

Conclusion

The ODCE's work in promoting compliance continues to play a significant role in informing company stakeholders of their rights and obligations with respect to the Companies Acts. The Office attempted in 2006 to broaden its compliance activity and intends to continue targeting areas which are known to suffer from corporate governance deficiencies. Standards have improved in recent years, and further improvement depends not only on compliance initiatives but also on a credible programme of ongoing investigation and enforcement. The following sections of this Report outline ODCE progress in these areas in 2006.



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Goal 2 – Uncovering Suspected Breaches of Company Law

Introduction

Fraud, non-compliance and other unlawful or irresponsible activity serve to distort business markets by conferring unfair and unwarranted advantages on some companies and their stakeholders to the detriment of others. Legal obligations should not be ignored for reasons of convenience in order to minimise costs and improve a company's commercial prospects when those costs are often transferred to other company stakeholders and adversely affect their commercial interests and their potential ability to compete in the marketplace.

The motivation for ODCE efforts in uncovering potential company law breaches is therefore to improve corporate conduct and to support and sustain fair competition in the marketplace.

Sub-Goal 2.1: Developing Detection and Reporting Arrangements for Suspected Breaches of the Companies Acts

Number/Sources of Suspected Breaches

Auditor reports and public complaints continued to be the primary sources of potential detected misconduct in 2006. However, there was a marked change in the number of reports of suspected misconduct received by the Office this year. This was primarily due to a recent exemption given to auditors under which they were no longer required to report annual return defaults¹⁶ which had amounted to about 60% of all of the reports and complaints made to the ODCE. As these defaults were proper to the work of the Companies Registration Office (CRO), the exemption naturally led to a welcome substantial reduction in overall numbers in 2006. For comparability reasons therefore, the 2005 and 2006 figures for reports and complaints in this section of the Annual Report and in the associated Appendices exclude annual return defaults. The revised figures now give a more representative picture of the volume of cases which are potentially appropriate for ODCE examination.

¹⁶ This exemption was contained in section 73(2)(d) of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. Section 73(2)(d) was commenced on 1 September 2005. ODCE Information Notice I/2005/3 explains the effect of the provision.

Leaving aside the effect of this exemption on the numbers, there was still a reduction in 2006 in the overall figures of incoming reports and complaints relative to 2005. This was due to a 26% reduction in auditor reporting which was offset to some extent by a 21% increase in the volume of public complaints. A breakdown of the reports by source is outlined in **Appendix 2.1.1**. It is unclear at this stage if the decline in auditor reports is due to improved compliance or if there are other factors involved.

The Office remains anxious to develop other potential sources of information for possible company law breaches in conjunction with other State and regulatory bodies and through its own investigations. The ODCE's own detection work last year included targeted enquiries in a number of areas (e.g., restricted directors acting in breach of the terms of their restriction and disqualified directors, including those disqualified in other jurisdictions acting in the State in the absence of the registration of their disqualification). We also keep under review information in the public domain, such as media reports, filings in the CRO and tax settlements made with the Revenue suggesting past failures by companies to keep proper records.

Cooperation between Regulatory Authorities

In order to preserve the integrity of its investigative work, the law provides that the ODCE is generally required to keep confidential information which it receives as part of its work. However, it is permitted to share information with fellow regulators and other parties on matters of relevance to one another. For example, contact with the Financial Regulator took place in respect of a small number of specific cases in 2006.

In particular, the cooperative relationship between the ODCE and the Revenue Commissioners was further developed during 2006. As permitted by the Company Law Enforcement Act 2001 ("the 2001 Act"), Revenue officials provided to the Office information relating to the commission of an offence under the Companies Acts. This has been helpful to the ODCE in its investigation and enforcement work.

The 2001 Act also enables the ODCE to share information of potential value to the Revenue Commissioners in its work. Perhaps the most substantial instance of ODCE information-sharing with Revenue in 2006 involved the disclosure of details of 86 large cases of excessive directors' transactions. The aggregate amount involved was some €48 million. The disclosure was made in order to enable Revenue to determine if a tax liability arises in any of these cases.

We also responded to Revenue requests on a number of cases and provided relevant information on the wider corporate interests of the persons involved.

