

## CONTRACTUAL EXPANSION OF SHAREHOLDERS' ACCESS TO CORPORATE INFORMATION – AN INFRINGEMENT OR A NEW MODEL OF CORPORATE GOVERNANCE?

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### ABSTRACT

*Active shareholders and investors often seek additional information on conduct of business, which surpasses shareholders' right to information under the corporate law. As the corporate law treats all shareholders equally, they can attempt to broaden their right to information only through contractual mechanisms, such as shareholders agreements. Authors shall argue about the justification of providing additional corporate information to only selected shareholders by analyzing the shareholder right to information and managers' duty of confidentiality provisions. Likewise, authors shall discuss whether by providing additional access to corporate information to some shareholders or even to the third parties outside of the company, the control in the company shifts towards the contractually created controlling shareholders, thus introducing a new model of corporate governance. This paper shall research practical examples of shareholders agreements in Croatian practice which provide for various additional informational rights to shareholders and which deal with the disclosure of confidential information in the due diligence process as a part of the sale of shares to potential buyers. Authors consider that the discussion on validity of contractual clauses which provide for expansion of shareholders' access to corporate information is well overdue.*

**Key words:** shareholders' right to information, shareholders agreement, managers' duty of confidentiality, due diligence.

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## 1. INTRODUCTION

Shareholders often request additional corporate information, especially outside of the general meeting through informal channels. Authors use the term “corporate information” to address information relating to company affairs, which should be interpreted broadly and include all legal and economic information concerning the company. This article limits the research to two types of companies, joint-stock and limited liability companies. Methodology of the research is focused on the shareholders’ information rights and managers’ duty of confidentiality provisions, with comparative analysis of the European union legislative sources, German and Croatian corporate laws. In this paper, authors shall analyze a random sample of shareholders’ agreements in Croatian practice which provide additional informational rights to shareholders and which deal with the disclosure of confidential information in the due diligence process as a part of the sale of shares to potential buyers. The goal is to question the validity of these contractual clauses and to reevaluate whether such provisions create a new model of corporate governance for joint-stock and limited liability companies.

## 2. SHAREHOLDERS’ RIGHT TO INFORMATION IN JOINT-STOCK COMPANIES

Shareholders’ rights to information, as one of the communication channels between shareholders and the management bodies, ensures that shareholders make informed decisions at the company’s general meeting (further in text: GM) regarding the most important company’s affairs. With the SRD I<sup>1</sup> entry into force, this right has been implemented at the European level, although many Member States (further in text: MS) had provided for it even before the SRD I implementation.<sup>2</sup> SRD I and II apply to listed joint-stock companies only, and they present the minimum standard of harmonization.<sup>3</sup> Article 9 (1) stipulates that

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<sup>1</sup> European Parliament: *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, OJ L 184, 14.07.2007, pp. 17–24.; European Parliament: *Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement*, OJ L 132, 20.05.2017, pp. 1–25 (further in text SRD II).

<sup>2</sup> Pinto, A.: The European Union’s Shareholder Voting Rights Directive from an American Perspective: Some Comparisons and Observations, *Fordham International Law Journal*, 32 2008.

<sup>3</sup> Lieder J., Bialluch, M.: Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (Share-

every shareholder has the right to ask questions related to the items on the agenda of the GM, and that right can be limited only under certain procedural<sup>4</sup> and substantive reasons provided by paragraph 2.<sup>5</sup> The latter include the protection of confidentiality and the company's business interests and other.<sup>6</sup>

In Croatian law, shareholders' right to information is explicitly prescribed by Article 287 of the Companies Act (further in text: CA)<sup>7</sup> and in German law by Article 131 of the German Stock Corporation Act (further in text: AktG).<sup>8</sup> According to the generally accepted view, the debtor of the obligation to provide information is the company itself, while the management board acts on its behalf as the responsible body for delivering the requested information.<sup>9</sup>

## 2.1. LIMITS OF SHAREHOLDERS' RIGHT TO INFORMATION IN JOINT-STOCK COMPANIES

According to both German and Croatian legal doctrine, shareholders' right to information cannot be limited or expanded by the parties, as the articles governing shareholders' right to information are mandatory.<sup>10</sup> For example, companies could not provide reasons for withholding information which ex-

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holder Rights Directive) in: Kindler, P., Lieder, J. (eds.): *European Corporate Law*, Baden-Baden: , Nomos Verlagsgesellschaft mbH & Co. KG, 2021, p. 858.

<sup>4</sup> Such as time limitation of the general meeting. See German and Croatian judicial practice. High Commercial Court of the Republic of Croatia: Case Pž-7368/11-6, 02.09.2015. See: Angerer, L.: Die Beschränkung des Rede- und Fragerechts des Aktionärs in der Hauptversammlung, *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 40(1) 2011, p. 27.

<sup>5</sup> Van der Elst, C.: Question time? The shareholder right to ask questions as appropriate stewardship tool, *Law and Economy*, 4(4) 2012, p. 38.

<sup>6</sup> *Ibid.*, p. 49.

<sup>7</sup> Official Gazette: *The Companies Act*, Zagreb: Official Gazette Ltd., 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19, 34/22, 114/22, 18/23, 130/23.

<sup>8</sup> Stock Corporation Act of 6 September 1965 (Federal Law Gazette I, p. 1089), last amended by Article 13 of the Act of 11 December 2023 (Federal Law Gazette 2023 I No. 354)

<sup>9</sup> Spindler, G., Stilz, E.: *Kommentar zum Aktiengesetz*, Band 1, §§ 1-149, 4. Auflage, München: C. H. Beck, 2019, Rn. 12, 16, 18.

