

# CHAPTER 3

CONFRONTING UNLAWFUL  
AND IRRESPONSIBLE  
BEHAVIOUR INsofar AS IT  
RELATES TO COMPANY LAW

## STRUCTURE OF THIS CHAPTER

This Chapter is structured in a manner whereby, in the following three Parts, the Office's inputs, throughputs and outputs respectively are detailed.

## PART A: INPUTS

### EXTERNAL INPUTS

The Office's activities in confronting unlawful and irresponsible behaviour are driven to a substantial extent, both directly and indirectly, by inputs received from external sources. This is a function of the fact that:

- a number of parties, including liquidators, auditors, examiners and certain professional bodies, have statutory reporting obligations to the Office;
- the Office forms part of a broader statutory framework that provides for the referral of, otherwise confidential, information between regulatory and enforcement bodies where such information is considered to be relevant to those other entities' functions; and
- the Office receives a substantial number of complaints from members of the public annually.

In that context, the principal inputs received from external sources during the year were as follows:

**Table 5 Inputs from external sources**

	2016	%	2015	%
<i>Statutory reports</i>				
Liquidators' reports (initial) (s682)	683		875	
Liquidators' reports (subsequent) (s682)	261		394	
Total liquidators' reports (s682)	944	72.5	1,269	74.2
Liquidators' reports regarding possible criminality (s723)	0	0	2	0.1
Auditors' indictable offence reports (s393)	69	5.3	100	5.9
Examiners' reports (s534)	5	0.4	3	0.2
Professional Bodies' indictable offence reports (s931)	5	0.4	4	0.3
<i>Referrals</i>				
Referrals from external parties	28	2.1	40	2.3
<i>Complaints</i>				
Complaints from members of the public	248	19.0	290	17.0
<i>Other</i>				
Disclosures under the Protected Disclosures Act 2014 <sup>17</sup>	4	0.3	3	0
<b>Total inputs from external sources</b>	<b>1,303</b>	<b>100</b>	<b>1,711</b>	<b>100</b>

The principal external sources of inputs driving the Office's activities over the year under review are elaborated upon below.

## LIQUIDATORS' SECTION 682 REPORTS

### Introduction – overview of the liquidator reporting regime

As can be seen from Table 5 above, liquidators' section 682 reports accounted for almost 73% of all external inputs received by the Office during 2016 (2015: 74%). In summary, liquidators of companies that are in insolvent<sup>19</sup> liquidation are required by law<sup>19</sup> to report to the Office on the circumstances giving rise to the company's demise and on the conduct of any person who was a director of the company during the twelve months preceding the entry of the company into liquidation. The liquidator must also proceed to apply to the High Court for the restriction<sup>20</sup> of each of the directors, unless relieved of that obligation by the Office<sup>21</sup>.

The essential aims of this statutory reporting regime are to:

- afford the public a degree of protection by ensuring that persons who have been determined by the High Court as not having acted honestly and/or responsibly in the run up to a company's entering insolvent liquidation may, in respect of the mandatory five year period of restriction, only act as directors of other companies that meet minimum capitalisation requirements; and
- ensure that persons who, in the run up to a company's entering insolvent liquidation, have been judged to have acted honestly and responsibly can continue to engage in entrepreneurial activity through the medium of limited liability companies without sanction or penalty.

In discharging its role in this regard, the Office expects liquidators to provide it with all of the information which is relevant to the making of an appropriate decision. It also encourages liquidators to make evidence-based recommendations regarding relief/no relief by reference to the results of their investigations.

The Office considers granting relief where a liquidator advances an evidence-based justification in support of a claim that a director has acted honestly and responsibly in conducting the company's affairs. In making its decisions, the Office is keen to ensure that no director needlessly bears the burden of a High Court hearing where he or she has clearly demonstrated honest and responsible behaviour in the conduct of the affairs of the failed enterprise. In practice, the Office acts as a filter to remove the need for consideration by the High Court of those cases which do not appear to warrant its attention.

It is important to note, however, that ODCE decisions of '*no relief*' or '*partial relief*' do not constitute a finding of dishonesty or irresponsibility in respect of the directors concerned, and it would be inappropriate for any such inference or imputation to be drawn. It is solely a matter for the High Court (having heard the submissions of the liquidator and director(s) respectively) to determine if a Restriction Declaration should be made in respect of any particular company director.

### Restriction and Disqualification Undertakings

The Act<sup>22</sup> introduced, for the first time, a statutory framework under which individuals who might otherwise face the prospect of Court proceedings can avoid having to go to Court by voluntarily agreeing to a restriction or disqualification as applicable (i.e., by providing a legally binding Undertaking to that effect).

In summary, the Act provides the ODCE with discretion as to whether to offer an Undertaking. Where an offer is made by the ODCE, it must be made on the prescribed form, the layout and content of which is stipulated by the Statutory Instrument (the offer document being referred to as a "Notice"). The Notice must set out, *inter alia*, an outline of the circumstances, facts and allegations establishing the grounds for a restriction or disqualification together with details of the legal effects of an Undertaking for the person providing same.

There is no obligation on the recipient of a Notice to accept the offer (i.e., to provide the Undertaking). However, where the recipient intends to accept the offer, they must do so within 21 days (or within such longer period as may be allowed by the ODCE). During this offer period, neither the ODCE nor any other person who is aware of the issuing of the Notice may initiate proceedings for the restriction or disqualification of the recipient of the Notice on foot of the circumstances, facts and allegations as set out in the Notice.

<sup>18</sup> A company is insolvent when it is unable to pay its debts as they fall due

<sup>19</sup> Section 682 Companies Act 2014

<sup>20</sup> Where an individual is restricted under section 819 of the Companies Act 2014, s/he may only act as the director or secretary of a company for a period of five years thereafter provided that the company concerned meets certain minimum capitalisation requirements. In the case of a public limited company a minimum called up share capital of €500,000 is required. In the case of any other company, the corresponding figure is €100,000.

<sup>21</sup> The process and scope of liquidator reporting are outlined in three main ODCE publications, Decision Notice D/2002/3 as supplemented by Decision Notice D/2003/1 and Information Notice I/2009/1. These documents are available at [www.odce.ie](http://www.odce.ie)

<sup>22</sup> Sections 849 to 854 of the Companies Act, 2014

Where a recipient of a Notice decides to accept the offer and to return a duly signed Undertaking Acceptance Form, they will be subject to a Restriction or Disqualification Declaration/Order on the same basis as if a restriction or disqualification had been imposed by the High Court. Therefore, any subsequent breach of the terms of the restriction or disqualification will constitute a criminal offence and will be the same as a breach of a Court-imposed restriction or disqualification.

Notwithstanding that company directors or other persons may have voluntarily provided Undertakings, they can, nevertheless, still apply to the Court – at any time during the currency of the restriction or disqualification – seeking to be relieved, in whole or in part, from the terms of the restriction or disqualification, as applicable. Whilst any such applications will be considered by the ODCE on a case by case basis in the context of the particular facts and circumstances, having regard to the need to uphold the integrity of the process, it is anticipated that the ODCE will, in most instances, oppose such applications.

With reference to disqualification, the legislation provides that the maximum duration of disqualification that the ODCE can offer by way of Undertaking is five years. Therefore, in circumstances where the ODCE forms the view that a period of disqualification of in excess of five years is warranted (a determination that is made by reference to the particular facts and circumstances of each case and any relevant jurisprudence), an offer will not be made. Rather, the matter will be dealt with by way of an application to the High Court.

