



December 2018

## Government to establish a new Corporate Enforcement Authority

### Background

In November 2017 the Government published a series of measures which it intended to take to tackle white collar crime (the “**Measures**”). One of the Measures was to establish a new independent corporate law enforcement agency, to overcome some of the difficulties currently faced by the Office of the Director of Corporate Enforcement (the “**ODCE**”), which operates as an Office of the Department of Business, Enterprise and Innovation.

The Government has recently published draft legislation, the General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018 (the “**Scheme**”), which if ultimately enacted will give effect to that proposal.<sup>1</sup>

### New Authority

The Scheme provides that the new body will be called the Corporate Enforcement Authority (the “**Authority**”). The Authority will comprise of between one and three full time

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<sup>1</sup> This article focuses solely on the provisions of the Scheme which relate to the establishment of the Corporate Enforcement Authority. However the Scheme also provides for other changes to the Companies Act 2014.

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members, who will be appointed for a period of five years (with a possibility of reappointment for a further five year term). An explanatory note to the Scheme states that flexibility is being deliberately given as to the number of the Authority's members, to allow its membership to be tailored according to its workload. The member(s) will be assisted in carrying out the Authority's functions by staff.

The Scheme gives the Authority autonomy to appoint its own staff, subject to standard Ministerial approvals. The Government believes that this will facilitate the Authority in acquiring the expertise it needs through the recruitment of more specialist staff. This differs from the current process for recruiting staff to the ODCE, whereby recruitment is managed through the Department of Business, Enterprise and Innovation (save for specialist competitions).

### New powers

For the most part, the Authority will have the same enforcement powers available to it as those that are currently conferred on the ODCE. However, the Scheme does give the Authority some additional powers.

The proposed new powers allow the Authority to access data under the control of an entity or individual, regardless of where the entity/individual has that data stored e.g. to access off-site lawfully accessible machines or cloud storage. The proposed new powers reflect the fact that evidence is now frequently collected in digital format and that this information may be stored off-site.

The Scheme also provides a statutory exemption to the hearsay rule and allows a court to consider admitting written statements which might otherwise be excluded into evidence, in certain circumstances and subject to certain conditions.

### Next steps

As noted above, the legislation is currently in draft form and changes may be made to it before it is enacted. Indeed it is stated in the explanatory notes to the Scheme that certain of its provisions will be subject to further consultation. For example, it is stated that the search powers will be subject to consultation with the Office of the Attorney General, to ensure that they provide appropriate protections for the person under investigation.

In the Measures the Government proposed to have the legislation enacted in Q2 2019. However that timeline may change, as the publication of the Scheme is behind schedule (originally it was intended to be published in Q2 2018).

Ultimately it is proposed that once the legislation is finalised and enacted, it will amend the provisions of the Companies Act 2014 so that the new legislation is integrated into that Act.

## Comment

A [published account](#) of shortcomings which were identified by Judge Aylmer in respect of an investigation carried out by the ODCE in the period 2008 to 2012, notes that at that time, the ODCE was not equipped to undertake a number of complex investigations in parallel. It is clear that the proposed new legislation is intended to remedy those matters by providing capacity for the Authority to be led by up to three senior personnel and by allowing the Authority to appoint its own specialist staff directly.

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