№6, June 2025

Problems of equal access to corporate information for minority shareholders and members of the company's board of directors

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The issue of access to corporate information has long remained overlooked, giving way to issues that seemed more "practical", such as profit distribution, dividend payments, managing a business or selling it. However, the management of the company and the exercise of "core" corporate rights are accompanied by high risks of making incorrect decisions without accurate and comprehensive information about the company's activities. At the same time, the legislation restricts the scope of rights of minority shareholders to receive information. Even members of the Board of Directors who are not shareholders enjoy broader information rights than minority shareholders.

In this article, we will consider the following questions:

- What qualifies as corporate information?
- How has the regulation of the right to information developed?
- How does the size of a shareholding affect access to information?
- What is a business purpose?
- Under what circumstances may a shareholder be denied access to information?
- What is the significance of the right to information for minority shareholders?
- What is the significance of the right to information for members of the board of directors?
- How is the right to information exercised when a minority shareholder holds a position on the board of directors?

WHAT QUALIFIES AS CORPORATE INFORMATION?

Corporate information is generally considered to be information about the financial and economic activities of a company that is materially relevant to its shareholders and potential investors. In particular, such information may include financial statements, minutes of governing body meetings, details of transactions and liabilities, and other information that has a significant impact on the company's operations.

Unlike a limited liability company (LLC), where a participant, regardless of the size of their share, can request and receive any information and documents, for minority shareholders there are "thresholds" for the size of a block of shares that allow access to certain information. This difference is due to the fact that, in LLCs, the personal involvement of each participant in the management of the company is of greater importance. This is clearly reflected in the procedure for acquiring ownership: by default, acquiring a share is more difficult, as pre-emptive rights and other restrictions often apply. In joint-stock companies, as a general rule, share transfers are generally less restricted, so a competitor of the company may become a shareholder.

HOW HAS THE REGULATION OF THE RIGHT TO INFORMATION DEVELOPED?

Historically, legislative regulation of the right to information was rather declarative in nature — the legislation simply stated its existence. The constituent documents, as a rule, either repeated the provisions of the law verbatim, without introducing any specifics, or proposed such strict restrictions, especially for individual participants and / or bodies of the corporation, that such general legislative regulation became the cause of numerous corporate disputes.

The problem was compounded by the fact that the Civil Code provided overly broad access to corporate information: a minority shareholder who owned only one share could request literally the entire volume of documents, which created clear opportunities for abuse. This led to a situation where competitors acquired minimal blocks of shares through affiliated structures in order to gain access to confidential information.

Subsequently, the Federal Law "On Joint-Stock Companies" introduced provisions restricting the rights of minority shareholders to access information, and established minimum shareholding thresholds for obtaining specific types of information. An attempt to resolve the conflict between the norms of the Civil Code and the Federal Law on Joint Stock Companies was made by the Supreme Arbitration Court of the Russian Federation, which granted the courts the right to refuse to provide information to shareholders if their request is an abuse of right. The final regulation of the right to information was established during the reform of the Federal Law on Joint-Stock Companies in 2017, which, in addition to the requirements for the minimum number of shares, introduced a requirement for the business purpose of requesting such information for minority shareholders with a stake of less than 25%.

HOW DOES THE SIZE OF A SHAREHOLDING AFFECT ACCESS TO INFORMATION?

The law divides minority shareholders' access to corporate information into categories based on its sensitivity and importance. **Thus, information of the first category is available to all shareholders of joint-stock companies without any restrictions. This information includes, for example,**

- the agreement on the establishment of the company;
- the decision on its establishment;
- the charter and any amendments to it;
- resolutions on securities issuance and related amendments report on the issue results and notification of the issue results;
- internal documents approved by the general meeting;
- annual reports;
- minutes of general meetings;
- lists of affiliated companies;

- conclusions of the audit commission, etc.

Information of the second category is available only to shareholders with a stake of more than 1% (and if sanctions are imposed against the company, then more than 5%). **At the same time, shareholders whose share in the authorized capital of a joint-stock company is more than 1%, but less than 25%, are required to prove a proper business purpose in order to receive such documents.** This category includes:

- information on major and related-party transactions;
- appraisers' reports on the valuation of the property in respect of which the specified transactions were made;
- minutes of board of directors (or supervisory board) meetings;
- broadcast recordings of meetings of the general meeting of shareholders via remote participation.

The third category of the most sensitive information includes documents that only participants with a stake of more than 25% have access to. These include:

- minutes of the company's collective executive body (management board, directorate);
- accounting documents.

WHAT IS A BUSINESS PURPOSE?

As already noted, particular attention should be paid to justifying the business purpose for requesting documents. The legislation understands this concept as

> "**the shareholder's legitimate interest in obtaining information and documents that are objectively necessary and sufficient for the proper exercise of the shareholder's rights**".

At the same time, the law provides only a vague description of the criteria under which it is impossible to recognize a business purpose as reasonable, for example, the shareholder's bad faith, the shareholder's unreasonable interest in obtaining information, or a situation where the shareholder is a competitor of the company, and the documents contain confidential information.