### Companies entering liquidation

As can be seen from the Table below:

- the total number of insolvent liquidations (i.e. creditors' and Court liquidations combined) continued to decline – with the 2016 levels representing 49% of the levels in 2012; and
- during 2016, the level of solvent liquidations continued to increase, accounting for 63% of all liquidations.

**Table 6 Companies entering liquidation: 2012 - 2016**

	2012	2013	2014	2015	2016
Creditors' liquidations	1,210	1,043	929	746	581
Court liquidations	107	76	78	70	61
<i>Total insolvent liquidations</i>	<i>1,317</i>	<i>1,119</i>	<i>1,007</i>	<i>816</i>	<i>642</i>
Members' liquidations	919	848	1,001	1,034	1,112
<i>Total insolvent liquidations<sup>23</sup></i>	<i>919</i>	<i>848</i>	<i>1,001</i>	<i>1,034</i>	<i>1,112</i>
<b>Total liquidations</b>	<b>2,236</b>	<b>1,967</b>	<b>2,008</b>	<b>1,850</b>	<b>1,754</b>

### Liquidators' s682 reports received – 2016

As can be seen from Table 5 above, a total of 944 liquidators' s682 reports were received during the year (2015: 1,269), of which:

- 683 were initial<sup>24</sup> reports (2015: 875); and
- 261 were subsequent<sup>24</sup> reports (2015: 394).

The continued decline in insolvent liquidations, which reflects the improving business environment more generally, is welcome. Based on current indications, a further reduction, in the order of approximately 15%, is anticipated over the course of 2017.

<sup>23</sup> Whilst the Office has no role in solvent (i.e. members') liquidations, data in respect of same has been included in the interests of completeness.

<sup>24</sup> An initial report is the first report received from a liquidator and is required to be submitted within 6 months of his/her appointment. In the majority of cases, the decision as to whether or not to grant relief is made based on this report. However, in some cases a subsequent report is required from the liquidator when his/her investigations have progressed further. In circumstances where a subsequent report is considered to be necessary, 'relief at this time' is usually granted in respect of the initial report.

The Table below provides details of the sectoral distribution of companies in respect of which liquidators' initial reports were received during the year.

**Table 7 Sectoral analysis of liquidators' initial section 682 reports received - 2016**

Sector	2016		2015	
		%		%
Wholesale & retail	174	25.5	181	20
Construction	92	13.5	208	24
Community, social & other	89	13	103	12
Manufacturing & printing	82	12	93	11
Hotels, bars & catering	75	11	104	12
Marketing & promotion	46	7	57	6
Real estate & renting	44	6	24	3
Technology & telecommunications	31	5	36	4
Financial & leasing	17	2	24	3
Transport & distribution	15	2	29	3
Agriculture, mining & marine	12	2	9	1
Recruitment & security services	6	1	7	1
<b>Total</b>	<b>683</b>	<b>100</b>	<b>875</b>	<b>100</b>

### Timeliness of liquidators' reporting

Over the course of the year, the Office issued 106 (2015: 124) notices to 57 (2015: 64) separate liquidators advising them that they were in default of their statutory reporting obligations. Most of these defaults were promptly rectified as a result of this action and, as a consequence, 96% of the first reports due during the year had been received by year end (2015: 96%). However, a small number of liquidators have been observed to repeatedly fail to comply with their reporting obligations. Appropriate enforcement action, up to and including criminal prosecution, may result from such persistent breaches of statutory obligations.

### Standard of liquidators' reporting

As reported in previous years, the standard of liquidators' reports received during the year was considered to be broadly satisfactory. However, in a small number of cases, the quality of reporting was not of the required standard. Where this arises, it is dealt with through engagement with the relevant practitioners. One factor that has been observed as having a bearing in this context is certain practitioners' relative inexperience of preparing reports for the Office. In that context, Table 8 below provides an analysis of the profile of liquidators undertaking insolvency engagements over the period 2011 to 2016. As can be seen from the Table, 125 liquidators undertook less than three liquidations in 2016 while 33 liquidators undertook seven or more liquidations. The vast majority of persons acting as liquidators are members of Prescribed Accountancy Bodies and, as such, are under IAASA's supervisory remit (see further elaboration below).

**Table 8 Profile of liquidators undertaking insolvent liquidations by number of engagements 2011 – 2016**

Number of liquidators	Number of engagements				Total
	<3	3-6	7-12	>12	
2011	182	57	30	27	296
2012	187	63	37	22	309
2013	203	46	16	21	286
2014	177	39	19	17	252
2015	160	63	19	23	265
2016	125	42	18	15	200

### Qualification for appointment as a liquidator or examiner

Also of relevance in the context of the foregoing is section 633 of the Act, which introduced new rules for qualification to act as a liquidator. The Act defines five categories of individuals who are entitled to act as a liquidator. These are:

- i. members of a Prescribed Accountancy Body holding a practicing certificate;
- ii. solicitors holding a practicing certificate;
- iii. members of any other professional bodies recognised for this purpose by IAASA (none currently);
- iv. persons qualified to act as a liquidator in another EEA<sup>25</sup> state; and
- v. persons with practical experience of windings-up and knowledge of relevant law prior to the commencement of the Act who are authorised by IAASA. Before granting an authorisation of this type, IAASA has to be satisfied, having consulted the ODCE, that the person is a fit and proper person to act as a liquidator.

An individual who has applied to IAASA for authorisation under (v) above may continue to act pending the determination of their application. As of the end of 2016, IAASA had advised the ODCE of the names of 24 individuals who have applied for authorisation under this provision. It is understood that these applications are currently under consideration by IAASA.

In addition to the qualification requirements prescribed in section 633, section 634 provides that all liquidators must have in place adequate professional indemnity insurance ("PII"). IAASA has issued Regulations prescribing the required level of PII required and these Regulations are available on IAASA's website<sup>26</sup>.

A related provision, section 519 of the Act, provides that a person can only act as an examiner if they are qualified to act as a liquidator.

<sup>25</sup> European Economic Area

<sup>26</sup> <http://iaasa.ie/getmedia/1a9c9ab1-994e-4491-8f6c-6d8a40d27f64/S-I-No-127-of-2016.pdf>

## SECTORAL DISTRIBUTION OF OTHER EXTERNAL INPUTS (I.E. EXTERNAL INPUTS OTHER THAN LIQUIDATORS' SECTION 682 REPORTS)

As can be seen from Table 5, in aggregate those external inputs other than liquidators' section 682 reports accounted for over 27% (2015: 26%) of total external inputs received during the year. The Table below provides an analysis of the sectoral distribution of those other external inputs.

**Table 9 Sectoral distribution of external inputs other than liquidators' section 682 reports**

Sector	2016		2015	
		%		%
Real estate & renting	80	23	71	16
Not a company	55	15	108	25
Community, social & personal	39	11	12	3
Health & social work	33	10	33	7
Construction	24	7	39	9
Finance & leasing	23	6	30	7
Manufacturing & printing	19	5	21	4
Wholesale & retail	16	5	39	9
Technology & telecommunications	15	4	17	4
Transport & distribution	14	4	18	4
Hotels, bars & catering	14	4	17	4
Marketing & promotion	12	3	14	3
Agriculture, mining & marine	7	2	11	3
Recruitment & security services	4	1	4	1
Other business sectors	0	0	5	1
<b>Total</b>	<b>355</b>	<b>100</b>	<b>439</b>	<b>100</b>

## COMPLAINTS

The Office receives substantial numbers of complaints annually from members of the public. During the year a total of 248 complaints were received (2015: 290), which accounted for 19% (2015: 17%) of all external inputs received. The Table below provides an analysis of the subject matter of complaints received.

