

Office of the Director  
of Corporate Enforcement

*Oifig an Stiúirthóra um  
Fhorfheidhmiú Corparáideach*

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## **STRATEGY STATEMENT 2003-2005**

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## Foreword

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This Strategy Statement for the Office of the Director of Corporate Enforcement (ODCE) identifies strategic priorities for the 2003 to 2005 period, and it will form the framework for the preparation of our annual Business Plans for the immediate future.

The preparation of this Strategy Statement was undertaken in mid to late 2002 at a time marked by continuing evidence of past disregard by companies, company directors and others with the requirements of Irish banking, company and tax law in particular. The establishment of the ODCE has created an expectation that similar activity in the company law area will be punished and deterred in the future.

This presents a formidable challenge for the Office, because no sanctions (no matter how punitive) and no resources (no matter how large) will entirely eliminate the temptation of those who seek to exploit situations for personal gain, contrary to accepted societal norms as represented by prevailing legislation.

Substantial benefits accrue from the privilege of incorporation, including in many cases the limitation of personal liability in public and private companies. These privileges are made available to promote enterprise development, but they also come with duties and responsibilities to behave honestly and responsibly in the conduct of corporate affairs. We are anxious to promote high standards –

- by positive encouragement of good corporate behaviour;
- by sanctioning past malpractice and
- by deterring as far as possible future misconduct.

And we will do so to the best of our ability over the next three years.

As Director, I want to thank my staff for collaborating in the preparation of this Strategy Statement. It will give a valuable focus to our future work, and I hope that we will enjoy together positive progress in attaining the strategic objectives which are enshrined in this document.

**Paul Appleby**  
**Director of Corporate Enforcement**

**31 December 2002**

## Part 1 – Background to this Strategy Statement

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### Introduction

The Director of Corporate Enforcement was formally established as an independent office on 28 November 2001. This event marked the successful implementation of certain decisions made by the Government in March 1999 arising from recommendations contained in the Report of the Working Group on Company Law Compliance and Enforcement<sup>1</sup>. This Report was critical of the existing regime of company law in Ireland and recommended that resources be invested in simplifying and codifying company law and enforcing compliance with the Companies Acts.

The Company Law Enforcement Act 2001 (“the 2001 Act”) implemented many of the Working Group’s recommendations in providing for:

- the establishment of a statutory Company Law Review Group;
- the improvement of the enforcement powers available to the Registrar of Companies in securing compliance with the filing and registration requirements of the Companies Acts and
- the establishment of the Office of Director of Corporate Enforcement (“ODCE”) with a wide company law compliance and enforcement remit and a multi-disciplinary team of administrative, accountancy, legal and Garda staff.

The 2001 Act was commenced on a progressive basis, and the Director of Corporate Enforcement has legal responsibility for the following primary areas:

- company law compliance;
- investigating suspected breaches of company law;
- company law prosecutions;
- the restriction and disqualification of company directors and others and
- the supervision of insolvent companies.

More detailed information on the functions of the ODCE is available in the Introduction publication which is freely available from the Office<sup>2</sup>.

### Mission and Goals of the ODCE

Consistent with the provisions of the 2001 Act, the ODCE’s mission is –

- to encourage compliance by companies and individuals with relevant requirements of the Companies Acts 1963 to 2001 and
- to bring to account those who disregard the law.

The ODCE’s pursuit of this latter objective involves three distinct elements. These are –

- uncovering suspected breaches of company law;
- correcting and/or prosecuting detected breaches of the Companies Acts and
- sanctioning improper conduct with respect to insolvent companies in particular.

All of this work will be underpinned by a determination to –

- providing quality services to the Office’s internal and external customers.

<sup>1</sup> This Report dated 30 November 1998 is available from the Government Publications Sales Office, price €12.70 (Pn. 6697).

<sup>2</sup> This publication is available free of charge from the Office, or it may be accessed from the ODCE website page at <http://www.odce.ie/publications/default.asp>.

## Structure, Staffing and Resources of the Office

The above goals are reflected in the organisational structure of the ODCE. Each of the following five Units has primary responsibility for achieving one of these goals:

- Compliance Unit;
- Investigations Unit;
- Enforcement Unit;
- Insolvency Unit and
- Corporate Services Unit.

A more detailed description of the responsibilities of each Unit for the goals and sub-goals identified in this Statement is provided in **Appendix 1**.

The Director performs a management and co-ordinating role within the Office, in order to ensure the effective application of resources to meeting the ODCE's goals and work priorities. Under his chairmanship, a Management Committee meets every two weeks to review progress with the Office's Business Plan and to settle any administrative or policy issues arising.

The approved staffing complement of the Office is 37 persons comprising administrative, accountancy, legal and Garda staff of various levels. Some ODCE staff are permanently assigned to one of the above Units, while others provide support to one or more Units as the need arises as indicated in Appendix 1.

An up-to-date list of the contact points for customer service staff within the Office is accessible from

<http://www.odce.ie/contact/default.asp>.

## Environmental Analysis

### Incidence of Corporate Malpractice

The Working Group on Company Law Compliance and Enforcement exhibited its frustration with the enforcement situation in company law in the following comments:

- “Irish company law has been characterised by a culture of non-compliance...”
- “Enforcement of the law in relation to non-registration offences has been rare and wholly unpredictable...”
- (Offenders) “have little reason to fear detection or prosecution...”
- “...the sound of the enforcer's footsteps on the beat is simply never heard...”

The public continues to be reminded of the reality of corporate malpractice in Ireland and elsewhere. Domestically, recent tribunal of inquiry and company investigation reports have identified improper business conduct, while internationally, recent events in the USA in particular have seen the reputations of auditing and investment firms and prominent business leaders compromised or in some cases fatally damaged. There is now a greater appreciation that human failings exist within as well as outside of the business community.

As a result, the improvement of standards in the business sphere has become a national and international political priority.

