

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

03.

## 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 a function of the fact 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**

	2013		%	2012		%
<b>Statutory reports</b>						
Liquidators' initial section 56 reports	1,226			1,315		
Liquidators' subsequent section 56 reports	<u>577</u>			<u>472</u>		
Total liquidators' section 56 reports		1,803	78.2		1,787	75.6
Liquidators' reports regarding possible criminality		10	0.4		2	0.1
Auditors' indictable offence reports		203	8.8		157	6.6
Professional Bodies' indictable offence reports		0	0		7	0.3
Reports under section 19 of the Criminal Justice Act 2011		0	0		1	0
<b>Referrals</b>						
Referrals from external parties		38	1.7		72	3
<b>Complaints</b>						
Complaints from members of the public		252	10.9		337	14.4
<b>Total inputs from external sources</b>		<b>2,306</b>	<b>100</b>		<b>2,363</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 78% of all external inputs received by the Office during 2013. In summary, liquidators of companies that are in insolvent<sup>16</sup> liquidation are required by law<sup>17</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>18</sup> of each of the directors, unless relieved of that obligation by the Office<sup>19</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>16</sup> A company is insolvent when it is unable to pay its debts as they fall due

<sup>17</sup> Section 56 of the CLEA

<sup>18</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>19</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 2013. As can be seen from the Table below:

- during the year, insolvent liquidations (i.e. creditors' and Court liquidations combined) accounted for 57% of all liquidations (2012: 59%);
- 2013 saw a 15% reduction in the number of insolvent liquidations compared to 2012 and reverses a trend which had seen four prior years in which the number of insolvent liquidations had exceeded 1,200; and
- solvent (i.e., members') liquidations fell by 8% during 2013, from 919 to 848.

**Table 6**  
**Companies entering liquidation: 2009 - 2013**

	2009	2010	2011	2012	2013
Creditors' liquidations	1,124	1,258	1,311	1,210	1,043
Court liquidations	121	128	99	107	76
<b>Total insolvent liquidations</b>	<b>1,245</b>	<b>1,386</b>	<b>1,410</b>	<b>1,317</b>	<b>1,119</b>
Members' liquidations	1,158	899	1,054	919	848
<b>Total solvent liquidations<sup>20</sup></b>	<b>1,158</b>	<b>899</b>	<b>1,054</b>	<b>919</b>	<b>848</b>
<b>Total liquidations</b>	<b>2,403</b>	<b>2,285</b>	<b>2,464</b>	<b>2,236</b>	<b>1,967</b>

## Liquidator reports received – 2013

As can be seen from Table 5 above, a total of 1,803 liquidators' reports were received during the year (2012: 1,787), of which:

- 1,226 were initial<sup>21</sup> reports (2012: 1,315); and
- 577 were subsequent<sup>21</sup> reports (2012: 472).

The 15% reduction in the number of insolvent liquidations compared to 2012 is welcome and, based on current indications, this downward trend is expected to continue during 2014. However, the high level of new liquidations continues to reflect 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>20</sup> Whilst the Office has no role in solvent (i.e. members') liquidations, data in respect of same has been included in the interests of completeness.

<sup>21</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 - 2013**

Sector	2013		2012	
		%		%
Wholesale & retail	271	22	318	24
Construction	236	19	273	21
Manufacturing & printing	159	13	172	13
Hotels, bars & catering	117	10	137	10
Community, social & other	103	8	116	9
Marketing & promotion	89	7	78	6
Real estate & renting	99	8	71	5
Transport & distribution	44	4	51	4
Technology & telecommunications	51	4	44	3
Financial & leasing	27	2	18	1
Recruitment & security services	13	1	19	1
Agriculture, mining & marine	17	1	18	1
<b>Total</b>	<b>1,226</b>	<b>100</b>	<b>1,315</b>	<b>100</b>

#### Timeliness of liquidators' reporting

Over the course of the year, the Office issued 224 (2012: 198) notices to 106 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, 97% of the first reports due during the year had been received by the end of the year (2012: 94%).

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.

#### 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 related work 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 2009 to 2013.

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 individual liquidators to attend the Office to discuss their reports and to review, inter alia, the basis for the conclusions set out therein.

