



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

Post Enactment Report

Companies (Corporate Enforcement
Authority) Act 2021



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Companies (Corporate Enforcement Authority) Act 2021

Background and Purpose

In October 2017 Government adopted a package of “measures to enhance Ireland’s corporate, economic and regulatory framework”. One of those measures was to establish the Office of the Director of Corporate Enforcement (ODCE) as an agency, in the form of a commission, as opposed to an Office within the then Department of Business, Enterprise and Innovation. This approach would build on the organisational and procedural reforms implemented by the Director of Corporate Enforcement since 2012 and provide the organisation with more autonomy and flexibility to adapt to the challenges it faces in its investigation and prosecution of increasingly complex breaches of company law, including the ability to recruit the required skills and expertise. The Government’s package of measures also committed to considering any recommendations of the Company Law Review Group (the CLRG) regarding corporate governance in the Companies Act 2014. The CLRG is the statutory advisory expert body charged with advising the Minister for Enterprise, Trade and Employment on the review and development of company law in Ireland.

To give effect to the measure a General Scheme of the Companies (Corporate Enforcement) Bill was published in December 2018. The Scheme received extensive scrutiny over a protracted period. Pre-legislative scrutiny by the Oireachtas Committee on Business, Enterprise and Innovation commenced in February 2019. As the pre-legislative scrutiny process was not completed at the time of the dissolution of the 32nd Dáil, scrutiny of the General Scheme of the Bill was reintroduced to the new Joint Committee for Enterprise, Trade and Employment. The report of the Joint Committee was published in April 2021 and the Companies (Corporate Enforcement Authority) Bill was published in September 2021.

The Companies (Corporate Enforcement Authority) Act 2021 was signed by the President on 22 December 2021. The Act, save for section 35, was commenced on 6 July 2022 and the Corporate Enforcement Authority was established on 7 July 2022.

The Act’s primary purpose is to establish the Corporate Enforcement Authority (CEA) as an independent agency, with a commission structure to replace and perform the functions of the Director of Corporate Enforcement. The new Authority is an agency of the Department of Enterprise, Trade and Employment, as opposed to an office within the Department. This transformation is intended to enhance independence, to build on the ODCE’s existing expertise and experience, and to strengthen the capability to meet the challenges faced in investigating and prosecuting alleged breaches of company law.

This post-enactment report has been prepared in accordance with Dáil Éireann Standing Order 164A Seanad Éireann Standing Order 168 and serves as a review of the functioning of Companies (Corporate Enforcement Authority) Act 2021 twelve months following enactment.

Scope

The Companies (Corporate Enforcement Authority) Act 2021 amends the Companies Act 2014. Since the enactment of the Companies Act 2014, the Department's policy has been to incorporate subsequent amending legislation into that Act, so that the citation would not change. Therefore, the 2021 Act is structured to amend existing sections of, or to insert new sections into, the 2014 Act.

While the principal focus of the 2021 Act is providing for the establishment of the CEA, it also amends the Companies Act 2014 to give effect to certain recommendations of the CLRG on shares and share capital, corporate governance and the protection of employees and unsecured creditors. The Act also introduces a requirement for directors of companies to provide their Personal Public Service Number to the Registrar of Companies, to verify their identity.

Policy Objectives

The Companies (Corporate Enforcement Authority) Act 2021 is part of a package of measures designed to ensure that Ireland's reputation as a top tier country for its business environment is underpinned by a robust company law enforcement framework. The Act delivers on the action in the Programme for Government 'Our Shared Future' to establish the ODCE as a stand-alone statutory body.

The primary focus of the Act, as set out in Part 2 of the Act, is the establishment of the CEA. The policy approach underpinning the CEA's establishment is that to be effective enforcement bodies must be statutorily independent, appropriately resourced, accountable and have a well-defined mandate. The main legislative features of this approach to enhance the Authority are -

- providing the CEA with the ability to recruit the required skills and expertise under section 944K. Having the autonomy to recruit specialist skills and expertise is essential to ensuring the continued capacity of the Authority to deliver on its mandate
- providing the CEA with a commission-like structure in section 944F, with flexibility to appoint up to 3 full-time Members. This structure enables the Authority to acquire the relevant expertise to meet the differing demands of its remit, which includes investigation, prosecution, supervision, and advocacy, and to provide for specific areas of responsibility, and
- investing the CEA, in section 944D, with all the same functions and powers that the ODCE had with some modifications to meet the differing demands of its remit.

