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Newsletter 12

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The right to be forgotten. Case Apolonia: a man convicted of murder requests to erase his name in order not to be related to the crime.

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La necesidad del Derecho de adaptarse a la sociedad y regular mediante normas los modernos problemas se refleja, entre otros campos, en el ámbito de protección de datos de carácter personal y muy particularmente en el reconocimiento del derecho al olvido, como un derecho autónomo.

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The right to be forgotten. Case Apolonia: a man convicted of murder requests to erase his name in order not to be related to the crime.

ILP Global Mertens Thiele
Germany

The need of the law to adapt to society and regulate modern problems is reflected, among other things, in the field of personal data protection, and particularly in the recognition of the right to be forgotten, as an autonomous right.

The right to be forgotten was recently recognized as an autonomous category, introduced by the Judgment of the European Court of Justice (ECJ) of May 13, 2014, in the so-called Google case. And it is finally confirmed in the new European Regulation, in its article 17, which will be enforced as of May 25, 2018.

From the moment in which the sentence of the ECJ has been dictated, the activity of a search engine like Google (find information, index it and make it available to Internet users according to a predetermined order of preference) is classified as a processing of personal data and the search engine manager is considered responsible for the treatment (because he is the one who decides the purposes and means of the same). It is the managers who should remove from their lists the information that is considered harmful.

Due to the recent recognition, the doctrinal and jurisprudential development of this matter is still very precarious.

The legal problems associated with the right to be forgotten are understood as problems of conflict of fundamental rights, and more specifically as situations that justify legitimate limitations to the exercise of the right to freedom, of expression and information.

The moment a person tries to eliminate from the search engines information related and harmful to himself, it conflicts with the right of the public to know this information and with the right to be able to freely express opinions about facts that in a determined moment are in the news.

But requests for the right to be forgotten are not only directed against Google, but also against the editors of magazines. This is what happens in the so-called "Apollonia Case" in Germany.

The process "Apollonia" *gets its name by the place of a crime, a sailing ship called Apollonia. Crime that had great repercussion in Germany, on which research programs were made and even books were written.*

In December of 1981 the yacht leaves Gran Canaria direction to the Caribbean, and being on the high sea a member of the crew kills the owner, his girlfriend and causes serious injuries to one of the travelers.

The Bremen Provincial Court (Landgericht) sentenced the accused to life imprisonment for murder.

A couple of years ago the condemned has started to demand the magazine "Der Spiegel" to eliminate the pages that make reference to his name as the author of the crimes of the archives of the journal that can be accessed free of charge on the Internet since 1999 and also requests that the links leading to the news of the

crime by entering his name should be deleted.

The territorial court of Hamburg (Oberlandesgericht) ruled in 2011 in favor of the plaintiff and ordered the magazine "Der Spiegel" to remove the name of the convict for damaging his personal rights.

At the end of 2012 the Federal Supreme Court (Bundesgerichtshof) revoked the previous ruling alleging reasons of public interest in the news.

In 2015 the convict has raised an appeal of unconstitutionality that now is to be decided by the first senate of the Constitutional Court (Bundesverfassungsgericht). It remains to be seen, how the Constitutional Court will approach and decide this issue.

The difficulty of balancing the right not to disclose personal data without consent (which in this case causes serious prejudice to the owner of the data, as it relates to criminal activities) and the right to freedom of expression and information, is perfectly reflected in this case.

Projects modifying the Environmental Impact Assessment System (Sistema de Evaluación de Impacto Ambiental - SEIA)

Estudio Jurídico Otero

Chile

On April 10, 2015, the Supreme Decree N° 20 of the of the Environment Ministry instructed the creation of a Presidential Advisory Commission (hereinafter the Commission), whose mission was to carry out proposals aimed at reforming the Environmental Impact Assessment System (SEIA), taking into account the new sociocultural and economic scenarios in the country.

This Commission consisted of 29 members from different sectors, such as academic, consultancies, non-governmental organizations, trade associations and government agencies. It advised 25 concrete proposals, which are in the process of becoming a reality through decrees and bills. On this occasion, we will refer specifically to three of them that seem to us of the greatest transcendence.