### Specific Roles of the Director and Other Parties

The problem of corporate malpractice is however wider than the remit of the Office. The role of the Director of Corporate Enforcement is focused on securing compliance with and enforcing the Companies Acts. While these Acts are a substantial body of law, improper conduct in the business sphere can also involve breaches of:

- other legislation (e.g., in areas like banking, competition, environmental, fraud, health and safety and tax law);
- contractual or membership conditions (e.g., the Listing Rules of a relevant stock exchange and the ethical standards of professional bodies make a significant contribution to upholding standards of corporate governance);

- behavioural norms (e.g., the Combined Code of Corporate Governance for public limited companies and auditing and accounting standards).

Within the specific domain of company law, the nature of offences ranges from evident non-compliance (e.g., the failure to notify prescribed information to the Registrar of Companies) to breaches of a positive duty imposed by the Companies Acts (e.g., the failure to keep proper books of account) to potentially more serious behaviour (e.g., fraudulent conduct). Those permitted to secure remedies for defaults in complying with the law include in particular:

- the parties affected, be they the company itself, officers, members/shareholders or creditors of the company affected;
- the Registrar of Companies insofar as filing offences are concerned, as well as
- the Director of Corporate Enforcement.

While it is open to many parties to seek civil redress for defaults in complying with the Companies Acts, the Director is under a particular obligation to sanction wrongdoing, and this must continue to be the priority.

### The Legislative Context

The present regime of company law comprises ten Acts and many more pieces of secondary legislation. This is an extensive and complex code of law containing some 300 offences, many of which have never been prosecuted. Where new offences are being prosecuted for the first time, time and resources require to be invested to achieve success. This will necessarily circumscribe in the medium term the ability of the Director both to secure compliance with the obligations of the Companies Acts and to sanction suspected breaches of the law on a comprehensive basis.

The powers given to the Director in the 2001 Act are also new, and the Courts are likely to scrutinise their use particularly in the initial stages, until they satisfy themselves of the

circumstances in which the exercise of these powers is justified.

In addition, the Office has brought together a range of administrative, accounting, Garda and legal staff, many of whom have not previously worked with the Companies Acts in any significant way. For these reasons, it is inevitable that the Office will take a little time to build up to a full range of activity.

Over the 2003-2005 period, a number of legislative initiatives are planned which will have a direct impact on the Office. These include in particular:

- the new Companies (Audit and Accountancy) Bill by which an Irish Auditing and Accounting Supervisory Authority will be established in 2003;
- the new legislation to establish an Irish Financial Services Regulatory Authority and related structures in 2003;
- the transposition into Irish law of new or amending EU legislation, e.g., the Market Abuse Directive;
- the work of the Company Law Review Group which should see a simplified company law framework introduced by 2005.

This legislation will complement the work of the Office in encouraging and enforcing the highest governance standards in the corporate area, and it will also give rise to additional work for the Office in implementing it.

### The Economic and Social Context

Close to 90% of the companies incorporated in the State are private limited companies. Less than 1% are public limited companies. The balance of about 10% includes unlimited companies, companies limited by guarantee and external companies. Many private limited companies are established with a nominal amount of paid-up share capital.

The attraction of a 12.5% corporation tax regime is obviously supportive of the develop-



ment of enterprise in the Irish economy. In general terms therefore, the regime for undertaking business in the State is attractive internationally. As many Irish company directors have been conferred with a substantial privilege to develop enterprises and other activities in a competitive environment under the protection of limited liability, it is important that they comply with their legal obligations and are seen to do so or be sanctioned in the event of default. In the national interest therefore, the Director of Corporate Enforcement has a vital role in ensuring that Ireland's regulatory regime in the company law area is of a high standard and that abuse of that regime is punished.

The recent success of Ireland's economy has been partially attributed to the partnership which existed between Government and representatives of the business and social economies. With the economic climate now more uncertain than it has been for some time, Government and corporate revenues will come under pressure in the next few years, and enterprise failure is likely to increase. In the face of an increasing workload, the Office will be challenged to deal adequately with corporate malpractice. Failure to sanction incorporation abuses may itself place strains on the partnership model at a time of change for Government and the economic and social economy representatives.

### Critical Success Factors

#### Public Support

Public support is vital in ensuring that the Office makes a positive contribution to improving compliance. This support will manifest itself in various ways, including:

- notification of circumstances suggesting company law or other irregularities;
- assistance in gathering evidence relevant to a suspected breach;
- attendance, where necessary, in Court to testify in the appropriate proceedings.

The Office will make every reasonable effort to cultivate communication channels which will contribute to receiving positive support in the discharge of its legal remit.

#### Legislation

Relevant primary and secondary legislation defines the investigation and enforcement activities of the Office. The ODCE's successes and failures will be closely related to the adequacy of the Companies Acts in particular in permitting suspected breaches of the law to be adequately investigated and enforced. Where problems arise, the Office will seek appropriate changes in the law. The ODCE hopes that the Minister for Enterprise Trade and Employment, the Government and the Oireachtas will give favourable consideration to requests from the Office for legislative change. The support of the Company Law Review Group will also be critical in developing appropriate proposals for company law reform.

#### The Courts System

The Office will be responsible for generating a large number of civil and criminal cases in the coming years. It is important that the Courts are in a position to handle this caseload without undue delay. Additional judicial and administrative resources will be required if the system of justice is to operate in a timely fashion in sanctioning and curbing corporate malpractice.

#### Staffing

Priority will continue to be given to integrating the mix of expertise and experience among the Office staff and improving their skills and competencies. Performance management will be a key contributor in encouraging personal development, in supporting staff to realise their full potential and in contributing to the achievement of the Office's goals. It is important that the structures within the Office are kept up to date and that the staff relationships are as co-operative and cohesive as possible.



