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# 10 key aspects of the new legal system for structural changes

**Royal Decree-Law 5/2023, of June 28, approves a new legal system for structural changes in corporations both domestic and crossborder, revoking Act 3/2009.**

Legal flash

June 29, 2023



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## 10 key aspects

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## General concepts

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### 1. New law on structural changes

[Directive \(EU\) 2019/2121](#), also known as the “Mobility Directive,” regulates, for the first time in the EU, crossborder conversions and divisions (involving the formation of new companies), and it amends the rules on crossborder mergers.

The Mobility Directive had yet to be transposed into Spanish national law, the deadline being January 31, 2023. Despite the approval of a draft bill several months ago, the text had not been submitted to Parliament before it was dissolved some weeks ago following the call for a general election.

[Royal Decree-Law 5/2023](#) (published in the Official Gazette of the Spanish State on June 29, 2023), in its first volume, approves a **whole new system for structural changes in corporations both domestic and crossborder**. As well as complying with the transposition into Spanish national law of the Mobility Directive, the new law revokes Act 3/2009, of April 3 (“[Act 3/2009](#)”), incorporating into a new regulation the whole legal system for domestic and crossborder structural changes (the “**New SCL**”).

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### 2. Entry into force and transitional regime

The New SCL will enter into force a month after publication in the Official Gazette of the Spanish State (i.e., on July 29, 2023).

A transitional system has been established for operations under way before the New SCL enters into force, and thus Act 3/2009 will apply to structural changes **the projects of which were approved by** affected companies before July 29, 2023. The requirement for the approval of the merger project by these companies seems to refer to it being necessary for the general meeting to grant this approval, although some commercial registries are adopting the criterion whereby Act 3/2009 can be applied if the projects are approved by the governing body or if they are submitted to the Commercial Registry (if so required) by July 29, 2023.

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### 3. Scope of application

The New SCL applies to structural changes of corporations (conversions, mergers, divisions and the transfer of all assets and liabilities), both domestic and crossborder, inside and outside of the European Economic Area (the “**EEA**”).

For the first time, the New SCL regulates non-European mergers and crossborder divisions. Previously, there was no specific legal system for these operations, which made it necessary



to apply and coordinate the legal systems of the companies involved to determine the feasibility and legal framework. Carrying out these operations will be easier now that they are properly regulated.

In line with the terminology used in the Mobility Directive, “international transfer of registered office” is now referred to as “crossborder conversion.” On the other hand, a “conversion of company type” or “domestic conversion” occurs when a Spanish company changes from being one type of company to another (e.g., from being a public limited company—*sociedad anónima*—to becoming a private limited company—*sociedad limitada*—or vice versa), while keeping the same nationality.

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#### 4. Structure

The New SCL’s structure differs greatly from that of the previous regulation. Among others, it includes:

- common provisions applicable to all structural changes (whether domestic or crossborder), e.g., on planning the structural change project, reports by the governing body and independent experts, approval of the operation, and the protection of shareholders and creditors;
- specific rules for each type of domestic structural change; and
- general rules on crossborder structural changes occurring inside and outside Europe, and rules specific to each type of change.

Therefore, to ascertain the system of a structural change, it will be necessary to analyze in each case how and when to combine **the pertinent common and specific provisions**.

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### Domestic operations

Domestic operations **refer to the conversion due to a change of company type** of a Spanish company, **mergers and divisions (including divisions by separation)** involving Spanish companies and **the transfer of all assets and liabilities** of Spanish companies. As mentioned above, besides requiring that the common and specific provisions applicable are known and interpreted in each case, the New SCL introduces significant developments as regards the procedure required to carry out the operations and the rules on protecting shareholders and creditors. The most important developments are summarized below.



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## 5. Main developments concerning the procedure

The procedure for effecting structural changes still involves three general stages: the preparatory stage, the decision stage and the implementation stage. Broadly speaking, the governing body must prepare a project that is approved by the general meeting and the resolutions are entered in the corresponding commercial registry.

However, in general terms, the New SCL requires a greater number of documents for the operation, or its contents and recipients, meaning that the schedule of operations will likely be affected and take longer. Below are the most noteworthy aspects.

