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Foreword



Pursuant to section 16(1) of the Company Law Enforcement Act 2001, I am pleased to present Ms Mary Coughlan, T.D., Tánaiste and Minister for Enterprise Trade and Employment, with my Office's Annual Report for 2008.

Throughout 2008, the ODCE continued to pursue its objective of improving compliance with company law. The Office adopts a twin-pronged approach to its role. Firstly, it seeks to encourage and facilitate voluntary compliance by deepening and widening levels of knowledge among relevant company stakeholders about their rights and responsibilities. Secondly, the Office seeks to drive compliance through a range of actions that include encouragement to correct detected breaches through to criminal prosecutions for more serious breaches of law or duty.

Highlights for the ODCE in 2008 by primary activity included:

- the appointment of a High Court Inspector to DCC plc, S&L Investments Ltd. and Lotus Green Ltd. to investigate aspects of various purchases and sales of the shares of Fyffes plc in 1995 and 2000;
- the publication of a detailed Company Law Handbook/ Guidance on Property Management Companies to help improve their governance;
- attendance at some 80 public events where ODCE staff gave presentations to and engaged with the public to urge compliance with the Companies Acts;
- a total of 32 convictions, 20 disqualifications and one restriction. A record amount of €46,600 in fines was also imposed. 12 of the 20 disqualifications arose from the Office's evaluation of dissolved insolvent companies;
- a 42% increase to 406 in the number of initial liquidator reports received. This reflected the declining performance of the national economy, and more than double the number of 2008 liquidations are expected in 2009. The Office also determined about 350 initial liquidator reports, a 22% rise on the 2007 outturn;
- a 15% increase to 584 in the number of cases of alleged breaches of the Companies Acts which were closed by the Office after investigation. In the majority of these cases, closure followed satisfactory rectification of the company law difficulty by administrative means. A further 78 cases were referred for investigation of possible legal action by the Office;
- a fourfold increase to €134 million in the amount of excessive directors' loans reported by auditors, many in construction and property companies. The Office is satisfied that its involvement resulted in compliance being achieved in many cases, while others remained under review at year-end;
- the first conviction of a company director for knowingly using company assets in breach of the legal restrictions on the giving of loans to directors;
- the first case of a company director being handed down a custodial sentence which was not suspended by the Court. However, the company director in question has appealed both the conviction and the sentence. The case involved a person acting as a director in breach of a High Court disqualification order.

I wish to express particular appreciation to the Department of Enterprise Trade and Employment for the four additional staff which were made available in 2008 in line with a Departmental commitment on increased staffing levels for the Office. Some of the increased throughput reported above was made possible by this increase.

Our expenditure outturn in 2008 was €4.34 million, a slight reduction on the €4.37 million spent in 2007. This reduction was achieved notwithstanding the expenditure associated with four additional staff and the initial cost of the DCC Inspection. These additional costs were largely met by curtailing advertising and publicity work in response to Government requests for cutbacks in uncommitted spending.

Our successful results in 2008 were achieved by a dedicated and hard working staff. I want to thank them for their continuing commitment to the work of the Office. Our collective efforts are helping business people, community interests and the general public to engage fairly and equitably with one another through corporate structures.

I also want to acknowledge the continuing support given to the Office by the Oireachtas, the Government and the Courts. Thanks is also due to those legal and accounting professionals who supported our work in 2008. I hope that this will continue for 2009 and that we will keep making a positive difference to improving corporate standards in the overall public interest.

Paul Appleby
Director of Corporate Enforcement
31 March 2009

Introduction

The present Strategy Statement of the Director of Corporate Enforcement identifies the following primary ODCE goals and related sub-goals:

Goal 1: Encouraging Compliance with the Companies Acts

- Sub-Goal 1.1: Publishing Accessible Company Law Information
- Sub-Goal 1.2: Promoting Compliance
- Sub-Goal 1.3: Improving Company Law and Associated Corporate Practices

Goal 2: Uncovering Suspected Breaches of Company Law

- Sub-Goal 2.1: Developing Detection and Reporting Arrangements for Suspected Breaches of the Companies Acts
- Sub-Goal 2.2: Identifying Suspected Breaches of the Companies Acts
- Sub-Goal 2.3: Commissioning/Supporting Formal Company Investigations