As the nature of the Office's work changes and develops over time, it is vital that the authorised complement of 37 staff is maintained. Flexibility in adjusting (and, if necessary, recruiting additional) staff numbers and competencies of the required standard will also be critical in delivering efficient and effective services. It is already apparent that extra staffing resources will be necessary in the short to medium term.

#### E-Government

The identification, commissioning and integration of technological solutions will be essential in supporting the developing Office processes and procedures. It will also be highly desirable that such solutions be compatible with those available to the ODCE's important clients and support the wider Government aims of developing e-services.

#### Resources

For the foreseeable future, the Office will continue to rely on the Department of Enterprise Trade and Enterprise for various services, including the provision of appropriate accommodation, finance and personnel services. This relationship will be vital in ensuring the successful development of the Office in the medium term.

The future performance and development of the Office will be critically dependent on the financial resources made available to support its work. As it develops, the Office will inevitably be purchasing additional professional services. The major cost item is likely to be legal in character as counsel will be required to tender specialist legal advice and prosecute civil and criminal proceedings on behalf of the Director. This will require additional resources on the non-pay side of the Office's budget. It will be essential that the public interest work of the Office in uncovering and sanctioning improper conduct will not be restricted by budgetary limitations.

#### Flexibility

The success of the Office will depend in part on its ability to respond to and anticipate market developments over time. Accordingly, the Office will have to be pro-active and nimble in dealing with emerging areas of concern. It will accordingly keep its own strategic direction under regular review and make adjustments as appropriate.

#### Accountability

Section 12(5) of the 2001 Act provides that the Director of Corporate Enforcement shall be independent in the performance of his functions. Section 17 also imposes a general requirement not to disclose confidential information obtained by virtue of the performance of any of his functions. While these are necessary provisions in safeguarding the integrity of the investigative and enforcement work of the Office, they nevertheless present a significant challenge for the Director in achieving a proper balance between his legal independence and accountability to the following parties.

#### The Minister for Enterprise Trade and Employment

Section 16 of the 2001 Act requires the Director to present his annual report to the Minister by 31 March in every year. The Minister may require that specified information be provided from time to time, subject to the exclusion of any information which the Director would regard as likely to prejudice the performance of any of his functions. The Director currently furnishes statistical information to the Minister on a quarterly basis.

#### Committee of the Oireachtas

Similarly, the Director is required to account to an appropriately established Committee of the Oireachtas in respect of the performance of his functions, subject to the exclusion of any information which he would regard as likely to prejudice the performance of any of his functions.

### The Courts

In exercising his functions, the Director and his staff will regularly appear before the Courts which will require from time to time the presentation of information and argument in pursuit of the administration of justice.

### The Clients of the Office

The Director is required by law to perform certain functions in conjunction with other parties under the 2001 Act. Some of these parties include companies, company directors, company secretaries, auditors, liquidators, receivers, the Registrar of Companies, the Director of Public Prosecutions, the Irish Stock Exchange, specified professional bodies, certain State authorities and members of the public. This will give rise to a shared accountability in the discharge of certain functions under the Act.

### Staff Members

The Director and his staff regard themselves as being mutually accountable to one another in performing the functions of the Office and in providing the necessary support, training and resources to undertake its tasks efficiently and effectively.

### **Impact/Performance Indicators**

Over the next three years, a large amount of activity will arise, and the Director and his staff will be regularly tracking this activity and recording progress. This will serve a number of purposes. Firstly, it will assist in evaluating Office performance. Specifically, it will support self-review exercises within the Office and underpin necessary changes in focus or strategy in the interests of effectiveness. It may also serve to justify staffing or resource improvements, if such become necessary.

The key measures will relate to the following:

- public acceptance of the need for compliance with company law;
- success in dealing with large volumes of reports and complaints of corporate malpractice;

- satisfactory enforcement of company law provisions;
- quality of work and outputs vis-à-vis the available inputs.

The initial performance indicators will comprise the following:

### Compliance Activity

- Number and nature of ODCE publications printed and distributed per year;
- Number and nature of presentations, articles, etc. given per year;

### Investigation Activity

- Annual number of cases received by source, subject and suspected offence;
- Annual number of cases determined by manner of decision;
- Annual number of civil proceedings by applicant, subject, nature and outcome;
- Annual usage of legal powers by section and frequency;

### Enforcement Activity

- Annual number of cases received by source, subject and suspected offence;
- Annual number of cases determined by manner of decision;
- Annual number of criminal proceedings by applicant, subject, suspected offence and outcome;
- Annual usage of legal powers by section and frequency;

### Insolvency Unit

- Annual number of cases received by source, subject and nature;
- Annual number of cases determined by manner of decision;
- Annual number of civil proceedings by applicant, subject, nature and outcome;
- Annual usage of legal powers by section and frequency;

## Corporate Services Unit

- Breakdown of annual expenditure versus budget;
- Breakdown of staffing versus approved complement;
- Breakdown of annual website hits;
- Number and nature of ODCE external services;
- Supply of Accommodation, IT, etc. for staff.

These indicators will be refined as the Office develops its services and activity. The Office will also seek to develop a set of impact indicators which will accurately define the overall performance of the Office in discharging its legal obligations.

## **Part 2 – Principal Goals and Sub-Goals**

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

The Oireachtas was no doubt mindful of the poor standard of compliance by companies, company directors and others with the requirements of company law when it mandated the Director in section 12(1)(b) of the Company Law Enforcement Act 2001 “to encourage compliance with the Companies Acts”.

#### **a) Publishing Accessible Company Law Information**

As indicated earlier, the obligations of company law are spread over ten Acts of the Oireachtas and numerous statutory instruments. It is undoubtedly one of the most extensive codes of Irish law. The problem of non-compliance is attributable in part to its extent. This situation has been exacerbated by a corresponding absence of accessible information as to what are the legal compliance requirements.

