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# CONFRONTING UNLAWFUL AND IRRESPONSIBLE BEHAVIOUR INSOFAR AS IT RELATES TO COMPANY LAW

## CHAPTER 3

# CONFRONTING UNLAWFUL AND IRRESPONSIBLE BEHAVIOUR INsofar AS IT RELATES TO COMPANY LAW

### Structure of this Chapter

This Chapter is structured in a manner whereby, in the following three Parts, the Office's inputs, throughputs and outputs respectively are detailed.

## PART A: INPUTS

### EXTERNAL INPUTS

The Office's activities in confronting unlawful and irresponsible behaviour are driven to a substantial extent, both directly and indirectly, by inputs received from external sources. This is necessarily so, given that:

- a number of parties, including liquidators, auditors and certain professional bodies, have statutory reporting obligations to the Office;
- the Office forms part of a broader statutory framework that provides for the referral of, otherwise confidential, information between regulatory and enforcement bodies where such information is considered to be relevant to those other entities' functions; and
- the Office receives a substantial number of complaints from members of the public annually.

In that context, the principal inputs received from external sources during the year were as follows:

**Table 5**  
**Inputs from external sources**

	2012		%	2011		%
<b>Statutory reports</b>						
Liquidators' initial section 56 reports	1,315			1,287		
Liquidators' subsequent section 56 reports	<u>472</u>			<u>438</u>		
Total liquidators' section 56 reports		1,787	75.62		1,725	77.04
Liquidators' reports regarding possible criminality		2	0.08		1	0.04
Auditors' indictable offence reports		157	6.64		169	7.55
Professional Bodies' indictable offence reports		7	0.30		9	0.40
Reports under section 19 of the Criminal Justice Act 2011		1	0.05		0	0
<b>Referrals</b>						
Referrals from external parties		72	3.05		31	1.39
<b>Complaints</b>						
Complaints from members of the public		337	14.26		304	13.58
<b>Total inputs from external sources</b>		<b>2,363</b>	<b>100</b>		<b>2,239</b>	<b>100</b>

The principal external sources of inputs driving the Office's activities over the year under review are elaborated upon below.

## Liquidators' section 56 reports

### Introduction – overview of the liquidator reporting regime

As can be seen from Table 5 above, liquidators' section 56 reports accounted for in excess of 75% of all external inputs received by the Office during 2012. In summary, liquidators of companies that are in insolvent<sup>26</sup> liquidation are required by law<sup>27</sup> to report to the Office on the company's demise and on the conduct of any person who was a director of the company during the twelve months preceding the entry of the company into liquidation. The liquidator must also proceed to apply to the High Court for the restriction<sup>28</sup> of each of the directors, unless relieved of that obligation by the Office.<sup>29</sup>

The essential aims of this statutory reporting regime are to:

- afford the public a degree of protection by ensuring that persons who have been determined as not having acted honestly and/or responsibly in the run up to a company's entering insolvent liquidation may, in respect of the mandatory five-year period of restriction, only act as directors of other companies that meet minimum capitalisation requirements; and
- ensure that persons who, in the run up to a company's entering insolvent liquidation, have been judged to have acted honestly and responsibly can continue to engage in entrepreneurial activity through the medium of limited liability companies without sanction or penalty.

In discharging its role, the Office expects liquidators to provide it with all of the information which is relevant to the making of an appropriate decision. It also encourages liquidators to make a suitable recommendation on relief by reference to the results of their investigations.

The Office considers granting relief where a liquidator advances an evidence-based justification in support of a claim that a director has acted honestly and responsibly in conducting the company's affairs. In making its decisions, the Office is anxious to ensure that no director needlessly bears the burden of a High Court hearing where he or she has clearly demonstrated honest and responsible behaviour in the conduct of the affairs of the failed enterprise. In practice, the Office acts as a filter to remove the need for consideration by the High Court of those cases which do not appear to warrant its attention.

It is important to note, however, that ODCE decisions of '*no relief*' or '*partial relief*' do not constitute a finding of dishonesty or irresponsibility in respect of the directors concerned, and it would be inappropriate for any such inference or imputation to be drawn. It is solely a matter for the High Court (having heard the submissions of the liquidator and directors respectively) to determine if a restriction declaration should be made in respect of any particular company director.

<sup>26</sup> A company is insolvent when it is unable to pay its debts as they fall due

<sup>27</sup> Section 56 of the CLEA

<sup>28</sup> Where an individual is restricted under section 150 of the Companies Act 1990, s/he may only act as the director or secretary of a company for a period of five years thereafter provided that the company concerned meets certain minimum capitalisation requirements. In the case of a private company, a minimum called up share capital of €63,487 is required. In the case of a public limited company, the corresponding figure is €317,435.

<sup>29</sup> The process and scope of liquidator reporting are outlined in three main ODCE publications, Decision Notice D/2002/3 as supplemented by Decision Notice D/2003/1 and Information Notice I/2009/1. These documents are available at [www.odce.ie](http://www.odce.ie)

### Companies entering liquidation

As a result of the severe economic downturn, company failures continued at a high level during 2012. As can be seen from the Table below:

- during the year, insolvent liquidations (i.e. creditors' and Court liquidations combined) accounted for 59% of all liquidations;
- 2012 was the fourth consecutive year in which the number of insolvent liquidations exceeded 1,200; and
- solvent (i.e., members') liquidations fell by 13% during 2012, from 1,054 to 919.

**Table 6**  
**Companies entering liquidation: 2008 - 2012**

	2008	2009	2010	2011	2012
Creditors' liquidations	530	1,124	1,258	1,311	1,210
Court liquidations	83	121	128	99	107
<b>Total insolvent liquidations</b>	<b>613</b>	<b>1,245</b>	<b>1,386</b>	<b>1,410</b>	<b>1,317</b>
Members' liquidations	1,051	1,158	899	1,054	919
<b>Total solvent liquidations<sup>30</sup></b>	<b>1,051</b>	<b>1,158</b>	<b>899</b>	<b>1,054</b>	<b>919</b>
<b>Total liquidations</b>	<b>1,664</b>	<b>2,403</b>	<b>2,285</b>	<b>2,464</b>	<b>2,236</b>

### Liquidator reports received – 2012

As can be seen from Table 5 above, total of 1,787 liquidators' reports were received during the year (2011: 1,725), of which:

- 1,315 were initial reports (2011: 1,287); and
- 472 were subsequent<sup>31</sup> reports (2011: 438).

This continuing high level of new liquidations reflects the economic conditions that prevailed during the course of the year under review. Of particular note in that context was the fact that a number of the reports received related to large scale entities, the commercial affairs of which are particularly complex.

