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Shareholders' Individual Information Right:

Prerequisites and Boundaries

1. Introduction

Relations under company law are characterised by their multifacetedness – there are always numerous parties involved in such legal relationships, and these relations are also multi-layered. Therefore, creation of an appropriate system of all kind of remedies as well as creating an effective balance between the interests of the company and its shareholders is quite a challenging task.^{*1} The choice of measures to protect shareholders' rights is also related to the question of whether and to what extent shareholders as the providers of capital should have the right to check the use of the resources provided by them.^{*2}

Being a shareholder of a limited liability company is always linked to certain property rights and expectations – generally speaking, every shareholder is in the first place interested in gaining dividends from an investment he has made obtaining a share of a company. In addition to property rights, or, in fact, as a prerequisite to proper execution of them, the law provides shareholders also other types of rights, the most important of which is the right to obtain information.^{*3} Shareholders' right to information is considered to be the most important part, the very essence, of the so-called “membership rights”, because only an informed member of a company can sensibly exercise his voting rights.^{*4}

Optimal legal regulations therefore must provide proper balance between (sometimes malicious) minority shareholders requiring too much disclosure, which can either burden the company unreasonably or affect the confidentiality necessary to carry out business, and the actual need of the minority shareholders not involved in daily management to be properly informed. For a shareholder it is important to get information that allows one to exercise membership rights; for the company, on the other hand, it is important to block the claims that can be considered as harassment or that may otherwise cause significant damage to the company.

This article aims to investigate the shareholder's right to information from the point of view of a shareholder as well as from the point of view of the company and to analyse whether Estonian law provides

¹ About shareholder remedies in Estonia see also: M. Vutt. Systematics of Shareholder Remedies – Origins and Developments. – *Juridica International* 17/2010, p. 188

² T. Laurer. US – Corporate Governance während einer feindlichen Übernahme – oder “der Revlon Auslöser”. – *Zeitschrift für Vergleichende Rechtswissenschaft. Archiv für Internationales Wirtschaftsrecht.* 103. Band. August 2004, p. 317.

³ U. Hüffer. *Aktiengesetz.* Beck'sche Kurzkommentare. 9. Auflage 2010, § 131, Rn 1.

⁴ W. Goette, M. Habersack, S. Kalss (Herausg.). *Münchener Kommentar zum Aktiengesetz.* Band 2. 3. Auflage 2008, § 131, Rn 1; H. Fleischer, W. Goette (Herausg.). *Münchener Kommentar zum GmbH Gesetz.* 1. Auflage 2012, § 51a, Rn 5.

reasonable balance between the shareholders' interests and the interests of the company. The paper will also provide an assessment of the corresponding Estonian court practice.

2. General rules on shareholders' right to information

Shareholders are considered to be the most important stakeholders of the company.^{*5} It is also argued that shareholders are the "economic owners" of the company,^{*6} the so-called initial capitalizers, who have the ultimate right to control company's management and, if necessary, to interfere.^{*7}

Therefore, every shareholder has the indisputable right to receive some kind of information from the company. In addition to that, every shareholder has the right to get copies of some specific documents and to examine some documents of the company. Those specific rights are granted to the shareholders by mandatory rules, and a company therefore cannot refuse to provide such information or copies of such documents. For example, every shareholder has an indisputable right to receive a copy of the minutes of the general meeting or a copy of a part thereof if the minutes are not available on the homepage of the company (§171 (5) and § 304 (4) of Estonian Commercial Code^{*8}). The same applies to the voting record in a private limited company, when shareholders have adopted a resolution without calling a shareholders' meeting (§173 (3) of CC). According to §179 (2) and 332 (4) of CC, every shareholder also has the right to receive the annual report and the profit distribution proposal.

In addition to the above-mentioned information law provides for shareholders the possibility to claim other information about the activities of the company, but the borders of the information claim are designed differently in private and public companies and the management board can usually refuse to give information or to provide documents if the company's interests are to be preferred as compared to the shareholders' interests.

