



Office of the Director  
of Corporate Enforcement

*Oifig an Stiúirthóra um  
Fhorfheidhmiú Corparáideach*

# **The Office of the Director of Corporate Enforcement**

**Presentation to the  
Association of Compliance Officers in Ireland  
Foundation Certificate in Compliance  
Professional Diploma in Compliance  
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# Presentation Overview

- Background to the establishment of the ODCE
- Role & Powers of the Office of the Director of Corporate Enforcement
  - Procedures, Powers of Investigation & Powers of Enforcement
- Sources of Information



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# The Key Drivers of Change

- Failure of companies to apply not merely corporate governance but company law
- “It must be said that although the foregoing are legal requirements, in practice a relaxed approach is taken by some private companies and the requirements of the Companies Acts 1963-2001 are all too often an afterthought”

*Courtney The Law of Private Companies*



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# Background to the Establishment of the ODCE

- Increased public concern arising from a number of alleged instances of corporate malpractice e.g. McCracken (Ansbacher (Cayman) Ltd. etc.), Moriarty, Flood, NIB etc.
- Working Group on Company Law Compliance & Enforcement (1998)
- DIRT Investigation (1999) and resultant reports
- **Enactment of the Company Law Enforcement Act, 2001**



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# Company Law Enforcement Act

- Enforcement of filing obligations remains with the Registrar of Companies
- Company Law Review Group established, on a statutory basis, in recognition of the need for a modern company law regime
- **Office of Director of Corporate Enforcement established to deal with Companies Acts in general**
- Other measures introduced to streamline enforcement



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# Company Law Enforcement Act

## ■ **Functions of the Director**

- to enforce the Companies Acts, including by the prosecution of offences by way of summary proceedings,
- to encourage compliance with the Companies Acts,
- to investigate instances of suspected offences under the Companies Acts,



# Company Law Enforcement Act

## ■ **Functions of the Director cont'd**

- at his or her discretion, to refer cases to the Director of Public Prosecutions where the Director of Corporate Enforcement has reasonable grounds for believing that an indictable offence under the Companies Acts has been committed,
- 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,





# Company Law Enforcement Act

## ■ **Functions of the Director Cont'd**

- for the purpose of ensuring the effective application and enforcement of obligations, standards and procedures to which companies and their officers are subject, to perform such other functions in respect of any matters to which the Companies Acts relate as the Minister considers appropriate and may by order confer on the Director,
- to perform such other functions for a purpose referred to as may be assigned to him or her by or under the Companies Acts or any other Act.



# Company Law Enforcement Act

- **Functions of the Director cont'd**
  - The Director may do all such acts or things as are necessary or expedient for the purpose of the performance of his or her functions under this or any other Act.

**Section 12 Company Law Enforcement Act, 2001.**



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# Overview of the ODCE

- Independent
- 45 staff
- Divided into 5 Units:
  - Compliance
  - Assessment
  - Insolvency
  - Enforcement
  - Corporate Services



# Procedures

- Assessment Unit assesses whether there is a prima facie actionable breach of Company law i.e. sieving process
- Insolvency Unit considers all insolvent companies including all companies in liquidation
- Enforcement Unit receives cases from Assessment & Insolvency Unit, accumulates evidence & takes the appropriate action
- Team structure
  - Member of the Garda Siochana
  - Accountant
  - Legal Adviser/Solicitor
  - Administrative Civil Servant



# Information Gathering

- ODCE receives information regarding suspected non-compliance from a number of sources:
  - complaints from the public
    - Downloadable complaint form on [www.odce.ie](http://www.odce.ie)
  - Companies Registration Office referrals
    - **Lists of dissolved companies & other complaints**
    - **Referrals of reports re failure to keep proper books of account**
  - auditors' reports
    - **Section 194 Companies Act, 1990**
    - **The Duty of Auditors to Report to the Director of Corporate Enforcement**  
- **Decision Notice D/2006/2**

section 202 1990



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# Information Gathering

- accountancy/professional bodies' reports
  - Section 58 Company Law Enforcement Act, 2001
- authorised officers'/inspectors' reports
  - Part II Companies Act, 1990
- liquidators' reports
  - Section 56, Company Law Enforcement Act, 2001
  - Section 299, Companies Act, 1963



# Information Gathering

- other sources with which ODCE has a relationship
  - Garda Siochana (Garda Bureau of Fraud Investigation)
  - Revenue
  - Irish Auditing and Accounting Supervisory Authority (IAASA)
  - IFRSA/Central Bank
    - Central Bank and Financial Services Authority Act, 2004
    - Statutory right to share information
  - Irish Stock Exchange
  - International agencies



# More Common Breaches

- On the basis of information coming to ODCE attention, the following are some of the more common breaches:
  - transactions with directors - breaches of directors' loans provisions
    - 268 reports to ODCE
  - reckless/fraudulent/insolvent trading
    - 85 reports to ODCE
  - trading while struck off
    - 43 reports to ODCE
  - shareholder Rights
    - 41 reports
  - failure to keep proper books of account
    - 38 reports and 38 convictions/Probation/TIC



# Investigation & Enforcement

- **How are matters coming to ODCE attention dealt with?**
  - Examination of available material and preliminary evaluation of the facts – is there a *prima facie* case to answer?
  - If so, further investigations will be conducted including e.g. correspondence, searches, interviews and taking of statements.
  - Appropriate enforcement action selected and pursued.



