



**Tithe an  
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Oireachtas**

***An Comhchoiste um Fhiontar, Trádáil agus Fostaíocht***

Grinnscrúdú Réamhrechtach ar  
Bhille na gCuideachtaí (An tÚdarás um Fhorfheidhmiú Corparáideach), 2018.

**Aibreán 2021**

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***Joint Committee on Enterprise, Trade and Employment***

Pre-legislative scrutiny of the  
Companies (Corporate Enforcement Authority) Bill 2018

**April 2021**



## Contents

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Contents.....	1
Réamhrá an Chathaoirligh/Chair's Foreword .....	2
Introduction .....	3
Summary of Recommendations .....	4
Overview of the General Scheme.....	5
Powers .....	6
Resourcing.....	9
Members of the Authority.....	11
Appendices .....	12
Appendix 1: Membership of the Joint Committee .....	12
Appendix 2: Terms of Reference of the Joint Committee .....	13



## Réamhrá an Chathaoirligh/Chair's Foreword

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Whether as consumers, householders or businesses, it is important that we can all go about our business confident that so-called “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.

Corruption and ‘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.

In recent years, it has been apparent to myself and others that there is a definite need for a range of additional measures to strengthen Ireland’s response to fraud and corruption – including improved prevention, detection, investigation and prosecution. Central to these measures is the need for a strong, independent statutory agency that would be responsible for company law compliance and enforcement. Such an agency would investigate increasingly complex breaches of company law.

Mindful of this pressing need, the Joint Committee has prioritised its consideration of the proposed legislation that we now report on. The Companies (Corporate Enforcement Authority) Bill will establish an autonomous Corporate Enforcement Authority to strengthen oversight relating to the conduct of business and corporate behaviour under the Companies Act 2014.

The Committee welcomes the proposals to give the new Authority the structures and powers that it needs to meet the challenges it faces in its investigation and prosecution of alleged breaches of company law. At the same time, the Committee stresses the need for sufficient resources – financial and otherwise – to be made available to the Authority if it is to meet these challenges.

The Committee is making a number of recommendations that it believes will strengthen the Bill and ensure that the Authority is fully equipped to discharge its functions. I hope that the Minister for Enterprise, Trade and Employment will proceed quickly with the finalisation of the Bill, and the Committee looks forward to considering it further when it is examined at Committee Stage.

I would like to express my thanks to the key stakeholders who, in making submissions in relation to the proposals, assisted the Committee in its deliberations.

Maurice Quinlivan

Chair of the Joint Committee on Enterprise, Trade and Employment



## Introduction

The General Scheme of the Companies (Corporate Enforcement Authority) Bill was published in December 2018. However, pre-legislative scrutiny was not completed when the 32<sup>nd</sup> Dáil was dissolved.

The General Scheme was referred to the Joint Committee on Enterprise, Trade and Employment (“the Committee”) for pre-legislative scrutiny by Tánaiste and Minister for Enterprise, Trade and Employment, Mr Leo Varadkar T.D.

The Committee first requested submissions from a number of stakeholders, and submissions were received from:

- The Office of Director of Corporate Enforcement
- Professor Deirdre Ahern
- The Law Society

The Committee held two meetings on the General Scheme:

Date	Witnesses
22 January	Officials from the Office of the Director of Corporate Enforcement <ul style="list-style-type: none"><li>• Mr Ian Drennan, Director of Corporate Enforcement</li><li>• Ms Suzanne Gunn, Enforcement Lawyer</li><li>• Mr David Hegarty, Enforcement Manager</li><li>• Mr David McGill, Digital Forensics Specialist</li><li>• Mr Conor O’Mahony, Head of Insolvency &amp; Corporate Services</li></ul>
2 February	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: <ul style="list-style-type: none"><li>• Ms Nina Brennan, Principal Officer</li><li>• Ms Orla O’Brien, Assistant Principal</li></ul>

This report deals primarily with the creation of the Corporate Enforcement Authority (“the Authority”). The report addresses issues raised related to:

- Powers
- Resourcing
- Number of Members of the Authority.

It is important to note that the ODCE (and the Authority proposed under this legislation) are not responsible for all white-collar crime, but rather are solely charged with the enforcement of company law. During his appearance before the Committee, the Tánaiste highlighted that other agencies, such as the Revenue Commissioners and the CCPC, are part of the approach to combatting white-collar crime.

The submissions are available on the Committee’s website.



## Summary of Recommendations

### Recommendations

1. The Committee recommends that legislation surrounding the searching of electronic devices be clarified.
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.
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.
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 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.
6. The Committee recommends that the minimum number of members of the Authority be increased to 2.
7. The Committee recommends that, in order to future proof the Authority, the maximum number of members be increased, possibly to 5.



