

# Companies (Corporate Enforcement Authority) Bill 2021

Bill No. 107 of 2021

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## Abstract

The [Companies \(Corporate Enforcement Authority\) Bill 2021](#) provides for the establishment of the Corporate Enforcement Authority as an independent agency that will be tasked with investigating suspected breaches of company law. The Bill also provides for the implementation of a number of recommendations of the Company Law Review Group that relate to provisions in the [Companies Act 2014](#), regarding corporate governance, shares and share capital.



## Contents

Glossary and abbreviations.....	3
Summary .....	5
Table of provisions.....	7
Background.....	18
The Office of the Director of Corporate Enforcement.....	18
Recent Reforms .....	18
Functions of the ODCE .....	19
Staffing and resources .....	20
Role of ODCE in a criminal investigation and prosecution .....	21
Government measures to tackle white collar crime .....	23
Proposals for the reform of company law .....	25
PLS of the General Scheme of the Bill .....	26
Proposed investigative powers of the Corporate Enforcement Authority .....	31
Industry commentary on the Bill .....	32
Principal provisions of the Bill.....	34
Corporate Enforcement Authority .....	34
Chapter 3A – Corporate Enforcement Authority .....	34
Chapter 3B – Investigation of director or former director of public-interest entity to find whether such director has engaged in certain prohibited conduct, etc. ....	38
Share Capital .....	40
Share Premium accounts .....	40
Intermediaries .....	40
Variation of company capital on reorganisation .....	41
Treasury shares, mergers and divisions .....	42
Distributions .....	42
Registration of share transfers .....	43
Corporate Governance.....	43
Prohibition on the appointment of a minor as company secretary.....	44
Right of a proxy to “demand or join in demanding a poll” .....	44
Disapplication of section 181(5)(d) in respect of certain CLGs .....	44
Miscellaneous .....	44
Requirement of directors to provide PPSN .....	44
Restriction of Directors .....	45

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## Glossary and abbreviations

Terminology	Description
The 2014 Act	Refers to the <a href="#">Companies Act 2014</a> . The 2014 Act is referred to in the Bill as the “Principal Act”.
The Bill	Refers to the <a href="#">Companies (Corporate Enforcement Authority) Bill 2021</a> .
CLRG	The Company Law Review Group is a statutory advisory expert body charged with advising the Minister for Enterprise, Trade & Employment on the review and development of company law in Ireland.
The Committee	Refers to the Joint Oireachtas Committee on Enterprise, Trade and Employment.
Corporate Enforcement Authority	Refers to the new agency proposed to be established under the Bill. The Corporate Enforcement Authority is referred to in the Bill as “The Authority”.
Divisions	Refers to a category of transaction recognised under the 2014 Act whereby the assets and undertaking of a transferor company are acquired by two or more acquiring companies, and the transferor is dissolved.
General Scheme	Refers to the General Scheme of the <i>Companies (Corporate Enforcement Authority) Bill</i> .
Mergers	Refers to a category of transaction under the 2014 Act whereby an acquiring company and the acquired company become a single new corporate entity.
Minister	Refers to the Minister for Enterprise, Trade and Employment.
ODCE	The Office of the Director of Corporate Enforcement is a statutory body whose remit involves improving the compliance environment for corporate activity in the Irish economy by encouraging adherence to the requirements of the Companies Acts, and bringing to account those who disregard the law.
PLS	Refers to pre-legislative scrutiny of the General Scheme of the Companies (Corporate Enforcement Authority) Bill.
Share premium account	A share premium account is an element of a company’s undenominated capital account representing amounts received by the company for shares issued by it in excess of the nominal value of those shares. A share premium account is generally treated similarly to the company’s denominated capital account (representing the nominal value of issued shares) and may not

	usually be used to pay distributions (e.g. dividends) or to offset trading losses.
Summary Approval Procedure	Refers to the set of steps provided for under Part 4, Chapter 7 of the 2014 Act whereby a company can undertake certain 'restricted activities' (such approving the giving of financial assistance for purchase of its own shares, reorganising or reducing its capital, or entering a members' voluntary winding up).
Transferor company	Refers to the company in a transaction that is transferring its assets or undertakings to another party in a transaction.

Source: L&RS analysis of the Bill

## Summary

The [Companies \(Corporate Enforcement Authority\) Bill 2021](#) [the Bill] was published by the Tánaiste and Minister for Business, Enterprise and Innovation, Leo Varadkar TD, [the Minister], on 3<sup>rd</sup> September 2021. The Government approved drafting of the Bill on 4<sup>th</sup> December 2018.<sup>1</sup> A General Scheme of the Bill and a Regulatory Impact Assessment for the proposed legislation were also published on 4<sup>th</sup> December 2018.<sup>2</sup> The Joint Committee on Business, Enterprise and Innovation of the 32<sup>nd</sup> Dáil, undertook Pre-Legislative Scrutiny [PLS] of the General Scheme of the Bill on [05 February 2019](#), [19 February 2019](#) and [02 April 2019](#). The Joint Committee on Enterprise, Trade and Employment of the 33<sup>rd</sup> Dáil, also undertook PLS on [22 January 2021](#) and [29 January 2021](#).

Announcing the decision to publish the Bill, the Minister stated:

““This Bill when enacted will be a milestone in the area of corporate enforcement in Ireland. The new Corporate Enforcement Authority will have more autonomy and resources to investigate suspected wrongdoing and to deal with larger, more complex investigations.

With new technology and more sophisticated economic crime, it is more important than ever that we have a well-resourced, standalone agency, to identify those non-compliant with company law. The new CEA will tackle allegations of company law breaches and investigate alleged criminal activity in the areas of fraudulent trading and dishonest dealings before a company becomes insolvent among other breaches of company law.

We have seen how intricate and complex some of these breaches can be and how hard it is to secure prosecutions. As a statutorily independent agency, the CEA will have more autonomy to recruit the specialist staff it needs. My Department will continue to work with the new CEA to ensure it has the appropriate legislative tools to undertake corporate law enforcement.”<sup>3</sup>

The purpose of the Bill is to provide for the necessary amendments to the [Companies Act 2014](#) [the 2014 Act] to facilitate the establishment of the Office of the Director of Corporate Enforcement as a stand-alone agency, to be called the Corporate Enforcement Authority [the CEA]. The Bill provides for the CEA to operate according to a commission structure that is independent from the Department of Business, Enterprise and Innovation.

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<sup>1</sup> Department of Business, Enterprise and Innovation, Press Release, “Minister Humphreys publishes legislation to establish the ODCE as a stand-alone agency,” (4<sup>th</sup> December 2018). Available at <https://dbe.gov.ie/en/News-And-Events/Department-News/2018/December/04122018b.html>.

<sup>2</sup> Available at <https://dbe.gov.ie/en/Legislation/General-Scheme-Companies-Corporate-Enforcement-Authority-Bill-2018.html>.

<sup>3</sup> Department of Enterprise, Trade and Employment, Press Release: *Tánaiste and Minister Troy to publish new law establishing new Corporate Enforcement Authority*, 17<sup>th</sup> August 2021. Available at <https://enterprise.gov.ie/en/News-And-Events/Department-News/2021/August/202108171.html>.

The Bill also provides for the implementation of several recommendations of the Company Law Review Group [CLRG] that relate to provisions in the 2014 Act, regarding corporate governance, shares and share capital.

## Table of provisions

Section	Title	Effect
<b>Part 1: Preliminary and general</b>		
1.	Short title, collective citation and commencement	Standard provision that defines the short title and collective citation of the Bill. Section 1 also provides for commencement by Ministerial order. The Bill will come into operation upon a commencement order being made by the Minister for Enterprise, Trade and Employment.  Commencement orders may be limited to particular provisions of the Bill or purposes.
2.	Definition	Standard provision that defines the “Principal Act” in the Bill as the <a href="#">Companies Act 2014</a> .
3.	Repeal	Provides for the repeal of <a href="#">Chapter 3 of Part 15</a> of the 2014 Act.
<b>Part 2: Amendment of Principal Act – Corporate Enforcement Authority</b>		
4.	Amendment of section 2 of Principal Act	Provides for the substitution of the definition of “officer of the Director” in <a href="#">section 2</a> of the 2014 Act with a definition of “officer of the Authority”, and inserts a definition of “Authority” in section 2 of the 2014 Act, to be defined as the Corporate Enforcement Authority.
5.	Amendment of section 12 of Principal Act	Provides for the deletion in <a href="#">section 12</a> of the 2014 Act, of a reference to section 946 of the 2014 Act. This is a consequential amendment arising from the repeal of Chapter 3 of the 2014 Act set out section 3 of this Bill.
6.	Amendment of section 930A of Principal Act	Provides for an amendment in <a href="#">section 930A</a> (2) of the 2014 Act, with a reference to “ <a href="#">section 957AA</a> ” being replaced with a reference to “section 944Z”. This is a consequential amendment arising from the repeal of Chapter 3 of Part 15 of the 2014 Act, and the insertion of new Chapters 3A and 3B.
7.	Amendment of section 930B of Principal Act	Provides for amendments in <a href="#">section 930B</a> (2)(e)(i) of the 2014 Act, with references to “section 957AA” being replaced with a reference to “section 944Z”. These are consequential amendments arising from the repeal of Chapter 3 of Part 15 of the 2014 Act, and the insertion of new Chapters 3A and 3B.



Section	Title	Effect
8.	Amendment of section 936A of Principal Act	Provides for an amendment in <a href="#">section 936A</a> (3)(b) of the 2014 Act, with a reference to “section 957B, a relevant sanction (within the meaning of section 957AA)” being replaced with a reference to “section 944AB, a relevant sanction (within the meaning of section 944Z)”. This is a consequential amendment arising from the repeal of Chapter 3 of Part 15 of the 2014 Act, and the insertion of new Chapters 3A and 3B.
9.	Amendment of section 936B of Principal Act	Provides for consequential amendments to <a href="#">section 936B</a> of the 2014 Act arising from the repeal of Chapter 3 of Part 15 of the 2014 Act, and the insertion of new Chapters 3A and 3B.
10.	Amendment of Part 15 of Principal Act	<p>Provides for the amendment of Part 15 of the 2014 Act with the insertion of new Chapters 3A and 3B into the 2014 Act.</p> <p>Chapter 3A provides the legislative framework for the establishment and operation of the Corporate Enforcement Authority. Chapter 3A proposes to include the following provisions:</p> <ul style="list-style-type: none"> <li>• 944A. Definitions (Chapter 3A)</li> <li>• 944B. Establishment day</li> <li>• 944C. Establishment of Corporate Enforcement Authority</li> <li>• 944D. Functions of Authority</li> <li>• 944E. Transfer of functions of Director to Authority</li> <li>• 944F. Membership of Authority</li> <li>• 944G. Appointment of chairperson of Authority</li> <li>• 944H. Resignation, removal, disqualification of Member</li> <li>• 944I. Acting Member</li> <li>• 944J. Assignment and transfer of staff to Authority</li> <li>• 944K. Staff of Authority, etc.</li> <li>• 944L. Superannuation of Members</li> <li>• 944M. Secondment to Authority of member of Garda Síochána</li> <li>• 944N. Accountability of Authority to Committee of Public Accounts</li> </ul>