**Table 8**  
**Profile of liquidators undertaking insolvent liquidations**  
**by number of engagements 2009 – 2013**

Number of liquidators	Number of Engagements				
	<3	3-6	7-12	>12	Total
2009	122	25	18	16	181
2010	169	48	33	26	276
2011	182	57	30	27	296
2012	187	63	37	22	309
2013	203	46	16	21	286

## 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 over 20% 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	2013		2012	
	%		%	
Real estate & renting	80	16	92	16
Construction	65	13	54	9
Wholesale & retail	42	8	46	8
Manufacturing	42	8	34	6
Hotels, bars & catering	32	6	18	3
Community, social & personal	40	8	26	5
Finance & leasing	45	9	33	6
Transport & distribution	10	2	11	2
Agriculture, mining & marine	8	2	17	3
Health & social work	14	3	16	3
Technology & telecommunications	22	4	22	4
Marketing & promotion	5	1	54	9
Recruitment & security services	7	1	1	0
Other business sectors	38	8	60	10
Business sector not known	0	0	0	0
Not a company	53	11	92	16
<b>Total</b>	<b>503</b>	<b>100</b>	<b>576</b>	<b>100</b>

## Complaints

The Office receives substantial numbers of complaints annually from members of the public. During the year a total of 252 complaints were received (2012: 337), which accounted for 11% (2012: 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)**

	2013	%	2012	%
Allegations of reckless/fraudulent/insolvent trading	43	17	77	23
Annual/Extraordinary General Meeting related	15	6	50	15
Relating to the issue of unpaid debts	30	12	37	11
General shareholder rights issues	23	9	33	10
Relating to companies trading whilst struck off the Register	1	0	32	9
Directors' conduct	40	16	24	7
Audit/auditor related	28	11	17	5
Allegations of forgery/furnishing of false information	21	8	12	4
Other	51	20	55	16
<b>Total</b>	<b>252</b>	<b>100</b>	<b>337</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>22</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>23</sup>. The Office has developed and published guidance to assist auditors in complying with their obligations in this regard<sup>24</sup>.

### Nature of suspected offences reported

During the year, a total of 203 indictable offence reports were received (2012: 157). The Table below provides an analysis of the nature of suspected offences notified 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 one suspected offence.

<sup>22</sup> Other than offences under sections 125(2) and 127(12) of the 1963 Act, as amended

<sup>23</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>24</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**

	2013	%	2012	%
Directors' loan infringements	165	78	127	76
Failure to maintain proper books of account	26	12	28	17
Provision of false statements to auditors	2	1	1	1
Person not qualified to act as auditor to a company acting as such	2	1	5	3
Falsification of documents	4	2	4	2
Failure to convene Extraordinary General Meeting of a company	0	0	0	0
Other miscellaneous offences	13	6	2	1
<b>Total</b>	<b>212</b>	<b>100</b>	<b>167</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, enforcement and other relevant bodies, subject to safeguards and appropriate limitations. In that context, the Office receives referrals from other statutory bodies and entities from time to time. During the year under review, the Office received 38 (2012: 72) such referrals from a variety of sources including:

- the Registrar of Companies;
- the Revenue Commissioners; and
- other State Departments/Bodies.

## Professional bodies' indictable offence reports

### RABs<sup>25</sup>

Where a RAB's 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>26</sup>. No such reports were received during the year under review (2012: 7).

### 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>27</sup>.

<sup>25</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>26</sup> Section 192(6) of the Companies Act 1990, as amended by section 73 of the CLEA

<sup>27</sup> Section 58 of the CLEA



Pursuant to the Company Law Enforcement Act 2001 (Section 58) Regulations 2002<sup>28</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.

No reports of this nature were received from PPBs during the year (2012: 0).

## 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>29</sup>. This reporting obligation extends to all liquidations, solvent and insolvent (i.e. both Creditors' Voluntary liquidations and Court liquidations) alike. During the year, 10 such reports were received by the Office (2012: 2).

## 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>30</sup>;
- the making of false statements to company auditors<sup>31</sup>;
- the furnishing of false information<sup>32</sup>;
- the destruction, mutilation or falsification of company documents<sup>33</sup>;
- failure to maintain proper accounting records<sup>34</sup>;
- the giving of unlawful financial assistance by a company for the purchase of its shares<sup>35</sup>;
- certain instances of the withholding of information or property from liquidators<sup>36</sup>; and
- pre-liquidation frauds<sup>37</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.

