| Regulatory Impact Analysis (RIA) | | |
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| **Department/Office:**<br><br>**Department of Business Enterprise and Innovation** | **Title of Legislation:**<br><br>**Companies (Corporate Enforcement Authority) Bill** | |
| **Stage:**<br><br>General Scheme of a Bill | | **Date:**<br><br>**October 2018** |

**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)

**Available to view or download at:**

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

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

http://www.clrg.org/publications/shares%20and%20share%20capital%20clrg%20report.pdf

http://www.clrg.org/publications/clrg%20adhoc%20committee%20report.pdf

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## Part 1: Description of issue and policy objectives

**The issue to be addressed**

The Government approved its package of "Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework", which was subtitled "Ireland combatting white collar crime", in October 2017. It was published 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 Business, Enterprise and Innovation, 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 Government assigned the implementation of these 7 Actions to the Department of Business, Enterprise and Innovation.

**Policy objectives**

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 Business, Enterprise and Innovation. 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 commissioners, 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.

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 that were made to the Minister for Business, Enterprise and Innovation but are not part of the Government's 2017 package of measures. These are recommendations that relate to provisions in the Companies Act 2014, firstly, on Shares and Share Capital, and, secondly, on the Protection of Employees and Unsecured Creditors. The CLRG adopted these reports in April and June 2017 respectively and submitted them to the 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 has 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 has set a deadline of end Q 2 of 2019 for the enactment of this legislation in its 2017 package of measures.
4. The Government has decided that the recommendations of the Company Law Review Group on Corporate Governance should be considered for legislative implementation, as appropriate.
5. The Minister for Business, Enterprise and Innovation has accepted other recommendations of the Company Law Review Group, and these too 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 corporate reporting.

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

The Government's package of "Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework" was adopted following a review by the 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 Business, Enterprise and Innovation 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. Their Reports are made public.

More recently, in developing the General Scheme, the Department has consulted with the –

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

Furthermore, advance copies of the General Scheme were sent to the Office of the Parliamentary Counsel and the Department of Public Expenditure and Reform for early information and comment.

The Department will publish the General Scheme on its website and submit it, on behalf of the Minister, to the Joint Oireachtas Committee on Business, Enterprise and Innovation for their consideration and decision as to whether to conduct pre-legislative scrutiny.

Looking ahead, the Company Law Review Group is reviewing enforcement of company law as part of its 2018/2020 Work Programme and the Law Reform Commission is preparing a report on Regulatory Powers and Corporate Offences. A Group to Review Anti-Fraud and Anti-Corruption Structures in Ireland, chaired by Mr. James Hamilton, has been established recently and will report in due course. The outcome of all these reviews will be considered as they become available and factored into the development of the Companies Act 2014 where appropriate. If time permits, that may be done in the context of drafting and enactment of a Bill based on the General Scheme for a Companies (Corporate Enforcement Authority) Bill.

The Department will continue to take account of any views supplied to it in the course of consideration of the Government's package of Measures, the CLRG Reports and the development of the General Scheme.

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

### A General Scheme of a Companies (Corporate Enforcement Authority) Bill

The Department has 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 and some provisions of Part 6 establish 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 Department considers that the regulatory impact of Parts 1 – 5 inclusive of the General Scheme is not significant for the following reasons –

1. The Scheme 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 Scheme does not create any new company law offences.
3. The Scheme does not introduce any new compliance requirements for business or others.

The Scheme does enhance the existing investigative tools of the ODCE, with a view to equipping the new Authority to meet the challenges of increasingly complex corporate law enforcement.

As mentioned above, Part 6 includes a new reporting requirement for company directors and secretaries. This is set out in Head 42 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 in company returns.

The Registrar of Companies is already a body scheduled in Schedule 5 of the Social Welfare Act 2005 as a body that may use Personal Public Service Numbers. The proposal in the General Scheme is to oblige directors of companies to supply their PPSN to the Registrar when –

1. Incorporating a company for the first time
2. Submitting the Annual Return
3. Notifying the Registrar of a change in director or secretary

Alongside this Head, the Registrar will make a business case to the Department for Employment Affairs and Social Protection.

This Head is proposed to support the accuracy of the Register and to address the possibility of duplication. At present, the Companies Registration Office is aware that at least a fifth of the names on company returns are duplicates and the majority of these are directors. This occurs where an individual uses variations of their names and addresses, for example using different initials or English transliterations of Irish language given names. From a company law perspective, this could be used to undermine the general rule against holding more than 25 directorships at any one time or the prohibition on being both director and secretary of the same company in certain circumstances. It is a public policy objective that the Registrar be in a position to verify information supplied to her in cases where there is a risk of non-compliance.

## Part 5: Analysis of Costs, Benefits and Impacts of Options

**Option 2:**

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 chief commissioner to delegate responsibilities for specific functions to 1 or 2 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 development of existing investigative tools, such as the powers for search and entry, is intended to facilitate more efficient and effective investigations.

The Department expects that there will be an increase in the running cost as a result of the transformation from an Office within the Department of Business, Enterprise and Innovation to an agency. This is because the new agency will need to take on some functions, such as human resources. The General Scheme provides that the funding of the new agency will be provided with the approval of the Minister for Business, Enterprise and Innovation, in consultation with the Minister for Public Expenditure and Reform.

The regulatory impact is negligible 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.

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.

**Option 3:**

The benefits and costs of Option 3 are the same as for Option 2, with the following additions –

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 new grounds for the granting of Restriction Orders is to encourage directors to comply with their obligations to employees and unsecured creditors in winding-up situations. There are should be only minimal costs associated with this proposal.

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 Company Law Review Group and by the Department of Business, Enterprise and Innovation.