Section	Title	Effect
		<ul style="list-style-type: none"> <li>• 944O. Accountability of Member to certain Oireachtas Committees</li> <li>• 944P. Confidentiality of information</li> <li>• 944Q. Disclosure of information to Authority</li> <li>• 944R. Restriction of application of certain articles of Data Protection Regulation</li> <li>• 944S. Transfer of rights and liabilities, and continuation of leases, licences and permissions granted by office of Director</li> <li>• 944T. Annual report</li> <li>• 944U. Strategy statement and work programme</li> <li>• 944V. Grants to Authority</li> <li>• 944W. Liability of Authority for acts or omissions</li> <li>• 944X. Accounts of Authority</li> <li>• 944Y. Final annual report of Director</li> </ul> <p>Chapter 3B provides for the investigation of a director or former director of a public-interest entity to find whether such director has engaged in certain prohibited conduct, etc. Chapter 3B proposes to include the following provisions:</p> <ul style="list-style-type: none"> <li>• 944Z. Definitions (sections 944Z to 944AH)</li> <li>• 944AA. Provisions applicable where Authority receives particulars, etc., from Supervisory Authority concerning relevant contravention and relevant director</li> <li>• 944AB. Sanctions which Authority may impose on relevant director for certain conduct</li> <li>• 944AC. Relevant circumstances to be considered in imposing relevant sanctions on relevant director</li> <li>• 944AD. Resolution of suspected certain conduct by agreement - relevant director</li> <li>• 944AE. Publication of relevant sanction imposed on relevant director</li> <li>• 944AF. Limitations on imposing monetary sanctions on relevant director</li> <li>• 944AG. Relevant director not to be liable to be penalised twice for same conduct</li> </ul>

Section	Title	Effect
		<ul style="list-style-type: none"> <li>944AH. Appeals to and orders of court, including orders confirming decisions of Authority</li> </ul> <p>A more extensive analysis of these provisions is set out in the Principal provisions section of this Digest, below.</p>
11.	Amendment of Principal Act – insertion of Schedule 22	Provides for the text set out in Schedule 2 of the Bill to be inserted as Schedule 22 of the 2014 Act.
12.	Amendment of Principal Act in relation to references to Director	Provides for the substitution of references in the 2014 Act for words specified in Schedule 2, arising from the replacement of the Director of Corporate Enforcement with the Corporate Enforcement Authority.
13.	Savings	Standard provision that provides for certain acts of the ODCE prior to the establishment of the Corporate Enforcement Authority to retain their validity and to be treated as acts done by or on behalf of the Corporate Enforcement Authority.
<b>Part 3: Amendment of Principal Act – Share Capital</b>		
14.	Amendment of section 71 of Principal Act	<p>Provides for the amendment of <a href="#">section 71</a> of the 2014 Act, with the insertion of a new section 5A.</p> <p>The effect of the proposed amendment is to permit a company that has a share premium account to use it to pay:</p> <ul style="list-style-type: none"> <li>preliminary expenses incurred in forming the company;</li> <li>expenses and commissions on issues of shares or debentures; or</li> <li>any premium due on redemption of certain redeemable preference shares or debentures.</li> </ul>
15.	Amendment of section 82 of Principal Act	<p>Provides for an amendment to <a href="#">section 82</a>(6)(n), deleting the words “of intermediaries” from the section. This amendment relates to exceptions to the general rule, under <a href="#">section 82(2) of the 2014 Act</a>, that a company may not give financial assistance for the purchase of its shares or of shares in its holding company.</p> <p>The amendment in section 15 addresses cases where a public company (or a private company</p>

Section	Title	Effect
		that is a subsidiary of one) pays a commission to a person or business that underwrites an issue of shares in the public company. This is a common commercial practice that reflects the costs and risks assumed by the underwriter. For that reason, and subject to a number of limiting conditions (including a maximum commission rate of 10 per cent), the exception to the rule was permitted. The <a href="#">Companies Act 1963</a> did not specify any person to whom permitted commissions must be paid, but <a href="#">a reform of that Act's provisions relating to financial assistance in 2005</a> limited the exception to cases where commissions were paid "to intermediaries" of the underwriter. The amendment proposes to remove the requirement to interpose an intermediary.
16.	Amendment of section 91 of Principal Act	<p>Provides for amendments to <a href="#">section 91</a>(1), (4) and (5) of the 2014 Act.</p> <p>Section 91 relates to transactions whereby a transferor company ('Company A') sells all or part of its assets and/or undertaking to another body corporate ('Company B'), and Company B pays the some or all of the purchase consideration by means of issuing shares in itself to Company A's members or holding company rather than directly to Company A.</p> <p>This amounts to a distribution by Company A to its members or holding company (equivalent to a dividend) and so would normally require Company A to have sufficient distributable reserves to pay the value distributed. If Company A does not have sufficient distributable reserves, the only lawful way to carry out the transaction would be for Company A to undertake a formal reduction or reorganisation of its capital under procedures provided for in the 2014 Act.</p> <p>Section 91 of the 2014 Act permits these transactions, but assumes that they take place only where the transferor company (referred to in that section as "the relevant company") is "reorganising" its capital, and so stipulates that the transaction must be approved by the Court</p>

Section	Title	Effect
		<p>or the Summary Approval Procedure under the Act.</p> <p>Section 16 provides for the amendment of section 91 to remove the reference to “reorganisation” in section 91(1), so that it is not a requirement of the transaction that it involve a reorganisation of the transferor company’s capital.</p> <p>Section 16 also provides for the amendment of section 91(4) to permit these transactions without the need for Court approval (or the Summary Approval Procedure) if the transferor company has sufficient distributable reserves.</p>
17.	Amendment of section 106 of Principal Act	<p>Provides for an amendment to <a href="#">section 106</a>(1) of the 2014 Act, substituting “<a href="#">section 102</a>(1)(a) or (g)” for “section 102(1)(a)”.</p> <p>Section 106 of the 2014 Act defines “treasury shares” by reference to section 102(1)(a) and <a href="#">section 105</a> of the 2014 Act, which set out some of the circumstances in which a company may become the holder of shares in itself or its holding company.</p> <p>The proposed amendment provides for shares acquired pursuant to a merger or division to come within the scope of section 106(1).</p>
18.	Amendment of section 109 of Principal Act	<p>Provides for an amendment to <a href="#">section 109</a>(2) of the 2014 Act by the inclusion of a paragraph (c). Section 109(2)(c) provides for the definition of a treasury share under section 109 to align with <a href="#">section 480</a> (relating to mergers) and <a href="#">section 503</a> (relating to divisions).</p>
19.	Amendment of section 123 of Principal Act	<p>Provides for an amendment to <a href="#">section 123</a>(1) of the 2014 Act by the inclusion of a new section 123(1)(f).</p> <p>The proposed amendment relates to the 2014 Act’s definition of a ‘distribution’ and the circumstances in which a company may reduce its share capital. Section 123(1) defines distributions as including “every description of distribution of a company’s assets to members of the company, whether in cash or otherwise”. It then lists a number of specific exceptions to</p>

Section	Title	Effect
		<p>that definition, mostly involving cases where a payment is offset against a new issue of shares.</p> <p>The amendment provides for the following two further exceptions to be included:</p> <ul style="list-style-type: none"> <li>• where a company has paid off fully paid shares (in effect, ‘redeemed’ shares that were not issued as redeemable shares) and</li> <li>• where a company has extinguished or reduced members’ outstanding liabilities on partly paid shares.</li> </ul>
<b>20.</b>	Amendment of section 480 of Principal Act	Provides for an amendment to <a href="#">section 480(3)</a> of the 2014 Act with the insertion of a new paragraph (aa). This is a consequential amendment following on from the amendment in section 17 of the Bill, and provides that any fully paid shares previously issued by a successor company, and held by a transferor company, and which are acquired by that successor company in itself pursuant to a merger under this Chapter, shall be deemed to be treasury shares.
<b>21.</b>	Amendment of section 503 of Principal Act	Provides for an amendment to <a href="#">section 503(4)</a> of the 2014 Act with the insertion of a new paragraph (j). This is a consequential amendment following on from the amendment in section 17 of the Bill, and provides that any fully paid shares previously issued by a successor company, and held by a transferor company, and which are acquired by that successor company in itself pursuant to a division under this Chapter, shall be deemed to be treasury shares.
<b>22.</b>	Amendment of section 1043 of Principal Act	Provides for an amendment to <a href="#">section 1043(1)(c)</a> , deleting the words “of intermediaries” from the section. Section 1043 applies minor variations to the commissions exception in relation to PLCs. Section 22 is a consequential amendment following on from the amendment provided for in section 15.
<b>23.</b>	Amendment of section 1045 of Principal Act	Provides for the amendment of <a href="#">section 1045</a> of the 2014 Act, by inserting a new section 1045(2).

Section	Title	Effect
		<p><a href="#">Section 95</a>(1) of the 2014 Act sets out the general rules applicable to directors' discretion to refuse to register a transfer of shares. Unless a company's constitution provides otherwise, the section gives directors a broad discretion to refuse registration.</p> <p>Section 1045 of the 2014 Act adapts section 95 for public limited companies (PLCs) but does not alter the grounds for refusing registration that are appropriate to private companies but not public ones.</p> <p>The proposed amendment provides for a refusal to register a transfer in the following circumstances:</p> <ul style="list-style-type: none"> <li>a) the transfer of a share (not being a fully paid share) to a person of whom they do not approve,</li> <li>b) the transfer of a share on which the company has a lien, or</li> <li>c) the transfer of a share which, in their opinion, may— <ul style="list-style-type: none"> <li>(i) imperil or prejudicially affect the status of the company in the State,</li> <li>(ii) imperil any tax relief or rebate to which the members of the company are entitled, or</li> <li>(iii) involve the company in the payment of any additional stamp duty or other duty on any conveyance of any property made, or to be made, to the company.</li> </ul> </li> </ul>
24.	Amendment of section 1087A of Principal Act	Provides for an amendment to the definition of "relevant securities" in <a href="#">section 1087A</a> of the 2014 Act so as for the definition to include securities that are registered in the name of a body as may from time to time be nominated by a central securities depository to hold securities represented in that depository's securities settlement system.
25.	Amendment of section 1230 of Principal Act	Provides for an amendment to the table accompanying <a href="#">section 1230</a> of the 2014 Act, to provide for the disapplication of <a href="#">section 105</a> (2) and (3), and <a href="#">section 106</a> (4) in respect of private unlimited companies with share capital (ULC)

Section	Title	Effect
		and public unlimited companies with share capital (PUC).
<b>Part 4: Amendment of Principal Act – Corporate Governance</b>		
<b>26.</b>	Amendment of section 131 of Principal Act	Provides for an amendment to <a href="#">section 131</a> (2) of the 2014 Act to clarify that any appointment of a minor as the secretary of a company would be void.
<b>27.</b>	Amendment of section 151 of Principal Act	Provides for an amendment to <a href="#">section 151</a> of the 2014 Act, deleting section 151(5). The proposed amendment would remove the power of the Minister to grant an exemption to the requirements set out in section 151(1) to show certain particulars in relation to directors in all business letters in which the company's name appears.
<b>28.</b>	Amendment of section 184 of Principal Act	Provides for an amendment to <a href="#">section 184</a> of the 2014 Act to include “vote and to demand or join in demanding a poll”. Section 184 sets out the prescribed form of proxy for use at a general meeting of a company. This includes information on rights available to the person so appointed, including the right to speak and vote.  <a href="#">Section 189</a> (7) also provides a person appointed proxy the right to “demand or join in demanding a poll”, but that information is not specified in the prescribed form of proxy. The proposed amendment to section 184 provides for the inclusion of that information.
<b>29.</b>	Amendment of section 930 of Principal Act	Provides for the deletion of paragraph (f) in <a href="#">section 930</a> (2) of the 2014 Act. The proposed amendment removes the “Institute of Incorporated Public Accountants” from the list of recognised accountancy bodies, granted recognition for the purposes of performing statutory audits.
<b>30.</b>	Disapplication of section 181(5)(d) in respect of certain CLGs	Provides for the insertion of a new section 1204A in the 2014 Act, disapplying <a href="#">section 181</a> (5)(d) in respect of a company limited by guarantee [CLG] where the CLG's constitution does not permit its members to appoint proxies.
<b>Part 5: Amendment of Principal Act – Miscellaneous</b>		



