



Oifig an Stiúrhóra um  
Fhorfheidhmiú Corparáideach  
Office of the Director  
of Corporate Enforcement

**REMARKS DELIVERED TO THE  
INTERNATIONAL FRAUD PREVENTION CONFERENCE**

**DUBLIN  
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DIRECTOR OF CORPORATE ENFORCEMENT**

Good morning ladies and gentlemen,

It is a pleasure to be here with you this morning and I would like to take the opportunity to thank the organisers for the invitation to speak with you. I trust that you will find the day's programme to be thought provoking as well as full of action points to take back to your respective workplaces.

Others on the bill are better placed to speak to you on the subject of cyber crime and so I will steer clear of that topic. Rather, during the time allotted to me, I would like to offer some observations under the other broad rubric of "*fraud*" - insofar as it relates to the activities of the ODCE.

Human beings are imperfect creatures and, as such, they are susceptible to a wide variety of temptations, pressures, incentives and motivations. In that context, fraud and other illegal acts are, unfortunately, inevitable. The standard convention is, therefore, to focus efforts on seeking to minimise opportunities and to maximise the prospects of prevention and detection, thereby dissuading such behaviour to the maximum extent practicable.

Those efforts are, however, not always successful and, in those circumstances and contingent upon the nature of the underlying indications of wrongdoing, your Boards of directors and senior management may find themselves in an engagement with the ODCE – be that as an injured party, a witness or even perhaps as a suspect.

Engagement with the ODCE can arise in a number of ways, e.g.:

- i. by way of an auditor's<sup>1</sup> or liquidator's<sup>2</sup> statutory report to the ODCE;
- ii. on foot of a protected disclosure<sup>3</sup>;
- iii. on foot of a complaint from a member of the public;
- iv. by way of a voluntary self-report following the internal identification of an issue;
- v. through media reportage; or
- vi. on foot of a referral from another regulatory or law enforcement body (including, for example, through the referral of a report submitted to An Garda Síochána pursuant to s19 of the Criminal Justice Act 2011<sup>4</sup>);

The purpose of my remarks this morning is to provide you with some insight as to what an engagement with the ODCE might look like and to offer some pointers as to how to render such engagement as pain free an experience as is practicable.

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<sup>1</sup> Section 393 Companies Act 2014

<sup>2</sup> Section 682 Companies Act 2014

<sup>3</sup> Protected Disclosures Act 2014

<sup>4</sup> In summary, section 19 requires the reporting of information relating to certain relevant offences to An Garda Síochána, including certain offences under company law (which are detailed at Schedule 1 to the 2011 Act).

The first point to make in that regard is that the ODCE's statutory remit relates to company law. Companies come in many shapes and sizes, ranging from the traditional "Mom & Pop" type operation to large privately owned commercial enterprises to Not-for-Profits to charities and all the way through to entities whose securities are publicly listed. As such, and given that our work gives us exposure to companies at all stages throughout their lifecycles, we have a, perhaps, unique insight into the inner workings of such a broad range of entities.

The second point worth making is that, whereas some of you may have the perception that company law is technical or regulatory in nature, in actual fact company law provides for serious criminal offences, capable of being tried on indictment with commensurate penalties being available to the Courts. In that context, those who can be prosecuted for an offence under company law include the company's directors and officers and the company itself.

The third point worth noting in that regard is that the ODCE's staff complement, in addition to including lawyers, accountants and digital forensics professionals, includes a cohort of members of An Garda Síochána<sup>5</sup>. Those Gardaí, whilst being officers of the ODCE, retain all of their powers as sworn police officers. What that means in practice is that, in addition to having our full range of investigative powers under company law, the ODCE, through its Garda complement, also has a broad range of other investigative tools at its disposal.

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<sup>5</sup> The Irish police service.

We know from experience that breaches of company law rarely occur in isolation – by which I mean that, where there is evidence suggestive of breaches of company law, it is not unusual for there to also be evidence suggestive of the commission of other offences such as, for example, offences under Criminal Justice legislation. So, as an example, where there is evidence of fraudulent trading<sup>6</sup> under company law – be that evidence of, for example:

- misuse of a company's assets; and/or
- use of a company as a vehicle for fraudulent or other unlawful activity;

it would not, in our experience, be unusual for there also to be evidence suggestive of the commission of criminal justice-type offences such as false accounting, the use of false instruments, deception, forgery and/or theft as well as, for example, potential offences under the tax code. This, in turn, means that it is increasingly the case that, when submitting files to the Director of Public Prosecutions for consideration, we find ourselves recommending charges under both company law and under other codes of criminal law.

