



Oifig an Stiúirthóra um  
Fhorfheidhmiú Corparáideach

Office of the Director  
of Corporate Enforcement

**FOR IMMEDIATE RELEASE**

**Launch of the ODCE Annual Report for 2011**

***“The investigative phase of our Anglo Irish Bank investigations is almost complete”***  
**– Director**

Mr Paul Appleby, the Director of Corporate Enforcement, today published his Office’s Annual Report for 2011. Highlights from the Report include:

- the submission of five extensive investigation files in the Anglo Irish Bank investigation to the Director of Public Prosecutions during the year;
- the committal of a person to prison for up to three years arising from a company law conviction;
- convictions on 19 charges in another four ODCE criminal proceedings;
- 18 disqualifications and two restrictions in ten ODCE High Court and Supreme Court actions;
- a further nine disqualifications and 119 restrictions arising from legal actions taken by liquidators following reports considered by the Office;
- the publication of 11 new or updated publications to help directors and others learn about their company law duties and responsibilities in an accessible way;
- the delivery of more than 50 presentations to professional, business and social enterprise interests throughout the country;
- decisions on almost 1,950 reports and complaints to the Office;
- a wide range of policy contributions on company law and criminal justice issues;
- total Office expenditure of €3.4 million, a 7.5% decrease on the previous year.

In a comment on these results, the Director said:

*"I am pleased that the ODCE again achieved important and tangible results in 2011.*

#### *The Anglo Investigation*

*The investigation of certain events in the former Anglo Irish Bank Corporation plc continued to dominate much of our work.*

*During 2011, we sent five extensive Anglo investigation files to the Director of Public Prosecutions.*

*In the first quarter of 2012, we sent another three large investigation files to the DPP.*

*I now regard the investigative phase of our Anglo Irish Bank investigations as almost complete. While there are some important residual matters on which work is ongoing, the ODCE expects to complete work on these in the near future.*

*It is of course entirely a matter for the DPP to determine if, and to what extent, any of the extensive investigation files which she has received from this Office and the Garda Bureau of Fraud Investigation warrant prosecution. ODCE staff remain available to address queries from the DPP's Office in order to assist with its deliberations on the investigation files. Every consideration will also be given to fulfilling any future DPP requests which may be made for additional evidential materials.*

#### *Enforcement Activity*

*The three year term of imprisonment imposed in one criminal case in 2011 is welcome confirmation that the Courts are prepared to deal severely with serious wrongdoing in the company law area. The circumstances of the case included theft, fraud and the filing of false information in the Companies Registration Office.*

*Overall, 153 persons were sanctioned by the Courts in 2011. All but seven were the directors of insolvent companies.*

*In these 146 cases, the High Court determined that a sanction of restriction or disqualification was warranted. In general, the directors involved were found to have conducted their business affairs irresponsibly and thereby caused unnecessary financial loss to their company creditors. 128 of these sanctions were imposed by the Court on foot of legal actions taken by company liquidators following reports considered by the Office.*

*That said, the performance of another 2,000 directors of insolvent companies was also scrutinised last year, and the Office was satisfied that they did not merit any form of legal action. In the present difficult commercial environment, it is important that financial loss caused by unscrupulous behaviour is minimised as far as possible. Accordingly, insolvent companies will continue to be a priority area for attention in order to identify conduct*

*deserving of sanction and help deter the minority who may be tempted to engage in dishonest or irresponsible business practices.*

#### Compliance Work

*We secured the correction of many company law defaults and cautioned over 200 directors and others as to their future conduct arising from detected defaults. However, no particular problem was identified in the majority of public complaints and reports considered by the Office.*

*We also maintained a high level of worthwhile public advocacy work which included 11 new or revised publications, over 50 presentations to professional, business and social enterprise interests throughout the country and various policy submissions to improve the operation of company law and criminal justice legislation.*