A useful two-way flow of information also occurred in 2006 between the Garda members of the Office and their colleagues in the Garda Bureau of Fraud Investigation (GBFI) and in other areas of the force. Over 1,800 company and related enquiries were made, including more than 700 with the GBFI.

The staff of the CRO also continued to be of substantial assistance, not only in keeping the Register of Companies up to date but also in retrieving and certifying filed original documentation for use by the ODCE in Court enforcement proceedings. This certification work was quite extensive at times, and the ODCE appreciates the considerable assistance which CRO staff continue to give in support of this important enforcement work.

A small number of contacts on individual cases also took place with the Department of Social and Family Affairs and the Pensions Ombudsman. Contact with the latter was helpful in the initiation of a number of disqualification proceedings in 2006.

In recent years, the Office has developed a good working relationship with the Northern Ireland Insolvency Service in relation to directors who have been previously sanctioned for irresponsible commercial behaviour in Northern Ireland and who have started or resumed businesses in the State. These contacts continued to grow in 2006, and a number of cases are on hands which may give rise to potential proceedings in due course.

As indicated earlier, the network of information-sharing arrangements with regulatory bodies was expanded in 2006 with the conclusion in May by the ODCE of a Memorandum of Understanding with the Irish Auditing and Accounting Supervisory Authority. It is anticipated that this will give rise to regular ongoing cooperation between both bodies in the future.

Sub-Goal 2.2: Identifying Suspected Breaches of the Companies Acts

The type of issue coming to attention via auditors continues to be dominated by a small number of defaults. There is a much broader range of issues contained in the public complaints made to the Office, and we continue, as indicated above, to seek out new fruitful avenues of enquiry by which particular company law offence types will be uncovered.

Nature of Issues identified in Mandatory Reports

The 297 mandatory reports received in 2006 disclosed a small number of indictable offence types under the Companies Acts. **Appendix 2.2.1** to this Report outlines the nature of the offences reported to the Office in any meaningful numbers in 2006 relative to the previous year's outturn.

Two offences represented almost 90% of the reported defaults:

- some 268 reported defaults (or about 80% of the total reported in mandatory reports) involved excessive directors' transactions. The associated sums amounted to over €70 million;
- about 38 instances of a suspected failure to keep proper books of account in companies were received (about 10% of the total). This obligation is fundamental to the maintenance of a sound company from a financial and operational perspective. Because failures in this area can distort business markets by creating unfair and unwarranted advantages on some companies and their stakeholders to the detriment of others, the question of enforcement action is seriously considered in each such case.

Nature of Issues identified in Voluntary and Other Reports

Many public complaints are of a general character, and it can require contact with the complainant and other investigations to clarify if a company law default (as distinct from fraud or a general breach of the criminal law) is involved. It will often be the case as well that the complaint can best be addressed by the complainant's own legal remedies.

Notwithstanding the difficulty of categorising the nature of these complaints and reports, **Appendix 2.2.2** provides information on the type of issues coming to attention under this heading. Some particular themes included:

- the incidence of complaints of improper corporate trading;
- the failure by directors and others to comply with certain basic obligations, including the non-holding of annual general meetings and
- complaints about outstanding debt.

There was also a small but significant rise in the volume of complaints relating to property management companies. With the publicity arising from the publication in December 2006 of Draft Guidance in the area, it is likely that this area will be the focus of a further increase in public complaints in 2007.

Throughput of Cases

2006 was a particularly successful year in completing investigative work on a large number of cases. This was due in part to the priority given to cases involving excessive directors' transactions and the allocation of an additional staffing resource to assist with this work. As is clear from **Appendix 2.2.3**, the ODCE concluded its deliberations in 913 cases (close to double last year's outturn of 470). 556 of these cases involved excessive directors' transactions to the value of €244 million.

In the absence of evidence of criminal intent, our work in relation to excessive directors' transactions was directed towards the administrative rectification of the defaults. To that end, 896 company directors were cautioned, and some 93% of directors have to date acknowledged their awareness of the legal restrictions in this area for the future.

In addition to the indicated 913 concluded cases, a further 130 are the subject of detailed investigation by the Office having reached a preliminary conclusion that circumstances warranting possible civil or criminal proceedings existed.