**Table 10 Complaints received (analysed by character of primary reported default)**

	2016	%	2015	%
Annual/Extraordinary General Meeting related	33	14	34	12
Directors' conduct (responsibilities & filing)	31	12	75	26
Allegations of reckless/fraudulent/insolvent trading	28	11	20	7
Other	26	10	12	4
Allegations of forgery/furnishing of false information/ falsified documents	23	9	24	8
Relating to the issue of unpaid debts	19	7	18	6
Access to accounting records/minutes of meetings	14	6	9	3
Register of members related	12	5	13	4
Audit/auditor related	10	4	38	13
Receivership related	9	4	0	0
Registered address related	8	3	11	4
General shareholder rights issues	7	3	8	3
Acting as a director while a bankrupt/restricted/disqualified	7	3	0	0
Companies trading whilst struck off the Register/dissolved	5	2	8	3
Relating to improper use of the word "Limited"	5	2	0	0
Liquidation/phoenix activity	5	2	0	0
Display of business particulars	4	2	0	0
Issues relating to change of accounting year end	2	1	0	0
Improper accounting records	0	0	20	7
<b>Total</b>	<b>248</b>	<b>100</b>	<b>290</b>	<b>100</b>



## AUDITORS' INDICTABLE OFFENCE REPORTS

### Introduction – overview of the auditor reporting regime

Section 393(1) of the Act provides that, where, in the course of and by virtue of their carrying out of an audit, information comes into the possession of a company's auditors which leads them to form the opinion that there are reasonable grounds for believing that an indictable offence under the Act has been committed by the company, or an officer or agent of the company, the auditors are required to report that opinion to the Office. The Office has developed and published guidance to assist auditors in complying with their obligations in this regard<sup>27</sup>.

### Nature of suspected offences reported

During the year, a total of 69 indictable offence reports were received from auditors (2015: 100). The Table below provides an analysis of the nature of suspected offences notified in those reports. It should be noted that the number of reports received does not accord with the number of suspected offences reported as, in a number of instances, reports included reference to more than one suspected offence.

**Table 11 Analysis of suspected indictable offences reported by auditors**

	2016	%	2015	%
Directors' loan infringements	58	78	81	75
Failure to maintain proper accounting records	10	14	25	23
Issues relating to access to accounting records	2	3	0	0
Failure to prepare consolidated financial statements	3	4	0	0
Issues relating to the directors' approval of financial statements	1	1	0	0
Provision of false statements to auditors	0	0	2	2
<b>Total</b>	<b>74<sup>28</sup></b>	<b>100</b>	<b>108</b>	<b>100</b>

## EXAMINERS' REPORTS

Pursuant to section 534(6) of the Act, where an examiner is appointed to a company, s/he shall, as soon as may be after it is prepared, supply a copy of his or her report to the ODCE. Five such reports were received from examiners without prompting. A further 10 examiners submitted reports having been contacted and advised of their obligation to do so (total received 2015: 3).

## REFERRALS

As alluded to earlier in this Chapter, the Office forms part of a broader statutory framework that permits the exchange of confidential information between regulatory, enforcement and other relevant bodies, subject to safeguards and appropriate limitations. In that context, the Office receives referrals from other statutory bodies and entities from time to time. During the year under review, the Office received 28 (2015: 40) such referrals from a variety of sources.

<sup>29</sup> Decision Notice D/2006/2 – Revised Guidance on the Duty of Auditors to Report Suspected Indictable Offences to the Director of Corporate Enforcement. This was more recently supplemented by Information Notice I/2009/4 – Reporting Company Law Offences: Information for Auditors

<sup>30</sup> Whereas 69 auditors' reports were received, these included a total of 74 suspected indictable offences, i.e., some reports included indications of more than one suspected offence.

## PROFESSIONAL BODIES' INDICTABLE OFFENCE REPORTS

### Recognised Accountancy Bodies ("RABs")<sup>29</sup>

Where a RAB's Disciplinary Committee or Tribunal has reasonable grounds for believing that an indictable offence under the Act may have been committed by a person while that person was a member of the RAB, the RAB is required to report the matter to the Office<sup>30</sup>. Five such reports were received during the year under review (2015: 4).

### Prescribed Professional Bodies ("PPBs")

Similarly, where the Disciplinary Committee or Tribunal of a PPB finds that a member conducting a liquidation<sup>31</sup>, examinership<sup>32</sup> or receivership<sup>33</sup> has not maintained appropriate records, or has reasonable grounds for believing that the member has committed an indictable offence under the Act during the course of a liquidation, examinership or receivership, the PPB concerned is required to report the matter to the Office.

Pursuant to the Company Law Enforcement Act (Section 58) Regulations 2002<sup>34</sup>, the following were designated as PPBs (equivalent designations under sections 448, 558 and 688 of the Companies Act 2014 have yet to be given effect to):

- Association of Chartered Certified Accountants (ACCA);
- Chartered Institute of Management Accountants (CIMA);
- Institute of Certified Public Accountants in Ireland (ICPAI);
- Institute of Chartered Accountants in Ireland (ICAI);
- Institute of Incorporated Public Accountants (IIPA);
- Irish Tax Institute; and
- Law Society of Ireland.

No reports of this nature were received from PPBs during the year (2015: 0).

## LIQUIDATORS' REPORTS REGARDING POSSIBLE CRIMINALITY

In addition to their reporting obligations under section 682 as detailed above, in accordance with section 723(5) of the Act, liquidators are required, in circumstances where it appears that any past or present officer of the company concerned has been guilty of any offence in relation to the company, to make a report to the DPP and also to refer the matter to the ODCE. This reporting obligation extends to all liquidations, solvent and insolvent (i.e. both Members' and Creditors' Voluntary liquidations and Court liquidations) alike. No such reports were received by the Office during the year (2015: 2).

## DISCLOSURES UNDER THE PROTECTED DISCLOSURES ACT 2014<sup>35</sup>

Section 22 of the Protected Disclosures Act 2014 provides that every public body shall prepare and publish, not later than 30 June each year, a report in relation to the immediately preceding year in a form which does not enable the identification of the persons involved. The abovementioned report is required to specify:

- i. the number of protected disclosures made to the public body;
- ii. the action (if any) taken in response to those protected disclosures; and
- iii. such other information relating to those protected disclosures and the action taken as may be requested by the Minister for Public Expenditure & Reform from time to time.

The Office's report under section 22 is set out at Appendix 3 to this Report.