<sup>10</sup> Goette, W., Habersack, M., Kalss, S.: *Münchener Kommentar zum Aktiengesetz*, 4. Auflage, München: C. H. Beck, 2018, Rn. 104, 183. Similarly, Erbs, G., Kohlhaas, M.: *Strafrechtliche Nebengesetze*, München: C. H. Beck, 2019, Rn. 2. However, Herrler believes that the relevant provisions can establish rules regarding the modalities for exercising the right to information and to speak (e.g., the order of speakers, technical aids). Grigoleit C.: *Aktiengesetz: Kommentar*, München: C.H. Beck, 2020, Rn. 1. See Barbić, J.: *Pravo društava: Knjiga druga, Društva kapitala, Svezak I, Dioničko društvo*, Zagreb: Organizator, 2010, p. 535.

ceed those established by law, or to grant excessive discretionary power to the management board.<sup>11</sup>

However, the shareholders' right to information is not absolute, as there are two main limitations.<sup>12</sup> One relates to the content and type of information, i.e. the shareholder may request only information about the company affairs if necessary for assessing the items on the GM's agenda (the focus is on the average shareholder making an objective assessment).<sup>13</sup> The term "company affairs" is rightly interpreted very broadly including both direct and indirect matters, legal and business relations, and anything related to the company and its activities.<sup>14</sup> The second limitation relates to the possibility of withholding information in cases prescribed by law aiming to balance the interests of individual shareholders for information and the interests of the company itself:<sup>15</sup> potential harm to the company, taxes, hidden reserves, accounting and valuation methods, criminal liability and online disclosures.<sup>16</sup>

### 3. SHAREHOLDERS' RIGHT TO INFORMATION IN LIMITED LIABILITY COMPANIES

The right to information is viewed as one of the fundamental shareholder's rights in a limited liability company (further in text: LLC) which enables them to control company's operations and effectively perform all other corporate rights, especially managerial ones.<sup>17</sup> In both Croatian and German law, the management board of the company shall, upon request, promptly provide each shareholder with information on the company affairs and permit inspection of the books and documents.<sup>18</sup> Therefore, shareholders' information right is

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<sup>11</sup> Supreme Court of Spain: Case STS 608/2014, 12.11.2014.

<sup>12</sup> Kocbek, M.: Veliki komentar Zakon o gospodarskih družbah (ZGD-1), 2. Knjiga (168. do 470. člen), Ljubljana, 2007, p. 500.

<sup>13</sup> Siems, M., *op. cit.*, Rn. 28. Article 287 (1) CA and § 131 (1) AktG.

<sup>14</sup> In the case of certain external affairs, a specific threshold of significance must be met. It is the shareholder's burden to prove that the specific information is necessary for the assessment of a particular item on the GM's agenda. Siems, M., *op. cit.*, Rn. 23.

<sup>15</sup> Poelzig D., §131 in: Spindler, G., Stilz E.: *Beck online Grosskommentar*, München: C. H. Beck, 2021, Rn. 147.

<sup>16</sup> Article 287 (2) CA and §131 (3) AktG.

<sup>17</sup> Podgorelec, P.: Pravica družbenika d.o.o. do informacij in vpogleda, *Podjetje in delo*, 5 2004, pp. 763-792.

<sup>18</sup> Article 447 (1) CA and §51a (1) BGBL: Law concerning limited liability companies in the revised version published in the Federal Law Gazette Part III, classification number 4123-1, as last amended by Article 9 of the Law of 22 February 2023, 51/2023 (further in text: GmbHG).

a comprehensive right which can be divided into two branches:<sup>19</sup> the right to be informed about the company's affairs (the shareholder only receives an answer to the question posed) and the right to inspect the company's books and documentation (it allows the shareholders the access to review documents at a designated location or to take documents with them for inspection and making copies).<sup>20</sup> Informing and inspection are simply different means of obtaining information.<sup>21</sup>

### 3.1. LIMITS OF SHAREHOLDERS' RIGHT TO INFORMATION IN LIMITED LIABILITY COMPANIES

Croatian and German legal doctrines emphasize the mandatory nature of provisions governing shareholders' rights to information in LLC,<sup>22</sup> thus aiming to ensure equal treatment for all members of the LLC. The articles of association can provide further details for exercising this right, such as the time frame during which a shareholder can access the company's books and documentation, and the persons who can assist in exercising this right.<sup>23</sup>

The company can withhold requested information from shareholder in order to protect company's interest.<sup>24</sup> The refusal is allowed if there is a concern that the requested information might be used for purposes unrelated to shareholders' membership in the company and could therefore cause harm (in Croatian law) or a significant disadvantage (in German law) to the company or an associated

<sup>19</sup> Higher Regional Court München: Case 31 Wx 48/07, 11.12.2007.

<sup>20</sup> Brete, R., Braumann, F.: Das Informationsrecht des Gesellschafters der verschiedenen Gesellschaftsformen, GWR, 4 2019, p. 59

<sup>21</sup> Schmidt, K., §51b, in: Scholz, F.: *GmbHG*, Cologne, 2018, Rn. 15; Thüringer Oberlandesgericht: *GmbH: Informationsrecht des Gesellschafters*, OLG-NL, 2004, p. 254.

