
Briefing

COVID-19: Directors' Duties and Compliance Considerations



This briefing was produced by the Institute of Directors in association with McCann FitzGerald for use in Ireland. McCann FitzGerald is one of Ireland's premier law firms, providing a full range of legal services to many of Ireland's leading businesses. Clients include international organisations, major domestic concerns, emerging Irish companies and clients in the State and semi-State sectors.

Between disruption caused by COVID-19 and constraints imposed to contain its spread, companies are faced with unprecedented levels of uncertainty. Reliance is placed on directors to take actions in response to an evolving situation that demands, on an almost daily basis, new measures which impact their businesses. As circumstances change, so too will the focus of directors but actions must always be informed by a director's duties and other legal and regulatory obligations.

Director Responsibilities

A director remains subject to his or her duties and responsibilities under the Companies Act 2014 (the "Act") as well as a range of statutory obligations in other areas of law such as employment, health and safety and data protection. Directors must act with due care and diligence, the yardstick being what would be expected from a careful and diligent director in the same circumstances. Business decisions must always be taken in the interests of the company, while (under statute) taking into account the interests of other stakeholders such as employees and (if insolvency looms) those of creditors. Failure to comply with these statutory duties could result in personal liability for a director. A director will prudently also have regard to the interests of customers and suppliers, as those relationships can be integral to the success of the business.

In order for directors to lead a company's response to meet the ongoing challenges and minimise the risk of being held to be in breach of duty, it is vital that they be able to communicate with one another and be able to take decisions (usually where a physical board meeting is not possible). Further information on meetings held remotely is available [here](#).

Protecting the Business

The impact of the COVID-19 crisis on companies will vary depending on the nature of the business. Clearly those businesses that were required to close their doors will suffer greater financial hardship than those businesses that remain open. Directors' ongoing access to management information will become important so that directors can make informed decisions.

In order to manage the current challenges, with a view to protecting the business for the future, the following factors will require consideration:

Operational Matters

Those companies with established business contingency plans may have a greater ability than others to continue trading by facilitating remote working by employees and having IT systems which permit directors and senior managers to access necessary financial and other information. The ability to communicate with employees, stakeholders, lenders and third parties such as suppliers is crucial.

Financial Matters

Clearly, fall-out from the COVID-19 crisis has immediate and likely long-term implications for companies and so the company's financial position needs to be monitored closely and cash flow managed. Credit risk of customers becomes an important consideration and costs will need to be cut to reflect the ability of a company to pay. Engagement with lenders may be required and waivers or payment holidays secured. Government assistance is available and, with financial advice, should be considered carefully.

Employees

Communication with employees is essential. Many employees will lose jobs (temporarily or perhaps altogether). Those employees who continue to work, for example, from premises or in delivery functions, need to be protected by adherence to health guidance protocols put in place and monitored by the company. The wellbeing of employees has become a key issue for employers so, to the greatest extent possible, reassurance should be given through regular communication about how the business is facing the challenge, with an explanation of decisions taken and the prospects for the company (where this can be assessed).

Customers, Suppliers and Markets

These need to be kept under constant review because the survival of a company will be dependent on its ability to trade in a particular market and on the ability of customers to request goods and services and to pay outstanding debts. Review of existing contracts to establish rights and obligations is required especially if a company is seeking to suspend or avoid contractual obligations. The ability to execute contracts through use of electronic signatures needs to be considered and Irish law facilitates this in many cases. Further information on using e-signatures can be found [here](#).

Compliance Business as Usual

As the uncertainty around the COVID-19 situation becomes a greater risk for companies, the focus on transparency and accountability means that the legal obligations on directors in relation to matters such as accounting records and registers are more important than ever. Directors must ensure that their company keeps proper books and records to enable “*at any time the assets, liabilities, financial position and profit or loss of the company to be determined with reasonable accuracy*”.

Maintaining Adequate Accounting Records

The Act requires every company to record and keep details of payments made to or by it and to record its financial position. Adequate accounting records are essential to the company’s preparation of annual financial statements which must give “*a true and fair view*” of the company’s financial position. Company directors should continuously monitor the performance of a company (keeping proper books of account to assist in this regard) to enable them to ascertain the exact financial position and thereby enable them take decisions to meet the COVID-19 challenges and protect the future business of the company.

Filing Annual Financial Statements

Unless exempt from doing so, a company must file its annual financial statements together with relevant documentation in the Companies Registration Office (the “CRO”) with the company’s annual return which must be filed by its annual return date.

The CRO recently confirmed that all annual returns due to be filed by companies between 19 March and 30 June 2020 will be deemed to have been filed on time if all elements of the annual return are completed and filed by then. The situation will be kept under review by the CRO depending upon how the COVID-19 situation evolves.