<sup>29</sup> A RAB is an accountancy body that is permitted to authorise its members and member firms, subject to those members having satisfied certain criteria, to act as statutory auditors and audit firms respectively. There are six RABs, i.e., the:

- Association of Chartered Certified Accountants (ACCA)
- Institute of Certified Public Accountants (ICPAI)
- Institute of Chartered Accountants in England & Wales (ICAEW)
- Institute of Chartered Accountants in Ireland (ICAI)
- Institute of Chartered Accountants of Scotland (ICAS)
- Institute of Incorporated Public Accountants (IIPA)

<sup>30</sup> Section 931(4) of the Act

<sup>31</sup> Section 688 of the Act

<sup>32</sup> Section 558 of the Act

<sup>33</sup> Section 448 of the Act

<sup>34</sup> S.I. 544 of 2002

<sup>35</sup> The Protected Disclosures Act 2014 is available at <http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/pdf>

## INTERNAL INPUTS

### INTRODUCTION

As will be evident from the earlier part of this Chapter, the volume of external inputs received is such that most case files opened within the Office are opened in response to what are termed "external inputs", e.g., auditors' reports, liquidators' reports and complaints from members of the public. Alongside those external inputs, the Office also generates what are termed "internal inputs" through a proactive approach to enforcement of the Act.

The nature and composition of internal inputs varies from year to year having regard to a number of relevant considerations, including:

- the Office's particular compliance and/or enforcement objectives in that particular year or over a particular cycle;
- thematic and/or once-off issues arising;
- available staff resources and the associated skillsets; and
- other relevant facts and circumstances.

Internal inputs can, therefore, range across a variety of enforcement headings. Illustrative examples include:

- actions focussing on particular cohorts of persons, e.g., persons who are undischarged bankrupts, restricted or disqualified;
- civil or criminal enquiries commenced on own initiative;
- actions in respect of dissolved insolvent companies; and
- actions relating to liquidator performance/behaviour.

### ACTIONS FOCUSING ON PARTICULAR COHORTS OF PERSONS, E.G., PERSONS WHO ARE UNDISCHARGED BANKRUPTS, RESTRICTED OR DISQUALIFIED

During the course of the year enquiries were initiated in a number of instances in which suspicions arose that persons who were undischarged bankrupts, disqualified or restricted may have been acting as company directors or in other specified roles (e.g., such as auditors) while not permitted to do so.

### INVESTIGATIONS COMMENCED ON OWN INITIATIVE

As indicated above, the Office initiates civil and criminal enquiries and investigations on its own initiative where this is considered necessary or otherwise appropriate having regard to the underlying facts and circumstances. The triggers for such actions can include, for example:

- issues identified internally;
- issues referred internally;
- issues identified on foot of a review of material filed with the CRO or other relevant documentation;
- issues identified through monitoring of litigation;
- issues identified through a review of press reportage, the internet, social media etc.

Depending upon the nature of the underlying circumstances, these enquiries and investigations may be furthered through the use of:

- the Director's civil investigative powers;
- the Director's criminal investigative powers; and/or
- the powers vested in the Gardaí seconded to the Office by virtue of those officers being members of An Garda Síochána.

## DISSOLVED INSOLVENT COMPANIES

The Office characterises as “*dissolved insolvent companies*” those companies that:

- are struck off the Register for failure to file their annual returns; and which
- at the date of strike off, had liabilities, whether actual, contingent or prospective.

It is open to the Office to apply to the High Court for the disqualification of the directors of such struck off companies<sup>36</sup>. However, company law also provides<sup>37</sup> that the Court cannot disqualify a person who demonstrates to the Court that the company had no liabilities at the time of strike off or that those liabilities had been discharged before the initiation of the disqualification application. In considering the sanction to be imposed, the Court may instead restrict the director(s) where it adjudges that disqualification is not warranted under the particular circumstances<sup>38</sup>.

Where there is evidence to suggest that a company was insolvent at the date upon which it was struck off the Register, it is the Office's policy to consider seeking the disqualification of the company's directors. This is because, by allowing the company to be struck off the Register, the directors avoid bringing the company's existence to a conclusion in the appropriate manner, i.e., through the appointment of a liquidator. By not appointing a liquidator, the company's directors also avoid the scrutiny of their behaviour as provided for by section 682 of the Act.

Where it appears to the Office that a director is liable to be disqualified in these circumstances, it may offer the individual concerned the opportunity to voluntarily submit to a Disqualification Undertaking. In the context of the foregoing, also worthy of note is the fact that, where a company is struck off the Register, its remaining assets are vested in the Minister for Public Expenditure & Reform in accordance with the provisions of the State Property Act 1954.

## ACTIONS RELATING TO LIQUIDATOR PERFORMANCE/BEHAVIOUR

One of the statutory functions of the Director is to:

“...exercise, insofar as the Director considers it necessary or appropriate, a supervisory role over the activity of liquidators and receivers in the discharge of their functions under this Act”<sup>39</sup>.

Whilst the section 682 process, as outlined earlier in this Chapter, provides the Office with a means of indirectly supervising certain aspects of liquidators' work, from time to time the Office considers it appropriate or otherwise necessary to engage in more direct supervision of liquidators' work. This, more direct, supervision is effected through the exercise of the powers conferred by section 653 of the Act<sup>40</sup>.

Section 653 of the Act provides that the Director may:

- either on his own initiative or on foot of a complaint from a member, contributory or creditor of a company, request production of a liquidator's books for examination – either in relation to a particular liquidation process, or to all liquidations undertaken by the liquidator; and
- seek the liquidator's answers to any questions concerning the content of such books, and all such assistance in the matter as the liquidator is reasonably able to give.

The powers conferred upon the Director by section 653 are accompanied by certain safeguards and limitations, i.e.:

- the Office must inform the respondent liquidator of the reason(s) as to why the request is being made; and
- a request may not be made in respect of books relating to a liquidation that has concluded more than six years prior to the request.

## QUANTUM OF INTERNAL INPUTS - 2016

During the course of 2016, a total of 128<sup>41</sup>(2015: 69) internal inputs were generated.

<sup>36</sup> Section 842(h) of the Companies Act 2014

<sup>37</sup> Section 843(3) of the Companies Act 2014

<sup>38</sup> Section 845(3) of the Companies Act 2014

<sup>39</sup> Section 949(1)(e) of the Companies Act 2014

<sup>40</sup> Section 446 of the Act includes a similar provision relating to receivers

<sup>41</sup> Relating to the broad categories of bankruptcy, disqualification, restriction and examinership.

## PART B: THROUGHPUTS

Generally speaking, inputs, irrespective of whether from internal or external sources, result in the opening of a case file. In the case of liquidators' section 682 reports, cases generally reach a natural conclusion when a decision has been taken as to whether or not to relieve the liquidator of the obligation to seek the company's directors' restriction and, where relief is granted, the file is usually closed.

Where relief is not granted, or only partially granted (i.e., granted in respect of some, but not all, of the directors), the Office will usually invite the relevant director(s) to provide a Restriction (or Disqualification, if applicable) Undertaking. If the offer of an Undertaking is not accepted (or if the case is not one in which, in the Office's assessment, an Undertaking offer is appropriate), a Court application will have to be made by the liquidator. The Office monitors the progress through the Courts of the relevant restriction or disqualification proceedings and the outcome is recorded once the proceedings have been determined. However, the Office also reviews cases from time to time where concerns come to its attention regarding, for example:

- credible suggestions of excessive liquidators' fees;
- apparent failures to distribute assets on a timely basis; and
- apparent failures to conclude a liquidation within a reasonable timeframe.