Section	Title	Effect
31.	Amendment of section 198 of Principal Act	Provides for an amendment to <a href="#">section 198</a> (4)(f) of the 2014 Act, with the insertion a reference to “ <a href="#">section 586</a> (2)”. This proposes to include resolutions for a creditor’s voluntary winding up, within the registration requirements set out in section 198.
32.	Amendment of section 633 of Principal Act	Provides for an amendment to <a href="#">section 633</a> of the 2014 Act, to include provisions, providing the Corporate Enforcement Authority with the power to request evidence from a person that they are qualified to act as a liquidator and making it an offence to fail to comply with such a request.
33.	Amendment of section 681 of Principal Act	Provides for an amendment to <a href="#">section 681</a> (3)(b) of the 2014 Act, with the substitution of “other” for “greater”. This proposes to allow for a shorter period than 6 months to be prescribed for the submission of statements from liquidators to the Companies Registration Office during a liquidation about the progress of the liquidation, thus facilitating a scenario where a liquidation is concluded less than 6 months prior to the previous statement.
34.	Amendment of section 819 of Principal Act	Provides for an amendment to <a href="#">section 819</a> (1) of the 2014 Act to broaden the range of people over whom a court may issue a declaration restricting them from acting or being appointed as a director or secretary of a company. The proposed amendment provides that a declaration may be issued in respect of the following people who were directors of: <ul style="list-style-type: none"> <li>a) an insolvent company;</li> <li>b) an insolvent company who failed to convene a general meeting of shareholders for the purpose of nominating a named liquidator;</li> <li>c) an insolvent company at such a general meeting who fails to table a notice to nominate such liquidator; or</li> <li>d) an insolvent company who has failed to provide the required notice to employees of the company in the winding up of the company.</li> </ul>

Section	Title	Effect
35.	Cases in which director must supply certain data	Provides for the insertion of a new section 888A into the 2014 Act. The proposed amendment provides for a requirement that directors of Irish registered companies provide their PPSN to the CRO when making an application under the 2014 to incorporate a company, when making an annual return under the 2014 by a company over which they are a director and when making a notice of change of directors or secretaries under the 2014 Act by a company over which they are a director. Section 35 also creates an offence of failing to comply with this obligation.
<b>Part 6: Consequential Amendment to <i>Irish Collective Asset-management Vehicles Act 2015</i></b>		
36.	Corporate Enforcement Authority	Provides for consequential amendments to <a href="#">section 192 of the <i>Irish Collective Asset-management Vehicles Act 2015</i></a> .

Source: L&RS analysis of the Bill

## Background

This section provides general background information in relation to:

- The Office of the Director of Corporate Enforcement;
- Government measures to tackle white collar crime;
- Proposals for reform of company law;
- PLS of the General Scheme of the Bill;
- Proposed investigative powers of the Corporate Enforcement Authority; and
- Industry commentary on the Bill.

## The Office of the Director of Corporate Enforcement

This section provides a brief background on the operations and role of the Office of the Director of Corporate Enforcement [ODCE]. The ODCE was established by [section 7](#) of the [Company Law Enforcement Act 2001](#). The legislative framework under which the ODCE operates is set out in [Part 15, Chapter 3](#) of the 2014 Act. The Director is appointed by the Minister for Enterprise, Trade and Employment, and is assisted by staff assigned by the Minister and members of An Garda Síochána seconded from the Garda National Economic Crime Bureau.

## Recent Reforms

One of the main purposes behind the proposed reform of the ODCE is to build upon the progress that has been made in recent years in strengthening the capacity of the ODCE to take on large-scale investigations and pursue enforcement measures in relation to breaches of company law.<sup>4</sup> The collapse of the retrial of Sean FitzPatrick and the ensuing criticism of the investigation, highlighted the need for a review in relation to how the failures, outlined below, could arise in such a high-profile case. This has led to significant changes in the resourcing and structure of the ODCE since the trial.

In December 2018 the Department of Business, Enterprise and Innovation published [An account of the shortcomings identified by Judge Aylmer of the Circuit Court concerning an investigation by the Office of the Director of Corporate Enforcement](#).<sup>5</sup> This account presents the factors surrounding the investigative shortcoming set out by Judge Aylmer, as well as measures taken and actions that were underway to address these shortcomings. The account notes that the following criticisms were raised by Judge Aylmer:

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<sup>4</sup> A more complete background to the role of the ODCE and recent reforms is available in Chapter 1 B of the Law Reform Commission Report on *Regulatory Powers and Corporate Offences* (LRC 119-2018), at pages 33 - 37. Available at <https://www.lawreform.ie/fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%201.pdf>

<sup>5</sup> Department of Business, Enterprise and Innovation, *An account of the shortcomings identified by Judge Aylmer of the Circuit Court concerning an investigation by the Office of the Director of Corporate Enforcement* (December 2018). Available at <https://dbej.gov.ie/en/Publications/Publication-files/Account-Judge-Aylmer-investigation-ODCE.pdf>.

- a. Lack of any investigation into how the letters of representation came into being;
- b. The failure to seek out the actual persons in the audit team who procured them;
- c. Coaching, contamination and cross-contamination of the witnesses' statements;
- d. Shredding of documents; and
- e. A partisan and biased approach to the investigation.

The account also addresses the issues within the ODCE at the time that gave rise to these deficiencies, stating:

"With the benefit of hindsight, it is clear that the ODCE, at the time of this investigation, lacked the specific skillsets, experience and risk management processes to allow it to undertake multiple, parallel investigations of the scale and complexity involved in the investigations into matters relating to the former Anglo Irish Bank Corporation ('Anglo'). This resulted in errors in the manner in which witness statements were taken, which were deemed by the Judge to be the most significant shortcoming, as well as shortcomings in the investigation process and the issue of the shredding of documents."<sup>6</sup>

In relation to the staffing and skills deficit, the account notes that there has been recruitment of specialist staff since 2008.<sup>7</sup> The account also specifies that:

"The establishment of the ODCE as a statutory Agency will provide greater autonomy in relation to recruiting specific resources, thus ensuring the Agency is better equipped to investigate increasingly complex breaches of company law. Sourcing of expertise and specialist staff, such as forensic accountants, will be enhanced under the Agency model."<sup>8</sup>

In relation to the failures in evidence gathering the account highlights that specialised training has been made available to staff from the Garda Training College. Procedural changes have also been implemented to ensure that "all criminal investigations are now led by members of An Garda Síochána assigned to the ODCE," and "an enhanced culture of risk management is also in place within the Office."<sup>9</sup>

## Functions of the ODCE

The functions of the ODCE are set out in [section 949](#) of the 2014 Act. These functions include:

- Encouraging compliance with the 2014 Act;
- Investigating suspected offences under the 2014 Act;
- Investigating instances of otherwise suspected non-compliance with the 2014 Act or with the duties and obligations to which companies and their officers are subject;

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<sup>6</sup> *Ibid*, at p. 6.

<sup>7</sup> *Ibid*, at p. 8.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid*, at p. 9.

- Enforcing the 2014 Act, through the summary prosecution of offences or through referring cases to the DPP where there are reasonable grounds for believing that an indictable offence under the 2014 Act has been committed; and
- Exercising a supervisory role over liquidators and receivers in relation to their activities undertaken in the discharge of their functions under the 2014 Act.

Section 949(3) of the 2014 Act provides that the Director will be independent in the performance of his or her functions.

### Staffing and resources

The ODCE's 2020 Annual Report<sup>10</sup> outlines that on 31 December 2020, there were 43 staff in place.<sup>11</sup> This includes 2 enforcement lawyers, a digital forensic specialist, 4 forensic accountants, a solicitor and 8 Detective Gardaí<sup>12</sup> on secondment from the Garda National Economic Crime Bureau.<sup>13</sup> The ODCE is funded via the Department of Enterprise, Trade and Employment's Vote, Vote 32.<sup>14</sup>

Table 1, below, is a reproduction of a table from the ODCE's 2020 Annual Report and provides a breakdown of the financial allocation and expenditure of the ODCE.

**Table 1. Financial allocation and expenditure of the ODCE in 2020**

	Allocation €000s	Expenditure €000s	%
Pay	3,740	2,295	61
Non-pay	2,317	2,015	87
Exceptional legal costs	50	0	0
<b>Total</b>	<b>6,107</b>	<b>4,310</b>	<b>71</b>

Source: ODCE, *Annual Report 2020*, at p. 12

The main reasons provided for the gap between the actual expenditure and the amount allocated were due to vacancies and delays in the recruitment of new staff, and potential legal costs

<sup>10</sup> OCDE, *Annual Report 2020*. Available at <https://www.odce.ie/Publications/CorporateStatutory/AnnualReportsReviews/TabId/497/ArtMID/906/ArticleID/675/ODCE-Annual-Report-2020.aspx>.

<sup>11</sup> *Ibid*, at p. 12. The staff numbers are the whole time equivalent number of staff in place.

<sup>12</sup> Comprised of a Detective Inspector, 3 Detective Sergeants and 4 Detective Gardaí.

<sup>13</sup> *Ibid*.

<sup>14</sup> Dáil Éireann provides money for the ordinary services of Government departments and offices. Expenditure is provided for under 'Votes', with one or more covering the functions of each department or office. At the end of each financial year, each department or office is required to prepare an account, known as the appropriation account, for each voted service administered by it. For more information see <https://www.audit.gov.ie/en/find-report/publications/2020/vote-32-business-enterprise-and-innovation.pdf>.

