

# New Law on structural changes in corporations

Royal Decree-Law 5/2023<sup>1</sup> transposes the Mobility Directive<sup>2</sup> and significantly modifies the legal framework governing structural changes (*modificaciones estructurales*) in corporations:

- repealing Law 3/2009 in its entirety;
- bringing cross-border structural changes into line with the Mobility Directive; and
- creating a new framework applicable to both domestic and cross-border structural changes, although using the regulation of cross-border transactions as the starting point.

The public consultation phase helped solve some of the problems with the preliminary draft law that were hindering the approval of simplified structural changes – which are actually the most common type.

In what concerns structural changes, the new law enters into force on 29 July 2023 and will apply to any draft terms (*proyectos*) that the affected companies have not approved prior to that date. Although it is not at all clear, this could reasonably be interpreted as also including draft terms that have been formulated but not yet approved by the general shareholders' meeting. Otherwise, this would mean that – despite the one-month period before the law comes into effect – some structural changes that are already underway but not yet approved by the general shareholders' meeting (e.g. experts have already been appointed) – would have to be adapted to the new framework, which would not be the most reasonable interpretation.

Below is an initial commentary on the new law.

## 1. MODIFICATION OF THE STRUCTURE AND OTHER SIGNIFICANT CHANGES IN THE NEW LAW

### 1.1 GENERAL STRUCTURAL CHANGES

The structure of the new law differs substantially from Law 3/2009, as it has a general part that is applicable to all structural changes – both domestic and cross-border – and a special part, which sets out

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<sup>1</sup> Royal Decree-Law 5/2023 of 28 June adopting and extending certain measures in response to the economic and social consequences of the war in Ukraine, supporting the reconstruction of the island of La Palma and other vulnerable situations; transposing European Union directives on structural changes to corporations and reconciling the work-life balance of parents and carers; and implementing and enforcing European Union law.

<sup>2</sup> 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 conversions, mergers and divisions.

the framework applicable to each type of domestic structural change, to intra-EU cross-border structural changes and to extra-EU cross-border structural changes.

## 1.2 PROTECTION MECHANISMS

### 1.2.1 Protection of creditors: replacement of the creditors' right of opposition with a system of safeguards

- (A) The traditional right of opposition (*derecho de oposición*) has been removed and replaced by a system of safeguards.
- (B) Under this new framework the company can choose what safeguards to offer the creditors in the draft terms, without it being obligatory to make such an offer. In addition, when there is an independent expert's report, that report can (although this is not obligatory) give an opinion on whether the safeguards (if any) are adequate. A procedure has also been established for creditors to exercise their right to receive safeguards (if applicable). The period for exercising their rights is one month (domestic transactions) or three months (cross-border transactions), counting from the date of publication of the draft terms and not from the publication of the merger resolution, as was the case up until now.
- (C) The protected creditors are the same as before – those whose claims predate the publication of the draft terms of the structural change and that have not fallen due by then. However, an important (and welcome) new concept has been introduced: the creditor can only request safeguards if the satisfaction of its claim is adversely affected (*perjudicado*) by the structural change (this replaces the former reference to “insufficiently secured” claims (*créditos no suficientemente garantizados*)).

### 1.2.2 Protection of shareholders

- (A) In mergers and divisions, it is now not possible to challenge the merger due to discrepancies in the share-exchange ratio. Instead, shareholders who do not vote in favour can seek cash compensation in court. This means that the optional (and little-used) framework in article 38.II of the former Law 3/2009, which allowed an expert to be asked to set that compensation when so provided for in the articles of association or the resolution of the general shareholders' meeting, is now mandatory.
- (B) Various cases that in the former law granted an exit right or similar mechanisms have been unified, and in those cases dissenting shareholders (or holders of shares without voting rights) now have the right to dispose of their shares for adequate compensation. If there is an independent expert's report, it must decide whether the compensation is adequate (taking as a basis “any” market price of the shares in the company prior to the announcement of the draft terms or the value of the company without considering the effect of the proposed transaction). Disagreeing with the compensation offered does not mean that the change can be challenged, but additional cash compensation can be requested in court.