It is important to emphasise that the right to information is not a minority right but an individual right of a shareholder, and this means that each shareholder has this right and can execute it irrespective of the amount of his share and irrespective of the fact of whether he has voting rights or not.^{*9} A majority shareholder has the same information rights as the minority shareholder,^{*10} though he usually has better access to information, especially if he also has the necessary majority to control the management. According to German case-law, the shareholder's information right is considered to be a right that cannot be separated from the shareholding (from the so-called membership^{*11}) and therefore also not to be encumbered with the pledge. This is substantiated by the fact that large-scale information about the company's activities should be granted only to its shareholders and the shareholders are not allowed to pass this information to third persons.^{*12} The authors of the paper are of the opinion that the same applies to the information right of the shareholders of limited companies under Estonian company law.

According to Estonian company law, there are two types of limited liability companies – private limited company (*osajühing*) and public limited company (*aktsiaselts*) – and the statutory rules regulating the information right of their shareholders are different. The differentiation of rules derives from the German system and is based on the principle that the private limited company is considered to be a proper legal form for small closed companies and the public limited company, on the other hand, is suitable for bigger and open business entities. Swedish law, on the other hand, follows a different principle: the scope of shareholders' information rights depends on the number of shareholders of the company as there are special rules for companies with fewer than ten shareholders, providing for shareholders of such companies

⁵ About stakeholder theory see, e.g.: J. Heath, W. Norman. Stakeholder Theory, Corporate Governance and Public Management: What Can the History of State-run Enterprises Teach Us in the Post-Enron Era? – *Journal of Business Ethics* 2004, No. 53, pp. 247-265 DOI: <http://dx.doi.org/10.4324/9780203107621>.

⁶ H. Meilicke, T. Heidel. Das Auskunftsrecht des Aktionärs (Teil I). – *Deutsches Steuerrecht* 1992, S 72.

⁷ P. Ireland. Company Law and the Myth of Shareholder Ownership. – Hardy, S., Butler, M. (Eds). *International Themes in Business Law*. Vol. 2. London 2007, p. 42.

⁸ Commercial Code. Adopted on 15 February 1995. – RT I 1995, 26/28, 355; 2010, 9, 41 (in Estonian). Hereinafter 'CC'.

⁹ H. Meilicke, T. Heidel. Das Auskunftsrecht des Aktionärs (Teil I). – *Deutsches Steuerrecht* 1992, S 73.

¹⁰ H. Fleischer, W. Goette (Herausg). *Münchener Kommentar zum GmbH Gesetz*. 1. Auflage 2012, § 51a, Rn 5-6.

¹¹ In German: *Mitgliedschaft*.

¹² G. Ring. Aktuelle Rechtsprechung des BGH zum GMmbH-Recht. – *Neue Justiz* 2014, S 353.

broader rights (Swedish Companies Act^{*13} 7 kap. 36 §). As *de facto* relations in companies usually depend less on the type of the company (private or public) and more on the number of shareholders, the latter approach seems even more reasonable.

3. Information right of a shareholder of a private limited company

According to §166 (1) of CC, the shareholders of a private limited company have the right to receive information from the management board on the activities of the company and to examine its documents. The management board may refuse to provide information or to present documents if there is a basis for presuming that this may cause significant damage to the interests of the private limited company.^{*14}

If the management board refuses to provide information or refuses to permit a shareholder to examine the documents, the shareholder may demand that the legality of the shareholder's demand be decided at the shareholders' meeting or may submit, within two weeks after receiving the refusal of the management board or within four weeks after submission of the request if the management board has not responded to the request, an application to the court in a proceeding on petition in order to obligate the management board to give information or to allow documents to be examined.^{*15}

Though statutory regulations provide the shareholder of a private limited company with the right to examine the documents of the company, he is not, however, entitled to claim for the possession of those documents. Neither can he demand the right to examine the documents of the company without the presence of a member of the management board or other representative of the company. This is substantiated by the fact that only the members of the management board are to be held liable in case the documents are lost or destroyed. Therefore, in case the shareholder claims for delivery of the company's documents, the court may refuse to accept the claim because it can be considered a "legal dead-end": § 371 (2) 2) of Estonian Code of Civil Procedure^{*16} allows the court to deny to commence the proceeding in the event that the plaintiff's claim has not been filed, to protect his right or interest protected by law, or if the objective sought by the plaintiff cannot be achieved by that kind of action.^{*17}

If the relations between different members of the management board are for some reason complicated, it is the duty of the shareholders to restore the normal management. The most complicated is the situation in companies where there are two arguing shareholders with equal votes who are simultaneously members of the management board. Information claims are usually an inevitable part of such arguments – both shareholders usually have the ambition to achieve control over the company. The situation is even worse when the arguing shareholders have equal votes but only one of them is a member of the management board. Estonian company law lacks specific regulations that allow overcoming such a conflict^{*18} and the court can only persuade the arguing parties to compromise.