That latter point is borne out by the fact that:

- we currently have a trial pending before Dundalk Circuit Criminal Court where the charges before the Court are fraudulent trading, the use of multiple false instruments and money laundering respectively; and

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<sup>6</sup> Section 722 Companies Act 2014 - the carrying on of the business of a company with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose.

- in recent days, we have, at the direction of the DPP, brought an accused person before the Criminal Courts of Justice on charges of fraudulent trading and money laundering.

**So, if, for whatever reason, your company finds itself the subject of an ODCE investigation, what can you expect?**

Well, you can expect any or all of the following depending upon the individual facts and circumstances and on the approach adopted by you towards our investigation.

- i. You may be required to provide documents by way of statutory demands. The term “*documents*” in that context includes hard copy documents, electronic documents, e.g., Word and/or Excel documents, email communications and SMS/WhatsApp communications. The types of documents that are routinely demanded during the course of investigations include, for example:
  - a) minutes of meetings of the Board and its Committees;
  - b) Board packs;
  - c) accounting records and underlying documentation; and
  - d) emails and other correspondence pertaining to certain transactions and topics, between specified parties and between specified date ranges etc.

In addition to being issued to companies under investigation, document production requirements are also routinely issued to third parties, including auditors and banks.

Failure to produce such material constitutes an offence. In that context, it is important to note that material over which legal professional privilege is being asserted must be furnished but, thereafter, certain additional statutory provisions apply for the purpose of protecting privilege;

ii. You may also expect:

- a) to be required to provide information and explanations pertaining to documentation that you have been required to produce. Similarly, a failure to provide such information and explanations constitutes an offence;
- b) to be the subject of search warrant, or potentially warrants at multiple locations;
- c) to be a Respondent in civil litigation before the High Court, e.g., on matters relating to legal professional privilege, i.e., for the purpose of obtaining a determination as to which documents over which privilege has been asserted actually enjoy that status; and
- d) to be asked to provide witness statements.

To put the foregoing in context, over the last three years, we have utilised powers to require the production of documents, for information and explanations and executed search warrants on more than 150 occasions.

Unfortunately, as can be a hallmark of, so called, “*white-collar*” investigations, you can also anticipate that, depending upon the nature, scale and complexity of the investigation, and upon the approach that your entity elects to adopt *vis-à-vis* the ODCE, the exercise has the potential to be very expensive – both in monetary terms and in terms of Board/senior management time. Moreover, an investigation can have further, and more widespread, impacts on a business, including on shareholders and employees as well as carrying the obvious reputational risks.

**So, how might your entities go about minimising the likelihood of having to engage with the ODCE and, where such engagement becomes a reality, minimising the associated cost and disruption?**

Well, in broad terms that breaks down into two categories, i.e., prevention and disposition.

#### *Prevention*

As regards, prevention, it is often reported that Boards feel that they spend too much time on the compliance agenda and too little on strategy. One can certainly have sympathy for Boards whose members feel that they are overly burdened by rules and regulations, leaving little time to focus on where the business is, and should be, going – all the more so at a time when Boards are grappling with the impact of COVID-19 against the backdrop of immense economic turmoil.

That said, one of the factors that is present in one shape or another in most of our larger investigations is some form of governance failure. Governance failures and culture issues are nothing new in corporate history and, in that context, it is noteworthy that the same themes and issues keep coming up over and over again.

Indications of governance deficiencies and failures that we observe can include poor or non-existent financial and other internal controls, poor risk management processes, insufficient supervision and the bringing to bear of insufficient challenge and scepticism in the Boardroom. Obviously, the nature and necessary levels of sophistication of governance processes will be contingent upon the nature and scale of the entity. Thereafter, the challenge for Board Chairs is to strike the appropriate balance between the Board's allocation of time to the compliance and strategy agendas respectively.

### *Disposition*

As regards disposition, it is of course entirely a matter for every company that is the subject of an ODCE investigation to determine the approach and attitude that it wishes to adopt. However, where a less than co-operative disposition is adopted, it is important to appreciate that this has potential consequences. At a minimum, those potential consequences are likely to include a more lengthy and costly process, both financially and in terms of Board/senior management time. The result may also involve more protracted High Court litigation than might otherwise be the case.

