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Corporate Enforcement Authority and Legal Privilege: Changes coming down the tracks

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The recently published Companies (Corporate Governance, Enforcement and Regulatory Provisions) Bill 2024 (the **"Bill"**) is designed to enhance and strengthen governance, enforcement and regulatory provisions in the Companies Act 2014 (as outlined in our recent briefing). This briefing examines proposed changes to the court process for determining whether documents seized by the Corporate Enforcement Authority (**"CEA"**) are privileged.

Background to proposed changes

These changes follow challenges encountered by the CEA recently in an application to the High Court to determine whether legal professional privilege attached to emails of John Delaney (the former CEO of the FAI), which were seized from the FAI in 2020 (and which has only been finally resolved in recent months) (***"CEA v FAI"***).[1]

CEA v FAI arose after the CEA seized material, including potentially privileged material, from the FAI on 14 February 2020. Three days later the CEA issued a motion seeking a determination in relation to privilege, to which Mr Delaney was joined as a notice party. Mr Delaney initially claimed legal professional privilege in respect of approximately 29,500 documents, which was subsequently reduced to 2,805 documents. The High Court appointed an independent assessor to examine the material over which an assertion of privilege had been made by Mr Delaney and the FAI. The independent assessor upheld Mr Delaney's privilege claim in respect of 1,613 documents. Ultimately, the High Court rejected the conclusions of the Assessors and ruled that Mr Delaney had not made out his claim for privilege and therefore rejected his claim. The High Court's ruling was upheld by the Court of Appeal and earlier this year the Supreme Court refused to grant Mr Delaney leave to appeal.

The current position

In *CEA v FAI*, the CEA deployed its powers under the current regime, particularly under section 795 of the Companies Act 2014, which allows the CEA to seize potentially privileged material, provided that the confidentiality of the material can be maintained until the High Court rules on whether the material is privileged. Section 795 presently prescribes that the CEA must apply to the High Court, on notice and **within 7 days** of seizing the material, to determine whether the material is privileged. The High Court can make directions in relation to preservation of the material pending its ruling and may also appoint an independent assessor to prepare a report on the potentially privileged material.

The Changes Proposed

If enacted, the Bill will amend section 795 of the Companies Act 2014 as follows:

- The CEA will have 14 days (rather than 7) to apply for a privilege determination. The Explanatory Memorandum to the Bill says that the extension is in consideration of cases where thousands of documents may be at issue and where an examination of the documents to determine relevance may necessarily take some time. While the CEA was able to make an application within 3 days in *CEA v FAI*, a longer period is provided for in other Acts: for example, the Competition and Consumer Protection Commission has 30 days in which to make such an application and the Commission for Communications Regulation must make an application "as soon as reasonably practicable".
- The Bill would explicitly allow for the appointment of more than one independent assessor to examine potentially privileged material and prepare a report for the court. This amendment would likely reduce the time required for producing a report to the Court in circumstances where the material is voluminous.

  In *CEA v FAI*, the first assessor appointed advised the parties that, due to the complexity and volume of material, a second assessor should be appointed to assist in examining the material and to expedite the report. This was resisted by Mr Delaney who asserted that the subsection made clear that only one assessor could be appointed. The Court ultimately found that, as section 795 allows the Court to make such directions considered appropriate, the Court could appoint additional assessors if necessary. The Court also referred to the Interpretation Act 2005, which states that the use of the singular must be construed as also importing the plural. The Bill would, however, resolve any ambiguities in that regard.

A General Scheme of the Bill was published in March 2024, but the Bill does not include all of the provisions contained in the General Scheme. In particular, the General Scheme provided that the application for a privilege determination would be made on an ex parte basis, rather than on notice. The General Scheme stated that the rationale for such an amendment was to prevent possible destruction of evidence yet to be seized where a person is tipped off to an investigation by virtue of their being on notice of the relevant motion – for example where the CEA comes into possession of material from a third party in relation to an individual. This amendment has not been retained in the Bill as introduced so, if enacted in its current form, such applications would continue to remain on notice.

Outlook

The Bill is expected to progress through the legislative process when the Houses of the Oireachtas resume in September and may be enacted by the end of this year.

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1. High Court: Director of Corporate Enforcement v Cumann Peile na hÉireann (Respondent) and John Delaney (Notice Party) [2022] IEHC 593 linked here; Court of Appeal: Corporate Enforcement Authority v Cumann Peile na hÉireann (Respondent) and John Delaney (Notice Party) [2023] IECA 226 linked here.

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