In order to overcome this deficiency, the Office will prepare and publish accessible compliance information in a variety of formats over the 2003-2005 period. These initiatives will include the following:

- the promulgation of general information on the rights and obligations of companies, company directors and other company officers, creditors and members/shareholders under the law which was published in late 2002 as Decision Notice D/2002/1<sup>3</sup>;
- the development of detailed information on areas of the Companies Acts where compliance remains elusive and which appear to require more specific explanations;
- the communication of the role and ongoing activities of the Director of Corporate Enforcement in support of his compliance and enforcement remit.

3 This series of seven Information Books is available free of charge from the Office, or it may be accessed from the ODCE website page at <http://www.odce.ie/publications/decision.asp>.

In the latter context, particular emphasis will be laid on:

- the resources and multi-disciplinary character of ODCE staff;
- the powers available to the Office to secure compliance with company law;
- the legal sanctions which may be imposed for breaches of the Acts;
- the damage to corporate and personal reputations which may result from the outcome of enforcement action undertaken by the Office;
- the successes of the ODCE in fulfilling its remit.

#### **b) Promoting Compliance**

The Office will use every appropriate opportunity to point out publicly the benefits for business development afforded by company law. These benefits include:

- enhancing Ireland's reputation as a place to do business, in order to encourage further national and international investment in the economy;
- supporting partnership in Irish society, in order to maintain public support for business development in Ireland;
- minimising business risks, so that creditors are not fatally damaged by irresponsible or dishonest business behaviour on the part of others;
- facilitating sound competitive enterprise by curbing illegal practices under which company proprietors undercut their rivals;
- protecting business and Government revenue by reducing the incidence of bad debts.

The success or otherwise of the ODCE's compliance work will be determined not only by the quality of its information materials but by the extent to which that information is received and understood by company directors in particular. In this context, the ODCE will use a variety of communications channels to reach as wide a constituency as possible.

Measures which will be implemented include:

- enlisting the support of professional organisations (such as accountancy, company secretarial and legal bodies), the social partners, chambers of commerce, public bodies and market regulators, so that members and officials of such organisations are made aware via presentations and seminars of the obligations which company law imposes;
- issuing consultation papers on aspects of the ODCE's role and work, so that a high degree of public awareness exists in relation to its remit;
- developing the ODCE's website, so that a wide dissemination of company law information can be achieved by the ODCE over time;
- using the resources of the Companies Registration Office, so that occasional ODCE compliance information can be distributed to registered company directors;
- informing, via the media, the public of the work of the ODCE and its desire to improve standards of corporate governance in Irish companies.

#### **c) Improving Company Law and Associated Corporate Practices**

##### Legal Standards

The 2001 Act is a valuable starting point for improving standards of compliance with Irish company law. However, the Office will review from time to time the effectiveness of the measures in the Act, so that more effective provisions can be identified and promoted to Government in due course.

Securing wider changes to company law and its associated provisions is a long-term process which is not directly the responsibility of the ODCE. Nevertheless, it is relevant to the compliance remit, and in helping to develop legislative proposals, the primary interests of the Office will include:

- alleviating the burden imposed by company law on companies, company directors and others, so that unnecessary or excessive requirements are removed or modified. A reduction of the wider burden will assist in achieving greater compliance with the fundamental duties of company law;
- ensuring that revised company law provisions are capable of speedy and effective enforcement.

The Office is committing significant staff resources and time to supporting the work of the Company Law Review Group, because of its importance in creating a modern framework for company law in the longer term. During the 2003-2005 period, contributions will also be made to other legislation relevant to its remit, including the new Companies (Audit and Accountancy) Bill, forthcoming financial services legislation, relevant EU legislation relating to the implementation of the Financial Services Action Plan and other criminal law matters.

The Office will also engage from time to time with other parties in relation to the development and implementation of statutory instruments under companies or other legislation which touch on its compliance remit. Such parties will include the Department of Enterprise Trade and Employment, the Registrar of Companies and the Courts Service. The purpose of these contacts will be to ensure that the relevant secondary legislation is framed in a manner which will assist the ODCE discharge its statutory duties on an effective basis.

#### Non-Legal Standards

Non-statutory measures also contribute to securing high standards of corporate behaviour. The Office will keep up to date with national and international developments in associated fields (including in particular accountancy, auditing and corporate governance) and assess to what extent these emerging developments may have relevance to company law compliance work.

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

The ODCE's efforts at encouraging compliance require to be complemented by thorough evaluations of alleged corporate malpractice. The compliance goal can only be confirmed and supported if the public believes that circumstances suggesting non-compliance will be properly investigated and deservedly sanctioned. If that belief is absent, the efforts of the Office to achieve voluntary compliance will be of little lasting effect.

### **a) Developing Detection and Reporting Arrangements for Suspected Breaches of the Companies Acts**

The first step must be to ensure that suspected breaches of the Companies Acts, wherever they may occur in the economy, are brought to the ODCE's attention promptly for appropriate investigation. This work will be undertaken as follows:

- examining matters of suspected malpractice which are on the public record;
- ensuring the mandatory reporting of suspected breaches by parties with a legal obligation to do so;
- encouraging voluntary reporting of suspected misconduct.

#### Matters of Public Record

Matters of interest to the ODCE will come to attention from time to time via:

- media reports;
- the published reports of tribunals of inquiry, company investigations or similar examinations, or
- records publicly available in State offices, such as the Companies Registration Office, the Courts Service, the Land Registry, local authorities, etc.

The Office will monitor such developments with a view to identifying instances where breaches of company law may have taken place.



### Mandatory Reporting

Various provisions in the Company Law Enforcement Act 2001 require specified parties to report certain suspected company law offences to the ODCE. For instance:

- the Registrar of Companies must transmit to the Office every auditor's notice reporting a failure to keep proper books of account<sup>4</sup>;
- the Irish Stock Exchange must report suspected insider dealing offences<sup>5</sup>;
- the recognised accountancy bodies must report the suspected commission of indictable offences by their members<sup>6</sup>;
- auditors must report the suspected commission of indictable offences by a company or one of its officers or agents<sup>7</sup>;
- liquidators must report certain criminal behaviour<sup>8</sup>.

