
Briefing

COVID-19: Taking Board Decisions without Meeting



INSTITUTE OF DIRECTORS
IN IRELAND

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Restrictions in travel and gatherings resulting from COVID-19 may make it inconvenient or difficult for the directors of a company to hold a physical directors' meeting. Indeed, it may not practically be possible for all or for a quorum of the directors to meet together by holding a "physical" (or "in-person") directors' meeting at all.

In these circumstances, it may be possible for the directors to act by way of a written resolution instead of holding a physical meeting or for the directors to meet by electronic means. Company directors and secretaries may also need to modify arrangements for their company's annual general meetings and further information on this is available [here](#)¹.

Unanimous Written Resolution

General

Under the Companies Act 2014 (the "Act"), unless the company's constitution provides otherwise, a resolution signed by all the directors entitled to receive notice of a meeting of directors will be as valid as if it had been passed at a directors' meeting duly convened and held. The Act similarly provides that, if the directors agree, it may not be necessary to give notice to any director who (being resident in the State) is absent from the State. Provided the constitution allows for use of the written resolution procedure, a resolution in writing signed by every director will be effective.

¹ Coronavirus: Contingency Planning for Annual General Meetings
<https://www.mccannfitzgerald.com/knowledge/corporate-advisory-and-governance/coronavirus-contingency-planning-for-annual-general-meetings>

The Requirements

Directors' decisions made by written resolution must be unanimous so that all eligible directors (being those entitled to vote on the relevant matter) must vote on it in the same way. So, unlike at a board meeting, the chairperson does not have a second or casting vote on any proposed action. It also will be necessary to consider quorum requirements (discussed below).

The written resolution can consist of several documents in like form each signed by one or more directors and will take effect from the time it was signed by the last director. This is to facilitate the passing of written resolutions where one or more directors is unable to sign the same piece of paper. The date of the resolution will be the date on which the last director signed. The document may be circulated electronically for signing but the original will need to be retained by the company with the board minutes, in the manner required by the Act.

Quorum

The company's constitution usually fixes whatever quorum is deemed necessary for the transaction of business of the directors. Even if every director who holds office is in a position to sign, no business can be transacted if the number of directors holding office is less than the prescribed quorum; however, such a sub-quorum meeting / written resolution is permitted if the company's constitution provides that the directors may act notwithstanding any vacancy in their number. The Act provides for a quorum of two as a default (this is despite the fact that an LTD can have as few as a single director).

It will be necessary to check whether, under the constitution, a director is prohibited from voting (by reason, for example, of his or her interests) on a proposed action or cannot be taken into account for the purposes of ascertaining whether a quorum is present. It may be that a director can count as forming part of a quorum if the director's interest is not likely to give rise to a conflict of interest for the purposes of the proposed action.

The written resolution procedure can be used even if one or more of the directors (but not in aggregate being a majority of all directors) is not permitted to vote on a directors' resolution (for example, by reason of a conflict). In this instance the remaining directors sign the resolution and note the names of the directors who are not entitled to vote and the reason for that position.

Can all Company Directors use Written Resolutions?

Under the Act, the written resolution procedure may be used for both private and public companies. Additional considerations for the use of written resolutions instead of meetings may apply to directors of a company that is regulated by the Central Bank of Ireland.

What if the Company Directors cannot use Written Resolutions?

If it is at all possible, an actual directors' meeting should be held where the business to be transacted is contentious or if, for any reason, it is anticipated that a matter will not be supported unanimously. Directors should always meet in cases in which they are making a declaration of the company's solvency as part of the summary approval procedure for restricted activities². However, if the company's constitution permits, electronic participation (audio-conference or video-conference) in the directors' meeting may be possible. The deemed location of these meetings may need to be considered for tax purposes (discussed below).

Directors Meetings' by Electronic Means

The Act provides that, save to the extent that the constitution provides otherwise, directors' meetings may consist of a conference between some or all of the directors who are not all in one place but each of whom is able to speak to and be heard by each of the other directors (directly or by means of telephonic, video or other electronic communication).

The Act further provides that a director taking part in such a conference will be deemed to be present in person at the meeting and be entitled to vote and be counted in the quorum. Under the Act, the meeting will be deemed to take place where the largest group of participants is assembled or (where no such group is assembled) where the chairperson is located. If neither of these cases apply, the meeting itself can decide the location.

Conclusion

While the directors' written resolution procedure is a valuable way of permitting the board to make decisions where it is impossible or inconvenient to hold a directors' meeting it remains the case that directors must inform themselves fully and carefully when transacting all business on behalf of the company. Although holding directors' meetings by electronic means is an acceptable and convenient means of conducting a directors' meeting, careful consideration will need to be given to the deemed location of the meeting.

² This is because section 202(6) of the Act states that the directors' declaration must be made "at a meeting of the directors".

Further information is available from



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