The following is an example of such a dispute from Estonian court practice. A private limited company had two arguing shareholders, but only one of them was also a member of the management board and therefore had access to the documents and information. The other shareholder – i.e., the one who was not a member of the management board – clearly had no access to any information or documents because of the dispute. Unfortunately, the claim he filed was aimed at obliging the member of the management board to

¹³ Swedish Companies Act: Aktiebolagslagen 2005:551. Available at: <http://www.notisum.se/rnp/sls/lag/20050551.htm>.

¹⁴ Section 166 (2) of CC.

¹⁵ Section 166 (3) of CC.

¹⁶ Code of Civil Procedure. Adopted on 20.04.2005. – RT I 2005, 26, 197; RT I, 31.12.2014, 1. Hereinafter 'CCP'.

¹⁷ According to Estonian case-law, it appears that choosing the wrong remedy is the main reason for courts to refuse to accept the action. See: M. Vutt. Hagi menetlusse võtmisest keeldumine või läbivaatamata jätmine õigusliku perspektiivituse tõttu (The Refusal to Accept Action or to Hear Action in Case of Legally Fruitless Claims), pp. 2-39. Available at: http://www.riigikohus.ee/vfs/1307/HagiOiguslikPerspektiivitus_MargitVutt.pdf (in Estonian).

¹⁸ Provisions that allow the arguing shareholders to apply to the court and to solve the problem before the company goes bankrupt as a result of the argument are available, for example, under Belgian law. In case there is a significant reason and other remedies have failed, a minority shareholder can apply to the court and claim that either he or the other shareholders should be bought out. See: A. Bertrand, A. Coibion. Shareholder Suits against the Directors of a Company, against Other Shareholders and against the Company Itself under Belgian Law. – European Company and Financial Law Review, August 2009, Vol. 6, No. 2/3, p. 290 DOI: <http://dx.doi.org/10.1515/ecfr>.

deliver the documents to him. The county court as well as the circuit court refused to satisfy his claim. The county court grounded the decision on implying the possibility of damaging the interests of the company.^{*19} The circuit court was of the same opinion and expressed the view that it is not possible to oblige the board member to hand over the documents under §166 of CC.^{*20}

The right of the shareholder of a German private limited company, GmbH (*Gesellschaft mit der beschränkter Haftung*), to receive information and to examine the documents is regulated quite similarly, under German law. According to §51a (1) and (2) of the Law on Private Limited Companies^{*21}, the management can refuse to provide the information only if one can assume that the shareholder may use the information for purposes in conflict with the company's interests or the interests of affiliated companies in the same group and cause herewith significant disadvantage to the company. Refusal needs to be stated in the shareholders' decision.

In German legal literature, it has been said that the information right of a shareholder must be understood in the widest sense: it involves all the legal and economic relations inside the company and also all the respective relations between the company and third persons. The information also involves knowledge about all kinds of contributions and expenses of the company and all the aspects of management and the distribution and use of profit.^{*22} It has been noted, though, that a mere curiosity cannot be considered proper grounds for an information claim.^{*23}

It has also been discussed that the vague legal regulation of the borders of a shareholder's information rights may grant shareholders of a private limited company quite an extensive right to inspect all the company's documents, which may not be the best solution from the point of view of the company, and German company law might actually need more detailed regulations.^{*24} The authors of this paper are of the opinion that the same characteristics describe also Estonian company law. The right to receive information is to be understood quite widely, but no specific regulation is probably necessary, as the case-law can shape the proper boundaries of the disclosure.

As the law provides the shareholder of a private limited company simultaneously with the right to demand information and the right to inspect the documents, one may ask which instrument should prevail in order to execute the information right. In German legal literature, the two possibilities for obtaining information are considered to be equal, but, as the inspection of documents tends to burden the company more than the simple distribution of information, one must choose, if possible, the distribution of information instead of the inspection of documents.^{*25} This means that if a shareholder claims for the examination of documents but the purpose of his information claim can still be achieved by the distribution of information, the distribution of information is considered to be sufficient to satisfy his claim. The court has the right to ascertain the scope of the actual interest of the shareholder and to establish the boundaries of the information distribution.

