

Board Business: *What first? Doing it differently? What else?*

COVID-19 is having an unprecedented impact on companies in all sectors.

The situation is evolving on a daily basis with extreme volatility in public markets; significant cashflow impacts caused by shutdowns, reductions in customers/demand and supply chain disruption; and operational upheaval as remote working becomes the new normal across many industries and companies take steps to protect the health and well-being of their employees and other stakeholders.

In this new environment, Boards will need to act quickly and decisively in the face of significant challenges.

In the first edition of our publication, 'Responding to COVID-19 - Board Business' we look at some immediate priorities for company Boards as the disruptive effect of COVID-19 intensifies across all sectors of the economy. We focus here on three key areas of "Board Business":

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| 1. So what are our top priorities? | Capital and Liquidity Management |
| 2. How should we hold our board meetings? | Governance and Decision Making |
| 3. What else do we need to consider immediately? | Selected Preliminary Operational Issues |



You will find a full range of timely materials for businesses in our dedicated **COVID-19 HUB** on our website.

Capital and Liquidity Management – ‘Cash is King’

Maximising available liquidity and preserving cash are quickly becoming priorities in the face of an unprecedented crisis of unknown magnitude, duration and impact. Assessing how existing facilities may be impacted or adapted, considering alternative capital sources and focusing on cash conservation and collection are immediate actions.

Some lessons from the previous financial crisis can be applied as drawdowns of all available headroom under revolving credit facilities escalate and overdraft facilities are put in place to address short term liquidity issues.

Boards will need to conduct a detailed assessment of their current financial position and implement procedures to maximise liquidity. This will focus on: (a) existing facilities, (b) alternative sources of capital, and (c) cash conservation.

Existing facilities

Bank debt:

- review of draw-down capacity, potential draw-stops, covenant headroom, force majeure and material adverse change clauses
- consider scope and cost of extending maturities and making other revisions of the existing terms of facilities
- review event of default triggers and consequences (including any cross-defaults), and the anticipated legal, financial and behavioural impact of national government/ EU policies on syndicate banks
- consider financial information obligations to, and requests from, lenders, noting that delays in completion of audits due to travel or other restrictions may risk non-compliance.

Revolving credit facilities:

- review of revolver conditions
- consider bank discretion to cap
- note the impact of a cash sweep.

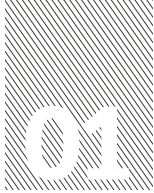
Factoring arrangements:

- assess material adverse change clauses
- review the ongoing eligibility of receivables.

Bond debt:

- assess covenants
- consider requirements around certification of covenant compliance and the impact of potential audit delays
- review interest payment arrangements and valuation factors
- in the case of listed debt, consider potential announcement obligations in various trading scenarios.

In all cases a proactive approach to engagement with lenders in relation to potential breaches is advisable. We have already seen some covenant relaxations announced, and very well received, in the UK market.



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Alternative sources of capital

- Consider alternative sources of capital or accommodations, to include:
 - » bridging finance
 - » convertible instruments
 - » shareholder support
 - » standstill arrangements with existing debt providers.
- Accessibility of ECB and domestic government supports should also be considered.
- Boards will need to consider available options, costs, timing and the impact on assets available as security.

Cash conservation

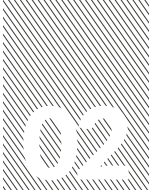
- Discretionary expenditure will need to be reviewed:
 - » in particular, contracted expenditure will need to be reassessed to ascertain any available flexibility as a result of break clauses or force majeure clauses
 - » dividends/any other capital return programmes potentially suspended.

In doing this, the adverse impact on working capital of any termination payments or crystallisation of contingent liability for non-performance should not be over-looked (and appropriate legal advice taken).

- Compensation plans should be reassessed, together with pension contributions where there is flexibility under the relevant pension plans. In addition, consider any governmental accommodations in terms of VAT and other payments.
- Cash collection will need to be assessed and consideration given to options ranging from a renegotiation of creditor terms to more formal debt recovery. Companies will note obligations where dealing with a supplier/customer in financial distress and any governmental restrictions introduced in this regard.

Achieving as stable and conservative a financial footing as possible will best position companies to endure the crisis, and in certain circumstances, to avail of any opportunities that may arise.

Directors will also however need to be aware of their statutory and fiduciary duties, particularly where a risk of insolvency (or the “zone of insolvency”) arises. Personal liability for a company’s debts can arise for directors under Irish company law in certain circumstances.



Governance and Decision Making – “Decisions together but staying apart”

Initial Board focus for many companies is likely to be on short term business continuity and survival issues, while prioritising the safe guarding of staff.

There will also need to be an ongoing assessment of longer term sustainability and the impact of COVID-19 scenarios on business model and strategy. This will likely result in engagement with each category of stakeholder (including employees, customers and suppliers, regulators, lenders and shareholders).