<sup>28</sup> SI 544 of 2002

<sup>29</sup> Section 299 of the 1963 Act

<sup>30</sup> Section 297 of the 1963 Act

<sup>31</sup> Section 197(1) of the Companies Act 1990

<sup>32</sup> Section 242 of the Companies Act 1990

<sup>33</sup> Section 243 of the Companies Act 1990

<sup>34</sup> Section 202 of the Companies Act 1990

<sup>35</sup> Section 60 of the Companies Act 1963, as amended

<sup>36</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>37</sup> Section 295 of the Companies Act 1963

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>38</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.

No such reports were received during the year under review (2012: 1).

## 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>39</sup>. However, the law<sup>40</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>41</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>42</sup>.*

<sup>38</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

<sup>39</sup> Section 160(2)(h) of the Companies Act 1990 (as amended)

<sup>40</sup> Section 160(3A) of the Companies Act 1990 (as amended )

<sup>41</sup> Section 160(9A) of the Companies Act 1990 (as amended)

<sup>42</sup> Section 12(1)(e) of the CLEA

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>43</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.

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 - 2013

During the course of 2013, a total of 107 (2012: 170) internal inputs were generated.

<sup>43</sup> Section 323A of the 1963 Act includes a similar provision relating to receivers

## 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, exercising the power of 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 12**  
**Throughput of liquidators' section 56 reports - 2013**

Section 56 reports on hand at 1 January, 2013		917 <sup>44</sup>
New reports received during 2013	1,803	
Less: Reports in respect of which determinations made during 2013	1,978	
<b>Section 56 reports on hand at 31 December, 2013</b>		<b>742</b>

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

**Table 13**  
**Throughput of other cases - 2013**

Other cases on hand at 1 January, 2013		184 <sup>45</sup>
New cases opened during 2013	610 <sup>46</sup>	
Less: Cases concluded during 2013	633	
<b>Other cases on hand at 31 December, 2013</b>		<b>155</b>

<sup>44</sup> Restated from the 2012 Annual Report

<sup>45</sup> Restated from the 2012 Annual Report

<sup>46</sup> 503 external inputs (Table 9 refers) plus 107 internal inputs

## 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 1,356 liquidators' reports during 2013 (2012: 1,246), with a further 622 decisions made to grant 'Relief at this time' (2012: 474).

Of the definitive decisions taken during 2013, a total of 1,014 were made in respect of initial reports (2012: 1,026), with a further 342 being made in respect of subsequent reports (2012: 220).

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

**Table 14**

#### Analysis of decisions taken in respect of initial liquidators' section 56 reports

Decision type	2013	%	2012	%
Full relief <sup>47</sup>	951	69	979	73
No relief <sup>48</sup>	47	4	39	3
Partial relief <sup>49</sup>	16	1	8	1
Relief at this time <sup>50</sup>	359	26	298	23
<b>Total</b>	<b>1,373</b>	<b>100</b>	<b>1,324</b>	<b>100</b>

**Table 15**

#### Analysis of decisions taken in respect of subsequent liquidators' section 56 reports

Decision Type	2013	%	2012	%
Full relief <sup>47</sup>	239	39	135	34
No relief <sup>48</sup>	80	13	71	18
Partial relief <sup>49</sup>	23	4	14	4
Relief at this time <sup>50</sup>	263	44	176	44
<b>Total</b>	<b>605</b>	<b>100</b>	<b>396</b>	<b>100</b>

<sup>47</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>48</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>49</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>50</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 2013 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 16**  
**Results of liquidators' Court applications – 2013**

