

GOVERNMENT EXTENDS EMERGENCY LEGISLATION PROVIDING FLEXIBILITY AND CERTAINTY TO COMPANIES FOR HOLDING GENERAL MEETINGS UNTIL 30 DECEMBER

On 24 September 2020, the Government enacted a statutory instrument extending the end of the relevant period under the Corporate Insolvency and Governance Act 2020 (**CIGA**) during which companies may benefit from certain flexibilities introduced by the CIGA in relation to the holding of general meetings from 30 September 2020 to 30 December 2020.

This extension will come as a relief to companies that are due to hold their AGMs, or indeed any other shareholder meeting, before the end of the year, allowing them to assess the likely circumstances (particularly relevant while Covid-19 cases in the UK are rising) and giving them the ability to choose to hold "closed doors" meetings or virtual-only meetings.

Background

The CIGA came into effect on 26 June 2020 and provided companies with much-needed flexibility and certainty in relation to (among other things) the convening and conduct of general meetings (including AGMs) held between 26 March 2020 and 30 September 2020 (**relevant period**).

The CIGA enables companies to override, temporarily, certain requirements in their constitutional documents and/or legislation relating to the holding of a general meeting, including class meetings or AGMs. The CIGA paved the way, at least temporarily, for companies to conduct their meetings in a number of different ways: behind "closed doors" or in hybrid or virtual-only formats. Please see our earlier briefing, [Coronavirus: UK Government publishes draft legislation relating to holding of company meetings](#) for an in-depth analysis of the relevant CIGA provisions and their implications for companies.

While the CIGA effectively curtails members' rights to participate in meetings (other than to vote), companies should be mindful of the [Best Practice Guidance for AGMs](#), issued by The Department for Business, Energy and Industrial Strategy (**BEIS**) and the Financial Reporting Council (**FRC**) which provides best practice guidance on how to involve shareholders in general meetings held in reliance on the provisions of the CIGA. We have seen a

Key issues

- The Government has extended the relevant period under the CIGA in relation to holding company meetings to 30 December 2020
- The 2020 AGM season has seen an increasing number of FTSE 350 and AIM 50 companies amending their articles to allow for hybrid and/or virtual shareholder meetings
- Companies may wish to consider whether they should take advantage of this extension to convene a general meeting ahead of the end of the year to update their articles of association to enable them to hold hybrid and/or virtual shareholder meetings
- Where companies choose to amend their articles to allow for hybrid and/or virtual shareholder meetings, they should engage with their investor base and proxy advisors and state clearly in their AGM notice the parameters and limitations of the new powers and the circumstances in which the board intends to use those powers

variety of approaches in terms of the strategies that companies have adopted to overcome shareholder engagement challenges, including:

- webcasting or livestreaming the meeting,
- offering audio or dial in facilities,
- holding separate investor sessions either ahead of or following the meeting, and
- holding investor Q&A sessions in advance of the meeting.

Companies should also consider the industry guidance published by The Chartered Governance Institute and the City of London Law Society Company Law Committee, [Shareholder meetings under the Corporate Insolvency and Governance Act 2020](#), which has been endorsed by both BEIS and the FRC. Please refer to our briefing, [Industry guidance published on new flexibilities for holding shareholder meetings](#), for further information.

What does this mean for companies and what can companies do now?

The extension of the relevant period under the CIGA will provide companies with continued certainty and flexibility in planning for and holding general meetings (including AGMs) until the end of the year which, given the current rise in Covid-19 cases, the likelihood of increased restrictions on gatherings of people and the continuing unavailability of some of the larger venues for shareholder meetings, is to be welcomed.

However, whilst a further extension of the relevant period to 5 April 2021 is possible under the CIGA, there is no certainty that this may materialise and any such decision will be driven by the state of the pandemic as we move towards the year end. As such, given that the continued uncertainty, challenges and potential public health risks arising from Covid-19 are likely to continue into 2021, companies which want to maximise their options for how they hold shareholder meetings in future may wish to consider convening a general meeting ahead of the end of 2020 — while the relevant CIGA provisions continue to apply — to amend their articles to allow for hybrid general meetings and AGMs and possibly even virtual-only meetings (but see below). Doing so may help not only to mitigate against continuing Covid-19 challenges to in-person meetings for the 2021 AGM season but also to facilitate greater shareholder participation going forward.

Emerging new trend?

Unsurprisingly, we have already seen a greater number of FTSE 350 companies and AIM 50 companies amend their articles this year to allow for hybrid meetings than we saw in 2019. Some have explicitly cited Covid-19 as the main driver for the amendments, whereas others have implied this in their AGM notices, and emphasised that the changes would provide the board with greater flexibility and are intended to facilitate greater shareholder engagement. Some companies have clarified that boards will only consider calling hybrid meetings where holding in-person meetings is not feasible or practical. Others have highlighted that boards (and shareholders) are eager to embrace new technology available to facilitate hybrid meetings and view this as a positive development for shareholder engagement and in line with best practice.

