

## NEW LEGAL REGIME FOR STRUCTURAL MODIFICATIONS OF COMMERCIAL COMPANIES

19 July 2023

In view of the dissolution of the Spanish Parliament as a result of the call for general elections on 23 July, the Government has opted to transpose the European Union Directives on the structural modifications of commercial companies via Royal Decree-Law, which has not, therefore, been presented as a draft law for approval by the Spanish Parliament. Thus, Royal Decree-Law 5/2023, of 28 June, among many other extensions and novelties, transposes European Union Directive 2019/2121 on the structural modifications of commercial companies (transformation, merger, spin-off and global transfer of assets and liabilities), both internal and cross-border, repealing Law 3/2009, of 3 April, on structural modifications of commercial companies.

The following are the most relevant modifications included in the new regulation:

### Scope of application

Royal Decree-Law 5/2023 applies to both internal and cross-border structural modifications of commercial companies, so that its scope of application encompasses all operations involving companies with registered offices in Spain (internal structural modifications), companies with registered offices in the European Economic Area (intra-European structural modifications) and companies incorporated under the law of a State that is not part of the European Economic Area, provided that a Spanish company is involved. (extra-European (extra-European structural modifications).

Thus, for the first time, the new rules regulate extra-European mergers and cross-border divisions, thus avoiding, as was previously the case, the need to apply and coordinate the different legal systems of the companies involved in the operation.



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### STRUCTURAL MODIFICATIONS

Royal Decree-Law 5/2023, as far as structural modifications are concerned, enters into force one month after its publication in the Official State Gazette, i.e. on 29 July 2023.

### Structural modification project

The minimum content of the project has been expanded, the main new features being the following:

- 1) For transformation operations, it will be necessary to draw up a Project in accordance with the terms of article 20 of Royal Decree-Law 5/2023.
- 2) In addition to the provisions set out above, reference should be made to (i) the indicative timetable for the transaction, (ii) the implications of the transaction for creditors and the guarantees, if any, offered to them, and (iii) details of the cash compensation to shareholders who have the right to dispose of their shares or holdings.
- 3) Certificates must be attached certifying that the participating companies are up to date with their tax and Social Security obligations.

### Report of the management body

The content of the report of the management body is extended to include two sections, one for the shareholders and one for the employees.

The following mentions should be included in the section for partners:

- a) The details of the cash compensation proposed in the Project to the partners that



have the right to dispose of their shares or units and the method used to determine such compensation.

- b) The consequences of the structural modification for the shareholders.
- c) The possible gender impact of the proposed change on the management bodies and its impact on corporate social responsibility.
- d) The rights and remedies available to members.

The section for employees will explain (i) the implications of the transaction for labour relations, (ii) any material changes in employment conditions or locations of operations and (iii) how this affects the company's subsidiaries.

At least one month before the date of the general meeting that approves the transaction, the directors shall make the report available to the shareholders and the employees' representatives or, where there are none, to the employees themselves, by posting it on the website or, if there is none, by sending it electronically.

#### **Independent expert report**

As a new feature, the report of the independent expert appointed by the Commercial Registrar must refer to:

- 1) Whether the cash compensation offered to shareholders who have a right to dispose of their shares or units is appropriate.
- 2) It may contain, at the request of the administrators, an assessment of the adequacy of any security provided to creditors.

Although the registry doctrine had already been interpreting it in this way, it is clarified that only when the beneficiary is a public limited company or limited joint-stock company will the independent expert's report rule on the sufficiency of the capital contributed (i.e. whether the assets of the absorbed or spun-off companies cover the capital of the beneficiary companies).

#### **Preparatory publicity of the agreement**

Except in the case of structural modifications adopted unanimously at a Universal Meeting, together with the draft of the operation, a notice must be posted on the Company's website or deposited at the Mercantile Registry in the form of an announcement by

informing shareholders, creditors and employees' representatives or, where there are none, the employees themselves, of the possibility of submitting to the company, no later than 5 working days before the date of the meeting, comments on the proposed transaction.

#### **Approval by the General Meeting**

The General Meeting is obliged to take note of the directors' reports and, where appropriate, of the opinions submitted by the employees or their representatives in relation to those reports; it shall also take note of the reports of the independent experts, as well as of the observations submitted, where appropriate, by shareholders, creditors or employees. In the light of the foregoing, the General Meeting shall decide whether or not to approve the Draft Structural Amendment.

