

## **Spanish Companies' Structural Changes to Substantially Impact Corporate Transactions**

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The **Spanish Companies Structural Changes Act**<sup>1</sup> (the "CSC Act") was published on April 4, 2009 in the Official Gazette. The CSC Act amends some particularly important aspects of Spanish corporate law and will foreseeably have substantial impact on corporate transactions in Spain. In general terms, the CSC Act will come into force on July 4, 2009 (with some exceptions).

The CSC Act unifies, broadens and revises the regime for structural changes of companies (transformation, merger, division/spin-off and global transfer of assets and liabilities) and regulates the international transfer of registered offices in detail. In addition, the CSC Act complies with certain commitments for Community harmonisation of corporate law that Spain had not yet accomplished. In this regard, it incorporates the Cross-border Mergers European Directive, the European Directive Amending the 3rd and 6th Directives and the European Directive Amending the 2nd Directive into Spanish law and adjusts certain provisions of the Public Limited Companies Act<sup>2</sup> to conform to the ruling of the Court of Justice of the European Union of December 18, 20083.

In short, the following are the key aspects of the CSC Act:

- It introduces a large number of regulations that will expedite merger and division/spin-off transactions (in particular, intragroup or unanimously approved reorganisations). Thus, the CSC Act extends the circumstances in which an independent expert's report on the merger or division plan is not required or to which simplified merger or division procedures may be applied (possibilities that are allowed under European Union law and had not yet been introduced into Spanish law).

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- It expressly regulates the “leveraged merger” or merger subsequent to acquisition of a company financed by borrowing, although with certain technical defects that will make interpretation and practical application difficult. This regulation applies where one of the companies being merged borrowed funds within the three years preceding the merger for the purpose of acquiring control of other company involved in the merger (or particularly important assets). This figure strengthens the protection of shareholders and creditors by requiring specific mentions in the merger plan and the issuance of a report by an expert appointed by the Commercial Registry.
- It incorporates the Cross-border Mergers European Directive into Spanish law and establishes the regulations (including the regime for employee participation) applicable to intracommunity cross-border merger transactions between limited liability companies in which at least one of the companies involved is Spanish.
- As a new element, it includes divestiture and “subsidiarisation” among companies structural changes, equating them with division/spin-off and therefore providing the benefit of universal succession. Divestiture is defined as the block transfer through universal succession of one or several parts of a company’s assets and liabilities, each of those parts forming an economic unit, to one or more companies, with the divested company (and not its shareholders) receiving shares, units or partnership interests in the beneficiary companies in exchange. Subsidiarisation (or as it is called in the CSC Act, “incorporation of a wholly-owned company through transfer of assets and liabilities”) is a transaction through which a company transfers all its assets and liabilities as a block to a newly created company and in exchange receives all the shares, units or partnership interests of the beneficiary company.
- It also includes as a type of structural change transaction the global transfer of assets and liabilities, thereby providing a further instrument for transfer of businesses with the benefit of universal succession. The global transfer of assets and liabilities consists of the block transfer by a company of all its assets and liabilities through universal succession to one or more shareholders or third parties in exchange for a consideration that cannot be in the form of shares, units or partnership interests of the transferee. As a result of the global transfer, the transferor company may be or may not be wounded up. If it is wounded up, the consideration for the assignment will

be received directly by its shareholders and it must be made in accordance with the regulations applicable to the liquidation quota.

- It regulates the international transfer of registered offices/corporate seat in detail, thereby facilitating such transactions. The regulation covers the transfer of a foreign company to Spain and the transfer of a Spanish company abroad.
- It incorporates the Directive Amending the Second Directive into Spanish law. To do so, it amends certain articles of the Public Limited Companies Act and adds new articles to adapt Spanish law governing public limited companies in respect of non-cash contributions and treasury stock to the principles of greater flexibility upon which that amendment is based.

It is important to point out that the CSC Act does not include the option of greater flexibility of the regime for financial assistance in the terms of the European Directive Amending the Second Directive, which allows EU Member States to permit transactions of financial assistance for acquisition of treasury stock if they fulfil certain conditions. Consequently, Spanish law governing public and private limited companies continues to forbid financial assistance with a view to the acquisition of treasury stock other than with the exceptions provided for in the Public Limited Companies Act.

In summary, the CSC Act is a critical piece of legislation that will favor the corporate restructuring in Spain, particularly through mergers and divisions/spin-offs.