The Table below provides details of the sectoral distribution of companies in respect of which liquidators' initial reports were received during the year.

<sup>30</sup> Whilst the Office has no role in solvent (i.e. members') liquidations, data in respect of same has been included in the interest of completeness.

<sup>31</sup> An initial report is the first report received from a liquidator and is required to be submitted within 6 months of his/her appointment. In the majority of cases, the decision as to whether or not to grant relief is made based on this report. However, in some cases a subsequent report is required from the liquidator when his/her investigations have progressed further. In circumstances where a subsequent report is considered to be necessary, 'relief at this time' is usually granted in respect of the initial report.

**Table 7**  
**Sectoral analysis of liquidators' initial section 56 reports received - 2012**

Sector	2012		2011	
		%	%	
Wholesale & retail	318	24	286	22
Construction	273	21	319	25
Manufacturing & printing	172	13	161	13
Hotels, bars & catering	137	10	142	11
Community, social & other	116	9	103	8
Marketing & promotion	78	6	63	5
Real estate & renting	71	5	96	7
Transport & distribution	51	4	44	3
Technology & telecommunications	44	4	16	1
Financial & leasing	18	2	16	1
Recruitment & security services	19	1	22	2
Agriculture, mining & marine	18	1	19	2
<b>Total</b>	<b>1,315</b>	<b>100</b>	<b>1,287</b>	<b>100</b>

#### Timeliness of liquidators' reporting

Over the course of the year, the Office issued 198 (2011: 339) notices to 79 separate liquidators advising them that they were in default of their statutory reporting obligations. Many of these defaults were promptly rectified as a result of this action and, as a result, 94% of the first reports due during the year had been received by the end of the year (2011: 95%). However, a small number of liquidators have repeatedly failed to comply with their reporting obligations. Such cases are a particular area of focus for the Office and appropriate enforcement action up to, and including, criminal prosecution may result from such persistent breaches of statutory obligations. In that context, it should be noted that liquidators' behaviour generally has been identified as an area deserving of greater focus in 2013 and beyond.

#### Standard of liquidators' reporting

The standard of liquidators' reports received during the year was considered to be broadly satisfactory. However, the quality of reporting in certain instances was not of the required standard. Indications would suggest that contributory factors in that regard include:

- the volume of insolvency assignments being taken on by some firms; and
- as a result of new entrants entering the market, a relative lack of experience of insolvency on the part of certain liquidators. In that context, Table 8 below provides an analysis of the profile of liquidators undertaking insolvency engagements over the period 2008 to 2012.

The foregoing issues necessitated a high level of engagement with relevant liquidators for the purpose of specifying Office requirements and clarifying aspects of reports submitted. In certain instances, it was considered necessary to request liquidators to attend the Office to discuss their reports and to review the basis for the conclusions set out therein.

**Table 8**  
**Profile of liquidators undertaking insolvent liquidations by number of engagements**  
**2008 – 2012**

Number of Liquidators	Number of Engagements				
	<3	3-6	7-12	>12	Total
2008	59	11	14	6	90
2009	122	25	18	16	181
2010	169	48	33	26	276
2011	182	57	30	27	296
2012	187	63	37	22	309

## Sectoral distribution of other external inputs (i.e. external inputs other than liquidators' section 56 reports)

As can be seen from Table 5, in aggregate those external inputs other than liquidators' section 56 reports accounted for just under 25% of total external inputs received during the year. The Table below provides an analysis of the sectoral distribution of those other external inputs.

**Table 9**  
**Sectoral distribution of external inputs other than liquidators' section 56 reports**

Sector	2012		2011	
	%		%	
Real estate & renting	92	16	85	16
Construction	54	9	49	9
Wholesale & retail	46	8	63	12
Manufacturing	34	6	29	6
Hotels, bars & catering	18	3	20	4
Community, social & personal	26	5	29	6
Finance & leasing	33	6	32	6
Transport & distribution	11	2	10	2
Agriculture, mining & marine	17	3	8	2
Health & social work	16	3	35	7
Technology & telecommunications	22	4	13	3
Marketing & promotion	54	9	35	7
Recruitment & security services	1	0	4	1
Other business sectors	60	10	33	6
Business sector not known	0	0	37	7
Not a company	92	16	32	6
<b>Total</b>	<b>576</b>	<b>100</b>	<b>514</b>	<b>100</b>

## Complaints

The Office receives substantial numbers of complaints annually from members of the public. During the year a total of 337 complaints were received (2011: 304), which accounted for 14% of all external inputs received. The Table below provides an analysis of the subject matter of complaints received.

**Table 10**  
**Complaints received (analysed by character of primary default)**

	2012	%	2011	%
Allegations of reckless/fraudulent/insolvent trading	77	23	81	27
Annual/Extraordinary General Meeting related	50	15	44	14
Relating to the issue of unpaid debts	37	11	52	17
General shareholder rights issues	33	10	22	7
Relating to companies trading whilst struck off the Register	32	9	9	3
Directors' conduct	24	7	41	14
Audit/auditor related	17	5	7	2
Allegations of forgery/furnishing of false information	12	4	7	2
Other	55	16	41	14
<b>Total</b>	<b>337</b>	<b>100</b>	<b>304</b>	<b>100</b>

## Auditors' indictable offence reports

### Introduction – overview of the auditor reporting regime

Where, in the course of and by virtue of, their carrying out of an audit, information comes into the possession of a company's auditors which leads them to form the opinion that there are reasonable grounds for believing that an indictable offence under the Companies Acts<sup>32</sup> has been committed by the company, or an officer or agent of the company, the auditors are required to report that opinion to the Office<sup>33</sup>. The Office has developed and published guidance to assist auditors in complying with their obligations in this regard<sup>34</sup>.

### Nature of suspected offences reported

During the year, a total of 157 indictable offence reports were received (2011: 169). The Table below provides an analysis of the nature of suspected offences contained in those reports. It should be noted that the number of reports received does not accord with the number of suspected offences reported as, in a number of instances, reports included more than 1 suspected offence.

