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A Shareholders' Right to Information and Challenging Corporate Resolutions

The Supreme Court introduced the innovative "Relevance Test" in Ruling No. 762/2024, dated May 29, 2024, to assess the information requested by shareholders when denied. This ruling interprets the essential nature of information required to challenge corporate resolutions on grounds of infringement of a shareholder's right to information.

The right to information is governed by Articles 196 and 272.3 of Royal Legislative Decree 1/2010, of July 2, which approves the consolidated text of the Capital Companies Act. Under this framework, shareholders may: (i) request, either before the General Meeting or during it, any reports or clarifications deemed necessary in relation to the agenda; and (ii) review the supporting documents for annual accounts at the company's registered office. It is important to note that information requests supported by shareholders holding 25% of the company's share capital cannot be denied.

This case involves the denial of a shareholder, holding 20% of the share capital, who requested information about employee payrolls and sales details. Consequently, the shareholder contested the resolutions adopted, claiming a violation of their right to information.

The Supreme Court differentiates between information necessary for the shareholder and information essential for exercising voting or participation rights by introducing a "Relevance Test" to determine what information warrants the viability of challenging corporate resolutions.

In this specific case, Article 196 of the Capital Companies Act must be interpreted in light of Article 204.3(b) of the same law, which states that a corporate resolution cannot be challenged solely because the information provided was incorrect or insufficient; instead, the information must be genuinely crucial for a shareholder to vote or participate properly.

Thus, the ruling clarifies that not every infringement of this right justifies challenging corporate resolutions, establishing a "Relevance Test" to determine what information is essential for a successful challenge of a resolution by the Board on grounds of infringement of the right to information.

The ruling differentiates between necessary information—"that which is rationally useful or relevant for exercising a shareholder's rights"—and essential information—"that which should be known to deliberate and vote on the resolutions approved."

The Court concludes that these terms are not equivalent. Information may be useful or relevant for protecting a shareholder's rights but not essential for exercising their participation rights. Consequently, the denial of such non-essential information does not justify challenging the resolutions but does allow for other legal actions.

This new mechanism operates in two phases. The first step is to determine if the information in question is necessary for the shareholder. If so, their right to information is infringed, and the second phase proceeds.

In this second phase, the essential nature of the information is evaluated—i.e., whether the shareholder needs to know it to deliberate and vote on the approved resolutions.

Upon completing the "Relevance Test," the Supreme Court concludes that only if the information is both necessary and essential will the infringement of the right provide grounds for challenging the resolution for which the information was withheld.

In summary, this ruling clarifies the distinction between the necessary and essential nature of the information requested by shareholders, introducing the "Relevance Test" as a mechanism to determine under what circumstances a refusal to provide information enables a challenge to corporate resolutions.

Marta López Sánchez

Graduate in Law from the University of Barcelona, currently completing the Masters in Legal Practice and Law at Pompeu Fabra University - Barcelona School of Management (BSM). She is a member of the Corporate Litigation Division at Bufete Barrilero y Asociados.

m.lopez@barrilero.es
LinkedIn

Regulation of the Right of Rectification

The speed at which information spreads in the media, especially on digital platforms, has elevated the relevance of the right of rectification. The immediacy and vast reach of these publications often result in the dissemination of inaccurate, incorrect, or even false information, harming individuals' reputations, privacy, and image, ultimately infringing fundamental rights.

The right of rectification serves as an essential legal tool to combat so-called "fake news," enabling affected individuals to demand prompt corrections of disseminated information, thereby restoring the accuracy of the data and information. This right is governed by Organic Law 2/1984, of March 26, which regulates the right of rectification, rooted in Article 20 of the Spanish Constitution, which enshrines freedom of expression, albeit limited by respect for fundamental rights, particularly the rights to honor, privacy, personal image, and the protection of juveniles and children.

LO 2/1984 is a brief regulation, comprising only eight articles, yet very clear in its content. To exercise the right of rectification, certain criteria must be met:

There must be a reference in a social communication medium.

The reference must pertain to factual information, that is, information that directly and individually identifies a natural or legal person.

The information must be likely to cause harm to the individual referenced, though actual harm need not be proven.

However, the 1984 regulation does not address digital media, referring only to "social media" as understood at the time (press, radio, and television). In the modern, globalized digital age, the Supreme Court has extended the right of rectification to apply to digital publications (STS No. 32/2024, January 11) by interpreting LO 2/1984 in conjunction with Organic Law 3/2018, of December 5, on Personal Data Protection and Digital Rights. It concluded that digital media publishing inaccurate information must, on the one hand, publish the correction "via a new link of similar prominence to the one in which the original information appeared, without comments or annotations," and on the other, publish an advisory notice (as per Article 85 of LO 3/2018), indicating that the original news item does not reflect the current situation of the individual, displayed visibly alongside the original information.