## Overview of the General Scheme

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The General Scheme is divided into six parts:

- Part 1 contains the general provisions of the Bill.
- Part 2 contains the heads related to the establishment of the Corporate Enforcement Authority.
  - This Part establishes the Corporate Enforcement Authority as an agency. The Authority will be independent in the performance of its tasks and exercise of its powers under the Companies Act. It will, like the ODCE, be tasked with enforcing and encouraging compliance with the Companies Act.
  - The Authority will have at least one Member and not more than 3 Members who will be appointed by the Minister on the recommendation of the Public Appointments Service. The Director of the ODCE will become one of the Members. This structure is similar to that of the Competition and Consumer Protection Commission.
- Parts 3-6 deal with amendments to the Principal Act (the Companies Act) which are primarily as a result of recommendations from the Company Law Review Group.
  - These include amendments related to Shares and Share Capital (Part 3), Corporate Governance (Part 4), Restriction of Directors (Part 5) and Miscellaneous Amendments (Part 6).



## Powers

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The General Scheme sets out some additional powers for the new Authority. The ODCE also outlined in its submission that a number of issues have emerged since the Bill was initially proposed over two years ago. However, the ODCE also notes that it shares the Government's view that the Authority should be set up as soon as possible and recognises that some of its recommendations (outlined below) may not be possible before the enactment of the Bill and therefore might best be given effect through subsequent changes to company law and Criminal Justice legislation.

Before the Committee, Mr Drennan noted that the ODCE has significant and substantial statutory powers and stated that their proposals are aimed at making the Authority more effective.

### Search and Seizure

The ODCE states in its submission that the search warrant powers under sections 787 and 788 of the Principal Act provide for:

- remote access to digital evidence to be authorised by warrant so as to ensure access to digital data such as an email address or access to information held in an internet data storage facility;
- permission to search an individual found at a premises the subject of the warrant. This is ordinarily provided for in other warrants; and
- empowering a warrant holder, or a person nominated by the warrant holder, to require the owner(s) or controller(s) of electronic devices to provide the passwords to a member of the Authority's staff carrying out searches.

The ODCE also notes that the Review Group has recommended the updating of legislation relating to warrants to take into account technological advances and require that owners/controllers provide passwords.

In addition, the ODCE believes that the Authority should be designated under the Communications (Retention of Data) Bill 2017 to allow the Authority to access the information available to other agencies. The ODCE notes that the CCPC is currently a designated agency under the Act. The ODCE also agrees with the report by the Review Group that the Criminal Justice (Surveillance) Act 2009 should be extended to the Authority.

During the ODCE's engagement with the Committee, Mr Drennan fully acknowledged that on occasion there are tensions between the privacy rights of citizens and the duty of the State, in particular when it comes to criminal investigations. Mr Drennan further noted that recent Supreme Court judgements in this area have had an impact on the ODCE's work and that this is a complex issue that creates "significant difficulties". Ms Gunn went into more detail on the judgments, outlining that the main issue related to the uptake of an entire email folder and the Supreme Court found that a lack of safeguards to protect non-relevant material had the potential impact of disproportionately breaching the privacy rights of the individual. Ms Gunn confirmed that this creates "acute issues" for electronic evidence or electronic devices.

### Recommendations

1. The Committee recommends that legislation surrounding the searching of electronic devices be clarified.

Mr McGill noted that Head 46 extends the existing search powers and will allow the Authority to conduct searching of documents stored in the cloud offsite.

The Tánaiste informed the Committee that a police powers Bill was being discussed across Government to give additional powers around access to electronic information and the cloud, rather than introduce piecemeal legislation for different bodies.



### Recommendations

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.

## Custody Regulations

The ODCE outlines that currently, and in the General Scheme, ODCE officials are not permitted to participate interviews alongside members of An Garda Síochána. As a result, expert staff, such as forensic accountants, must liaise with Garda Detectives from outside the interview room. The ODCE notes that the CCPC and Criminal Assets Bureau already have these powers and believes that similar powers for the new Authority “would considerably enhance its investigative effectiveness”. During the Committee’s engagement, Mr Drennan stated that it is “suboptimal for staff to be sitting outside the room having to try to deal with answers that have been given to the interviewing gardai and then trying to formulate supplementary questions arising from those answers, and doing it all in real time”. Mr Drennan also noted that there are also constraints around the length of time an individual can be detained and the entitlement to rest periods mean the time is run through quickly.

The Tánaiste acknowledged that this issue had been raised a number of times and stated that it would be examined, though likely to be provided for later as it is not provided for in this Bill. Ms Brennan from the Department of Enterprise, Trade and Employment highlighted that this would require an amendment to criminal justice legislation and that the Department would have to consult with the Department of Justice.