<sup>32</sup> Other than offences under sections 125(2) and 127(12) of the 1963 Act, as amended

<sup>33</sup> Section 194(5) of the Companies Act 1990, as inserted by section 74 of the CLEA and subsequently amended by section 37 of the 2003 Act and section 73 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005

<sup>34</sup> Decision Notice D/2006/2 – Revised Guidance on the Duty of Auditors to Report Suspected Indictable Offences to the Director of Corporate Enforcement. This was more recently supplemented by Information Notice I/2009/4 – Reporting Company Law Offences: Information for Auditors

**Table 11**  
**Analysis of suspected indictable offences reported by auditors**

	2012	%	2011 <sup>35</sup>	%
Directors' loan infringements	127	76	144	77
Failure to maintain proper books of account	28	17	23	12
Provision of false statements to auditors	1	1	1	1
Person not qualified to act as auditor to a company acting as such	5	3	9	5
Falsification of documents	4	2	3	1
Failure to convene Extraordinary General Meeting of a company	0	0	1	1
Other miscellaneous offences	2	1	5	3
<b>Total</b>	<b>167</b>	<b>100</b>	<b>186</b>	<b>100</b>

## Referrals

As alluded to earlier in this Chapter, the Office forms part of a broader statutory framework that permits the exchange of confidential information between regulatory and enforcement bodies, subject to safeguards and appropriate limitations. In that context, the Office receives referrals from other statutory bodies from time to time. During the year under review, the Office received 72 (2011: 31) such referrals from a variety of sources including:

- the Registrar of Companies;
- the Revenue Commissioners;
- An Garda Síochána;
- IAASA; and
- the Central Bank

## Professional bodies' indictable offence reports

### RABs

Where a RAB's<sup>36</sup> Disciplinary Committee or Tribunal has reasonable grounds for believing that an indictable offence under the Companies Acts may have been committed by a person while that person was a member of the RAB, the RAB is required to report the matter to the Office<sup>37</sup>. During the year, a total of 7 reports (2011: 9) were received from RABs. The Table below provides an analysis of the nature of suspected offences contained in those reports.

<sup>35</sup> The data as presented in respect of 2011 includes some reclassification from the data as presented in the 2011 Annual Report for the purpose of facilitating a more granular analysis.

<sup>36</sup> A RAB is an accountancy body that is permitted to authorise its members and member firms, subject to those members having satisfied certain criteria, to act as statutory auditors and audit firms respectively. There are six RABs, i.e., the:

- Association of Chartered Certified Accountants (ACCA)
- Institute of Certified Public Accountants (ICPAI)
- Institute of Chartered Accountants in England & Wales (ICAEW)
- Institute of Chartered Accountants in Ireland (ICAI)
- Institute of Chartered Accountants of Scotland (ICAS)
- Institute of Incorporated Public Accountants (IIPA)

<sup>37</sup> Section 192(6) of the Companies Act 1990, as amended by section 73 of the CLEA

**Table 12**  
**Analysis of professional bodies' indictable offence reports – 2012**

Suspected offence	Statutory Provision	Reports
Acting as an auditor whilst not qualified to do so	Section 187, Companies Act 1990	1
Furnishing false information	Section 242, Companies Act 1990	2
Acting as an auditor whilst not qualified to do so	Section 187 and 242, Companies Act 1990	1
Failure on the part of a liquidator to convene a General Meeting of a company and its creditors where the liquidation continues for more than 12 months and subsequently furnishing financial statements to the Registrar.	Section 272 Companies Act 1990	3
<b>Total</b>		<b>7</b>

#### Prescribed Professional Bodies ("PPB")

Similarly, where the Disciplinary Committee or Tribunal of a PPB finds that a member conducting a liquidation or receivership has not maintained appropriate records, or has reasonable grounds for believing that the member has committed an indictable offence under the Companies Acts during the course of a liquidation or receivership, the PPB concerned is required to report the matter to the Office<sup>38</sup>.

Pursuant to the Company Law Enforcement Act 2001 (Section 58) Regulations 2002<sup>39</sup>, the following have been designated as PPBs:

- Association of Chartered Certified Accountants (ACCA);
- Chartered Institute of Management Accountants (CIMA);
- Institute of Certified Public Accountants in Ireland (ICPAI);
- Institute of Chartered Accountants in Ireland (ICAI);
- Institute of Incorporated Public Accountants (IIPA);
- Irish Tax Institute; and
- Law Society of Ireland.

Other than those reports received from RABs as referred to above, no reports were received from PPBs during the year.

<sup>38</sup> Section 58 of the CLEA

<sup>39</sup> SI 544 of 2002

## Liquidators' reports regarding possible criminality

Liquidators are required, in circumstances where it appears that any past or present officer of the company concerned has been guilty of any offence in relation to the company, to make a report to the DPP and also to refer the matter to the Office<sup>40</sup>. This reporting obligation extends to all liquidations, solvent and insolvent (i.e. both Creditors' Voluntary liquidations and Court liquidations) alike. During the year, 2 such reports were received by the Office.

## Reports under section 19 of the Criminal Justice Act 2011

Section 19 of the Criminal Justice Act 2011 ("CJA") created a statutory obligation on persons generally to report certain information to An Garda Síochána concerning certain so-called "*relevant offences*". Relevant offences are those listed in the Schedule to the CJA. They include some of the more serious offences under the Companies Acts including:

- fraudulent trading<sup>41</sup>;
- the making of false statements to company auditors<sup>42</sup>;
- the furnishing of false information<sup>43</sup>;
- the destruction, mutilation or falsification of company documents<sup>44</sup>;
- failure to maintain proper accounting records<sup>45</sup>;
- the giving of unlawful financial assistance by a company for the purchase of its shares<sup>46</sup>;
- certain instances of the withholding of information or property from liquidators<sup>47</sup>; and
- pre-liquidation frauds<sup>48</sup>.

The reporting obligation extends to any person who has information which s/he knows, or believes, might be of material assistance in:

- i. preventing the commission by any other person of a relevant offence; or
- ii. securing the apprehension, prosecution or conviction of any other person for a relevant offence.

The obligation is to disclose that information "*...as soon as it is practicable to do so to a member of An Garda Síochána.*" A person who fails without reasonable excuse to so disclose any such information commits a criminal offence contrary to section 19.

It is important to note that Section 19 of the CJA does not impose an obligation to report to the ODCE. Rather, the obligation is to report to "*...any member of An Garda Síochána*". However, as detailed in Chapter 1 of this Report, the officers of the ODCE include seconded members of An Garda Síochána<sup>49</sup>. Accordingly, it is possible in practice for persons who have information regarding relevant offences that are company law offences to comply with their obligations under section 19 of the CJA by reporting such information to one of the Office's Garda officers.

One such report was received during 2012. This related to an alleged contravention of section 293(1)(c) of the Companies Act 1963 – arising from the alleged failure of an officer of a company which was being wound up to deliver up to the company's liquidator all or such part of the real and personal property of the company as was in the officer's custody or under his control.