Amendments to the Companies Act 2014 in respect of corporate governance and shares and share capital are provided for in Parts 3 and 4 and most may be categorised as technical in that they correct omissions, provide clarifications, or rectify perceived anomalies.

Outline of the Act

Part 1 of the Act sets out standard provisions on citation, commencement, definitions and repeals.

Part 2 of the Act (sections 4 to 13) provides for the establishment of the CEA and inserts Chapters 3A (Corporate Enforcement Authority) and 3B (Investigation of director or former director of public-interest entity to find whether such director has engaged in certain prohibited conduct, etc.) into the Companies Act 2014 (new sections 944A to 944AH). The CEA is invested with the same functions and powers that the Director of Corporate Enforcement had but with some modifications to reflect a new commission-like structure. The CEA's functions, under section 944D, include encouraging compliance with the Companies Act 2014, investigating suspected offences and non-compliance under that Act, prosecuting summary offences, referring suspected indictable offences to the Director of Public Prosecutions, and exercising certain supervisory functions with respect to liquidators and receivers. Section 944F (Membership of Authority) provides for the structure of the Authority which is that of a commission, with between 1 and 3 full time Members as may be determined by the Minister for Enterprise, Trade and Employment. Section 944K provides the Authority with the power to appoint its own staff and to determine the grades and number in each grade subject to Ministerial approval. As with the ODCE previously, provision is made in section 944M for the secondment of members of An Garda Síochána to the CEA.

Section 944O is new and concerns the accountability of the CEA to Oireachtas Committees. Where the Chairperson of the Authority has informed a Committee of his/her opinion that a matter in respect of which he/she is requested to give an account before that Committee is a matter which is or has been or may at a future time be the subject of proceedings before a court or tribunal in the State and the Committee does not withdraw the request, the Chairperson of the Authority or the Chairperson of the Committee may apply to the High Court in a summary manner for determination of the matter.

Sections 944T and 944U provide that the Authority shall prepare an annual report, strategy statement and work programme.

Part 3 of the Act (sections 14 to 25) contains amendments to the Companies Act 2014 relating to shares and share capital. These give legislative effect to some of the recommendations that were made in the Report by the CLRG on Shares and Share Capital, published in April 2017. These are designed to rectify perceived anomalies regarding share capital that arise from the repeal, modernisation and restructuring of the Companies Acts 1963-2013 into what is now the Companies Act 2014.

This section also includes an amendment to the Companies Act 2014 to confirm that Chapter 7A of Part 17 of the Companies Act 2014 applies to the securities registered in the name of a central securities depository (CSD) and those securities that are registered in the name of a nominee of the CSD.

Part 4 of the Act (sections 26 to 30) contains amendments to the Companies Act 2014 which implement recommendations of the CLRG on corporate governance. These address issues concerning

the administration of company meetings, which, as above, arise from the move from the Companies Acts 1963 -2013 regime to the current Companies Act 2014.

While Part 5 makes miscellaneous amendments to the Companies Act, a further CLRG recommendation is implemented by Part 5, section 34 of the Act. The CLRG Report on the Protection of Employees and Unsecured Creditors, published in June 2017, recommended changes to the current law on restriction of directors. Section 34 of the Act provides the High Court with a power to restrict directors on the basis that they have failed to act appropriately in a winding-up situation, for example they have failed to convene a general meeting to nominate a liquidator or failed to give the required notice to employees of an impending liquidation.

Part 5 makes miscellaneous amendments to the Companies Act 2014. Section 31 provides for the obligation to register resolutions in a creditors' winding-up with the Registrar. Section 32 provides the CEA with the power to request evidence from a person that they are qualified to act as a liquidator. Section 33 provides that it may be prescribed that liquidators submit statements to the Companies Registration Office more frequently than at 6 monthly intervals. Section 35 (yet to be commenced) introduces a requirement for directors of companies to provide their Personal Public Service Number (PPSN) to the Registrar of Companies, to verify their identity.