The ODCE will proceed by way of letters, meetings, presentations, public consultations and media advertisements to arrange that all of the parties in question are made aware of their legal obligations to report to the Office in an adequate and timely manner under each of these provisions.

### Voluntary Reporting

The ODCE will continue to encourage members of the public to draw to attention circumstances suggesting corporate malpractice. A standard Complaint Form which is accessible from <http://www.odce.ie/contact/default.asp> may be used for this purpose.

Section 18 of the 2001 Act overrides any confidentiality provision in certain other legislation, so as to enable the Competition Authority, a member of the Garda Síochána or an officer of the Revenue Commissioners to disclose to the Office information relating to the suspected commission of an offence under the Companies Acts. The Central Bank is also permitted to disclose similar information relating to certain collective investment

schemes under the European Communities (Undertaking for Collective Investment in Transferable Securities) Regulations 1989-1999, and it is expected that forthcoming legislation will extend this information gateway to all aspects of financial service supervision.

This Office will actively encourage all regulatory authorities to make voluntary disclosures of information, where breaches of the Companies Acts are suspected to have occurred. Where appropriate, the ODCE will facilitate the making of such disclosures by agreeing appropriate procedures with the authorities concerned.

### **b) Identifying *Prima Facie* Breaches of the Companies Acts**

Frequently, allegations of corporate malpractice are of a general character, and no breach of company law is immediately apparent. Even where a breach is specified, the subject matter will still require examination to establish the accuracy of the allegation or the extent to which all relevant company law issues have been identified.

A number of sources of potential information, including the Companies Registration Office, will be exploited for this purpose. The experience and expertise within the ODCE will be tapped at an early stage to enable staff to decide on the source and direction of potentially fruitful enquiries.

On occasion, enquiries by the Office of the company or its officers will be sufficient to encourage one or more parties to remedy a default in complying with their company law obligations. Where this results in a satisfactory resolution of the issue, the Office is unlikely to take enforcement action.

Where defaults are not remedied voluntarily, the Office will determine its most appropriate initial response, viz:

<sup>4</sup> Section 194 of the Companies Act 1990 as amended by section 74(b) of the 2001 Act.

<sup>5</sup> Section 115 of the Companies Act 1990 as amended by section 37 of the 2001 Act.

<sup>6</sup> Section 192(6) of the Companies Act 1990 as amended by section 73 of the 2001 Act. Section 58 of the 2001 Act is also relevant.

<sup>7</sup> Section 194(5) of the Companies Act 1990 as amended by section 74(e) of the 2001 Act. See also Decision Notice D/2002/2 which provides guidance on this provision.

A copy of the Notice is available free of charge on request to the Office, or it may be accessed from the ODCE website page at <http://www.odce.ie/publications/decision.asp>.

<sup>8</sup> Section 299 of the Companies Act 1963 as amended by section 51 of the 2001 Act.

- the undertaking of a detailed investigation, where there is *prima facie* evidence that legal action requires to be considered;
- referral of the case elsewhere, where it is proper to the remit of another body;
- a decision not to intervene, where no breach of company law is indicated, where effective civil remedies are available to the parties in dispute or where the Office lacks the legal powers to intervene effectively.

### c) Commissioning and Supporting Formal Company Investigations

Occasionally, it will be necessary for the Office to initiate a formal investigation of a company or related party under the provisions of the Companies Acts or otherwise to seek a Court Order to secure compliance with particular information requirements. Such inquiries can be conducted directly by the Office or indirectly by parties commissioned to undertake them.

This form of initiative will usually involve a significant commitment of ODCE staff and/or financial resources. It will be important that such inquiries are managed effectively by:

- defining initially the scope of the investigation;
- fixing an appropriate budget and timeframe for the investigation;
- seeking to secure the co-operation of the party or parties being examined;
- planning properly the progress of the investigation;
- reporting regularly on developments;
- obtaining prior approval for any extension of the scope of the investigation.

The ODCE will also be required to support and defend any attempts which may be made in the High Court to overturn any decision to initiate such an investigation or otherwise to

limit the field of inquiry or the content of the subsequent report.

At the conclusion of each formal investigation, the ODCE will review the extent to which particular approaches taken during the investigation yielded a good return. The Office will also be anxious to identify any lessons which might usefully be employed in similar investigations in the future.



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

Where *prima facie* breaches of the Companies Acts are established from ODCE investigations, the company and/or other parties will be brought to account and sanctioned as appropriate. The imposition of sanctions, following the administration of justice in public, are necessary conditions for deterring future breaches of the Companies Acts and securing a transparent and compliant company law environment.

#### a) Developing a Balanced Enforcement Policy

In evaluating suspected breaches of the Companies Acts, the ODCE will consider what options are available to secure compliance or to sanction non-compliance. However, bearing in mind that there are about 300 offences which could be minor, moderate or extremely serious depending on the circumstances of each case, it is important that a graduated case by case approach be taken in determining what form of sanction and/or remedy might best meet the circumstances in any particular case.

The legal options available to the Director in the Companies Acts include:

- the initiation of court proceedings with a view to securing an order remedying a default in complying with the Companies Acts<sup>9</sup>;
- inviting the person(s) in default to remedy to the satisfaction of the Director a Companies Act offence and pay an administrative penalty within 21 days, in lieu of the person being prosecuted in Court<sup>10</sup>;
- the initiation of criminal proceedings on a summary basis before the District Court in respect of the offence;
- in more serious cases, the referral of the case to the DPP for a decision to prosecute on indictment, and/or
- initiating other proceedings to sanction corporate misbehaviour, e.g., applying for

the restriction or disqualification of directors<sup>11</sup>.