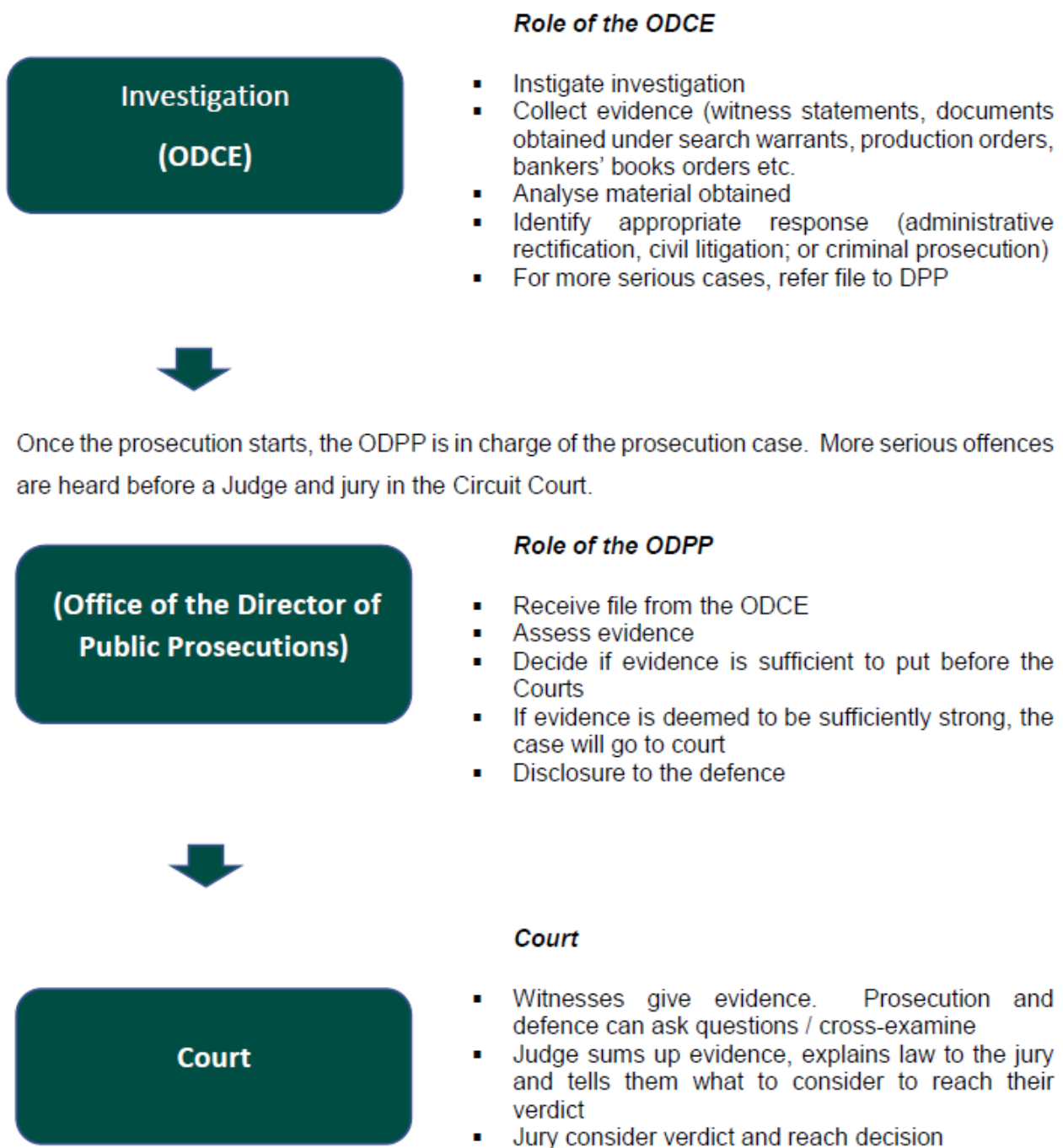
associated with casework being less than expected, and the failure to finalise as of the year-end a procurement exercise that was expected to generate significant expenditure.<sup>15</sup>

### **Role of ODCE in a criminal investigation and prosecution**

Diagram 1, below, is a reproduction of an infographic prepared by the Department of Enterprise, Trade and Employment outlining the processes involved in a criminal investigation and prosecution.

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<sup>15</sup> ODCE, Note 10, at p. 13.

**Diagram 1. Roles of ODCE, DPP and Court in an ODCE criminal investigation**

Source: Department of Enterprise, Trade and Employment

## Government measures to tackle white collar crime

In November 2017 the Government published a report outlining 14 different proposed actions aimed at tackling corporate, economic and regulatory crime [the 2017 Report].<sup>16</sup> These actions were developed following a cross Departmental review by the then Tánaiste and Minister for Business, Enterprise and Innovation, Frances Fitzgerald TD, the Minister for Finance and Public Expenditure and Reform, Paschal Donohoe TD and the Minister for Justice and Equality, Charlie Flanagan TD. The first proposed action is the establishment of “the Office of the Director of Corporate Enforcement as an independent company law enforcement agency, to provide greater autonomy to the agency.”<sup>17</sup>

Announcing the publication of these measures, then Taoiseach, Leo Varadkar said:

“Like a lot of people, I am frustrated at our inability as a country to secure more convictions when it comes to corruption and white-collar crime. Corruption and white-collar crime damage our economy, breed cynicism in our society and are a threat to our international reputation.

So, we have looked at best practice around the world and will be changing our approach into the future through new laws and better enforcement. We cannot change the past but we can change things for the future. This is a whole of Government effort and a national priority for me as Taoiseach.”<sup>18</sup>

In relation to the publication of the 2017 Report, then Tánaiste and Minister for Business, Enterprise and Innovation, Frances Fitzgerald TD stated that:

“While Ireland is internationally identified as a low risk economy and a secure place in which to do business, this Government recognises that, like every other jurisdiction, we must continue to respond to emerging challenges. That is why I am pleased to publish a suite of measures aimed at enhancing corporate governance, increasing transparency and strengthening Ireland’s response to White Collar Crime.

As part of this, I will be establishing a new independent statutory agency which will be responsible for company law compliance and enforcement and it will investigate increasingly complex breaches of company law. This will be established in line with international best practice and my Department will continue to engage with the

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<sup>16</sup> *Measures to enhance Ireland’s corporate, economic and regulatory framework, Ireland combatting “white collar crime”* (November 2017). The appendix to the Report (at p. 37) provides a table of actions. Available at [https://merrionstreet.ie/MerrionStreet/en/ImageLibrary/20171101\\_Measures\\_to\\_Enhance\\_Regulatory\\_Framework.pdf](https://merrionstreet.ie/MerrionStreet/en/ImageLibrary/20171101_Measures_to_Enhance_Regulatory_Framework.pdf).

<sup>17</sup> *Ibid*, at p. 1.

<sup>18</sup> Government Press Release, “Government announces a package of measures to enhance Ireland’s corporate, economic and regulatory framework in the fight against White Collar Crime,” (2 November 2019). Available at [https://merrionstreet.ie/MerrionStreet/en/News-Room/Releases/Government\\_announces\\_a\\_package\\_of\\_measures\\_to\\_enhance\\_Ireland%E2%80%99s\\_corporate\\_economic\\_and\\_regulatory\\_framework\\_in\\_the\\_fight\\_against\\_White\\_Collar\\_Crime.html](https://merrionstreet.ie/MerrionStreet/en/News-Room/Releases/Government_announces_a_package_of_measures_to_enhance_Ireland%E2%80%99s_corporate_economic_and_regulatory_framework_in_the_fight_against_White_Collar_Crime.html).



Organisation for Economic Co-operation and Development (OECD) in relation to international best practice.”<sup>19</sup>

The 2017 Report outlines the proposed changes to the ODCE and the reasoning behind these changes. It highlights that as an independent agency, it will have greater autonomy and flexibility to fulfil its role.<sup>20</sup> The 2017 Report also suggests that the changes to the ODCE will enhance its capacity to recruit more specialist staff in line with the organisation’s need.<sup>21</sup> The 2017 Report proposes that a structure similar to a Commission be adopted as:

“This differs from a typical State Agency which is assisted in undertaking its functions by a non-executive board. In practice, this will result in a Chief Commissioner assisted by other Commissioners who have delegated responsibilities for specific functions.”<sup>22</sup>

The 2017 Report also notes the Government’s commitment that the new agency operates according to international best practice, including in relation to its internal controls, staffing, budget and corporate governance.<sup>23</sup>

In 2018 the Minister for Justice and Equality appointed Mr James Hamilton to chair a multi-agency review group examining structures and strategies to prevent, investigate and penalise economic crime and corruption.<sup>24</sup> In March 2019 the Department of Justice and Equality carried out a public consultation in relation to this work.<sup>25</sup> The Hamilton Review Group published their recommendations in December 2020.<sup>26</sup> In relation to the establishment of the Corporate Enforcement Authority, the Review Group recommended:

“The Review Group recommends increasing the resourcing for the prosecution of financial crime to include additional prosecutors, along with a seconded specialist in digital forensics and a seconded forensic accountant. This is necessary to enable the prosecution services to deal with the larger economic crime cases submitted to the ODPP which do not fall within the remit of the Special Financial Crime Unit. It will enable the ODPP to meet anticipated additional demands arising both from the Corporate Enforcement Authority Bill and from the recommended expansion in GNECB capacity and provide more frequent training (as part of the recommended joint training programme) to other law enforcement bodies as well as provide additional access to necessary legal advice in larger investigations while respecting the independence of both prosecutors and investigators.”<sup>27</sup>

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<sup>19</sup> *Ibid.*

<sup>20</sup> 2017 Report, Note 16, at p. 8.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> Mr James Hamilton is the former Director of Public Prosecutions and a noted anti-corruption expert.

<sup>25</sup> See [http://www.justice.ie/en/JELR/Pages/Review\\_of\\_anti-fraud\\_and\\_anti-corruption\\_structures\\_and\\_procedures](http://www.justice.ie/en/JELR/Pages/Review_of_anti-fraud_and_anti-corruption_structures_and_procedures).

<sup>26</sup> The full report of the Hamilton Review Group can be viewed online at:

[http://www.justice.ie/en/JELR/Hamilton\\_Review\\_Group\\_Report.pdf/Files/Hamilton\\_Review\\_Group\\_Report.pdf](http://www.justice.ie/en/JELR/Hamilton_Review_Group_Report.pdf/Files/Hamilton_Review_Group_Report.pdf).

<sup>27</sup> *Ibid.*, at pp. 13-14.

## Proposals for the reform of company law

The Company Law Review Group [CLRG]<sup>28</sup> has published a number of thematic reports on aspects of company law. Some of the amendments proposed in Parts 3, 4 and 5 of the Bill are respectively derived from recommendations of the CLRG in the following three reports:

- [The Recommendations of the Company Law Review Group relating to Shares and Share Capital in the Companies Act 2014](#) (March 2017);
- [The Recommendations of the Company Law Review Group relating to Corporate Governance in the Companies Act 2014](#) (November 2017); and
- [The Company Law Review Group Report on the Protections for Employees and Unsecured Creditors 2017](#) (June 2017).

Writing to the Minister in relation to the publication of the CLRG Report on the Protections for Employees and Unsecured Creditors 2017, the Chairperson of the CLRG, Dr Thomas Courtney stated that:

“It is my strong belief that it is very important that the recommendations contained herein, together with those contained in our previous report on Shares and Share Capital (a review of Part 3 of the Companies Act 2014), are acted upon swiftly and that legislation is brought forward by your Department at the earliest possible opportunity. While I fully understand that Ireland has EU obligations to transpose EU company law directives, the recommendations in the Review Group's Reports on Parts 3 and 4 are more relevant for more Irish companies than most EU company law.

Company law is dynamic and having finally established a world-class company law code in the Companies Act 2014 it behoves us all to ensure that we keep it top of the class by swiftly moving to bring forward legislation to address improvements that have been identified as being necessary or desirable.”<sup>29</sup>

The findings of the CLRG in relation to these three reports are considered in greater detail in the Principal provisions section of the Digest, below.

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<sup>28</sup> The CLRG 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. More information about the CLRG is available at <http://www.clrg.org/>.

<sup>29</sup> CLRG, *Report on the Protections for Employees and Unsecured Creditors 2017* (November 2017), at pp. 7-8.

## PLS of the General Scheme of the Bill

The Joint Committee on Business, Enterprise and Innovation of the 32<sup>nd</sup> Dáil, undertook Pre-Legislative Scrutiny [PLS] of the General Scheme of the Bill on [05 February 2019](#), [19 February 2019](#) and [02 April 2019](#). The Joint Committee on Enterprise, Trade and Employment of the 33<sup>rd</sup> Dáil, also undertook PLS on [22 January 2021](#) and [29 January 2021](#).