Organisation and administration of Board meetings will also need to be considered.

Boards will need to think critically about the nature and reliability of information on which Board members are basing decisions given the evolving nature of the COVID-19 pandemic.

There will be occasion for many Board meetings, and at least some shareholder meetings, as the crisis evolves.

Board meetings – points to consider

How?

Ensure Board meetings can occur remotely and, where appropriate, decisions be taken by written resolution (and check the company’s constitution for any provisions in this respect). Ensure that the confidentiality and security of Board information can be maintained as directors work remotely.

Tax status

Consider the tax impact, if any, that may arise from directors not being able physically to attend Board meetings in Ireland.

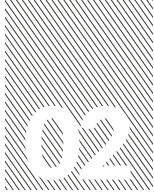
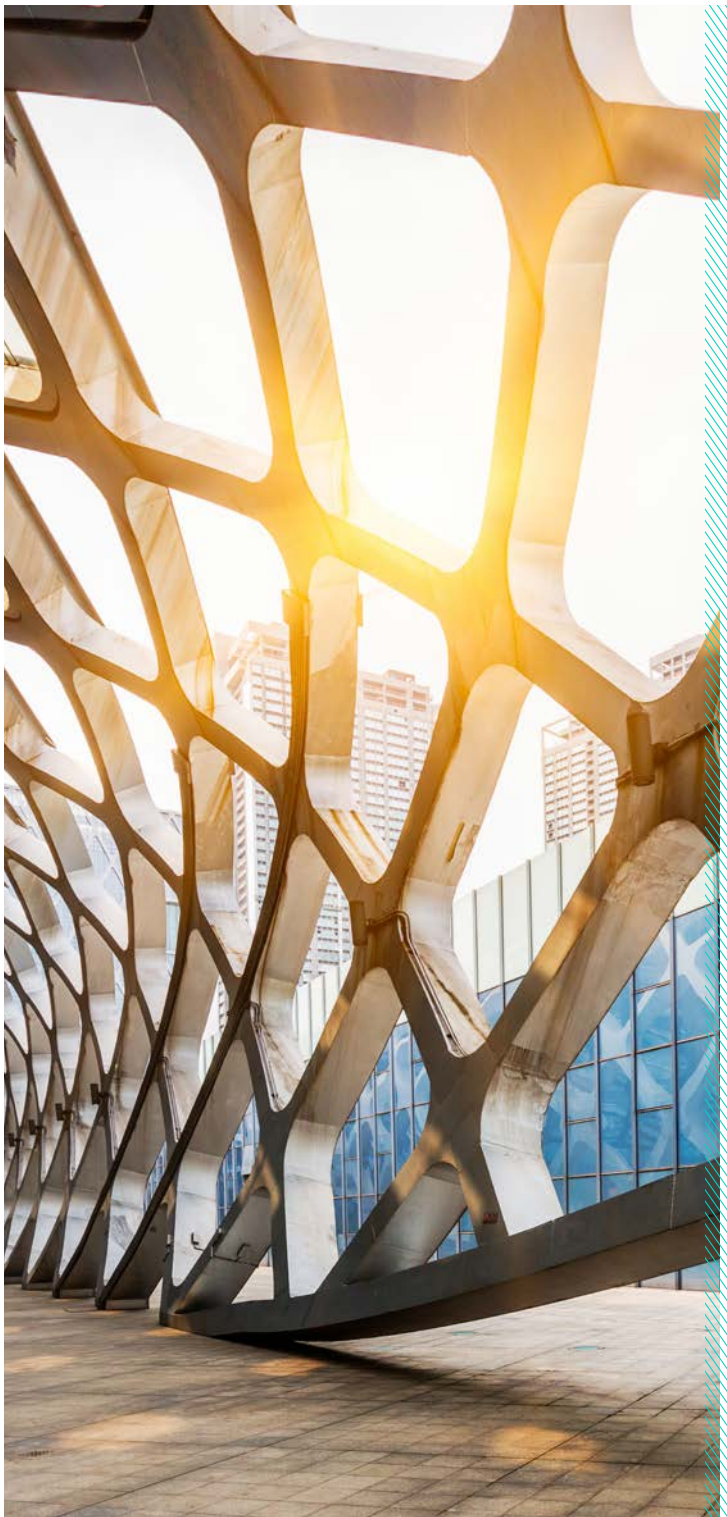
For example, many companies are resident in Ireland by reason of being Irish incorporated. Many others may rely on holding Board meetings in Ireland (a) so as to be managed and controlled in Ireland (and therefore resident in Ireland) and (b) so as not to be resident in another jurisdiction. Where the latter arises, various workarounds should be considered.

Regulatory requirement?

