



Companies (Miscellaneous Provisions) (COVID-19) Act 2020: The Corporate Law Perspective

Introduction

The Companies (Miscellaneous Provisions) (COVID-19) Act 2020 (the “2020 Act”) is now on the statute books following its quick passage through the Oireachtas and recent commencement by the Minister for Enterprise, Trade and Employment, Leo Varadkar.

The new measures derive, in part, from recommendations of the Company Law Review Group (“CLRG”) (upon which we [previously reported](#)). The CLRG proposed amendments to the Companies Act 2014 (the “Act”) in light of difficulties faced by Irish companies due to the COVID-19 pandemic. We set out below a high level overview of the key provisions of the 2020 Act.

The Challenges

Compliance with a number of the provisions of the Act has proved challenging for companies in recent times. For instance:

- Distancing restrictions and guidelines on travel have affected the ability of many companies to hold annual general meetings and other general meetings in the normal way. Meanwhile, Single European Companies (SEs) can, pursuant to an EU regulation, avail of **temporary extension** measures permitting their annual general meetings to be held up until the end of 2020.
- Creditors’ meetings required in the context of various processes under the Act (including for instance in a creditors’ winding up) have been impacted for the same reasons.
- Valid execution of deeds by companies, typically requiring two directors, or one director and the company secretary, to manually affix the common seal of the company and wet-ink sign the deed (on the same original signature page) has proved difficult where the directors and the seal are in different locations.
- Cash flow issues have exposed some companies to a greater risk of being wound up despite the fact that the debts of the company might not be substantial.
- Many companies have been concerned about shareholder expectations where its directors have withdrawn recommended dividend resolutions (due to be approved by the shareholders at general meeting) in cases where the financial position of the company no longer supports the payment.
- Examinerships, although a welcome method of court protection for distressed companies particularly at this time, are bound by statutory time limits which can be difficult for an examiner to adhere to in the current environment particularly in terms of progressing requisite meetings.

The new measures

So, what measures have been introduced to alleviate some of these challenges?

Interim period

The interim period, during which the amending provisions will apply, begins on 21 August 2020 and expires on 31 December 2020 (unless extended by ministerial regulation).

Company Seals: new section 43(A)

In recognition of imposed physical distancing of officers of the company and in some cases the seal itself, this section permits documents under seal to be executed in different counterparts, in limited circumstances, and deems the documents together to comprise one instrument. Clients may, in fact, find it easier to rely on “workarounds” suggested in [our previous updates](#), for example, the use of powers of attorney.

General Meetings: new section 174A and various other provisions amended

- Companies need not hold their annual general meetings within the period stipulated under the Act as long as the 2020 annual general meeting is held by 31 December 2020 at the latest. By way of background, the first annual general meeting of a company must take place within 18 months of incorporation and after this, no more than 15 months may elapse between annual general meetings.
- Companies may hold general meetings by electronic or hybrid means. The use of electronic communications technology 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 electronic communications technology, to the extent that such requirements or restrictions are proportionate to the achievement of those objectives. A company must inform attendees, before the general meeting concerned, of any requirements or restrictions which it has put in place in this regard. There are provisions concerning data security and technology failure and the Minister may make further regulations in this area.
- The new measures allow for a change of location and date of general meetings and permit the cancellation, change of venue and type (physical or by way of electronic means) of general meetings to be held. Somewhat unhelpfully, it appears that these actions may be taken only on the basis of health measures introduced by Irish authorities. Irish law permits general meetings to be held outside Ireland and the impact of foreign health restrictions has not been dealt with. Companies may cancel and reschedule meetings without the need to have a formal adjournment meeting in the first instance.

Notices and Voting

- Notice of a general meeting held during the interim period must include particulars of (i) the platform to be used for the meeting; (ii) access details; (iii) the mode of confirmation of attendance; (iv) identification requirements; (v) the process to ask questions during the meeting; and (vi) the process to vote on resolutions.
- Notice requirements for rescheduled general meetings held during the interim period are set out. Notice is to be given in the same manner as the notice for the original general meeting but where, in the opinion of the directors of the company, giving such notice in that manner is not reasonably practicable, notice may be given through (i) the company’s website; (ii) email; or (iii) a national newspaper. Shareholders may agree in writing to waive notice requirements.
- A virtual attendance at a meeting counts towards a quorum and all resolutions must be voted on by a poll where that has been indicated in the notice of the meeting. The chairperson of the meeting may conduct a vote by a show of hands of every member who is participating in the virtual meeting where the chairperson is of the opinion that he or she can identify the members entitled to vote and verify the content of voting instructions relating to the resolution in question.

Dividend Resolutions: new section 186A

This section allows directors, subject to certain restrictive conditions, to withdraw or amend a previous resolution to approve a dividend, if there has been a change in the financial circumstances of the company in light of COVID-19. Directors may form an opinion based on the actual or perceived consequences of COVID-19 on the affairs of the company.

Notices of general meetings of traded plcs: amended section 1103

This provision modifies the Act to stipulate that notices of general meetings of traded public limited companies (plcs whose shares are admitted to trading on a regulated market in an EU member state) which are to be held by electronic means must set out the means by which the meeting will be held and how the members attending can participate in such a meeting.

Circumstances in which company deemed to be unable to pay its debts: amended section 570

By way of background, a court may wind up a company if it is unable to pay its debts as they fall due. Section 570 of the Act sets out the circumstances where a company is deemed to be unable to pay its debts.

The amendments increase the debt threshold amounts for the commencement of a winding up by the court. The thresholds have increased from an individual debt of €10,000 or aggregate debts of €20,000 to an aggregate of €50,000. This means that, following the amendment, one or more creditors must have aggregate debts in excess of €50,000 and have made a formal demand before the company is deemed unable to pay its debts for these purposes.

Creditors' meetings: new section 690A

The changes facilitate the virtual holding of creditors’ meetings. The provisions as to meetings are broadly reflective of those applicable to general meetings during the interim period.

Extension of Examinership: new section 534(3A)

This provision permits an examiner of companies that go into examinership and are under the protection of the court during the interim period to have more time in which to make their report to the court if exceptional circumstances apply. Previously the examiner had up to 70 days to present a report to the court and this could be extended by the court by 30 days. The new measures provide for the possibility of an additional extension of 50 days to be granted by the court where it is satisfied that exceptional circumstances exist.

Concluding Thoughts

This new law should provide much needed clarity and flexibility to many Irish companies which have been faced with the challenge of technical compliance with the Act against a backdrop of distancing and other practical restrictions. It is expected that the interim period will serve as a trial period for permanent company law amendments in respect of electronic meetings and other governance requirements.

It’s worth noting that proposals to suspend reckless trading provisions (similar to measures recently introduced in the UK) and to codify directors’ common law duties towards creditors in an insolvency context were not included in this round of legislative changes. The government, however, intends to carry out a review of certain aspects of insolvency law, with the assistance of the CLRG, and we will keep you up to date with these developments.

If you would like to discuss these or other COVID-19 related matters, please get in touch with author Emma Doherty, Ursula McMahon or your usual Matheson contact.