

An Irish version of the FBI? The Corporate Enforcement Authority under the spotlight

Taoiseach Leo Varadkar intends for the new Corporate Enforcement Authority to be “an Irish version of the FBI” when it comes to white-collar crime. Muireann Reedy looks at how the new Authority will differ from the ODCE, examines some of its proposed new powers, and asks what this will mean for white-collar crime.

In December 2018 the Government published draft legislation, the “General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018” (the “Scheme”) which if enacted will establish a Corporate Enforcement Authority (the “CEA”). The Government had announced its plan to establish a new independent corporate law enforcement agency as part of a series of measures which were published in 2017 to tackle white-collar crime. This step was taken in recognition of some of the difficulties which are currently faced by the Office of the Director of Corporate Enforcement (the “ODCE”) in carrying out its functions.



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administrative processes. Each member of the CEA will be appointed for a period of five years with the possibility of being re-appointed for a further five years. The member(s) will be supported in carrying out the CEA’s functions by staff. By providing for the CEA to be headed by up to three members, the Government clearly wants to ensure that the CEA has enough individuals at the helm to enable it to potentially manage several large-scale investigations at the same time. The legislation which established the ODCE provided for it to be headed by a single individual – the Director of Corporate Enforcement. Another key difference between the ODCE and the CEA is that the CEA will have the power to appoint its own staff, subject to standard Ministerial approvals. The Government believes that giving the CEA this autonomy will facilitate it in hiring and retaining the specialist staff it needs. Recruitment for the ODCE is managed through the DBEI (save for specialist competitions). An additional €1m has been allocated to the ODCE’s budget for 2019 to assist it in establishing the CEA, of which €750,000 has been ear-marked for staff pay.

Functions

It appears as though the CEA is going to replace the ODCE as explanatory notes to the Scheme refer to the ODCE’s “transition” to the CEA. The CEA will take over the functions that are currently performed by the ODCE including promoting compliance with the Companies Act 2014 (the “2014 Act”), investigating suspected offences or instances of non-compliance with the 2014 Act and enforcing the 2014 Act. The Scheme contains a saver for any investigations started by the ODCE and provides that such investigations may be continued by the CEA. The Scheme also states that the person who is holding the position of the Director of Corporate Enforcement immediately before the CEA is established will become a member of the CEA once it is established, save in certain exceptional circumstances.

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New Powers

All the ODCE’s current powers will be carried over to the CEA. However, the Government is proposing to give the CEA a significant new power which would allow it to use its own devices, while onsite, to connect to corporate networks and to access offsite lawfully accessible machines or cloud storage. The Scheme also proposes that the

CEA could use its own machines while onsite to use login credentials obtained from mobile devices to access the cloud storage that is accessible from those devices. Essentially, this amendment to the ODCE’s current search and seizure powers would allow the CEA 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 using any electronic device deemed necessary and at any location deemed necessary.

These proposed new powers reflect the fact that evidence is now frequently collected in digital format and that this information may be stored off-site. These search and entry tools will be subject to consultation with the Office of the Attorney General, to ensure that appropriate protection is provided for the person being investigated. The Government has also noted that if introduced, this power would be new ground and may be of interest to other investigative bodies such as the Gardai.

The DBEI is also working with the

Department of Justice and Equality, with a view to giving the CEA a power under the Communications (Retention of Data) Bill to apply to the courts to retain specified telecommunication records for an investigation.

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Comment

The Government has clearly recognised some of the challenges faced by the ODCE when investigating potential

company law breaches. Giving the new Authority independence, more resources and stronger search and seizure powers will certainly enhance its capabilities to carry out its mandate.

Only time will tell if the CEA becomes “an Irish version of the FBI”. A broader overhaul of the current regime for investigating and prosecuting white-collar crime would probably be needed to justify that comparison. In that regard, the establishment of the CEA does not go as far as some of the recommendations made by the Law Reform Commission in 2018, where it recommended that a Corporate Crime Agency should be established and that a dedicated unit for prosecuting corporate offences should be created within the Office of the Director of Public Prosecutions.

The information contained in this article is based on what is currently contained in the Scheme and is subject to change.

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Structure

The CEA is to operate as an independent agency and be structured as a commission. This differs to the ODCE’s construct as an Office of the Department of Business, Enterprise and Innovation (the “DBEI”). The Government believes that, by establishing the CEA as an independent agency, it will solve some of the resourcing issues faced by the ODCE which has to compete for resources with the other offices and agencies under the DBEI’s remit.

Notably, the CEA is to be headed by between one and three full time members. The Government has said that it is deliberately leaving some flexibility as to the number of its members to allow the CEA to expand if its workload increases or if it needs to separate its investigative, compliance and