#### Conclusion

*Overall, 2011 was another challenging and demanding year for the Office and a year which nevertheless saw us achieve valuable and tangible results at a difficult time. Expenditure was a modest €3.4 million last year, a 7.5% decrease on the previous year. Overall, I am satisfied that my staff delivered value for money in fulfilling our important company law compliance and enforcement mandate.*

*My term as Director will conclude in a few months' time, and I believe that the Office has made, and is continuing to make, a positive impact in encouraging high standards of corporate governance. I hope that the Office's worthwhile contribution in improving and upholding corporate standards over the last ten years will continue for the foreseeable future. I wish my colleagues and my successor every success in the future."*

Press queries in relation to the ODCE's Annual Report for 2011 may be addressed to Kevin Prendergast at (01) 8585844 or (087) 2296828.

**Office of the Director of Corporate Enforcement**  
**1 June 2012**

### Editor's Note

The following provides some further information on matters dealt with in the ODCE's Annual Report for 2011.

#### **ODCE Anglo Irish Bank Investigations**

As indicated earlier, the investigative phase of the ODCE's Anglo Irish Bank inquiries is almost complete. While there are some important residual matters on which work is ongoing, the ODCE expects to complete work on these in the near future. ODCE staff remain available to address queries from the DPP's Office in order to assist with its deliberations on the investigation files. Every consideration will also be given to fulfilling any future DPP requests which may be made for additional evidential materials.

The present status of the various ODCE investigations is summarised in the following table.

Issue under Investigation	Status of ODCE Investigation
1) Provision by Anglo of funds to various parties in July 2008 for the purchase of its shares (suspected offence under company law)	Two large investigation files were sent to the DPP in March 2011 and December 2011. A lengthy ODCE report preceded these files in December 2010.
2) Regular refinancing of certain Anglo directors' loans close to Anglo's end-year reporting date (suspected company law offence of providing false or misleading information to Anglo's auditors)	Two large investigation files were sent to the DPP in January 2012 and March 2012. A lengthy ODCE report preceded these files in December 2010.
3) Provision by Anglo in 2008 of a loan to one of its directors (suspected offence of fraudulent trading)	Two investigation files were sent to the DPP in December 2010 and December 2011.
4) Failure by Anglo to maintain a register of loans to its directors (suspected offence under company law)	Two investigation files were sent to the DPP in August 2011 and December 2011.
5) Content of Anglo financial and other public statements in 2008 (concerns of inadequate disclosure under company law)	A large initial investigation file was sent to the DPP in March 2012. An ODCE report preceded this file in December 2010. This area is closely related to the other investigated events which are receiving priority. The need for further work will be kept under review in consultation with the DPP's Office.

## **GBFI Anglo Irish Bank Investigations**

The Garda Bureau of Fraud Investigation (GBFI) has likewise sent a number of large investigation files to the DPP in the following areas:

- short-term back-to-back deposits of about €7.4 billion received by Anglo in late September 2008;
- the provision by Anglo of funds to various parties for the purchase of its shares in July 2008 (possible market abuse aspect).

## **The Role of the DPP**

In considering the ODCE and GBFI investigation files, it is entirely a matter for the Director of Public Prosecutions to determine if, and to what extent, any of these files warrant prosecution. The DPP is independent in the performance of her functions.

All DPP decisions are highly sensitive and require very careful consideration. Where circumstances warrant, the DPP's Office obtains the advice of Counsel to assist with its deliberations.