The UK’s Financial Conduct Authority recently announced temporary reliefs for listed companies facing challenges of corporate reporting which include allowing listed companies an additional two months within which to publish audited financial statements.

The directors’ report must include a fair review of the business of the company, and a description of the principal risks and uncertainties facing it. The review must, to the extent necessary for an understanding of the particular matter, include an analysis of financial key performance indicators, and, where appropriate, an analysis using non-financial key performance indicators, including information relating to environmental and employee matters. This review may prove especially difficult to undertake currently.

Annual General Meetings

Company directors and secretaries may need to revise their usual planning for their company’s annual general meeting (“AGM”). An AGM may only be validly convened on the provision of a minimum of 21 clear days’ notice so given this long lead-time and the increasing COVID-19 related restrictions, company directors may have to react quickly to reduce the risk to those travelling or gathering to attend the AGM.

It should be checked that the venue to host the AGM, specified in the notice, will still be accessible and available. These are crucial factors because business cannot be transacted at an AGM unless a *quorum* of members is present at the venue specified in the notice. Unless the company's constitution states otherwise, the quorum required is two members present in person or by proxy. Many of the options available in this case will depend upon whether the company has issued notice of the AGM and further information on these is available [here](#).

The Company's Registers

The Act imposes a legal obligation on Irish companies to maintain registers and records. These include, amongst others:

- minute books recording the proceedings at general meetings, board meetings and meetings of board committees;
- a register of the members (past and present); and
- a register of any charges on the assets of the company.
- All registers need to be accurate and kept up-to-date and failure to do so is an offence but it can also lead to other offences under the Act.

Minute Books

Although minutes are principally for the benefit of the company or the board itself and for the company's members, they may also be inspected by regulators. For example, the Act empowers the Director of Corporate Enforcement to require a company to produce its minutes of meetings and must allow the Director to inspect those books and to make copies.

In current circumstances, directors ought keep detailed records of the commercial basis of decisions that are taken when the company faces disruptions so that the directors will be able to demonstrate the basis for their honest beliefs at the relevant time and their view of the reasonable grounds for taking those decisions.

Cyber Fraud

Pursuant to recent Government advice, many businesses now find themselves operating (to some extent or entirely) remotely. In such uncertain times, directors must understand the risks involved when employees are operating outside of an organisation, in particular the threat of cyber fraud, and ensure that suitable IT controls are put in place. For further information see [here](#).

Data Protection

Companies are obliged to ensure the safety and health of their employees but measures intended to ensure a safe working environment can increase processing of employee personal data. In response to concerns, the Data Protection Commission (DPC) recently issued guidance about data protection issues and COVID-19 which highlights the importance of taking decisions about personal data (particularly health data) which are necessary, proportionate and informed by directions of public health authorities. For further information see [here](#).

Directors must ensure that companies continue to resource requirements for information governance such as maintaining records of processing activity and ensure that IT systems document and evidence compliance and, address security obligations.

Financial Difficulty

If insolvency becomes a real possibility for the company, the primary focus of the directors shifts away from the company's members and in favour of the company's creditors.

In this regard, some commentators are concerned that, where a company avails of State assistance, it may be an admission of insolvency and (unless a rescue is possible) that steps ought be taken to cease to trade and to wind up the company.

However, this seems to be an overly simplistic view of the legal position and, if availing of such State assistance will help preserve a future for the company, it ought be availed of. Indeed, once a new Government is in place in Ireland, it may be that further emergency legislation is passed to modify current insolvency laws so that the sanctions for directors trading while they may not be able to pay all of their debts as they fall due would be suspended for a period, provided that they are acting honestly and responsibly.

It is important to emphasise that the law does not penalise directors who have acted honestly and responsibly at the time the company was in financial difficulty. Professional advice from financial and legal experts ought to be obtained if directors do not believe that there is a likely future for their business or if they have concerns as to their liability in allowing their company continue to trade.

Comment

No duty of a company director is absolute and the nature and scope of every obligation will relate to its context. This is especially true of any strategic or commercial decision of a company's board in times of emergency.

In any strategic response or significant commercial decision, a director should diligently consider and weigh the relative advantages and disadvantages of the relevant proposal and of any alternatives that there may be to it. The board may be assisted by expert advice and opinion.

Constant monitoring of the company's circumstances, COVID-19 related restrictions and market conditions is required to enable the directors react in a timely manner as they try to ensure a future for their companies and to protect the interests (including livelihoods) of stakeholders.

Further information is available from



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Alternatively, your usual contact in McCann FitzGerald will be happy to help you further.



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