<sup>40</sup> Section 299 of the 1963 Act

<sup>41</sup> Section 297 of the 1963 Act

<sup>42</sup> Section 197(1) of the Companies Act 1990

<sup>43</sup> Section 242 of the Companies Act 1990

<sup>44</sup> Section 243 of the Companies Act 1990

<sup>45</sup> Section 202 of the Companies Act 1990

<sup>46</sup> Section 60 of the Companies Act 1963, as amended

<sup>47</sup> Paragraph (a), (d), (e), (f), (g), (i), (j), (k), (l), (m), (n), (o) or (p) of section 293(1) of the Companies Act 1963

<sup>48</sup> Section 295 of the Companies Act 1963

<sup>49</sup> Who, under Section 12(4) of the Company Law Enforcement Act 2001, continue to be vested with, and capable of exercising or performing, any of their ordinary powers or duties as members of An Garda Síochána

## INTERNAL INPUTS

### Introduction

Whilst, as will be evident from the earlier part of this Chapter, the volume of external inputs received is such that most case files opened within the Office are opened in response to external inputs received, the Office also generates internal inputs through a proactive approach to enforcement of the Companies Acts. Inputs in this regard include, for example, internal initiatives relating to:

- dissolved insolvent companies;
- the supervision of liquidators; and
- other investigations and enquiries commenced on own initiative.

### Dissolved insolvent companies

The Office characterises as “*dissolved insolvent companies*” those companies that are struck off the Register of Companies due to the non-filing of their annual returns and which, at the date of strike off, had liabilities, whether actual, contingent or prospective.

It is open to the Office to apply to the High Court for the disqualification of the directors of struck off companies<sup>50</sup>. However, the law<sup>51</sup> also provides that the Court cannot disqualify a person who demonstrates to the Court that the company had no liabilities at the time of strike off or that those liabilities had been discharged before the initiation of the disqualification application. In considering the penalty to be imposed, the Court may instead restrict the directors where it adjudges that disqualification is not warranted<sup>52</sup>.

Where there is evidence to suggest that a company was insolvent at the date upon which it was struck off the Register, it is the Office's policy to consider seeking the disqualification of the company's directors. Where a company is struck off the Register of Companies, its remaining assets are vested in the Minister for Public Expenditure & Reform in accordance with the provisions of the State Property Act 1954. In any case where a struck off company identified appears to possess significant assets at the time of strike off, the Office brings this to the attention of the Department of Public Expenditure & Reform.

### Supervision of liquidators

One of the statutory functions of the Director is:

*“...to exercise, insofar as the Director feels it necessary or appropriate, a supervisory role over the activity of liquidators and receivers in the discharge of their functions under the Companies Acts”<sup>53</sup>.*

Whilst the section 56 process, as outlined earlier in this Chapter, provides the Office with a means of indirectly supervising certain aspects of liquidators' work, from time to time the Office considers it appropriate or otherwise necessary to engage in more direct supervision of liquidators' work. This, more direct, supervision is effected through the exercise of the powers conferred by section 57 of the CLEA<sup>54</sup>.

Section 57 provides that the Director may:

- either on his own initiative or on foot of a complaint from a member, contributory or creditor of a company, request production of a liquidator's books for examination – either in relation to a particular liquidation process, or to all liquidations undertaken by the liquidator; and
- seek the liquidator's answers to any questions concerning the content of such books, and all such assistance in the matter as the liquidator is reasonably able to give.

<sup>50</sup> Section 160(2)(h) of the Companies Act 1990 (as amended)

<sup>51</sup> Section 160(3A) of the Companies Act 1990 (as amended )

<sup>52</sup> Section 160(9A) of the Companies Act 1990 (as amended)

<sup>53</sup> Section 12(1)(e) of the CLEA

<sup>54</sup> Section 323A of the 1963 Act includes a similar provision relating to receivers

The powers conferred upon the Director by section 57 are accompanied by certain safeguards, i.e.:

- the Office must inform the respondent liquidator of the reason(s) as to why the request is being made; and
- a request may not be made in respect of books relating to a liquidation that has concluded more than 6 years prior to the request.

## Investigations commenced on own initiative

As indicated above, the Office initiates enquiries and investigations on its own initiative where this is considered necessary or otherwise appropriate having regard to the underlying facts and circumstances. The triggers for such actions can include, for example:

- issues identified internally;
- issues referred internally;
- issues identified on foot of a review of material filed with the CRO;
- issues identified through monitoring of litigation;
- issues identified through a review of press *reportage*, the internet etc.

By way of example, the subject matter of enquiries initiated during the year included suspicions of bankrupt persons acting as company directors, persons acting as auditors whilst not authorised to do so and the possible falsification of documents.

Depending upon the nature of the underlying circumstances, the Office's enquiries and investigations may be furthered through the use of:

- the Director's civil powers;
- the Director's criminal powers; and/or
- the powers vested in the Gardaí seconded to the Office by virtue of those officers being members of An Garda Síochána

## Quantum of internal inputs - 2012

During the course of 2012, a total of 172 (2011: 74) internal inputs were generated.

## **PART B: THROUGHPUTS**

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Generally speaking, inputs, irrespective of whether from internal or external sources, result in the opening of a case file.

In the case of liquidators' section 56 reports, cases generally reach a natural conclusion when a decision has been taken as to whether or not to relieve the liquidator of the obligation to seek the company's directors' restriction and, where relief is granted, the file is usually closed. Where relief is not granted, or only partially granted (i.e. granted in respect of some, but not all, of the directors), the Office monitors the progress of the relevant restriction or disqualification proceedings and the outcome is recorded once the proceedings have been determined. However, the Office also reviews cases from time to time where concerns come to its attention regarding, for example:

- liquidators' fees;
- apparent failures to distribute assets on a timely basis;
- apparent failures to conclude a liquidation within a reasonable timeframe.

In the case of other inputs, such as, for example, auditors' reports, complaints, referrals etc., a file is opened and the subject matter is examined to determine, in the first instance, whether the matter is one that comes within the Office's remit. Thereafter, cases are progressed on the basis deemed most appropriate to their individual circumstances, with methods of progression including, for example:

- meeting the complainant, typically with a view to obtaining an enhanced understanding of the issues being complained of;
- meeting the directors (for example, in a case relating to directors' loans);
- exercising civil powers, such as, for example:
  - issuing demands to company directors for the production of companies' books and records;
  - issuing demands to liquidators for the production of their liquidation books and records;
  - issuing demands to persons acting, or purporting to act, as auditors for the production of evidence of their qualifications;
  - issuing demands requiring liquidators to file outstanding s56 reports;
- exercising criminal powers, such as, for example, executing search warrants, arrest etc.;
- liaising with other statutory authorities potentially being in a position to assist the Office's enquiries, for example through the sharing of relevant information.