	Cases	Directors affected
Restriction Orders granted	116	219
Disqualification Orders granted	7	9
No Orders granted	14	20
<b>Total</b>	<b>137</b>	<b>248</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 pleaded guilty in a US Court to a number of fraud related offences, an element of which related to a fraud perpetrated against an investor using an Irish registered company;
- a director had failed to record significant property sales through company books of account, with proper books and records not being maintained. The director had falsified an official Local Authority certificate arising from which significant payments were made to the company and in excess of €244,000 in pension deductions and employer contributions had not been remitted to the statutory employee pension scheme;
- a tax liability in excess of €2.6m (including estimates) had accrued in the case of a company that provided static guard/security services. A Receiver had been appointed in respect of undischarged financing and the Private Security Authority had revoked its license to operate security services. The directors had failed to maintain proper books and records or to deliver these up to the liquidator or co-operate with the liquidation;
- in a small company operation, the directors' salaries constituted a significant percentage of overheads and the directors did not properly account for, or discharge, PAYE/PRSI or VAT throughout the 3 years of trading. In year 2, the directors drew down director loans rather than a taxable wage at a time when the company was struggling to meet revenue targets. The liquidator concluded that these loans starved the company of working capital, allowed the directors to have a tax free lifestyle for three years and that the directors failed to engage with, or respond to, the liquidator on the outstanding loans. At liquidation, the company had a tax liability of €96,000;
- a company had engaged in systematic under-declaration of tax liabilities for amounts in excess of €356,000 over a two-year period. Misleading and inaccurate financial statements had been filed with the Registrar of Companies and proper books and records had not been kept. The Revenue Commissioners had planned to undertake a VAT audit when the company was placed in liquidation;

- a company director had failed to account, or provide an adequate explanation, for the whereabouts of €3.1m of shareholders' funds. Significant sums provided by shareholders could not be traced in the company's records. The funds were obtained through the company director and were meant to be provided for the benefit of the company. This did not appear to have happened and no satisfactory explanation was offered. A payment of €500,000 from company funds also had the effect of relieving the director of a personal guarantee given by him;
- relevant facts included the insolvency of a company related to its inability to meet its tax liabilities, a failure to maintain proper books and records or to deliver these up to the liquidator or co-operate with the liquidation. Assets were transferred to another company and company funds had been used for lifestyle expenditure. The Revenue Commissioners petitioned the High Court for the wind up of the company on foot of a liability of approximately €203,000.

#### **Civil outputs from the s56 process**

Late in 2012, the Office issued notices under section 57 of the CLEA to liquidators in two separate cases, requiring them to produce the books and records in respect of named liquidations. In one case, the liquidator in question was subsequently interviewed pursuant to section 57(2). Section 57(2) requires liquidators to answer any questions concerning the content of the books and records requested and to provide such assistance in the matter as the liquidator is reasonably able to provide. The Office's enquiries in these cases were ongoing at year end.

#### **Criminal outputs from the s56 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.

Arising from an analysis carried out during the year, the Office identified a small number of liquidators who were persistently failing to comply with their reporting obligations on a timely basis. The Office contacted those liquidators, advised them that their level of non-compliance would no longer be tolerated and that future breaches would result in criminal prosecutions being initiated. Following this contact, the levels of compliance amongst this cohort of liquidators improved dramatically. However, instances of non-compliance still arose in a limited number of cases and prosecutions were initiated in relation to two liquidators during 2013 for the failure to file their section 56 Reports within the statutory deadlines. In the case of one of the liquidators concerned, on a plea of guilty, section 1(1) of the Probation of Offenders Act 1907 was imposed on the defendant in respect of two charges, with the defendant paying a sum of €500 on each of the two charges to the Court's poor box and agreeing to pay prosecution costs of €1,250. The second liquidator concerned failed to attend Court and, as a consequence, a bench warrant was issued for the individual's arrest. This latter case will be progressed during 2014. To the extent that it is considered necessary, it is also the intention of the Office to initiate further prosecutions in appropriate cases.



## 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 175 cases (2012: 124) 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 €62m (2012: €55m). Actions taken by the Office in pursuit of the objective of securing rectification on a voluntary basis included the holding of meetings with company directors of 15 separate companies.

The Office also formally cautioned 4 individuals in respect of whom there were concerns that they might have been purporting to be auditors whilst not qualified to act in that capacity.

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

A variety of legislative provisions were successfully used during the course of 2013 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;
- 224 directions, pursuant to section 371(1) of the 1963 Act, requiring liquidators to comply with their reporting obligations under section 56 of the CLEA;
- 1 direction, 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; and
- 2 demands under section 19 of the Companies Act 1990, requiring the production of documents.

