

CORPORATE GOVERNANCE AND COMPLIANCE

Companies (Miscellaneous Provisions) (COVID-19) Act 2020 amends the Companies Act 2014: what companies need to know

August 2020

The purpose of this update is to summarise the main changes to company law introduced by the Companies (Miscellaneous Provisions) (COVID-19) Act 2020 (the "Act") which was commenced on 21 August 2020.

This update focuses on company secretarial dimensions to the new Act, for example:

- changes relating to the execution of documents;
- the deferral of annual general meetings ("AGMs");
- the conducting of general meetings wholly or partly by means of electronic communications technology ("Virtual Meetings");
- the ability for directors to change or cancel a general meeting;
- the new information which must be contained in the notice of a general meeting; and
- the procedure for giving notice of rescheduled general meetings.

PURPOSE OF THE ACT

The Act amends the Companies Act 2014 (the "2014 Act"), largely on an exceptional and temporary basis. The Act has been introduced in response to both the risk to human life and public health posed by COVID-19, and the economic difficulties caused by it. The Act largely applies to what is called the "Interim Period", being the period beginning on 21 August 2020 and ending on 31 December 2020. This period may be extended by Ministerial Order.

EXECUTION OF INSTRUMENTS DURING THE INTERIM PERIOD

Section 5 of the Act inserts a new section 43A into the 2014 Act, which provides that, during the Interim Period, an instrument to be made or executed by a company may consist of several documents in like form if:

- one such document is signed by a director of it or by some other person appointed for the purpose by its directors or by a committee of them;
- one such document is countersigned by the secretary or by a second director of it or by some other person appointed for the purpose by its directors or by a committee of them; and
- one such document has the company's seal affixed to it.

This means that if the seal and the required signatures are on different copies of a document, that document will be validly executed under seal. This will address situations where the seal and the signatories are in different locations, and it would be difficult for the seal and the signatures to be placed on the same document in a timely manner.

It is understood from the context that this section refers only to instruments that would require to be executed under seal, although this has not been specified in the Act.

GENERAL MEETINGS DURING THE INTERIM PERIOD

Members' meetings are a particular concern in the context of COVID-19, and the Act introduces a number of new provisions into the 2014 Act in this regard.

AGMs may be deferred to no later than 31 December 2020

A new section 174A(3) provides that where a company would otherwise be required to hold its AGM at any time in 2020, the company may hold that AGM at a later date than would otherwise apply, provided that it holds the AGM not later than 31 December 2020.

Financial statements and reports to be laid before a company in general meeting

Under section 341(2) of the 2014 Act, a company would usually be required to lay its statutory financial statements, directors' report and auditor's report before the AGM within 9 months of the financial year-end.

If a company defers its AGM pursuant to the above section 174A(3), a new section 174A(4) of the 2014 Act replaces this requirement with a requirement that those documents be laid at the above deferred AGM. This means that a company will not be required to hold the AGM within 9 months of the financial year-end (which would otherwise effectively have been the case).

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General meetings may be conducted wholly or partly by means of Virtual Meetings

A new section 174A(5) of the 2014 Act provides that a company “*need not hold*” a general meeting at a physical venue but “*may conduct*” the meeting wholly or partly by the use of a Virtual Meeting “*as long as all attendees have a reasonable opportunity to participate in the meeting in accordance with...* [section 174A].”

As set out below, this adds detail to the existing provision in section 176(4) of the 2014 Act whereby an AGM or extraordinary general meeting (“EGM”) could be held in two or more venues at the same time using any technology that provides members with a reasonable opportunity to participate. In addition, this provision is not limited to such meetings but also applies (as set out in the new section 174A(14)) to a general meeting of holders of shares in a company of a particular class, and to a scheme meeting (for the purpose of a scheme of arrangement), as well as to any such meeting (or AGM or EGM) that has been rescheduled.

Prerequisites to the use of Virtual Meetings

Section 174A(7) of the 2014 Act provides that the use of Virtual Meetings pursuant to section 174A(6) may be made “*subject only*” to such requirements or restrictions put in place by the company as are necessary to ensure the identification of attendees and the security of the Virtual Meetings, to the extent that such requirements or restrictions are “*proportionate to the achievement of those objectives.*” As section 174A does not contain further information as to what would or would not be considered proportionate to the achievement of the objectives of ensuring the identification of attendees and the security of the Virtual Meeting, what is in fact proportionate to the achievement of such objectives will likely be decided on a case-by-case basis.

Section 174A(8) provides that a company “*shall inform*” attendees, before the general meeting, of any requirements or restrictions which it has put in place.

Under section 174A(9), a company that provides for the use of a Virtual Meeting for participation in a general meeting by an attendee “*shall ensure, as far as practicable*” that such Virtual Meeting:

- i. provides for the security of such Virtual Meeting by the attendee;
- ii. minimises the risk of data corruption and unauthorised access; and
- iii. provides certainty as to the source of the Virtual Meeting.

Temporary failure or disruption of a Virtual Meeting shall not invalidate the general meeting or related proceedings

A new section 174A(10) of the 2014 Act provides that any temporary failure or disruption of a Virtual Meeting “*shall not invalidate*” the general meeting or any related proceedings. This sub-section is particularly welcome given the possibility of technical issues in our current remote working environment and provides certainty should companies (or attendees) experience technical issues during a general meeting.