- **Project (art. 4 of the New SCL).** Largely, although the same contents are required as before for the merger and division project, the New SCL introduces the following provisions:
  - It is necessary to set up a conversion project (art. 20 of the New SCL).
  - The conversion, merger or division project must attach or include certificates substantiating that the companies involved have **fulfilled their tax and social security obligations** (arts. 20.3.3, 40.9, 64.3 and 74.1.5 of the New SCL).
  - Under article 4.1.6 of the New SCL, the project must mention the cash compensation given to shareholders entitled to dispose of their shares (see section 6 of this legal flash), and article 4.1.4 provides that it must explain the implications of the operation for the creditors and the guarantees they will be offered, if applicable (see section 7 of this legal flash).
- **Preparatory publicity.** Except in cases where structural changes are unanimously approved by the universal general meeting of shareholders (art. 9.1 of the New SCL), in addition to the operation project, an announcement must appear on the company's web page or must be submitted to the commercial registry informing shareholders, creditors and workers' representatives (or, in their absence, the workers themselves) that they may **communicate their observations on the proposed operation to the company** up to five working days before the general meeting (art. 7.1.2 of the New SCL).
- **Directors' report for shareholders and workers.** The directors' report explaining the operation must now include two sections. Alternatively, there may be one report for shareholders and another for workers (arts. 5.1 and 5. 2 of the New SCL), although if all of the shareholders agree, the section of the report addressed to them will not be required (art. 5.4 of the New SCL).

The section addressed to **workers** will explain how the operation will affect labor relations, material changes to employment conditions or in the locations of the company's places of business; and how these changes will affect any subsidiaries of the company (art. 5.5 of the New SCL).



Not less than one month before the date of the general meeting, the project and report or reports must be made available to the shareholders, the workers' representatives or the workers themselves (art. 5.6 of the New SCL).

› **Expert report.** Developments affecting the expert report:

- It must include the expert's opinion as to whether the cash compensation offered to the shareholders entitled to dispose of their shares is adequate. See section 6 of this legal flash for more information.
- At the directors' request, it may include an assessment of the adequacy of the guarantees offered to the creditors, if applicable (art. 6.3 of the New SCL).

The New SCL also makes changes that **improve the legal system** with regard to the expert report, as explained below.

- Articles 6.2 and 41.3 of the New SCL clarify that, only when the new company resulting from the operation or the beneficiary is a public limited company—*sociedad anónima*—will the expert be required to give an opinion as to whether the assets of the absorbed or divided companies cover the capital of the resulting company (if newly created) or its capital increase (if it already existed before the merger or division). The scientific and registry law doctrine already gave this interpretation, but the wording of Act 3/2009 sometimes led to confusion (when a public limited company—*sociedad anónima*—was absorbed by a private limited company—*sociedad limitada*—for example).
- In cases involving what is known as a **merger leveraged buyout** (put simply, a merger in which one of the merging companies becomes indebted to acquire control of another of the merging companies), the independent expert is no longer required to ascertain whether there has been “financial assistance” (art. 42.1.3 of the New SCL as opposed to art. 35.3 of Act 3/2009). This point, incorporated during the parliamentary processing of Act 3/2009, required a financial expert to give an opinion on an essentially legal matter, which in practice resulted in divergence.

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## 6. Main developments concerning the protection of shareholders

Under the current system, shareholders have a right of separation or disposal in cases of conversion due to a change of company type and in a specific type of merger, that is, when a takeover merger occurs in which 90% or more, but not the totality, of the absorbed company's shares are directly owned by the absorbing company, and the reports of directors and experts are not drawn up (art. 50 Act 3/2009). Under the New SCL, in these same cases, shareholders are entitled to dispose of their shares, which enables them to receive compensation in cash (art. 12.1 of the New SCL). As under the current system, shareholders do not have the right to dispose of shares in any other operations involving a structural change (mergers, divisions and the transfer of assets and liabilities).



Some developments affect the procedures more than the substance, among which we highlight the following:

- Dissenting shareholders are entitled to dispose of their shares (art. 12.1 of the New SCL). To date, in the event of a conversion, the only requirement imposed on shareholders was that they did not vote in favor (art. 15 of Act 3/2009). Under article 50 of Act 3/2009, they were not subject to any particular conduct requirements.
- Under article 12.1 of the New SCL, the holders of non-voting shares are also entitled to exercise this right.
- Shareholders that object to the amount of compensation in cash have two months from the date they received or should have received that amount to file a claim with the commercial court, or the arbitral tribunal specified in the bylaws, to request additional cash compensation (art. 12.4 of the New SCL).
- Within two months from the date the resolution of the general meeting is published, in the event of a merger or a division, the shareholders can challenge the share-exchange ratio, if they consider it to be inadequate, and request a cash payment, in which case the resulting company can compensate them with shares drawn from its treasury stock, instead of cash (arts. 49.1, 49.2 and 63 of the New SCL).

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## 7. Main developments concerning the protection of creditors

Under Spanish law, the protection of creditors in mergers and divisions has traditionally been based on the acknowledgment of a right to challenge the structural change, also being able to undermine it by granting to the creditor of unmatured claims a joint and several guarantee issued by a lending institution. This right to challenge no longer exists under the New SCL, which adopts several different measures to protect creditors involved in mergers and divisions:

- On drawing up the project, directors are obliged to indicate the implications arising from the operation for creditors and, **if applicable, the guarantees offered to them** (art. 4.1.4 of the New SCL).
- Creditors are granted the right to **submit “observations”** before the general meeting is held (art. 7.1.2 New SCL), expressing, if applicable, their disagreement with the guarantees offered.
- Provided they are able to **prove that the satisfaction of their rights is at stake** due to the structural change, creditors are entitled to demand “adequate” guarantees from the company (art. 14.1 New SCL). Regardless of whether an independent expert’s report has been issued stating that the guarantees are inadequate (art. 13.1.1 of the New SCL) or if there is no report (art. 13.1.3 of the New SCL), creditors must resort to the commercial registrar before approaching the courts.



