our work. I look forward to their continuing assistance in 2005.

The Office has developed a number of priorities for 2005 which we are actively pursuing. These include:

- the development of further guidance on the new or amended corporate governance requirements contained in the Companies (Auditing and Accounting) Act 2003;
- the management of a growing workload of investigation and enforcement cases;
- the acquisition of additional staffing resources to support the growing demand for compliance information and for the investigation of alleged corporate misconduct.

By improving compliance and deterring non-compliance, we are helping markets to work more effectively. We want to continue in 2005 to create conditions of fairer competition and reduced enterprise risk by ensuring that more people act and compete within the law. Our work in 2004 indicates that the ODCE has been active in supporting lawful and responsible market conduct, and we plan to build on that success further in 2005 and beyond.

Paul Appleby

Director of Corporate Enforcement

31 March 2005

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: Ensuring Quality Customer Service

- 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 2004 by reference to each of these goals and sub-goals.

Annual Report 2003



Tuirisc Bliantúil 2003

Goal 1 – Encouraging Improved Compliance with Company Law Duties

Introduction

In 2004, the Director of Corporate Enforcement and his staff continued with their work of encouraging directors and others to comply with their obligations under the Companies Acts 1963-2003. This work was undertaken at two main levels:

- by developing presentations, articles and guidance materials for company directors and others in support of their compliance efforts, and
- by promulgating the results of enforcement actions successfully undertaken by the Office and others against persons in default of their company law duties.

Sub-Goal 1.1: Publishing Accessible Company Law Information

Directors' Compliance Statements

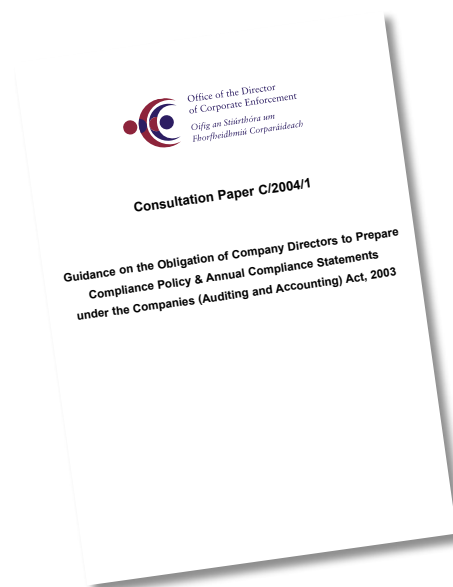
The substantive piece of compliance-related work undertaken by the Director and his staff in 2004 was the preparation of guidance on the new legal requirement contained in Section 45 of the Companies (Auditing and Accounting) Act 2003 that certain directors prepare statements of their company's compliance with company law, tax law and other 'relevant obligations'.

Consistent with his legal obligation to encourage compliance with company law and being aware that there was considerable uncertainty in relation to the responsibilities of directors with respect to this new requirement, the Director determined early in 2004 that his Office would have to prepare some guidelines in the area. Initially, this was prepared in-house by the then Corporate Compliance Manager, Mr. Ian Drennan. When a draft document was available, the Director invited the Consultative Committee of

Accountancy Bodies – Ireland (CCAB-I), IBEC, the Institute of Directors in Ireland and the Revenue Commissioners to contribute jointly to the preparation of Draft Guidance. Over the May to July period, the representatives met with the ODCE on seven occasions to finalise a Consultation Paper and Draft Guidance. This was published by the ODCE on 22 July as Consultation Paper C/2004/1 in the presence of the representatives of the contributing bodies.

The Director and his staff also contributed in parallel to the preparation by the Auditing Practices Board of guidance for auditors on their reporting obligations. This was published in draft form for consultation purposes in August 2004 and was made available on the APB's website at www.frc.org.uk/apb/ and on the ODCE's website at www.odce.ie.

In response to his request for submissions on the ODCE Consultation Paper and Draft Guidance, the Director received some 36 submissions on the content. A list of those who provided comments is at **Appendix 1.1.1** to this Report. Following the expiry of the deadline for public comments on 30 September, the Director reconvened the group to consider the submissions which had been received and to develop further the Guidance. He asked the Irish Financial Services Regulatory Authority to join the group because the Central Bank and Financial Services Authority of Ireland Act 2004 had recently included provisions dealing with compliance statements for regulated financial service providers.