### Recommendations

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.

The ODCE also supports the Review Group’s recommendation to allow for the extension of detention periods for suspects of serious offences to a maximum of seven days (subject to judicial authorisation).

## Other Issues

The ODCE outlined a number of additional issues related to existing legal processes and recommends some changes. The cumbersome processes and timelines relating to legal professional privilege is one issue raised. The ODCE recommends streamlining the procedure in section 795 of the Companies Act and extending the period in which applications must be brought before the Courts.

The ODCE also recommends that, in order to ensure that it may retain certain documents as archives, that the National Archives Act 1986 be extended to the Authority and that the Authority have access to attested copies of Court orders in proceedings to which it is not a part to ensure a more efficient investigation and prosecution of those directors breaching Restriction and Disqualification Orders.

The ODCE is also recommending that certain reporting obligations for liquidators be extended to examiners.

Minister Troy outlined an action plan, led by the Minister of Justice, following the Hamilton Review Group report “Review of structures and strategies to prevent, investigate and penalise economic crime and corruption” and stated that new powers relevant to the Authority will continue to be actively considered.



### Recommendations

4. The Committee supports the ODCE's request 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 amendments to be made in subsequent legislation rather than this General Scheme.



## Resourcing

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The resources available to the ODCE and Authority were a significant issue during the Committee's engagements and the submissions received.

### Staffing

The ODCE submission outlines the resource implications of the transition to the Corporate Enforcement Authority. Additional staffing will be required due to both the transition to an Agency and the vision set out for it.

As an Agency, the Authority will have its own legal, regulatory and governance obligations. The Authority will have to, for example, maintain its own accounting systems, HR and legal responsibilities as an employer in its own right, comply with the Code of Practice for the Governance of State Bodies, and take responsibility for certain ICT requirements. The ODCE notes that it is not currently equipped to assume these responsibilities, most of which are currently being provided by the Department of Enterprise, Trade and Employment.

To enable the Authority to meet the vision set for it, the ODCE notes that additional staffing will be required as the investigations are intensive and increasingly more complex due to, for example, legislation struggling to keep up with technological advances, the numbers of parties involved in investigations, the propensity of interested parties to litigate and many parties the ODCE engages with being well resourced. During the Committee meeting with the ODCE, Mr Drennan further stated that the ODCE faces challenges of finding itself engaging in civilian litigation; however, he also recognised that this is an inevitable part of the ODCE's job.

Discussing the need for additional resources, Mr Drennan emphasised his view that "the right resources are much more important than more resources" and outlined that additional digital forensics and legal resources were necessary. Mr Drennan outlined that the ODCE has indicated that the Authority will need a new digital forensics professional, another legal professional and an administrative support officer.

Mr Drennan addressed questions on "surge capacity", stating that in the event of being served with judicial review proceedings "the surge capacity is that everybody rolls up their sleeves and gets stuck in".

Minister Troy informed the Committee that an increased allocation of 14 civil servants (a 35% increase) has been approved and that good progress has been made on other organisational issues (including ICT and accommodation). The Tánaiste stated that the increased civil servant allocation was made up of two principal officers, three assistant principal officer equivalents - digital forensics, an enforcement lawyer and an ICT manager - one higher executive officer, two executive officers and five clerical officers.

The Tánaiste noted that an issue facing the ODCE is the difficulty in retaining skilled employees in certain areas due to pay levels available in the private sector and noted that the transformation into an agency will allow greater flexibility and the greater ability to contract in people for particular tasks. The Tánaiste further highlighted that the organisation cannot be doubled or trebled overnight and that there needs to be a plan for scaling up.

The Tánaiste assured the Committee that preparations for the transition into the Authority were underway and were not waiting for the Bill to be passed to commence.

### Garda Resources

Alongside civil servants, a number of members of An Garda Síochána are assigned to the ODCE. The ODCE outlined that the current arrangements regarding the assignment of members of An Garda Síochána, and the associated budgetary issues will need to be amended.

Mr Drennan addressed the allocation of Gardaí, noting that the ODCE would benefit from the additional members of An Garda Síochána and that the ODCE has indicated that the Authority will require one additional detective sergeant and eight additional detective Gardaí. The Tánaiste noted that there are plans to double the complement of Gardaí assigned from eight to sixteen.



The ODCE submission notes that certain arrangements will need to be amended to give the Authority greater independence, certainty and agility, particularly in relation to the arrangements for the assignment of Gardaí. Mr Drennan also highlighted that there are occasions when additional resources are necessary during pinch-points.

### **Budgetary Allocation**

In a submission to the Committee, Professor Ahern stated that the ODCE has been under-resourced and that the effectiveness of the Authority will depend on not just its structure, but on being properly resourced.