Goal 3: Prosecuting Detected Breaches of the Companies Acts

- Sub-Goal 3.1: Developing a Balanced Enforcement Policy
- Sub-Goal 3.2: Upholding the Disclosure Requirements of the Companies Acts
- Sub-Goal 3.3: Sanctioning Parties Disregarding Company or Other Interests
- Sub-Goal 3.4: Acting against Parties Denying Accountability under the Law

Goal 4: Sanctioning Improper Conduct relating to Insolvent Companies

- Sub-Goal 4.1: Supervising Liquidators in the Proper Discharge of their Duties
- Sub-Goal 4.2: Assessing Directors' Conduct in Insolvent Liquidation Situations
- Sub-Goal 4.3: Sanctioning Fraudulent or Abusive Behaviour

Goal 5: Providing Quality Services to Internal and External Customers

- Sub-Goal 5.1: Securing and Managing ODCE Resources
- Sub-Goal 5.2: Developing Staff
- Sub-Goal 5.3: Developing and Maintaining Quality Customer Services

This Report reviews progress in 2008 by reference to each of these goals and sub-goals.

Goal 1: Encouraging Compliance with the Companies Acts

Introduction

The Office undertook a notable amount of work in 2008 in furthering its compliance remit and achieved record results in a number of areas. Staff supporting the compliance function prepared and issued a number of significant publications, attended over 80 public events and handled over 400 company law compliance issues. The Office's Reception Team also successfully dealt with many more routine queries. In all, it was a very satisfactory year.

Sub-Goal 1.1: Publishing Accessible Company Law Information

The Office issued nine separate publications in 2008 (five in 2007). The full list is available at **Appendix 1.1.1** to this Report. The more significant of these publications are dealt with below.

In all, the Office circulated some 24,000 copies of its various publications in 2008. All of the newly published documents discussed below are available on the ODCE website at www.odce.ie.

Handbook on Residential Property Owners' Management Companies

The most extensive guidance document issued in 2008 was the Office's Company Law Handbook on Residential Property Owners' Management Companies¹. This major publication comprises more than 200 pages and was developed in order to improve the future performance of these companies. This form of company and the wider issue of multi-unit developments with which those companies have been associated have been a regular subject of public controversy in recent years. The ODCE Company Law Handbook is the latest in a series of publications by the Law Reform Commission², the National Consumer Agency³ and various other parties which have addressed aspects of the area.

The ODCE Handbook deals with the many and varied company law issues that pertain to property management companies. Among the key topics dealt with are:

- the key phases in the evolution of the management company;
- the voting power of members of the company;
- the predominant role of the company's directors;
- its annual general meetings;
- the legal rights of members to apply for relief to the High Court and
- the role and approach of the ODCE in dealing with management company issues.

The Handbook was developed from an ODCE Consultation Paper⁴ which issued in December 2006. Almost 70 submissions were received from various interested parties, and the associated comments and suggestions significantly influenced the preparation of the final Handbook. A commentary on those submissions was also published in conjunction with the Handbook.

Management Companies Booklet – A Property Owners' Guide to Company Law

As a companion to the lengthy Handbook, the Office also issued a Booklet entitled "Management Companies – A Property Owners' Guide to Company Law." This summary guidance was prepared to give ordinary members of residential management companies (namely the property owners) an overview of their rights in company law. The Booklet was developed as an introduction to the area enabling those interested in learning more to consult the greater level of detail available in the Handbook.

The Booklet explains the concepts of the management company and the managing agent and outlines the respective roles of directors, members and the company secretary. It highlights the importance of the company's financial statements, the audit and the annual return and explains how company law can help members to assert their rights. The Booklet also defines the rather limited role of the ODCE in addressing the many problems which arise with management companies.

¹ Decision Notice D/2008/1. The Handbook is available on request from the Office or at www.odce.ie.

² See the Law Reform Commission Report on Multi-Unit Developments (June 2008) which is available at www.lawreform.ie.

³ See the National Consumer Agency publications (September 2008) on the Conclusions and Outputs of its Multi-Unit Development Stakeholder Forum and on Buying and Living in a Multi-Unit Development Property in Ireland. Both documents are available at www.consumerproperty.ie.