<sup>22</sup> See also Article 447 (4) CA and §51a (3) GmbHG. Barbić, J.: *Pravo društava: Knjiga druga, Društva kapitala, Svezak II, Društvo s ograničenom odgovornošću*, Zagreb: Društvo za uzajamno osiguranje, Kreditna unija & Europsko društvo - Societas Europea, 2013, p. 247.; Schmiegelt, K., Schmidt, M., §3 Der Gesellschafter, in: Prinz, U., Winkeljohann, N.: *Beck'sches Handbuch der GmbH*, München, 2014, Rn. 66. See also OLG München: *Auskunfts- und Einsichtsbegehren des ausgeschiedenen Gesellschaftergeschäftsführers*, FGPrax, 2006, p. 84.

<sup>23</sup> Barbić, J.: *Pravo društava: Knjiga druga, Društva kapitala, Svezak II, Društvo s ograničenom odgovornošću*, Zagreb: Društvo za uzajamno osiguranje, Kreditna unija & Europsko društvo - Societas Europea, 2013, p. 261.

<sup>24</sup> Podgorelec, P.: Pravica družbenika d.o.o. do informacij in vpogleda, *Podjetje in delo*, 5 2004, pp. 763-792.

company.<sup>25</sup> Decision on refusal shall require a resolution of the shareholders. Croatian legislator additionally provides that if the company has a supervisory board, the management board is entitled to bring the decision to withhold the information from a shareholder.<sup>26</sup>

#### 4. SHAREHOLDERS' RIGHT TO ACCESS CORPORATE INFORMATION OUTSIDE THE GENERAL MEETING

For the joint-stock companies, Croatian and German law stipulate that information must be provided only at the GM and legal doctrine is unanimous that an individual shareholder does not have a general right to corporate information but only to information that is necessary for decision-making at the GM.<sup>27</sup> Therefore, if the requested information does not relate to any of the agenda items, the management board is free to withhold the information.

However, is the management board entitled to provide the information outside of the GM, and if yes, can the information be provided only to a certain shareholder? This particularly pertains to communication and informational pressure exerted on the management board by institutional investors who may hold significant stakes in the company.<sup>28</sup> In joint-stock companies such situations are partially covered by the so-called extended right to information in Croatian and German law,<sup>29</sup> which provides that if the corporate information is given to a certain shareholder outside of the GM all other shareholders may request that information. A noticeable difference in national regulation is whether such a request should be made at the GM or outside of it. Croatian legislation stipulates only that such information is provided upon a shareholder's request, whereas German legislation specifies that the shareholder must submit

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<sup>25</sup> Article 447 (2) CA, §51a (2) GmbHG. Barbić, J.: *Pravo društava: Knjiga druga, Društva kapitala, Svezak II, Društvo s ograničenom odgovornošću*, Zagreb: Društvo za uzajamno osiguranje, Kreditna unija & Europsko društvo - Societas Europea, 2013, pp. 254-256; Schmiegelt, K., Schmidt, M., *op. cit.*, Rn. 81.

<sup>26</sup> Article 447 (3) CA.

<sup>27</sup> Beisel, D., § 2 Due Diligence, in: Beisel, D., Klumpp, H.: *Der Unternehmenskauf*, 7. Auflage, München: C.H. Beck, 2016, Rn. 24; Kubis, D.: Auskunft ohne Grenzen? – Europarechtliche Einflüsse auf den Informationsanspruch nach § 131 AktG, Zugleich eine Anmerkung zum Beschluss des BGH vom 5. 11. 2013 (II ZB 28/12), *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 43(5) 2014, p. 611.

<sup>28</sup> Decher, C., Aktionärsinformation - Responsio -, *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 49(2-3) 2020, p. 245.

<sup>29</sup> Article 287 (3) CA and §131 (4) AktG.

the request at the GM.<sup>30</sup> Although the request should explicitly be made at the GM, there is no obligation to make it at the very next GM. However, if a shareholder delays making such a request without objective justification, this could imply a certain abuse of this right.<sup>31</sup> As for providing the requested information, only the Croatian provision explicitly stipulates that the information must be provided at the GM. Although the German provision only addresses the submission of the request at the GM, the prevailing doctrinal view is that the request must be fulfilled at the GM as well.<sup>32</sup> However, in that case, the information does not have to be related to the agenda of GM.<sup>33</sup> The purpose of this provision is to eliminate discrimination and information imbalance between shareholders, thereby ensuring equal treatment of all shareholders.<sup>34</sup>

Importantly, the extended right to information does not cover information given to a potential buyer of the shares, if at that moment the buyer is not already a shareholder.<sup>35</sup> In other words, shareholders are not entitled to request corporate information given to a potential buyer of the company's shares, unless the potential buyer is already a shareholder.

In contrast to the joint-stock companies, the right to information in a LLC is not restricted to matters on the agenda of a GM. It extends to all aspects of the company's operations, assets and management, including the functioning of its organs, and all legal and economic relations within the company and with affiliated companies,<sup>36</sup> regardless of whether it is necessary for exercising their voting rights at the company's meetings.<sup>37</sup> The legal term "company's affairs"<sup>38</sup>

<sup>30</sup> See Article 287 (3) CA and §131 (4) AktG.

<sup>31</sup> Kubis, D. (2018), *op. cit.*, Rn. 156-157; Herrler, S., *op. cit.*, Rn. 60.; Siems, M., *op. cit.*, Rn. 81.

<sup>32</sup> Siems, M., *op. cit.*, Rn. 85.

<sup>33</sup> Koch, J., Informationsweitergabe und Informationsasymmetrien im Gesellschaftsrecht, *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 49(2-3) 2020, p. 208 & p. 212.

