



Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach
Office of the Director
of Corporate Enforcement

Covid-19 and the insolvency-related functions of the ODCE

Directors of companies that have recently become unable to pay their debts as they fall due, or that are at risk of becoming so unable in the near term, are understood to have concerns regarding the operation of certain company law provisions - in particular, regarding the perceived risk of having a declaration of restriction made against them in circumstances where they have acted in good faith and the company's inability to pay debts as they fall due is as a consequence of the Covid-19 pandemic ("the pandemic").

Where the inability to pay company debts as they fall due has arisen as a consequence of the pandemic, the Office of the Director of Corporate Enforcement ("ODCE") notes a number of key considerations that are relevant to the ODCE's determination as to whether directors of such companies will be able to demonstrate that they have acted honestly and responsibly, and, if not, whether they should be offered restriction undertakings or otherwise face restriction applications before the High Court. The aforementioned considerations include, but are not limited to, the following:

1. Liquidators of companies in insolvent liquidation are obliged to submit an initial statutory report to the ODCE within 6 months of their appointment.
2. Liquidators of such companies are obliged to apply to the High Court for the restriction of the relevant directors unless relieved of that obligation by the ODCE (and unless the relevant director(s) have been offered, and have accepted, a restriction undertaking).
3. The ODCE will generally grant relief to liquidators from their obligation to make a restriction application in any case where the available evidence clearly demonstrates that a company director has acted honestly and responsibly in the conduct of a company's affairs.
4. Consistent with the fact that a majority of company insolvencies arise as a result of legitimate business failure, the ODCE grants such relief in the large majority of cases. Only a small minority of directors of insolvent companies are offered restriction undertakings or otherwise face the prospect of being restricted by the Courts.
5. The ODCE considers each company's case on its own merits, taking into account both the report(s) submitted by the liquidator and any other relevant information which may have been obtained independently of the liquidator.

6. The ODCE would generally not consider directors to have acted dishonestly or irresponsibly in circumstances where the company has become insolvent as a consequence of events largely, and genuinely, outside the directors' control. This has been the position adopted throughout the period of almost 20 years that the ODCE has been adjudicating upon liquidators' reports. It is the actions taken, or not taken, by the directors in response to financial difficulties being faced by the company that will inform the assessment as to whether directors should face a restriction application (or undertaking as the case may be).
7. Directors may currently, or may shortly, find themselves in the position where they believe that companies of which they are directors are unable to pay their debts as they fall due and, as such, may be concerned as to the implications of any decision to continue trading in such circumstances.
8. Whilst continuing to trade while insolvent would generally give rise to a significant risk that the directors concerned could face restriction proceedings (and possibly other consequences depending upon the relevant facts and circumstances), the ODCE notes that the Courts have demonstrated a willingness to afford some latitude for a continuation of trading for a short period in certain circumstances. The extension of any such latitude by the Courts would generally be contingent upon (i) there having been a reasonable prospect that the company would be able to trade out of its difficulties in a relatively short timeframe; and (ii) the directors having acted in good faith and having acted honestly and responsibly in all other respects.
9. In the case of those companies that do enter insolvent liquidation over the coming months, the ODCE will have due regard to the impacts of the pandemic as it carries out its functions of examining, and adjudicating upon, liquidators' reports. In that context, issues that the ODCE will expect liquidators to have examined, and which the ODCE will itself have regard to, will include:
 - a) the adequacy of the directors' processes and procedures for monitoring the company's financial position on an ongoing basis;
 - b) whether, and if so at what point, directors sought professional advice relating to the insolvency/impending insolvency;
 - c) the basis upon which the company's directors formed the view that the company would be able to trade out of its difficulties within a reasonable timeframe (which might include, for example, the potential impact of access to Government grants, loans and other supports, both already announced and in prospect);

- d) the length of time that trading continued after it had become apparent, or should have been apparent, that the company was insolvent;
- e) the extent to which the company's financial position continued to deteriorate, as well as the nature of any additional liabilities that accrued, during the period during which the directors knew, or ought to have known, that the company was insolvent;
- f) in cases where there are material tax liabilities involved, the extent to which such liabilities arose prior to, or during, the pandemic and, where they arose during the pandemic period, the extent to which the company availed of, and complied with, the Revenue Commissioners' requirements for deferred payment and warehousing of liabilities;
- g) the steps taken to reduce costs and/or to restructure the business.

10. In the context of the subject matter of this statement, the ODCE notes the Revenue Commissioners' stated position that a declaration made as part of an application for the COVID-19 Temporary Wage Subsidy Scheme is not a declaration of insolvency.

11. The ODCE is independent in the discharge of its statutory functions and must have regard to the facts and circumstances in each individual case and, as such, cannot be prescriptive in a general sense as to how it might discharge its functions in respect of future cases. However, provided that directors' decisions and judgements were:

- a) made on the basis of objectively verifiable evidence;
- b) based on assessments and assumptions that were reasonable in the context of the circumstances pertaining at the relevant times;
- c) made in good faith and the directors otherwise acted honestly and responsibly,

it is unlikely that the ODCE will consider that the company directors concerned should be restricted.

OFFICE OF THE DIRECTOR OF CORPORATE ENFORCEMENT

4 JUNE 2020