In her opening remarks at the 13<sup>th</sup> Annual National Prosecutors' Conference on 19 May 2012, the DPP, Ms Claire Loftus, summarised the role of her Office and its relationship with investigating agencies in the following terms:

*"We are fortunate to reside in a democracy based on the rule of law which has provided by statute for the independence of the prosecutor. This independence first enacted by statute in 1974 is, by dint of the efforts of the first DPP Eamonn Barnes in particular, well established and understood by now. This means that I and my staff can take decisions on whether to prosecute or not completely free from political or public pressure or the perception of that pressure. It is also I think a reassurance and protection for the public whom we serve.*

*I am of course also independent of investigators whether An Garda Síochána or other specialised agencies. I have no investigative function and no role in directing the scope of investigations. While I and my staff can offer legal advice and suggestions on the approach to investigations it is ultimately for the investigator to decide how to proceed. This independence of investigations has the benefit of bringing objectivity to the assessment of the fruits of those investigations when they are submitted as evidence in files to this Office.*

*It is worth restating here the fundamental requirement before we will decide to prosecute any individual: That is to be satisfied that there is sufficient evidence upon which a jury, properly instructed in the law, could find the defendant guilty. There has to be a reasonable prospect of conviction. Once we are satisfied of this we consider whether it is in the public interest to prosecute. This gives me an important discretion as a prosecutor which many jurisdictions do not have but one which must be exercised carefully."*<sup>1</sup>

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<sup>1</sup> See [www.dppireland.ie/filestore/documents/Director's\\_Opening\\_Address\\_190512.pdf](http://www.dppireland.ie/filestore/documents/Director's_Opening_Address_190512.pdf).

## **Company Law Remit of the Director of Corporate Enforcement**

The three main functions of the Director of Corporate Enforcement, as set out in the Company Law Enforcement Act 2001, are:

- to encourage compliance with the Companies Acts;
- to investigate instances of suspected offences under the Acts and
- to take enforcement proceedings for breaches of company law or duty.

The Office sets out to achieve these goals through its varied activities as evidenced in the Annual Report. A number of Illustrations are attached to this Note and give examples of this work. The Director is independent in performing these functions.

### **Raising Standards of Compliance**

The Office issues copies of guidance documents free of charge, as well as speaking to thousands of individuals, in relation to the standards of corporate governance required by company law. The Office also regularly deals with information queries on company law issues from members of the public. A sample of some of the queries received and dealt with in 2011 is included at **Illustration 1.1.1** of the Annual Report (copy below). We do not however provide advice on individual company law problems.

### **Investigating Suspected Defaults**

The Office deals administratively with very many complaints and reports. Only about 5% of cases closed in 2011 involved ODCE or liquidator legal action. **Illustration 2.1.2** in the Annual Report (copy below) gives one example of matters that were resolved satisfactorily without recourse to the Courts.

Particular attention is paid to companies and issues with a large potential impact, including companies which are or have been listed on a stock exchange. A number of such cases arose in 2011 which led to the exercise of the Director's powers.

**Illustration 2.1.4** (copy below) outlines one case where the Office found it necessary to act at short notice to remedy evident non-compliance with company law in an unlisted public company.

### **Enforcing Serious Misconduct**

The law provides for both civil and criminal enforcement civil sanctions. Civil sanctions include disqualification and restriction. Such proceedings may be taken by the ODCE and by liquidators. **Illustration 2.2.4** (copy below) outlines the circumstances of misconduct in a number of insolvent company cases where the relevant liquidator secured the disqualification of at least one company director in 2011.

On occasion, serious misconduct necessitates the Office seeking the imposition of criminal sanctions. **Illustration 2.2.5** (copy below) outlines the 2011 case which was investigated by ODCE officers and prosecuted by the DPP. This later resulted in the Circuit Court imposing two concurrent custodial sentences of three years with the last year suspended on each.

**Ten Years of the ODCE**

By the end of 2011, the ODCE had been in operation for ten years. The final Illustration (below) contains commentary from the Annual Report summarising a number of highlights of the Office's work in that time.

**Conclusion**

The ODCE's Annual Report for 2011 is available from its website at [www.odce.ie](http://www.odce.ie).