In the case of other inputs, such as, for example, auditors' reports, public complaints, protected disclosures, referrals etc., a file is opened and the subject matter is examined to determine, in the first instance, whether the matter is one that comes within the Office's remit. Thereafter, cases are progressed on the basis deemed most appropriate to their individual circumstances, with methods of progression including, for example:

- meeting the complainant, typically with a view to obtaining an enhanced understanding of the issues being complained of;
- meeting the directors (for example, in a case relating to directors' loans);
- exercising civil powers, such as, for example, issuing demands to:
  - companies and their directors for the production of the minutes of meetings and statutory registers;
  - companies and their directors for the production of the company's books and records;
  - liquidators for the production of their books and records, i.e., the liquidator's own books and records as distinct from those of the company in liquidation (which may, in parallel, be sought);
  - auditors requiring the provision of supplementary information regarding an indictable offence report received;
  - persons acting, or purporting to act, as auditors for the production of evidence of their qualifications;
  - bankrupts who are acting as company directors and secretaries, seeking sworn statements relating to their insolvency status;
  - liquidators requiring that they file outstanding section 682 reports;
- exercising criminal powers, such as, for example, executing search warrants, exercising the powers of arrest and detention etc.;
- liaising with other statutory authorities potentially being in a position to assist the Office's enquiries, for example through the sharing of relevant information.

Upon completion of the Office's enquiries, a decision is made as to the most appropriate course of action to be taken. This can include, for example:

- the decision to take no further action (for example, where enquiries suggest that there has been no breach of company law or where the breach is minor in nature and enforcement action would, as a consequence, be disproportionate);
- a decision not to take enforcement action on this occasion but, rather, to issue a warning that any recurrence will precipitate enforcement action (for example, where the breach has been rectified and/or remediated and rectification/remediation has been evidenced to the ODCE's satisfaction);
- referral to other statutory authorities or professional bodies of matters relevant to their respective remits;
- the issuing of civil directions, e.g., directions to companies and/or their directors requiring the remedying of stated defaults within prescribed timeframes;
- the initiation of civil proceedings, i.e., Court applications for the purpose of seeking specified remedies;
- the initiation of summary criminal proceedings or referral of the matter to the DPP for consideration as to whether charges should be directed on indictment.

Set out in the following Tables are details of the various caseloads progressed by the Office during the year under review.

Details of the outputs that flow from the processing of the Office's various caseloads are detailed in the next section of this Chapter.

**Table 12 Throughput of liquidators' section 682 reports - 2016**

Section 682 reports on hand at 1 January, 2016		478
New reports received during 2016	683	
Less: Reports in respect of which determinations made during 2016	737	
<b>Section 682 reports on hand at 31 December, 2016</b>		<b>424</b>

Detail regarding the Office's determinations on liquidators' reports is provided later in this Chapter.

**Table 13 Throughput of other cases - 2016**

Other cases on hand at 1 January, 2016		70
New cases opened during 2016	483	
Less: Cases concluded during 2016	460	
<b>Other cases on hand at 31 December, 2016</b>		<b>93</b>

## PART C: OUTPUTS

### OUTPUTS FROM THE SECTION 682 PROCESS

#### Relief decisions made on liquidators' reports

The Office made definitive decisions (i.e. decisions other than to grant 'Relief at this time') on 736 liquidators' reports during 2016 (2015: 1,005), with a further 254 decisions made to grant 'Relief at this time' (2015: 362).

Of the definitive decisions taken during 2016, a total of 545 were made in respect of initial reports (2015: 784), with a further 191 being made in respect of subsequent reports (2015: 221).

The decisions taken in respect of initial and subsequent reports respectively are analysed in the following two Tables.

**Table 14 Analysis of decisions taken in respect of initial liquidators' section 682 reports**

Decision type	2016	%	2015	%
Full relief <sup>42</sup>	503	74	744	79
No relief <sup>43</sup>	27	4	28	3
Partial relief <sup>44</sup>	15	2	12	1
Relief at this time <sup>45</sup>	137	20	156	17
<b>Total</b>	<b>682</b>	<b>100</b>	<b>940</b>	<b>100</b>

**Table 15 Analysis of decisions taken in respect of subsequent liquidators' section 682 reports**

Decision type	2016	%	2015	%
Full relief <sup>42</sup>	138	45	174	41
No relief <sup>43</sup>	43	14	33	8
Partial relief <sup>44</sup>	10	3	14	3
Relief at this time <sup>45</sup>	117	38	206	48
<b>Total</b>	<b>308</b>	<b>100</b>	<b>427</b>	<b>100</b>

Complete lists of the directors, and associated companies, in respect of which full relief and relief at this time respectively were granted during 2016 are available at [www.odce.ie](http://www.odce.ie).

<sup>42</sup> Full relief is granted in cases where the Office forms the opinion that, based on the information available (including the liquidator's report(s)), all of the directors of the insolvent company appear to have acted honestly and responsibly in the conduct of the company's affairs.

<sup>43</sup> No relief is granted in cases where the Office forms the opinion that, based on the information available (including the liquidator's report(s)), there is insufficient evidence to demonstrate that any of the directors of the insolvent company acted honestly and responsibly in the conduct of the company's affairs.

<sup>44</sup> Partial relief is granted in circumstances where, based on the information available (including the liquidator's report(s)), the Office forms the opinion that some, but not all, of the directors of the insolvent company appear to have acted honestly and responsibly in the conduct of the company's affairs.

<sup>45</sup> 'Relief at this time' is granted in cases where the Office is satisfied that the liquidator needs more time in which to progress/complete his/her investigations into the circumstances giving rise to the company's demise. Similarly, on occasion, the Office considers it necessary to postpone making a definitive decision due to the complexity of certain companies' affairs and the associated necessity for supplemental engagement with the liquidators concerned. Where 'Relief at this time' is granted, the liquidator will be required to submit a subsequent report.

## Restriction and Disqualification Undertakings

As detailed earlier in this Chapter, following the commencement of the Act on 1 June, 2015, the Office introduced a procedure whereby those directors, in respect of whom it is determined that the liquidator should not be relieved of the obligation to apply to the High Court for their Restriction, may be invited to voluntarily submit to a Restriction (or Disqualification, if applicable) Undertaking. The Table below sets out the number of Undertaking offers issued during the year under review, together with details of the number of Undertaking offers accepted and declined respectively.

**Table 16 Undertaking offers issued, accepted and declined**

	2016		2015	
	Cases	Directors	Cases	Directors
Number of cases eligible for the issue of Undertaking offers	<b>89</b>	<b>151</b>	<b>26</b>	<b>49</b>
<i>Comprising of:</i> Restrictions	84	143	26	49
Disqualifications	5	8	0	0
Number of cases in which offers actually issued	<b>85</b>	<b>146</b>	<b>22</b>	<b>39</b>
<i>Comprising of:</i> Restrictions	80	138	22	39
Disqualifications	5	8	0	0
Number of cases in which offers were accepted, i.e., one or more Undertakings provided	<b>65</b>	<b>101</b>	<b>13</b>	<b>22</b>
<i>Comprising of:</i> Restrictions	60	93	13	22
Disqualifications	5	8	0	0
Number of cases in which offers were not accepted	<b>17</b>	<b>28</b>	<b>4</b>	<b>7</b>
<i>Comprising of:</i> Restrictions	17	28	4	7
Disqualifications	0	0	0	0
Number of cases in which offers were still under consideration at year end:	<b>3</b>	<b>17</b>	<b>5</b>	<b>10</b>
<i>Comprising of:</i> Restrictions	3	17	5	10
Disqualifications	0	0	0	0
<b>Total</b>	<b>85</b>	<b>146</b>	<b>22</b>	<b>39</b>

## Outcome of liquidators' Court applications

As indicated earlier in this Chapter, where not granted relief by the Office and where invitations to submit to Undertakings are not accepted, liquidators are required to apply to the High Court seeking the restriction of relevant company director(s). In certain instances, liquidators will, as a consequence of their own investigations and based on their assessment of director behaviour, opt to seek to have directors disqualified rather than restricted. The Table below sets out details of the results of liquidators' Court applications as delivered by the High Court during the year.