Part 6 (section 36) is a technical amendment which updates references to the Companies Act 2014 and the CEA in section 192 of the Irish Collective Asset-Management Vehicles Act 2015. The 2015 Act is amended by the substitution of references to the Companies Act 2014 consequent to this Act.

Operation of the Act

S.I. No. 335 of 2022 provided for the commencement of the Companies (Corporate Enforcement Authority) Act 2021 (apart from section 35) on 6 July 2022.

PART 2 – CORPORATE ENFORCEMENT AUTHORITY

The Corporate Enforcement Authority (CEA) was established on 7 July 2022. The CEA's statutory functions include:

- Promoting compliance with company law
- Investigating instances of suspected breaches of company law
- Taking appropriate enforcement action in response to identified breaches of company law,
- Supervising the activities of liquidators of insolvent companies, and
- Operating a regime of restriction and disqualification undertakings in respect of directors of insolvent companies.

The CEA is also conferred with statutory functions in respect of certain investment vehicles under the Irish Collective Asset-Management Vehicles Act 2015 and is the competent authority for the purpose of imposing sanctions on company directors under the Companies (Statutory Audits) Act 2018.

The Act builds on the organisational and procedural reforms already implemented by the Director of Corporate Enforcement in the period 2012 -2021. The Act provides the Authority with more autonomy and flexibility to adapt to the challenges it faces in its investigation and prosecution of increasingly complex breaches of company law, including the ability to recruit the required skills and expertise. This, allied with the financial and human resources allocated to the new Authority, will ensure that it is well-placed to tackle breaches of company law and promote compliance.

Structure of the Authority

The Authority is structured as a commission, with Members appointed by the Minister for Enterprise, Trade and Employment. Section 944F provides for the membership of the Authority. Subsections (1) and (2) provide for the structure of the Authority which is that of a commission, with between 1 and 3 full-time Members, as may be determined by the Minister for Enterprise, Trade and Employment. Section 944G provides where there is more than one Member of the Authority, the Minister shall appoint one of the Members to be chairperson. In the context of the total size of the new Authority, including expanded Garda resources, a maximum three-Member Authority was considered the most appropriate and is in line with other bodies including the Competition and Consumer Protection Commission (CCPC). This approach is designed to future-proof the new organisation and to ensure it can be agile and can respond to changing circumstances. For example, if there are significant increased demands on the Authority, it will be possible for it to be scaled up further or organised along specific lines of responsibility.

To ensure continuity between the ODCE and the CEA, the Act at section 944F provided that the person who held the office of Director of Corporate Enforcement immediately before establishment day shall be a Member of the Authority. Mr. Ian Drennan is currently the sole Member and Chief Executive Officer of the Authority. The CEA is structured with 8 Directors of Function (PO equivalent) who report directly to the CEO as follows:

- Director of Criminal Enforcement
- Director of Legal and Policy
- Director of Governance and Support Operations
- Director of Insolvency Supervision
- Director of Digital Investigations and Analytics
- Director of Finance and ICT
- Director of Legal
- Director of Civil Enforcement and Advocacy

Resourcing the Authority

The importance of adequately resourcing the CEA was highlighted in the Implementation Plan arising from the Hamilton Group's *Review of structures and strategies to prevent, investigate and penalise economic crime and corruption*. The necessity of appropriate resourcing and the requirement for its constant review were stressed by the Joint Oireachtas Committee on Enterprise, Trade and Employment in its pre-legislative report on the Companies (Corporate Enforcement Authority) Bill.

The allocation of human resources to the CEA has been based on:

- The Government's vision and policy objectives for the new Authority
- The CEA's statutory functions and the statutory provisions which maintain the new Authority's multi-disciplinary human resource complement including seconded members of An Garda Síochána ("AGS"), and
- The Director of Corporate Enforcement's assessment of the CEA's resourcing requirements prior to the establishment of the CEA.

Staffing

In preparation for the CEA's establishment the Department of Enterprise, Trade and Employment approved an additional 14 civil servants to be assigned to it in accordance with the Director of Corporate Enforcement's assessment of the CEA's resourcing requirements. A further 3 civil servant posts were approved following establishment, bringing additional civil servant staff of the Authority to 17.

