An Roinn Fiontar,
Trádála agus Fostaíochta
Department of Enterprise,
Trade and Employment

# Regulatory Impact Analysis - General Scheme of a Companies (Corporate Enforcement Authority) Bill

## Updated at publication and initiation of Bill

June 2021

| Regulatory Impact Analysis (RIA) | | |
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| **Department/Office:**<br><br>**Department of Enterprise, Trade and Employment** | **Title of Legislation:**<br><br>**General Scheme of a Companies (Corporate Enforcement Authority) Bill** | |
| **Stage:**<br>Updated at publication and initiation of Bill | | **Date:**<br><br>**June 2021** |

**Related Publications:**

Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework – Ireland combatting "white collar crime", Government of Ireland (November 2017)

Report of the Company Law Review Group on Corporate Governance (November 2017)

Report of the Company Law Review Group on Shares and Share Capital (April 2017)

Report of the Company Law Review Group on Protection of Employees and Unsecured Creditors (June 2017)

General Scheme of the Companies (Corporate Enforcement Authority) Bill

A review of structures and strategies to prevent, investigate and penalise economic crime and corruption Implementation Plan

Report of the Joint Oireachtas Committee on Enterprise, Trade and Employment Pre-legislative scrutiny of the General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018

**Available to view or download at:**

merrionstreet.ie/en/News-Room/News/Government_Publishes_a_Package_of_Measures_aimed_at_Fighting_White_Collar_Crime.html

www.clrg.org/publications/clrg%20corporate%20governance%20report.pdf

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| www.clrg.org/publications/shares%20and%20share%20capital%20clrg%20report.pdf<br><br>www.clrg.org/publications/clrg%20adhoc%20committee%20report.pdf<br><br>HRG Implementation Plan.pdf (justice.ie)<br><br>Joint Committee on Enterprise, Trade and Employment calls for new Corporate Enforcement Authority to be given powers and resources to tackle 'white collar crime' – 20 Apr 2021, 11.30 – Houses of the Oireachtas |
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**Part 1: Description of issue and policy objectives**

**<u>The issue to be addressed</u>**

A package of “Measures to Enhance Ireland’s Corporate, Economic and Regulatory Framework” was published by the Government on 2 November 2017.

That package included the following measures, referred to as ‘Actions’ –

- Establishing the Office of the Director of Corporate Enforcement as a company law enforcement agency, rather than as an Office of the Department of Enterprise, Trade and Employment, to provide greater autonomy over its resources (Actions 1-5 inclusive)
- Examine the Company Law Review Group’s Report on Corporate Governance and bring forward proposals, including for legislative change, as appropriate (Actions 10 and 11)

The Programme for Government 2020 also includes the following commitment in relation to the ODCE: *Establish the Office of the Director of Corporate Enforcement (ODCE) to be a stand-alone statutory body.*

**<u>Policy objectives</u>**

The first policy objective is to give effect to Actions 1-5 of the Government’s 2017 package of measures and establish the Office of the Director for Corporate Enforcement as an agency that is distinct from the Department of Enterprise, Trade and Employment. That objective includes giving effect to the Government’s full plan for the new agency, as elaborated in the 2017 package. That plan encompasses strengthening the autonomy of the new agency over its resources, structuring it as a commission with full time Members and equipping it to adapt to the challenges it faces to thoroughly investigate suspected breaches of company law.

The second policy objective is to give effect to Actions 10 and 11 of the Government’s 2017 package of measures concerned with corporate governance.

Since the Government’s Decision in late 2017, the Department has identified other policy objectives and considers that implementation of the Government’s Decision, which requires primary legislation, is an appropriate opportunity to consider the implementation of those objectives too.

Therefore, a third policy objective at this time is to implement some recommendations of the Company Law Review Group. These are recommendations that relate to provisions in the Companies Act 2014, on shares and share capital and on the Protection of Employees and Unsecured Creditors. The group adopted these reports in 2017 and submitted them to the then Minister as part of its Work Programme for the period 2016/2018.