<sup>34</sup> Kubis, D. (2018), *op. cit.*, Rn. 147.; Siems, M., *op. cit.*, Rn. 72.; Parać, Z.: Obveza obavještanja i glavna skupština dioničkog društva, in: Barbić, J., Giunio, M. (eds.): *Zbornik 49. susreta pravnika*, Zagreb: Hrvatski savez udruga pravnika u gospodarstvu, 2011, p. 133. However, it is an open question how shall other shareholders know that corporate information was given to a shareholder outside of the GM. For some possible solution see the discussion in Marković Čas, A., *Pravica delničarjev do obveščenosti, Podjetje in delo*, 5 1998, p. 547.

<sup>35</sup> Kubis, D. (2018), *op. cit.*, Rn. 151.; Herrler, S., *op. cit.*, Rn. 56.

<sup>36</sup> Schmidt, K., § 51a, *op. cit.*, Rn. 19.; Altmeyen, H., Toth, G. H.: *Gesetz betreffend die Gesellschaften mit beschränkter Haftung GmbHG Kommentar*, 2023, § 51a, Rn. 6.

<sup>37</sup> Podgorelec, P.: *Pravica družbenika d.o.o. do informacij in vpogleda, Podjetje in delo*, 5 2004, *op. cit.*, pp. 763-792.

<sup>38</sup> Zöllner, W., § 51a, in: Baumbach, A., Hueck, A.: *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)*, München: C. H. Beck, 2016, Rn. 11. The High Commercial Court of the Republic of Croatia, in its decision Pž-2510/05 of March 10, 2008, concluded that



and company's books and documentation should be interpreted broadly.<sup>39</sup> The principle is that there are no secrets between the LLC and its shareholders.<sup>40</sup> Thus, shareholders of the LLC can request corporate information outside of the GM, and other shareholders or in certain cases, management board, decide whether to provide or withhold the information due to the reasons previously discussed.

#### 4.1. MANAGER'S DUTY OF CONFIDENTIALITY AS A CORPORATE LAW RESTRICTION OF CONTRACTUAL EXPANSION OF SHAREHOLDERS' ACCESS TO CORPORATE INFORMATION

Members of the management board have the duty of confidentiality in joint-stock companies<sup>41</sup> and LLCs<sup>42</sup> under both Croatian and German law. The scope of this duty is not easy to define. It is generally considered that it includes both confidential information and business secrets of the company.<sup>43</sup> Authors question the relation between the management board's duty of confidentiality and shareholders' access to corporate information at or outside of GM.

The first question is might the management board be obliged to withhold the information when shareholders request the information on the grounds of shareholders right to information provisions in joint-stock companies or in LLCs? In German theory, it is considered that the management board's right to withhold the information can become an obligation only if providing such information would constitute a breach of duty of confidentiality.<sup>44</sup> On the other hand, if the

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the formulation stating a shareholder can request "information about the company's affairs" is too narrow and must be interpreted broadly.

<sup>39</sup> Podgorelec, P.: *Informacijske pravice družbenikov*, Ljubljana: GV Založba, 2007, p. 42.

<sup>40</sup> Schmiegelt, K., Schmidt, M., *op. cit.*, Rn. 73.

<sup>41</sup> See § 93 (1) of AktG and Article 252 of CA.

<sup>42</sup> See Terlau, M., § 10 in: Römermann, V.: *Münchener Anwaltshandbuch GmbH-Recht*, 5. Auflage, München: C. H. Beck, 2023, Rn 67. For Croatia see Article 430 together with Article 252 of CA.

<sup>43</sup> Spindler, G., §93 in: Goette, W., Habersack, M., Kalss, S.: *Münchener Kommentar zum Aktiengesetz*, 6. Auflage, München: C. H. Beck, 2023, Rn 146. See also Barbić, J.: *Pravo društava: Knjiga druga, Društva kapitala, Svezak I, Dioničko društvo*, Zagreb: Organizator, 2010, p. 797. Confidential information, generally speaking, relates to information which must not be disclosed in order to protect the company's competitiveness and reputation. For German law see additionally §404 of AktG. For Croatian law see article 19 of Official Gazette: *The Data Protection Act*, Zagreb: Official Gazette Ltd., 108/1996, 79/2007.

<sup>44</sup> Kubis, D., §131 in: Goette, W., Habersack, M., Kalss, S.: *Münchener Kommentar zum Aktiengesetz*, 5. Auflage, München: C. H. Beck, 2022, Rn 117; Drinhausen, F., §131 in Hölter, W., Weber, M.: *Aktiengesetz Kommentar*, 4. Auflage, München: C.H. Beck – Verlag Vahlen, 2022,



management board must provide information based on shareholders' information right (because the grounds for refusal are not met under the shareholders' right to information), then it can be argued that providing the information to shareholders cannot be qualified as a breach of the duty of confidentiality.<sup>45</sup>

Second, as both legislators provide for criminal liability in case of manager's breach of confidentiality,<sup>46</sup> it opens a question can managers be held criminally liable for breaching the duty of confidentiality if they provide the information to shareholders based on the shareholders' information right? The answer on this question should be clear – if managers must provide the information to shareholders because there was no ground for refusal under the shareholder's right to information provisions, disclosing the information was not unlawful.<sup>47</sup> Thus, in such cases there is no ground for managers' criminal liability.