There is another instrument that may be considered an extension of the shareholder's information right. According to §191 (1) of CC, shareholders whose shares represent at least one-tenth of the share capital may demand a resolution on conducting of a special audit on matters related to the management or financial situation of the private limited company, and the appointment of an auditor for the special audit by a resolution of the shareholders. Though the Supreme Court has expressed a view that the special audit is an instrument that allows shareholders to inspect the documents,^{*26} this statement cannot be regarded as justified, as the aim of the special audit is different – it is conducted by auditors or advocates (§191 (3) of CC) who inspect the documents and find answers to certain questions on management or financial matters.

¹⁹ Ruling of Tartu County Court 5.2.2009, 2-08-64591.

²⁰ Ruling of Tartu Circuit Court 1.7.2009, 2-08-64591.

²¹ German Law on Private Limited Companies: Gesetz betreffend die Gesellschaften mit beschränkter Haftung in der im Bundesgesetzblatt Teil III, Gliederungsnummer 4123-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 27 des Gesetzes vom 23. Juli 2013 (BGBl. I S. 2586) geändert worden ist. Hereinafter: GmbHG.

²² M. Passarge, S. Kölln. Das Auskunfts- und Einsichtsrecht nach § GmbHG § 51a GmbHG bei der kommunalen GmbH. – NVwZ 2014, S 982.

²³ K. Kiethe. Das Informationsrecht des ausscheidenden GmbH-Gesellschafters. – Deutsches Steuerrecht 1993, S 1709.

²⁴ H. Fleischer, W. Goette (Herausg.). Münchener Kommentar zum GmbH Gesetz. 1. Auflage 2012, § 51a, Rn 4.

²⁵ H. Fleischer, W. Goette (Herausg.). Münchener Kommentar zum GmbH Gesetz. 1. Auflage 2012, § 51a, Rn 61.

²⁶ CCSCr 3-2-1-29-08, para. 13.

The authors of the paper take the view that the special audit, being a minority right^{*27}, cannot replace the shareholder's right to examine the documents of the company.

4. Information right of a shareholder of a public limited company

As regards the other type of Estonian corporate entities, the information right of the shareholders of a public limited company is more restricted. According to §287 (1) of CC, a shareholder has the right to receive information on the activities of the public limited company from the management board at the general meeting. The management board of a public limited company has a right to refuse to give information similar to that of the management board of a private limited company (§287 (2) of CC) and the shareholder has the same right to apply to the court in order to obligate the management board to provide information (§287 (3) of CC).

Consequently, the shareholder of a public limited company has a right to receive information only at the general meeting, which means that he has the right to ask the management board questions concerning the activities of the company, but he cannot examine the company's documents. The shareholder has the right to get a copy of the minutes of the shareholders' meeting (§303 (4) of CC), but he does not have the right to examine the minutes of the management board or supervisory board meetings. Yet a shareholder may ask the management questions about the issues discussed by the management board or at the supervisory board meetings. In addition to that, every shareholder has access to all the documents that have been disclosed through the commercial registry.

The Supreme Court of Estonia has several times ruled that a shareholder of a public limited company has limited access to company's documents^{*28} and referred to other possibilities for getting information about the company's activities – for example, demanding that the general meeting would adopt a resolution on conducting of a special audit on matters related to the management or financial situation and on appointing of an auditor for the special audit (§330 (1) of CC).^{*29} If the general meeting does not adopt the decision on conducting a special audit, shareholders whose shares represent at least one tenth of the share capital may request that a special audit be conducted and that an auditor be appointed by a court. The court shall decide on conducting of a special audit only with good reason. In practice, it is sufficient to substantiate that there is a need to inspect the actions of the management or to check the legality of contracts concluded by the company. The aim of the special audit is to ascertain whether the members of the management board have committed omissions that might give cause for claims against them. The request to conduct a special audit is also an appropriate remedy to inspect the circumstances of the foundation or alteration of share capital and other, similar issues.^{*30} If possible, the court shall also hear the members of the management board and supervisory board of the public limited company before deciding on the conducting of a special audit (§330 (2) of CC). As has already been mentioned, the opinion expressed by the Supreme Court is not fully correct – the special audit does not literally grant shareholders the access to documents but only foresees a different possibility for receiving answers to some specific questions.