On 05 February 2019, the Joint Committee on Business, Enterprise and Innovation of the 32<sup>nd</sup> Dáil heard from officials from the Department of Business, Enterprise and Innovation.

On 19 February 2019 the Joint Committee on Business, Enterprise and Innovation of the 32<sup>nd</sup> Dáil heard from officials from the Office of the Director of Corporate Enforcement [the ODCE].

On the 02 April 2019 the Joint Committee on Business, Enterprise and Innovation of the 32<sup>nd</sup> Dáil heard submissions from the Law Reform Commission and the Company Law Review Group.

On the 22 January 2021 the Joint Committee on Enterprise, Trade and Employment of the 33<sup>rd</sup> Dáil heard from officials from the ODCE.

On 29 January 2021 the Joint Committee on Enterprise, Trade and Employment of the 33<sup>rd</sup> Dáil heard from the Tánaiste and Minister for Enterprise, Trade and Employment, Mr Leo Varadkar T.D., and Minister of State for Trade Promotion, Digital and Company Regulation, Mr Robert Troy T.D, accompanied by officials from the Department of Enterprise, Trade and Employment.

The Committee also considered written submissions received from the ODCE, Professor Deirdre Ahern and the Law Society.

The Committee published its report on the PLS of the General Scheme of the *Companies (Corporate Enforcement Authority) Bill 2018* in April 2021.<sup>30</sup> Speaking following the publication of the Committee's report, Committee Chair Maurice Quinlivan TD stated that:

“Corruption and so-called ‘white-collar crime’ – and the perception that they are not adequately detected and punished – damage our economy and threaten our international reputation as a reliable place to do business in. They also breed cynicism in our society on the basis that certain crimes are regarded as being treated leniently.

It is important that consumers, householders or businesses can all go about our business confident that white collar crime is treated with the seriousness that it deserves. Our approach to such crime must be evident in the structures that we put in place to deter it and in the resources that we apply to dealing firmly with such crime where it occurs.”<sup>31</sup>




The Committee made seven recommendations aimed at strengthening the legislation. Table 3 below presents the Committee's recommendations as set out in its PLS report on the General Scheme. The Table also provides the Department of Enterprise, Trade and Employment's response and analysis of whether the recommendations made by the PLS report are addressed (either in whole or in part) in the Bill or elsewhere.

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<sup>30</sup> Available at <https://www.oireachtas.ie/en/press-centre/press-releases/20210420-joint-committee-on-enterprise-trade-and-employment-calls-for-new-corporate-enforcement-authority-to-be-given-powers-and-resources-to-tackle-white-collar-crime/>.




<sup>31</sup> *Ibid.*




**Table 1 Key to traffic light dashboard comparing the Bill as published with Committee PLS recommendations.**

L&RS categorisation of the Department's response in the Bill to the Committee's key issue	Traffic light dashboard used in Table 2 to highlight impact of the Committee's PLS conclusion
Key issue has clearly been accepted and is reflected in the Bill.	
The Bill may be described as adopting an approach consistent with the key issue or the impact of the key issue is unclear.	
Key issue has not been accepted or implemented in the Bill.	

**Table 2 Traffic light dashboard comparing the Bill as published with Committee PLS recommendations.**

No.	Recommendation as per Joint Committee on Enterprise, Trade and Employment (April 2021)	L&RS 'traffic light' identifier	Response from Department of Enterprise, Trade and Employment on whether addressed (either in whole or in part) in the Bill or elsewhere
1.	The Committee recommends that legislation surrounding the searching of electronic devices be clarified.		<p>It is important to note that there is no gap in the ODCE powers or those of the new Authority in relation to the ability to search electronically for example in the cloud. The judgment of the Supreme Court in CRH v. CCPC, was concerned with the seizure of material that consists of both relevant and irrelevant material. The judgment has relevance for investigating authorities including the ODCE.</p> <p>Government policy is to consolidate powers such as search and seizure in the General Scheme of the Garda Síochána (Powers) Bill published on 29 April 2021.</p> <p>In that General Scheme, the interaction of privacy and technology in searches is addressed in a Head on Extended Power of Seizure based on the Companies Act 2014. It is further intended that the legislation is underpinned by codes of practice.</p> <p>The Department will continue to actively examine these matters including with the</p>

No.	Recommendation as per Joint Committee on Enterprise, Trade and Employment (April 2021)	L&RS 'traffic light' identifier	Response from Department of Enterprise, Trade and Employment on whether addressed (either in whole or in part) in the Bill or elsewhere
			Department of Justice in the context of the further development of that Bill.
2.	The Committee recognises the benefit of overarching "police powers" legislation rather than piecemeal powers and calls for such a Bill to be prioritised in order that the Corporate Enforcement Authority has the necessary powers to meet the objectives set for the Authority.		<p>The Companies (Corporate Enforcement Authority) carries over all the powers of the ODCE to the new Authority. In addition, the Bill provides that Garda seconded to the Agency may continue to use their powers.</p> <p>The Department will continue to actively examine as stated above in particular in the context of the development of the General Scheme of the Garda Síochána (Powers) Bill and the Implementation Plan arising from the Hamilton Review Group published on 18 April which also includes actions relating to powers for investigating authorities.</p>
3.	The Committee recommends that non-Garda staff of the Corporate Enforcement Authority be able to attend interviews alongside members of An Garda Síochána. The Committee believes this should be included in the current legislation as the precedent exists for other bodies.		<p>As it stands pending amendment to the Custody Regulations non-Garda staff from any agency may not attend interviews of a detained suspect.</p> <p>The Implementation Plan arising from the Hamilton Review Group (Action 20) proposes to address this in the context of the forthcoming Garda Síochána (Powers) Bill, including to allow An Garda Síochána to engage an expert from any statutorily-mandated regulatory or investigative body, or an independent expert, to participate in interviewing a detained suspect.</p> <p>As this has implications for the Custody Regulations as well as other investigating authorities it is considered appropriate to consider the power within this framework.</p>
4.	The Committee supports the ODCE's requests for the extension to the period in which applications by the ODCE/CEA must be brought before the Courts, and the extension of certain reporting requirements to examiners. The Committee, however, acknowledges that it may be preferable for		These and other legislative proposals will be considered for inclusion as appropriate in forthcoming legislation.

No.	Recommendation as per Joint Committee on Enterprise, Trade and Employment (April 2021)	L&RS 'traffic light' identifier	Response from Department of Enterprise, Trade and Employment on whether addressed (either in whole or in part) in the Bill or elsewhere
	these amendments to be made in subsequent legislation rather than this General Scheme.		
5.	The Committee notes that sufficient resourcing will be vital to the successful operation of the Corporate Enforcement Authority. The Committee recommends that the level of resourcing required be kept under constant review, with the possibility to increase staffing and other resources where required.		<p>Sufficient resourcing is vital to the successful operation of the Corporate Enforcement Agency. The Bill gives the new Authority greater autonomy and flexibility in terms of the ability to recruit staff with the necessary skills mix and depth of experience.</p> <p>The Director has made an assessment of the requirements based on functions and the number, and complexity, of cases that it will handle. The resources now being applied to the new Authority are in line with his assessment. The total of non – Garda staff approved is now 54, an increase of approximately 35% over existing numbers.</p> <p>The new Authority will also require the secondment of additional Garda resources to enable it to deliver its new statutory remit. This will see the complement of seconded garda resources go from 7 to 16.</p> <p>This recommendation will be implemented on an ongoing basis. No issues for legislation arise.</p>
6.	The Committee recommends that the minimum number of members of the Authority be increased to 2.		In the context of the total size of the new Authority, including expanded Garda resources, a maximum three-Member Commission was considered the most appropriate, and is in line with other bodies including the Competition and Consumer Protection Commission. There is flexibility in the scheme for the Minister to appoint Members once the Bill is enacted subject to the approval of the Minister for Public Expenditure and Reform.
7.	The Committee recommends that, in order to future proof the Authority, the maximum number of members be increased, possibly to 5.		As set out above, the proposal for up to 3 Members is deemed proportionate and appropriate into the medium term. There is flexibility in the scheme for the Minister to appoint members once the Bill is enacted

No.	Recommendation as per Joint Committee on Enterprise, Trade and Employment (April 2021)	L&RS 'traffic light' identifier	Response from Department of Enterprise, Trade and Employment on whether addressed (either in whole or in part) in the Bill or elsewhere
			subject to the approval of the Minister for Public Expenditure and Reform.

Source: The L&RS is grateful to the Department of Enterprise, Trade and Employment for providing an analysis of how the Committee's PLS recommendations impact on the Bill. The traffic light assessment represents the analysis of the L&RS.



## Proposed investigative powers of the Corporate Enforcement Authority

At the outset it should also be noted that provisions relating to new investigative powers under Heads 45 and 46 from the General Scheme of the Bill have not been included in the Bill. Head 45 provided for the admissibility of written statements in court proceedings as an exception to the hearsay rule. It was proposed in the General Scheme that such a section would be modelled on [section 13 of the Competition Act 2002](#).

The hearsay rule is a general rule of evidence, subject to many exceptions. It provides that testimony given by a witness concerning words spoken, statements made or documents generated by a person who is not produced in court as a witness is inadmissible if the testimony is presented to prove the truth of the facts which they assert. The two main reasons given for this generally exclusionary approach are that out-of-court statements cannot be tested by cross-examination and they are not made under oath.

Head 46 related to a new type of warrant which was to be available to the Corporate Enforcement Authority that would enable it to search for electronic records that a company may hold on a server that is remote from the physical location of the company and to access such information using any means necessary.

During the PLS hearing on the 19<sup>th</sup> February 2019, Mr David McGill of the ODCE spoke in greater detail of the power involved in Head 46.<sup>32</sup> He noted that currently under [section 787](#) of the 2014 Act the ODCE have the power to use any electronic device found at a premise to search any connected devices, whether at that premises or somewhere else. He noted that this is not best practice as it may result in interference with the evidence. He noted that while they have equipment which could be used to interrogate devices found in offices, they are not currently allowed to do that. He also noted that with the permeation of mobile devices, more information is stored on the cloud. He suggested that Head 46 will provide them with the power to use their own devices with the log-in credentials from mobile devices on-site to access cloud services and extract data.

The main focus of commentary arising out of Part 6 of the General Scheme related to the new investigative powers introduced under Heads 45 and 46.

Claire Cummins BL, notes that while the operations of the proposed Corporate Enforcement Authority will be broadly similar to the ODCE, the provision of new investigative tools will significantly enhance its powers. In this regard, she notes:

“Firstly, under Head 45 of the General Scheme of the Bill, the legislation will expressly allow a court to consider admitting written statements, which might otherwise be excluded, into evidence in certain circumstances, thereby creating a statutory exception to the rule against hearsay.

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<sup>32</sup> Joint Committee on Business, Enterprise and Innovation debate – Tuesday, 19 Feb 2019. General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018: Discussion. Available at [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_business\\_enterprise\\_and\\_innovation/2019-02-19/2/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_business_enterprise_and_innovation/2019-02-19/2/).