**Office of the Director of Corporate Enforcement**

**1 June 2012**

**Illustration 1.1.1: Sample of Public Enquiries dealt with by the Office in 2011**

Nature of Query	Response Given
A private limited company was unable to hold annual general meetings (AGMs) due to quorum and other issues. The company's auditor enquired if he had a reporting obligation to the ODCE.	There is no reporting obligation on auditors in relation to the failure to hold AGMs. <sup>2</sup> However, the auditor should consider if there are any other offences by the company or any of its officers or agents that might be reportable. <sup>3</sup>
A caller sought clarification in relation to a person who was a disqualified director in another jurisdiction and whether this disqualification had any implications for his Irish directorships.	A person who stands disqualified in another jurisdiction must disclose his or her disqualification to the Registrar of Companies on appointment as a director of an existing Irish registered company <sup>4</sup> or a newly incorporated company <sup>5</sup> . If s/he fails to do so, s/he is automatically disqualified from acting as a director in the State. <sup>6</sup> However where disclosure is made, s/he can act as a director unless and until s/he is later disqualified by the High Court. This may happen if the ODCE decides that the circumstances of the foreign disqualification warrant petitioning the Court for the person's disqualification in the State. <sup>7</sup>
A shareholder of a company listed on the Irish Stock Exchange enquired if s/he had a right to view the minutes of a directors' meeting.	Shareholders are entitled to inspect the minutes of all general meetings of the company. <sup>8</sup> However, they have no automatic right of access to the minutes of directors' meetings, unless the Articles of Association of the company grant them that access.

<sup>2</sup> Only suspected indictable offences under the Companies Acts are reportable by auditors to the ODCE. The failure to hold an AGM is not an indictable offence under Section 131 of the Companies Act 1963. However, the ODCE can direct the holding of an AGM at the request of a member/shareholder.

<sup>3</sup> Section 194(5) of the Companies Act 1990.

<sup>4</sup> Section 195(8) of the Companies Act 1963 as amended by Section 91(a) of the Company Law Enforcement Act 2001.

<sup>5</sup> Section 3A of the Companies (Amendment) Act 1982 as amended by Section 101 of the Company Law Enforcement Act 2001.

<sup>6</sup> Section 160(1A) of the Companies Act 1990.

<sup>7</sup> Section 160(2)(i) of the Companies Act 1990.

<sup>8</sup> Section 146 of the Companies Act 1963.



#### **Illustration 2.1.2: Case relating to Accounting Deficiencies and Directors' Loans**

The ODCE received a wide-ranging complaint from a director of a family-owned company operating in the North East. The company's auditors also made an indictable offence report with regard to directors' loans and other accounting deficiencies at the company. The company was also significantly in arrears in its filings to the Companies Registration Office.

Having examined the complaint, the ODCE engaged with the company and its professional advisers to help rectify the reported matters. This led the company to engage a firm of consultants to recommend how best it should conduct its affairs in future so as to remain compliant with the Companies Acts at all times. A series of measures came to be adopted which saw new financial controls and procedures being put in place, all outstanding filing returns being made to the Companies Registration Office and the directors' loans of about €350,000 plus interest being repaid to the company.

#### **Illustration 2.1.4: ODCE Engagement with Aventine Resources plc**

In late November 2011, Aventine Resources plc, formerly Minmet plc, ("the Company") announced that it was holding an Annual General Meeting ("AGM") on 22 December 2011 at 12 noon. This announcement which was placed on its website served as the notice to its shareholders of the Meeting. It indicated an intention to conduct substantive business at the AGM but proposed to do so without giving shareholders the opportunity to consider the Company's accounts for the year ended 31 December 2010. Apparently, these accounts were only in the process of being audited.

In advance of the AGM, the ODCE wrote to the Company and its officers drawing attention to the fact that they were in default of their company law requirements by failing to provide the shareholders with a copy of the Company's accounts for the year ended 31 December 2010 and the related directors' and auditor's reports at least 21 days in advance of the AGM.<sup>9</sup> The Company and its officers were requested to rectify their defaults. The Office made it known that no substantive business should be conducted at the scheduled AGM.