**Table 17 Results of liquidators' Court applications**

	2016		2015	
	Cases	Directors	Cases	Directors
Restriction Declarations granted	48	90	83	150
Disqualification Orders granted	7	11	10	14
Declarations or Orders not granted	11	23	14	34
<b>Total</b>	<b>62<sup>46</sup></b>	<b>124</b>	<b>107</b>	<b>198</b>

<sup>46</sup> Total does not equate to the sum of the above due to the fact that, in five cases, some directors were restricted while others were disqualified.



On foot of Undertakings or Court Orders, a total of 183 (2015: 172) directors were restricted and 19 (2015: 14) directors disqualified. Further analysis of the Orders made by the Court on foot of liquidators' applications and Undertakings is provided in Appendices 4 to 6 of this Report.

### Facts and circumstances considered by the High Court in making Disqualification Orders and by the ODCE in offering Disqualification Undertakings

Set out below, for illustrative purposes, are examples of the types of issues that were considered by the High Court in making Disqualification Orders or to which regard was had by the ODCE in offering Disqualification Undertakings (and in response to which Undertakings were accepted). The full list is set out at Appendix 5 to this Report. In all instances the Orders/Undertakings were on foot of liquidators' section 682 reports following, where necessary, the provision of additional information and clarification as sought by the ODCE:

- a company involved in operating a nursing home had its registration cancelled by the local District Court on the application of the Health Information & Quality Authority. Following the withdrawal of the registration, the directors left the State and took no further role in the affairs of the company. They failed to place the company in liquidation, allowing it to be struck-off for the non-filing of statutory returns. An uncontested Employment Appeals Tribunal hearing awarded former employees in the region of €181k and one of the former employees eventually had to petition for the winding up of the company in order for payment of the award to be made. The directors failed to co-operate with the liquidation, failed to provide any books and records to the liquidator, failed to provide a sworn Statement of Affairs and failed to respond to the questionnaire issued by the liquidator (High Court Disqualification);
- a director of a contract cleaning company had failed to declare in excess of €600,000 in tax liabilities in respect of PAYE/PRSI, VAT and Corporation Tax, which were identified by the Revenue Commissioners through an audit. The majority of the PAYE/PRSI liability arose from the transfer of a personal asset (office premises) as consideration for a director's loan balance with no independent valuation carried out at the time (High Court Disqualification);
- the Revenue Commissioners petitioned the High Court for the winding up of a company that was engaged in the provision of security services. The petition was in response to estimated accumulated tax liabilities in excess of €300,000. The liquidator reported that the directors made excessive wage payments to themselves and to individuals believed to be related parties and, moreover, withdrew cash from the company's bank account for wages in an amount that was substantially in excess of employees' wages. The directors also failed to account for all sales made by the company (High Court Disqualification);
- the longest disqualification in the history of company law was handed down by the High Court against a director of a collapsed investment firm who was found to have misappropriated approximately €66.5m in client funds. Two other directors were also given lengthy disqualifications from acting as company directors. The firm's failure to maintain proper accounting records rendered it difficult, and in some cases impossible, to determine where misappropriated client funds had been diverted to. The company was liquidated in 2011 after a High Court-appointed investigation by two Central Bank inspectors found "...systemic and deliberate misuse" of clients' money, the majority of which represented transfers to syndicated property investments. Sums of more than €2.3 million were diverted for the benefit of two of the directors and the company's books and records were kept in such a manner as to conceal the improper transfer of those funds (High Court Disqualification);
- a company that operated a self-service online event registration website was placed in liquidation when clients experienced difficulties in collecting receipts from the company. The company allowed customers to use the site to create their own web pages to advertise and sell tickets for events. It subsequently emerged that the main director was siphoning off significant amounts of funds from the company. The software developed for the company should have been intended and designed to direct payments to a trust account or the actual account of the event organiser. A total of €967,276 had been siphoned off by this director to a PayPal account controlled exclusively by him (High Court Disqualification);
- the directors of a company involved in operating a public house engaged in systematic and deliberate under-declaration and under-payment of VAT for a period of at least two years, resulting in undeclared debts to the Revenue Commissioners of in excess of €200,000. The directors continued to trade while insolvent during these two years. The liquidator reported concerns over the maintenance of proper accounting records and had serious concerns that cash was being withdrawn from the business in an improper manner (Disqualification Undertaking);
- a company involved in the construction industry failed to discharge tax liabilities of in excess of €700,000. Moreover, bank liabilities may have been discharged from property sale proceeds in preference to tax liabilities and following the issuing of payment demand proceedings by the Revenue Commissioners (Disqualification Undertaking);

- the directors of a company involved in selling overseas properties sold a number of properties in both Turkey and Bulgaria on behalf of clients but, instead of forwarding the net proceeds to the owners of the properties, used those proceeds to pay amounts to other clients and to discharge company salary costs. The Revenue Commissioners petitioned for the winding up of the company following a Revenue Attachment Order being placed on the company's bank account. The liquidator reported that limited tax payments were made during the lifetime of the company. The sworn Statement of Affairs indicated tax liabilities of approximately €102k at liquidation and approximately €715k in unsecured creditors, much of which related to property owner funds not repaid. The company had also been prosecuted for various breaches of the Property Services Regulations for carrying on unlicensed property service activities (Disqualification Undertaking);
- in a further unrelated case, directors of a construction company failed to discharge the VAT arising on the sale of houses by the company in circumstances where the VAT liability was, or ought to have been, known at the time of sale of each of the houses (the amounts that should have been remitted to the Revenue Commissioners instead being used to discharge loan liabilities). The directors also transferred two houses each for their own benefit or for the benefit of their families (Disqualification Undertaking);
- a company involved in operating two retail outlets failed to record cash receipts for one retail outlet for nearly 12 months and for the second outlet for some 3 months prior to the cessation of trading (or, at a minimum, failed to make any such records available to the liquidator). The absence of proper books and records meant that the liquidator was unable to determine the correct amount of tax liabilities owed by the company or to otherwise review tax compliance by the company. The liquidator indicated that tax returns had been filed on the basis of guesses of the amount of tax due, which he considered reckless. The liquidator also confirmed that he was unable to satisfy himself that cash payments to the directors or staff were properly recorded. This left open the possibility that PAYE/PRSI returns made were false (Disqualification Undertaking);
- a company engaged in the provision of financial advisory and accounting services failed to discharge a VAT liability of close to €160,000, which was raised following a Revenue audit. A substantial distribution of company assets - in excess of €212,000 - was made to a connected company despite the commencement of the audit. Notwithstanding that a body corporate is not permitted to perform audit services, the company in question issued a number of audit reports that it was not eligible to do so and a principal director of the company may have forged client signatures in various accounts filed with CRO. The liquidator also believed that the company acted as its own auditor in breach of company law (High Court Disqualification);
- a company involved in operating a public house engaged in a practice whereby recorded cash takings were used to fund an abnormally high level of cash payments for goods and services throughout the lifetime of the company. Company stock was routinely transferred from the company to the principal director's new venture and product for this new venture was paid for from company cash assets. Cash wage payments were made to staff and remittances in respect of PAYE and other payroll taxes were made irregularly and tax returns were not made for some periods. The liquidator estimated that the undischarged liability for PAYE and other payroll taxes was €186,814. The undischarged VAT liability was €84,512. During the 12 months prior to liquidation, payments totalling €42,428 were made for the principal director's personal benefit and for his associated businesses (Disqualification Undertaking).

