

COMPANY COMPLIANCE AND GOVERNANCE

COVID-19 Practical Considerations: Company Compliance & Governance

3 April 2020

This briefing sets out practical considerations for companies in ensuring continued corporate compliance during the COVID-19 pandemic.

Ordinarily, the day-to-day running of a company requires a large amount of human interaction – to hold members' meetings and board meetings, sign documents, and file forms with the Companies Registration Office ("CRO"). The COVID-19 pandemic, and in particular the restrictions on travel and prohibition on meetings of more than two people introduced by the Government on 26 March and which are set to last until, at least, 19 April (the "Restrictions") make the day-to-day running of a company more difficult but not, generally, impossible. This briefing sets out practical steps that companies can take to operate and govern their company as well as to comply with their corporate compliance requirements during this difficult period.

CRO OPERATIONS GREATLY RESTRICTED BY THE RESTRICTIONS

In line with Government guidelines on COVID-19, the public office of the CRO closed on 12 March and remains closed indefinitely. CRO staff will not be attending the public office until the Restrictions have been lifted. CRO customers can still order documents from the CRO and online filing is still possible via <https://core.cro.ie/>.

The CRO has announced that it is generally *"not in a position to process submissions or answer queries at this time."* Certain limited functions can be carried out by CRO staff working from home, such as receiving charges, and these will

continue during the Restrictions. The CRO were briefly unable to process company incorporations, re-registrations and changes of name, but are currently again processing such applications; however delays might reasonably be anticipated in this regard.

The CRO is currently accepting delivery of post through An Post or using its DX number; however it will not accept items delivered by courier or by hand.

The COVID-19 pandemic is an evolving situation and the CRO are keeping it under constant review. Further information/updates can be found at the CRO's twitter handle: https://twitter.com/cro_ie.

THE PROPERTY REGISTRATION AUTHORITY ("PRA") IS CURRENTLY CLOSED UNTIL FURTHER NOTICE

In light of the COVID-19 pandemic, the PRA's public offices are currently closed. The PRA have also announced the temporary suspension of property registrations with the exception of eRegistration services. The PRA will no longer be in a position to accept applications lodged through the post / DX. The PRA's Land Direct services will operate as normal with the exception of copy document requests. For the time being, customers should not forward applications to the PRA and should not request copy documents through Land Direct.

DIRECTORS' MEETINGS

The directors of a company are generally required to manage the company's business, and will likely need to meet to consider the company's response to the COVID-19 pandemic during the period in which the Restrictions are in effect. The Companies Act 2014 (the "Act") provides some helpful provisions which would allow this to be done in a safe manner.

Holding directors' meetings while complying with social distancing requirements

Helpfully, section 161(6) of the Act provides that a board meeting may consist of a conference held by means of telephonic, video or other electronic communication. Each director so attending will be deemed to be present in person at the meeting and shall be entitled to vote and be counted in the quorum for the meeting. The section requires that each director attending be able to speak to, and be heard by, the other directors present. Current technology provides many ways of facilitating this (e.g. Zoom, Microsoft Teams, Skype for Business and conference calls) and with the vast majority of people now working from home, remote meetings should be relatively easy to set up.

Written resolutions of directors

In addition, section 161(1) of the Act provides that a resolution in writing

In addition, we would recommend following the protocols below:

- All parties should allow time for any technical issues that may arise in joining a call;
- The Chairperson should take a roll call of those present on the call;
- Once all parties have confirmed their presence, all phones should be placed on mute until a party wishes to contribute; and
- Each party should identify themselves at the start of any contribution so as to facilitate minute-taking.

signed by **all** the directors shall be as valid as if it had been passed at a board meeting. It should be emphasised that such a resolution must be signed by all the directors (whereas to pass a resolution at a board meeting, it would generally be sufficient that a quorum be present and that a majority vote in favour). This resolution may be signed in counterparts – therefore, it could be emailed to the directors, printed off, and signed by each of them individually. Each director should sign an original, rather than signing a copy signed by another director, and each director should return their signed page to the secretary (by email and post) to allow them to maintain the company's records. Importantly, the resolution will take effect **from the time that it is signed by the last director**. The Act also provides for the situation where one or more of the directors would not be permitted to vote on a resolution. However, as detailed below, a written resolution cannot be used instead of a board meeting for the purpose of the Summary Approval Procedure. Where it is not possible to print the resolution, a view might be taken that unanimous assent by email from all of the directors could constitute a unanimous written resolution.