Mr O'Mahony informed the Committee that an extra €1 million was allocated to the ODCE in 2019 in anticipation of the legislation going ahead and that this should be adequate in the short to medium term to cover the staffing requirements.

Further detail on the budgetary allocation was provided by the Tánaiste, outlining that it is €6 million in 2021 and will increase to €6.3 million in 2022. The Tánaiste also highlighted that the figures could be a bit misleading as there is currently a €1.5 million underspend.

### **Recommendations**

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.



## Members of the Authority

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Head 9 of the General Scheme sets out that the Authority will have at least one member and not more than three members. The explanatory note highlights that this structure is similar to the Competition and Consumer Protection Commission (CCPC).

In a submission to the Committee, Professor Ahern outlined that the CCPC has a preferable composition with between two and six other members. Professor Ahern noted that it is not good practice to leave all decisions in the hands of one person, and workload and workstream issues support the case for having increased membership.

During his appearance before the Committee, the Tánaiste stated that he has an open mind regarding the number of members of the Authority and that there may be a case for allowing, or at least giving the Minister flexibility, to expand the number of members.

Professor Ahern also raised the possibility of part-time members being provided for in the legislation, as is the case with the CCPC, recommending that it be provided for the Authority to avail of the diverse expertise of persons who may not be in a position to commit to a full-time membership role.

### Recommendations

6. The Committee recommends that the minimum number of members of the Authority be increased to 2.
7. The Committee recommends that, in order to future proof the Authority, the maximum number of members be increased, possibly to 5.



## Appendices

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### Appendix 1: Membership of the Joint Committee

Deputies: Maurice Quinlivan (SF) [Chair]  
Richard Bruton (FG)  
Francis Noel Duffy (GP)  
Joe Flaherty (FF)  
Paul Murphy (S-PBP)  
James O'Connor (FF)  
Louise O'Reilly (SF)  
Matt Shanahan (Ind)  
David Stanton (FG)

Senators: Garret Ahearn (FG)  
Ollie Crowe (FF)  
Róisín Garvey (GP)  
Paul Gavan (SF)  
Marie Sherlock (Lab)



## Appendix 2: Terms of Reference of the Joint Committee

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### a) Scope and Context of Activities of Committees (*derived from Standing Orders – DSO 84, SSO 70*)

- 1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;
- 2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil/and or Seanad;
- 3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993;
- 4) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 111A; and

The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

- (i) a member of the Government or a Minister of State, or
- (ii) the principal officeholder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle, whose decision shall be final.

- 5) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.

### b) Functions of Departmental Committees (*derived from Standing Orders – DSO 84A and SSO 70A*)

- (1) The Select Committee shall consider and report to the Dáil on-
  - (a) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and
  - (b) European Union matters within the remit of the relevant Department or Departments.
- (2) The Select Committee may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.



- (3) Without prejudice to the generality of paragraph (1), the Select Committee shall consider, in respect of the relevant Department or Departments, such—
- (a) Bills,
  - (b) proposals contained in any motion, including any motion within the meaning of Standing Order 187
  - (c) Estimates for Public Services, and
  - (d) other matters as shall be referred to the Select Committee by the Dáil, and
  - (e) Annual Output Statements including performance, efficiency and effectiveness in the use of public moneys, and
  - (f) such Value for Money and Policy Reviews as the Select Committee may select.
- (4) Without prejudice to the generality of paragraph (1), the Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:
- (a) matters of policy and governance for which the Minister is officially responsible,
  - (b) public affairs administered by the Department,
  - (c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
  - (d) Government policy and governance in respect of bodies under the aegis of the Department,
  - (e) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,
  - (f) the general scheme or draft heads of any Bill
  - (g) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of State on any Bill enacted by the Houses of the Oireachtas,
  - (h) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,
  - (i) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
  - (j) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (d) and (e) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and
  - (k) such other matters as may be referred to it by the Dáil from time to time.
- (5) Without prejudice to the generality of paragraph (1), the Joint Committee shall consider, in respect of the relevant Department or Departments—
- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,
  - (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
  - (c) non-legislative documents published by any EU institution in relation to EU policy matters, and
  - (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.



- (6) Where the Select Committee has been joined with a Select Committee appointed by Seanad Éireann, the Chairman of the Dáil Select Committee shall also be the Chairman of the Joint Committee.
- (7) The following may attend meetings of the Select or Joint Committee, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:
  - (a) members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
  - (b) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
  - (c) at the invitation of the Committee, other members of the European Parliament.
- (8) The Joint Committee may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department or Departments, consider—
  - (a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and
  - (b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 111F apply where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.