# Investigation

- Garda Síochána
  - Own powers
  - Power of arrest
  - Power of detention
  - Powers to seize & dispose of evidence
- Search & Seizure
  - section 20 Companies Act, 1990
- Appointment of Authorised Officers
  - section 20 Companies Act, 1990





# Investigation

- Appointment of Inspectors
  - Part II Companies Act, 1990
- Examine directors
  - section 245, Companies Act, 1963
- Examine Bank Records
  - Bankers Books Evidence Act, 1879



# Investigation

- Information sharing
  - sections 17 & 18 Company Law Enforcement Act, 2001
- Right of Access by the ODCE to Liquidators’/ Receivers’ Books
  - Section 57 & 53 Company Law Enforcement Act, 2001
- Order for Arrest
  - Sections 46 & 49 Company Law Enforcement Act, 2001



# Enforcement Options

- ODCE has a number of enforcement options open to it depending on circumstances. These include:
  - seeking voluntary compliance
  - imposition of fines
  - initiation of investigations (directly or via the Courts)
  - civil remedies e.g. injunctions, applications for restriction, disqualification, imposition of personal liability etc.
  - criminal prosecution (summary or on indictment)
  - referral to other enforcement agencies.



# Consequences of Non-Compliance

## Administrative fines

- Maximum €1,000 (probably)
- Upon service of notice specifying the breach(es)
- No prosecution will ensue where the fine is paid and the default is remedied within the prescribed time period (21 days).



# Consequences of Non-Compliance

- In addition to the criminal sanctions provided for under the Acts, there are a number of civil sanctions and remedies available e.g.:
  - service of notice to comply with obligations (injunctions)
    - Section 371 Companies Act, 1963
  - seek restriction
  - seek disqualification
  - seek the imposition of unlimited liability for debts and liabilities of a company in insolvency.
  - order for restraint of assets
    - Section 55 Company Law Enforcement Act, 2001





# Consequences of Non-Compliance

## Prosecutions

- In general, maximum penalties under the Companies Acts are:
  - €1,900 and/or 12 months imprisonment on summary conviction, and;
  - €12,700 and/or 5 years imprisonment on conviction on indictment (any offence for which the maximum sentence is 5 years or more is an arrestable offence).



# Consequences of Non-Compliance

- Significantly higher penalties are available for certain offences e.g.
  - fraudulent trading: €63,500 and/or 7 years, and;
  - Market abuse: €10million and/or 10 years.



# Restriction

- Director of an insolvent company
  - Not able to prove that acted honestly and responsibly
  - Reverse Burden of proof
  - Company need not be in liquidation
  - Applies to Shadow Directors (Those in accordance with whose wishes directors ordinarily act)
- Must have minimum capitalisation of Company
  - Private company €63,487, plc €317,435



# Disqualification

- Automatic disqualification
  - Breach of restriction order
  - Conviction on indictment of an offence involving fraud or dishonesty or any offence in relation to a company
  - Undischarged bankrupt acts as director
  - Disqualified abroad and not disclosed here
- By court
  - Guilty of fraud or breach of duty as director
  - Conduct makes them unfit to act as a director



# Disqualification

- By court – continued
  - Persistently in default
  - Director of company struck off the Companies Register with debts owing
- For a period of five years or other such period as the courts direct:
  - Cannot act as a director (or other officer or auditor or receiver or liquidator or examiner)
  - Cannot take part in the formation, promotion or management of a company
  - Name will appear on the register of disqualified persons



# Sources of Information

- Information Books – provide guidance on:
  - principal duties and obligations of company directors and secretaries e.g.
    - statutory registers and minutes
    - books of account
    - financial statements and audit
    - meetings, notice etc.
    - filing obligations
    - transactions with directors.





# Sources of Information

- rights and powers of shareholders and creditors e.g.:
  - notice of, and attendance at, meetings
  - voting rights
  - right of access to certain information e.g. financial statements
  - rights regarding dividends
  - right to petition for relief in cases of oppression
- the respective roles and functions of auditors, liquidators and receivers
- the consequences of non-compliance.



# Sources of Information

- ODCE website – [www.odce.ie](http://www.odce.ie)
  - guidance for directors and secretaries etc.;
  - commentary on corporate governance best practice and access to main reports on the subject;
  - public notice information e.g. civil enforcement action, prosecutions, insolvency information;
  - access to full complement of company law statutes etc.;
  - information on ODCE services.



# **Question & Answers**

## **Thank You**



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