



Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach

Office of the Director
of Corporate Enforcement



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Enforcement under the Companies Act

ODCE Update

Kevin Prendergast
Head of Enforcement, ODCE



Retained Enforcement Powers

- Right to seek appointment of Inspector
 - Inspector for SME's now through Circuit Court
 - New obligation to notify Director by third parties
- Access to books and records of company in liquidation



Retained Enforcement Powers

- Access to company records
 - New ground - “affairs of company conducted in an unlawful manner”
- Search and seizure, including IT
- Order to comply with the Act
- Power to inspect Liquidators’ books



New powers

- S.763 ODCE can appoint Inspector for share dealing by directors
- S.780 Power to inspect books and records of other companies where offence suspected in a company
- S.800 Power to seek disclosure order re shares and debentures



New powers

- S.335 ODCE can seek to confirm entitlement to audit exemption
 - Access to such books and records
 - Furnish information
 - Breach a category 4 offence



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New insolvency powers

- S.761 Petition to wind up a company if it is “just and equitable” based on information obtained in performance of Directors’ functions



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ODCE power to Wind up

- Section 569(1)

“A company may be wound up by the court—

...

(g) if the court is satisfied, on a petition of the Director, that

it is in the public interest that the company should be wound up;”



ODCE power to Wind up

- Director may petition the court
- In practice Officers will do so under delegated power
- Section 573, court may appoint a liquidator, and indeed a provisional liquidator
- Standard rules for official winding up will apply



ODCE power to Wind up

- The “Watchdog” proposal
- May be guided by referrals from other bodies:
 - Central Bank
 - Competition and Consumer Protection Commission
 - Etc
- As Insolvency is not a State service, will be a costs/resources impact for the Office



Undertakings

- Concept already well established in the UK
- Aims to remove from courts the majority of restriction and disqualification proceedings
- Replace by administrative structure operated by ODCE
- Reduction in costs and administration for liquidators and courts
- Reduction in costs and stress for directors



Restriction

- S.819 Companies Act, limits on directors of insolvent companies
- Directors must have acted honestly and responsibly
- Directors must cooperate with liquidator in the winding up
- New capital thresholds €500,000 for a plc, €100,000 for all other companies
- CLG's can now have a restricted director if a member undertakes to contribute €100,000



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Restriction

- Relief can now be sought at any time, not just within one year



Disqualification

- Defined in s.838
- Conduct makes a person unfit s.842
- Director of a company struck off the Register with debts owing
- Repeated Companies Act defaults
- Conviction on indictment of any offence relating to a company “as prescribed” s.839



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Disqualification

- If disqualified abroad and a director here, must notify CRO. Failure triggers disqualification



Restriction Undertakings s.852

- Liquidator will report to the ODCE indicating whether restriction warranted
- ODCE will at their discretion make an offer to some or all of directors
- Liquidator will not be relieved, 2 month clock or such further period as granted
- Grounds will be set out



Restriction Undertakings

- Liquidator and ODCE precluded from initiating restriction proceedings pending receipt of undertaking s853
- Director signs and returns restriction acceptance document (statutory notice), action permanently barred
- No return, liquidator instructed that no relief, continues to court



Disqualification Undertakings s.850

- Can be in relation to both ODCE and third party applications
- ODCE issues notice to director where he believes there are grounds
- Grounds will be set out
- 21 days to accept or proceedings will issue
- Director signs and returns restriction/disqualification acceptance document (statutory notice)



Liquidators

- S.633 – Rules for Liquidators
 - Member prescribed accountancy body
 - Solicitor
 - Member other body approved by IAASA
 - Qualified in other EEA State
 - 2 years' practical experience and approved by IAASA/ODCE
- S.634 – Must have PII



Categorisation of offences

- Current situation
 - Most offence sanctions by means of s240 Companies Act 1990
 - Penalty on summary conviction – fine of up to €2,500 and/or up to one years imprisonment
 - On Indictment – fine of up to €22,220 and up to five years' imprisonment



Categorisation of offences

- Certain offences have higher tariffs
 - Fraud – on indictment a fine of up to €11,102 and up to seven years in jail
 - Transparency Directive – fines of up to €1million and up to five years in jail
 - Market Abuse Directive – fines of up to €10million and up to ten years in jail



Categorisation of offences

- New offence categories
- Set out in section 871
- Interacts with Fines Act to ensure that lower level fines continue to be upgraded consistent with other legislation



Categorisation of offences

- Category 1 offence
 - Summary charge – Class A fine and/or up to 12 months imprisonment
 - Indictment – Fine of up to €500,000 and/or up to ten years imprisonment



Categorisation of offences

- Category 2 offence
 - Summary charge – Class A fine and/or up to 12 months imprisonment
 - Indictment – Fine of up to €50,000 and/or up to five years imprisonment



Categorisation of offences

- Category 3 offence
 - Summary charge only – Class A fine and/or up to 6 months imprisonment
- Category 4 offence
 - Summary charge only – Class A fine only



Categorisation of offences

- Class A fine under Fines Act 2010 is currently €5,000
- Categories 1 and 2 are indictable and therefore reportable by auditors to ODCE
- Will continue to be some “hors categorie” offences, for example under Market Abuse and Transparency



Categorisation of offences

- Daily penalties for continued breach
 - Category 1 - €5,000 if on indictment, Class D fine (€1,000 currently) if summary
 - Category 2 - €1,000 if on indictment, €100 if summary
 - Category 3 and 4 - €50
- Court can also order a remedy of the breach



Categorisation of offences

- CLRG has provided guidance on the categorisation of future offences
 - Proportionality
 - Technical/Filing offences to be category 3 or 4
 - Public policy reason for offences to be indictable
 - Classification should have regard to possible impact on all relevant stakeholders



Enforcement strategy

- Main expansions to ODCE powers already in law
 - Companies (Amendment) Act 2009
 - Criminal Justice Act 2011
- Significant changes for ODCE are in insolvency
 - Restriction and disqualification undertakings
 - Winding up in public interest



Enforcement strategy

- Most common offences remain
 - Failure to keep proper books
 - Unqualified auditors
 - Breach of restriction/disqualification orders
- SAP procedure for directors' loans can validate
 - Risk is personal liability if directors' statutory declaration made without reasonable grounds



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Enforcement strategy

- Strategy continues to be to move criminal prosecution towards more high level crime, and to explore alternative methods of dealing with low level offending
- Vast majority of reports to the Office will continue to be dealt with administratively



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THANK YOU

Further information is available at:

www.odce.ie

www.cro.ie

www.djei.ie