CLIFFORD

CHANCE

SPAIN: KEY ISSUES IN THE NEW STRUCTURAL MODIFICATIONS REGIME

Royal Decree-Law 5/2023, of 28 June, approved a new regime on structural modifications (which will enter into force on 29 July and will apply to structural modifications whose draft terms have not been approved by then), raising a number of questions, the most significant of which we will address here.

Key issues

- New structure of the legal regime
- New types of cross-border structural modifications
- Right to amend the draft terms
- Tax certificate requirement
- New right of creditors to request guarantees
- Joint and several liability of the various companies involved in the de-merger
- Leveraged mergers
- Challenging the exchange ratio

NEW STRUCTURE OF THE LEGAL REGIME

The former Structural Modifications Act regulated the various types of transactions separately, though it included various legal references between them. RDL 5/2023, however, adopts a new regulatory approach, establishing extensive common provisions for all internal structural modifications and others for cross-border ones, along with rules specific to each type of transaction. This presents numerous obstacles to understanding and implementing the new regime, due to the need to combine and integrate different sets of legislation that are not always clearly coordinated.

By way of example, an internal de-merger will be governed by the provisions specific to internal de-mergers; however, given how merger law supplements de-merger law, we must also combine – as appropriate – the rules on mergers and the provisions common to all structural modifications.

The issue becomes more complex still in cross-border transactions: if the de-merger is transnational, determining the applicable rules will require integrating the former sets of legislation not only with the provisions specific to cross-border de-mergers, but also with those specific to cross-border mergers.

NEW TYPES OF STRUCTURAL MODIFICATIONS

Cross-border conversion

In terms of classes or types of structural modifications, the main change lies in the regulation of the so-called "cross-border conversion". This essentially translates not so much – or not only – into a simple change in company type (like an internal conversion), but the conversion of a Spanish corporation into a foreign company (or vice versa) and by extension its subjection to a new personal law, or *lex societatis*. This concept comes from the EU Mobility Directive, which the Spanish legislator was obliged to transpose (hence its condemnable recourse to a royal decree-law, justified by the transposition deadline having passed). This is despite the concept already being envisaged

in the previous legislation, under the name "international transfer of registered address".

Cross-border de-merger

Also in line with the Mobility Directive, the new regime includes a rule on cross-border de-mergers, providing the dual possibility of the beneficiary companies being either newly incorporated (the only scenario envisaged in the Directive) or existing companies.

However, although this particular transaction was not expressly provided for under the previous legislation, it was in fact already possible under the EU freedom of establishment and by analogy with cross-border mergers, there being precedents in this respect.

RIGHT TO AMEND THE DRAFT TERMS

In addition to approving or rejecting the structural modification draft terms, RDL 5/2023 expressly entitles the general meetings of the companies involved to amend them, provided of course that all the companies so agree and it is not a unilateral amendment by one of them. This was not provided for in the previous legislation, though it was often accepted (albeit with certain limits and conditions).

Under the new regime, the draft terms may be amended to, for example, reflect comments made by shareholders, creditors, and workers' representatives, who must now be allowed to present observations on the draft terms prior to the general meeting (except where the resolution is adopted unanimously by all the shareholders at a universal general meeting).

It should be understood, in any case, that the amendment can only affect ancillary or secondary aspects of the draft terms, not the essential nature or characteristics of the proposed structural modification.

TAX CERTIFICATE REQUIREMENT

One of the most striking changes introduced is the requirement to submit certificates proving that the company is up to date with its tax and social security obligations as part of the conversion, merger, de-merger, or global assignment draft terms, whether the transaction is internal or cross-border.

The same requirement to be up to date in compliance with tax obligations is imposed in matters of public procurement and subsidies. These certificates are also envisaged in the Spanish General Tax Act for cases – among others – of the sale of a business or division, with the acquirer's liability for such business or division's debts, sanctions, and liabilities being limited as a consequence.

However, since the general effect given to these certificates is inconsistent with the universal succession that characterises structural modifications, their requirement is questionable and disproportionate. It seems to cloak a simple excess of tax zeal, intended to force companies that want to undertake a structural modification to first rectify their tax (or social security) situation.