Directors may cancel or change a general meeting for the purposes of preventing, limiting, minimising or slowing the spread of COVID-19

A new section 174A(12)(a) of the 2014 Act provides that where, “*in the opinion of the directors of a company*”, it is deemed necessary in order to comply with the public health guidance of the Government in respect of the movement or gathering of persons for the purposes of preventing, limiting, minimising or slowing the spread of COVID-19, the directors may, “*at any time up to the end of the day prior to the day on which a general meeting is to be held*”:

- i. cancel the general meeting;
- ii. change the venue of the general meeting; or
- iii. change the means of holding the general meeting, for example, by facilitating attendees to participate by way of a Virtual Meeting.

It is unclear whether or not the words “*... end of the day...*” means by the usual close of business of a company or by midnight.

Pursuant to section 174A(12)(b) of the 2014 Act, the directors of a company may, due to “*exceptional and unexpected circumstances*”, cancel a general meeting “*at any time prior to*” the holding of such general meeting. As section 174A does not contain further information as to what might be considered “*exceptional and unexpected circumstances*”, this determination will likely be made on a case-by-case basis. This is sensible, as unexpected circumstances cannot be prescribed in advance by legislation.

Notably, section 174A(12)(b) differs from section 174A(12)(a) because it allows for the cancellation of a general meeting at any time prior to the holding of that general meeting as opposed to any time up to the end of the day prior to the holding of that general meeting, meaning that such general meeting could be cancelled on the day of the general meeting due to exceptional and unexpected circumstances.

Where a meeting is to be changed or cancelled under section 174A(12), there may also be a difficulty in giving notice of this. A new section 181A(1) thus provides that although such notice shall generally be given in the same manner as the notice for the general meeting (as in section 181 of the 2014 Act), where, “*in the opinion of the directors of the company*”, giving such notice in that manner “*is not reasonably practicable*”, notice shall be given:

- i. where the company has a website, on that website;
- ii. by email to all members for whom the company has an email address; and
- iii. in a national newspaper.

Section 181A(2) provides that the requirement to give notice of the change or cancellation shall not apply where all members agree in writing to the change or cancellation, or to dispensing with notice for the general meeting.

NOTICE OF GENERAL MEETING TO CONTAIN NEW INFORMATION

Section 7 of the Act inserts a new section 181(5)(aa) into the 2014 Act which requires that in the case of a general meeting to be held wholly or partly by the use of a Virtual Meeting, the notice of the general meeting shall specify:

- i. the electronic platform to be used for the general meeting;
- ii. the details for access to the electronic platform;
- iii. the time and manner by which an attendee must confirm his or her intention to attend the meeting;
- iv. any requirements or restrictions which the company has put in place in order to identify attendees who intend to attend the meeting;
- v. the procedure for attendees to communicate questions and comments during the meeting; and
- vi. the procedure to be adopted for voting on resolutions proposed to be passed at the meeting.

Notwithstanding that section 174A(5) of the 2014 Act provides that “*A company need not hold a general meeting at a physical venue ...*”, section 181(5)(a) of the 2014 Act is not amended by the Act and therefore there remains a legal requirement to specify “*the place*” of the meeting. Where a meeting is to be held wholly by the use of a Virtual Meeting pursuant to section 174A(5), companies will need to give some thought as to where shall be specified as “*the place*” of the meeting. It is unclear whether or not the specification of locations such as ‘online’ or ‘on the internet’ will suffice.

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MEMBERS AND PROXIES WHO PARTICIPATE IN A GENERAL MEETING BY USE OF A VIRTUAL MEETING SHALL BE COUNTED IN THE QUORUM FOR THE MEETING

A new section 182(2A) of the 2014 Act provides that during the Interim Period, each member and proxy who participates in a general meeting by the use of a Virtual Meeting in accordance with section 174A "shall be counted in the quorum for the meeting."

VOTING ON RESOLUTIONS AT GENERAL MEETING DURING THE INTERIM PERIOD

A new section 195A has been inserted into the 2014 Act, whereby, in the notice of a general meeting, a company may insert in it a notice of intention to require voting on a poll on all resolutions. In such

a case, all resolutions at the meeting shall be taken on a poll.

CONCLUSION

The Act is to be welcomed as a means of temporarily amending existing Irish company law so as to cope with and address the ongoing threats and risks posed by the COVID-19 pandemic.

The Act introduces new provisions into the 2014 Act, many of which are effectively set to expire at the end of the Interim Period. This is nevertheless a cause for concern because the 2014 Act was intended to be a single body of law in which one could see all of the law in one place and in a convenient format. The provisions in the Act could perhaps have been phrased such that the temporary provisions during the Interim Period

would be stated to have effect during the Interim Period and would disappear as a matter of law once the Interim Period comes to an end. It is unfortunate that the text of the Act will make permanent changes to the text of the 2014 Act even though most of the Act will become redundant after the Interim Period expires.

It has been suggested that permanent changes should not be made to the 2014 Act. This was raised by Senator Michael McDowell in Seanad Éireann debate on Friday, 24 July 2020 but was not further pursued. It would presumably be necessary that a further Act would be brought into law at some time in the near future to tidy up the 2014 Act and remove the provisions introduced by the Act upon their expiry at the end of the Interim Period.

CONTACT US

With the Government's recent postponement of Phase 4 of the Roadmap for Reopening Society and Business, the COVID-19 pandemic has and will continue to cause disruption for companies. If you have any questions or concerns regarding the information contained in this update please contact a member of the Corporate Governance and Compliance team.



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