When one compares the information rights of the shareholders of private and public limited companies, it is evident that the shareholder of a private limited company has a more extensive right to information than the shareholder of a public limited company. The reason for that is the fact that the private limited company is considered to be a closed corporation in which shareholders are normally more involved in daily business while shareholders of a public limited company, on the other hand, are usually just investors.

The basic principles of the information right of the shareholder of a German public limited company, AG (*Aktiengesellschaft*), are regulated in quite a similar way, but, as compared to Estonian general statutory rules, German regulations are more detailed. According to §131 (1) of German Law on Public Limited

²⁷ Only shareholders representing at least one-tenth of the share capital may demand a resolution on conducting of a special audit.

²⁸ CCSCr 14.12.2012 No. 3-2-1-133-11, p. 18; CCSCr 3-2-1-29-08, para. 13.

²⁹ CCSCr 7.5.2008 No. 3-2-1-35-08, para. 10.

³⁰ CCSCr 7.5.2008, 3-2-1-35-08, para. 10.

Companies^{*31}, every shareholder has a right to receive information on the activities of the public limited company from the management board at the general meeting. The management's right to refuse to provide information is regulated more thoroughly. In addition to the general provision that the management may refuse in case the disclosure of the information is likely to cause significant disadvantage to the company, the management may also refuse to provide information on certain taxation, accounting, and valuation matters, or if providing the information might lead to the criminal liability of the board members. The latter is an expression of the very basic legal principle that prohibits obligating a person to provide information that might imply that he has committed a crime. Estonian company law lacks such a clear regulation; nevertheless, as the principles of Estonian criminal law are the same, the boundaries of the management's obligation to provide information cannot be interpreted differently. The same principle is also expressed in Estonian Constitution.^{*32} Yet it has been expressed in German legal literature that the management is not, however, allowed to refuse to provide information if the information to be provided would imply that the member of the management board could be held liable for inside trading violations.^{*33}

When refusing to provide information the management board does not necessarily need to prove that the damage has been occurred but only to substantiate it which means that it has to give explanation that suffices to make such an allegation plausible.^{*34}

A shareholder who has been denied information may request that his question and the reason for which the information was denied be recorded in the minutes of the meeting (§131 (5) of AktG).

It is also important to note that, according to §131 (2) of AktG, the articles of association or the rules of internal procedure may authorise the chairperson of the meeting to limit the number of questions and the speaking time of shareholders as appropriate and to lay down general rules thereon.

Though it is stipulated by law that the management board has the right to refuse to provide information, it is at the same time the obligation of the board, because it is the management board's duty to avoid damage to the company.^{*35} Therefore the management's decision about the disclosure should be evaluated from the point of view of the general business judgement rule.

The authors are of the opinion that the same principle is applicable under Estonian company law for both types of companies.

5. Protection of a company's trade secret as a ground for refusal of a shareholder's information claim

As one can see, the basic rule that sets the boundaries for shareholders' information rights is quite simple – shareholders of both types of limited companies can demand information about the activities of the company, and the shareholders of private limited companies have an additional right to examine all the documents unless it may cause significant damage to the company. But the real scope of the information right as well as the meaning of "significant damage" can only be interpreted through case-law. Estonian case-law has given the very basic interpretation of this rule: in deciding whether the disclosure of the information may cause significant disadvantage (damage) to the company, all aspects and circumstances should be reasonably considered and the merely subjective opinion of the management board cannot substantiate the refusal. The refusal is grounded only in the case of there being an actual danger that the disclosure would lead to significant damage (which is not necessarily material damage) to the company. The refusal does not have grounds in case there is a danger that the disclosure would somehow harm third persons.^{*36}

³¹ German Law on Public Limited Companies: Aktiengesetz vom 6. September 1965 (BGBl. I S. 1089), das zuletzt durch Artikel 26 des Gesetzes vom 23. Juli 2013 (BGBl. I S. 2586) geändert worden ist. Hereinafter: AktG.

³² According to §22 (3) of the Constitution of the Republic of Estonia, no-one shall be compelled to testify against himself or herself, or against those closest to him or her.

