

Helpful ODCE Guidance for Directors and Liquidators during COVID-19

This article has been created by Hayes solicitors exclusively for IoD members.

Introduction

The Office of the Director of Corporate Enforcement (ODCE) recently issued new guidance outlining the implications of COVID-19 on its insolvency related functions. The statement provides an update on how they will assess the actions of directors of companies which have gone or will go into an insolvent liquidation as a consequence of the pandemic. The guidance is undoubtedly a welcome publication during this difficult time for almost all businesses.

Background

The Companies Act 2014 requires a liquidator to send a report to the ODCE and, unless the ODCE directs otherwise, to bring an application to Court seeking Orders restricting the directors of the company.

The mandatory nature of this process is of significant concern to directors of companies which have recently become insolvent as a consequence of COVID-19. Confronted by the unexpected, exceptional and uncertain implications of COVID-19, prudent directors of most Irish companies have had to consider the potential impact on solvency and the consequences associated with being a director of an insolvent company. Directors and business groups have sought greater certainty for directors seeking to balance the risk of personal liability for their companies' debts with the need to continue trading through the uncertainty.

ODCE Statement

As noted in our [previous article](#) other jurisdictions (including the UK and Australia) have introduced temporary legislative changes suspending certain wrongful trading provisions for a limited period, in order to help protect and reassure directors. It appears from the ODCE's statement that Ireland will not follow that approach but will rely instead on the broad flexibility given under Irish legislation to assess directors' actions. Although the ODCE cannot say that no directors will be subject to restriction order proceedings due to becoming insolvent as a result of COVID-19, the ODCE's guidance should represent significant reassurance to directors who act in a professional manner, and in the best interests of the company, their employees and their creditors in the current exceptional circumstances.

The ODCE confirmed that generally it will 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. The ODCE's guidance also added that, as most company insolvencies arise as a result of legitimate business failure, the ODCE grants relief in the large majority of cases.

The ODCE's guidance outlines helpfully the issues that will be considered when reviewing a liquidator's report - a welcome reminder of the important steps that need to be taken to manage the affairs of a company which is on the brink of, or is trading through, insolvency. Equally, the guidance should serve to remind the directors of all such companies that a failure to take each of these steps may well be viewed negatively by the ODCE should a liquidation ever come about.

Key Considerations in Assessing Honesty and Responsibility:

As the ODCE carries out its functions of examining and adjudicating upon liquidators' reports, some of the key questions to be considered in assessing whether to bring restriction proceedings against a director include:

- On what basis did the directors decide that the company would be able to trade out its difficulties within a reasonable timeframe? This may include the impact of access to government grants, loans and other supports, both announced and expected.
- Did any tax liabilities of the company arise before or during the pandemic? If the liabilities arose during the pandemic, to what extent did the company avail of, and comply with, the Revenue Commissioners' requirements for deferred payment and warehousing of liabilities?
- How adequate were the directors' procedures for monitoring the company's financial position on an ongoing basis?
- Did the directors seek professional advice relating to the impending insolvency?
- How long did the company continue trading after it became apparent, or should have been apparent, that the company was insolvent?
- To what extent did the company's financial position continue to deteriorate during the period in which the directors knew (or ought to have known) that the company was insolvent?
- What steps were taken to reduce the costs and/or restructure the business?

Summary

The ODCE's guidance confirms that it will consider each case on its own merits by taking into account the liquidator's report and any other relevant information obtained independently from the liquidator. Significantly, the ODCE will now consider also the impact that COVID-19 has had on the financial position of the company and it will have due regard to the genuine efforts made by directors to rescue their business in these unprecedented times.

The guidance concludes by stating that, provided that the 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, and (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 should be restricted.

Directors should remember, despite the helpfulness of the ODCE's guidance, that company directors are not absolved of their duties and obligations of stewardship of the company. In these times of exceptional challenges continuous ongoing review and analysis of its financial position should be carried out and documented to ensure informed and appropriate decisions are made, as we have recommended in our earlier article. In addition, as soon as the risk of insolvency needs consideration, the extra steps and key considerations highlighted above and in the ODCE guidance should be addressed immediately.

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