⁴ Consultation Notice C/2006/2 – Draft ODCE Guidance on the Governance of Apartment Owners' Management Companies.



Handbook and Summary Guide on Residential Property Owners' Management Companies

Consistent with its intended accessibility, the Booklet was produced in conjunction with the National Adult Literacy Agency and received the Plain English mark. Both the Handbook and the Booklet are available in Irish as well as English on the ODCE website at www.odce.ie. The website also contains for ease of reference a chapter-by-chapter version of the Handbook⁵.

Several thousand copies of the Booklet were issued to management companies, libraries, citizens' advice centres and public representatives following publication.

Consultation Paper on Whistle-blowing and Company Law

The Office issued three separate Consultation Papers during 2008. The first of these in June discussed the merits of a whistle-blowing provision in Irish company law⁶. ODCE staff primarily developed this Consultation Paper in late 2007/early 2008 as part of their contribution to the examination by the Company Law Review Group (CLRG) of the desirability of including a whistle-blowing provision in the new Companies Consolidation Bill⁷.

The Paper provides extensive analysis of whistle-blowing both within and beyond the company law context by reference to national and international experience. It contains a modest ODCE legislative proposal which was developed in an effort to establish a consensus on the inclusion of a whistle-blowing provision in Irish company law.

Unfortunately, this proposal failed to attract CLRG support. In reporting in its Annual Report to the Minister in March 2008⁸, the CLRG recommended that no company law-specific whistle-blowing provision should be included in the new Companies Bill. At year-end, it is understood that the Department of Enterprise Trade and Employment had accepted this CLRG recommendation.

Notwithstanding the CLRG recommendation, it was nevertheless decided in 2008 that the ODCE's valuable research and analysis of the topic of whistle-blowing should be published separate from the CLRG's own evaluation. Having regard to the circumstances giving rise to the publication of this Consultation Paper, no specific timeframe was set for receiving feedback on its content⁹.

Consultation Paper on the Draft ODCE Statement of Strategy, 2009-2012

The Office also issued in July a Consultation Paper on a new Statement of ODCE Strategy for the period 2009-2012¹⁰. The Paper contained a short statement summarising the Office's current strategy and outlined a series of questions to elicit helpful comments on the subject of the Office's medium and long term strategic direction. The consultation period closed on 30 September, and the Office received 13 submissions in total.

The Office also conducted a number of staff workshops and meetings in order to assess the relevance of the current strategy and the extent to which future changes were necessary.

The Director is considering all of the inputs into the new Strategy Statement, and the final document will endeavour to take full account of the significant changes to the external economic and regulatory environment which have occurred in recent months.

Consultation Paper for Stakeholders in Business Expansion Scheme Companies

In September 2008, the Office issued a Consultation Paper for the directors of and investors in companies benefiting from the Business Expansion Scheme and its sister scheme,

⁵ Available at www.odce.ie/en/media_general_publications_article.aspx.

⁶ Consultation Paper C/2008/1 – Discussion Paper entitled 'Whistle-blowing and Irish Company Law'.

⁷ Some background to this work is also available in the Office's Annual Report for 2007.

⁸ The CLRG Annual Report is available at www.clrg.org.

⁹ Comments may be made on the Whistle-blowing Consultation Paper to consultation@odce.ie.

¹⁰ Consultation Paper C/2008/2 – New ODCE Statement of Strategy.

the Seed Capital Scheme¹¹ in order to help mitigate occasional problems arising with these companies. While the primary source of guidance on these schemes is available from the Revenue Commissioners, the ODCE Consultation Paper focussed in particular on the rights and responsibilities of directors and investors under company law. It also explained the important role of auditors in helping to provide assurance to stakeholders.

The Office received eight responses to the Consultation Paper. Final guidance is currently being drafted, and it is intended to publish it in the first half of 2009.

'Corporate Compliance Matters'

The Office continued its collaboration with the Companies Registration Office in publishing the newsletter titled 'Corporate Compliance Matters'. The newsletter was issued in March 2008 and was distributed to the home addresses of some 240,000 company directors. The Office contributed three articles on the following subjects:

- areas for attention by company directors. This was based on the recent experience of the Office in dealing with cases of indicated non-compliance;
- practical debt management for company directors, and
- facing up to business difficulties.