**So, how might your entities seek to minimise the cost and disruption associated with a large scale investigation?**

Well, in broad terms, the following will, or are at least likely to, help:

- i. firstly, the Board – or, at a minimum a Committee with the requisite delegations of authority - needs to fully understand the issues and to be driving the decision making process as regards interactions with the ODCE;
- ii. secondly, and equally importantly, adopt a co-operative approach. Obviously the calculus may be somewhat different where your company or individuals therein are suspects but the general principle continues to apply nonetheless. We are reasonable people and, if met with a co-operative approach, will reciprocate to the extent practicable having regard to our statutory duties and responsibilities. Co-operation can, for example, have the effect of rendering document production more efficient from both parties' perspective;
- iii. following receipt of an order to produce documentation, engage early and develop an appreciation for the fact that statutory document production is not a process akin to discovery in civil proceedings – this is particularly the case where the production of electronically stored data has been required and the use of search terms is being proposed to us. Specifically, the use of search terms will not always be capable of providing us with the requisite level of assurance that all relevant material will be identified and, moreover, is not always compatible with investigators' duty to seek out exculpatory as well as inculpatory material. As such, we cannot always agree to such an approach;

- iv. we are not entitled to see documents over which a valid claim of legal professional privilege can be asserted – and we fully respect that. However, circumstances do arise in which the subjects of an investigation may consider it appropriate, or to their advantage, to provide us with access to such material. In such circumstances, we would encourage you to consider the possibility of entering into a limited waiver of privilege agreement, i.e., a so-called “*Fyffes Agreement*”. While there is no guarantee that we will enter into such an agreement, where the terms are acceptable to us the ODCE will give favourable consideration to such an agreement. Specifically, we will never enter into such an agreement if the prospective counterparty is seeking to limit our discretion to use relevant material for the purposes of our full suite of statutory functions or to share the relevant material with the Courts and/or with other relevant authorities;
  
- v. the commonplace use by employees of official devices for personal purposes means that the assertion of privacy rights is increasingly becoming a feature of investigations. Given the tensions between relevance to an investigation and privacy rights – and our policy position that relevance trumps privacy - civil litigation levels are likely to continue to increase, particularly where multiple parties’ rights are at issue. In that context, positive engagement with investigators has the potential to limit the necessity for litigation and the associated costs involved.

As will, I trust, be evident from the foregoing, so called “*white collar*” investigations:

- are document heavy and are increasingly characterised by large, and sometimes huge, volumes of data;
- are characterised by complex and often novel and/or evolving legal issues, privacy being a case in point;
- often involve the necessity to engage in civil litigation in order to progress investigations (e.g., regarding assertions of privilege), which can be protracted for a variety of reasons; and
- require investigators to constantly navigate the risks associated with the foregoing.

Those considerations, combined with the fact that the parties – particularly in the case of larger investigations – tend to be well resourced, mean that investigations of this nature are complex, resource intensive and time consuming. It is important in that context to appreciate that, whereas there may be a public perception that Ireland is not particularly good at tackling so called “*white collar*” crime, that perception is not borne out by the facts and is, perhaps, also based on an imperfect understanding of the complexities involved.

Notwithstanding the challenges and complexities, regulatory and law enforcement bodies are always looking for ways in which to work more co-operatively and effectively and, for our part, the ODCE has strong working relationships with those other bodies with whom we have mutual interests. In addition, the Companies (Corporate Enforcement Authority) Bill – albeit that it has lapsed with the recent dissolution of the Dáil<sup>7</sup> – will, if continued by the incoming Government, further aid the ODCE to discharge its mandate by providing the proposed new entity with a greater degree of autonomy and associated investigative flexibility. Other relevant developments in the not too distant future are likely to include the publication of the Report of the Group charged with reviewing Ireland's current anti-fraud and anti-corruption structures, of which the ODCE is a member.

### **Concluding remarks**

So, in conclusion ladies and gentlemen, I hope that my remarks have provided you with some insight as to what an ODCE investigation looks like from the receiving end and as to how you might go about rendering the process to be as painless as possible.

I would like to conclude by thanking you for your attention and by again expressing my gratitude to the organisers for the invitation to participate. I hope that you will find the day to have been a valuable exercise from which you will derive much to think about and to bring back to your respective Boardrooms.

Thank you.

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<sup>7</sup> The Lower House of the national Parliament

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