

# Companies (Miscellaneous Provisions) (Covid-19) Act, 2020

by Keith Rooney and Conall O'Neill

The Companies (Miscellaneous Provisions)(Covid-19) Act, 2020 (for ease “the Covid Act”) came into effect on 21 August of this year. The Covid Act is a direct legislative response to concerns raised by businesses up and down the country, along with the Registrar of Companies, as the deadlines for Annual Returns and General Meetings loomed large while the pandemic continued to make the normal running of a company impractical.

In its initial guise the Covid Act was intended to last only during what it defines as the “emergency period”, at present a period extending until December 2020. However, the newly inserted Section 12A of the Companies Act 2014 allows for this period to be extended by ministerial order and given the ongoing difficulties in containing the spread of Covid-19 it is highly likely that the provisions of this Act will continue through most of 2021.

## Main Objectives

The Covid Act primarily addresses practical issues in the running of companies in the era of social-distancing and the new economic reality that has presented. The key areas covered by the Covid Act are:

- General Meetings
- Sealing by a Company
- Dividends
- Winding Up
- Examinership

In this article we will look at each of the changes in turn and broadly outline the new approaches allowed during the emergency period.

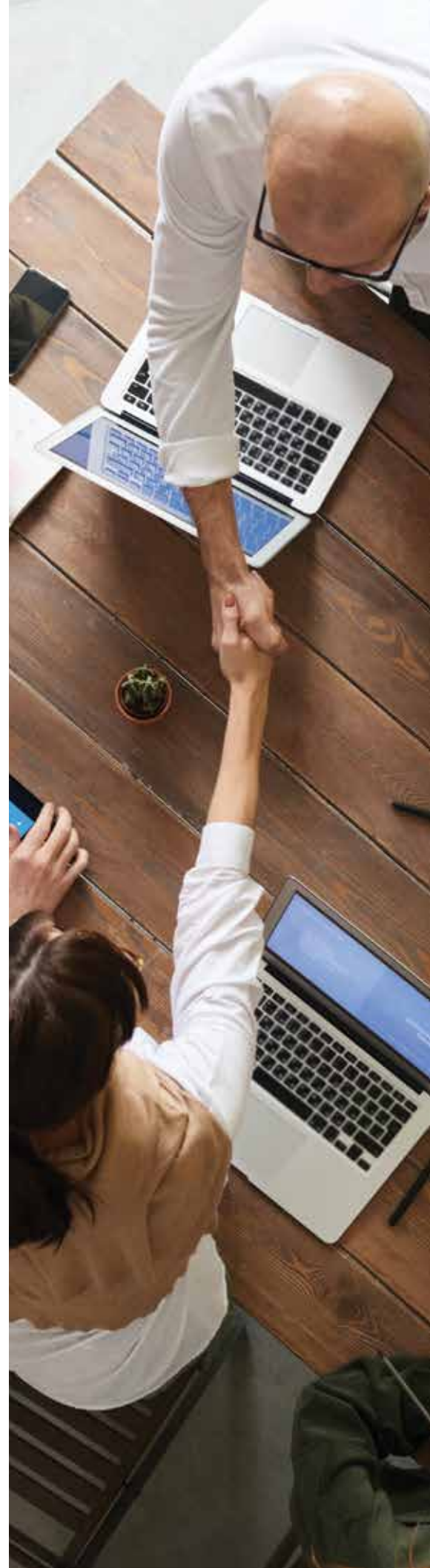
## General Meetings

The most immediately useful aspect of the changes brought about by the Covid Act relates to general meetings.

At the outset it is worth noting that there was some ambiguity under the Companies Act, 2014 about whether or not a meeting could be held remotely. The Companies Act, 2014 certainly provided for members to attend a meeting through instant-communication platforms such as Zoom. However, whether the meeting itself still required a physically central location where people may gather, and where the board must gather, remained an open question.

The new provisions, found in the amended Section 174A, override any other requirements under the Companies Act, 2014 save for one. The provisions that allow companies to conduct their meetings entirely through the written resolution process remain unaffected. There is an obvious logic to this given the purpose of both the written resolution procedure and the amendments under the Covid Act is to eliminate the requirement for physical meetings at all.

Of crucial importance is the extension of timelines for the holding of general meetings. Any company who has not yet had their Annual General Meeting but was required to do so in 2020 can now hold the meeting at any time prior to 31 December 2020, regardless of what the latest date should otherwise have been.



Annual General Meetings availing of the time extension can now be held entirely online pursuant to the newly inserted Section 174A(5) of the Companies Act, 2014. However, there are certain restrictions and safeguards placed upon that right.

First, all persons who would have been entitled to attend a general meeting in person must be given a reasonable opportunity to participate in the online meeting. The Covid Act does not stipulate what "reasonable opportunity" means. However, it would appear quite obvious that a person without sufficient internet connectivity, for example, be given time to arrange alternative means of accessing the meeting. There will be no hard and fast rules in terms of what is reasonable, but a pragmatic and common-sense approach will serve companies well.