Optional provisions

Both section 161(1) and 161(6) of the Act are *"optional"* provisions and so apply save to the extent that a company's constitution provides otherwise. Therefore, every company will be allowed to hold telephonic board meetings and pass written directors' resolutions – even if its constitution is entirely silent on these points – provided that it has not dis-applied the optional provisions or has not expressly barred the holding of such meetings or the passing of resolutions as written resolutions. Where applicable, these provisions will apply equally to meetings of committees established by a board.

Other considerations

If there are reasons why meetings should be held in a particular place (for example, related to tax residency, where it may be important that decisions are made

in a particular jurisdiction), a company will need to give further consideration to such factors and we can advise on these if needed.

MEMBERS' MEETINGS

Where possible, companies should avoid holding members' meetings for so long as the Restrictions remain in effect. In certain circumstances this will not apply, for example, where a company is required to hold an annual general meeting ("AGM") or the company needs to pass a members' resolution. In those cases, the following measures may be of assistance.

Holding members' meetings while complying with social distancing requirements

For members' meetings, the legal situation is even clearer than directors' meetings (as outlined above), in that section 176(4) of the Act states that any meeting – whether an AGM or an extraordinary general meeting ("EGM") – may be held in two or more venues at the same time using any technology that provides members, as a whole, with a reasonable opportunity to participate. As section 176(4) is a mandatory provision of the Act, it cannot be disapplied by a company's constitution.

Helpfully, section 176(4) of the Act does not limit the number of venues in which a general meeting can be held, and thus would allow for each member to attend using individual teleconference facilities. Details of the teleconferencing arrangements should be sent out with notice of the meeting, and the same practical advice would apply to general meetings as has been detailed above in respect of directors' meetings.

Further advice should be sought as to whether or not technology must also allow the attendees to **vote**. The position is likely to be different for every company because the ability to vote is generally only critical where an attendee is required to make up a quorum.

We would strongly recommend the use of section 176(4) of the Act given that the ['COVID-19 Workplace Protection and Improvement Guide'](#) published by the

Government and the National Standards Authority of Ireland on 27 March advises that physical distancing measures should be implemented across all business types and can be achieved by, amongst other things, *"the use of technology for video/ virtual meetings"* and *"limiting the number of meetings including length and proximity of gathering of employees/others"*.

Often the quorum for a general meeting will be expressed to be a number of persons *"present in person or by proxy"*. Although section 176(4) of the Act does not provide that telephonic attendance is to be deemed to be presence in person (as does section 161(6) in the case of directors' participating in a telephonic meeting) it is thought that telephonic attendance will, given the Restrictions, satisfy the requirement of being *"present in person or by proxy"*. However we would recommend that companies seek specific legal advice where there is likely to be difficulty in the requisite number of persons being present physically or by proxy.

Use of proxy forms

Obviously for practical reasons, where a company has a large number of members it may not be feasible that each member participates using individual teleconference facilities. In such cases, section 183 of the Act, which provides that any member may appoint another person as his or her proxy to attend and vote in their place, may be very useful.

It is strongly recommended, for so long as the Restrictions remain in effect, that companies should make clear in the notice of a meeting or by other appropriate means that members may not attend in person, will be refused entry if they do so, and should vote by proxy. The proxy form should appoint the chairperson of the **meeting** as proxy and not the chairperson of the board or a specific director who may, given the Restrictions, be unable to attend. Where shareholders have already appointed someone other than the chairperson of the meeting, they should be encouraged to submit a new proxy form as soon as possible within the period prescribed for receipt of proxies.

In a case where a company with a large number of members is proposing to hold a meeting during the period in which the Restrictions are in effect, it is recommended that such company would seek specific legal advice.

Choice of venue

The notice of a members' meeting must specify the place of the meeting, and when sending out notice of such meeting, a venue should be chosen that is appropriate for the particular company in light of the Restrictions. It is unclear whether or not all venues need to be listed in an AGM notice. However for practical reasons and given the Restrictions, we would suggest that all venues do not need to be listed in an AGM notice. If a meeting has already been convened for a venue that has become unavailable due to the Restrictions, and the company's constitution allows the board to change the venue of such meeting, the meeting should be moved to an appropriate venue. Where this is impracticable, companies should take specific legal advice.

Unanimous written resolution of members

Section 193 of the Act provides that a resolution in writing signed by all the members of a company entitled to attend and vote on such resolution at a general meeting shall be as valid and effective as if it had been passed at such a meeting. Helpfully, such a resolution may be signed in counterparts, and so could be emailed to the members and signed by each of them individually. Importantly, such resolution will take effect **from the time that it is signed by the last member**. Please note, however, that a written resolution may not be used instead of a meeting to remove a director, or to remove or change a statutory auditor.