³³ U. Hüffer. Aktiengesetz. Beck'sche Kurzkommentare. 9. Auflage 2010, § 131, Rn 31.

³⁴ C. Mense, M. Klie. HV-Saison 2015: Aktuelle Trends und rechtliche Entwicklungen für die Vorbereitung und Durchführung von Hauptversammlungen. – Gesellschafts- und Wirtschaftsrecht 2015, 45, S 49.

³⁵ U. Hüffer. Beck'sche Kurzkommentare. Aktiengesetz. 11. Auflage, 2014, § 131, Rn 23.

³⁶ CCSCd 21.3.2007, No. 3-2-1-22-07, para. 10; CCSCr 23.4.2008, No. 3-2-1-29-08, para. 11; CCRSC 8.6.2009, No. 3-1-1-46-09, para. 10.2.

As the law tends to be vague as regards the definition of significant damage, one can ask how Estonian case-law has interpreted this term. According to case law, the possible violation of a trade secret of the company can be considered the most common objection that management boards use to block the unpleasant information claims of shareholders.

Under Estonian case-law^{*37}, the meaning of "trade secret" is interpreted through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)^{*38}, Article 39 p. 2. According to the article in question, both natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. So in order to classify some kind of information as a trade secret, it is not enough to argue that it is not generally known; it must also have some kind of commercial value.

In a dispute between a private limited company and a minority shareholder thereof, the management board refused to provide access to the bank account statement, justifying the refusal by a prohibition on revealing the company's trade secret – the database of the company's customers. Neither the county court nor the circuit court found the refusal grounded.^{*39}

The Estonian Supreme Court has answered a question about whether a refusal to provide basic board remuneration information referring to a possible violation of the company's trade secret is justified.^{*40} The circumstances of the case were simple: A public limited company had a bloc of controlling shareholders (members of the same family) who were all either members of the management board or the supervisory board or employed by the company and therefore receiving either direct remuneration or another kind of compensation from the company. The company in question also had a minority shareholder (his share representing approx. 24% of the company's share capital), who was through its shareholders controlled by a competitor of the public limited company in question.

The minority shareholder applied to the director of the company (who was at the same time also the majority shareholder) and demanded information about the provisions of the contract concluded between the director and the company, specifically about the stipulations regarding remuneration and the actual amount of the salary paid to the director. The minority shareholder also requested information about the outlays to persons connected to the director (i.e., his relatives). At the shareholders' meeting, the director answered that the contract between him and the company was concluded in written form and that all the outlays had been made in the amount confirmed by the supervisory board. The only explanation the director gave to the shareholder was that there were contracts concluded between the related persons and the company, and he refused to disclose the provisions of such contracts. So the basic question was how transparent the relationships between the company and its management and the persons connected to the management should be and whether the minority shareholder should be granted information about management costs.

The main objection of the company was that, as the minority shareholder was controlled by the competitor of the company, the disclosure of the demanded information would cause significant damage to the company. Therefore, the director refused to disclose the above-mentioned information to the shareholder and the shareholder applied to the court.

The first two instances, the county court and the circuit court, refused to satisfy the shareholder's claim.^{*41} Both courts were probably influenced by the first impression that the aim of the minority shareholder was rather to harass the majority and to get some private information about the executives and their family members. The Supreme Court, on the other hand, found the information claim grounded and handled the case according to the rules that such a specific conflict between the majority and the minority should be handled.

³⁷ CCSCd 21.3.2007, 3-2-1-22-07, para. 13.

³⁸ Available at: https://www.wto.org/english/tratop_e/trips_e/t_agmo_e.htm.

³⁹ Ruling of Harju County Court 1.12.2010, 2-10-31025 and ruling of Tallinn Circuit Court from 9.2.2011, No. 2-10-31025.

⁴⁰ CCSCr 17.9.2013, No. 3-2-1-86-13.

⁴¹ Ruling of Tartu County Court 20.11.2012 and Ruling of Tartu Circuit Court 18.3.2013; No. 2-12-26039.