As implementing regulations covering this requirement are not expected (unlike, for example, the regime governing public procurement and subsidies), the certificate should be understood to only be required in relation to the central government, that is, the Spanish State Tax Agency, not in relation to other agencies, such as municipalities in which the company concerned carries out economic activity through an establishment or branch. Besides the fact that legislative history would suggest this being the case, it would

otherwise lead to an infinite and uncontrollable number of certificates required (potentially by all agencies with tax responsibilities).

NEW CREDITOR PROTECTION MEASURES

General rules

One of the aspects in which RDL 5/2023 has brought the greatest change is in creditor protection measures, which also extend to all structural modifications (including conversion, a transaction that in principle has no effect on the company's assets). Until now, creditors had a right of opposition, which, when exercised, obliged the company to provide security to their satisfaction or, failing that, a guarantee from a credit institution. However, the new regime takes the system established by the Mobility Directive for cross-border transactions and applies it to all structural modifications, with the plausible aim of avoiding having different systems of protection for different internal transactions.

In essence: (i) the draft terms can – but do not have to – offer personal or *in rem* guarantees to creditors; (ii) company directors can also attach to the draft terms – though it is again not compulsory – a statement of the company's financial position and its ability to meet its obligations; (iii) should an independent expert be involved, such expert may decide – albeit only at the directors' request – on the adequacy of the guarantees offered; (iv) creditors prior to the draft terms who are not satisfied with the guarantees offered or the lack thereof are entitled to request that they be extended or that new ones be granted, through a procedure before the commercial registry or the commercial court, depending on whether the report of the expert – who, if not already appointed, may be appointed for this purpose – holds the guarantees to be adequate or inadequate; and (v) the creditor must also prove that the enjoyment of its right is at risk due to the structural modification and that it has not obtained adequate guarantees.

This is a complex procedure, which should not foreseeably be particularly relevant in practice (as the former right of opposition was not). Not only does it often depend on the decisions freely made by the companies in question, it also forces creditors to undertake a quite complex process with an uncertain outcome.

Protection in de-mergers

The creditor protection regime specifically envisaged for de-mergers is of greater relevance, as these are transactions that due to their effect of dividing or segregating assets can involve greater risk.

Under the previous regime, obligations assumed by a beneficiary company that were not fulfilled were borne by the other beneficiary companies for the amount of the net assets attributed to each of them, as well as the de-merged company – if it persisted – for the entirety of the obligation. However, this joint and several liability did not apply in respect of obligations breached by the de-merged company itself, its creditors thus lacking the right to make claims against the beneficiary companies in such cases.

The new regulation has corrected this disparate treatment by extending the joint and several liability to cover cases of breach by the de-merged company as well. Liability is limited in all cases, however, including when it is exercised against a de-merged company for a debt not honoured by a beneficiary company, for the amount of net assets attributed to each company.

LEVERAGED MERGERS

RDL 5/2023 maintains a regulation specific to leveraged mergers (construed as those involving two or more companies, when one of them has assumed debt in the previous three years in order to acquire control of another or others). Essentially, it reinforces the content of the merger plan and the directors' report by requiring them to include a payment plan for the acquisition debt and to justify the reasons for the acquisition of control and subsequent merger. However, it has removed the requirement that the independent expert's report (required in all cases) also determine whether financial assistance exists.

This removal is cause for celebration. It was a troubling requirement of quite uncertain legal scope, due to the general inapplicability of the prohibition on financial assistance for corporate transactions – such as mergers – that have their own shareholder and creditor protection regime. This was borne out in practice, which saw experts resort to unusual and prudent formulas when making this specific representation.

CHALLENGING THE EXCHANGE RATIO

Another novelty of RDL 5/2023 relates to structural modifications that require an exchange ratio (i.e. mergers and de-mergers): the establishment of a single regime for challenges to the exchange ratio by dissenting shareholders.

While this regime was already envisaged in previous legislation, it was purely optional and of limited practical relevance. Now, this right of challenge is mandatory, empowering shareholders who exercise it to claim a cash payment before the commercial courts. Exercising the right does not, in any case, suspend the structural modification or prevent its recording at the commercial registry.

CLIFFORD
CHANCE

CONTACTS

Luis Alonso
Partner

T +34 91 590 4147
E luis.alonso
@cliffordchance.com

Javier García de Enterría
Consultant

T +34 91 590 4102
E javier.garciadeenterria
@cliffordchance.com

Samuel Rosas
Counsel

T +34 91 590 4180
E samuel.rosas
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2023

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Houston • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Riyadh • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.