



Office of the Director
of Corporate Enforcement

*Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach*

Corporate Healthcheck for Directors of Private Limited Companies

**Presentation to
Nova UCD**

Kevin Prendergast

Corporate Compliance Manager, ODCE.



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Presentation Overview

- Company law, Why should you care?
- Principles of Corporate Governance
 - Corporate Healthcheck
 - General Common Law Duties
 - Common Breaches
- Sources of Information



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Company Law, Why should you care?

Criminal 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).



Company Law, Why should you care?

Criminal Prosecutions

- Significantly higher penalties are available for certain offences e.g.
 - fraudulent trading: €3,500 and/or 7 years, and;
 - Market abuse: €10million and/or 10 years.



Company Law, Why should you care?

Civil remedies

Court orders

- 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



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
 - 800 persons restricted



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
 - 2100 persons disqualified



Corporate Healthcheck

- The basics
- Applies to all companies
- 13 groups of questions
- Litmus test of Corporate Governance
- Mixture of legislative provisions, common law and common sense
- Breaches of Company Law coming to the attention of the ODCE



I - Registered Office

- **Where is the registered office of the company?**
 - Accountants offices (has it moved?)
 - Change of accountants office/business premises
 - Failure to notify CRO of change of Registered Office within 14 days is an offence
 - “Brass plate” at the address
 - Must be printed on Business Letters (and emails and website)
 - Not served with any company notices, Company dissolved?



II – E-communication

- **Are my website and emails compliant?**
 - Website must contain company information on home page or page immediately accessible from home page (“prominent and easily accessible”)
 - Emails (letters in any form) must also disclose information
 - Could also include SMS’s and any other forms of communication
 - Company Name and legal form
 - Place of registration (Ireland)
 - Address of registered office



III – Directors

- **Are you a properly appointed director?**
 - At least 20% of directors not appointed & not registered
 - Company formation agents
 - May not have a capacity to act
 - Must notify CRO within 14 days of appointment of the director & subsequent amendments
 - Resident Director (at least one in State)
 - Number of Directorships (25 with exclusions)



IV – Directors Addresses

- **Are the addresses of directors correct?**
 - Substantial number of directors addresses incorrect
 - May not have received notifications
 - Must notify CRO within 14 days of change of address



V- Books & Records

- **What books and records do you have?**
- **Where are they kept?**
 - Registers etc must be kept in the registered office
 - Register of Directors and Secretary
 - Register of Directors' and Secretary's interests (in the company and related companies)
 - Register of Members
 - Register of Debenture holders & copies of the debentures
 - Directors' service contracts
 - Minutes of general meetings, the board & board sub-committees.



VI – Books of Account

- **Who maintains your accounts, and where?**
 - Accountancy knowledge required if placing reliance on another
 - Required to be kept at the registered office or such other place as the directors think fit
 - Detailed books of account which
 - correctly record and explain the company's transactions;
 - at any time, enable the financial position of the company to be determined with accuracy;
 - enable the directors to ensure that the financial statements comply with Companies Acts requirements;
 - allow the financial statements to be readily and properly audited.



VI – Books of Account

- Details of all day to day receipts & expenditure
 - Details of assets and liabilities
 - Detailed records of goods purchased/sold & invoices therefor
 - Statements of stock – stocktaking
 - Detailed records of services provided and invoices therefor
- Failure to keep proper books of account
- Section 202 Companies Act, 1990
 - 38 Convictions in 2006,
 - Auditors are required to report to the ODCE where proper books are not being (or have not been) maintained



VII - Audits

- **Have your books ever been audited?**
- **When were the books last audited?**
 - Companies are obliged to appoint auditors to audit their books
 - Audit exemption (small companies) if
 - Turnover does not exceed €7.3m
 - Not more than 50 employees
 - Balance Sheet total does not exceed €3.65m
 - Annual returns have to be up to date
 - Board meeting must pass resolution & must be noted



VII - Audits

- Auditors are obliged to report indictable offences
 - Section 194(5) Companies Act, 1990
 - 369 reports to the ODCE in 2006



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VIII – Board Meetings

- **When was your last meeting of directors?**
 - No prescribed timing of board meetings
 - Suggested 2-6 times p.a.
 - Failure of the board to maintain control over the affairs of the company is a primary cause of company insolvency & failure
 - Must maintain minutes of meetings
 - Normally prior to AGM/EGM, provide members with required notice of meetings and, prior to AGM, furnish members with a copy of the financial statements.



IX – General Meetings

- **When was your last AGM/EGM?**
 - mandatory
 - each calendar year
 - not more than 15 months since the last AGM
 - generally within the State
 - not mandatory if single member private limited company upon election
 - EGM mandatory
 - Section 40 Companies (Amendment) Act, 1983



IX – General Meetings

- Ensure that sufficient notice is given
- Required to
 - Approve accounts
 - Approve directors report
 - Appoint officers
 - Appoint auditors
 - Pass resolutions/special resolutions
- Approximately 31 reports to ODCE in 2006



X – Annual Returns

- **What is your annual return date (ARD)?**
- **When did you last submit your annual return (AR)?**
 - Every company has an ARD and must submit an Annual Return to be filed within 28 days of the ARD
 - Failure to file an annual return is an offence
 - Furnishing False Information
 - 1989 mandatory reports in 2005 (no longer reported to ODCE)
 - Penalties to file annual return
 - Dissolution of the Company
 - Application to CRO/High Court
 - Personal liability of officers if continue to trade
 - Improper use of the word “Limited” is an offence



