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Informs

Commercial Law Department
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New legal regime for structural changes in commercial companies

On June 28th 2023 the **Royal Decree-Law 5/2023**[1] was published in the BOE, which transposes the **Directive (EU) 2019/2121**[2] and will result in the **derogation of Law 3/2009**[3], and the consequent emergence of a new legal regime for structural modifications of commercial companies.

[1] Royal Decree-Law 5/2023, of June 28, adopting and extending certain measures in response to the economic and social consequences of Ukraine war, supporting the reconstruction of La Palma island and other situations of vulnerability; transposing European Union Directives on structural modifications of commercial companies and reconciliation of family and professional life of parents and carers; and implementing and enforcing European Union law.

[2] Royal Decree-Law 5/2023 transposes Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border transformations, mergers and divisions, the deadline for transposition of which expired last January 31, 2023.

[3] Law 3/2009, of April 3, 2009, on structural modifications of commercial companies.

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This Royal Decree-Law, which will enter into application on July 29th 2023, raises some doubts from a practical point of view. **What happens, without going any further, to ongoing operations?** This is undoubtedly one of the questions that generates the most controversy since, in the interests of greater transparency, the application of this new legal regime entails new obligations for companies.

The purpose of this note is, precisely, to summarise succinctly the aforementioned obligations and/or main differences of the new legal regime of structural modifications:

1. Changes in structure

The new regulation entails a change in the structure of the legal text compared to the derogated Law 3/2009, containing, on the one hand, common provisions applicable to all the structural modifications that make up its objective scope, whether internal or cross-border, and, on the other hand, specific rules applicable to each of the internal structural modifications (i.e. transformation by change of company type, merger, spin-off and global transfer of assets and liabilities).

2. Main novelties in the regulation of structural modifications of commercial companies "in their internal sphere"

- **Structural modification project**

The minimum content of the structural modification project is extended to include, among others, the following: **(i)** accreditation of being **up to date with tax and Social Security obligations**, by providing the corresponding certificates; **(ii)** the implications of the operation for creditors and, where appropriate, indicating any personal or real guarantees offered to them; and **(iii)** cash compensation to shareholders who have the right to dispose of their shares or holdings, or quotas, as the case may be.

- **Report of the Management Board**

Two sections on members and employees should be included, which may form part of a **single report** or, alternatively, may be included in **two separate reports**, at the choice of the company.

The **section on members** should cover, inter alia: **(i)** the cash compensation proposed in the draft, if exercised by members who have the right to dispose of their shares or holdings, and the method used to determine the compensation; **(ii)** the type of exchange of shares or holdings; **(iii)** the consequences of the structural change for members, and; **(iv)** the impact on the company's corporate liability. However, this section is not required if all the shareholders with voting rights so agree.

However, unless the company has no employees other than those who form part of the management bodies, the **section for the employees** shall be mandatory, which shall include: **(i)** the consequences of the operation for labour relations; **(ii)** any substantial change in employment conditions; and **(iii)** the effect of the above points on the company's subsidiaries.

The management report shall be made **available to the shareholders and employees' representatives at least one month before the date of the general meeting** at which the transaction is to be submitted for approval; it shall not be required if the structural modification is agreed upon unanimously by all the companies at a general meeting.

- **Independent expert report**

The independent expert report shall: **(i)** assess the adequacy of the cash compensation offered to shareholders who have a right to dispose of their shares; **(ii)** assess the adequacy of the guarantees offered to creditors, if required by the management body.

The **previously existing obligation for the independent expert to give an opinion in the case of financial assistance is removed** in leverage merger transactions.[4]

- **Preparatory publicity of the agreement**

In addition to the documentation required by the previous legislation, **a notice informing shareholders, creditors and employee representatives of their right to submit comments on the proposal** must be posted on the company's website or, where appropriate, deposited with the Companies Register, no later than five working days before the date of the general meeting.

For this purpose, the adoption of the structural amendment resolution is still permitted without the need to publish or deposit the documents required by law in the event of unanimous agreement.

- **Shareholders' protection**

A similar mechanism to that of the previous regulation is envisaged with regard to the right of disposal in mergers by takeover when the acquirer directly owns 90% or more, but not 100%, and no directors' or experts' reports are drawn up on the merger plan. In these cases, shareholders who have voted against the approval of the project or who are holders of non-voting shares or holdings will have the right to dispose of their shares in exchange for appropriate cash compensation, giving notice within 20 days of the date of the general meeting approving the resolution. In the event that the shareholders do not agree with the amount of the cash compensation, supplementary compensation may be claimed before the Commercial Court or the arbitration tribunal provided for in the articles of association.