1 Mechanism of environmental assessment for strategic projects.

The change seeks to consider a special class of projects, corresponding to "investment initiatives with significant potential for the development of the country and that, given their economic or physical size, they therefore have inherently a scope that exceeds the process of environmental assessment".

For this type of projects, a "review of strategic aspects such as the location and general description of the project in a pre-feasibility stage (example: size, technology, description of the environment)" will be carried out on first place, and the second stage would consist in the environmental assessment of the project.

We believe that this initiative could be beneficial to strengthen the processes and resolutions of Environmental Qualification (Calificación Ambiental - RCA) of the projects submitted to the system, today much questioned by both investors and the community. However, the latter will work as long as this mechanism does not become an additional bureaucratic process which would only delay the execution of the projects.

2 Redefining the role of the Environmental Assessment Service within the framework of the SEIA.

In the Commission´s opinion, currently the Environmental Assessment Service (SEA) does not fully exercise its role of administrator of the SEIA. Thus, it is proposed to provide this entity with greater powers to control, execute, manage, analyze, communicate, link, plan, lead, motivate and make decisions in order to ensure fulfilling of the SEIA's purposes.

It is also sought to strengthen the SEA with the power to review and analyze the decisions of the bodies participating in the SEIA, "justifying the appropriateness or not of including them in the corresponding consolidated report requesting clarifications, corrections and/or extensions (ICSARA)", as well as the power to "resolve di-

fferences, contradictions and difficulties in the decisions".

In our opinion the way in which the Commission proposes to empower and provide the SEA with new powers is correct, considering one of the complains made by the experts is mainly directed to the lack of SEA's ability to take relevant decisions and stop being, as it is today, a mere spectator who "cuts and pastes" the decisions of other bodies with environmental competence.

3 Modifications in the functioning of the Ministers Committee.

Its purpose is to strengthen the Committee with certain measures, such as "the creation of a Technical Secretariat and a panel of experts to request reports when appropriate". Likewise, it is being proposed to incorporate the Ministry of Social Development.

In this regard, the Technical Secretariat would have the role of supporting the Committee coordinating the different State portfolios, and producing reports so that they may better resolve appeals. It is also intended to create a panel of experts which would be in their positions for 2 years.

Finally, it is sought to increase to 90 days the Committee's deadline to decide the complaint resources, taking into account the complexity of the matters it has to review.

We consider that assuming delays in solving complaint resources is extremely correct. Likewise, the creation of the panel of experts and the Technical Secretariat would undoubtedly add greater coordination and deepen the content and technical quality of the resolutions of the Ministers Committee.

Finally, we should highlight what is stated in the Commission's report regarding the fact that "the SEA prevents the need for autonomy with respect to the political authority, which should express itself in a change in the duration of the office and the way of removing its Executive Director". Thus, in SEA's words, its Executive Director (maximum authority) should remain in office at least 6 years and he should cease in said position for specific reasons such as: end of the legal term of his appointment, voluntary resignation accepted by the President of the Republic, dismissal for obvious negligence in the exercise of his functions, incapacity and others of an objective nature. It is regrettable that this appears only as a footnote and not in the main text of the report, since it would provide autonomy and depoliticize the SEA and the SEIA, endowing them with an eminently technical character. We hope that this will also be part of an amendment to the SEA in the near future.

Who decides the acquisition/sale/contribution of essential assets in Spanish companies?

ILP Abogados

Spain

Good corporate governance is a key element in improving economic efficiency in a company. It is a factor that generates value in companies which makes them more attractive to investors. For the improvement of corporate governance, **Law 31/2014, of December 3,** amended the **Capital Companies Act.**

One such amendment was the introduction of Article 160.f). In that article, a new competence of the general meeting is established. Such competence consists in deliberating and agreeing on *"the acquisition, disposal or contribution of essential assets to another company".* The law adds that the essential character occurs when *"the amount of the transaction exceeds twenty-five per cent of the value of the assets that appears in the last approved balance."*

For these purposes, and for its correct application, it is important to be clear about the meaning of said law as well as its implications.