Section 193 of the Act is a mandatory provision for every company registered under Part 2 of the Act ("LTD") and so applies regardless of what is stated in a company's constitution. Section 193 of the Act will apply to a DAC, CLG, PLC or unlimited company unless the company's constitution provides otherwise. Obviously, the procedure under section 193 of the Act may be impracticable for a company with a large number of members.

Section 193 of the Act may also be used by single-member companies (of any type) or by multi-member LTDs to remove the need to hold an AGM. The resolution in such a case must acknowledge receipt of the financial statements that would have been laid before the members, resolve all such matters as would have been resolved at such AGM, and confirm that no change is proposed

in the appointment of the statutory auditor. However, please note that such a resolution may not be used by multi-member companies other than LTDs.

In the case of a single-member company, all the powers of the company (including the power to remove a director, but not to remove or change an auditor) shall be exercisable by the sole member without needing to hold a meeting. The decision should be drawn up in writing and notified to the company.

The Act also allows for written resolutions signed by a majority (rather than all) of the members, but given that such a resolution will not take effect until 7 days (for an ordinary resolution) or 21 days (for a special resolution) has passed after signing by the last member, this tends to be rarely used in practice.

Other considerations

If there are reasons why members' meetings should be held in a particular place, the company will need to give further consideration to such factors.

TRANSFER OF SHARES

In order for a transfer of shares to be registered in a non-listed company, board approval is required and a proper instrument of transfer e.g. a stock transfer form (often requiring stamping by the Revenue Commissioners) must be delivered to the company. Board approval can be provided by way of a written resolution of the directors or at a meeting of the directors and therefore should not cause any particular difficulty during the period in which the Restrictions remain in effect.

It is necessary for the transferor to sign the stock transfer form. An individual transferor must sign his or her name. If the transferor is a corporate body, this may often require the affixing of the company seal, in which case this must be done in accordance with the Act and the transferor's constitution and the stock transfer form must bear original signatures.

Unless a transfer is exempt from the payment of stamp duty, stamp duty calculated at 1% of the total consideration must be paid to the Revenue Commissioners within 30 days of the date of the transfer. Once the appropriate stamp duty is paid or an exemption granted, the Revenue Commissioners issue a stamping certificate. A stamp duty return is filed with the Revenue Commissioners electronically through the Revenue Online Service (ROS) or through a registered agent, as set out at www.ros.ie.

Should the Revenue Commissioners office close, this will have a significant

impact on the date of registration for many share transfers. It may be possible to split the transfer of the legal and beneficial ownership in order to enable transfers to be registered at short notice. Please contact a member of the Company Compliance & Governance team for further advice in this regard.

APPOINTMENT OF DIRECTORS

Given the closure of the CRO's public office until further notice, it is worth re-iterating in this briefing that most resolutions that require filing will nonetheless be effective from **when passed** (rather than from when the filing is made). The appointment of a director is one such case: the validity of the appointment of a director will be **unaffected** by a delay in filing the Form B10 at the CRO notifying them of the change, and the appointment will be effective from the **date on which the resolution approving such appointment (board or member(s), as the case may be) is passed**.

In the vast majority of cases, this would be a current date, although there will be circumstances where a future date may be required, where, for example, third party consent is required. As a matter of good practice, appointments should not be made retrospectively unless the circumstances are exceptional in nature. If the appointment is conditional on some event occurring, such as approval of the appointment by a regulatory authority, then the date of such appointment will be determined by the date that the relevant approval is issued. If such authority is required, then it is inappropriate for the company to appoint the director with an effective date **prior** to the date the authority is granted.

AMENDING THE CONSTITUTION OF A COMPANY

Section 32(1) of the Act provides that a company may by special resolution amend its constitution. The provisions set out above in respect of members' meetings should be taken into account in passing that resolution. The company must then notify the CRO of the amendment, and must deliver to the CRO a copy of the amended constitution. However, as for a change in directors, the amendment will generally take effect from when the resolution is passed and **will not be affected by any delay in filing**. Where the consent or approval of a third party (e.g. the Charities Regulatory Authority) is required to the change, obviously this should be sought, and time should be allowed for any additional delays that might arise in this regard due to the Restrictions.

CHANGING THE NAME OF A COMPANY

Although most changes to a company's constitution will take effect from when the resolution is passed, an exception to this is where it is proposed to change the

name of the company, as this is expressed in section 30 of the Act as being subject to "the approval of the Registrar". The CRO are currently processing change of name applications, but delays might reasonably be expected.