Upon completion of the Office's enquiries, a decision is made as to the most appropriate course of action to be taken. This can include, for example:

- the decision to take no further action (for example, where enquiries suggest that there has been no breach of company law or where the breach is minor in nature and enforcement action would, as a consequence, be disproportionate);
- a decision not to take enforcement action on this occasion but, rather, to issue a warning that any recurrence will precipitate enforcement action (for example, where the breach has been rectified and/or remediated);
- referral to other statutory authorities or professional bodies of matters relevant to their respective remits;
- the initiation of civil proceedings;
- the initiation of criminal proceedings.

Set out in the following Tables are details of the various caseloads progressed by the Office during the year under review. Details of the outputs that flow from the processing of the Office's various caseloads are detailed in the next section of this Chapter.

**Table 13**  
**Throughput of liquidators' section 56 reports - 2012**

Section 56 reports on hand at 1 January, 2012		839
New reports received during 2012	1,787	
Less: Reports in respect of which determinations made during 2012	1,720	
<b>Section 56 reports on hand at 31 December, 2012</b>		<b>906</b>

Detail regarding the Office's determinations on liquidators' reports is provided later in this Chapter.

**Table 14**  
**Throughput of other cases - 2012**

Other cases on hand at 1 January, 2012		187
New cases opened during 2012	644	
Less: Cases concluded during 2012	638	
<b>Other cases on hand at 31 December, 2012</b>		<b>193</b>

## PART C: OUTPUTS

### Outputs from the section 56 process

#### Decisions made on liquidators' reports

The Office made definitive decisions (i.e. decisions other than to grant 'Relief at this time') on 1,246 liquidators' reports during 2012 (2011: 1,125), with a further 474 decisions made to grant 'Relief at this time' (2011: 472).

Of the definitive decisions taken during 2012, a total of 1,026 were made in respect of initial reports (2011: 881), with a further 220 being made in respect of subsequent reports (2011: 244).

The decisions taken in respect of initial and subsequent reports respectively are analysed in the following two Tables.

**Table 15**  
**Analysis of decisions taken in respect of initial liquidators' section 56 reports**

Decision Type	2012	%	2011	%
Full relief <sup>55</sup>	979	73	806	68
No relief <sup>56</sup>	39	3	59	5
Partial relief <sup>57</sup>	8	1	16	2
Relief at this time <sup>58</sup>	298	23	296	25
<b>Total</b>	<b>1,324</b>	<b>100</b>	<b>1,177</b>	<b>100</b>

**Table 16**  
**Analysis of decisions taken in respect of subsequent liquidators' section 56 reports**

Decision Type	2012	%	2011	%
Full relief <sup>55</sup>	135	34	170	40
No relief <sup>56</sup>	71	18	61	15
Partial relief <sup>57</sup>	14	4	13	3
Relief at this time <sup>58</sup>	176	44	176	42
<b>Total</b>	<b>396</b>	<b>100</b>	<b>420</b>	<b>100</b>

<sup>55</sup> Full relief is granted in cases where the Office forms the opinion that, based on the information available (including the liquidator's report(s)), all of the directors of the insolvent company appear to have acted honestly and responsibly in the conduct of the company's affairs.

<sup>56</sup> No relief is granted in cases where the Office forms the opinion that, based on the information available (including the liquidator's report(s)), there is insufficient evidence to demonstrate that any of the directors of the insolvent company acted honestly and responsibly in the conduct of the company's affairs.

<sup>57</sup> Partial relief is granted in circumstances where, based on the information available (including the liquidator's report(s)), the Office forms the opinion that some, but not all, of the directors of the insolvent company appear to have acted honestly and responsibly in the conduct of the company's affairs.

<sup>58</sup> 'Relief at this time' is granted in cases where the Office is satisfied that the liquidator needs more time in which to progress/complete his/her investigations into the circumstances giving rise to the company's demise. Similarly, on occasion, the Office considers it necessary to postpone making a definitive decision due to the complexity of certain companies' affairs and the associated necessity for supplemental engagement with the liquidators concerned. Where 'Relief at this time' is granted, the liquidator will be required to submit a subsequent report.

Complete lists of the directors, and associated companies, in respect of which full relief and relief at this time respectively were granted during 2012 are available at [www.odce.ie](http://www.odce.ie).

### Outcome of liquidators' Court applications

As indicated earlier in this Chapter, where not granted relief by the Office, liquidators are required to apply to the High Court seeking the restriction of relevant company directors. In certain instances, liquidators will, as a consequence of their own investigations, opt to seek to have directors disqualified rather than restricted. The Table below sets out details of the results of liquidators' Court applications as delivered by the High Court during the year.

**Table 17**  
**Results of liquidators' Court applications – 2012**

	Cases	Directors affected
Restriction Orders granted	130	227
Disqualification Orders granted	12	15
No Orders granted	5	15
<b>Total</b>	<b>147</b>	<b>257</b>

Further analysis of the Orders made by the Court on foot of liquidators' applications is provided in Appendices 3 to 5 of this Report.

### Facts and circumstances considered by the High Court in making Disqualification orders

Set out below, for illustrative purposes, are examples of the types of issues that were considered by the High Court in making the disqualification Orders listed in Appendix 4 to this Report. These Orders were made on foot of disqualification applications made by the appointed liquidators following the submission of their respective section 56 reports to the Office.

- A director had continued to trade in the company name, and to invoice for construction services, for two years despite the company having been struck-off the Register of Companies. The Revenue Commissioners eventually petitioned the Courts for the restoration and wind up of the company. The company had unpaid PAYE/PRSI liabilities of €225,000 and trade creditor liabilities of €214,000. A second company was also dissolved and employees of the first company had continued to be hired out to this company, with both companies being traded effectively as one entity despite both having been struck-off. A third bank account in a personal name had been opened, with cheques and lodgements made to this new account despite some of the cheques being made out to a limited company.
- A company had engaged in systematic under declaration of tax liabilities for amounts in excess of €1.5m involving 28 monthly PAYE/PRSI returns filed from January 2007 to May 2009 and 8 VAT returns filed for every two month period from January 2008 to May 2009. The company had traded while insolvent and the directors had received approx. €87,000 in payments at a time when the company was insolvent, with one director having the use of an apartment owned by the company without the payment of rent or service charges. Four company directors were disqualified by the High Court for periods ranging from 4 to 7 years.
- While a director had invested €450,000 in one company, he had taken all of this money back out of the company over a two year period, with significant sums having been withdrawn at a time when the company was insolvent with unpaid tax liabilities in excess of €180,000. There was also evidence of phoenix activity, with the business being continued by a second company.
- A company had not maintained proper books and records and the liquidator believed that it was losing money throughout its period of trading. The company paid virtually no tax and was wound up following a Revenue petition.