Secondly, there is an enhanced power in respect of searching electronically-held evidence. In this regard, it is proposed under Head 46 of the General Scheme of the Bill to amend s.787 of the 2014 Act, to authorise the Authority to access data under the control of an entity or individual, regardless of where they have that data stored, and access it using any means necessary (by which it is meant using any electronic device deemed necessary and at any location deemed necessary) to ensure best compliance with evidential rules and digital forensics principles.”<sup>33</sup>

## Industry commentary on the Bill

Following the Government approval of the publication of the Bill, the Director of Corporate Enforcement at the ODCE, Ian Drennan, issued a press statement welcoming the changes outlined in the Bill. He stated that:

“The approval by Government of legislation paving the way for the establishment of the Corporate Enforcement Authority marks a watershed moment in Ireland’s strategic approach towards addressing economic and white collar crime.

With enhanced autonomy and significantly increased levels of investigative assets - including additional legal and digital forensics professionals and seconded members of An Garda Síochána - the CEA will assume the ODCE’s current caseload and will, I anticipate, continue to build on the ODCE’s forensic and robust approach towards tackling serious breaches of company law and associated wrongdoing in both civil and criminal realms.”<sup>34</sup>

A number of solicitor firms specialising in company law have also published commentaries in relation to the Bill.

Commentary published by McCann Fitzgerald highlights that some of the recommendations of the CLRG that have not been acted on in the Bill. It states that:

“However, not every CLRG recommendation is reflected in the Bill so it is expected that further changes will be made to the Bill to incorporate more of the submissions to date.

...

As mentioned, many additional submissions have been made to the Department to remove what are considered to be anomalies in the Act and it is hoped that many more of these as-yet-unimplemented changes will be included in the Bill before it is enacted. To take one example, a domestic merger of companies is possible under the Act (and is well-used in

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<sup>33</sup> Claire Cummins BL, “White-Collar Crime and Programme for Government 2020” [2020] *Commercial Law Practitioner* Vol. 27(7), 153, at 154.

<sup>34</sup> Ian Drennan, ODCE Press Release, “Director of Corporate Enforcement welcomes Government approval of legislation to establish the Corporate Enforcement Authority” (18 August 2021). Available at <https://www.odce.ie/MediaPresentations/PressReleases/PressReleases2021/TabId/764/ArtMID/1482/ArticleID/679/Press-Release-17-August-2021.aspx>

practice), provided one company is a company limited by shares so that (for example) two designated activity companies cannot merge under the process.”<sup>35</sup>

Commentary published by Matheson welcomes the proposed establishment of the Corporate Enforcement Authority and states that:

“The government has publicly committed to invest in the CEA [the Corporate Enforcement Authority], including by assigning 14 additional staff to it and increasing its permanent complement of members of An Garda Síochána from 7 to 16. Assuming this can be achieved, the CEA’s headcount will be nearly 50% above existing levels in the ODCE. This is to be welcomed and should go some way to address the recommendations in the Hamilton Report that “the new Corporate Enforcement Authority should be suitably resourced to enable it to meet its mandate and to realise its full potential.” The CEA must prepare a strategy statement as soon as possible after its establishment, detailing its key objectives and output for the following three years (and renew it every three years subsequently). This should assist in focussing minds and resources on key themes and priorities, and deliver a level of transparency and accountability.”<sup>36</sup>

Commentary published by Eversheds Sutherland discusses the functions of the Corporate Enforcement Authority and the timing of the legislation. It notes that:

“While the core functions of the CEA will be somewhat similar to that of the ODCE, the Bill proposes to grant additional functions and powers to include investigating instances of suspected company law offences, prosecution of summary offences for non-compliance with the company law, referral of indictable offences to the Director of Public Prosecutions and supervising liquidators and receivers. In that regard, it is anticipated that the additional powers granted will allow for a more forensic and robust approach in tackling serious breaches of company law.

...

The Government’s approval of the Bill is timely against the backdrop of the aftermath of the Covid-19 pandemic and the possibility of a significant increase in corporate insolvencies resulting from the difficulties faced by companies during the pandemic.”<sup>37</sup>

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<sup>35</sup> McCann Fitzgerald (briefing), “Proposed Update to Companies Legislation” (8 September 2021). Available at <https://www.mccannfitzgerald.com/knowledge/company-secretarial-and-compliance/proposed-update-to-companies-legislation>.

<sup>36</sup> Emma Doherty & Karen Reynolds, Matheson (briefing), “The Companies (Corporate Enforcement Authority) Bill 2021 – now published” (10 September 2021). Available at [https://www.matheson.com/insights/detail/the-companies-\(corporate-enforcement-authority\)-bill-2021-now-published](https://www.matheson.com/insights/detail/the-companies-(corporate-enforcement-authority)-bill-2021-now-published).

<sup>37</sup> Ciara Wheeler, Eversheds Sutherland (briefing), “Approval of the Companies (Corporate Enforcement Authority) Bill 2021. What is expected?” (02 September 2021). Available at <https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/global/ireland/approval-of-the-companies-corporate-enforcement-authority-bill>.

## Principal provisions of the Bill

This section of the Digest examines the main provisions of the Bill. The Bill comprises 6 Parts and 36 sections. The Bill also contains two schedules. Schedule 1 provides for the insertion of a new Schedule 22 into the 2014 Act. Schedule 2 provides for consequential amendments to the 2014 Act in relation to references to the Director of Corporate Enforcement to be replaced with references to the Corporate Enforcement Authority.

### Corporate Enforcement Authority

Part 2 of the Bill provides for amendments to the 2014 Act with a view to establishing the Corporate Enforcement Authority as an independent statutory entity. The principal provision of Part 2 is section 10, which provides for the insertion of new Chapters 3A and 3B into the 2014 Act. A short synopsis of each provision in Part 2 is given in the Table of Provisions (above).

### Chapter 3A – Corporate Enforcement Authority

Chapter 3A comprises of 25 sections. Sections 944A, 944B, 944C, 944E, 944F, 944G, 944H, 944I, 944J, 944L, 944N, 944O, 944P, 944R, 944S, 944T, 944U, 944V, 944W, 944X and 944Y are standard provisions in legislation of this kind.<sup>38</sup> An outline of these provisions is set out below.

Sections 944D, 944K, 944M and 944Q are specific provisions relating to the Corporate Enforcement Authority and are considered in greater detail below.

**Section 944A** provides for definitions of terms that are used in Chapter 3A.

**Section 944B** provides that the Minister shall appoint a day to be the establishment day of the Corporate Enforcement Authority.

**Section 944C** provides that on the establishment day the Corporate Enforcement Authority shall exist to perform the functions as provided for in the 2014 Act, as amended by this Bill. Section 944C also provides that Schedule 22 shall have effect in relation to the Corporate Enforcement Authority.

**Section 944E** provides that all functions of the ODCE are transferred to the Corporate Enforcement Authority, and that references to the ODCE in other legislation shall be construed as references to the Corporate Enforcement Authority.

**Section 944F** provides that the Corporate Enforcement Authority shall consist of between 1 and 3 Members, as determined by the Minister. Members shall be appointed, on a full-time basis for a term of 5 years, by the Minister following a recommendation from the Public Appointments Service. The Director of Corporate Enforcement, on the establishment day, shall be a Member for the remainder of his term of office as the Director. A person appointed as a Member is required not to hold any other paid office or occupy any other paid position without the consent of the Minister.

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<sup>38</sup> For example, a number of sections correspond to the provisions that relate to the establishment of the Competition and Consumer Protection Commission in the [Competition and Consumer Protection Act 2014](#) and the establishment of the Data Protection Authority under the [Data Protection Act 2018](#).

**Section 944G** provides for the appointment of a chairperson of the Corporate Enforcement Authority by the Minister. The chairperson shall have a casting vote in case of decisions requiring a vote that are tied. The chairperson is required to carry on and manage the staff, administration and business of the Corporate Enforcement Authority.

**Section 944H** provides for the resignation, removal or disqualification of a Member. The Minister may remove a Member from Office where:

- the Member has become incapable through ill-health of performing his or her functions;
- the Member has committed stated misbehaviour; or
- the removal of the Member appears to the Minister to be necessary for the effective performance by the Authority of its functions.

Where a Member is removed from office, the Minister is required to provide the Member with a statement of reasons for the removal, and a copy of that statement is required to be laid before each House of the Oireachtas. Section 944H also provides that a Member shall be disqualified and cease to hold office where:

- they have been adjudicated bankrupt;
- they have made a composition or arrangement with creditors;
- they have been sentenced by a court of competent jurisdiction to a term of imprisonment;
- they have been convicted of any indictable offence in relation to a company or any other body corporate;
- they have been convicted of an offence involving fraud or dishonesty, whether in connection with a company or not;
- a declaration has been made against him or her under [section 819](#) or is deemed to be subject to such a declaration by virtue of [Chapter 5 of Part 14](#); or
- they have been the subject of an order under [section 160 of the Companies Act 1990](#) or a disqualification order within the meaning of [Chapter 4 of Part 14](#).

**Section 944I** provides that the Minister may appoint a person as an acting Member, to perform the functions of a Member, where the Corporate Enforcement Authority consists of one Member who is unable to perform the functions of a Member during a period. An authorisation to act as a Member under section 944I shall cease to be effect after 6 months, although the period may be extended by the Minister. Section 944I proposes to largely re-enact [section 948](#) of the 2014 Act.

**Section 944J** provides for the transfer of staff from the ODCE to the Corporate Enforcement Authority on the establishment day.

**Section 944L** provides for the operation of a superannuation scheme or schemes for Members other than Members who are civil servants.<sup>39</sup> The Minister is required to obtain the consent of the Minister for Public Expenditure and Reform before operating such a scheme. Every superannuation scheme made by the Minister under section 944L is also required to be laid before each House of the Oireachtas as soon as may be after it is made. If a resolution annulling the scheme is passed by either such House within the next 21 days on which that House has sat after

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<sup>39</sup> A superannuation scheme refers to an organisational pension programme.

the scheme is laid before it, the scheme shall be annulled accordingly. Section 944L largely re-enacts [section 950](#) of the 2014 Act.

**Section 944N** provides for the chairperson to be accountable to the Committee of Public Accounts and, where required, to give evidence to that Committee in relation to specified matters concerning the operation of and use of resources by the Corporate Enforcement Authority. In exercising these duties, the chairperson is prohibited from questioning or expressing an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such a policy.

**Section 944O** provides for Members of the Corporate Enforcement Authority to be accountable to Committees or sub-committees of Committees of the Houses of the Oireachtas, other than the Committee on Public Accounts, the Committee on Members' Interests of Dáil Éireann or the Committee on Members' Interests of Seanad Éireann. This is a standard provision in legislation of this type<sup>40</sup> and replaces [section 955](#) of the 2014 Act. A Member will not be required to give an account before a Committee in respect of any matter which is, has been or may be the subject of proceedings before a court or tribunal. A Member acting under the section 944O is prohibited from questioning or expressing an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such a policy.

**Section 944P** provides for the confidentiality of information obtained or provided to the Authority in the performance of its functions, and re-enacts [section 956](#) of the 2014 Act.

**Section 944R** provides for the restriction of the application of Articles 14 and 15 of the [General Data Protection Regulation](#) [the GDPR] to allow for the Authority to carry out its functions where those functions give rise to the processing of personal data to which the GDPR applies. This provision is largely similar to [section 957A](#) of the 2014 Act which applies in respect of the Director of the ODCE.

**Section 944S** provides for the transfer of rights and liabilities, and continuation of leases, licences and permissions granted by the ODCE. This is a standard technical provision allowing for the dissolved ODCE to transfer property and legal rights on the establishment day to the new Corporate Enforcement Authority.

**Section 944T** provides for the preparation of an Annual report, to be submitted to the Minister and laid before each House of the Oireachtas.