As an agency, the CEA has more autonomy to recruit required skills and expertise. The CEA's Strategy 2022-2025 sets out the importance of recruiting suitably qualified and experienced staff, sourced to the maximum extent practicable, through open competition thereby providing the CEA with access to the widest pool of available talent in the labour market.

The CEA's full-time Garda complement is increasing from 7 to 16 officers (comprising of 1 Detective Inspector, 3 Detective Sergeants and 12 Detective Gardaí). Recruitment of additional Gardaí is underway and on November 8, 2022, 5 new Detective Gardaí became CEA officers, having been successful at interview. This increased complement will enable the agency to take on a greater volume of criminal investigative work.

A Memorandum of Understanding (MoU) between the ODCE and An Garda Síochána was agreed and signed on 3rd June 2022. The MoU is published on the CEA's website. It formalises arrangements between the two entities on a range of matters, including the procedure by which secondees are selected. It provides for ongoing co-operation between the two bodies to ensure both organisations work effectively to fulfil their respective independent statutory obligations.

Financial Resources

In advance of the Authority's establishment the Department had already increased the ODCE's budget by €1million or 20% over previous levels. Budget 2022 increased the ODCE's allocation by a further €1.6 million, to €7.75 million, representing a total budgetary increase of 44% to the ODCE in preparation for the establishment of the new Authority. The increase in the CEA's annual budget for 2023 of €1.956m (+25%) to €9.706m signals continued commitment to ensuring the CEA has the requisite financial resources required to deliver on its statutory objectives.

Statement of Strategy 2022-2025

In accordance with section 944U of the Companies Act 2014, the CEA's Strategy Statement for the period 2022-2025 was submitted to the Tánaiste on 4th July 2022 and laid before the Houses of the Oireachtas on 9th August 2022. The Statement of Strategy is published on the CEA's website.

Having regard to the CEA's statutory mandate, the strategy outlines the CEA's mission to

promote and serve the public interest by ensuring high levels of compliance with company law through effective advocacy and proportionate, robust and dissuasive enforcement.

The CEA's vision is to be an

enforcement agency that is trusted by the public and highly regarded by its stakeholders and counterparts, whose work contributes to public protection and to Ireland being regarded as a safe and well-regulated economy in which to invest and create employment.

The strategy the CEA will pursue over the period 2022-2025 in discharging its mission, comprises of three pillars:

- 1) Embedding governance structures, building operational capability and establishing presence
 - 1.1 Embedding governance structures and organisational values
 - 1.2 Building operational capability
 - 1.3 Establishing presence

2) Effective advocacy and influencing

- 2.1 Empowering stakeholders
- 2.2 Responding to evolving issues
- 2.3 Influencing, advising and engaging in thought leadership

3) Operating effective systems of proportionate, robust and dissuasive enforcement

- 3.1 Operating an effective system of supervision of corporate insolvency
- 3.2 Operating an effective system of proportionate, robust and dissuasive enforcement
- 3.3 Ensuring individual accountability

CEA Activities post establishment to an Authority

In addition to ongoing investigative and enforcement operations commenced by the ODCE, since its establishment on 7 July work on a range of activities has been undertaken by the CEA including:

Corporate

- Launch of the CEA's corporate identity
- Launch of cea.gov.ie and the CEA's social media channels on LinkedIn and Twitter
- Publication of Statement of Strategy for the period 2022-2025

Enforcement Activities

- Charging of individuals with fraudulent trading, failure to maintain adequate accounting records, fraudulently removing the property of a company, providing false information, theft and deception
- Publication of a Memorandum of Understanding between the CEA and An Garda Síochána

Advocacy and stakeholder engagement

- Publication of a suite of information and guidance documents for the benefit of company directors and other company law actors
- Publication of Information Notes on the topical subjects of members' right of access to companies' registers of members and the appointment of auditors, as well as a statement on its enforcement activities
- Delivery of multiple presentations to stakeholder groups

Capability enhancement

- Appointment of Director of Finance and ICT, Director of Legal, Senior Enforcement Lawyer, Senior HR Manager and Senior Governance Manager
- Progressed the recruitment of additional members of An Garda Síochána as secondees to the CEA

Investigative and Enforcement Powers

The Act invested the CEA with all of the investigative powers and functions that the ODCE had and so it is well equipped with substantial and wide-ranging powers. The CEA has the power to issue a range of warning directions or notices, the power to enter and search premises and take documents and other material, and the power to bring summary criminal prosecutions.

