



Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach

Office of the Director
of Corporate Enforcement

**STATEMENT ON THE PUBLICATION BY GOVERNMENT
OF THE REPORT ENTITLED
“MEASURES TO ENHANCE IRELAND’S CORPORATE, ECONOMIC
AND REGULATORY FRAMEWORK”**

The ODCE looks forward to studying in greater detail the package of measures contained in the Report published by Government today entitled “*Measures to Enhance Ireland’s Corporate, Economic and Regulatory Framework*”. From an initial review of the Report, the measure of most direct relevance to the ODCE is the decision by Government to transition it from its current construct as an Office of the Department of Business, Enterprise & Innovation to an independent Agency headed by a Commission.

There are very significant differences between the Office and Agency models. Whereas both are subject to similar accountability arrangements, Agencies have greater autonomy, particularly as regards recruitment and staffing. As such, they have greater flexibility and latitude to ensure that their skills and competencies mix is optimally aligned with their mandates.

As such, the decision to transition the ODCE to an independent Agency is a welcome development. The implementation of that decision will further advance the process that the ODCE, with the support of successive Ministers, has been engaged in over recent years to ensure that the organisation is suitably equipped to discharge its mandate in an effective manner. Steps taken in that regard over recent years have included, amongst others:

- a major internal restructuring in the latter half of 2012¹;
- a detailed review, during 2013, of the extent to which the ODCE was, at that time, equipped to discharge its mandate, which identified both:
 - certain key skill and capability deficiencies that militated against organisational effectiveness²; and
 - a need for the further professionalisation of the organisation²;
- the development, during 2013, of a set of Enforcement Principles³, which was accompanied by a clearly articulated enforcement strategy under which the emphasis is on the investigation of indications of wrongdoing at the more serious and complex end of the spectrum;
- based on the abovementioned review, sanction was sought, and was subsequently received during 2014, for the recruitment of a number of specialist staff to address key skills and capability deficiencies;
- following receipt of sanction, the process of more closely aligning the ODCE’s skills base and organisational capabilities with its statutory mandate was progressed through the:
 - recruitment of 6 suitably qualified and experienced accountants, whose backgrounds include professional services firms, law enforcement and financial services;
 - recruitment of a suitably qualified and experienced digital forensic specialist, whose background is in law enforcement;

¹ ODCE Annual Report 2012, page 13 refers

² ODCE Annual Report 2013, page 7 refers

³ ODCE Annual Report 2013, page 6 refers

- establishment of an in-house digital forensics laboratory, including an on-site digital forensics capability whereby data retrieved from digital devices can be relayed to investigators in real time;
- as senior-level vacancies have arisen, the reconfiguration of the skill sets, competencies, roles and responsibilities associated with those posts in order to better reflect the organisation's needs; and
- an ongoing investment in training, development and other measures aimed at the further professionalisation of the organisation.

In parallel with the foregoing, the ODCE introduced an undertakings regime, under which the directors of insolvent companies are afforded the opportunity to enter into binding restriction/disqualification undertakings, thereby avoiding the time and expense associated with having to engage in High Court litigation. That process, which was introduced by the Companies Act 2014, has significantly reduced the number of cases having to be processed by the High Court, thereby reducing the costs associated with liquidations and freeing up Court time to deal with other matters.

The serious investigative failings that came to light during the course of the trial that ultimately ended in May 2017 relate to an investigation that commenced in early 2009 and concluded in mid-2012. It is also important that sight is not lost of the fact that the investigation in question was one of five Anglo-related investigations initiated by the ODCE at the time, two of which subsequently resulted in persons being convicted of criminal offences in the Circuit Criminal Court. A third of those investigations resulted in the Director of Public Prosecutions issuing directions to charge an individual on indictment, with that trial currently pending. It is equally important that sight is not lost of the fact that those Anglo-related investigations were merely a subset of the ODCE's overall advocacy and enforcement activities, which also include:

- the provision of accessible information to company directors, shareholders and creditors on their rights and responsibilities under what is a highly complex body of law;
- scrutinising liquidators' reports in respect of insolvent companies and determining whether, having regard to public interest considerations, company directors' behaviour warrants being referred to the High Court for judicial consideration;
- securing compliance, on an ongoing basis, with company law through a range of administrative and formal enforcement measures – such measures ultimately being in the interests of shareholders, creditors (including State creditors such as the tax authorities) and the public; and
- undertaking investigations into indications of both civil and criminal wrongdoing under company law and, as appropriate, bringing such matters to the attention of the Courts and/or other relevant State authorities.