**Section 944U** proposes to require the Corporate Enforcement Authority to prepare a strategy statement for submission to the Minister, relating to the period of three years following the establishment day. The strategy statement is required to be laid before each House of the Oireachtas, as soon as practicable following this, the strategy statement shall also be published online. Section 944U also provides for the preparation and submission to the Minister of a work programme for the Corporate Enforcement Authority, relating to the objectives and priorities of the Corporate Enforcement Authority on a yearly basis.

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<sup>40</sup> See [section 27 of the Competition and Consumer Protection Act 2014](#) and [section 19 of the Data Protection Act 2018](#).

**Section 944V** provides for the making of grants to the Corporate Enforcement Authority, whereby the Minister may, out of moneys provided by the Oireachtas, advance sums as determined by the Minister, with the consent of the Minister for Public Expenditure and Reform.

**Section 944W** exempts Members and staff of the Corporate Enforcement Authority from liability in respect the performance of any function under the proposed legislation, save where the act or omission is shown to be in bad faith. Section 944W re-enacts [section 953](#) of the 2014 Act.

**Section 944X** provides for the keeping of financial accounts by the Corporate Enforcement Authority. The Corporate Enforcement Authority is required to submit estimates of income and expenditure to the Minister as required by Minister.

**Section 944Y** provides for the preparation of a final annual report to be prepared by the Corporate Enforcement Authority in respect of the ODCE, with section 944T applying in respect of an annual report under this section.

### Section 944D Functions of Authority

Section 944D provides for the functions of the Corporate Enforcement Authority. This section is largely similar to [section 949](#) of the 2014 Act, which is repealed under section 3 of the Bill. Section 949 of the 2014 Act provides for the functions of the Director of the ODCE (discussed above). Section 944D provides that the Corporate Enforcement Authority shall be independent in the performance of its function and subject to Chapter 15A and Schedule 22, shall regulate its own procedures.

### Section 944K Staff of Authority, etc.

Section 944K provides for the appointment of staff to Corporate Enforcement Authority. Section 944K also provides that the Corporate Enforcement Authority may appoint the number of staff and grades of staff as it deems appropriate, subject to the approval of the Minister given with the consent of the Minister for Public Expenditure and Reform. Members of staff are defined as civil servants.

Ensuring the Corporate Enforcement Authority has the appropriate flexibility and autonomy in relation to staffing is a key objective that has featured consistently in policy documents in relation to the Bill. The issue of staffing also featured during the PLS hearing of the 5<sup>th</sup> February 2019, where speaking on behalf of the Department of Business, Enterprise and Innovation, Ms Eadaoin Collins noted that:

“The current director came in in 2012. A huge amount of reform has taken place in the ODCE in recent years. Speaking to the specialist recruitment, eight forensic accountants were recruited of whom seven are in place now in addition to two enforcement portfolio managers, two enforcement lawyers, a digital forensic specialist. These are the new specialist cohort of staff to complement the existing staff within the office and bring a wealth of new skills. There has been two very specific cohorts of training in the area of witness statements.”<sup>41</sup>

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<sup>41</sup> Joint Committee on Business, Enterprise and Innovation debate – Tuesday, 5 Feb 2019. General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018: Discussion. Available at [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_business\\_enterprise\\_and\\_innovation/2019-02-05/2/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_business_enterprise_and_innovation/2019-02-05/2/).



The Regulatory Impact Analysis of the General Scheme, in analysing the costs, benefits and impacts of the proposals, states that:

“... 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.”<sup>42</sup>

### **Section 944M Secondment to Authority of member of Garda Síochána**

Section 944M provides for the secondment to the Corporate Enforcement Authority of a member of An Garda Síochána. This largely re-enacts [section 951](#) of the 2014 Act.

The 2020 Annual Report of the ODCE notes that 8 Detective Gardaí are on secondment with the ODCE. These are comprised of a Detective Inspector, 3 Detective Sergeants and 4 Detective Gardaí.

### **Section 944Q Disclosure of information to Authority**

Section 944Q provides for the disclosure of information to the Authority relating to offences under the 2014 Act, by the following bodies:

- the Competition and Consumer Protection Commission;
- a member of An Garda Síochána;
- an officer of the Revenue Commissioners;
- the Insolvency Service of Ireland;
- the Irish Takeover Panel;
- the Registrar of Companies;
- the registrar of friendly societies; or
- any other such authority or person as may be prescribed by the Minister.

This section largely re-enacts [section 957](#) of the 2014 Act.

### **Chapter 3B – Investigation of director or former director of public-interest entity to find whether such director has engaged in certain prohibited conduct, etc.**

Chapter 3B comprises 9 sections, which largely re-enact [sections 957AA](#) to [957I](#) of the 2014 Act, with appropriate consequential amendments that follow from the enactment of provisions contained in this Bill.

**Section 944Z** provides for definitions of terms that are used in Chapter 15B. This section largely re-enacts section 957AA.

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<sup>42</sup> *Regulatory Impact Analysis of the Companies (Corporate Enforcement Authority) Bill*, (October 2018), at p. 8. Available at: <https://www.gov.ie/en/publication/ef9afb-companies-corporate-enforcement-authority-bill-2018/>.

**Section 944AA** provides for a situation where the Corporate Enforcement Authority receives particulars and information referred to in [section 936A](#) of the 2014 Act, from the Irish Auditing and Accounting Supervisory Authority and has investigated a director in relation to whether they have engaged in conduct giving rise to a relevant contravention.<sup>43</sup> Section 944AA provides that the Corporate Enforcement Authority may impose sanctions, and provides directors with a right of appeal to the High Court in respect of a decision to impose sanctions. Section 944AA is largely a re-enactment of [section 957B](#).

**Section 944AB** provides for the sanctions which the Corporate Enforcement Authority may impose on a director for a relevant contravention. Section 944AB is largely a re-enactment of [section 957C](#).

**Section 944AC** provides for relevant circumstances to be considered by the Corporate Enforcement Authority prior when imposing relevant sanctions on relevant director. These include:

- (a) the gravity and duration of the relevant contravention;
- (b) the degree of responsibility of the relevant director;
- (c) the financial strength of the relevant director (including the annual income of the director);
- (d) the amount of profits gained or losses avoided by the relevant director in consequence of the contravention, in so far as they can be determined;
- (e) the level of cooperation of the relevant director with the Supervisory Authority or Corporate Enforcement Authority, or both;
- (f) previous impositions of relevant sanctions on the relevant director.

Section 944AC is largely a re-enactment of [section 957D](#) of the 2014 Act.

**Section 944AD** provides for circumstances where the Corporate Enforcement Authority and a director may enter into an agreement to resolve matters giving rise to conduct that would amount to a relevant contravention. Section 944AD is largely a re-enactment of [section 957E](#) of the 2014 Act.

**Section 944AE** provides for publication on the website of the Corporate Enforcement Authority of a relevant sanction imposed on relevant director. Section 944AE is largely a re-enactment of [section 957F](#) of the 2014 Act.

**Section 944AF** provides for limitations on imposing monetary sanctions on a director. These include a prohibition on imposing a monetary sanction that would cause the director to be adjudicated bankrupt and a prohibition on the imposition of more than one monetary sanction in respect of the same conduct, where the conduct has resulted in 2 or more relevant contraventions. Section 944AF is largely a re-enactment of [section 957G](#) of the 2014 Act.

**Section 944AG** provides that a director shall not to be liable to be penalised twice for the same conduct where the conduct gives rise to an offence punishable under the law of the State as well

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<sup>43</sup> A relevant contravention refers to :

- (a) a breach of the standards of a prescribed accountancy body by a member of that body, or
- (b) a contravention by a statutory auditor of a provision of —
  - (i) [section 336](#) or [section 337](#) of the 2014 Act,
  - (ii) [Part 27](#) of the 2014 Act, or
  - (iii) Regulation (EU) No 537/2014.



as to a relevant contravention. Section 944AG is largely a re-enactment of [section 957H](#) of the 2014 Act.

**Section 944AH** provides for appeals to and orders of the court, including orders confirming decisions of the Corporate Enforcement Authority. Section 944AH is largely a re-enactment of [section 957I](#) of the 2014 Act.

## Share Capital

Sections 14 to 23 of the Bill provides for amendments to the 2014 Act arising out of recommendations of the CLRG in the Shares Report.<sup>44</sup> These are discussed in further detail below. A short synopsis of each provision in Part 3 is given in the Table of Provisions (above).

### Share Premium accounts

Section 14 relates to recommendation 2.1 in the Shares Report. It proposes to insert a new subsection 5A in [section 71](#) of the 2014 Act. The effect of the proposed amendment is to permit a company that has a share premium account<sup>45</sup> to use it to pay:

- preliminary expenses incurred in forming the company,
- expenses and commissions on issues of securities, or
- any premium due on redemption of certain redeemable preference shares or debentures.

This would restore provisions that applied before the introduction of the 2014 Act. In its recommendation, the CLRG said that this amendment would permit companies to reduce their share capital without needless expense on court applications or statutory auditors' reports. The CLRG noted that UK company law makes a similar provision in respect of share premium accounts.

### Intermediaries

Section 15 is based on recommendation 4.2 in the Shares Report. The recommendation relates to exceptions to the general rule, under [section 82\(2\) of the 2014 Act](#), that a company may not give financial assistance for the purchase of its shares or of shares in its holding company.

Section 15 addresses cases where a public company (or a private company that is a subsidiary of one) pays a commission to a person or business that underwrites an issue of shares in the public company. This is a common commercial practice that reflects the costs and risks assumed by the underwriter. For that reason, and subject to a number of limiting conditions (including a maximum commission rate of 10 per cent), the exception to the rule was permitted. The [Companies Act 1963](#)

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<sup>44</sup> See *The recommendations of the Company Law Review Group relating to shares and share capital in the Companies Act 2014*, (2017). Available at <http://www.clrg.org/publications/shares%20and%20share%20capital%20clrg%20report.pdf>.

<sup>45</sup> A share premium account is an element of a company's undenominated capital account representing amounts received by the company for shares issued by it in excess of the nominal value of those shares. A share premium account is generally treated similarly to the company's denominated capital account (representing the nominal value of issued shares) and may not usually be used to pay distributions (e.g. dividends) or to offset trading losses.

did not specify any person to whom permitted commissions must be paid, but [a reform of that Act's provisions relating to financial assistance in 2005](#) limited the exception to cases where commissions were paid “to intermediaries” of the underwriter.

The CLRG recommended that the requirement to interpose an intermediary be removed. Section 15 therefore proposes deletion of the words “to intermediaries” from [section 82\(6\)\(n\)](#). Section 22 proposes deletion of the words “to intermediaries” from [section 1043\(1\)\(c\)](#) of the 2014 Act. (Section 1043 applies minor variations to the commissions exception in relation to PLCs.)

### Variation of company capital on reorganisation

Section 16 concerns transactions whereby a transferor company<sup>46</sup> (‘Company A’) sells all or part of its assets and/or undertaking to another body corporate (‘Company B’), and Company B pays the some or all of the purchase consideration by means of issuing shares in itself to Company A’s members or holding company rather than directly to Company A.

This amounts to a distribution by Company A to its members or holding company (equivalent to a dividend) and so would normally require Company A to have sufficient distributable reserves to pay the value distributed. If Company A does not sufficient distributable reserves, the only lawful way to carry out the transaction would be for Company A to undertake a formal reduction or reorganisation of its capital under procedures provided for in the 2014 Act.

