

LESSON 12: CONVERSION, MERGER AND SPIN-OFF OF COMPANIES

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1.-Introduction

The conversion, merger and spin-off of companies cannot be considered simple amendments to the articles of association. They are significant modifications of a company's structure which are regulated in RD-Law 5/2023 which implements in our legal framework the EU Directive 2019/2021.

2.- Common requirements

RD-Law 5/2023 has introduced common requirements to be fulfilled in all types of structural modifications:

a) Directors of the companies participating in the structural modification must draw a project and a report. The project informs about the legal form, name, address of the participating companies and the company resulting from the structural modification, the modification schedule, guaranties for third parties, consequences for partners, etc. The report informs about the justification which underlies the modification, about legal and economic issues, and consequences for employees.

b) Independent experts appointed by the territorial Trade Register must draw up a report analyzing the adequacy of creditors' guaranties and partners' contributions and compensations in case of transfer of shares or equity participations.

c) Structural modifications must be approved by the general meeting of all companies involved.

d) The general meeting resolution approving the structural modification of the company must be published in the BORME and in the web site of the company. If the company does not have a web site, the general meeting resolution will be published in a widely read newspaper in the province where the company has its domicile. The publication will not be required when all the partners are personally informed of the general meeting resolution.

d) RD-Law 5/2023 also includes common instruments to protect partners, and creditors. Partners, who have voted against the modification or who own shares or equity participations without voting rights, have the right to transfer their shares and equity participations receiving an adequate economic compensation established in the modification project. To protect creditor's interest RD-Law 5/2023 introduces a concrete procedure which allow them to revise the guaranties offered in the modification project.

3.-Conversions

a) Concept and types

A conversion is a legal transaction whereby a company changes its legal corporate form to another which will govern its structure, organization and the relationships with its partners and third parties. By using the conversion procedure, it is possible to simplify the change of legal form, avoiding the money and time spent while the company is dissolved, liquidated, extinguished and set up again under another legal form. It is important to highlight that, during the conversion, the company continues to be a legal person.

Considering the different legal forms that can be adopted by Spanish companies, there are a number of possible conversions to be mentioned. As a general rule any *registered* trading company can be converted into another company type.

b) Special protection of partners' interests

- The conversion of a company involves significant changes to partners' status. In order to maintain their interests, the RD-Law 5/2023 has granted to those partners, who have voted against the modification or who own shares or equity participations without voting rights, have the right to transfer their shares and equity participations receiving an adequate economic compensation established in the modification project. Nevertheless, those partners who voted against the resolution, or who own shares or equity participations without voting will automatically be removed of the company when the conversion involves assuming personal liability for company debts.

- When a company has issued bonds or other kind of securities and wants to be converted into another legal form which does not accept the issuance of those financial instruments, the conversion cannot be carried out unless the bonds or securities issued are converted or cancelled.
- When the company wants to be converted into a legal form which requires the full payment of the subscribed share capital, it will be necessary to pay the amount or reduce the capital before the general meeting adopts the resolution to convert the company.
- When the company is converted into a legal form which does not accept industrial partners, the contributions of the former industrial partners to the converted company will have to be that established in the articles of association or agreed by all the partners. The former industrial partners can continue with their personal obligations in the converted company if they agree and the articles of association of the converted company regulate their personal obligations as ancillary services.

c) Special protection of creditors' interest

From the company creditors' standpoint, the conversion does not involve a change of debtor. The debtor continues to be the same legal person but under another legal form. Nevertheless, the RD-Law 5/2023 introduces certain rules in order to protect the creditor's interest when a company is converted.

- Partners who assume a personal liability for the company's debts after the company conversion will respond in the same way for all the existing debts before the conversion.
- When the conversion involves a change in the partners personal liability for company debts which becomes a limited liability, partners will maintain their personal liability for all existing debts before the conversion, unless the company's creditors have accepted the change of legal form.

