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Industry Information

## Corporate Enforcement in Ireland - ODCE to be Established as a Stand Alone Agency

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In December 2018 Minister for Business, Enterprise and Innovation, Heather Humphries T.D. announced that the Cabinet had approved for publication the General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018 (the “Scheme”).

The proposed new legislation is designed to strengthen Ireland’s regulatory framework for the conduct of business and is a key action in the Government’s package of measures to tackle white collar crime.

As the Scheme will have to progress through the usual legislative process, certain of the proposals set out therein may be amended and / or removed if / when the legislation is ultimately passed. Nonetheless, the Scheme contains some noteworthy proposals which we consider below.

### Executive Summary

The purpose of the Scheme is to establish the Office of the Director of Corporate Enforcement (“ODCE”) as an agency, rather than its current form of an office within the Department of Business, Enterprise and Innovation. The new agency will take the form of a commission structure and will be named the Corporate Enforcement Authority (the “Authority”).

In addition to establishing the Authority, the Scheme seeks to introduce a number of noteworthy amendments to the Companies Act 2014 (the “Act”).

### The Authority

The Scheme proposes repealing the provisions of the Act that establish and provide for the functions of the Director for Corporate Enforcement (the “Director”) and his Office, which sections will be replaced with new provisions that reflect the new structure of the Authority.

It is proposed that the Authority will be more flexible (in particular as regards its ability to recruit specialist skills and expertise) and autonomous than the ODCE and thus better equipped to investigate increasingly complex breaches of company law.

The Authority will comprise between one and three commissioners (referred to as Members), who will be appointed by the government, and who will sit on a full time basis for a period of up to five years, with the possibility of a further term of up to five years. The flexibility regarding the number of members is designed to enable the Authority to bring in specific expertise commensurate with its workload.

The Authority will have largely the same powers as the ODCE but its ability to investigate non-compliance with the Act is proposed to be enhanced by the introduction of:

- » enhanced powers to collect electronically stored data. Under this proposed amendment to the Act, the Authority will be authorised to access data under the control of an entity or individual, regardless of where they have that data stored and to 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 evidence rules and digital forensics principles; and
- » a new statutory exemption to the hearsay rule that would allow a court to consider admitting written statements into evidence in certain circumstances and subject to certain conditions. This proposal is modelled on section 13 of the Competition Act 2002.

In terms of oversight, the Authority will be required to prepare and submit on an annual basis a report on its activities in the immediately preceding year. In addition, the Authority will be required to prepare and submit a strategy statement in respect of the following three year period.



## Other Noteworthy Proposed Amendments to the Act

In addition to the proposed amendments to the Act necessitated by the creation of the Authority, the Scheme proposes a number of unrelated noteworthy amendments.

### New Grounds For Restriction of Directors

The Scheme provides that a restriction order can be made against a director who has:

- (a) Failed to convene a general meeting of shareholders for the purpose of nominating a named liquidator; or
- (b) At such a meeting fails to table a motion to nominate a named liquidator;
- (c) Has failed to provide the required notice to employees in a winding up.

This proposed amendment is intended to address an issue raised in the Company Law Review Group's 2017 Report on the Protection of Employees and Unsecured Creditors.

### Directors to Provide PPSN to Companies Registration Office

The Scheme proposes that directors in possession of, or entitled to, a PPSN, shall be required to include it in certain filings made with the Companies Registration Office ("CRO"), including annual returns. A director who is not entitled to a PPSN, or an EEA equivalent, shall be instead required to provide a copy of the photo page of his or her passport to the CRO. One of the aims of this proposed amendment is to facilitate the CRO in verifying that directors are not seeking to circumvent the cap on the number of directorships that can be held by using different variants of their name.

### Share Premium Account

The Scheme includes a proposed amendment to the Act which enables a company with a share premium account to use the account for various purposes, for example, the writing off of the company's preliminary expenses or the expenses of or commission paid or discount allowed on any issue of shares or debentures.

### Redemption of Shares for Unlimited Companies

The Scheme includes a proposal to disapply the requirement for distributable reserves to redeem own shares for unlimited companies.

## Conclusion

Although the proposed legislation is at its infancy, the Scheme provides a useful insight into the changes that may be coming down the tracks. We will keep you updated as this proposed legislation progresses.

## Authors

This briefing is for general guidance only and should not be regarded as a substitute for professional advice. Such advice should always be taken before acting on any of the matters discussed. If you have any further queries, please contact the below authors:



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