- A company had printed a local magazine and subsequently this magazine continued to be published by a second company (by way of phoenix activity). The directors had registered a further company to carry on the business of production, publication, editing and distribution of a freesheet newspaper. The Revenue Commissioners petitioned the Courts for the wind up of the companies.
- The directors of a company had breached the statutory provisions in respect of directors' loans over a number of years. The total withdrawals had increased from approximately €77,000 in 2006 to €200,000 in 2008. None of these drawings were put through the company's payroll. There had also been a failure to adequately pursue debtors on a timely basis leading to reliance on undischarged tax liabilities for cashflow. When the company ceased trading, the directors took no action to place it in liquidation. The Revenue Commissioners had to petition for the wind up of the company, at which time tax liabilities were (including estimates) in excess of €360,000.
- The insolvency of two companies related to director and inter-company loans whereby a director had failed to repay director loans of approximately €375,000 and €215,000 respectively and an additional inter-company loan of €222,000 had been made to a third company. These loans were made over a number of years. The total withdrawals from both liquidated companies were in the region of €812,000. The failure to repay the loans contributed to the companies' inability to meet their liabilities.
- A director of a company had diverted assets from the company and had failed to co-operate with the liquidation. The liquidator had initially been engaged in relation to an application for examinership, on the basis that the director proposed additional investment in the company. The liquidator subsequently became concerned by actions of the director to cease trading and transfer assets from the company, and having established the insolvency of the company, the liquidator petitioned for its liquidation.
- A director of a company had allowed the company to continue trading for a period of at least 18 months when he knew, or ought to have known, that the company was insolvent. During this time trading losses increased by more than €1.2m and Revenue liabilities by more than €1.5m. The company had relied on unpaid tax liabilities for cashflow for more than 3 years. At the time of liquidation, the Revenue Commissioners were owed more than €5m. There was a significant overstatement of goodwill in the company's financial statements. There was also evidence of phoenix activity, with the business of the company being transferred to a second company for no consideration immediately prior to liquidation.

#### **Other outputs from the section 56 process**

From time to time the Office's review of liquidators' reports identifies issues that are considered to warrant action over and above the making of a determination as to whether relief should be granted or not. Such actions typically include:

- making internal referrals of matters considered to warrant further investigation and/or enforcement action; and
- making referrals to other regulatory bodies.

## Outputs of enforcement work

The Office's enforcement work takes a variety of forms, including:

- engaging with company directors and other interested parties with a view to securing the voluntary rectification/remediation of instances of non-compliance;
- exercising the Director's civil powers to secure compliance;
- referring indications of possible breaches of regulatory provisions other than those relating to company law to other relevant regulators (incorporating also the referral of relevant matters to professional bodies);
- seeking civil remedies in the High Court, such as, for example, applying to the High Court for company directors' disqualification for stated reasons;
- taking summary criminal proceedings before the District Court; and
- where, having conducted a detailed investigation and concluded on the basis of same that the indications of suspected criminality are such that trial on indictment may be warranted, referring investigation files to the DPP for consideration as to whether the matters therein warrant criminal prosecution before the Circuit Court.

The principal outputs associated with the Office's enforcement activities are detailed below.

## Securing voluntary rectification/remediation

In 124 cases where suspected directors' loan infringements had been reported, or had otherwise come to attention, the Office's actions resulted in rectifications (including the repayment/reduction of loans) totalling €55m (2011: €51m).

## Securing compliance through the exercise of the Director's civil powers

A variety of legislative provisions were successfully used during the course of 2012 in order to secure compliance with the Companies Acts. These included:

- 3 directions under section 131(3) of the Companies Act 1963 (as amended) ("the 1963 Act") requiring the convening of companies' Annual General Meetings ("AGM"). These directions were issued following the consideration of complaints received from members of the companies concerned;
- 2 directions under section 145(3A) of the 1963 Act requiring production of the minutes of companies' AGMs as well as meetings of the directors/Committees of the directors. Similarly, these directions were issued following the consideration of complaints received;
- 198 directions, pursuant to section 371(1) of the 1963 Act, requiring liquidators to comply with their reporting obligations under section 56 of the CLEA; and
- 7 directions, pursuant to section 371(1) of the 1963 Act, requiring compliance with certain aspects of the Companies Acts, including the obligations to prepare audited financial statements and file annual returns with the CRO.

In addition to the foregoing, the Office also exercised its right to make certain compliance related applications to the High Court on 3 separate occasions. Those applications were for the purposes of securing compliance by companies, their directors and, in one instance, a liquidator with certain of their statutory obligations. The applications in question resulted in Court Orders being made relating to:

- the provision of audited financial statements to company members;
- the laying of audited financial statements before company AGMs;
- the filing of Annual Returns with financial statements with the CRO;
- undertakings being given to the High Court by the company and its directors in relation to compliance with statutory provisions concerning the following matters:

- maintenance and functioning of a registered office;
  - maintenance and production of company Minute Books and statutory Registers;
  - convening of AGMs;
  - furnishing proper notice of AGMs, together with all statutorily required documents, to all parties entitled to receive such notice in advance of AGMs; and
  - making instruments appointing proxies available for inspection in advance of AGMs;
- costs being awarded to the Office against a liquidator on foot of compliance proceedings initiated by the Office for the purpose of seeking an Order compelling the liquidator concerned to provide a section 56 Report to the Office. As the section 56 report in question was provided after the service of the High Court proceedings, but before the return date, an Order was made striking out the proceedings with an Order for costs against the liquidator.

Generally, where successful and where costs are sought, the Office is awarded its costs in making such applications.

## Referrals to professional and other regulatory bodies

Whilst there is an obligation upon the Office to keep confidential information that comes into its possession, there is statutory provision<sup>59</sup> for the disclosure of information to certain third parties (including other regulatory bodies and certain professional bodies) provided that certain prescribed criteria are satisfied.

Pursuant to the foregoing provision, 18 referrals were made to RABs during the year. Having regard to its statutory remit, such referrals are always copied to IAASA.

Issues typically referred to RABs include:

- suspected instances of members purporting to conduct audits whilst not authorised by their professional bodies to do so or where otherwise precluded from doing so by virtue of law or professional obligations;
- non-reporting, or delayed reporting, of suspected indictable offences;
- matters relating to the nature of audit opinions provided in respect of companies limited by guarantee;
- failure to respond to queries raised by the Office subsequent to receipt of indictable offence reports.

In addition to the foregoing, the Office makes referrals to other regulatory bodies as considered necessary or otherwise appropriate.

## Civil enforcement

### Dissolved insolvent companies

As outlined earlier in this Chapter, in the case of companies that, at the time of being struck off the Register, were insolvent, it is the Office's policy to consider seeking the disqualification of such companies' directors in appropriate cases.