In the event that the structural modification is adopted at a Universal Meeting and unanimously, the resolution may be adopted without the need to publish or deposit the required documents, although they must be incorporated into the deed, and without any announcement regarding the possibility of making observations or a report by the administrators on the Draft Modification.

#### **Protection of partners**

Shareholders will have a right to dispose (right of separation) of their shares or holdings in exchange for appropriate cash compensation provided they have voted against or hold non-voting shares or holdings (until now in the transformation it was simply necessary not to vote in favour).

This right to dispose of the shares or holdings shall be available in internal transformations, in mergers by absorption of a 90% owned company when the directors' and experts' reports on the draft terms of merger have not been drawn up and in cross-border operations when they are to be subject to a foreign law. Consequently, this right of disposal does not apply to other mergers, demergers and transfers of assets and liabilities.

Shareholders who intend to exercise the right to dispose of their shares or holdings must notify the Company within 20 days of the date of the General Meeting which approved the resolution on the structural modification.

Shareholders who have declared their wish to exercise their right to dispose of their shares or holdings consider that the compensation in



If the cash compensation offered by the Company has not been adequately fixed, they shall be entitled to claim supplementary cash compensation before the Commercial Court, or the Arbitral Tribunal provided for in the Articles of Association, within 2 months from the date on which they have received or should have received the initial compensation (the cash compensation must be paid within 2 months from the date on which the amendment takes effect).

### Creditor protection

Traditionally, the protection of creditors in merger and spin-off operations was based on the recognition of a right of opposition in order to obtain from the company a guarantee in satisfaction of the creditor or a joint and several guarantee by a credit institution. However, with the new regulation, this right of opposition disappears, and creditor protection is articulated with different measures:

- 1) The administrators must state in the Project the implications of the operation for creditors and, where applicable, any personal or real guarantee offered to them (article 4.1.4 of Royal Decree-Law 5/2023).
- 2) Creditors may submit to the Company, no later than 5 working days before the date of the General Meeting, any observations they may consider relating to the Draft (article 7.1.2 of Royal Decree-Law 5/2023), and the General Meeting must take note of them in its resolutions (article 8.2 of Royal Decree-Law 5/2023).
- 3) Creditors, in order to be granted or supplement the guarantees for their claims, must demonstrate that the satisfaction of their rights is at risk due to the structural modification and that they have not obtained adequate guarantees from the Company, it being presumed, unless proven otherwise, that the guarantees are adequate or necessary when the independent expert's report has confirmed such adequacy or the Company has issued a statement on the financial situation under the terms of article 15 of Royal Decree-Law 2/20023. If these premises are met, creditors whose claims arose prior to the publication of the corresponding Project, even if they have not matured at the time of said publication, who do not agree with the guarantees offered or with the lack thereof and have notified the Company of their disagreement,

may, within 1 month of publication (Article 13 of Royal Decree-Law 5/2023),:

- a. Apply to the Companies Registry of the registered office, if an independent expert's report has been issued on the guarantees, deeming them to be inadequate.
  - b. Go to the Commercial Court, if an independent expert's report has been issued on the guarantees, considering them to be adequate.
  - c. Request the Commercial Registry to appoint an independent expert, within 3 months of the publication of the Draft, if no independent expert's report on the creditors' guarantees has been issued.
- 4) In the case of a spin-off (Article 70 of Royal Decree-Law 5/2023), the joint and several liability of the companies participating in the spin-off (beneficiary companies and, where applicable, the company being spun-off) is maintained in respect of the debts incurred and not yet due, up to the amount of the net assets attributed to each of them in the spin-off. This joint and several liability shall expire after 5 years.

### Transitional arrangements

The regulations set forth in Law 3/2009, of 3 April, on structural modifications of mercantile companies, shall apply to structural modification operations of mercantile companies whose projects have still been approved by the companies involved prior to the entry into force of Royal Decree-Law 5/2023 (scheduled for 29 July 2023).

### Entry into force

Royal Decree-Law 5/2023, as far as structural modifications of commercial companies are concerned, will enter into force one month after its publication in the Official State Gazette, i.e. on 29 July 2023.



We remain at your disposal for further information. Yours sincerely  
**Legal-Tax Department CONFIANZ, S.L.**

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This review does not constitute a professional opinion and has been prepared by our professionals for the sole purpose of disseminating information that may be of interest to you.

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