Nevertheless, and notwithstanding that several years have elapsed in the interim during which the organisation has undergone substantial change both in terms of personnel and in how it operates, the seriousness, and the high-profile nature, of those failings have given rise to an understandable diminution of confidence in the ODCE. In that context, and following receipt of a request on 24 May, 2017 from the then Minister, the Director prepared a report on the matter under section 955(1)(a) of the Companies Act 2014 and submitted same to An Tánaiste on 23 June, 2017.

That report (which, together with the appendices thereto, is a very substantial document) provides a factual account of what went wrong within that investigation, and in the subsequent prosecution, and of the factors that contributed to those failures. There are valuable and indeed necessary lessons to be learned, by all concerned, from that exercise and, in that context, while the ODCE appreciates that there are a range of legal considerations associated with any decision to publish that report, it is the ODCE's hope that publication will ultimately prove possible in order that the public can gain a full understanding of the failures that occurred, the factors that contributed to those failures occurring and the context within which they occurred.

Today's publication by Government of its proposals for reform in the area of white collar crime marks an important step towards restoring public confidence in the State's capacity to tackle wrongdoing of this variety. Over the coming months, the ODCE will provide An Tánaiste and her officials with any assistance they consider helpful or necessary in bringing to fruition Government's decision to transition the ODCE from an Office to an independent Agency.

**OFFICE OF THE DIRECTOR OF CORPORATE ENFORCEMENT
2 NOVEMBER, 2017**

NOTE FOR EDITORS

Legislative basis, structure and resources

The position of Director of Corporate Enforcement (“Director”) was established by the Company Law Enforcement Act 2001 (which was subsequently consolidated into the Companies Act 2014). The Director is supported in discharging his statutory functions by the Office of the Director of Corporate Enforcement (“ODCE”). As provided for by the Act, the Director is independent in the discharge of his statutory functions.

The ODCE is an Office of the Department of Business, Enterprise & Innovation (“the Department”) and, as such, is staffed by officers of the Minister for Business, Enterprise & Innovation – some of whom are recruited through open competition and some of whom are allocated to the ODCE by the Department from time to time. In addition, and in accordance with its establishing legislation, the ODCE’s staff complement includes a cohort of members of An Garda Síochána. The assignment of the approved complement of Gardaí to the ODCE is a matter for the Garda Commissioner. To date, Gardaí assigned to the ODCE have been seconded from the Garda National Economic Crime Bureau (formerly the Garda Bureau of Fraud Investigation).

The ODCE currently has a staff complement of 38⁴, which includes 6 (of an approved complement of 7) members of An Garda Síochána. Its budget for 2017 is €4.9m, comprising of €2.8m for pay and €2.1m for non-pay. Under public sector financial regulations, the ODCE is not permitted to use its non-pay budget for pay purposes.

Principal statutory functions

Under the Companies Act 2014, the Director’s principal functions are to:

- i. encourage compliance with company law;
- ii. investigate instances of suspected offences under the Companies Act;
- iii. enforce the Companies Act, including through the prosecution of offences by way of summary proceedings (i.e., in the District Court);
- iv. refer cases, at his discretion, to the Director of Public Prosecutions (“DPP”) for consideration as to whether charges should be directed on indictment (in such instances, prosecutions occur before a jury in the Circuit Criminal Court);
- v. exercise, insofar as he feels it necessary or appropriate, a supervisory role over the activity of liquidators and receivers in the discharge of their functions under the Act. This function involves the receipt of, and adjudication upon, reports from the liquidators of insolvent companies.

⁴ Whole Time Equivalents

Headline outputs: 2012 to 2016⁵

Some of the more significant outputs that have resulted from the ODCE's performance of the above functions over the period 2012 to 2016 (inclusive) are detailed below.

Referrals to the DPP

Consistent with the decision to concentrate on investigating indications of wrongdoing at the more serious end of the spectrum, in recent years the ODCE has been engaged in increasingly complex investigative work. That work has resulted in 10 files (not including Anglo-related matters, which are detailed separately below) being submitted to the DPP for consideration as to whether charges should be directed on indictment.