The Supreme Court explained that, generally, every shareholder has the right to receive information about the basic conditions of the contracts concluded between the company and the members of its management board as well as about all aspects of their remuneration. The Supreme Court also emphasised that shareholders are the initial capitalizers, the investors of the company, and therefore must have knowledge about the costs of the management of their investment. The authors of this paper are of the opinion that the latter approach follows the trend, recognisable worldwide, of increasing the disclosure in public limited companies. It is still possible to argue that overly extensive disclosure can harm the privacy of the members of management boards. But this was certainly not the case. As for the German approach, for a long time the prevailing opinion has been that there is no obligation to disclose the salaries paid to the individual board members, but nowadays there are different points of view expressed on this matter as well.^{*42}

One must explain that a public limited company with a strong controlling shareholder who therefore also controls all the members of the management and supervisory board is quite representative of Estonian public limited companies.^{*43} Another distinctive feature of such companies is that they are inclined not to pay dividends to shareholders and minority shareholders therefore suffer long-term oppression.^{*44} So for the minority shareholder who does not want to or cannot sell his shares, the only possible way to act is to ask questions, to investigate, to find out what is actually going on – in a word, to “pick on” the majority. As it has been expressed in legal literature, in cases of conflict between the majority and the minority, the source of the conflict lies in the fact that the majority shareholder, on the other hand, is inclined to treat the company as if it was owned by him solely.^{*45}

Summarising the circumstances that justify the refusal to provide information implying presumed damage to the company's trade secret, one can conclude that the possible leak of a trade secret can, in fact, be grounds for the refusal, but the interpretation of the meaning of “trade secret” and therefore also the meaning of the possible damage is quite narrow in Estonian company law and such an interpretation should be considered well-grounded as it would otherwise be too easy for a company to avoid the minimum disclosure that shareholders need to execute their membership rights properly.

6. Right of a former shareholder to demand information

The question of whether a former shareholder has a right to receive information can only arise as regards the boundaries of the information rights of shareholders of private limited companies, as the shareholders of public limited companies can only receive information at the general meeting and only present shareholders and not former ones have the right to attend the general meeting.^{*46} But as a shareholder of a private limited company may demand both information and access to the documents also between meetings, one might ask what happens if the shareholder loses his share(s) before the company has managed to provide the necessary information.

The Supreme Court of Estonia has dealt with the above-mentioned problem. According to the circumstances of the case, a shareholder of a private limited company applied to the court and the court satisfied his information claim against the company and obliged the company to provide the shareholder with the bank statements of the company from a certain period. The court ruling entered into force in May 2011 and the bailiff commenced the enforcement proceeding. Then, in November 2011 the court made a decision in another

⁴² A. P. H. Wandt. *Die Auswirkungen des Vorstandsvergütungs-Offenlegungsgesetzes auf das Auskunftsrecht gemäß § 131 Abs. 1 S. 1 AktG.* – Deutsches Steuerrecht 2006, S 1460 ff.

⁴³ It is argued that such a shareholder structure is a general characteristic of European public limited companies. See, e.g.: T. Clarke. *Theories of Governance – Reconceptualizing Corporate Governance Theory after the Enron Experience.* – *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance.* T. Clarke (Ed.). Oxon, 2004, p. 11.

⁴⁴ In its decision from 29th October 2014, the Estonian Supreme Court solved another dispute that had arisen between the majority and the minority of a public limited company, where a minority shareholder demanded that the majority should vote for the decision to pay dividends. It is important to note that the company in question actually had enough means to pay dividends. The Supreme Court expressed a clear viewpoint – a minority shareholder cannot claim the dividend unless shareholders have adopted such a decision and the adoption of such a decision is the majority's discretion (CCSCd 29.10.2014, 3-2-1-89-14).

⁴⁵ B. R. Cheffins. *Company Law: Theory, Structure and Operation.* Oxford: OUP 1997, p. 65.

⁴⁶ According to §297 (4) of CC, a shareholder in person or his representative may participate at a general meeting, unless otherwise provided by legislation and according to §287 (5) as a rule, the set of shareholders entitled to take part in a general meeting shall be determined as at seven days before the date of holding the general meeting.

civil proceeding and excluded the shareholder from the company.^{*47} The court decision in the latter proceeding also entered into force, and after that, in January 2012, the company applied to the court, claiming the enforcement proceeding to be inadmissible as the person claiming the documents of the company was no longer a shareholder and therefore no longer had a protected interest in receiving any information or documents.