Second, the company can identify a specific online resource to host the meeting and may also designate a technological means of casting votes – whether before, during or after the meeting. With regards to identifying the online resource this, again, is a purely practical measure. A company can elect to use Zoom, Microsoft Teams, Pexip or any of the other available communications tools. It is at the discretion of the company to choose. However, a platform that does not easily lend itself to access by the members should be avoided in case it falls foul of the "reasonable opportunity" requirement in Section 174(A)(5). Insofar as voting is concerned, practically this will likely be achieved via email to a dedicated email address. Copies of all the votes can then be held in the email server as evidence of the voting intention.

Lastly, restrictions on the participation and the use of technology are permitted in order to verify the identity of all persons at the meeting. This ultimately comes down to ensuring the sanctity of the general meeting. It is reasonable to stipulate that persons must have their cameras on while voting or be visible to the board members at least when engaging in the meeting. Participation can also be limited to members only or similar restrictions where capacity and technological limitations may not permit a broader participation at the meeting. Like all things within the Covid Act, reasonableness will dictate whether the restrictions are permissible or otherwise.

If the company elects to place restrictions on the meeting, then all potential participants must be made aware of them in advance of the meeting. Similarly, any special technological requirements for the meeting or other special requirements must be notified to all participants in advance.

A practical example of this would be using an online encrypted messaging service to register ones vote in a meeting. Many members may be unfamiliar with that technology and it will be necessary to inform them of both the requirement to have access to it and the reasons for that requirement.

### Technological Requirements

Whatever platform or technology is used to host the meeting, it must meet certain basic standards and criteria of performance. These are, again, common-sense requirements but bear enumerating nonetheless:

- All participants must be able to hear the Chair and any person called on by the Chair during the meeting.
- All participants must be able to speak to the Chair and submit questions in a similar manner as would be allowed under the company constitution.
- The platform or technology must provide for secure communications and be private to the attendees.
- The board must ensure the source of any electronic communication to the meeting is known.

If the platform or technology should fail or be disrupted during the meeting the obligation falls to the Chair to attempt to have it working again as quickly as practicable. However, a failure of the technology will not invalidate a meeting on its own. These things can happen and the loss of a couple of members will not prevent the meeting from continuing unless there is a particularly contentious vote. In those circumstances it would be best to wait and have the members reconnected as soon as possible.

If a company willfully causes a member to lose connectivity with the meeting then, and only then, shall the company be liable in respect of that failure. The liability then only attaches to willful acts and not to negligence or other technical faults.

Usefully, the date, time and location of an AGM or EGM can be changed up to end of day on the day immediately preceding the meeting if the Board deem it necessary to comply with guidelines issued under the Health Act, 1947.



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This would have likely been an effective provision when the country switched from level 3 to level 5 earlier this month. Meetings scheduled shortly after the changeover may have simply become unworkable and, thus, the board would have the right to change the date and time as required to comply with public health guidelines.

### Dividends

Many companies may be caught in a situation where a dividend recommendation has been made but, subsequently and because of Covid-19, the company can no longer sustain or justify that dividend. In those situations, the directors can withdraw the resolution or propose an amendment to reduce the dividend, if required. Even if the company's constitution forbids a withdrawal or amendment of this nature the Act overrides it if the members of the company agree unanimously to approve the step and where all eligible voting members are given 3 days' notice of the Board having formed the view that it is required.

### Sealing by a Company

Requirements for the countersigning and sealing of documents by a company are, to say the least, impractical at present.

To that end the Covid Act allows for the execution of a number of counterparts. Combined, those counterparts shall constitute an original sealed document. It is important to remember that the various documents are not each an original. Rather they together form an original instrument, as a whole.

### Winding Up

In the Companies Act, 2014 the debt threshold required before liquidation could be forced on a company was set at €10,000 for a single creditor or €20,000 for a group of creditors. In the Covid Act that level is temporarily raised to €50,000 for both individual and grouped debts.

This is designed to stave off, as much as is practical, a sharp increase in liquidations and to give companies the breathing room required to survive the pandemic period. It is unlikely to have a long-term saving effect for companies, but might prevent a short, sharp increase in liquidations. Other measures such as the Employment Wage Subsidy Scheme and Pandemic Unemployment Payment will also assist with this.

### Examinership

The period for formulating a plan of rescue can be extended now by an

additional 50 days (150 rather than 100 after the initial 30 and 70 days). While the changes are minimal, they are anticipated to be particularly useful where sourcing angel financing or negotiating with other creditors with difficulties of their own. In reality while the measure is relatively limited, it should be seen as a useful tool and, ultimately, examinership may be the savior of many Irish companies in the months and years ahead.

### Conclusion

Like so many of the enactments brought in to tackle Covid-19, this Act is a mixed bag. It contains some very useful provisions to assist companies in complying with their regulatory requirements and offers some small salve to those for whom insolvency is imminent, staving off the evil day perhaps a little longer. Nevertheless, it is a welcome relief for small and medium enterprises in particular.



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