Guidance Leaflets

The Office also published single page guidance leaflets for use as handouts at presentations, exhibitions and conferences attended by ODCE staff. The subjects covered were particularly suited for the present difficult economic conditions:

- rights of creditors;
- the corporate health check, and
- facing up to business difficulties.

Planned Publications

The Office also substantially completed work in 2008 in developing a number of summary booklets which will serve as companion publications to our more comprehensive Information Books¹² on the duties and powers of company directors, secretaries, shareholders, creditors, etc. These booklets have received the Plain English mark from the National Adult Literacy Agency and will be available shortly. Irish language versions of these publications will also be available.

Sub-Goal 1.2: Promoting Compliance

Advocacy Work

With the benefit of an increase in staff, the Office was able to expand its work in informing company directors and other interested parties on key aspects of company law. The Office re-ran its radio advertising campaign in the first half of 2008 focussing on topics of relevance to directors and shareholders. Where relevant, the Office also placed occasional advertisements in various publications highlighting important company law issues as well as reinforcing the "Get Informed" message. However, expenditure on advertising and publicity was necessarily curtailed in the second half of the year in response to Government requests for cutbacks in uncommitted spending.

2008 also saw a significant expansion in the number of presentations given by ODCE staff to directors and other interested parties on company law issues and on the work of the Office. In all, Office staff delivered some 65 presentations to over 3,100 people (45 presentations in 2007). A full list of these presentations is at **Appendix 1.2.1**.



Minister for Foreign Affairs, Mr Micheál Martin, TD, meets ODCE staff at the BT Small Business Show in Cork on 16/17 May 2008.

As well as private company directors and professionals such as accountants and solicitors, the Office also focussed on the community and voluntary sector whose members are often constituted in company form in order to avail of public funding. Many of these company directors are unremunerated volunteers who need information on the importance of their role as directors and on their associated legal obligations.

¹¹ Consultation Paper C/2008/3 – Draft Guidance for Investors and Directors in Companies availing of the Business Expansion and Seed Capital Schemes.

¹² Decision Notice D/2002/1.

Office staff attended sixteen exhibitions, conferences and events (seven in 2007). The list of events attended is at **Appendix 1.2.2**. Staff provided information on company law as well as copies of guidance booklets to the many thousands of people who attended these events. Where relevant, complaints were received for investigation.

Public Enquiries

Throughout the year, the Office continued to deal with company law queries of a general and specific nature. ODCE reception staff dealt with general queries such as requests for copies of guidance or questions concerning the remit of the Office.

Where a more considered response was considered necessary, relevant staff responded to the queries. In total,

the Office dealt with some 400 queries in this fashion. A sample of these queries is at **Illustration 1.2.2**. While those contacting the Office had questions covering a wide range of company law topics, the issues which regularly arose included director disputes and how to resolve issues such as board deadlock, the rights of members and directors in residential property management companies and the extent to which specific company law enactments had yet been commenced by Statutory Instrument.

2008 was also notable for an increase in the number of callers with questions concerning insolvency and the non-payment of debts. As indicated above, the Office responded to the upsurge in these queries by developing articles and guidance leaflets containing some helpful information for company directors in particular.

