

Corporate Governance and COVID 19 – Practical Implications to Consider:

This article has been created by Hayes solicitors exclusively for IoD members to assist in minimising or mitigating some of the implications of the COVID-19 crisis.

Introduction

The sudden spread of COVID-19 and its impact on domestic and international business in Ireland has created huge disruption and uncertainty for companies across all sectors. What is clear is that both the pandemic itself and the measures taken by the government will give rise to immense challenges for businesses in the coming weeks and months.

Under the Companies Act 2014 (the “2014 Act”) directors of Irish companies are legally responsible for anticipating the challenges to their businesses and managing them appropriately. Outlined below are some key corporate governance challenges arising from the outbreak, with practical solutions for how these challenges could be navigated and managed by directors. We’ve highlighted some changes introduced by the Irish Companies Registration Office to extend filing deadlines in recognition of recent restrictions in movement and also some points to consider around convening AGMs that fall due during these times. We also provide some guidance for businesses that may face solvency issues during this period.

Mitigation of Risks

In order to be best placed to deal with the challenges and pressures facing directors in these times of uncertainty, it is of critical importance that they:

- have a clear business plan;
- hold regular meetings to review the ongoing financial position and progress of the business plan;
- keep regular minutes of all meetings, resolutions and decisions taken;
- take regular professional legal and financial advice; and
- can justify their beliefs in the merits of continuing trading.

While decision making should always be clearly documented, trading in times of greater uncertainty puts greater emphasis on the need to have a clear direction and to accurately document and record decisions made by the directors in a timely manner.

Risk Review

Two of the fundamental duties that directors owe to the company are to act in good faith and in the best interests of the company and to exercise care, skill and diligence in their conduct. Directors should show proper consideration to relevant commercial risks. For example, if a company has close trading links with a country that is significantly affected by the virus outbreak in terms of its operations or supply chains, then directors should be able to demonstrate that they have been proactive and responsible in discharging their duties having regard to the risks posed by these links.

Depending on the type and gravity of the risks which COVID-19 carries for a business, directors may consider a policy specifically aimed at dealing with those risks. Any policy that the board adopts

should be in writing, formally considered and adopted by the board by resolution, and communicated to all staff to whom it relates, with training provided where necessary.

Financial Reporting

The 2014 Act requires that the directors' report to be annexed to the company's financial statements contains particulars of important events affecting the company which have occurred in the last financial year. A description of the principal risks and uncertainties facing the company should be included. Directors should consider whether the impact of COVID-19 on their business should be disclosed here.

Annual General Meetings ("AGM"s)

Directors that have or must soon convene an AGM should have regard to methods for reducing the risk of infection posed by attendees and, depending on the number of attendees involved, have regard to current public health advice and movement restrictions applicable to organisers of any events or gatherings. Where notice of an AGM has been served, it may be possible to delay or postpone the AGM. However companies must be aware that, for most companies, not more than 15 months can elapse from the date of the 2019 AGM to the date of the 2020 AGM (and the AGM must also be within 9 months from the date of the financial year end).

A private limited company or a single member company has the option to dispense with the holding of an AGM where its members pass a unanimous written resolution dealing with the business of the AGM for that year. This option is not permissible to public limited companies, many of which will have large shareholder bases and, in many cases, well-attended AGMs.

Companies must also be aware that virtual meetings are not permissible under Irish law. However, hosting hybrid general meetings (i.e. a physical meeting of a small number of shareholders that enables other shareholders to participate by electronic means) offers a potential solution. Companies should ensure that appropriate technology is available to facilitate this and to enable all shareholders to participate if they do have to hold an AGM, in anticipation of longer term continuation of the current restrictions and health guidance on travel and attendance at meetings in person. Clear instructions on how to participate electronically should be contained in the notice of AGM and consideration given to how best to identify and ensure that all shareholders can actively participate in the meeting. Other potential solutions which can be considered include a wider use of the appointment of a small number of proxies to attend and vote at an AGM and the use of a combination of live streaming and video conferencing or telephone facilities.

Annual Returns

The Irish Companies Registration Office has announced that all annual returns required to be filed at any time up to 30 June 2020 will be considered filed on time if all elements of the annual return (comprising Form B1, financial statements and signature page) are completed and filed with the fee being paid by that date. The 30 June date is being kept under review and may be extended. It has also been reported that action to strike off and dissolve companies will be suspended until 30 June 2020.

Insolvency

It is unavoidable in the current environment that many companies will face solvency challenges. The fundamental duty of a director is to act in the best interests of the company. Directors need also to take into consideration their obligations to ensure that a business only continues to trade and, in

particular, incur debt when it has a reasonable prospect for survival and repaying such debts. If a director is reckless in allowing a business to continue to incur debts when the company is insolvent (i.e. unable to pay its debts as they fall due), they may be made personally liable for the company's debts incurred during the period of insolvency unless it can be shown that the director acted honestly and responsibly in the conduct of the affairs of the company.

In the UK, it has been announced that wrongful trading law in England and Wales will be suspended (with effect from 1 March 2020) to allow businesses to pay employees and suppliers even if the company is facing insolvency, in order to give businesses a greater chance to weather the storm of the current pandemic. Ireland should take a similar initiative to relax or suspend Ireland's reckless trading law on a temporary basis, say for three months as proposed in the UK or six months, as proposed in Australia and New Zealand. The broader duties and related liabilities on directors (in addition to the fraudulent trading and disqualification provisions) could be left in place as a counterbalance to ensure that the directors continue to act properly and in good faith.

Other initiatives being advanced in Australia and New Zealand should also be considered in Ireland to reduce the burden on directors who continue to trade in good faith through the present uncertain economic environment:

- to give creditors, who trade in good faith with and are unrelated to a company, greater comfort that payments received from the company won't be clawed back by a subsequent insolvency;
- to increase the 21 day period (say to three or six months) within which a company has to respond to a creditor petition to wind up the company; and
- to give leniency in a company's compliance in good faith with its obligations under its constitution for convening meetings by electronic media, even if this isn't explicitly permitted (and this might be extended to introduce the possibility to convene virtual shareholder meetings).

Where the risk of insolvency becomes likely, directors are obliged to actively keep the company's financial position under review taking into consideration all of its stakeholders (including creditors, the Revenue Commissioners and employees) and to meet (remotely) as often as required to do so. Written records of the directors' meetings and decisions should be kept in the company's statutory records. Directors will need to consider, notwithstanding the uncertainty that exists at present, if the company has a reasonable prospect of survival including in this:

- addressing debtor arrears position;
- reviewing credit terms with customers;
- identifying alternative suppliers/distribution channels for goods and services key to its operations;
- engaging with key employees (and early engagement with employee representatives) to provide re-assurance as to job viability, and potential changes in employment terms, where appropriate;
- laying off non-essential employees (exploring temporary lay off if possible); and
- reviewing payment obligations, including early engagement with trade creditors and banks.

Directors should keep under review all announcements by the Government designed to alleviate the burden on struggling companies and the company's ability to access them. There are initiatives already in place, including the introduction of a wage subsidy and more easily accessed unemployment and employment support payments for employees. Other initiatives to promote economic activity are also being kept under review by the Irish Government and across the EU.

Conclusion

The business environment for companies in Ireland and internationally is changing day-by-day. In such uncertain circumstances, all businesses should conduct early stage analysis of the key points highlighted above and ensure there is a plan, appropriate decisions and written records in place in order to minimise or mitigate the implications of COVID-19.

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