In the light of the number of Companies Acts offences and the range of enforcement measures which are available, it is important for reasons of economy and effectiveness that a balanced enforcement policy and associated procedures be adopted, reviewed and regularly updated.

#### b) Upholding the Disclosure Requirements in the Companies Acts

The provisions of company law afford privileges to persons availing of incorporation. These provisions require in turn that information on the constitution, leadership and performance of companies is made available at specified times, so that individual stakeholders are in a position to make an informed assessment of the company's true position. Any failure to make the required disclosures in full and on a timely basis weakens the position of company stakeholders in protecting their interests.

The ODCE therefore regards it as very important for the effectiveness of the company law regime that the required registers are maintained up to date, that annual financial statements are prepared, that appropriate disclosure is made and that the information disclosed is accurate. Consistent with this stance, the Office will act in appropriate circumstances to ensure that the required information is made available and where necessary will seek to sanction any party who fails to abide by his or her statutory obligations. The Registrar of Companies discharges a similar role in respect of filing offences under the Companies Acts.

#### c) Sanctioning Parties disregarding Company or Other Interests

Company law imposes many obligations, but at its heart is a requirement that company directors and others in responsible positions nurture and protect the company and its stakeholders, sometimes at the expense of personal interests. These obligations include keeping proper books of account, holding annual and extraordinary general meetings,

<sup>9</sup> Examples include section 371, 371A or 381 of the Companies Act 1963 as amended by sections 96, 97 and 98 respectively of the 2001 Act.

<sup>10</sup> This option is available under section 109 of the 2001 Act. It is hoped to commence this provision during 2003/2004.

<sup>11</sup> Section 150 or 160 of the Companies Act 1990 as amended by sections 41 and 42 respectively of the 2001 Act.

restricting director/company transactions in certain situations, not engaging in insider dealing, refraining from trading while insolvent and not acting in responsible positions within companies if bankrupt or unqualified.

The ODCE appreciates that the competitive pressures of the marketplace are in themselves challenging and regularly result in honest enterprise failure. Company stakeholders do not need to bear added investment risks denoted by the failure of directors and other parties to adhere to the standards of behaviour expected of them under the law. Clearly, the ODCE must be rigorous in ensuring that improper corporate behaviour is sanctioned, so as to deter illegality and improve overall standards in the future.

#### **d) Acting against Parties denying Accountability under the Law**

The Companies Acts assign supervisory roles in specified circumstances to the Director of Corporate Enforcement, the Registrar of Companies, the judiciary, inspectors appointed under the Acts, the Irish Stock Exchange, auditors, liquidators and other parties. Each party possesses legal powers to support the discharge of their mandate.

Where parties being examined or supervised defy or deny the exercise of the powers by the relevant supervisory authority, a prompt response must follow. The ODCE, for its part, will take speedy action to ensure that the oversight powers accorded by law to the relevant authorities are upheld and discharged to the maximum extent possible, so as to maintain a balanced and responsive system of corporate regulation.

At the same time, it is the entitlement of any party to seek to judicially review any decision or action taken by the Director or any other supervisory authority. The Director will of course rigorously defend in the public interest any proceedings which are mistaken or unwarranted.

## **Goal 4 – Sanctioning Improper Conduct with respect to Insolvent Companies**

The Company Law Enforcement Act 2001 imposes particular obligations on the ODCE to examine the conduct of the directors of insolvent companies, because of the financial impact of their failure on the fortunes of creditors, employees and shareholders of the failed entities. There is a public interest in seeking to ensure that such damage does not recur or at least that culpable directors are deterred from inflicting similar damage on others in the future. At the same time, the Office does not wish to deter entrepreneurial talent by punishing persons who behaved honestly and responsibly in the conduct of the failed companies, even though losses may have ensued to others.

#### **a) Supervising Liquidators in the Proper Discharge of their Duties**

The effective discharge by the ODCE of its insolvency remit will require *inter alia* that liquidators properly carry out the legal obligations which are enshrined in the Companies Acts. The reporting by liquidators is critical in this respect<sup>12</sup>. The Office will have to ensure that they provide initial and subsequent reports in full on a timely basis. For this purpose, relevant Office staff will require to track accurately the reporting deadlines and take measures to ensure that liquidators comply on a timely basis. Such measures will include legal action if necessary.

Where a liquidator applies to the High Court for the restriction of one or more company directors, the ODCE will require to satisfy itself that this obligation is undertaken properly. This may involve the Director participating in Court proceedings in appropriate cases, viz:

- for the purpose of ensuring that liquidators bring restriction applications to the Court against company directors, where they are required by law to do so;

12. Decision Notice D/2002/3 on the Liquidation-Related Functions of the Director of Corporate Enforcement describes these reporting obligations in detail. A copy of the Notice is available free of charge from the Office, or it may be accessed from the ODCE website page at <http://www.odce.ie/publications/decision.asp>.

- for the purpose of making the Court aware of additional information in the hands of the Director prior to it making a decision on a restriction application which may have been brought by a liquidator against a company director;
- for the purpose of monitoring any other proceedings which the liquidator may have launched against company directors or other parties.

The Director is also empowered by section 57 of the 2001 Act to examine the books and documents of a liquidator in relation to one or more liquidations. This initiative may be taken independently or on receipt by the Director of a complaint from a member, contributory or creditor of the company. While the Director only expects to use this provision occasionally, it is nevertheless an important instrument by which liquidators can be held accountable for the position of trust accorded to them in the Companies Acts in respect of company assets.

During the 2003-2005 period, the Director envisages that these provisions will –

- enable his Office to become familiar with the expertise of individual liquidators;
- help to raise the overall standards of liquidators in discharging their role and
- enable him to determine if further legislative measures are desirable in this area.