X – Annual Returns

- a) Profit and Loss Account
- b) Balance Sheet
- c) Cash Flow Statement
- d) Notes to Financial Statements
- e) Directors Report
 - (i) state of company's affairs
 - (ii) fair view of development of business /
indication of likely future developments
 - (iii) Amount of Dividend
 - (iv) Ensuring Compliance



XI – Larger companies

- **Audit Committees (due shortly)**
 - Independent directors who review(amongst others):
 - Accounts prior to audit approval
 - Relationship with auditors
 - Mandatory for Plc's
 - Private companies with turnover greater than €50m and assets greater than €25m must comply or explain
- **Directors' Compliance Statements (on hold)**
 - Compliance with tax law and company law indictable offences:-
 - In forthcoming Consolidated Companies Bill
 - Comply or explain for all plc's and private companies with turnover greater than €25m and assets greater than €12.5m



XII - Prohibited Transactions with Directors

- **Substantial Property Transactions**
 - Where a director of a company (or a person connected with that director):
 - purchases an asset from, or sells an asset to, the company, and;
 - the value of that asset exceeds lesser of €3,500 or 10% of the company's 'relevant assets' (normally its net assets),
 - the transaction must be approved in advance by the shareholders in a general meeting of the company.



XII - Prohibited Transactions with Directors

- **Prohibition on Loans etc.**
 - In general, a company is prohibited from making a loan or quasi-loan to a director (or person connected to that director), or from entering into a credit transaction as creditor for a director, entering into a guarantee on behalf of a director (or person connected to the director) or from providing security in respect of a loan or quasi-loan etc. to a director.
 - Except if in total within 10% of relevant assets (excluding guarantee/security)
 - 268 auditors reports to the ODCE in 2006
 - Total of €200 million returned to companies in 2006



XII - Prohibited Transactions with Directors

- Exceptions:
 - A company is not precluded from entering into a guarantee or providing security for a loan if pre-approved by shareholders and accompanied by Auditors report that transaction will not affect company's ability to pay debts.
 - Loans between group companies
 - Directors' expenses
 - Business transactions are also excluded e.g. where the company's ordinary business involves granting loans.



XII - Prohibited Transactions with Directors

- **Criminal offence**
- Breach of the provisions relating to directors' loans etc. is a criminal offence (indictable and therefore reportable).
- **Civil consequences**
- Breaching either the substantial property transactions provisions or the directors' loans provisions include having to:
 - account to the company for any gain made, and;
 - indemnify the company for any loss or damage suffered.



XIII - Insolvency

- **Are you in financial trouble?**
- **Can you pay your debts as they fall due?**
 - Possibly insolvent
 - Majority of companies have cashflow difficulties
 - Refinancing/Liquidation
- **Criminal Offences**
 - Pre liquidation offences
 - Post Liquidation Offences
 - director must co-operate with Liquidator
 - Fraudulent Trading
 - Failure to keep proper books & records leading to the insolvency of the company



XIII - Insolvency

- **Civil actions**
 - Personal liability
 - on liquidation; or
 - as an Unliquidated Insolvent Companies (UIC)
 - Reckless trading
 - » Section 297A Companies Act 1963
 - Fraudulent Preference
 - » Section 286 Companies Act 1963



XIII - Insolvency

– Section 150 /160 Restriction/Disqualification

- Disqualification for Directors of Dissolved Insolvent Companies
- Initial test cases in 2004 (3)
- 100 cases selected in 2005
- 10 directors disqualified in 2006
- 8 cases before courts at year end
- Several further cases will be prosecuted in 2007



DIRECTORS DUTIES

COMMON LAW FIDUCIARY DUTIES

- Act in good faith and in company's interest
 - Must honestly believe in their decisions
 - Interest must be the company's and members' interest, not the interest of particular member(s)
 - No abuse of powers



DIRECTORS DUTIES

COMMON LAW FIDUCIARY DUTIES

- Be open and transparent
 - May not make an undisclosed profit from acting as a director. Must account for any secret profit derived
 - Minimise potential conflicts. Executive directors in particular should not be involved with a competitor



DIRECTORS DUTIES

COMMON LAW FIDUCIARY DUTIES

- Act with due care, skill and diligence
 - Related to individual director's knowledge and experience
 - Director is liable for loss resulting from negligence





DIRECTORS DUTIES

COMMON LAW FIDUCIARY DUTIES

To whom are Directors Duties Owed?

- Company
 - Accepted in Case Law
- Shareholders
 - Limited in Case Law to Gain from Shares on Merger
- Creditors
 - Insolvent company
- Employees



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



What to do?

- **Advice to Directors**
 - Ask questions
 - Don't assume anything
 - Books & Records - where are they
 - Discuss issues don't avoid them
 - Seek professional advice
 - Consult your company secretary/auditors/legal advisors
 - Possibility of insurance



Sources of Information

- Information Books – provide guidance on:
 - principal duties and obligations of company directors and secretaries
 - 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
 - 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.
- LO - CALL 1890 315 015



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Question & Answers

Thank You



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