A fourth policy objective is to address a potential issue identified by the Companies Registration Office, to do with the reporting obligations of companies with respect to their directors and secretaries. This arises from the fact that individuals may use different forms of their name when submitting Forms, such as Annual Returns, to that Office. While this practice is legal, it could be used to hide possible breaches of company law provisions, such as the prohibition on a person being a director of more than 25 companies (section 142 of the Companies Act 2014) or on being both a director and secretary of the same company in certain circumstances (section 129). Under the current procedures for Annual Returns and other Forms, there is no method for the CRO to verify if different names or forms of names refer to just one person.

**Part 2: Identification and description of options**

**Option 1: Do nothing**

The option to "do nothing" is not feasible with respect to the primary policy objectives identified above. This is for the following reasons –

1. The Government made the decision to establish the Office of the Director of Corporate Enforcement as an agency, with a commission structure. This decision must be given effect.
2. Giving effect to this decision requires new primary legislation to amend the Companies Act 2014.
3. The Government set a deadline of end Q2 of 2019 for the enactment of this legislation in its 2017 package of measures.
4. The Government decided that the recommendations of the Company Law Review Group on Corporate Governance should be considered for legislative implementation, as appropriate.

5. The then Minister for Enterprise, Trade and Employment accepted other recommendations of the Company Law Review Group, and these require primary legislation for effect.

The option to "do nothing" is relevant to the fourth policy objective, to address an issue with a company reporting to the Companies Registration Office. However, to do nothing in this case would be to retain the current situation whereby there is no mechanism for the Companies Registration Office to verify whether different names supplied on company returns refer to the same person or not. In the absence of such verification, it will remain difficult to detect if a person is not complying with certain provisions of the Companies Act 2014.

**Option 2: Propose legislation to implement the Government's Decision to establish the Office of the Director of Corporate Enforcement and to implement certain recommendations of the Company Law Review Group**

This Option is to prepare a General Scheme of a Companies Bill that is in line with the Government's Decision to adopt the package of "Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework" in October 2017.

That General Scheme would –

- Establish the Office of the Director for Corporate Enforcement as an agency, with a commission structure
- Give legislative effect to some of the recommendations of the Company Law Review Group on Corporate Governance.

While this Option gives full effect to the Government's Decision of October 2017, it does not meet the other policy objectives set out above. In particular, it does not give effect to recommendations in two other Company Law Review Group Reports and it does not address the Department's concerns with respect to the register of companies.

Therefore, Option 2 is not proposed.

**Option 3: Propose legislation to implement the Government's Decision of October 2017 and to address other company law matters.**

This Option is to prepare a General Scheme of a Companies Bill that implements the Government's Decision of October 2017 and gives effect to the other policy objectives that have developed since that Decision was made.

As implementation of the Government's Decision requires primary legislation to amend the Companies Act 2014, the Department considers that it is appropriate to expand that legislation to cover the related policy objectives. Given the time required to prepare and enact legislation, it is also an efficient approach.

The key additional measures that the Department proposes to include in this approach are amendments to the Companies Act 2014 to –

1. Implement recommendations of the Company Law Review Group on Shares and Share Capital. These are intended to reinstate provisions that were inadvertently omitted during, or address perceived anomalies as a result of, the modernisation and consolidation of the Companies Acts 1963-2013 into what is now the Companies Act 2014.
2. Add to the grounds for an application to the High Court for a Restriction Order. This follows from proposals in the Company Law Review Group's Report on Protection of Employees and Unsecured Creditors.
3. Oblige company directors to supply their Personal Public Service Number to the Registrar of Companies when applying to incorporate a company, making their annual return, or notifying of change in directors or secretary. This information will not be publicly available and will be required for verification purposes only.

As Option 3 addresses each of the policy objectives set out in Part 1 of this RIA, it is the preferred option.

**Part 3: Views of stakeholders**

A package of "Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework" was adopted following a review by the then Ministers for Business, Enterprise and Innovation; Finance and Public Expenditure and Reform; and Justice and Equality over the course of the summer of 2017. The package was then published, on 2 November 2017.

The Company Law Review Group is a statutory advisory expert body charged with advising the Minister for Enterprise, Trade and Employment on the review and development of company law in Ireland. It consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and unions), regulators (implementation and enforcement bodies) and representatives from government departments. The General Scheme gives effect to recommendations included in two reports of the CLRG, namely, its reports on corporate governance and on shares and share capital, both published in 2014. These provisions are encompassed in Parts 3 and 4 of the General Scheme and most may be categorised as technical in that they correct omissions, provide clarifications or rectify perceived anomalies. As a rule, they arise from the large consolidation and modernisation project that took place between 2012 and 2014 and resulted in the Companies Act 2014.