Finally, the authors question the legal validity of agreements between shareholders and the companies under which the company agrees to provide additional corporate information to certain shareholders or even third parties. Obligation to provide corporate information outside of the general meeting is often a part of the so-called shareholders agreements (further in text: SHA). German legal doctrine uses a specific test to determine whether the manager has breached confidentiality, which authors consider could also be used to determine the validity of information clauses in SHA. In particular, managers should assess the advantages and disadvantages of disclosure risk of certain corporate information in each case, i.e., each time they disclose the information, where they should confront, on the one hand, the company's interest in confidentiality with, on the other hand, company's business interest to disclose the information in a particular case.<sup>48</sup> Thus, if the SHA consists of a clause under which the managers are obliged to disclose confidential information to a particular party, regardless of whether that party is a shareholder or not,

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Rn 29; Koch, J., §131 in: üffer, U., Koch, J.: *Aktiengesetz*, München: Verlag C. H. Beck, 2024, Rn 87. The same is accepted for Croatian law as well. See Barbić, J.: *Pravo društava: Knjiga druga, Društva kapitala, Svezak I, Dioničko društvo*, Zagreb: Organizator, 2010, p. 798.

<sup>45</sup> Kubis, D., 2022, *op. cit.*, Rn 117.

<sup>46</sup> For Croatia, see article 262 of Official Gazette: *Criminal Code*, Zagreb: Official Gazette Ltd., 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, 36/24. For Germany see § 404 of AktG.

<sup>47</sup> Kubis, D., 2022, *op. cit.*, Rn 138.

<sup>48</sup> Spindler, G., *op. cit.*, Rn 168. For Croatian law, Barbić argues that the objective interest of the company, i.e. shall the company suffer any damage if the information is disclosed, is a standard for deciding whether an information is confidential. Barbić, J., *Pravo društava: Knjiga druga, Društva kapitala, Svezak I, Dioničko društvo*, Zagreb: Organizator, 2010, p. 797. If applied to a due diligence dilemma, we can argue that the management board should apply an individual test regarding each information, as for bringing any other decision.

German legal doctrine concludes such clauses might be qualified as void.<sup>49</sup> The ratio is that such clauses do not allow for a balance of the risks for the company as described. The examples when disclosure of information could be qualified in the interest of the company are if the party to whom the information is being disclosed provides financial support for capital increase or other financial benefit, offers possible new business relationships, offers a know-how for business, etc.<sup>50</sup>

The authors argue for the same conclusion in Croatian law due to the following arguments. First, the management board's duty of confidentiality is a mandatory provision of the CA, and it represents a part of the managers' duty of care.<sup>51</sup> Second, under the managers' liability set in article 252/1 of the CA, the managers must prove the application of a duty of care or the so-called business judgement rule as the ground for the exculpation. In order to be successful in their claim, he/she should prove that the proper assessment was applied when deciding upon the disclosure of certain information. Logically, managers should address a particular claim for breach of confidentiality and prove that they have applied the business judgment rule properly in that particular case. In that regard, advance approval of disclosing certain information without assessing each request individually would represent a weak defense for the managers, as it would be questionable whether any business judgment rule was applied in disclosing disputed information. Third, a clause in the SHA that gives additional information rights to certain shareholders cannot be grounds for managers' exculpation, even though the parties to the SHA would often be the company and not the managers. The ratio is the mandatory nature of managers' duty of care and duty of confidentiality.

To conclude, the management board should be cautious regarding provisions in the SHA that provide certain shareholders with the right to additional information. They should be aware that such clauses do not free them from applying the business judgment rule when deciding upon disclosure of each particular information, which is the legal standard equally applied to Croatian joint-stock companies and LLCs. Such clauses could be qualified as void if their effect could be interpreted as contradictory to Article 252 of the CA.

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<sup>49</sup> *Loc. cit.* See Linker, A. C., Zinger, G.: Rechte und Pflichten der Organe einer Aktiengesellschaft bei der Weitergabe vertraulicher Unternehmensinformationen, *Neue Zeitschrift für Gesellschaftsrecht*, 11 2002, p. 500. If disclosure of confidential information is coupled with indemnity agreements for managers in cases of any damages arising out of the disclosure, it could even trigger criminal liability of managers.

<sup>50</sup> Linker, A. C., Zinger, G., *op. cit.*, p. 500.

<sup>51</sup> Article 252 CA; Barbić, J.: *Pravo društava: Knjiga druga, Društva kapitala, Svezak I, Dioničko društvo*, Zagreb: Organizator, 2010. p. 790.

## 5. THIRD PARTY RIGHT TO OBTAIN THE CORPORATE INFORMATION OR THE SO-CALLED DUE DILIGENCE DILEMMA?

Firstly, it is necessary to determine if corporate laws extend the shareholders' information right to third persons, who are not shareholders. On the EU level, the SRD I and II provide that it is "every shareholder" that has the right to ask questions related to items on the agenda.<sup>52</sup> There is no mention of a third party with the same right. On the national level regarding the joint-stock companies, German<sup>53</sup> and Croatian<sup>54</sup> legislators also strictly mention the shareholders as the entitled party to search the corporate information from the company. The same is provided for the shareholders in LLCs.<sup>55</sup> The legal nature of shareholders' information determines this right as an individual shareholder's right, which every shareholder can exercise, regardless of having the voting or non-voting share or the amount of shares.<sup>56</sup> Thus, a third party, regardless being a creditor or a person with a legal interest in the company, cannot request information based on the shareholders' information right, even in the cases when they are permitted to attend the general meeting of the company (except in cases when they act as a proxy).<sup>57</sup> Furthermore, even if a third party claims that it will become a future shareholder they would not meet the criteria for application of shareholders' information right.<sup>58</sup>

The authors shall further discuss the so-called due diligence dilemma, or the question can the company or shareholders disclose the corporate information to a potential investor or a buyer who remains a third party, not a shareholder, during the so-called due diligence process. Potential buyers of the company's shares or investors often request the due diligence, i.e. an investigation and analysis of all legal and economic affairs of the target company, which in

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<sup>52</sup> See Article 9 of the SRD I.