#### **b) Assessing Directors' Conduct in Insolvent Liquidation Situations**

In reporting to the Director on their investigations of insolvent companies in liquidation, liquidators are required to indicate if the company's directors, individually and collectively, have satisfied them that they have acted honestly and responsibly in the failed enterprise. The purpose of this reporting provision is to enable the Director to determine if the liquidator should be exempted from proceeding to seek the restriction of the directors of the company in liquidation. If this assessment suggests that the circumstances warrant other possible sanctions, including

prosecution and/or disqualification, appropriate action will be considered.

The ODCE's evaluation of liquidator reports will take into account:

- any information which may have been gathered independently;
- the views of any third parties who may have made representations to the Office;
- any clarifications which have been obtained from the liquidator in question and
- the expert advice of the administrative, accounting, legal and/or Garda colleagues within the Office.

Over the next three years, the ODCE will receive a large number of such reports on an annual basis, and this will require the Office to select and prioritise the reports received. It will also try to identify if particular economic sectors or other circumstances contribute to directors' misconduct and attempt to prevent the recurrence of such conditions in the future in the interests of a sound business environment.

#### **c) Sanctioning Fraudulent or Abusive Corporate Behaviour**

Specific new powers have been conferred on the Director in the Company Law Enforcement Act to remedy and sanction abuses of incorporation. These powers have been made available specifically to tackle 'phoenix syndrome' situations, where a new company may be established with the same or a similar business as the insolvent company. Before being abandoned (often without being liquidated), the assets of the failed enterprise may be transferred to the new company. This can result in serious losses for creditors, many of whom are not in a position to seek redress either by way of the appointment of a liquidator or the initiation of other legal action. If the new business has been established with assets transferred at below market value, the company will be in a position to compete unfairly against other similar businesses.

Clearly in the next few years, the ODCE must begin to tackle abusive corporate behaviour<sup>13</sup> and use in appropriate circumstances its new powers to seek redress by means of various types of High Court order, including:

- inspecting the insolvent company's books;
- summoning directors and other persons for examination by the Court;
- restoring property improperly acquired to its rightful owner;
- contributing to the company's debts.

In this or in other situations, the behaviour may merit taking other initiatives, including seeking the disqualification of company directors or other persons to prohibit their being involved in the future management or direction of companies. Having regard to the range of eligible circumstances now enshrined in the Company Law Enforcement Act, this option is likely to be used by the ODCE on a relatively frequent basis.

During the 2003-2005 period, the Office will identify the extent to which corporate malpractice in the insolvency area can be dealt with by the Office with its current level of resources or in partnership with other parties such as the affected creditors. It will also review the use it makes of the provisions dealing with insolvency in the 2001 Act and assess the impact of their effectiveness at two levels in particular:

- the success of the Office in utilising these provisions to sanction non-compliant company law behaviour;
- the extent to which the legal provisions themselves are properly enforceable in deterring improper behaviour on the part of company directors and other parties.

If legal change is required to improve the effectiveness of the Office in this important area, the Director will seek to convince Government that appropriate provisions should be introduced in amending legislation.

## **Goal 5 – Providing Quality Services to Internal and External Customers**

The management and successful implementation of the important functions of the Director in the Company Law Enforcement Act 2001 requires a continuing programme of development in the human and physical capital of the Office. Particular attention has had to be devoted to this area in the start-up phase of the Office, as a basic organisational structure was developed and staff from different backgrounds and expertise were recruited and integrated into the Office.

This investment in human and physical assets has a primary purpose, namely to provide the necessary resources and services to its staff, so that the Office properly meets the needs of its external customers. A motivated, organised and well-led staff is the foundation for providing quality services for the Office's external customers who are –

- company directors and others who wish to comply with the requirements of company law,
- professionals and members of the public who engage with the ODCE about possible or actual malpractice in the company law area,
- the persons about whom reports or complaints of possible malpractice are received,
- the press and other members of the general public who seek information about Office activity and
- staff in Departments, public agencies and other public or private sector bodies with whom the Office has cause to do business in discharging its role.

### **a) Securing and Managing ODCE Resources**

The availability of adequate resources will play a significant part in determining the success of the ODCE. As an Office committed to high legal standards, it will also be important that its financial, organisational and

13 Decision Notice D/2002/4 on Unliquidated Insolvent Companies outlines the approach of the Director in this area. A copy of the Notice is available free of charge from the Office, or it may be accessed from the ODCE website page at <http://www.odce.ie/publications/decision.asp>.



staffing resources are utilised in a prudent and effective manner.

#### Financial Resources

As the ODCE is in a start-up phase at present, it is unclear if the current level of its allotted budget (€3.75 million in 2003) will be sufficient to cover its longer-term requirements. A significant element of budgetary flexibility is essential, in order to enable the ODCE to meet the challenges which will arise from time to time in discharging its legal remit. The ODCE will nevertheless strive to keep within its annual budget, and where additional resources are anticipated to be necessary, this will be brought to the attention of the Department of Enterprise Trade and Employment at the earliest possible date.

#### Organisational Resources

Following the enactment of the 2001 Act, the Director decided that he would establish his Office in temporary premises, in order to enable early legal effect to be given to the Act's provisions. However, it is only recently that the Office has transferred into its permanent premises in Parnell Square, and a programme of planning and development work is underway to provide a secure and satisfactory initial working environment for staff. The facilities of the Office will be improved over time, so that the work of staff can be carried out in an effective manner.

#### Information and Communications

##### Technology (ICT) Resources

The delivery of ODCE services will depend significantly on developing and maintaining a sound ICT platform for staff and external customers. This will be provided in conjunction with the Department of Enterprise Trade and Employment, and ODCE requirements will be adapted and developed to suit the particular security and service needs of the Office.

As an Office which will be continually making decisions under statute, it is vital that those decisions are well informed. In order to achieve a situation where staff have ready

access to reliable and accurate information, a continuing development programme of information collation, storage and retrieval will be required. This will involve *inter alia* access to professional sources of legal and other information and liaison with third parties, such as the Companies Registration Office, the Garda Síochána, the Courts Service and various other parties.