As illustrative examples of valid grounds for requesting access, the Supreme Arbitration Court of the Russian Federation noted planning the sale of shares, preparing for litigation to the court or participating in the general meeting of shareholders. It is important to note, however, that there is no clear list of such grounds, and in the event of a conflict, the court will consider each specific case taking into account the actual circumstances of the case.

UNDER WHAT CIRCUMSTANCES MAY A SHAREHOLDER BE DENIED ACCESS TO INFORMATION?

In addition to cases of refusal to provide information to minority shareholders with a stake of less than 25% due to the lack of a business purpose, there are also general grounds for refusal that apply to shareholders with any stake. These are grounds such as:

1. The requested document is freely available on the Internet.
2. The same document is repeatedly requested within three years after the first request is executed.
3. The document refers to the period when the shareholder did not own the shares.
4. The document is older than three years (except for information about current transactions).

WHAT IS THE SIGNIFICANCE OF THE RIGHT TO INFORMATION FOR MINORITY SHAREHOLDERS?

For minority shareholders, obtaining complete and truthful information is of increased importance not only for the general understanding of business affairs, but also because of many other factors. For example, to challenge large transactions or related-party transactions, a minority shareholder needs information about the terms and circumstances of their conclusion. Likewise, if a minority shareholder wishes to withdraw from the company by selling their shares back due to the minority's disapproval of a major transaction, the minority shareholder will need documents confirming the relevant grounds.

If the minority shareholder plans to sell its shares to another person, it may be necessary to determine the market value of such shares and conduct a due diligence. To do this, you will need to provide the appraiser with documents on the company's activities.

In addition, information may be necessary to protect against subsidiary liability — despite the status of a minority shareholder, the courts may in some cases bring it to justice. Access to corporate information helps minimize such risks and demonstrate the shareholder’s good faith and prudence and reasonableness in court.

WHAT IS THE SIGNIFICANCE OF THE RIGHT TO INFORMATION FOR MEMBERS OF THE BOARD OF DIRECTORS?

Unlike minority shareholders, the right to information of members of the Board of Directors is not limited by any thresholds. By default, all board members are equally entitled to receive information about the company, as they make important decisions about its activities: approve transactions in certain cases, analyze the company's financial condition and approve annual reports, and determine the amount of dividends.

At the same time, there is a judicial practice in which courts assess whether the requested documents and information are necessary to fulfill the powers of members of the Board of Directors. For example, a member of the Board of Directors may be denied access to information if the documents are requested for the period preceding the period of work of a member of the Board of Directors, or if the connection of the documents with his duties is not justified.

The right to information is also of high interest to the members of the Board of Directors themselves, in particular, documents and information about the company's activities may be required by a member of the Board of Directors to protect themselves from claims related to their activities. Members of the Board of Directors definitely have more influence on the activities of joint-stock companies than minority shareholders who are not able to influence the results of voting, since the Board of Directors is responsible for resolving issues of general management of the company's activities, and each member of the Board of Directors has an equal number of votes. **Therefore, the activities of members of the Board of Directors are associated with higher risks in relation to minority shareholders, in particular:**

- members of the Board of Directors are explicitly named as controlling persons of the debtor, which leads to their active involvement in subsidiary liability in the event of bankruptcy of the company;
- board members may be held liable for damages resulting from their unreasonable or unfair actions;
- members of the Board of Directors may be held criminally liable if they abuse their powers.

In order to protect themselves from unjustified prosecution, members of the Board of Directors should be able not only to review with the documents of the joint-stock company, but also to provide copies of them in case of claims, including in court.

HOW IS THE RIGHT TO INFORMATION EXERCISED WHEN A MINORITY SHAREHOLDER HOLDS A POSITION ON THE BOARD OF DIRECTORS?

A minority shareholder who also serves on the Board of Directors is entitled to receive the full scope of information available to the Board of Directors. However, in practice, there have been attempts to restrict such a person's access to information, citing the small size of their stake. The Supreme Court of the Russian Federation resolved this conflict in 2019, confirming the priority of the rights of a member of the Board of Directors to receive information.

In such situations, the courts reject arguments about restricting access to information due to holding shares of less than 25%, emphasizing that the right of a member of the Board of Directors to access information is unconditional and does not require proof of substantive interest or lack of abuse of the right.

CONCLUSION

In conclusion, it should be emphasized that establishing full equality of access to corporate information between minority shareholders and members of the board of Directors seems impossible and impractical. Minority shareholders and members of the board of Directors have fundamentally different status in corporate governance. Members of the Board of Directors who are more responsible for strategic development and day-to-day management of the company need a wider range of information to make informed decisions. Minority shareholders, on the other hand, mainly pursue investment goals, and the amount of information they need is proportional to the level of their influence on the company's activities and the potential risks associated with their investments. The different levels of responsibility and tasks assigned to minority shareholders and members of the board of Directors objectively highlight the differences in the scope and procedure for providing them with corporate information.