Most FTSE 350 companies that have updated their articles since April have done so to allow for hybrid meetings as opposed to wholly virtual meetings in relation to which, absent the flexibilities provided by the CIGA, there exists legal uncertainty as to their validity. In addition, hybrid meetings are generally

looked upon more favourably than virtual-only meetings by the investor community.

The Investment Association (**IA**) position is that its members will not support amendments to companies' articles of association in relation to electronic meetings if they allow for virtual-only AGMs and that the IA's Institutional Voting Information Service will "red-top" any company that can hold virtual-only AGMs following amendments to their articles of association. The rationale for such resistance has been three-fold: (i) it is harder for shareholders to hold boards to account at virtual meetings due to the remoteness of the participants; (ii) it is harder for participants in the meeting to identify the views of each other and to register their agreement (or disagreement) in a virtual setting; and (iii) perception: it is considered easier for boards to filter challenging questions or shareholders in a virtual setting.

Contrasting approaches to the ability to hold virtual-only meetings

TalkTalk Telecom Group plc is one of the few FTSE 350 companies that has updated its articles to allow for both hybrid and virtual-only meetings. The company clarified in its AGM notice that although the proposed amendments to its articles would enable the board to hold virtual-only general meetings and AGMs, the board would only do so where it "determines that exceptional circumstances dictate this, e.g. like the Covid-19 crisis, and with prior consultation with the Company's major shareholders".

The approach adopted by TalkTalk provides the board with flexibility to hold virtual-only meetings where they think this is necessary — something which, in light of the ongoing pandemic, may prove to be an invaluable discretion.

In contrast, in order to address shareholder concerns about the use of the power to hold virtual meetings contained in the new articles proposed for adoption (which also allowed for hybrid meetings), **Amino Technologies plc** announced that, if the new articles were adopted, it would not use its power to hold virtual-only meetings ahead of its 2021 AGM and it would propose amendments to the articles at the 2021 AGM such that the power to hold virtual-only meetings would be subject to prior annual shareholder confirmation by shareholder resolution. This effectively rules out being able to use the power in relation to next year's AGM even if the pandemic is still with us although it would be open to Amino to hold a hybrid meeting or to rely on the provisions in the CIGA if they were to be extended to cover next year's AGM season.

There are risks to adopting an annual shareholder confirmation approach: if they did not already have the necessary confirmation from shareholders, companies may find themselves in a position where they are unable to use their powers under the articles in precisely the sort of circumstances for which they were bestowed (i.e. to be able to hold virtual meetings in circumstances where holding a physical meeting would be challenging).

Covid-19 as a catalyst for change

The impact of the Covid-19 crisis has caused companies to reassess the way in which meetings have been held and has highlighted that the traditional physical format is susceptible to the challenges that arise when dealing with a pandemic.

The timing of the pandemic had significant ramifications on this year's AGM season, forcing companies to hastily change the way they have typically held their AGMs (particularly those that had AGMs scheduled for April and May).

Only a handful of companies held hybrid meetings (in the true sense of the word) before the pandemic and even fewer have held virtual-only meetings given the continuing legal uncertainty over their validity, the opposition from institutional investors, and concerns over the robustness of the technology.

While there are still concerns around virtual meetings within the investor community, every company¹ that included a resolution at this year's AGM to amend their articles to allow only for hybrid meetings as an alternative to physical ones has seen the resolution passed with strong support from their shareholders.

In contrast, not all companies that sought shareholder support to change their articles to allow for hybrid and/or virtual meetings have received it. At its AGM earlier this year, Standard Life Aberdeen (**SLA**) saw its resolution to adopt new articles (which would allow for both hybrid and virtual meetings) voted down.

Notwithstanding SLA including a statement in its AGM notice that it did not currently intend to hold virtual meetings (and that it simply wanted to be prepared for the future), the proxy advisor, the Institutional Shareholder Service, initially recommended that shareholders vote against the proposed resolution. It subsequently changed its stance — but this may have led to some confusion and come too late as some shareholders may well have already voted against the proposal.

The SLA example acts as a reminder for companies to engage not only with their key shareholders but also the proxy advisors at an early stage in order to anticipate and address any concerns they may have about their intentions with regard to hybrid and/or virtual meetings and provide any necessary assurances. Knowing the attitudes of key investors is crucial as it will enable the company to frame its proposal accordingly – the messaging should be clear and tailored as appropriate, depending on the investor base and their sentiment toward hybrid and/or virtual meetings.

Where companies expect that (some of) their investors may be reluctant to green-light virtual meetings, it is important that they make absolutely clear in the notice of meeting the parameters or limitations around the exercise of the new powers — for example, that the proposed amendments to the articles, if approved, would only permit hybrid and not virtual-only shareholder meetings (which may resonate with IA members) — or, if relevant, the circumstances in which the directors might seek to hold a virtual-only meeting.

Further Information

For further information about any of the matters covered in this briefing, please contact any of its authors, or your usual Clifford Chance contact.

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