## 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>51</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, 11 referrals (2012: 18) were made to RABs during the year. Having regard to its statutory remit *vis-à-vis* the RABs, 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, 14 cases (2012: 10) involving applications by the Office for directors' disqualification were determined by the High Court. In all of these cases, the Court made a total of 25 (2012: 17) Orders for directors' disqualification and a further 3 Orders (2012: 1) for directors' restriction.

The Office determined a further 41 cases (2012: 38) 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 issuing 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 case (which was awaiting determination by the High Court); and
- a further 8 cases were under examination by the Office.

Thus, a total of 64 cases (2012: 67) 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 17**

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

Company Name	Company Number	Persons Sanctioned (Disqualification applies unless Restriction indicated)	Start Date	End Date
Alliance Systems Buildings Ltd	133079	Michael Potter	29.01.13	29.01.17
Alliance System Manufacturing Ltd	139950	Geraldine Potter	29.01.13	29.01.17
Hillvale Developments Limited	372457	Francis Beggan	04.02.13	04.02.17
Ferns Close Management Company Limited	412634	Virginia Beggan	04.02.13	04.02.17
Grangeport Developments Ltd	403259	Jerry Martin	04.02.13	04.02.18
J & C Martin Investments Ltd	456505	Catherine Martin	04.02.13	04.02.17
John (Jerry) Martin & Company Ltd	131778			
Doon Sewage Up-Grade Ltd	421764			
Eirkey Forecourt Advertising Ltd	344659			
Mayo Truck Spares Limited	341850	Eamon McGreal	11.02.13	11.02.18
		Keri Louise McGreal	11.02.13	11.02.18
Valen Construction Limited	234709	Gillian Lowry	22.04.13	22.04.16
		Christopher Lowry	22.04.13	22.04.16
Fastnet Broadband Holdings Ltd	407380	Lawrence O' Neill -	04.03.13	04.03.18
Teocom Limited	453877	Restricted		
Alonvert Limited	269073	Aidan O'Regan - Restricted	29.04.13	29.04.18
		Alicia Comiskey- Restricted	29.04.13	29.04.18
Peter & Yuk Company Limited	421556	Yuk Chan	17.06.13	17.06.18
Yo Thai Co. Limited	345596	Joon Hong Yong	17.06.13	17.06.18
O'Grady Excavations & Enterprises Limited	334550	Gerard F. O' Grady	22.07.2013	22.07.2018
		Declan O' Grady	22.07.2013	22.07.2018
Tony Burke Furniture Centre Limited	110004	Anthony Burke	29.07.2013	29.07.2018
		Delia Burke	29.07.2013	29.07.2018
Oakcourt Construction Limited	422397	Eamonn O'Loughlin	14.10.2013	14.10.2017
		Michele O'Loughlin	14.10.2013	14.10.2016
Cibo Foods Retail Limited	395275	Ciaran O'Donovan	14.10.2013	14.10.2017
Cibo Food Catering Limited	395274	Deborah Hughes	11.11.2013	11.11.2015
Cibo Food Company Limited	361570	Brian Hearne	11.11.2013	11.11.2017
D & G Electrical Services Limited	417365	Darren McKibben	11.11.2013	11.11.2018
		Catherine Johnston	11.11.2013	11.11.2018
Belmont Hotels	129129	Michael Morris	16.12.2013	16.12.2018
Efrt Limited	397664	Joan Morris	16.12.2013	16.12.2018

## Other civil enforcement proceedings

### **Messrs Michael and Thomas Bailey/Bovale Developments<sup>52</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 ("Bovale"), in 2006. Following a number of pre-trial applications (most of which have been summarised in previous Annual Reports) the substantive application for the Respondents' disqualification was heard by the High Court in October 2013 and was the subject of a reserved judgment delivered by the Court on 9 December, 2013.

The Respondents did not dispute that the evidence adduced by the Office of misconduct by them as directors of Bovale was such that the Court should now be satisfied (for the purposes of sections 160(2)(a), (b) and (d) of the Companies Act 1990) that they were, whilst directors, guilty of a fraud in relation to Bovale and the Revenue Commissioners; were guilty of breach of duty as officers of Bovale and that their conduct as officers was such that it now makes them unfit to be concerned in the management of a company. However, the Respondents sought to rely upon a number of mitigating factors for the purpose of submitting to the Court that, notwithstanding the gravity of the misconduct now acknowledged by them and in respect of which they had offered apologies, the Court should only make disqualification orders for a relatively short period.