Regarding the timeframe available for exercising the right of rectification, Article 2 of LO 2/1984 stipulates it must be exercised "within seven calendar days following the publication or broadcast of the information to be rectified" through written notice to the director of the communication medium. This is a very short window, including non-business days, and starts from the time of the news release, not from when it came to the affected individual's attention. Consequently, if the deadline passes without the individual being aware of the information, they lose the opportunity to take legal action, and the media director is not obligated to publish the rectification.

If the media director does not provide the rectification, the law includes an urgent and summary judicial procedure regulated by Article 6 of LO 2/1984 to ensure the swift rectification of the requested publication and prevent further harm to the affected person's rights and legitimate interests.

This right of rectification, although established before the digital era, remains relevant due to the interpretive adaptations of the Supreme Court, which extend its application to current digital media. However, the short deadline for exercising this right can often be insufficient, leading to a lack of effective protection for affected individuals.

María Cobo Rueda

Double Degree in Law and Business Administration from the University of Córdoba; Double Masters in Legal Practice and Advocacy and an LLM in International Legal Studies.

m.cobo@barrilero.es
LinkedIn

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Change in Criteria for Employee Requirement in the Inheritance and Donations Tax (ISD)

On March 22, 2024, the Central Economic-Administrative Tribunal (TEAC) issued Resolution No. 7583/2022, affirming an earlier ruling that an individual performing management functions may also serve as a full-time employee. This person is therefore eligible for the 95% reduction in the Inheritance and Donations Tax (ISD) in cases of inheritance transfers of a family business.

In this decision, TEAC upheld an appeal submitted by a taxpayer whose application for the family business reduction under the ISD had been denied by the Tax Agency of Galicia (ATRIGA) and, later, by the Regional Economic-Administrative Tribunal of Galicia (TEAR). ATRIGA argued that the taxpayer's company did not meet one of the requirements in Article 4 of the Wealth Tax Law (IP)—a standard to which the ISD Law refers to determine eligibility for the family business reduction—specifically, the requirement of engaging in an economic activity for IP purposes.

To determine what constitutes an economic activity, the Wealth Tax Law refers to the Personal Income Tax (IRPF) regulation. The IRPF provides a specific criterion for determining whether a business activity is being conducted when a company is engaged in leasing real estate: activity management by a full-time employee on a labor contract.

In this specific case, ATRIGA ruled that the family business had only one employee, working part-time for ten hours a week as the company's sole director. However, the taxpayer provided evidence that the sole director also held the title of General Manager and demonstrated effective full-time engagement in this role.

TEAC, aligning with both the Supreme Court's perspective and previous rulings, adopted a more flexible approach aligned with current business practices. Specifically, TEAC concluded that having an employee to manage an economic activity (such as real estate leasing) adds a presumption of compliance with the essential element of "arrangement on one's own account of production means or human resources, or for the purpose of intervening in the production or distribution of goods or services." Therefore, the presence of a full-time employee should not be the sole criterion to prove the existence of economic activity.

Furthermore, TEAC reiterated in prior rulings that, for ISD purposes, the same individual performing management duties may also fulfil the full-time employment criterion established in IRPF regulation for classifying real estate leasing as a business activity. Therefore, TEAC found that the taxpayer in question was entitled to the 95% ISD reduction on the transfer of the family business by inheritance.

This TEAC criterion surpasses the traditional stance of the General Directorate of Taxes (DGT), which asserted that the management of real estate leasing activities and the management of the company could not be the responsibility of the same individual. However, TEAC's ruling from March 22 establishes a reiterated criterion, which, therefore, should be binding for tax authorities and regional and local economic-administrative tribunals.

The TEAC decision reflects a sensible approach aligned with the current Spanish business landscape, offering legal certainty and avoiding restrictive interpretations that may not align with the everyday reality of many family businesses. Although the resolution pertains to a specific case, it may set a valuable precedent, emphasizing the importance of tax and estate planning in family business succession scenarios. In any event, each case will need to be examined on its own merits, taking into consideration both the means available to companies engaged in real estate leasing and the functions performed by the employee managing the activity.

Inés de Grado

Inés de Grado Double Degree in Law and Business Administration (CUNEF), Double Masters in Legal Practice and Business Tax Advisory (LL.M-IE Law School).

i.grado@barrilero.es
LinkedIn

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Flexible Reincorporation for Employees on Medical Leave (IT)

The Government recently announced a proposed reform of the Medical Leave (IT) system aimed at facilitating a gradual reincorporation process for employees returning from medical leave, particularly in cases of chronic illnesses or long-term treatments. This change seeks to balance the needs of both employees and companies, offering a more adaptable system that takes individual circumstances into consideration.