At the end of the year, a total of 267 cases remained on hands, a significant reduction on the previous year's figure of 607. 44 of these 267 cases involved excessive directors' transactions to an aggregate value of €33 million. About half of the 267 cases have been on hands for more than twelve months due predominantly to the complexity of the cases and the Office's other more pressing priorities. However, this represented a significant and welcome reduction on the 350 or so cases with a similar profile at end-2005.

Manner of Disposal of Cases

Appendix 2.2.4 contains a breakdown of the manner in which the 913 cases were concluded in 2006, distinguishing between mandatory and voluntary reports. Most of the cases were closed having secured a remedy of the default and issued a caution to the relevant persons. The bulk of these related to directors' transactions.

In another 19% of cases, no action was warranted following assessment by the Office because of the absence of (or insufficient evidence of) any obvious company law default. Typically, the complainant will have a concern about possible misconduct which is not directly relevant to the requirements of the Companies Acts.

In about 7% of cases, the complainant had available legal remedies to address his or her concerns. Occasionally, there will be debts owed to a complainant, and the ODCE does not involve itself in a matter which amounts to a pure commercial dispute.

In the balance of about 9% of cases, various other reasons (e.g., the issue was not a relevant matter for ODCE attention) were associated with the conclusion of each case.

While commercial difficulties are regularly a focus of complaint to the Office, a company law default can be inhibiting the proper engagement of the relevant stakeholders. In 2006 for instance, the ODCE issued three directions requiring the holding of outstanding annual general meetings following complaints by the members/ shareholders of companies that they were being denied the opportunity to call the directors to account following the failure to hold such meetings. **Illustration 2.2.1** describes a case, involving a management company, where action by the Office secured the holding of an outstanding annual general meeting and the replacement of the directors by members' representatives.

Illustration 2.2.1: Instance of ODCE interventions empowering the members of a Management Company to take charge of the Company's Affairs

In October 2005, a member of a management company associated with a property in the North West contacted the ODCE indicating that no annual general meetings had been held. Subsequent investigations revealed that the company's annual returns to the Companies Registration Office suggested that the accompanying financial statements had indeed been laid before an annual general meeting. Following contact with the company, it transpired that persons who were not the members attended these meetings although a company director sought to maintain that they were the true members.

Having considered the position, the ODCE was satisfied that no proper annual general meetings had been called in the past. Pursuant to section 131 of the Companies Act 1963 (as amended), it accordingly directed the holding of an early annual general meeting. The direction specified among other things that:

- the members be informed that the meeting was to be held at the specific direction of the ODCE;
- the members be permitted to be accompanied by professional advisers;
- the auditors be notified of the meeting in order to secure their attendance;
- the various statutory registers be made available for inspection for 30 minutes prior and subsequent to the meeting and
- the directors be obliged to have the bank statements and the block insurances available for inspection.

The meeting was held in accordance with the direction, and a significant number of members participated. The business of the meeting led to the appointment of representatives of the members as directors for the first time. The ODCE successfully completed its work on the case in November 2006.

Another case which was resolved satisfactorily also involved a property management company which had been dissolved for some time arising from the failure of the company's

directors to attend to their legal duties. **Illustration 2.2.2** provides the relevant details.

Illustration 2.2.2: Instance of ODCE interventions encouraging the restoration of a dissolved Management Company to the Companies Register

Complaints were received in December 2005 indicating that a management company in a town in the West of Ireland had been struck off the Register of Companies for failure to file annual returns. It was also alleged that the directors had failed to disclose all of their directorships in filings to the Companies Registration Office.

On investigation, it transpired that there was substance to these allegations and that the company's registered office was no longer operative.

The ODCE then drew the directors' attention to the fact that the management company had been dissolved, that they were eligible to be disqualified from acting as directors and that personal liability was also a risk in cases of reckless or fraudulent trading. The directors were invited to consider the taking of appropriate measures to remedy the known deficiencies.

Subsequently, representatives of the directors informed the Office that remedial action would be taken. By May 2006, the company's accounts had been audited and filed; the company had been restored to the Companies Register, and members of the management company had replaced the original directors. Subsequently, a new registered office was also notified to the Registrar of Companies.

These cases are indicative of the positive role which the Office played in 2006 in helping company stakeholders in appropriate circumstances to assert their rights and secure a remedy for the predicament in which they found themselves. ODCE staff will continue to address as best we can complaints and reports involving possible company law defaults with a view to encouraging rectification of these defaults in appropriate cases.