Following a detailed review of the evidence and the mitigating factors relied upon by the Respondents, the High Court held that, but for the mitigating circumstances, the appropriate period for which the Respondents should be disqualified would be 14 years. However, taking those mitigating factors into consideration, the Court concluded that the actual period for which the Respondents should be disqualified is 7 years.

The Court placed a stay on the coming into effect of this disqualification Order in circumstances where the Respondents had indicated their intention to bring an application before the Court pursuant to Section 160(8) of the Companies Act 1990 for a degree of relief from the intended disqualification Order. As at 31 December, 2013, that relief application had not yet been determined and the stay on the coming into effect of the disqualification order remained in place.

The written decision of the High Court in this case has a neutral citation of [2013] IEHC 561. A copy of the judgment of Ms. Justice Finlay Geoghegan is available on the website of the Courts Service at [www.courts.ie](http://www.courts.ie) and on the ODCE website.

### **Aventine Resources plc/John Francis Liwosz and Anthony William Brown**

In 2013, the Office initiated High Court disqualification proceedings against Messrs. John Francis Liwosz and Anthony William Brown, the directors of Aventine Resources plc for Orders pursuant to Sections 160(2)(b) (breach of duty) and (f) (persistent default) of the Companies Act 1990. During 2013, the pleadings were advanced and ultimately closed at the end of 2013, with a view to applying for a hearing date in 2014.

### **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>53</sup>.

<sup>52</sup> Formerly known as Bovale Developments Limited (prior to re-registration as an unlimited company)

<sup>53</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.

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 2013 the position was that four of the cases had been fully concluded, one case was still pending at High Court level and Supreme Court hearing dates were awaited in respect of four appeals<sup>54</sup> from earlier decisions of the High Court.

During the year under review one 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. In addition, the case pending at High Court level was resolved on the basis that the Office's High Court proceedings were withdrawn with no Order for costs against either party. As at year end, dates for the hearing of the three remaining Supreme Court appeals were awaited.

## 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 5 occasions (2012: 4), resulting in:

- 17 convictions (2012: 16), with the Probation of Offenders Act 1907 being applied in respect of a further 6 charges in 2 of the aforementioned cases;
- aggregate fines of €10,000 (2012: €8,208) being imposed;
- 2 automatic disqualifications being imposed (by virtue of a conviction for acting in contravention of a restriction Order) (2012: 1); and
- the Office being awarded costs of €6,250 (2012: €6,000).

<sup>54</sup> One of those appeals had been taken by the Office against a decision 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.

Details of those prosecutions are summarised in the Table below.

**Table 18**  
**Summary prosecutions brought - 2013**

Case	District Court hearing, date & venue	Charges	District Court Outcome
ODCE v. Mr. Adrian Kelly t/a Kelly & Co	28 January 2013 Dublin District Court	4 offences contrary to section 187(1) <sup>55</sup> of the Companies Act 1990 and 6 offences contrary to section 242(1) <sup>56</sup> of the same Act	10 convictions recorded. Aggregate fines of €2,500 imposed in respect of four section 187(1) offences and six section 242(1) offences. Prosecution costs of €1,250 to be paid by the defendant.
ODCE v. Mr. Declan Walker t/a Declan Walker & Co	13 February 2013 Arklow District Court, County Wicklow	5 offences contrary to section 187(1) of the Companies Act 1990	5 convictions recorded. Aggregate fines of €6,000 imposed in respect of five section 187(1) offences. Prosecution costs of €1,250 to be paid by the defendant.
ODCE v. Ballyrye Ltd & Mr Frank Kilbride, director of Ballyrye Ltd	19 July 2013 Longford District Court	3 offences by the company and 1 offence by the director, contrary to section 202 <sup>57</sup> of the Companies Act 1990	On pleas of guilty, section 1(1) of the Probation of Offenders Act 1907 was imposed in respect of all four offences. Aggregate prosecution costs of €1,250 to be paid by the defendants.
ODCE v. Mr. Declan Moloney & Mr Séamus Moloney	14 November 2013 Newcastle West District Court, County Limerick	1 offence each, contrary to section 161(1) <sup>58</sup> of the Companies Act 1990	1 conviction recorded against each person. Fines of €750 imposed on each person. Aggregate prosecution costs of €1,250 to be paid by the defendants. Also, consequential disqualifications of two years imposed (dating from the conviction date) under section 161(2) of the Companies Act 1990.
ODCE v. Mr. Gerard Murphy	17 December 2013 Dublin Metropolitan District Court	2 offences contrary to section 56(1) and (3) <sup>59</sup> of the Company Law Enforcement Act 2001	On a plea of guilty, section 1(1) of the Probation of Offenders Act 1907 was imposed in respect of both offences, with the defendant paying €500 to the Court's Poor Box in respect of each offence. Prosecution costs of €1,250 to be paid by the defendant.