<sup>53</sup> See §131 of AktG.

<sup>54</sup> See article 287 CA.

<sup>55</sup> See §51a GmbHG and article 447 CA. For the analysis of similarities and differences regarding the shareholder's information right in joint stock company and limited liability company, see Čulinović Herc, E., Jurić, D., Madžarov Matijević, S.: Pravo na obavještenost u društvima kapitala – granice ujednačavanja rješenja i otvorena pitanja primjene, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 41(1) 2020.

<sup>56</sup> Koch, J., 2024, *op. cit.*, Rn 4.

<sup>57</sup> Teichman, C.: Information rights of shareholders in German company law, in Randall, T., Giudici, P., Varottil, U. (eds): *Research Handbook on Shareholder Inspection Rights: A Comparative perspective*, Cheltenham: Edward Elgar Publishing Limited, 2023, p. 130.

<sup>58</sup> Herrler, S., *op. cit.*, Rn. 57.

practice evolves into a complex and expensive process.<sup>59</sup> The core idea is to disclose all the information relevant to the company to the potential buyer, who remains a third party, not a shareholder, during the due diligence process.

In corporate law theory, the due diligence dilemma is primarily discussed within the management board's duty of confidentiality.<sup>60</sup> The management board of joint-stock company can decide on the conduct of a due diligence process through a resolution of the entire board, weighing the risks associated with the disclosure (the approval of the supervisory board may also be required). The greater the risk of information misuse for the company, the more extensive the protective measures the board must implement (signing a confidentiality agreement, selective disclosure, involving an independent expert).<sup>61</sup> The board exercises discretion based on the business judgment rule weighing the risks of disclosing information, such as revealing know-how or confidential third-party data, against the company's interest in the sale.<sup>62</sup> A common practical solution to reconcile conflicting interests of a potential buyer of a company as an external party and of a seller, is to conduct due diligence only after a Letter of Intent (LOI) is signed, which typically includes a Non-Disclosure Agreement (NDA) which details the confidentiality obligations and non-use clauses imposed on the potential buyer, often enforced with substantial contractual penalties.<sup>63</sup>

Regarding LLC, the managing director must obtain the approval of the shareholders before allowing a due diligence review. The same applies if a shareholder requests information from the management under §51a GmbHG and intends to pass this information on to a potential buyer.<sup>64</sup> Both the company and its managing directors, as well as the shareholders, are prohibited from acting on their own authority (without the appropriate decision of the shareholders) from forwarding information and documents about the company and its operations to third parties for the purpose of due diligence.<sup>65</sup> Confidentiality clauses

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<sup>59</sup> See e.g. Kaal W.A.: Private fund investor due diligence: evidence from 1995 to 2015, *Review of Banking and Financial Law*, 36(1) 2016.

<sup>60</sup> Krömker, M.: Der Anspruch des Paketaktionärs auf Informationsoffenbarung zum Zwecke der Due Diligence, *Neue Zeitschrift für Gesellschaftsrecht*, 9 2003, p. 418.

<sup>61</sup> Liese, J., Theusinger, I., § 27. Compliance in M&A-Transaktionen, in: Hauschka, C., Moosmayer, K., Lösler, T.: *Corporate Compliance*, 3. Auflage, München: C. H. Beck, 2016, Rn. 37-38.

<sup>62</sup> Beisel, D., *op. cit.*, Rn. 24.

<sup>63</sup> Beisel, D., *op. cit.*, Rn. 18.

<sup>64</sup> Liese, J., Theusinger, I., *op. cit.*, Rn. 36.

<sup>65</sup> Lutter, M., Hommelhoff, P: *GmbHG-gesetz: Kommentar*, 18. Auflage, Köln: Dr. Otto Schmidt, 2012, Rn. 24a and b

in the AoA are also permissible.<sup>66</sup> Generally, the mere intention to sell a share in a GmbH does not justify refusing access to information. German legal doctrine has also addressed the issue of exercising the inspection rights through experts. The involvement of an expert is permissible, as long as the principle of confidentiality is observed.<sup>67</sup> Company internal matters do not have to be disclosed to third parties except in the case of professionals who are obligated by their profession to maintain confidentiality.<sup>68</sup> For example in cases of legal advice or in connection with the sale of the shares. However, if there are concerns that the buyer might use the information to the detriment of the company or an affiliated company, or when revealing information could lead to potential damage claims from company's contractual partner,<sup>69</sup> the information can be withheld.<sup>70</sup>

## 6. SHAREHOLDERS' AGREEMENTS AS CONTRACTUAL TOOLS FOR EXPANSION OF SHAREHOLDERS' INFORMATION RIGHTS

SHA is a contract which company or its shareholders widely use in corporate practice.<sup>71</sup> In short, it is considered to be a contract where at least one contractual party is the company or shareholder, and subject matter of the contract concerns the company, shares of the company or relations between the shareholders.<sup>72</sup> In most EU countries this contract is not regulated by law.<sup>73</sup>

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<sup>66</sup> Schmiegelt, K., Schmidt, M., *op. cit.*, Rn. 71.