Those members of companies participating in the merger who do not consider the established exchange ratio to be appropriate may challenge and demand a cash payment, whereby the resulting company may compensate the members with its own shares or units instead of the cash payment.

- **Creditors' protection**

There continues to be active preservation of the rights of creditors whose claims arose prior to the publication of the structural modification project and have not yet matured at the time of publication.

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[4] The need to indicate whether financial assistance is available in leveraged mergers was regulated in Art. 35 of Law 3/2009. Leveraged mergers consist of the participating company borrowing to acquire control of another company, and when this happens, the acquiring company absorbs the acquired company (forward merger) or, conversely, the acquiring company is absorbed by the acquired company (reverse merger).

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However, one of the substantial changes in the new law with respect to the previous regulation is the incorporation of a system of adequate guarantees, which eliminates creditors' previous right of objection[5]. This system of guarantees forms part of the structural modification operation from the outset, and the company's administrators who draw up the project must include the implications of the operation for creditors and, where appropriate, the aforementioned personal or real guarantees offered to them.

Creditors, if they do not agree with the guarantees offered, and especially with those not offered, having notified the company of their disagreement, will have a **period of 1 month for domestic transactions and 3 months for cross-border transactions to apply, depending on the precedents, to the Commercial Registrar or the Commercial Court for a ruling on the adequacy of the guarantees**, the creditors having to demonstrate that the satisfaction of their rights is at risk due to the structural modification.

In any event, the exercise of creditors' rights will not paralyse the structural modification operation being carried out, nor will it prevent its registration in the Mercantile Register.

3. Main developments in "cross-border" structural modifications

Royal Decree-Law 5/2023 also regulates cross-border structural modification operations, whether intra-European[6] or extra-European[7], to which the common and specific provisions on internal structural modifications will also apply:

- **Shareholders' protection**

The shareholders of Spanish companies participating in a structural modification that become subject to a foreign law as a result of this operation may dispose of their shares or holdings to the company or to the shareholders or third parties that it proposes, in the same way as in domestic operations, i.e. in exchange for adequate cash compensation and on the condition that they vote against the approval of the project, or that they hold non-voting shares or holdings.

This includes the option for shareholders of participating Spanish companies to dispose of their shares or holdings if they consider that the exchange ratio established in the project is not adequate.

- **Creditors' protection**

Creditors whose claims arose prior to the publication of the transformation project may sue the company in the courts of the registered office prior to the operation for a period of two years after the transformation takes effect.

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[5] The creditors' right of objection was regulated in Art. 44 of Law 3/2009.

[6] Intra-European cross-border structural changes are considered to be those where the structural change is made with a company whose registered office is in another Member State of the European Economic Area.

[7] Cross-border structural changes outside Europe are considered to be those involving companies whose registered office is outside the European Economic Area.

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- **Issue of a pre-operation certificate**

Spanish companies participating in a structural modification in which Spain is the State of origin are **required** to obtain a **prior certificate attesting to the fulfilment of all the conditions required to carry out the operation.**

The **competent Spanish authority** for issuing such prior certificate will be the **Mercantile Registry**, who may request additional information, including from the competent authorities of the State of destination, if he has reasonable grounds for suspecting that the operation is being carried out for abusive or fraudulent purposes with a view to circumventing EU or Spanish law.

The Mercantile Registry will have a period of three months to issue a decision on the preliminary certificate, although in the event of the complexity of the transaction, the period may be extended for a period not specified by law.

The refusal of the Mercantile Registry's prior certificate may be appealed by the company before the competent Mercantile Court within two months of its notification.

Based on the above, and in view of the fact that all these new developments will be applicable as of 29 July, it is worth returning to our initial question as to what will happen to ongoing transactions. In this respect, the Royal Decree-Law is not clear, because although its First Transitional Provision establishes that the first book of the Royal Decree-Law will apply to structural modifications **"whose projects have not yet been approved by the companies involved prior to the entry into force of the Royal Decree-Law"**, the fact is that the regulation does not clarify what is to be understood by **"approved by the commercial companies"**. Does it refer to projects formulated by the administrative body of the companies or, as the case may be, to projects approved by the corresponding General Assembly Meetings?