Several thousand companies are struck off the Register in any given year. However, only some of these would actually be insolvent. Many more would not have traded or would have discharged all outstanding liabilities prior to being struck off. Against this background, the Office seeks to identify companies where there is evidence of material unpaid debts having existed at the date of strike off. During the year under review, 10 cases involving applications by the Office for directors' disqualification were determined by the High Court. In 9 of these cases, the Court made a total of 17 Orders for directors' disqualification and a further 1 Order for a director's restriction.

<sup>59</sup> Section 17 of the CLEA

The remaining case was struck out following the restoration to the Register of the company concerned and the subsequent appointment of a liquidator. The Office determined a further 38 cases without Court action. Cases do not proceed to the Courts where, for example, the former directors satisfy the Office that all liabilities had been settled prior to the issue of the intended Court proceedings or where the company had been restored to the Register following initiation of the Office's enquiries.

At year end, proceedings had been issued in a further 5 cases and were awaiting determination by the Courts, while a further 14 cases were under examination by the Office. Thus, a total of 67 cases were dealt with during the year under review.

Further details of Orders made by the High Court are set out in the Table below.

**Table 18**  
**Disqualification and Restriction Orders obtained pursuant to section 160(2)(h) of the Companies Act 1990**

Company Name (Number)	Person the subject of the Order (all Orders are Disqualification Orders unless Restriction is indicated)	Commencement date of Order	Cessation date of Order
P & W Denagher Enterprises Ltd (414368)	Patrick Denagher (Senior William Denagher	20/02/2012 20/02/2012	19/02/2016 19/02/2016
Tinkler Sand & Gravel Ltd (200993) PFS Depot Limited (361519)	Owen Tinkler Catherine (Triona) Tinkler	09/07/2012 09/07/2012	08/07/2015 08/07/2015
Robert Fiddes Painters and Decorators Ltd (420992)	Robert Fiddes Deirdre Fiddes	16/07/2012 16/07/2012	15/07/2017 15/07/2017
Dudley Homes Ltd (420310)	Kenneth Figgis Patricia Quinn - Restricted	30/07/2012 30/07/2012	29/07/2017 29/07/2017
Awebb Construction Limited (455049) and BCS Data Cabling Solutions Limited (394785)	Andrew Webb Irina Stolarova	08/10/2012 08/10/2012	07/10/2015 07/10/2015
J&C East Cork (Developments) Ltd (282102) and Peter Cuthbert Construction Ltd (264039)	Philip Joseph Jordan Peter Cuthbert	08/10/2012 08/10/2012	07/10/2017 07/10/2017
Cromleach Hospitality Limited (439567)	Christy Tighe Maira Tighe	05/11/2012 05/11/2012	04/11/2017 04/11/2017
Lakepoint Media Limited (442605)	Paul Morris Kathleen Morris	05/11/2012 05/11/2012	04/11/2017 04/11/2017
Poddle Inns Limited (379630)	Ciaran Curtis Bernardine Kavanagh	10/12/2012 10/12/2012	09/12/2017 09/12/2017

## Other civil enforcement proceedings

### **Messrs Michael and Thomas Bailey/Bovale Developments<sup>60</sup>**

As has been adverted to in previous Annual Reports, the Office initiated disqualification proceedings against Messrs Michael and Thomas Bailey (the Respondents), the directors of Bovale Developments, in 2006. During the year under review the Respondents brought an application before the High Court seeking an Order of discovery, directed against the Office. This application was the subject of a half-day hearing before the High Court in October, following which Mr Justice Cooke delivered a reserved judgment in which he rejected the application and awarded the Office its costs.

### **Mr. John Slattery/Lapple Ireland Limited**

In July 2012 the High Court made a disqualification Order for 6 years against Mr. John Slattery, a former Managing Director of Lapple Ireland, in proceedings brought by the Office. Further details of this case can be accessed at [www.odce.ie](http://www.odce.ie).

### **National Irish Bank Limited ("NIB")/National Irish Bank Financial Services Limited ("NIBFS")**

As has been outlined in previous Annual Reports, the Office has been involved in a series of inter-related civil cases, all of which stem from the Report of the Inspectors (Appointed under Section 8 of the Companies Act 1990) to Investigate the Affairs of NIB and NIBFS<sup>61</sup>.

In July 2005, the Office commenced disqualification proceedings against nine persons who had formerly been directors and/or officers of NIB and/or NIBFS. At the beginning of 2012 the position was that two of the cases had been fully concluded, one case was still pending at High Court level, the Supreme Court was expected shortly to make final Orders in one other case which it had heard during 2011 and Supreme Court hearing dates were awaited in respect of five appeals<sup>62</sup> from earlier decisions of the High Court.

During the year under review, the Supreme Court made an Order in the case of **Director of Corporate Enforcement v. Barry Seymour** and granted a declaration of restriction under section 150 of the Companies Act 1990 in respect of the Respondent for 5 years, effective from 6 December 2011 (this Order was made in substitution for the 9 year disqualification Order which the High Court Judge had considered appropriate). The Supreme Court also awarded the Office one-half of its costs as incurred in both the High Court and Supreme Court.

In November 2012 another of the appeals was listed for hearing before the Supreme Court. This was the Office's appeal of a decision of the High Court that no disqualification Order should be made against the Respondent. By agreement between the parties, the Office's appeal was withdrawn and the Court was asked to vacate the Order for costs (as against the Office) that the High Court had made in the Respondent's favour.

## Criminal enforcement

### **Summary prosecutions**

In accordance with the provisions of the CLEA, the Director can bring summary prosecutions before the District Court. During the year the Office brought and prosecuted summary proceedings on 4 occasions, resulting in:

- 16 convictions, with a further 14 charges being taken into consideration;
- aggregate fines of €8,208 being imposed;
- a term of imprisonment of 5 months (suspended for 3 years) being imposed;

<sup>60</sup> Formerly known as Bovale Developments Limited (prior to re-registration as an unlimited company)

<sup>61</sup> The Inspectors were appointed by the High Court in March 1998 and carried on their investigations over a period of slightly in excess of 6 years. Their Report was published by Order of the High Court made in July 2004.

<sup>62</sup> Two of those appeals had been taken by the Office against decisions of the High Court rejecting the Office's contention that the relevant respondents should be disqualified. Three of the appeals had been taken by respondents against decisions of the High Court affirming the Office's contentions that the respondents should be disqualified.

- 1 automatic disqualification being imposed (by virtue of a conviction for acting in contravention of a restriction Order); and
- the Office being awarded costs of €6,000.

Details of those prosecutions are summarised in the Table below.