<sup>67</sup> Schmidt, K., § 51a, *op. cit.*, Rn. 27; Hillmann, R. §51a, in: Fleischer, H., Goette W.: *Münchener Kommentar zum GmbH-Gesetz*, Band 2 (§§35–52), München: C. H. Beck, 2019, Rn. 60. Higher Regional Court München: Case 31 Wx 48/07, 11.12.2007. See OLG München: *Einsicht in Jahresabschlüsse durch Gesellschafter einer GmbH*, FGPrax 2008, p. 81.

<sup>68</sup> Hillmann, R., *op. cit.*, Rn. 60

<sup>69</sup> In the absence of an express agreement concerning a due diligence review, the intent of the contract partner must always be considered. Liese, J., Theusinger, I., *op. cit.*, Rn. 44-45.

<sup>70</sup> If a shareholder intends to misuse the data by sharing it with a third party, the shareholder's request for information may be even considered as a breach of loyalty. Beisel, D., *op. cit.*, Rn. 21-22.

<sup>71</sup> Capital market law, especially venture and equity funds significantly contributed to popularity and development of SHA in corporate practice. For an overview see Cumming D., Johan, S. A.: *Venture capital and private equity contracting: An international perspective*, Academic Press, 2009.

<sup>72</sup> See for example in Cadman, J.: *Shareholders' Agreements*, London: Sweet & Maxwell, 2003, p. 3.

<sup>73</sup> For Germany see Mock, S., Germany, in: Mock, S., Csach, K., Bohumil, H.: *International Handbook on Shareholder' Agreements, Regulation, Practice and Comparative Analysis*, Berlin: De Gruyter, 2018, p. 279.

Recently, Croatian Parliament adopted 2024 amendments of the CA, which introduced the obligation of shareholders who conclude a SHA to disclose this information to the company, and then the company discloses it in the court register.<sup>74</sup> The CA provides that the article 293.a applies to listed joint-stock companies only. The obligation to disclose is limited depending on the content of the SHA (not all SHA) and not all content of the SHA, but only the fact that the SHA has been concluded, the purpose of the SHA and the means achieving that purpose as provided for in the SHA. The limitations of contractual content of SHA should be found in mandatory corporate and obligations law provisions of the CA and the Croatian Obligations Act.<sup>75</sup> The only statutory restriction in the CA regarding the content of SHA is the prohibition to contract any compensation or benefit in the SHA on how to vote at the general meeting.<sup>76</sup> All other provisions from the SHA must be interpreted in accordance with the general corporate and contract law in order to interpret their validity.

#### *6.1. RESEARCH OF INFORMATION AND DUE DILIGENCE CLAUSES IN SHAREHOLDERS' AGREEMENTS IN CROATIAN PRACTICE*

As SHA are not publicly available and are of confidential legal nature, the authors conducted research based on a random sample of a total of ten SHA collected from Croatian corporate lawyers and companies, from which six texts were in the form of a template already applied to (unknown) number of SHA in practice (for both joint-stock and limited liability companies), and four were legally binding SHA (two for joint-stock and two for limited liability company). The goal of the research was to establish whether the SHA provides information clauses which grant additional information rights to certain share-

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<sup>74</sup> Article 293.a of the 2024 amendments of the CA (adopted in on 7<sup>th</sup> of November 2024). See on webpage: [https://www.sabor.hr/sites/default/files/uploads/sabor/2024-11-06/143601/PZE\\_84.pdf](https://www.sabor.hr/sites/default/files/uploads/sabor/2024-11-06/143601/PZE_84.pdf), last accessed on 11/11/2024. For an overview before the 2024 amendments of CA regarding the SHA see Braut Filipović, M.: How can shareholders' agreements shape corporate governance and directors' liability?, *InterEULawEast*, 9(2) 2022, p. 201.

<sup>75</sup> For Croatian law, see Article 2 of the Croatian Obligations Act (NN no. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23). For German law see § 134 and § 138 of the BGB (Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 9 des Gesetzes vom 16. Juli 2024 (BGBl. 2024 I Nr. 240) geändert worden ist)

<sup>76</sup> Such a contractual provision would be classified as a misdemeanor. For Germany see § 405 par. 3, no. 6 and 7 of AktG and Articles 631/1/7 and 631/1/8 of the CA. If we consider voting shareholders' agreement, in that case corporate law would further pose restrictions such as nullity of shareholder's voting according to the instructions of management or supervisory board, that only shareholders have voting rights at the general meeting and other.

holders and to assess if drafted clauses are valid. Further, authors analyzed if SHA refer to the due diligence dilemma regarding the potential sale of shares.

In SHA for both joint-stock companies and LLCs, authors found clauses which provide for some additional information right to a certain shareholder. These provisions are called “Information right” or “Reporting requirement”. The common feature of these provisions is that the subject who promises to deliver information to a certain shareholder is the company, and not an individual shareholder or manager. As the company is represented by the management board, the management board shall primarily be faced with the obligation to provide additional information based on the content of the SHA. As to the content of the information, examined SHA provide various information, mostly of the financial nature such as quarter report of the managers on profit and loss accounts, balance sheets, cash flow statements and forecast, and any other additional information on investors’ request. For the need of the legal discussion in this article, of the particular interest we find clause providing that the company shall notify the investor/shareholder “of any important event that may have a material impact on the company’s business, assets, operations, results of operations of financial condition without undue delay after any member of the Management Board becomes aware of such event.” Particularly troublesome we find the clause in one SHA which provides that the copy of the minutes of the meeting of management board shall be delivered to certain investors/shareholders.<sup>77</sup>