A case management system will be developed and upgraded over time for the purpose of collecting together and distributing to staff members the information necessary to enable them to undertake their duties in an effective and efficient basis. It is intended that the information made available to the Office from third parties will come to be automatically integrated into the case management system, in order to avoid duplication in information handling.

#### **b) Developing Staff**

Providing an adequate level and quality of resources will be conducive to supporting staff undertaking their work. Within available resources, staff must also be motivated and properly trained, if a responsive and quality service is to be provided to the ODCE's external customers. The Office will therefore support staff development by:

- providing good basic training to staff on arrival and a continuing programme of staff development during their employment with the Office;
- defining the role of each member and identifying their contribution to the goals of the Office;
- supporting staff in their day-to-day work by developing *inter alia* detailed procedures manuals to enable the Office to maintain an adequate performance through successive changes in personnel;
- empowering staff to make decisions and undertake tasks appropriate to their competencies and responsibilities;

- involving staff in decision-making within the Office through consultation mechanisms;
- giving good feedback to staff on their work and
- keeping staff informed on a timely basis of developments in the work of the Office affecting them.

#### c) Developing and Maintaining Quality Customer Services

The reputation of the ODCE will be inextricably linked with the quality of its engagement with its external customers. The Office will endeavour to inform the public of its plans and listen carefully to the feedback which results. In relation to day-to-day business, staff will treat their customers with respect and endeavour to assist them as far as possible. They will provide to the best of their ability accurate information on the activity of the Office in any area where the legal constraints on disclosure of confidential information do not arise. In discharging the Office's statutory duties, staff will be firm but fair in seeking to have statutory obligations complied with or sanctioned. In addition to publications on the ODCE's statutory remit, a Customer Service Plan and Freedom of Information Guide will be published to assist customers in dealing with the Office.

The ODCE has developed a website as a means of engaging with its customers about the Office, its legal powers, its ongoing activity and the customers' concerns. The initial website attracted favourable comment for the range and quality of company law information which is included on it. The Office plans to develop its content in the coming years by:

- including on a timely basis decisions of the Courts and the Office which are of relevance to its external customers;
- expanding the range of information on the website which will assist in encouraging company law compliance;

- extending the ability of the Office to provide electronic services to its clients;
- reviewing on a regular basis the structure of the website, so that it remains in a user-friendly format.

The Office already provides electronically a number of services to the public, including:






- requests for general information (info@odce.ie);
- requests for material under the Freedom of Information Act (foi@odce.ie);
- the facility to comment on ODCE Consultation Papers (consultation@odce.ie) and
- the ability to offer comment on the services provided by the Office (feedback@odce.ie).

During the period covered by the Strategy Statement, the Office will examine expanding the range of online services on offer to its major clients.

## Part 3 - Conclusion

As a new organisation, the ODCE has substantial challenges ahead in reducing the incidence of non-compliance which was portrayed in the Report of the Company Law Compliance and Enforcement Working Group. What is involved essentially is a change of culture, and that will only be achieved gradually. The Office has made an encouraging start to its work, but the real issues will only begin to be tackled over the period of this Strategy Statement.

The progress of the Office in meeting the goals outlined in this Statement can be monitored in its publications. These may be accessed from the following contact points:

	<a href="http://www.odce.ie/publications">www.odce.ie/publications</a>
	<a href="mailto:info@odce.ie">info@odce.ie</a>
	(01) 858 5800
<i>Lo-call</i>	1890 315 015
	(01) 858 5801
	Office of the Director of Corporate Enforcement 16 Parnell Square Dublin 1

## Appendix 1

### Description of the Primary Responsibilities by Unit for the Goals/Sub-Goals identified in this Statement

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

- a) Publishing Accessible Company Law Information  
Compliance Unit with particular support from the Legal Advisers.
- b) Promoting Compliance  
Compliance Unit with occasional support from other staff.
- c) Improving Company Law and Associated Corporate Practices  
Compliance Unit with particular support from the legal and accountancy staff.

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

- a) Developing Detection and Reporting Arrangements for Suspected Breaches of the Companies Acts  
Investigations Unit, subject to the Compliance and Insolvency Units taking the lead with respect to auditor and liquidator reporting respectively.
- b) Identifying *prima facie* Breaches of the Companies Acts  
Investigations Unit, including the legal, accountancy and Garda staff.
- c) Commissioning and Supporting Formal Company Investigations  
Investigations Unit, including the legal and accountancy staff.



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

- a) Developing a Balanced Enforcement Policy  
Prosecutions Unit, including the legal, accountancy and Garda staff.
- b) Upholding the Disclosure Requirements in the Companies Acts  
Prosecutions Unit, including the legal, accountancy and Garda staff.
- c) Sanctioning Parties disregarding Company or Other Interests  
Prosecutions Unit, including the legal, accountancy and Garda staff.
- d) Acting against Parties denying Accountability under the Law  
Prosecutions Unit with particular support from the legal and Garda staff. The Investigations and Insolvency Units may also be associated with judicial review proceedings.

### Goal 4 – Sanctioning Improper Conduct with respect to Insolvent Companies

- a) Supervising Liquidators in the Proper Discharge of their Duties  
Insolvency Unit, including the legal, accountancy and Garda staff.
- b) Assessing Directors' Conduct in Insolvent Liquidation Situations  
Insolvency Unit, including the legal, accountancy and Garda staff.
- c) Sanctioning Fraudulent or Abusive Corporate Behaviour  
Insolvency Unit, including the legal, accountancy and Garda staff.


### Goal 5 – Providing Quality Services to Internal and External Customers

- a) Securing and Managing ODCE Resources  
Corporate Services Unit with support from all staff.
- b) Developing Staff  
Corporate Services Unit with support from all staff.
- c) Developing and Maintaining Quality Customer Services  
Corporate Services Unit with support from all staff.

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