Goal 2.3: Commissioning/ Supporting Formal Company Investigations

The Companies Acts provide a number of legal options for the formal examination of company books and documents. All of the following examinations have been undertaken pursuant to the powers available in section 19 of the Companies Act 1990 (as amended).

Investigations Completed in 2006

AIB Investment Managers Ltd.

Previous ODCE Annual Reports dealt with certain historic problems with respect to AIB Investment Managers Ltd. which caused the Director to examine certain books and documents of the company. Following consideration of the results of a detailed investigation of the same events by the Financial Regulator and the reported tax settlements in 2006 by a number of the beneficiaries involved, the Director determined that no further action was warranted by him under the Companies Acts.

Dunnes Stores Ireland Company/Dunnes Stores (ILAC Centre) Ltd.

Earlier Annual Reports have discussed the events surrounding the lengthy examinations of the books and documents of these companies. Following the completion of these examinations, the Director decided in 2006 that he would take no further action arising directly from the results of these examinations.

Ongoing Investigations

Cologne Reinsurance (Dublin) Limited

The ODCE Annual Report for 2005 outlined the background to this case. The Director took certain further action in 2006 to retrieve certain additional relevant information, and this company examination remained open at end-2006. The Director will be monitoring developments arising from related legal proceedings in the USA in early 2007.

Departmental Company Examinations

In 2006, the Department of Enterprise Trade and Employment kept the Director informed of developments in relation to its outstanding examinations of the books and documents of College Trustees Ltd., Guinness and Mahon (Ireland) Ltd. and Hamilton Ross Company Limited.

Other Company Examinations

The Director initiated two formal examinations of company books and documents in 2006. Both remained ongoing at year-end.

Conclusion

While the volume of incoming work to the Office declined in 2006 because auditors no longer had to report annual return defaults, this exemption has had no practical impact on the quantity of work being handled by the Office, because these defaults were always referred to the CRO for attention. It is however expected that a further decline in auditor reports will arise in 2007 if there is a significant use of the more generous criteria for audit exemption which became available in late 2006 following the commencement of section 9 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006.

However, there is every expectation that the rise in public complaints which we experienced in 2006 will continue in 2007. A particular factor in this context is the increasing awareness that the ODCE can improve the performance of property management companies which is an area of increasing public concern. The Office is also becoming more sophisticated in detecting possible company law offences itself or in conjunction with other bodies. The Director is accordingly satisfied that the character of issues which are on hands and in prospect will continue to absorb considerable resources in the coming year.

Goal 3 – Prosecuting Detected Breaches of the Companies Acts

Introduction

2006 was another busy year for the Office on the enforcement front. We again delivered on our aim of securing a reasonable balance between civil and criminal enforcement proceedings with 32 civil enforcement, 28 criminal enforcement and nine other proceedings during the year. We also maintained a good record of success in the proceedings brought and defended by the Office as indicated by the fact that of the 46 proceedings determined in 2006, only three were unsuccessful.

Our continuing desire to bring significant breaches of company law duties and obligations to the attention of the Courts was reflected in the imposition of suspended sentences of six months' imprisonment on two persons continuing to act as directors while in breach of company capitalisation requirements following their restriction by the High Court. We also secured the disqualification for nine years of a central figure in the Ansbacher affair.

Primarily from a concern for the effectiveness of our law enforcement functions, we are anxious insofar as penalties are concerned that breaches of the law should be capable of being sanctioned by effective, proportionate and dissuasive penalties. We recognise that judges have full discretion to determine what is an appropriate penalty in the circumstances of each particular case and that comparing the level of aggregate fines imposed every year is not necessarily indicative of the gravity of the matters determined by the Courts. Subject to that caveat, the aggregate amount of fines imposed in criminal cases dropped back in 2006 to over €23,000 from some €35,000 in 2005. However, 2006 was unusual in that in some of the cases heard, judges found it appropriate to deal with matters having regard to charitable donations made by the defendants. We understand that donations in excess of €7,000 arose in these instances.

Legal Proceedings

In an overall context, the Director participated in 69 proceedings, of which 39 were in the High Court and 26 were in the District Court. A further two cases were each before the Supreme Court and Circuit Court on appeal, and one of the cases before the Supreme Court was awaiting hearing at year-end. A brief overview of the