Illustration 1.2.2: Sample of Public Enquiries dealt with by the Office in 2008

A person called in relation to an unsatisfied debt by a company that ceased trading. The director subsequently transferred the company's assets to a new business and continued to trade as a sole trader.	The caller was informed that debt recovery is a civil matter between the parties and that independent legal advice should be sought. He was also directed to the ODCE website to view recent guidance on the "Rights of Creditors".
A member of a management company complained that the company was not being managed properly. The complex was poorly maintained even though high service charges were imposed. The management company members were not aware of company annual general meetings (AGMs) having been held, and therefore they had no say in the election of directors. They had never received copies of company financial statements. In addition, they complained about the poor performance of the managing agent.	The caller was told that the company must hold an AGM every calendar year and that each AGM must not be more than 15 months apart. Members have a right to 21 days' notice of the meeting and its agenda as well as copies of its financial statements. The caller was referred to the ODCE website to view information guides on the duties of companies and directors. He was also invited to submit a complaint form on the failure of the company to hold AGMs. He was advised that the performance of the managing agent was ordinarily a contractual matter between the management company and its agent.
A member of a company indicated that a Company Secretary had refused a request for a copy of the register of members on the basis that the company was not allowed under the Data Protection Acts to release the details without the members' prior consent.	The person was informed that they have a right to a copy of the register under Section 119 of the Companies Act 1963. If the company fails to comply with the request, a complaint should be submitted to the ODCE.
A company director sought assistance in relation to an internal dispute between two directors who were also shareholders. One director had assumed the role of decision maker and had totally excluded the other from any aspect of company management. What can the director do?	The caller was informed that the responsibility for resolving the dispute lies with both directors. If necessary, independent legal advice should be sought. Ultimately, the High Court could direct the winding up of the company.

Media Contacts

The Director issued five formal press statements in 2008 as outlined in **Appendix 1.2.3**. The Office also dealt with well in excess of 100 media queries.

The Director undertook from time to time a number of media interviews to promote the Office's compliance work. The publication of the guidance on management companies was a case in point.

In addition, ODCE staff wrote or contributed to a number of media articles, dealing with issues such as the ongoing work of the Office and the company law implications of the current economic difficulties. In all, the Office featured in almost 500 press and media articles with particular reference to the Office's enforcement work.

Sub-Goal 1.3: Improving Company Law and Associated Practices

The Office made two formal responses to consultation papers in 2008.

The first of these was made to the Director of Public Prosecutions (DPP) relating to their Discussion Paper on Prosecution Policy on the Giving of Reasons for Decisions¹³. In its submission, the Office concurred in general with the DPP's proposal to give reasons in certain circumstances to affected parties where a decision was made not to prosecute a case. In terms of detail, the Office stated that where appropriate a full statement of the reasons supporting a decision not to prosecute should be supplied, unless such disclosure would compromise a person's right to their good name or to the presumption of innocence.

The Office's second policy submission was in response to a Consultation Paper issued by the Department of Enterprise Trade and Employment (DETE) in relation to the transposition of Directive 2006/46/EC of the European Parliament and Council¹⁴. The Directive provides for new requirements with regard to, for instance, disclosures about corporate governance, clarification of board responsibility for financial statements and key non-financial information, transparency in intra-group relations and transactions with related parties. The DETE Paper asked a series of questions relating to national implementation of the Directive. Broadly, the Office was supportive of enhanced disclosure requirements and argued against the introduction of any increase of thresholds that would allow companies to limit such disclosures.

The Office also made some comments to DETE in regard to the response of the Institute of Directors in Ireland to the Draft Criminal Justice (Money Laundering) Bill 2008¹⁵. The Office indicated its support for the retention of the current powers of the Garda Síochána in this area, as well as outlining the difficulties occasionally encountered in obtaining certainty regarding the identity of rogue directors under the law as it stands.

Company Law Review Group

The Director is a member of the Company Law Review Group, and in that position, he attended a number of meetings of the Group during 2008 which began consideration of its new two year work programme up to the end of 2009.

Late in 2008, the CLRG published its Annual Report for 2007 which outlined the thinking behind its recommendations with respect to the issues arising under its 2006/2007 work programme. A copy of the CLRG Report is on its website at www.clrg.org. Further information on the proposals in which the ODCE had an interest is contained in the ODCE's Annual Report for 2007.

NSAI – ISO 26000 on Corporate Social Responsibility

The International Standards Organisation (ISO) made significant strides in developing a global standard in the area of Corporate Social Responsibility in 2008. The ODCE continued to contribute in an appropriate manner to developments as a member of the Irish 'Mirror Committee' which is managed by the National Standards Authority of Ireland (NSAI) and is tasked with reviewing the work of the ISO on behalf of the State. As the standard is currently at a preliminary Committee Draft stage, it is not available for public inspection.