- In the specific case of divisions, (art. 70 of the New SCL), and with regard to **the joint and several liability of any company involved in one** (currently regulated under art. 80 of Act 3/2009) we highlight the following:
  - The joint and several liability of the company divided or divided by separation for the debts assumed and not repaid by the beneficiaries will be limited to the net assets remaining in that company.
  - Companies benefiting from the division will be jointly and severally liable for any remaining debts chargeable to the company being divided or divided by separation.
  - In both cases, the relevant debts are those that have arisen and are outstanding before the division project is published.
  - This joint and several liability will expire after five years have elapsed.

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## Crossborder operations

The New SCL regulates crossborder structural changes **inside and outside of Europe**, including, for the first time, non-European mergers and crossborder divisions.

Crossborder structural changes include the following:

- **Conversions** of limited liability companies incorporated under the national law of an EEA member state (in the case of conversions within the EU), or under the national law of a state that is not a member of the EEA (in the case of non-EU conversions) into limited liability companies governed by Spanish law or, conversely, conversions of the latter into the former—known as the “international transfer of registered office” under the current SCL—(arts. 80.1.1 and 121.1 of the New SCL).
- **Mergers, divisions and transfers of all assets and liabilities** of limited liability companies formed in accordance with the law of an **EEA** member state provided that, when at least two of them are governed by the laws of different member states, one is subject to Spanish law (art. 80.1.2 of the New SCL).
- **Mergers, divisions and transfers of all assets and liabilities** involving limited liability companies formed in accordance with the law of a state that **is not a member of the EEA** and one or several companies subject to Spanish law (art. 121.2 of the New SCL).

Crossborder structural changes will be subject to common provisions and to any specific provisions applicable in each case. Below we summarize the most significant developments in these structural changes affecting the procedure and the protection of shareholders and creditors.



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## 8. Main developments concerning the procedure

One particular noteworthy formality is that, to ensure legal certainty in crossborder structural changes, an authority from each state must issue a “**pre-operation certificate.**” This certificate ensures scrutiny of the legality of crossborder operations in accordance with the legislation of the state in which the company undergoing the conversion operates.

Spain has chosen to designate the **commercial registrar as the authority competent** to issue this pre-operation certificate (arts. 90.1 and 123 of the New SCL).

If, on assessing compliance, the commercial registrar has serious doubts indicating that the crossborder operation is set up for **abusive or fraudulent purposes**, leading to or aimed at the evasion or circumvention of EU or Spanish law, or for criminal purposes (arts. 91.1 and 123 of the New SCL), it can obtain any additional information it considers necessary from the body or public entity competent in the area (including those of the destination state) (arts. 91.2 and 123 of the New SCL).

The commercial registrar will carry out an overall assessment of the relevant information and documents it receives, having recourse to an independent expert for that purpose (arts. 91.3 and 123 of the New SCL).

If, in the course of overall assessment, it becomes clear that the crossborder operation is set up for abusive or fraudulent purposes, or for criminal purposes, it will not issue the pre-operation certificate and it will give the company the reasons for this decision (the company will have two months from the date it is notified of this decision to appeal the refusal before the commercial court). Otherwise, the commercial registrar will issue the certificate and inform the company of its decision (arts. 91.5 y 92.1 and 123 of the New SCL).

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## 9. Main developments concerning the protection of shareholders

Shareholders of Spanish companies involved in a structural change due to which the company will be governed by the law of another state (art. 12.1 II of the New SCL), have the right to **dispose of their shares** for adequate cash compensation. Shareholders that vote against the respective resolutions and holders of non-voting shares will have this right (arts. 86 and 122 of the New SCL).

In mergers and divisions, shareholders of Spanish companies that become merged, or of a divided Spanish company, who do not have or have not exercised their right to dispose of their shares, but who consider that the cash compensation offered by the company is inadequate, can **challenge** this amount and claim cash payment (arts. 104.1, 109.1 and 122 of the New SCL).





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## 10. Main developments concerning the protection of creditors

In cases of crossborder conversion, the state of origin must still have a jurisdiction to which creditors can apply for two years after a crossborder conversion has taken effect, although the agreements in which the jurisdiction and arbitral tribunals are established will prevail over this rule as provided in the respective regulations (arts. 99 and 122 of the New SCL).

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For additional information, please contact our [\*Knowledge and Innovation Group\*](#) lawyers or your regular contact person at Cuatrecasas.

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