Consultation Paper C/2004/1

As two of the substantive areas for comment were the date of the commencement of the compliance statements obligation and the possible exemption of certain qualifying companies (both of which were matters reserved for political decision in the legislation), the group also assisted the Director in developing a submission to Mr Michael Ahern, T.D., the Minister for Trade and Commerce on both issues. As part of this work, the ODCE undertook some original research in conjunction with Experian Ireland Ltd. which suggested that taking into account all Irish-registered public limited companies and all Irish-registered private companies limited by shares above the turnover and balance sheet thresholds indicated in the Act, a maximum of 7,000 companies (or less than 5% of Irish-registered companies) would be subject to compliance statements. The Director included this research in his submission to the Minister in mid-November, and no decision had been made on either issue at year-end.

In developing the Revised Guidance, the Director based the group's discussions on a restructured draft which had been included in the CCAB-I submission. The group proceeded during a further five meetings to refine this document. Some of the main issues where greater clarity was given in the Revised Guidance were the following:

- the companies which are subject to the requirement to prepare compliance statements and correspondingly those which are exempted from it;
- what obligations are covered by the reporting requirement;
- the extent to which directors could rely on the compliance policies, procedures and information provided by management;
- the scope and manner of reporting by directors and the impact of detected non-compliance on the content of the directors' annual compliance statement;
- certain terminology in the provision, e.g., 'all reasonable endeavours' and 'fair and reasonable'.

Following the conclusion of discussions within the group, the Director published the Revised Guidance on 16 December. He also made available a list of

company law offences for the assistance of directors and professionals who may be seeking to satisfy themselves that they have dealt with the main areas of potential offence in their compliance policies and procedures. Similar statements of tax and industry-specific obligations are being made available by the Revenue Commissioners and IBEC.

Since publication, the Director and his staff have received very positive feedback on the quality of the Revised Guidance. Copies of the Revised Guidance and the list of company law offences are available from www.odce.ie/consultation.asp or on request from the Office. When Ministerial decisions are available on the commencement date of, and on any company exemptions from the obligation, the Director will formally publish the Revised Guidance.



Picture by Dara MacDonnell of the Irish Times

Paul Appleby at the launch of the Revised Guidance on Directors' Compliance Statements

Information Note on the Companies Act 2003 (Commencement) Order 2004¹

Following the making of the Companies (Auditing and Accounting) Act 2003 (Commencement) Order 2004 by the Tánaiste and Minister for Enterprise Trade and Employment, the ODCE prepared and published an Information Note on the scope of the provision. The Note identifies the sections and subsections of the Act which were commenced from specified dates and briefly explains the impact of the individual provisions.

Website Development

The Director and his staff continued to give priority in 2004 to updating the content of the website to ensure that new compliance and enforcement material was prepared and included promptly on the ODCE website.

¹ A copy of the Information Note is available at www.odce.ie/publications/information.asp

Sub-Goal 1.2: Promoting Compliance

Market Research

In the ODCE's Annual Report for 2003 (see **Illustration 5.3.1** in particular), reference was made to a representative sample of the qualitative comments which were made to TNS/mrbi as part of their market research on the impact of the Office. In March 2004, the ODCE received the quantitative returns from the research which were positive for an organisation which had only been established some two years earlier.

The following table represents a summary of the quantitative research results in respect of a sample of 300 company directors, 100 accountants and 30 liquidators.

Issue	Outturn
Perception of Improved Compliance Environment	95% of accountants/liquidators believe that company law compliance has improved. While a comparable result for directors was not measured, 97% of directors regard such compliance as important
Awareness of the ODCE	Overall, 67% are familiar with the ODCE – 54% of directors, 97% of accountants, 100% of liquidators
Knowledge of ODCE Information Materials	Overall, 47% are aware of ODCE publications – 30% of directors, 83% of accountants, 97% of liquidators
Perception of ODCE Effectiveness	Overall, 44% rate the ODCE as effective – 35% of directors, 67% of accountants and 60% of liquidators

Advocacy Work

Throughout 2004, the Director and his staff continued to respond positively to requests from business, professional, regulatory and voluntary groups to speak on aspects of the ODCE's brief and on the particular

area of company law duties and obligations. In all, Office staff made close to 60 presentations to an aggregate audience of over 3,500 during the year. Unsurprisingly, the subject of directors' compliance statements featured strongly in the issues on which the Office was asked to contribute. Details of the presentations made by ODCE staff in 2004 are contained in **Appendix 1.2.1**.

The Director and his staff also contributed a number of articles and papers on compliance issues to the national and professional media. The Director continued his collaboration with the Registrar of Companies in the production of a Bulletin which is circulated to company directors. Specific issues which were the subject of articles with a view to improving company law compliance were:

- key company law obligations for directors;
- property management companies;
- directors' transactions with their companies and
- directors' compliance statements.

Details are contained in **Appendix 1.2.2**.

Press Statements, Briefings and Queries

The Director issued 11 press statements on aspects of his compliance and enforcement remit in 2004. The Director's press statements dealt with two primary themes, namely directors' compliance statements and novel aspects of the Office's enforcement work in 2004. Details are contained in **Appendix 1.2.3**.