In developing the General Scheme and the Bill, the Department also consulted with the –

- Companies Registration Office
- Department of Social Protection
- Department of Justice
- Office of the Attorney General
- Office of the Director for Corporate Enforcement

**Pre-legislative scrutiny on the General Scheme**

The Department published the General Scheme on its website and submitted it, on behalf of the Minister, to the Joint Oireachtas Committee on Business, Enterprise and Innovation for their consideration. Pre-legislative scrutiny commenced but was not completed at the time of the dissolution of the Dáil. Officials from the Department attended the Committee on 5 February 2019 with the Director of Corporate Enforcement attending on 19 February 2019. The Chair of the Company Law Review Group and the Law Reform Commission appeared before the Committee on 2 April 2019.

The Joint Committee decided to seek a submission from the Director of Corporate Enforcement in relation to the case of the Director of Public Prosecutions V Seán FitzPatrick under the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 in light of the protections it would afford the Director. This procedure culminated in motions passed in the Houses on 17 December 2019 conferring power to send for persons, papers and records, which is a precondition for consent to issue a direction. By letter to the then Minister dated 19 December 2019, the Joint Committee further advised that the consent of other Committees was required in order for the Director's submission to be protected under the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013. These consents were being pursued when the dissolution of the Dáil took place.

As the pre-legislative scrutiny process was not completed, scrutiny of the General Scheme of the Bill was introduced again into the new Joint Committee for Enterprise, Trade and Employment. The Director and the Tánaiste attended the Committee on 22nd

January and the Tánaiste and Minister Troy attended on 29th January. The report of the Joint Committee was published on 20 April 2021.

## Part 4: Proposals to give effect to Option 3

## Companies (Corporate Enforcement Authority) Bill

The Department prepared a General Scheme of a Companies (Corporate Enforcement Authority) Bill with the following structure -

- Part 1 contains the general provisions, such as definitions and repeals;
- Part 2 establishes the new Corporate Enforcement Authority, set out its functions and powers;
- Parts 3, 4 and 5 give effect to recommendations of the Company Law Review Group;
- Part 6 also addresses some outstanding technical issues and introduces a new reporting requirement for companies to verify the names of directors and secretaries.

The final Bill reflects the General Scheme set out above as follows –

**Preliminary and General**
**Part 1** of the Bill sets out the standard provisions on citation, commencement, definition and repeal.

**Amendment of Principal Act – Corporate Enforcement Authority**
**Part 2** of the Bill (Sections 4 to 13) invests the new Authority with all the same functions that the Director of Corporate Enforcement has with some modifications to reflect the new commission structure.

**Amendment of Principal Act – Share Capital**
Part 3 of the Bill (Sections 14 to 25) contains amendments to the Companies Act 2014 relating to shares and share capital. It includes a further amendment included in the Bill after the drafting of the General Scheme which arose in 2021. It clarifies definitions arising from the migration of Irish securities from Euroclear UK and Ireland to Euroclear Bank Belgium following the UK Exit from the EU.

**Amendment of Principal Act – Corporate Governance**
**Part 4** of the Bill (Sections 26 to 30) contains amendments to the Companies Act 2014 relating to corporate governance.

**Amendment of Principal Act – Miscellaneous**
**Part 5** makes other amendments to the Companies Act 2014 (Sections 31-35) including the requirement for directors of companies to supply their PPS number for verification purposes by the CRO.

**Consequential Amendment to Irish Collective Asset Management Vehicles Act 2015**
**Part 6** (Section 36) is a technical amendment which amends references in Irish Collective Asset-management Vehicles Act 2015 as a result of the changes made by this Bill.

**Schedules 1 and 2**

Schedule 1 inserts a new schedule into the Companies Act 2014 providing for matter such as the seal of the Corporate Enforcement Authority.

Schedule 2 is technical and provides for amendments to the Companies Act 2014 in respect of references to the Director of Corporate Enforcement.