New powers and other enhancements for the CEA are matters that are being actively considered. The Department is working closely with the CEA to ensure it has the appropriate legislative tools necessary to enhance Ireland's company law framework and to undertake modern and complex corporate law enforcement. In this regard legislative proposals are being considered by the Department which arise from submissions made by the ODCE/CEA, actions in the Hamilton Review Group Action Plan and discussions with the Department of Justice in relation to the Garda Síochána (Powers Bill).

PART 3 – SHARE CAPITAL

Amendments to the Companies Act 2014 provided in this part gave effect to recommendations of the CLRG regarding shares and share capital, the majority of which have provided greater clarity on the intentions of the section in question, corrected unintended consequences, and reinserted necessary provisions that were included in the 1963 Act but not in the 2014 Act. The main changes are summarised below.

Following enactment -

- A company can now use its share premium account for, among other things, the writing off of its preliminary expenses, or the expenses of, or commissions paid on, any issue of shares or debentures. Under section 62(2) of the 1963 Act, a company that had a share premium account could use that share premium for a number of purposes including those listed above. There was no equivalent provision in the 2014 Act which had caused difficulty in practice for some companies, so a new subsection (5A) was inserted in section 71 of the 2014 Act to rectify this; no further issues have been reported.
- A reduction in share capital, carried out in accordance with the provisions of the 2014 Act, will not constitute a distribution.
- Three-party share-for-undertaking transactions are now permitted even if there is no reorganisation on a company capital and a transaction can proceed without regard to the section where the company has adequate distributable reserves, under amendments made to section 91 of the 2014 Act. These amendments have brought the language of the Act in line with the intention of the section and with accounting practice under Financial Reporting Standard 102.
- The definition of treasury shares now includes shares acquired by a company pursuant to a merger or division, which has clarified the treatment of such shares acquired by a successor company. This required amendments to sections 106, 109 480 and 503.

No issues have been reported to the Department regarding these legislative changes since their introduction to legislation

PART 4 – CORPORATE GOVERNANCE

Part 4 contains certain corporate governance amendments to the 2014 Act recommended by the CLRG in its 2017 Report, which corrected or clarified the meaning of certain sections.

These amendments, included:

- in section 131 as amended, clarifying that a person must be at least 18 years of age to be secretary of a company and any appointment of a minor will be void,
- in section 151 as amended, removing the exemption from having certain information shown on all business letters of a company,
- in section 184 aligning the provisions relating to the instrument appointing a proxy in section 184 with the proxy's right to demand or join in demanding a poll as provided for in section 189(7) of the Act, and
- in section 181, clarifying that subsection 181(5) may not apply to members of a company limited by guarantee (CLG) if the CLG's constitution states otherwise.

No issues have been reported to the Department regarding these legislative changes since their introduction to legislation.

PART 5 - MISCELLANEOUS PROVISIONS

Part 5 makes miscellaneous amendments to the Companies Act 2014.

Section 31 provides for the obligation to register resolutions in a creditors' winding-up with the Registrar.

Section 32 provides the CEA with the power to request evidence from a person that they are qualified to act as liquidators.

Section 33 provides that it may be prescribed that liquidators submit statements to the Companies Registration Office more frequently than at 6 monthly intervals.

Section 35 – not yet commenced

Section 35 of the Act provides for cases in which a director must supply certain data to the Registrar of Companies. Once commenced, section 35 will require directors to file details of their PPSNs with the CRO when incorporating a new company, being appointed as a director to an existing company or filing a company's annual return on an annual basis. PPSNs will be used for validation purposes only by the CRO and will not be available to the public.

It is intended to commence this section by the end of Q1 2023, subject to the approval of a data sharing agreement between the Companies Registration Office and the Department of Social Protection and the upgrade of the Companies Online Registration Environment (CORE) to accept Directors' PPSNs.



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