Over the following days, the Director took into account the fact that many of the Company's shareholders were not Irish and that those wishing to attend the AGM should be given the opportunity to avoid a potentially unnecessary and costly journey to Dublin. In the circumstances, he issued a public statement about his recent engagement with the Company relating to the forthcoming AGM and placed the statement on the ODCE website. Consistent with ODCE requests, the AGM was opened and adjourned on 22 December without any substantive business having been conducted.

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<sup>9</sup> Section 150(9) and Section 159(1) of the Companies Act 1963 (as amended).

#### **Illustration 2.2.4: Insolvent Companies - Liquidator Disqualifications in 2011**

Mr Michael Lynn, a director of Kendar Holdings Ltd, was disqualified for 12 years. The High Court heard evidence that Mr Lynn fraudulently gave multiple undertakings to financial institutions in order to obtain loans for property acquisitions, and they sustained large losses as a result. He used company funds to meet personal lifestyle costs and the significant marketing and advertising expenditure of his overseas companies. Mr Lynn acted to put assets beyond the reach of creditors. Hundreds of property buyers who paid large deposits have been unable to contact him or recover their funds as he has resided abroad since December 2007 in a bid to avoid serious civil and criminal proceedings. Mr Lynn was also struck off the Roll of Solicitors and ordered by the Court to pay €2 million in fines to the Incorporated Law Society.

A ten year disqualification was imposed on Mr Michael (Gerry) O'Shea, a director of Bacus Cafes Ltd. The High Court heard evidence that he sold company assets in the weeks prior to the company being wound up by Court Order which prevented the liquidator using these proceeds for the benefit of creditors. Mr O'Shea used over €100,000 of company funds to discharge the debt of another company of which he was a director. He also failed to maintain proper books and records in the company.

Mr Jas Kalsi, a director of MPS Global Ltd, was disqualified for eight years in respect of this property investment company. The Court held that Mr Kalsi was knowingly a party to the carrying on of the business in a reckless manner with intent to defraud creditors and ordered that he should be held personally liable for debts and liabilities to the maximum sum of €4,491,444. The liquidator was granted a 'freezing order' over Mr Kalsi's personal assets. The Court heard evidence that his failure to keep proper books of account contributed to the company's inability to pay all of its debts and resulted in substantial uncertainty as to the assets and liabilities of the company and substantially impeded the orderly winding up of the company's affairs.

Six and five year disqualifications were imposed on two directors of Acuspread Ltd, Mr David McWeeney and Mr Noel Mackin respectively. The High Court heard evidence that they ought to have known that the company was trading while insolvent well before its liquidation in May 2010 given the 16 judgements registered by its creditors as far back as mid-2008 and the incidence of bounced cheques. There was a large body of unsecured creditors with debts totalling over €528,000. A number of depositors for the company's spreader machines did not receive them, and their deposits were used to fund other company expenses. There was also poor accounting for many cash transactions and a failure to cooperate fully with the liquidation.

A disqualification order 'for such period as to the Court seems appropriate' was made against Mr Patrick Mahony, and a five year restriction was made against Mrs Ita Mahony, both of whom were directors of Boxform Ltd, a company in the construction sector. It is understood that a further Court application will be made by the liquidator to determine the appropriate period of disqualification of Mr Mahony. The Court held that the directors had made certain payments to a bank which were deemed to be a fraudulent preference of the company's creditors and consequently invalid. Both Patrick and Ita Mahony were declared by the same Court Order to be personally liable without any limitation of liability for all of the company's debts and liabilities pursuant to Section 297A of the Companies Act 1963 (as amended) which relates to

fraudulent or reckless trading. However, the Court ordered that the personal liability attaching to Mrs Mahony would not be enforceable if she were to file a sworn statement of affairs demonstrating that she had no personal assets of substance and undertook to inform the liquidator of any change in her position within the period of three years from the date of her disqualification. It is understood that she has since furnished a sworn statement of affairs to the liquidator.