Irish Auditing and Accounting Supervisory Authority (IAASA)

The Director is a director of the board of IAASA as well as being a member of its Remuneration Committee, and he continued in 2008 to work with his fellow directors in developing the remit of the Authority. At year-end, he was appointed as a member of an IAASA Enquiry Committee which will investigate in 2009 allegations which were made against the Institute of Chartered Accountants in Ireland in a newspaper article some time ago. A copy of IAASA's Annual Report will be available from its website at www.iaasa.ie in mid-2009.

¹³ More information on the DPP Discussion Paper and on the results of the consultation exercise is available at www.dppireland.ie/publications/reasons_project/.

¹⁴ The full text of the Directive is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0046:EN:HTML>.

¹⁵ More information on this Bill is available at www.justice.ie/en/JELR/Pages/PB08000277.

International Association of Insolvency Regulators (IAIR)

The ODCE is a member of the IAIR and actively participates in its annual work programme. At its Annual Conference in St Petersburg in June, ODCE staff introduced the results of two research studies which the ODCE had undertaken on behalf of the Association.

One study dealt with the value of information-sharing among national insolvency regulators in a world where commerce increasingly extended beyond national borders. The research provided in particular a directory of information sources for IAIR members by which they could seek to cooperate with one another in dealing with transnational insolvencies or domestic insolvencies that have an international dimension. This research was undertaken in cooperation with the Office of the Superintendent of Bankruptcy in Canada.

The second study explored the extent to which sanctions imposed on individuals for past misconduct in insolvency situations are mutually recognised in IAIR jurisdictions. The study suggested that further work would be beneficial in strengthening our respective regulatory frameworks. The reports of both studies are available in the publications section of the IAIR website at www.insolvencyreg.org.

At the invitation of the IAIR, the ODCE undertook to host its 2010 Conference in Dublin.

OECD Peer Review of Bribery Convention

In the ODCE's Annual Reports for 2006 and 2007, reference was made to the Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (1997).¹⁶ In connection with Ireland's implementation of its obligations under this Convention of the Organisation for Economic Cooperation and Development (OECD), the Government established a Senior Officials' Compliance Committee during 2007, and a staff member of the ODCE serves on this Committee.

In June 2008, an examination team (composed of lead examiners from Estonia and New Zealand, as well as officials from the OECD Secretariat) visited Dublin to enquire into Ireland's progress with the implementation of its obligations under the Convention. The examiners had discussions with a large number of relevant bodies, including with officials of the ODCE. The resulting OECD evaluation report on Ireland's implementation of the Convention was published in December 2008.¹⁷

Engagement with the Law Reform Commission (LRC)

As noted in our 2007 Annual Report, the ODCE responded to the LRC's Consultation Paper on Multi-Unit Developments. During the first half of 2008, the ODCE had further engagement with the Commission concerning property management companies.

Following on from the Consultation Paper, the LRC published a Report entitled 'Multi-Unit Developments'¹⁸ in June 2008. This Report made inter alia various recommendations for legal change, and **Appendix 2** to the Report contains a draft Multi-Unit Developments Bill intended to implement the Report's recommendations. The ODCE was gratified by the favourable comments in the Commission's Report concerning the ODCE's guidance work with respect to property management companies.

High Level Inter-Departmental Committee on Multi-Unit Developments

Following publication of the LRC's Consultation Paper on Multi-Unit Developments, the Government decided in 2007 to establish a High Level Inter-Departmental Committee comprising representatives of relevant Departments and Offices to assist in the development of a coherent and comprehensive legislative response to the Commission's analysis and recommendations. An ODCE official served as a member of this Committee throughout the period of its activities.

In August 2008, the Committee concluded its deliberations and delivered its Report to the Cabinet Committee on Multi-Unit Developments (following publication of the June 2008 LRC Report referred to above).

Conclusion

The Office's compliance work is a primary driver in its attempts to support a growing culture of compliance in the State. However to be effective, this important work must be supported by a credible regime of balanced but effective actions which encourage the correction of defaults or sanction wrongdoing where appropriate. The following sections of this Report set out how the Office carried out this work in 2008.

¹⁶ Information on the Convention is available at www.oecd.org and at www.anticorruption.ie.

¹⁷ www.oecd.org/dataoecd/33/6/41869600.pdf

¹⁸ LRC 90 – 2008, available at www.lawreform.ie.