Note that if you are regulated by the Central Bank of Ireland, corporate governance requirements / expectations normally require directors to be physically in attendance. However there are exceptions which in our view should now apply.

Up to date information

Ensure that directors are provided with all relevant and up to date information - with a focus on assessment of the financial position of the company and possible strategy adaptation – so the Board can deal with the impact of the crisis quickly.



Governance and Decision Making - “Decisions together but staying apart”

Specific agenda?

Consider putting in place a dedicated COVID-19 Board agenda to enable identification of key areas of impact and possible responses.

Risk:

- Consider a refreshment and renewal of risk committee mandates, review the risk register, and re-assess the adequacy of mitigating actions. This may include the availability of business interruption insurance (which could provide important working capital headroom)
- Consider the arrangements which would be put in place where members of senior management and/or Board members are required to self-isolate for any period of time.
- For larger entities, it may be appropriate to establish a COVID-19 Committee. This would allow the Board to continue to focus on any pre-pandemic priorities, while also being reassured that the impact of COVID19 is being adequately reviewed at committee level.

A view for the long term

While dealing with the crisis at hand maintain focus on the company's long term financial, strategic and operational goals and stakeholder interests.

Shareholder meetings – points to consider

Companies may be required to hold Annual General Meetings or other shareholder meetings in the coming period whilst significant restrictions are in place.

Boards should:

Venue: Be mindful of public health guidelines issued to reduce the risk of transmission, consider the proposed venue for the proposed meeting, and seek to discourage physical attendance - encouraging proxy voting instead.

Formalities: Ensure that a chairperson and valid quorum will be present (with suitable contingent alternates), and that forms of proxy are suitably widely drafted (e.g to cover proxy substitution and procedural as well as substantive business)

Communications: Consider appropriate communications to shareholders where changes to the meeting format are required after the notice of meeting has been despatched.

Contingencies: Consider adjournment or postponement of the meeting if that becomes necessary (but note that this may not be suitable given timing requirements around AGMs and possible expiration of shareholder authorities).

Compliance: Ensure that actions taken are compliant with the company's constitution and applicable legal requirements.

Certain types of companies, including private companies limited by shares, may avail of a procedure under the Companies Act to dispense with the need to hold a physical AGM in a particular year.



Preliminary Operational Type Issues

The impact on employment and employer obligations in different situations is one of the first issues arising for companies. This includes key compliance issues around data protection and health and safety. Cyber security risks are likely to be significantly heightened due to the ongoing disruption. Business continuity/interruption policies may mitigate some of the risks.

Depending on the type of company or industry, there are certain operational issues which should be prioritised, and processes put in place to deal with those issues at the outset.

Employment and Data Protection

This is the most pressing area for many companies. Employers are endeavouring to mitigate the impact of the virus on their workforce, ensure the health and safety of their employees, comply with their legal obligations and consider practical solutions to employment law issues that are developing on a daily basis. As this crisis unfolds, it is essential that Boards ensure that companies have a strategy in place to respond in a speedy, legally informed and pragmatic manner.

The A&L Goodbody Employment and Data Protection teams have compiled their top-ten FAQs for employers which will assist Boards in managing the varied and complex employment and data protection issues that will arise in practice. This FAQ is available on the employment page of A&L Goodbody COVID-19 hub www.algoodbody.com/COVID-19-coronavirus-hub/employment

Health and safety

This is a particularly critical area for companies involved in large scale construction, production or factory work. It is imperative that these entities carry out a risk assessment of their workplaces and put in place all reasonably practicable

measures to prevent the spread of the virus. In the absence of these measures being taken, the Health and Safety Authority could potentially take corrective action including imposing significant financial penalties and/or pursuing a prosecution. Boards of these companies should ensure that a risk assessment is carried out without delay.

Insurance

Boards should undertake a review of their business continuity and business interruption policy to ascertain whether or not coverage is provided in the event of business closure resulting from a governmental request. On the basis that their policy may well be silent on this issue, insurance providers should be contacted and the impact discussed at Board level.

Cybersecurity

With a large number of employees now working from home, the risk of cyber-attacks has increased. Hackers are likely to take advantage of an increased reliance on digital tools. Boards should be aware of this and ensure that they are equipped to maintain the security of their networks through increased awareness campaigns for staff and refresher training if necessary.

Please do not hesitate to contact A&L Goodbody if you wish to discuss any of the matters raised in this publication.

In our next edition we will be dealing with a range of matters to be considered by public quoted companies and the impact of COVID-19 on these companies.

We will also issue an edition dealing with the impact on M&A transactions and on contracts, including the validity of electronic signatures.

If there are any issues relating to the impact of COVID-19 which you would like to see dealt with in future editions, please contact any member of the [Corporate and M&A team](#).



You will find a full range of timely materials for businesses in our dedicated [COVID-19 HUB](#) on our website.



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