To begin with, what is the implication of Article 160.f) of the Capital Companies Act?

Definition of "essential asset"

An essential asset is one whose value exceeds 25% of the assets that appear in the last approved balance. This presumption is *iuris tantum*, i.e., it admits evidence to the contrary. These presumptions are provided for in Article 385.3 of Law 1/2000, of January 7, on Civil Procedure.

However, an asset cannot be solely qualified as essential by the value it holds on the balance sheet. In this sense, an asset can be essential but have a value less than 25% of the assets. Or, in the opposite case, it can have a higher value than said percentage but not be considered as an essential asset.

Therefore, to make a correct rating of the asset, one has to take into account different parameters. First of all, the operation has to have a significant impact on the equity, financial or economic sphere of the company. Secondly, the sphere resulting from the operation has to differ substantially from the one it had before. Notwithstanding the foregoing, this situation should be assessed in practice on a case-by-case basis.

To this end, the General Directorate of Registries and Notaries (Dirección General de los Registros y del Notariado, hereinafter, the "DGRN"), specifically stated the following in its Resolution of June 11, 2015: *"the reference of Article 160 to essential assets of any entity involves the transfer to an undetermined juridical concept, essential assets, whose determination and precision is different for each case, each company and each moment of corporate life".*

Legal transactions: acquisition, transfer and contribution

In order to correctly understand the application of the section under analysis, it is necessary to have a clear definition of these legal transactions.

First *"acquisition"* means the act by which ownership of an asset is acquired. Secondly, *"transfer"* refers to the operation by which ownership of the asset is transferred. Finally, through a *"contribution",* a company contributes goods or money to another company to

integrate its corporate estate.

For what purpose was Article 160.f) included in the Capital Companies Act?

The main purpose of the article was to prevent certain transactions being carried out without the authorization from the general meeting. The partners were granted power of decision for certain operations that had an impact on the company.

Specifically, and as already mentioned, the amendment consisted in introducing a new competence of the general meeting. The acquisition, transfer and contribution of essential assets constituted the new matter subject to be approved by the corporate body.

These were operations with special importance for the economic and political rights of the partners. Specifically, and as foreseen in the preamble of Law 31/2014, of December 3, *"the powers of the general meetings in companies to reserve for their approval those corporate operations that due to their relevance have similar effects to structural changes "*were extended.

These acts were outside the scope of the ordinary management of the company. In this regard, the Supreme Court in its judgment of April 17, 2008 ruled that "it exceeds the normal traffic of the Company to leave it without its assets, without authorization from the General Meeting for this extraordinary management business".

What happens if the approval of the operation by the general meeting is dispensed with?

If there is no agreement, there could be doubts as to whether the act is enforceable towards third parties. It is at this point that we must interpret Article 234 of the Capital Companies Act. Said law governs the scope of the power of representation of directors in a company.

The first paragraph of said law limits the power of representation to the acts included in the company purpose. If the acts exceed this purpose, the second paragraph must be applied. According to said paragraph, these acts bind the Company if they have been done in good faith and without serious fault.

Therefore, not every acquisition of an essential asset without the agreement of the general meeting will be invalid. In this case, if due diligence has been used, the operation will be totally binding for the company.

In this sense, the DGRN ruled in its Resolution of June 26, 2015 that *"Article 160 of the consolidated text of the Capital Companies Act has not repealed Article 234.2 of the same legal text, and therefore the company is bound towards third parties who have acted in good faith and without serious fault".*

Conclusion

In conclusion, the inclusion of this law has come from a law intended to improve corporate governance. With section 160.f) of the Capital Companies Act, the role of partners and shareholders has been strengthened. This introduction, in short, gives them a greater power of decision. Additionally, and ultimately, this amend-

ment has encouraged participation in the social capital of companies.

For further enrichment of this article, we propose reading the following link:

http://www.juntadeandalucia.es/institutodeadministracionpublica/aplicaciones/boletin/publico/boletin66/Articulos_66/Alvarez-Royo-Villanova_Sanchez-Santiago.pdf