[Section 91](#) of the 2014 Act permits these transactions, but assumes that they take place only where the transferor company (referred to in that section as “the relevant company”) is “reorganising” its capital, and so stipulates that the transaction must be approved by the Court or the Summary Approval Procedure under the Act.<sup>47</sup>

The CLRG notes in recommendation 8.1 of the Shares Report that a capital reorganisation is not required if the transferor company has sufficient reserves to fund the transaction. It also notes that the reference to ‘reorganisation’ is unclear, as a simple write-down of the transferor company’s capital may suffice.

Section 16 therefore seeks to give effect to the CLRG’s recommendations by amending section 91 to:

- permit these transactions without the need for Court approval (or the Summary Approval Procedure) if the transferor company has sufficient distributable reserves, and
- remove the reference to “reorganisation” in section 91(1), so that it is not a requirement of the transaction that it involve a reorganisation of the transferor company’s capital.

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<sup>46</sup> A transferor company refers to the company in a transaction that is transferring its assets or undertakings to another party in a transaction.

<sup>47</sup> The Summary Approval Procedure (SAP) is a set of steps provided for under [Part 4, Chapter 7](#) of the 2014 Act whereby a company can undertake certain ‘restricted activities’ (such approving the giving of financial assistance for purchase of its own shares, reorganising or reducing its capital, or entering a members’ voluntary winding up). The SAP can be used as an alternative to applying to the Court for approval of certain types of restricted activity. Use of the SAP is mainly restricted to private companies and it may be used by PLCs only in very limited circumstances.

In any case where the transferor company does not have sufficient distributable reserves, the current requirement for Court approval or the Summary Approval Procedure will remain.

### Treasury shares, mergers and divisions

Sections 17, 18, 20 and 21 relate to an anomaly in the 2014 Act relating to circumstances in which a company becomes the owner of shares in itself or its holding company.

In general, companies may not own shares in themselves or their holding companies as this would contravene the principle of preservation of capital. Exceptions are allowed for cases where a company redeems shares out of distributable reserves or cancels them as means of distributing funds to its members or reducing its capital. However, company law generally recognises that there are circumstances where a company may acquire ownership of its shares (or those of its holding company) without cancelling them.<sup>48</sup> Such shares are referred to as 'treasury shares' and the 2014 Act places strict limits on the conditions for buying them, the percentage of the company's nominal share capital they may represent (set at a maximum of 10 per cent) and prohibits the exercise of voting rights in respect of them.

[Sections 106](#) of the 2014 Act defines 'treasury shares' by reference to [section 102](#) and [section 105](#) of the 2014 Act, which set out some of the circumstances in which a company may become the holder of shares in itself or its holding company. The CLRG noted in recommendation 11.1 of the Shares Report that this definition does not take account of two other circumstances, namely mergers and divisions.<sup>49</sup>

Part 3 of the Bill addresses this anomaly by proposing amendments to sections 106 (which defines 'treasury shares')<sup>50</sup>, [section 109](#) (which governs how treasury shares may be held)<sup>51</sup>, [section 480](#) (dealing with mergers)<sup>52</sup> and [section 503](#) (dealing with divisions).<sup>53</sup>

### Distributions

Section 19 of the Bill relates to the 2014 Act's definition of a 'distribution' and the circumstances in which a company may reduce its share capital. [Section 123\(1\)](#) defines distributions as including "every description of distribution of a company's assets to members of the company, whether in cash or otherwise". It then lists a number of specific exceptions to that definition, mostly involving cases where a payment is offset against a new issue of shares.

The CLRG notes in recommendation 12.1 of the Shares Report that the 2014 Act did not carry over two exceptions to the definition of 'distribution' that had previously applied. These covered

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<sup>48</sup> For example, a company may acquire another company that holds shares in it as an investment.

<sup>49</sup> 'Mergers' are a new category of transaction under the 2014 Act whereby an acquiring company and the acquired company become a single new corporate entity. (Previously, the acquired company simply became a subsidiary of the acquirer and the two remained separate entities.) Similarly, 'divisions' are a new category of transaction recognised under the 2014 Act whereby the assets and undertaking of a transferor company are acquired by two or more acquiring companies, and the transferor is dissolved.

<sup>50</sup> See section 17 of the Bill.

<sup>51</sup> See section 18 of the Bill.

<sup>52</sup> See section 20 of the Bill.

<sup>53</sup> See section 21 of the Bill.

cases where a company paid off fully paid shares (in effect, ‘redeemed’ shares that were not issued as redeemable shares) and where a company ‘forgave’ members’ outstanding liabilities on partly paid shares. Both of these transactions are therefore means of reducing a company’s capital.

The significance of these procedures not being excluded from the definition of ‘distribution’ is that [section 117](#) of the 2014 Act requires that distributions be paid out of profits available for that distribution, which excludes the company’s share capital and share premium account. Both of these transactions are capital in nature and requiring the company to have distributable reserves to cover them could defeat their purpose.<sup>54</sup> (Both types of transaction would require following appropriate procedures – such as obtaining Court approval or use of the Summary Approval Procedure – to ensure the protection of creditors)

Section 19 adopts the CLRG’s recommendation of adding these two types of transaction to the list of exceptions to the definition of ‘distribution’ in section 123.

### Registration of share transfers

Section 23 of the Bill addresses an apparent oversight in the drafting of the 2014 Act. [Section 95\(1\)](#) of the 2014 Act sets out the general rules applicable to directors’ discretion to refuse to register a transfer of shares. Unless a company’s constitution provides otherwise, the section gives directors a broad discretion to refuse registration.

The CLRG noted in recommendation 9.1 of the Shares Report that section 95(1) is framed in terms that are appropriate for private companies (shares in which are usually held by self-selecting groups of investors), but not for public companies, whose shares are usually transferrable to any person.

[Section 1045](#) of the 2014 Act adapts section 95 for public limited companies (PLCs) but does not alter the grounds for refusing registration that are appropriate to private companies but not public ones. The CLRG therefore recommended an amendment of section 1045 to adapt general rule in a way more suitable for PLCs. Section 23 does so by allowing refusal to register a transfer on grounds similar to those that applied under the *Companies Act 1963*. These will apply unless the company’s constitution provides otherwise.<sup>55</sup>

### Corporate Governance

Sections 26, 27 and 28 of the Bill provides for amendments to the 2014 Act arising out of recommendations of the CLRG in the Corporate Governance Report. These are discussed in further detail below. A short synopsis of each provision in Part 4 is given in the Table of Provisions (above).

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<sup>54</sup> The CLRG notes that [section 84\(1\)\(c\)](#) permits a company to “... pay off any paid up share capital...” but says the absence of any reference to this in section 123 means that it “cannot be relied on as resolving the dilemma”.

<sup>55</sup> The CLRG notes that both Irish and UK Listing Rules oblige companies (with limited and specific exceptions) to register all transfers, and that the constitutions of listed Irish companies will already have provided for this.

### Prohibition on the appointment of a minor as company secretary

Section 26 of the Bill implements recommendation 3.1 of the Corporate Governance Report.

[Section 131](#)(1) of the 2014 Act prohibits the appointment of a person under the age of 18 as a director or secretary of a company. Section 131(2) makes clear that the purported appointment of a minor as a director is void. However, it does not deal with the purported appointment of a minor as secretary. Section 26 therefore proposes adding the words “or secretary” to section 131(2).

### Right of a proxy to “demand or join in demanding a poll”

Section 28 implements recommendation 13.2 of the Corporate Governance Report.

[Section 184](#) of the 2014 Act sets out the prescribed form of proxy for use at a general meeting of a company. This includes information on rights available to the person so appointed, including the right to speak and vote. The CLRG noted that [section 189](#)(7) also gives a person appointed proxy the right to “demand or join in demanding a poll”, but that that information is not specified in the prescribed form of proxy. It recommended an amendment to [section 184](#) to provide for the inclusion of that information.

### Disapplication of section 181(5)(d) in respect of certain CLGs

Section 30 addresses an apparent oversight in the drafting of [section 181](#) of the 2014 Act. Section 181 sets out information that must be included in a notice of a general meeting. This includes a statement to the effect that a member is entitled to appoint a proxy to attend, speak and vote at the meeting instead of him or her. However, [section 1205](#) provides that the constitution of a private company limited by guarantee [CLG] may provide that members do not have the right to appoint proxies. The requirement in section 181 could therefore conflict with the constitution of a CLG, and the CLRG proposed, in recommendation 12.1 of the Corporate Governance Report, an amendment to address this.

Section 30 implements the CLRG’s recommendation. The proposed amendment will remove the requirement to include information about appointing proxies if the company’s constitution does not permit its members to do so.

### Miscellaneous

Part 5 of the Bill provides for miscellaneous amendments to the 2014 Act.

### Requirement of directors to provide PPSN

Section 35 provides for the insertion of a new section 888A into the 2014 Act. The proposed amendment provides for a requirement that directors of Irish registered companies provide their PPSN to the CRO when making an application under the 2014 to incorporate a company, when making an annual return under the 2014 by a company over which they are a director and when making a notice of change of directors or secretaries under the 2014 Act by a company over which they are a director. This is aimed at addressing the scenario which arises where a person uses

different versions of their name to avoid statutory limitations to the number of directorships they can hold.<sup>56</sup> Section 35 also creates an offence of failing to comply with this obligation.

The Regulatory Impact Analysis notes that:

“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.”<sup>57</sup>

## Restriction of Directors

Section 34 of the Bill proposes to amend [section 819\(1\)](#) of the 2014 Act by adding new grounds on which the Corporate Enforcement Authority, a liquidator or a receiver may apply to the High Court for a Restriction Order in respect of a director of a company.

Restriction Orders are provided for in [Chapter 3 of Part 14](#) of the 2014 Act as a means of protecting the public against dishonest or irresponsible directors. They can be applied by the High Court to directors of insolvent companies who (in broad terms) fail to act honestly and responsibly in relation to their companies’ affairs or to cooperate appropriately with liquidators. The effect of a Restriction Order is to prevent the director from being or acting as director or secretary of a company, or being involved in the formation or promotion of one, for a period of five years. A Restriction Order is a less severe measure than a Disqualification Order (under [Chapter 4](#)), which can be applied to directors who are found to have acted fraudulently.

Section 34 addresses cases where the directors of an insolvent company fail to convene a general meeting to appoint a named liquidator, or fail at such a meeting to propose a motion to appoint a named liquidator. The CLRG noted that appointment of a liquidator “usually requires an indemnity from [the creditors] to the liquidator in respect of [the liquidator’s] fees and costs”. Failure to appoint a named liquidator can therefore result in the company being nominally in liquidation but not being actively liquidated. The CLRG described this as “most unsatisfactory”, suggesting that:

“...there is a concern that in some cases this situation is being deliberately engineered in order to avoid the scrutiny of directors’ behaviour by liquidators, the ODCE or the courts.”

The CLRG proposed, in recommendation 4.4 of the Protections for Employees and Unsecured Creditors Report, that a director of an insolvent company who fails to take appropriate steps to nominate a named liquidator should be deemed to be subject to a Restriction Order.

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<sup>56</sup> See [section 142](#) of the 2014 Act.

<sup>57</sup> *Regulatory Impact Analysis of the Companies (Corporate Enforcement Authority) Bill*, (October 2018), at p. 8. Available at: <https://www.gov.ie/en/publication/ef9afb-companies-corporate-enforcement-authority-bill-2018/>.

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