

Impact of the COVID-19 pandemic on the 2020 AGM season & Bird & Bird



Is technology to the rescue?

The question as to how AGMs are to be held during the unique circumstances caused by the COVID-19 pandemic is one which will develop rapidly over the coming weeks and months. One possible option for companies is to hold their AGM as a 'hybrid' meeting, through the use of web/communications technology, as considered further below.

A wholly 'virtual' meeting

Until the EU Shareholder Rights Directive provisions permitting virtual meetings were implemented in the UK from 2009, it was not deemed possible under English law to hold wholly 'virtual' meetings, where there is no physical meeting place, and participants only otherwise attend by way of e.g. telephone. Such a meeting style has traditionally been viewed as falling short by institutional shareholder bodies from a wider governance perspective. It should be noted, however, that it can reasonably be expected that at least some of these traditional views will be set aside given the unique nature of the circumstances facing listed companies and their AGMs over the months to come, and the ensuing need for greater flexibility all round.

Hybrid meetings as compared to virtual meetings

The distinction between a virtual AGM and a hybrid one is that a virtual-only meeting envisages that all eligible members attend via electronic means (be it via tele-conference or videoconference), where specifically provided for in a company's Articles. A hybrid meeting will have a certain number of members present physically, and the opportunity for other eligible members to attend via electronic

means (i.e. the same tele/videoconferencing, for example).

The best example of a public company holding a virtual AGM in the UK is Jimmy Choo plc, in 2016. The Jimmy Choo virtual meeting was held in accordance with the Articles of the company, which had been specifically amended to allow for the possibility the year before. It was the first of its type in the UK and remains, to a great extent, an outlier, given the aforementioned widely-held view in the industry. It is also worth noting the considerable expense and planning required for the Jimmy Choo AGM, with the creation of a fully tested AGM App which was available across all platforms, and the further creation of a specific platform containing unique log-ins for all members. To what extent it would be possible to implement this in the current climate on a shortened timescale is a logistical question and it is likely that this would not be available to all. The existing Articles would also need to allow for this.

Hybrid meetings – whether included in a company's Articles or not

Holding any kind of hybrid meeting (i.e. whereby any shareholders are able to participate by electronic means in addition to at least one member attending physically) will depend on a company's Articles. Where the Articles do not provide for such an eventuality, it is not immediately apparent whether this will be possible. Issues that may exist in Articles which have remained un-amended include that the notice provisions will require a company to specify the "place" of a meeting

(something which carries a physical attendance requirement ordinarily). For the vast majority of companies which retain such a requirement for an AGM notice to specify the “place”, a hybrid meeting may be possible but a purely virtual AGM seems to be off the table.

Under s360A of the Companies Act, "*nothing [in Part 7] is to be taken to preclude the holding and conducting of a meeting in such a way that persons who are not present together at the same place may by electronic means attend and speak and vote at it*". In light of this, it can be argued that, unless there is something in the Articles that *specifically precludes it*, a company may hold its AGM by teleconference/videoconference. In doing so, it could afford its meeting a physical location, with one member attending physically, (thereby granting the meeting its “place”), whilst simultaneously encouraging people to attend by teleconference/videoconference. Given the wide wording afforded by the Companies Act, it could even theoretically be said that physical attendance will not be permitted (in light of safety concerns), provided the arrangements for electronic attendance are clearly communicated and workable.

The possible compromise which we therefore highlight here is in the form of a nominally ‘hybrid’ meeting i.e. with one (or more) attending at the defined physical location, but with the vast majority of members (and the board) attending via electronic means. Whilst this does, in theory, conflate hybrid and virtual, it nonetheless falls within the bounds of s.360A and provides a possible option for those companies which have not expressly provided for virtual AGMs in their Articles.

Some further considerations

For those companies whose articles incorporate the possibility for hybrid meetings, a series of considerations remain (these also apply to a hybrid meeting convened ‘outside of’ a company’s Articles, as above):

- 1 Further contents of the notice of the meeting – in particular, the question as to whether emphasis should be placed in the AGM notice for electronic attendance wherever possible, or whether the interpretation made clear above allows for electronic attendance to be mandated.
- 2 Meeting the quorum – whilst many AGMs will likely involve a number of members attending by proxy, given the logistical convenience, a company will need to ensure that its quorum requirements, as laid out in its Articles, is met.
- 3 Method of voting – again, a company must first look to its Articles. It is not yet clear whether the Department for Business, Energy and Industrial Strategy is to introduce legislation which would allow for Articles to be overridden; for example, where Articles decree that voting is to be carried out by a show of hands, companies could grant members the opportunity to vote by verbally confirming during a teleconference, or voting by pressing a button, with these constituting qualifying votes, given the extraordinary circumstances in which companies find themselves. AIM-listed gold explorer Tertiary Minerals, for example, instituted a ‘vote by mobile phone’ for its AGM this week, showing that alternatives can be put in place where a company’s Articles or possible future guidance may allow.



Postponement as an option?

Postponement of the AGM should certainly also be an option to consider where notice has already been given. Any decision as to this, however, must take into account the fact that AGMs statutorily must take place within six months of a company's financial end-of-year. Equally, it may not be an option which is included within the company's articles. Notwithstanding this, a possible postponement may mean that the AGM can be held at a time when less onerous restrictions are in place allowing for a fuller and more representative shareholder quorum to be present. It should be noted, however, that the indications point very much towards social distancing being a requirement in the longer-term, meaning that postponement will likely be an option that quickly is no longer available.

Formal guidance likely to come

Given the constantly changing nature of the situation, the Government is likely to release specific advice and guidance in the coming weeks to clarify the situation further (some of which may deal with the uncertainties and possibilities highlighted in this article). Guidance published earlier this week by The Chartered Governance Institute provides a number of points for consideration for companies, particularly concerning adapting the basis upon which they hold their AGM (including live-streaming the meeting

for those who are not required to attend). This guidance can be found at <https://www.icsa.org.uk/assets/files/pdfs/guidance/agms-and-impact-of-covid-19-web.pdf>. In the meantime, we shall be available to provide as much advice and guidance as possible to our listed clients to ensure the smooth running of shareholder meetings during this exceptional period.

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