4.-Mergers

a) *Concept and types*

A merger is a legal transaction involving two or more companies, in which one or more of them are dissolved and the partners and equities merge with an existing company or merge and are consolidated as a new company. Two different merger procedures should be mentioned. Firstly, the merger strictly speaking, which involves the dissolution of one or more of the merging companies (non-surviving companies) and the continuation of one or more of the merging companies (surviving companies) which will take over all the partners and equity of the dissolved companies. Secondly, the merger by consolidation, in which all the merging companies are dissolved and then

consolidated to form a new company which will include all the partners and equities of the dissolved companies.

b) Requirements

To merge companies, some previous requirements should be taken into account:

- One, several or all the companies involved in the merger procedure must be dissolved previously.
- The dissolution must not lead to the liquidation and extinction of the non-surviving companies.
- The equity and partners of the non-surviving companies must be transferred to the newly created company or to the surviving company, depending on the merger procedure.
- The surviving company or the new company resulting from the merger receives the equity of the dissolved companies and provides their partners with shares or equity participations in return.

d) Procedure

For a merger procedure to be successfully concluded, it must complete all the different stages in strict compliance with the required terms.

1.-The directors of the merging companies must draw up a merger project. Two reports will be attached to the merger project. A) One drawn up by the directors of each merging company, to explain the legal and economic aspects of the project in detail, stating the conversion rate of the shares and any particular difficulty in their valuation. B) Another report drawn up by independent experts appointed by the Trade Register, in case the merging companies are obligated to have their accounts audited (PbLLC and Partnerships limited by shares).

2.-The merger project and the rest of documents related to the merger must be available on the website of the merging companies and, if there is no web site, in the company domicile.

3.-The merger must be approved by the general meeting of the merging companies according to the quorums and majorities required by law. The notice of the general meeting must expressly include the right of partners, employees, and owners of special rights to inspect in the company's domicile all the documentation related to the merger.

4.- After the general meeting resolution, the merger of companies will be recorded into a public deed and registered in the Trade Register.

The RD-Law 5/2023 does not provide the members of the merging companies with the right to withdraw because it has given priority to the merging companies' interests over the interests of those partners who do not want to abandon the non-surviving company and be part of another one. Partners' protection is achieved reinforcing the right to be informed about the merger.

4.- Spin-offs

a) Concept and types

A spin-off is the opposite of a merger. It has two alternative forms, each of which is subject to a different procedure:

- *Total spin-off of companies:* this occurs when a company is dissolved, dividing its entire equity into two or more parts, each of which is transferred to a newly created company or to a previously existing company.
- *Partial spin-off of companies:* this occurs when one or more parties of the equity of a company are separated without dissolving the company and the different parts separated are transferred into one or more newly created or previously existing companies.
- *Segregation:* this occurs when a part of the equity of a company is transferred by universal succession to another one. Through the segregation, the segregated company acquires shares or equity participations from the receiving company in return. The main difference between a segregation and spin-off is that, in a segregation, the segregated company itself, and not its partners, receives the shares or equity participations in return for its non-monetary contribution to the receiving company. In a segregation, the contribution of the segregated company consists of a part of its equity as an economic unit.

b) Procedure

The spin-off procedure is similar to the merger. Some special issues related to creditors' protection must be mentioned. As a rule, creditors have the right to revise the guaranties provided by the spin-off project drawn up by the directors. Together with that, the RD-Law 5/2023 has introduced a special liability system for the participating companies, depending on the type of spin-off.

1. *Total spin-off of companies.* If one of the beneficiary companies does not comply with an obligation assumed in the spin-off, the other beneficiary companies will be jointly liable for compliance with such obligation.
2. *Partial spin-off of companies.* The beneficiary company is liable for all the obligations acquired through the spin-off, while the segregated company maintains a subsidiary responsibility for such obligations.

5.- Vocabulary

Conversion- Transformación

Merger- Fusión

Spin-off- Escisión

Amendments to the articles of association- Modificaciones estatutarias

Company balance sheet- Balance de la sociedad

Audit report- Informe de los auditores

Economic interest group- Agrupación de interés económico (AIE)

To oppose a resolution- Oponerse a un acuerdo de la junta

Right to withdraw- Derecho de separación

Bonds (or other kind of securities)- Obligaciones (u otros instrumentos de financiación)

To file for entry at the Trade Register- Presentar (una escritura) para ser inscrita en el Registro

To challenge- Impugnar

Equity- Patrimonio neto