The reform introduces significant changes to the gradual reincorporation of workers. Firstly, this return will not be mandatory for the employee; it will only be applied if the worker and their treating physician deem it appropriate, and if the company agrees to support this reincorporation. In other words, the decision will be a joint agreement between all three parties, ensuring that the worker's health remains the top priority.

Employees will be able to return to their roles gradually without requiring complete medical clearance. During this period, the company will be responsible for ensuring that the job accommodates the physical or mental limitations of the employee. This may involve changes to assigned tasks or adjustments to working hours.

The implementation of this reform presents notable challenges for both employees and companies. One primary concern for employees is the potential pressure to return before full recovery. The unions CCOO and UGT have expressed their concerns about misuse of this flexibility, warning that, if mismanaged, it could compromise medical care. Additionally, they fear that some employees may feel pressured, directly or indirectly, to return to work prematurely, risking their health.

For businesses, the reform will require adjustments to internal policies and procedures. This could involve redefining roles, acquiring new equipment, or adapting the work environment to ensure no risks to the employee's health. These adjustments could increase costs, which companies must anticipate and manage effectively.

With the likely approval of this reform, it is essential for companies to begin preparations. Specific protocols will need to be developed to properly manage the gradual reincorporation process, always respecting the employee's choice and medical guidelines. These protocols will not only ensure compliance with the regulation but will also safeguard the legal security of the company.

It will also be crucial to train human resources departments to manage these new situations effectively. Similarly, companies will need to review and adapt their work environments, ensuring they are safe for employees returning from sick leave. This preventive approach will not only protect the health of the employee but will also help to mitigate potential legal risks.

In conclusion, while the reform presents certain challenges, it also offers an opportunity for companies to strengthen their internal policies and enhance workplace safety.

Gabriela Lachiondo

Labor Division, Madrid. Degree in Law and Business Administration from Universidad Carlos III.

g.lachiondo@barrilero.es
LinkedIn

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The Use of Private Telephone Conversations as Valid and Lawful Evidence in Criminal Proceedings

The recent judgment No. 753/2024, dated July 22, issued by the Criminal Chamber of the Supreme Court, examines a case in which the Provincial Court of Alicante ruled to nullify proceedings from the start of an investigation, finding that a violation of the fundamental right to privacy had occurred. In this case, proceedings were initiated following the recording of conversations captured by a private individual who participated in these conversations and subsequently submitted them to the Prosecutor's Office for investigation, suspecting that the content might constitute bribery.

The Provincial Court's decision to nullify the proceedings was based primarily on two grounds:

That the recordings were obtained covertly and that the person who recorded them lacked a legitimate interest justifying the action.
That the recordings were copies, not original files, and thus failed to meet the authenticity and integrity requirements necessary for admissibility.
Following the initial ruling, the Public Prosecutor filed an appeal, arguing that the nullification represented a violation of the right to effective judicial protection, to due process with all guarantees, and to the use of evidence.

When the case reached the Supreme Court for a decision on the appeal, the Criminal Chamber focused significant portions of the reasoning in judgment No. 753/2024 on the legal principles established in the "Gürtel Case" and on existing case law regarding recordings of conversations between individuals as evidence in criminal proceedings. The following elements derived from the Court's arguments can be used to assess whether the recording of a private conversation may be utilized as valid evidence in criminal proceedings:

Covert recording of a conversation does not constitute a constitutional violation of the right to privacy when recorded by one of the participants (except in exceptional cases where the conversation's content affects the core intimate or family aspects of one of the parties).
There can be no claim of a secret message, as the message was directed to and received by the other participant, who was then free to record it. Thus, there is no breach of communication confidentiality.

Excluded from the above criteria—and therefore not valid as evidence—are recordings obtained through criminal entrapment by official crime investigation entities.

Recordings of conversations between individuals captured by one participant are likewise invalid when the recorded person was lured to the meeting with the deliberate intent of having them disclose information that could be used against them.

The right to remain silent, to avoid self-incrimination, and to refrain from declaring oneself guilty are not affected in this context, as these constitutional guarantees apply to statements made by the accused before the authorities or their agents and do not apply to statements made between private individuals outside of official proceedings.

Applying this legal precedent, the Criminal Chamber determined that the conversations in this case were entirely lawful. The judgment specifically notes, "The meetings between individuals were voluntary and spontaneous, and the decision by one of them to record the conversations was not prompted by police or any other public investigative institution. While their conduct may be morally and ethically questionable, it did not infringe upon the right to a trial with full guarantees or the right to avoid self-incrimination."