The county court agreed with the company and was of the opinion that the former shareholder no longer had any protected interest and therefore, although there was a court ruling that had entered into force, the enforcement proceeding was inadmissible. The circuit court, on the other hand, decided that the initial ruling that gave the shareholder the right to receive the company's bank accounts should be enforced and that the company could not avoid the enforcement of the ruling. The Supreme Court agreed with the circuit court in the main but explained additionally that when deciding whether a former shareholder has the right to examine a company's documents, it is important to consider the time period foreseen in the court ruling that the company is obliged to provide information about. If the relevant period is the time when the person requesting the information was a shareholder, the former shareholder has the right to obtain information. The Supreme Court emphasised that the situation would be different, however, if the court ruling had declared the shareholder's right to get information about the future issues of the company (in this case, meaning the matters occurring after his exit).^{*48}

This statement leaves an open question of whether this was only a specific solution for a specific enforcement proceeding or Estonian courts have intentionally widened the information right of shareholders of private limited companies. The solution in this specific case is somehow understandable when we consider here two articles from Estonian Law of Obligations Act.^{*49} According to §1014 of LOA, a person who has a claim with respect to a thing against the possessor of the thing or a person who wishes to check the existence or absence of such a claim may demand that the possessor present the thing or allow the thing to be examined if the person has a legitimate interest therein. Section 1015 of LOA specifies the same rule for presenting documents, and, according to that, a person who has a legitimate interest in examining a document that is in the possession of another person may demand that the possessor of the document allow the document to be examined if the document has been prepared in the interests of the person who wishes to examine the document or if the document sets out a legal relationship between such a person and the possessor of the document or the preparation of a transaction between those persons.

So when one considers those two additional legal regulations, it can be concluded that a former shareholder of a private limited company who can still prove that he has a specific interest in examining a certain document of the company can probably present the claim in reliance on the above-mentioned general provisions of the LOA. This means that he must prove he has a legitimate interest in examining the documents. Present shareholders' claims, on the other hand, need no special substantiation.

According to German legal literature, a former shareholder of a private limited company has restricted access to the company's documents or other inside information. To receive information, he must prove he has a special lawful interest. For example, it has been opined that the only interest a shareholder who has been excluded from the company can have after his exclusion is the interest in receiving information about the value of his share in the company, to ascertain the fairness of the monetary compensation.^{*50}

7. Conclusions

Proceeding from the above, the authors of this article take the view that, in addition to statutory rules, Estonian courts have managed to form basic principles of shareholders' information rights. At the same time, it still seems to be difficult to draw conceptual conclusions about the clear boundaries of those rights on the basis of Estonian case law, as courts have solved separate cases and there is no *obiter dictum* in any of the Supreme Court's rulings on this matter. Despite this, general trends are noticeable.

⁴⁷ According to §167 (1), a court may, on the request of a private limited company, exclude a shareholder from the private limited company if the shareholder fails, without good reason, to perform the shareholder's obligations to a material extent or in any other way significantly damages the interests of the private limited company, or does not perform obligations or terminate damage regardless of a written caution from the private limited company.

⁴⁸ CCSCd 6.11.2013, No. 3-2-1-114-13, paras 12–13.

⁴⁹ Law of Obligations Act. RT I 2001, 81, 487; RT I, 11.4.2014, 1. Hereinafter: LOA. In Estonian.

⁵⁰ K. Kiethe. Das Informationsrecht des ausscheidenden GmbH-Gesellschafters. – Deutsches Steuerrecht 1993, S 1714.

First, it is essential that Estonian case law shows a clear trend toward wider disclosure. This means that grounds for denial of a shareholder's information claim are *de facto* limited. For example, a shareholder is entitled to receive from a company the basic information about management costs, including costs of transactions between the company and persons related to the management. Such information can't be considered a trade secret or sensitive personal information, and refusal to disclose such information is, as a rule, not justified.

It is also important that Estonian case law has recognised the information right of a former shareholder on quite a narrow foundation. The authors are of the opinion that it can, similarly to German law, be accepted only in the case that the former shareholder has a specific interest related to some of his property rights – for example, when a fair evaluation of his share is needed. Such an approach provides the company with proper protection against situations where a former shareholder makes a claim for information about the activities of the company after he has lost his membership rights and therefore has no legal interest in receiving detailed information any longer.