<sup>55</sup> Acting as an auditor whilst not qualified to do so

<sup>56</sup> Furnishing false information

<sup>57</sup> Failing to keep proper books of account

<sup>58</sup> Acting as a director whilst subject to a High Court Restriction Order

<sup>59</sup> As a liquidator, failing to provide statutory reports to the ODCE

**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 detailed the general nature of the issues that the Office has been investigating and the extent to which files have been submitted to the Office of the DPP as a result of those investigations.

At the beginning of 2013 the position was that the DPP had directed that three persons, i.e., Mr. Sean FitzPatrick, Mr. William McAteer and Mr. Patrick Whelan - all former directors of Anglo Irish Bank Corporation – should be tried on indictment, each in respect of sixteen alleged breaches of the provisions of section 60 of the 1963 Act. The DPP had further directed that one of those persons, i.e., Mr. Sean FitzPatrick, should be tried on indictment in respect of twelve alleged breaches of the provisions of section 197 of the Companies Act 1990.

During the year under review, the trial of the alleged contraventions of section 60 was listed to commence on 13 January, 2014 and the trial of the section 197 allegations was provisionally fixed for hearing on 7 October, 2014. During December 2013 the commencement date for the section 60 trial was put back to 31 January, 2014 and, at the time of writing, that trial is continuing in the Dublin Circuit Criminal Court before His Honour Judge Martin Nolan and a jury. An additional seven alleged contraventions of the provisions of section 243(2) of the Companies Act 1990 by Mr. Patrick Whelan were added to the indictment before the commencement of this trial. Those additional charges are also based on evidence gathered in the course of the Office's investigations and subsequently submitted to the Office of the DPP for consideration.

During the course of 2013 the Office continued to commit substantial resources to assisting the Office of the DPP in the discharge by that Office of its obligations to disclose to the defence all relevant evidence in its possession. That obligation of disclosure<sup>60</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>61</sup>.*

In addition, the Office continued to gather further evidence as it became available, or in response to directions from the DPP's Office as to further investigative steps that it considered necessary or desirable.

<sup>60</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>61</sup> McKevitt v DPP, unreported, Supreme Court, 18 March, 2003

As recorded in previous Annual Reports, the Office has submitted files to the DPP concerning three other issues stemming from its Anglo investigations. To date no charges have been directed by the DPP in respect of those matters. It is important to emphasise, however, that the use of the phrase *“to date no charges have been commenced by the DPP”* is not intended to convey the impression that further charges will definitely, or probably, be directed at some future date. The DPP is independent in the performance of her functions. Accordingly, it is entirely a matter for her to determine if, and to what extent, any investigation files submitted to her Office warrant prosecution; and, if so, what particular charges ought to be prosecuted. Those decisions are based on a number of considerations, further information regarding which can be found in Chapters 4 and 6 of the *Guidelines for Prosecutors* published by the Office of the DPP<sup>62</sup>.

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

At the beginning of the year, the DPP was continuing to review two cases in respect of which files had been submitted during 2012. In one of those cases, three supplementary files were submitted to the Office of the DPP in early 2013. On the direction of the DPP, the Defendant in this case was arrested and charged with 50 alleged offences pursuant to sections 187 of the Companies Act 1990 and section 242 of the Companies Act 1990 respectively. This case is currently pending before the Courts.

<sup>62</sup> Available at <http://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>