The Department considers that the regulatory impact of Parts 1 – 4 inclusive of the Bill is not significant for the following reasons –

1. The Bill does not assign additional functions to the new agency. The focus is on organisational reform with the agency taking over the current functions of the Director of Corporate Enforcement.
2. The Bill does not create any new company law offences.
3. The Bill does not introduce any new compliance requirements for business or others.

Part 5 includes a new requirement for company directors and secretaries. This is set out in section 35 and is designed to meet the fourth policy objective outlined in the previous chapter of this RIA, namely to enable the Registrar of Companies to verify information supplied to her.

## Part 5: Analysis of Costs, Benefits and Impacts of Option 3

**Option 3:**

The Government's Decision to establish the Office of the Director of Corporate Enforcement as an agency with a commission structure has benefits.

To start, the main objective is to give the new Authority greater autonomy over the deployment of its resources and its organisational structure. The Authority will have the ability to recruit staff according to the skills it has identified as necessary. This will support flexibility in adapting to the challenges of investigating increasingly complex breaches of company law.

The commission structure will enable a Chairperson who is one of up to three members of the commission to delegate responsibilities for specific functions to the other full time commissioners, as appropriate. This will support an increasing case load if required and facilitate organisation around dedicated areas of work and / or expertise.

The regulatory impact is not changed as the new authority will take over the same functions as the Office of the Director of Corporate Enforcement. There are no new reporting obligations.

Under the Corporate Enforcement Authority Bill, the Minister for Enterprise, Trade and Employment will have overall responsibility for the new Authority. The budget and staffing numbers will also be subject to the consent of the Minister and the Minister for Public Expenditure and Reform.

The General Scheme also proposes that staff of the new Authority will be civil servants. The Department is cognisant that an independent and new agency must have the resources necessary to effectively carry out its functions. The table below sets out the 2021-2022 Budget.

**Office of the Director of Corporate Enforcement/new Corporate Enforcement Authority**

| Year | Pay | Non-Pay | Contingency Legal Costs | Total |
|---|---|---|---|---|
| **2021** | **€3.740 million** | **€2.317million** | **€0.05 million** | **€6.107 million** |
| **2022** | **€4 million** | **€2.317 million** | **€0.05 million** | **€6.367 million** |

**Resources**

Given the role and remit of the new Authority as envisaged by Government it is appropriate that additional staffing resources will be needed to enable the Authority to undertake its statutory functions. The underlying rationale for establishing the Office as an independent statutory agency is to ensure that it has the legal and organisational wherewithal to provide for effective corporate enforcement in Ireland and that its successful establishment is a Government priority.

An increase in staff to a total of 69.8 is proposed, representing an increase of 23. This would be made up of 53.8 Civil Service Staff - an increase of 14 on the current number. Additional Garda Síochána resources will also be required based on the new Corporate Enforcement Authority's (CEA) statutory functions, the CEA's assessment of its resourcing needs and the Government's vision for the new Authority. Garda resourcing of the CEA will be provided in line with An Garda Síochána's new operating model and the involvement of the CEA as provided for under the Hamilton Review Implementation Plan.

The proposed increase in Civil Service staff comprises:
2 Principal Officers
Head of Finance and ICT;
Head of Governance, Compliance and Communications

4 Assistant Principal equivalents
Digital Forensic
Enforcement lawyer
ICT Manager
HR Specialist

1 Higher Executive Officer
Finance and ICT
2 Executive Officers
Finance and ICT
Human Resources

5 Clerical Officers
4 in Enforcement
1 in Finance and ICT

The benefit of implementing recommendations of the Company Law Review Group on Corporate Governance is greater clarity in the law. There are no additional costs identified for these proposals

The benefit of implementing recommendations of the Company Law Review Group on Shares and Share Capital is greater clarity in the law. There are no additional costs identified for these proposals.

The benefit of introducing grounds for the granting of restriction orders is to further ensure directors comply with their obligations to shareholders and employees in winding-up situations.

The benefit of obliging directors to supply their PPSN to the Registrar of Companies is that the Registrar will be able to verify the identity of company directors. This information will be supplied by company directors at the same time as they are legally required to submit company returns. Therefore, the cost of compliance with this provision should be minimal.

## Part 6: Enforcement, Compliance and Review

Irish company law is kept under regular review by the Department of Enterprise, Trade and Employment.