**Table 19**  
**Summary prosecutions brought - 2012**

Case	District Court hearing, date & venue	Charges	District Court Outcome
ODCE v. Mr. George F. Motyer	23 February 2012 Bantry, County Cork	6 offences contrary to section 187(1) <sup>63</sup> of the Companies Act 1990 and 6 offences contrary to section 242(1) <sup>64</sup> of the same legislation	8 convictions recorded with 4 other charges taken into consideration. Aggregate fines of €400 imposed in respect of four section 187(1) offences. As regards the four section 242(1) offences, imprisonment for 5 months but with the sentence suspended for 3 years. Prosecution costs of €1,250 to be paid by the defendant.
ODCE v. Mr. Frank Houlihan	12 July 2012, Midleton District Court, County Cork	4 offences contrary to section 187(1) of the Companies Act 1990 and 5 offences contrary to section 242(1) of the same legislation	2 convictions recorded with 7 other charges taken into consideration. Aggregate fines of €3,808 imposed in respect of one section 187(1) offences and one section 242(1) offence. Prosecution costs of €1,250 to be paid by the defendant.
ODCE v. Mr. Barry Keating	21 November 2012 Gorey District Court County Wexford	7 offences contrary to section 187(1) of the Companies Act 1990	4 convictions recorded with 3 other charges taken into consideration. Aggregate fines of €2,000 imposed. Prosecution costs of €1,250 to be paid by the defendant.
ODCE v. Mr. Niall Holohan	14 December 2012 Dublin Metropolitan District Court	2 offences contrary to Section 161(1) <sup>65</sup> of the Companies Act 1990	Convictions recorded on both charges. Aggregate fines of €2,000 imposed. Prosecution costs of €1,250 to be paid by the defendant. Consequential disqualification order <sup>66</sup> for five years.

<sup>63</sup> Acting as an auditor whilst not qualified to do so

<sup>64</sup> Furnishing false information

<sup>65</sup> Acting in contravention of a section 150 restriction declaration

<sup>66</sup> Section 161(2) of the Companies Act 1990

### Circuit Court Appeals

During 2012 there were two instances in which the Circuit Court dealt with appeals taken arising from the outcome of summary proceedings brought by the Office in the District Court. Details of those appeals are summarised in the Table below.

**Table 20**  
**Circuit Court appeals - 2012**

Case	District Court hearing, date & venue	Charges	District Court Outcome	Circuit Court Outcome
ODCE v. Mr. Eoin Mansfield	24 May 2012, Dungarvan County Waterford.	7 offences contrary to section 187(1) of the Companies Act 1990	7 convictions, fines of €7,000 and prosecution costs of €1,250.	Appeal withdrawn and District Court Order affirmed.
ODCE v. McEvoy's Self Service Drapery Limited	4 July 2012 Dundalk, County Louth	5 offences contrary to section 202 of the Companies Act 1990	5 convictions, fines of €3,000 and prosecution costs of €1,115.	Convictions affirmed. Fines reduced to €2,400. Also defendant to pay additional prosecution costs of €1,250.

### Cases referred to the DPP for consideration as to whether to prosecute on indictment

Whereas the Director can initiate summary prosecutions before the District Court, the initiation of prosecution on indictment (i.e. before a jury in the Circuit Court) is a matter solely for the DPP.

#### The former Anglo Irish Bank Corporation plc ("Anglo")

Previous Annual Reports have outlined the general nature of the allegations that the Office has been investigating and the extent to which files had, prior to the commencement of 2012, been submitted to the DPP regarding such matters. The Office's work on this case continued during 2012 and, for a significant number of the Office's staff, Anglo matters remained the primary focus of their activity throughout the year.

In February 2012 a further file was submitted to the DPP in relation to the Office's investigation of alleged offences under section 60 of the Companies Act 1963, arising from the alleged provision by Anglo of certain loans in mid-2008 to certain parties to purchase Anglo shares. This supplementary file dealt with issues that had been raised by counsel retained on behalf of the DPP. In addition, further witness statements were furnished periodically to the DPP's Office during the course of the year, as they became finalised and available.

In July 2012 the DPP directed that three former Anglo officers (i.e., Messrs Sean FitzPatrick, William McAteer and Patrick Whelan respectively) should each be charged with 16 separate alleged contraventions of the requirements of the aforementioned section 60. Thereafter, the DPP was, in accordance with standard criminal procedure, required to serve Books of Evidence on each of the accused persons and ODCE officers provided assistance to the DPP's Office in connection with the preparation of those Books. In addition, during the second half of the year, the Office committed substantial resources to assisting the DPP's Office to discharge that Office's obligations to disclose to the defence all relevant evidence in its possession. That obligation of disclosure<sup>67</sup> extends not simply to the material which the DPP's Office has seen fit to include in the Books of Evidence (on the basis that it is evidence on which the prosecution proposes to rely at trial), but to "*...any [other] material which may be relevant to the case which could either help the defence or damage the prosecution*"<sup>68</sup>.

In both March and June of 2012 supplementary files were sent to the DPP in relation to the Office's investigation of suspected contraventions of section 197 of the Companies Act 1990 that are alleged to have been committed in connection with the making of statements to Anglo's then auditors, which dealt, *inter alia*, with the extent to which Anglo's own directors, or persons connected with them, had received loans from Anglo. In December 2012, and on foot of directions given by the DPP arising from her consideration of all the related files submitted by the Office concerning those alleged offences, Mr. Sean FitzPatrick was arrested by Gardaí attached to the Office and charged with 12 separate alleged contraventions of section 197.

In March 2012, a file was submitted to the DPP concerning the possibly intentional or reckless provision of false or misleading information in certain annual and interim financial statements issued by Anglo which might constitute breaches of the Transparency (Directive 2004/109/EC) Regulations 2007 or the European Communities (Admission to Listing and Miscellaneous Provisions) Regulations 2007.

#### **Other criminal cases referred to the DPP**

In August, October and December 2012 respectively, three further, separate and unrelated, files were submitted by the Office to the DPP for consideration as to whether charges should be preferred on indictment in relation to the alleged Companies Acts offences detailed in those files.

In one of these cases, the Office did not consider that charges should be preferred, and made a recommendation to that effect, but, for reasons relating to the provenance of the case, felt it appropriate that the matter be referred for consideration nevertheless. Having reviewed the file concerned, the DPP concurred with the Office's recommendation. In the other two cases, the DPP was continuing to review the files at year end.

<sup>67</sup> Which has its roots in the constitutional rights to a trial in due course of law (found in Article 38.1 of the Constitution of Ireland) and to fair procedures (found in Article 40.3).

<sup>68</sup> *McKevitt v DPP*, unreported, Supreme Court, 18 March, 2003