FILING OF ANNUAL RETURNS

The CRO has made the following announcements regarding the filing of annual returns in response to the COVID-19 pandemic:

- All annual returns due to be filed by any company now and up to 30 June 2020 will be deemed to have been filed on time if all elements of the annual return are completed and filed by 30 June 2020;
- All annual return signature pages due to be delivered to the CRO will be treated as received on time if they are received by the CRO by close of business on 30 June 2020;
- All company strike off steps and procedures have been suspended until after 30 June 2020. The CRO have confirmed that a company that does not file its annual return on time will not be struck off;
- Filings can still be made online;
- Those who possess a Revenue Online Services (ROS) signature can complete the online filing using ROS signature instead of using a signature page;
- Processing times of annual returns may now be longer than usual timeframes. All filings received by the CRO will be queued and processed as soon as possible; and
- The date of 30 June 2020 may be extended by the CRO depending on the situation on that date.

SUMMARY APPROVAL PROCEDURE

A copy of the declaration made by the directors for the purpose of the Summary Approval Procedure must be delivered to the CRO within 21 days after the date on which the restricted activity is commenced, to ensure that the restricted activity is found to have been validly carried on. The CRO have confirmed that for so long as the CRO remains closed, the declaration may be filed by email, and that this will constitute compliance with the 21-day period.

VOLUNTARY STRIKE OFF

The CRO have confirmed in a recent update entitled '[FAQs Filing with the CRO up to 30th June 2020](#)' that "**all strike off steps and procedures have been suspended until 30th June 2020.**"

RE-REGISTERING AS A DIFFERENT TYPE OF COMPANY

Where a company wishes to re-register from one company type to another, section 1285 of the Act provides that the change will take effect only upon the issue to the company by the CRO of a certificate of incorporation on re-registration. The CRO are currently processing re-registration applications, but delays might reasonably be expected.

APOSTILLING / AUTHENTICATION

Due to the COVID-19 pandemic, the

Apostilles/Authentications public offices of the Department of Foreign Affairs ("DFA") in Dublin and Cork closed on 27 March and will remain closed until further notice. The DFA currently continue to authenticate and apostille documents received by registered post accompanied by a detailed cover letter and payment. This will however add significant delays to the timeframe in which documents are being processed. Should a document require legalisation by an Embassy / Consulate (in advance of authentication), it will be necessary to review the restrictions imposed by each individual Embassy/Consulate. For example, on 23 March the Embassy of the People's Republic of China in Ireland announced that all authentication applications are currently suspended until further notice.

NOTARISATION

Arthur Cox are working closely with a number of notaries. Should you require any document to be notarised, please contact a member of Arthur Cox.

USE OF ELECTRONIC SIGNATURES

Due to the outbreak of COVID-19, the Restrictions, and the non-availability of authorised signatories, it is necessary for companies to find practical solutions, such as the possible use of electronic signatures, when executing documentation so as to minimise disruptions to business transactions. However, this has to be balanced with the

realisation (for the time being, at least) that certain registries, including the CRO, the PRA and the Intellectual Property Office of Ireland shall only accept certain filings delivered as 'wet ink' originals.

Moreover, it is important to note that certain documents are excluded from execution using e-signature, and practical difficulties remain in relation to, for example, the execution of deeds and witnessed documents. Given the Restrictions, we recommend that a company's board appoint additional authorised persons to sign documents.

Arthur Cox continues to work closely with clients and registries to find practical solutions to minimise disruption to business transactions during these uncertain times. Should you require any assistance regarding document execution, please contact a member of the Company Compliance & Governance team.

CONTACT US

The COVID-19 pandemic and the Restrictions have and will continue to cause disruption for companies. If you have any questions or concerns regarding the information contained in this briefing, please contact a member of the Company Compliance & Governance team.

KEY CONTACTS



Dr Thomas B. Courtney
Partner
+353 1 920 1223
tom.courtney@arthurcox.com



Daibhi O'Leary
Associate
+353 1 920 1034
daibhi.oleary@arthurcox.com



James Heary
Director
+353 1 920 1253
james.heary@arthurcox.com

Karen Leonard
Client Service Manager
+353 1 920 1237
karen.leonard@arthurcox.com

Pamela Sullivan
Team Leader
+353 1 920 1445
Pamela.Sullivan@arthurcox.com

Edel Quigley
Team Leader
+353 1 920 1212
edel.quigley@arthurcox.com