## OUTPUTS FROM ENFORCEMENT WORK

The Office's enforcement work takes a variety of forms, including:

- engaging with company directors and other interested parties with a view to securing the voluntary rectification/remediation of instances of non-compliance;
- exercising the Director's powers to secure compliance and/or to progress enquiries and investigations;
- exercising the Director's functions to permit/facilitate compliance;
- seeking civil remedies in the High Court in response to indications of non-compliance;
- taking summary criminal proceedings before the District Court;
- where, having conducted an investigation and concluded on the basis of same that the indications of suspected criminality are such that trial on indictment may be warranted, referring investigation files to the DPP for consideration as to whether the matters therein warrant criminal prosecution before the Circuit Court; and
- referring indications of possible breaches of regulatory provisions other than those relating to company law to other relevant regulators (incorporating also the referral of relevant matters to professional bodies).

The principal outputs associated with the Office's enforcement activities are detailed below.

## SECURING VOLUNTARY RECTIFICATION/REMEDATION

### Directors' loans infringements

In 60 cases (2015: 89) where suspected directors' loan infringements had been reported by auditors, or had otherwise come to attention, the Office's actions resulted in rectifications (including the repayment/reduction of loans) totalling €17m (2015: €21m). Such rectifications are in the interests of affected companies' members and creditors.

### Failure to comply with accounting standards

Section 291(3) of the Act requires companies to prepare their financial statements, *inter alia*, in accordance with applicable accounting standards. Section 291(9) provides that failure to comply with that requirement is a Category 2 offence on the part of the company and any officer in default. In 2 (2015: 0) instances where companies' failure to comply with accounting standards had been reported to the Office by way of indictable offence reports, warnings issued to the companies in question. Specifically, the directors of the companies in question were afforded the opportunity to address the underlying non-compliance and warned that, in the event of reoccurrence, enforcement action was the likely response.

### Persons acting as company directors while not permitted to do so

During the year, the registers of disqualified, deemed disqualified and restricted persons, as maintained by the Registrar of Companies, were reviewed. Arising from that review, a total of 83 instances were identified where persons appeared to be acting in contravention of such Orders/provisions. Following intervention by the Office, the individuals' positions were regularised.

### Total cautions issued

In addition to the foregoing, cautions issued to a total of 59 companies (2015: 73) on a variety of matters.

## SECURING COMPLIANCE AND PROGRESSING ENQUIRIES AND INVESTIGATIONS THROUGH THE EXERCISE OF THE DIRECTOR'S STATUTORY POWERS

A broad range of legislative provisions were utilised during the course of the year under review in order to both secure compliance with company law and to progress enquiries and investigations respectively. Specific outputs in that regard included:

- serving 3 statutory directions under section 778 of the Act (2015: 4), requiring the recipient companies to produce specified books and documents;
- serving 2 statutory directions under section 780 of the Act (2015: 0), requiring third parties to produce specified books and documents relating to books and documents required under production orders served under section 778;
- serving 2 statutory requests under section 653(3) of the Act (2015: 0), requiring former statutory auditors of a company, now in liquidation, to produce certain books and records for examination;
- serving 3 orders under section 7A of the Bankers' Books Evidence Act 1879 (2015: 0), requiring that the respondent banks should permit an officer of the Director to be at liberty to inspect and take copies of certain banking records required for the investigation of specified indictable offences under the Companies Act;
- 106 statutory directions (2015: 128), pursuant to section 797(1) of the Act, requiring liquidators to comply with their reporting obligations under section 682;
- 2 directions under section 175(5) of the Act requiring the convening of companies' Annual General Meetings ("AGM") (2015: 2). These directions were issued following the consideration of complaints received from members of the companies concerned.

## PERMITTING/FACILITATING COMPLIANCE THROUGH THE EXERCISE OF THE DIRECTOR'S STATUTORY FUNCTIONS

During the year, two requests (2015: 0) were received from companies seeking a direction disapplying the limitation in section 288(9) of the Act, under which, ordinarily, a company may not alter its current or previous year end date more than once in a five year period. In both instances, the requisite approval was granted under section 288(10)(c) of the Act.

## CIVIL REMEDIES SOUGHT

### High Court application

During the year one application was made to the High Court in the context of proceedings that had been initiated by a company seeking that it be wound up by the High Court. The company in question was one in respect of which a criminal investigation by the Office had already been commenced. On the consent of all relevant parties, the High Court made an order directing the provisional liquidator (who the Court had, on that same day, appointed to the company) to allow the Office to forthwith take possession of certain original and copy documentation of, or relating to, the company's affairs, subject to certain specified safeguards which were put in place to vindicate the privacy entitlements of certain third parties.

### Dissolved insolvent companies

Several thousand companies are struck off the Register in any given year. However, only some of these would actually be insolvent (i.e., unable to discharge their debts as they fall due) at the date of strike off. Many more would typically never have traded or would have discharged all outstanding liabilities prior to being struck off. Against this backdrop, the Office has historically pursued a policy of seeking to identify companies where there is evidence of material unpaid debts having existed at the date of strike off. In the case of such companies, the Office's policy has historically been to consider seeking the disqualification of such companies' directors by way of applications to the High Court.

During 2016, two pre-existing applications were adjudicated upon by the High Court, details of which are set out in the Table below.

**Table 18 Dissolved Insolvent Companies: High Court Determinations**

Company	High Court determination
Prorep Limited	On 11 April, 2016 the Court disqualified two persons for three years each. The Court further measured costs in the sum of €3,500 towards the ODCE's costs.
Sally Anne's Temple Limited	On 11 April, 2016 the Court disqualified one person for three years. The Court further measured costs in the sum of €3,500 towards the ODCE's costs.

No new applications were made during the year. The primary factors contributing to the lack of new applications were:

- the knock-on implications of the Office's appeal to the Court of Appeal in the case of "Director of Corporate Enforcement V Walsh & Ors" [2016] IECA 2 (the circumstances surrounding which were set out in detail the Office's 2015 Annual Report). Specifically, pending clarification of the principles and issues involved by the Court of Appeal, the office had taken a decision not to initiate any new applications;
- competing enforcement priorities; and
- staffing issues.

The Court of Appeal allowed the Office's appeal and overturned the High Court's decision. The principal aspects of the Court of Appeal's judgement were set out in the Office's 2015 Annual Report. In delivering its judgement, the Court of Appeal imposed Orders of Restriction for five years each on the three respondents pursuant to section 150 of the Companies Act 1990. The Court of Appeal further made an order for costs in the sum of €4,000 towards the ODCE's costs.

## Other civil litigation

During the year under review, the Office was also involved in miscellaneous civil proceedings, details of which are set out in the Table below.