The ruling notes that the recorded conversations were submitted by the interlocutor to the Prosecutor's Office and used as an indication to initiate an investigation, leading the investigating judge to order wiretapping. The incriminating evidence in this case came from the later wiretaps authorized by the judge, and any later review did not retroactively invalidate these recordings, "regardless of the assessment of this factor regarding its reliability as a form of evidence, which is not the issue at hand here."

Thus, the Supreme Court's Criminal Chamber upheld the recordings obtained by the private individual as sufficient indicative evidence to justify other privacy-intrusive measures, without requiring this preliminary source to meet the high standards of veracity and custody required for a true piece of evidence.

Based on the above reasoning, the Second Chamber accepted the appeal by the Public Prosecutor and overturned the judgment, remanding the case back to the deliberation and drafting stages of the judgment.

In conclusion, recordings of private conversations are valid and lawful when obtained by one of the participants, even if they are captured by a private party outside of official investigative entities tasked with investigating and prosecuting criminal responsibilities, provided that the conversations do not address core aspects affecting the privacy of either party.

Álvaro de la Rica

Degree in Law from the University of Navarra, Master of Access to the Legal Profession from the Autonomous University of Madrid, and a member of the Criminal Division at Bufete Barrilero y Asociados.

Contact: a.rica@barrilero.es
LinkedIn

The New Temporary Employment Provision

With the final approval of the "Labor Act" recently reviewed by the Chamber and awaiting the Senate's examination, some significant changes will affect the temporary employment provision system. Parliamentary proceedings have, so far, been quite slow, given that the law addresses multiple employment issues, sparking differing views between the majority and the opposition.

These updates, embedded in Article 10 of the Bill, respond to critical situations identified in recent years. Adjustments are introduced through modifications of specific clauses within Legislative Decree no. 81/2015, directly impacting this type of contract.

The "Labor Act" introduces new rules regarding temporary employment provisions. Here is a brief analysis of these updates:

The temporary nature of a provision that allows the use of workers employed indefinitely by employment agencies for open-ended assignments will be removed until June 30, 2025. These assignments, which can last more than 24 months (even if not consecutive) without establishing a permanent employment relationship with the host company, will now have a stable application. This regulatory shift will end the frequent revisions that had led to uncertainty and impermanence, thereby making this form of temporary employment fully accessible.

Key Changes in Employment Provisions

Paragraph 2 of Article 31 states that, unless otherwise specified by collective agreements (including company-specific ones, as noted in Article 51), the number of agency-supplied employees must not exceed 30% of permanent employees as of January 1 of the year in which the agency contracts are issued. The rule requires rounding up when the decimal reaches or exceeds 0.5. For companies starting operations mid-year, this percentage is calculated based on the number of permanent employees at the time the employment contract is signed with the agency.

Certain categories of workers are already excluded from this percentage requirement:

Workers in mobility (ex Article 8, paragraph 2, of Law no. 223/1991), a category that has essentially ceased to exist as the mobility provision was repealed on January 1, 2017.
Unemployed workers who have been receiving NASPI benefits (unemployment aid, excluding agricultural unemployment benefits) for at least six months or who are receiving salary supplements.

Disadvantaged or highly disadvantaged workers defined under Article 2 of Community Regulation no. 651/2014. As specified in the Ministerial Decree of October 17, 2017, this category includes those without regular employment for at least six months, individuals aged 15–24, those without a secondary or professional school diploma (ISCED level 3), recent graduates without formal work experience, individuals over 50, single adults with dependents, those in sectors with a gender imbalance exceeding 25% of the average gender disparity, and ethnic minority members needing linguistic or professional development to improve job prospects. "Highly disadvantaged" workers are those without regular employment for at least twelve months.

Once approved, the bill will establish that percentage limits do not apply to the following cases:

Situations outlined for fixed-term contracts in Article 23, paragraph 2, of Legislative Decree no. 81/2015, including the launch of new activities, innovative startups for the first four years post-formation (or a shorter period for pre-established ones), seasonal activities, specific performances, television or radio programs, replacing absent workers, and contracts for those over 50.

Fixed-term agency contracts for employees hired permanently by the employment agency.

Disadvantaged Workers: Removal of Mandatory Justifications

The final update in Article 10 of the Bill concerns paragraph 2 of Article 34 of Legislative Decree no. 81/2015: effective immediately upon enactment, there will no longer be a requirement to provide justifications for extending temporary contracts beyond 12 months for disadvantaged or highly disadvantaged workers as defined by the Ministerial Decree of October 17, 2017, to which I previously referred.

Rossella Lo Galbo

Degree in Law from the University of Bologna, Doctor of Law, member of the Labor and Social Security Division, and Head of Italian Desk


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