### 1.2.3 Protection of employees

- (A) Employees have been granted, along with creditors and shareholders, the [right to submit comments on the draft terms of the structural change](#), which the general shareholders' meeting must take note of when approving them. An announcement should be published notifying employees, creditors and shareholders of their right to do so.
- (B) The [directors' report now has two addressees](#) (it can be a single report or a different one can be made for each group): shareholders and employees.

### 1.3 OTHER SIGNIFICANT DEVELOPMENTS

In addition to the protection mechanisms for creditors, shareholders and employees, some of the other new and important features include the following:

- (A) The possibility of the [general shareholders' meeting amending the draft terms of the structural change](#) has now been expressly mentioned. This was not possible under the former Law 3/2009, although the Directorate General for Legal Certainty and Public Trust (*DGSJFP*) had allowed it in some cases.
- (B) The draft terms must now include accreditation of [being up to date with tax and social security obligations](#) by submitting the corresponding certificates issued by the competent authority; the idea is that this will prevent companies that are not up to date with their obligations from participating in these transactions. This is one of the most controversial provisions.
- (C) Some doubts about the independent expert's report have been clarified: the part of the report relating to the valuation of the contributed assets is only required when the resulting or beneficiary company is a public limited company (*sociedad anónima*) or partnership limited by shares (*sociedad comanditaria por acciones*), and [the expert's report only](#) has to be [valid and in force](#) at the time of the [general shareholders' meeting](#).
- (D) The reference to [financial assistance in the provision regarding leveraged mergers](#) has been deleted.
- (E) It has also been clarified that the [half-yearly financial report](#), which replaces the merger balance sheet in listed companies, [does not have to be audited](#).
- (F) Although it has been expressly recognised that divisions by separation (*segregaciones*) that form a new company can benefit from the simplified framework for divisions that form a new company (*régimen simplificado de la escisiones por creación*), which was not really necessary, that specific framework does not actually mention that the division balance sheet is not required – a point which we expect will be addressed and remedied through interpretation.

## 1.4 MAIN DEVELOPMENTS IN CROSS-BORDER STRUCTURAL CHANGES: INTRA- EU AND EXTRA-EU

### 1.4.1 General provisions on cross-border transactions

In addition to the new features for domestic structural changes that have already been described, the new law establishes the following:

- (A) Normally it will be the company itself that acquires the shares of a dissenting shareholder that has exercised its right to dispose of its shares, but it can also be other shareholders or third parties proposed by the company.
- (B) A period of three months is established for issuing the certificate attesting to compliance with the requirements (which registrars can extend – although it is not stated until when – in complex cases provided that they inform the affected company), which may delay this type of transaction.
- (C) The Registry has been given additional investigative powers if it suspects that the transaction is being performed for abusive or fraudulent purposes leading to or aimed at evading EU or Spanish law, or for criminal purposes. The Registry can also refuse to issue the certificate if it concludes that there is such abuse, fraud or criminal purpose. Such a refusal may be challenged in court.
- (D) In cross-border conversions (*transformaciones transfronterizas*), creditors whose credits predate the publication of the draft terms will now have the right to institute proceedings against the company in the state of origin within two years of the registration date of the conversion, instead of having to file them in the state of destination. The judicial forum is therefore maintained for two years, which can help to avoid fraud.
- (E) Finally, Law 31/2006 of 18 October on employee involvement in European public limited companies and cooperatives (*sociedades anónimas y cooperativas europeas*) has been amended to adapt the regulation of employee participation rights – when any of the companies involved is governed by a system that recognises that regulation – to the provisions of the Mobility Directive.

### 1.4.2 Special provisions on extra-EU cross-border changes

As regards extra-EU cross-border changes (which are not covered by the Mobility Directive):

- (A) Conversions (*transformaciones*), mergers, divisions (*escisiones*) and global transfers of assets and liabilities (*cesiones globales de activos y pasivos*) are all regulated.
- (B) Mergers, divisions and global transfers are now regulated in more detail than in the former law, which simply made a reference to the application of the respective national laws.
- (C) In general, the framework for intra-EU structural changes applies. In the case of extra-EU transactions, the content of the pre-transaction certificate required for the structural change is not set in advance.

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