Mr Dermot Doran, a director of Eamonn Doran Ltd, was disqualified for five years. The High Court heard evidence that the company traded while significantly insolvent with losses in 2005, 2006, 2007 and 2008 and that it was unable to meet its Revenue liabilities from July/August 2007. The liquidator believed that bad debts of €332,000 related to loans made to Mr Doran by the company. The director also failed to keep proper books and records which precluded the monitoring of its financial position.

A five year disqualification was imposed on Mr David Casey, a director of Keylogues Fabrication Ltd. The High Court heard evidence that Mr Casey had falsely attributed a lodgement of €105,000 to himself when in fact it had come from a trade creditor. He also had outstanding loans from the company of €95,538 at end 2007 which grew by €54,000 a year later, and this negatively impacted on the company's prospects.

Mr Joseph Bruen, a director of Phone-Pak Ltd, was disqualified for five years. The High Court heard evidence that the liquidation resulted from the escalation of substantial arrears in the company's account with its main supplier. This major creditor was owed in excess of €1.6 million and petitioned the High Court to wind up the affairs of the company. Several assurances including incorrectly prepared financial statements had been given to the creditor that failed to materialise.

#### **Illustration 2.2.5: Director of Public Prosecutions v. Kenneth Shanny**

This investigation started following receipt of an extensive report from the Companies Registration Office (CRO). The CRO had received a defective company annual return which necessitated correspondence with the apparent presenter. However, the presenter denied that he had filed the return in question or had conducted the audit of the accompanying accounts. Following investigation, it transpired that Mr Shanny had filed the return and the false audited accounts. It was also discovered that there were instances of theft and fraud relating to the assets of the company involved.

This case was primarily investigated by the Gardaí seconded to the ODCE who were in a position, pursuant to Section 12(4) of the Company Law Enforcement Act 2001, to use both their normal Garda powers and those available to officers of the Director under the Companies Acts. Following referral of the investigation file to the DPP, Mr Shanny was ultimately charged with 16 offences, 13 under the Criminal Justice (Theft and Fraud Offences) Act 2001 and three under the Companies Act 1990. The company law offences related to Section 187 (qualification for appointment as auditor) and Section 242 (furnishing false information).

Following hearings in January and April 2011, Dublin Circuit Court convicted the defendant on two charges, one under each Act. Concurrent three year jail terms were imposed on each charge with the last year suspended on each. He will also be required to comply with a good behaviour bond for two years after his release.

## **ODCE Highlights, 2001 - 2011**

Highlights of the first ten years of the ODCE included:

- a number of demanding investigative and enforcement initiatives in cases like Anglo Irish Bank, National Irish Bank, DCC, Bovale Developments and Ansbacher (Cayman) to name a few;
- the successful prosecution of more than 100 companies, company directors and other persons on some 300 criminal charges in the company law area;
- the disqualification of over 100 company directors and other persons from involvement in a company for an average of about five years;
- the restriction of some 1,200 company directors for five years arising from liquidator applications made under the supervision of the ODCE;
- a success rate of over 90% with its legal actions;
- the voluntary rectification of non-compliance in the company law area in many hundreds of cases;
- decisions made by Office staff on more than 12,000 reports and complaints received;
- the important contribution made by ODCE staff as advocates of improved corporate governance. This work included the issue by the Office of over 80 new or revised company law guidance publications, the attendance of Office staff at over 600 conferences, exhibitions and similar events and a diverse range of policy contributions covering company law, criminal justice legislation, whistle-blowing and property management companies;
- a greater recognition of the importance of good corporate governance in society. Market research conducted during the period indicated the belief of 85% of directors that levels of compliance with company law had increased in the preceding five years;
- public recognition of the effectiveness of the Office. Market research conducted during the period indicated the belief of 75% of company directors that the Office was effective in its role;
- delivery of these results on a relatively modest spend of about €4 million per year.