**Table 19 Miscellaneous Civil Proceedings**

<p>Relief applications under section 152 of the Companies Act 1990 / section 822 of the Companies Act 2014</p> <p>In three instances during the year, persons who were the subject of Restriction or Disqualification Orders indicated to the Office their intention to apply to the High Court for relief from the terms of those orders.</p>	<p>In the first case (Mr. Keith McGowan / Camlin Electric Limited / Tarmonbarry Hydroelectric Limited), given that the individual concerned (who was seeking relief for the purposes of facilitating employment abroad) had served more than 4 years of the 5 year restriction term and in light of his relative youth, the ODCE did not object to the application. The Court granted the relief sought.</p> <p>In the second case (Mr. Fearghal O’Nolan / Pierce Contracting Limited), having elicited further information and clarification as considered necessary, the ODCE did not object to this application. The Court granted the relief sought.</p> <p>In the third case (Mr. Michael Keane / National Irish Bank Limited), following engagement with the ODCE, the prospective applicant withdrew his proposed application for relief and agreed to make a contribution of €5,000 towards the ODCE’s costs.</p>
<p>Application by the Director of Corporate Enforcement to be joined as a Notice Party to existing High Court proceedings</p> <p>Newbridge Credit Union Limited (In liquidation) – the High Court – 2016 No. 362 COS – Jim Luby v Ben Donnelly + Others</p>	<p>In September 2016, proceedings were served on the ODCE. The litigation dealt with the winding up of a Credit Union, which was taking place pursuant to Part 7 of the Central Bank and Credit Institutions (Resolutions) Act 2011 and, specifically, whether the restriction provisions of the Companies Act 2014 should/would apply to the winding up. The ODCE was successful in its application on 21 November, 2016 to be joined to the liquidation proceedings as a Third Party, on the same day that the Credit Union Development Association (CUDA) also successfully applied to be joined to the proceedings as an <i>Amicus Curiae</i><sup>47</sup>. The parties were directed to exchange Outline Written Legal Submissions in advance of the hearing then scheduled for 6 March, 2017. That hearing date has now been vacated with the hearing now listed to take place over two days commencing Tuesday 20 June 2017.</p>

## SUMMARY CRIMINAL PROCEEDINGS

As has been set out in detail in previous Annual Reports, in recent years the Office has made a conscious policy decision to devote less resources towards pursuing criminality on the less serious end of the spectrum in favour of concentrating its resources on investigating more serious indications of wrongdoing. Consistent with that repositioning policy, the Office did not initiate any summary prosecutions during the year.

<sup>47</sup> Friend of the Court

## INDICTABLE CRIMINAL PROCEEDINGS

Consistent with the aforementioned policy, during the year the Office had a significant level of engagement with the Office of the DPP, details of which are set out below.

### Files referred to the DPP

During 2016, the ODCE submitted 5 files to the DPP, details of which are set out in the Table below.

**Table 20 Files submitted to the DPP in 2016**

File	Status at year end
1	Charges directed (summary disposal): <ul style="list-style-type: none"> <li>• one count of Deception contrary to section 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001</li> <li>• one count of Using a False Instrument contrary to section 26 of the Criminal Justice (Theft and Fraud Offences) Act 2001</li> <li>• one count of Furnishing False Information contrary to section 242(1) of the Companies Act 1990</li> </ul>
2	File under consideration by the DPP
3	File under consideration by the DPP
4	File under consideration by the DPP
5	File under consideration by the DPP

### Criminal trials

Previous Reports have included details of the proceedings initiated by the DPP in which Mr. Sean FitzPatrick, the former Chairman and Chief Executive of Anglo Irish Bank Corporation plc, was charged with 21 alleged breaches of section 197 (i.e., false statements to auditors) and 6 alleged breaches of section 242 (i.e., furnishing false information) of the Companies Act 1990. Mr. FitzPatrick's retrial in connection with those charges began before His Honour Judge Aylmer and a jury in the Dublin Circuit Criminal Court on 21 September 2016. At that time it was envisaged that the trial would be likely to conclude by the end of 2016. However, the bulk of the Court's time between September and December was taken up with legal issues which required to be dealt with in the absence of the jury, and in respect of which no reporting is permissible during the currency of the trial. As at the date of submission of this Report, the trial is still ongoing.

A separate trial of Mr. William McAteer and Mr. Patrick Whelan, also former directors of Anglo Irish Bank Corporation plc, was scheduled to commence in the Dublin Circuit Criminal Court on 16 January 2017. The DPP had directed that both accused should be tried on indictment in respect of alleged breaches of section 297 of the Companies Act 1963 (i.e., fraudulent trading). On 19 December 2016, in advance of the trial date, Mr. McAteer entered a plea of guilty. On 21 December 2016, Mr. Whelan entered a plea of guilty to a charge of a breach of Section 44(1) of the Companies Act 1990 (i.e., licensed bank's register of lending to directors and connected persons) in lieu of the alleged offence under section 297. In early 2017 His Honour Judge Martin Nolan sentenced Mr McAteer to imprisonment for a term of two and a half years, and fined Mr Whelan €3,000, in respect of the offences to which they had pleaded.

During the year His Honour Judge Terence O'Sullivan directed that the trial of Mr David Drumm, a former director and Chief Executive of Anglo Irish Bank Corporation plc, should commence on 12 January 2018 for the following offences with which he was charged:

- 1 alleged contravention of Regulation 76(2) & (4) of the Transparency (Directive 2004/109/EC) Regulations 2007, as applied by section 21 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006;
- 7 alleged contraventions of section 25 of the Criminal Justice (Theft and Fraud Offences) Act 2001;
- 7 alleged contraventions of section 243(1) of the Companies Act 1990 and section 240(1)(b) of the Companies Act 1990, as inserted by section 104 of the Company Law Enforcement Act 2001;
- 16 alleged contraventions of section 60(1) & (15) of the Companies Act 1963, as amended by section 15 of the Companies (Amendment) Act 1982 and section 240(8) of the Companies Act 1990, as inserted by section 104 of the Company Law Enforcement Act 2001.

As at the date of this Report, that trial is still scheduled to commence in January 2018. However on 7 April 2017 another trial of Mr Drumm, that had been scheduled to commence on 24 April 2017, was adjourned and a new trial date has not yet been fixed. In the light of the postponement of that (earlier) trial of Mr Drumm, it is conceivable that the commencement date of 12 January 2018 for the second trial might yet have to be put back.

## REFERRALS TO PROFESSIONAL AND OTHER REGULATORY BODIES

Whilst there is an obligation upon the Office to keep confidential information that comes into its possession, there is statutory provision<sup>48</sup> for the disclosure of information to certain third parties (including other regulatory bodies and certain professional bodies) provided that certain prescribed criteria are satisfied.

Pursuant to the foregoing provision, 1 referral (2015: 7) was made to a RAB during the year. Having regard to its statutory remit *vis-à-vis* the RABs, such referrals are always copied to IAASA.

Issues typically referred to RABs include:

- suspected instances of members purporting to conduct audits whilst not authorised by their professional bodies to do so or where otherwise precluded from doing so by virtue of law or professional obligations;
- non-reporting, or delayed reporting, of suspected indictable offences;
- matters relating to the nature of audit opinions provided in respect of companies limited by guarantee;
- failure to respond to queries raised by the Office subsequent to receipt of indictable offence reports.

In addition to the foregoing, the Office makes referrals to other regulatory bodies as considered necessary or otherwise appropriate.

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<sup>48</sup> Section 956 of the Companies Act 2014