The largest event was the publication on 30 July of the High Court Inspectors' Report into National Irish Bank Ltd. and National Irish Bank Financial Services Ltd. Significant preparations were undertaken by the Office to prepare for the launch. The Director hosted a media briefing on the Report, issued a press statement and associated briefing material. The event attracted national and international media attention, and the Director was involved during the course of that day in giving many interviews to the press, radio and television. A copy of the complete Report and its various constituent parts were placed on the ODCE



Picture by Alan Berson of the Irish Times

Paul Appleby at the NIB/NIBFS Press Briefing in July 2004

website, and some 9,000 copies of the Report were downloaded as a result during 2004.

The Director and his staff also dealt with over a hundred press queries during the course of the year on aspects of the ODCE's remit and work. In many cases, the ODCE necessarily declined to provide direct information or comment having regard to the duty of strict confidentiality which underlies much of the Director's investigative work.

Public Enquiries

The staff of the Office dealt with growing numbers of public enquiries in 2004 by phone and e-mail in particular. While the ODCE does not provide professional advice to members of the public, it does direct them to sources of relevant information with particular reference to company law issues. The Office's publications and website form a central part of that response. It is estimated that some 8,000 copies of ODCE publications were distributed in response. Details of the large growth in website traffic are contained in the Goal 5 section of this Report.

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

Implementation of the Market Abuse Directive² in Ireland

During 2004, the Department of Enterprise Trade and Employment invited the ODCE, IFSRA and the Irish Stock Exchange to comment on the manner in which the 'Market Abuse' Directive and associated EU instruments would be implemented in Irish law. The result of these deliberations was that IFSRA will likely be designated as the 'competent authority' by the Minister for the purpose of giving effect to this Directive. At end-2004, the necessary implementing Regulations had not yet been made.

Irish Auditing and Accounting Supervisory Authority – Interim Board

Pending the commencement of relevant provisions of the Companies (Auditing and Accounting) Act 2003, the Irish Auditing and Accounting Supervisory Authority³ (IAASA) continued to operate on an interim basis during 2004. As a member of the Interim Board, the Director contributed to the work of the Authority during the course of the year. The Director's involvement in the Interim Board's work included inter alia the development of the Authority's initial work programme in preparation for the sanctioning of its staffing complement and the formal establishment of the Authority.

Company Law Review Group

The Company Law Review Group (CLRG) is a statutory body which advises on the development and maintenance of a modern company law framework. In addition to the Director being a member of the Group, a number of ODCE staff continued to participate in the work of its committees and sub-committees.

During 2004, the ODCE was involved in particular in the CLRG's review and redrafting of aspects of the

² Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003. There are also an implementing Commission Regulation (EC) No. 2273/2003 of 22 December 2003 and two implementing Commission Directives 2003/124/EC and 2003/125/EC of 22 December 2003.

³ Section 8 of the Companies (Auditing and Accounting) Act 2003 outlines the functions of IAASA. These include:

- supervising how the prescribed accountancy bodies regulate and monitor their members;
- promoting adherence to high professional standards in the auditing and accountancy profession;
- monitoring whether the accounts of certain classes of companies and other undertakings comply with the Companies Acts and
- acting as a specialist source of advice to the Minister on auditing and accounting related matters.

Companies Acts relating to insolvency matters. The Office attended meetings and offered assistance and advice in relation to ongoing drafts of the relevant chapter. In its work, the Office has sought to ensure that the proposed chapter contains a more user-friendly presentation of the statutory requirements and a simplification of the current legislation, in order that the State's corporate insolvency provisions are better structured and more accessible to creditors and other stakeholders.

International Relations

As a member of the International Association of Insolvency Regulators (IAIR), the ODCE continued to make contributions to the work of the organisation. The Director and a staff member attended the Association's Annual Conference in New Delhi in February 2004 at which the Director gave a presentation on the research project on phoenix companies which he had been asked to lead. The Conference authorised the publication of the research in report form, and this was done during the year. Further information on the nature of the conclusions of the research is contained in the Goal 4 section of this Report.

The Director also attended an IAIR Workshop in Prague in October which EU Accession States had been invited to attend. Presentations were made by all of the attendees on the insolvency framework in their jurisdictions, and valuable contacts have been made as a result with a number of the Accession States which have given rise to useful exchanges of information since.

During 2004, the Office also briefed visitors from Australia and the UK on its role and activity in securing greater compliance with the Companies Acts and thereby improving the risk environment for companies operating in Ireland. The Director also spoke to an international conference held in Belfast on the subject of corporate regulation in Ireland which was attended by many regulators and other interests from around the world.