Restrictions & disqualifications of company directors

- 868 company directors restricted by the High Court on foot of liquidators' reports with a further 115 company directors entering into restriction undertakings⁶ with the ODCE on foot of liquidators' reports (as a public protection measure, restricted persons may only act as company directors during their period of restriction if the companies of which they are directors meet certain minimum capitalisation requirements);
- 65 company directors disqualified by the High Court on foot of liquidators' reports with a further 8 company directors entering into disqualification undertakings⁶ with the ODCE on foot of liquidators' reports (as a public protection measure, disqualified persons are not permitted, *inter alia*, to act as company directors during their period of disqualification);
- 54 company directors disqualified and a further 7 restricted on foot of ODCE applications to the High Court in respect of insolvent companies struck off the Register of Companies for failing to file statutory returns.

Summary prosecutions

- 64 criminal convictions in the District Court.

Rectifications by way of administrative approach

The ODCE adopts a proportionate approach towards enforcement and, as such, seeks, in appropriate instances, to resolve non-compliance without recourse to formal enforcement measures. In that context, over the period 2012 to 2016, the ODCE secured the rectification of directors' loans in contravention of company law requirements to an aggregate value of €221m.

⁵ As full year 2017 data are not available at this time, data provided are to year end 2016

⁶ Undertakings were introduced by the Companies Act 2014, hence the lower figures than Court-imposed restrictions/disqualifications, which have been in place since 2002

Investigations into matters relating to the former Anglo Irish Bank Corporation plc

In total, the ODCE came to have an involvement in 5 separate lines of enquiry associated with the former Anglo Irish Bank Corporation plc. The subject matter of those 5 strands, and the outcome of each, is summarised below.

Strand	Resulting action (summary)	Outcome (summary)
Provision of lending by Anglo for the purpose of the purchase of its own shares (i.e., the "section 60" investigation)	16 charges of alleged offences contrary to section 60 of the Companies Act 1963 directed by the DPP against each of Mr. William McAteer, Mr. Patrick Whelan and Mr. Sean FitzPatrick. A further 28 charges directed against Mr. Patrick Whelan, being 7 offences of alleged forgery, 7 of alleged conspiracy to commit deception, 7 of the alleged falsification of a document and 7 of the alleged fraudulent alteration of a document.	Mr. William McAteer convicted on 10 counts and acquitted on the remaining 6 Mr. Sean FitzPatrick acquitted on all counts Mr. Patrick Whelan convicted on 10 counts of section 60 and acquitted on the remaining 6. 21 of the remaining 28 charges were dismissed under section 4E of the Criminal Procedure Act 1967, as amended, and Mr. Whelan was found not guilty on the 7 charges of alleged fraudulent alteration of documents.
Register of Directors' Loans	1 charge directed by the DPP against Mr. Sean FitzPatrick of an alleged offence contrary to section 44 of the Companies Act 1990.	Charge dismissed following an application under section 4E of the Criminal Procedure Act 1967, as amended
Provision by Anglo of a loan to Mr. William McAteer for the purpose of refinancing existing borrowings that he had with another financial institution and which were secured only by Anglo shares	1 charge directed by the DPP against each of Mr. William McAteer and Mr. Patrick Whelan of alleged offences contrary to section 297 of the Companies Act 1963 (fraudulent trading).	Mr. William McAteer convicted of an offence contrary to section 297 of the Companies Act 1963 (on entering a plea of guilty) Mr. Patrick Whelan convicted of an offence contrary to section 44 of the Companies Act 1990 (on entering a plea of guilty to that alternate charge).
Mr. Sean FitzPatrick's loans (i.e., the "section 197" investigation)	21 charges directed by the DPP against Mr. Sean FitzPatrick of alleged offences contrary to section 197 of the Companies Act 1990 and a further 6 charges of allegedly furnishing false information contrary to section 242 of the Companies Act 1990.	Acquitted on all counts by direction of the trial judge to the jury.
Transparency Directive-related matters	1 charge directed by the DPP against Mr. David Drumm of an alleged offence contrary to Regulations 76(2) and 76(4) of the Transparency (Directive 2004/109/EC) Regulations 2007 as applied by section 21 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006.	Trial pending.