In authors’ opinion, drafters of the information clauses in SHA should bear in mind that the managers’ duty of confidentiality is a mandatory provision for both joint-stock company and LLCs in Croatian law. As previously analyzed, managers should apply the test of balance of the company’s interest between withholding and disclosing the confidential information for each particular request to provide the information. If one could interpret information clauses in SHA as the waiver of the managers’ obligation to apply the described test and favor the standpoint that the managers should “automatically” deliver information provided in SHA, authors consider that such clauses should be void as they provide for managers’ obligation to act contrary to their duty of confidentiality. Vice versa, if information clauses in SHA could be interpreted in a way that

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<sup>77</sup> Particularly when taking into account the German legal doctrine standpoint, which holds that requests for information related to confidential data discussed in supervisory board meetings should not be answered (this includes the behavior of supervisory board members during discussions and voting, as well as the course of discussions and the content of adopted decisions). This also applies to everything related to the cooperation between the management board and the supervisory board within the scope of the supervisory board’s activities, as otherwise, the confidential collaboration between these two bodies would be jeopardized. See: Poelzig D., *op. cit.*, Rn. 68.



the disclosure of the information should be done only if it is in accordance with the duty of confidentiality, these clauses would still be valid.

As to the due diligence dilemma, authors found that some SHA in Croatian practice expressly deal with that situation, within the so-called “Confidentiality clauses”. In one example, the SHA contained a clause under which a shareholder could disclose a confidential corporate information to a potential buyer of the shares, under the conditions that the parties concluded a non-disclosure agreement and that the information disclosed concern the company but not the other shareholders. In another SHA, disclosure of confidential information by the company to various experts was expressly allowed if these experts are obliged to confidentiality due to their profession (such as lawyers) or under the non-disclosure agreement. We consider that such clauses are in accordance with the due diligence dilemma previously discussed.

However, managers should be aware that there should be no simple forwarding of the information to a certain shareholder or providing confidential information under the NDA to potential buyer, because the managers’ duty of care, especially duty of confidentiality requests assessing the company’s interest in each particular case.

## **7. EXPANSION OF SHAREHOLDERS’ INFORMATION RIGHTS LEADS TO THE NEW MODEL OF CORPORATE GOVERNANCE?**

Investors perceive acquiring information before and during their investment period as a tool for obtaining control over the investment, especially if the investment consists of contingency payment.<sup>78</sup> However, given the potentially wide range of information that can be provided to individual shareholders through the SHA, we can debate the exact purpose of such broad information for shareholders. The answers to these questions depend on each individual SHA, and authors call for further research on clauses in SHA which have the goal to influence decision-making process of other shareholders or management of the company.

Corporate law has already set the balance between shareholders, management and supervisory boards regarding the access to corporate information. As for both joint-stock companies and LLCs, shareholders delegate the management

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<sup>78</sup> Dessein, W.: Information and Control in Ventures and Alliances, *The Journal of Finance*, 60(5) 2005, p. 2535.

of the company to a separate body – management board or board of directors.<sup>79</sup> Corporate laws provide that the management bodies have unlimited access to corporate information (management and cost effectiveness) and the management board serves as a filter of information to all other corporate bodies, shareholders and third parties.<sup>80</sup>

By providing detailed information about the company's operations, and especially the minutes from the board meeting to one shareholder, the paradigm of corporate governance as regulated by the CA can be changed, because, slowly but surely, control shifts to the specific, contractually created controlling shareholders. Whether considering shareholders with the extended right to corporate information as an additional value to the company (through the collaboration paradigm)<sup>81</sup> or as a new source of control<sup>82</sup> is debatable. In each case, it creates at least two new issues. First, should the equality of the shareholders principle be reinforced or treated as an obstacle for future development of corporate governance practices? Second, should we support a power shift from management board/board of directors to shareholders in managing the company? Authors call for future rethinking and debate on the new moments in corporate governance which are openly dissenting from the corporate governance as set in statutory corporate laws.

## 8. CONCLUSION

In this paper, authors analyzed the legal grounds for providing additional corporate information to only selected shareholders on the basis of the shareholders' right to information institute and managers' duty of confidentiality provisions. The research was limited on joint-stock companies and LLCs in a comparative

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<sup>79</sup> Armour, J., Hansmann, H., Kraakman, R., Pargendler, M.: What is corporate law?, in: Kraakman, R., Armour, J. (eds.): *The Anatomy of Corporate Law: A Comparative and Functional Approach*, Croydon: Oxford University Press, 2017, p. 11.

<sup>80</sup> To compare, for joint-stock companies, German scholars debate whether the supervisory board can have access to all corporate information, and should they request this information directly or from the management board. The prevailing opinion is the latter, which puts the supervisory board in subordinated position regarding the access to information (while supervisory board should have a wider access to information than the shareholders!). See Davies, P. L., Hopt, K. J.: Corporate Boards in Europe - Accountability and Convergence, *American Journal of Comparative Law*, 61(2) 2013, p. 332.

<sup>81</sup> Fisch, J. E., Sepe, S. M.: Shareholder Collaboration, *Texas Law Review*, (98) 2020, pp. 863, 865.

<sup>82</sup> For an overview see Hill, J. G., Thomas, R. S.: *Research Handbook on Shareholder Power*, *Research Handbooks in Corporate Law and Governance series*, Cheltenham: Edward Elgar Publishing Inc., 2015.

sample, including EU and national corporate laws of Germany and Croatia. Authors questioned the limits of shareholders' right to information coupled with managers' duty of confidentiality to determine the shareholders' right in seeking the corporate information. It is clear that the managers' duty of confidentiality is a legal standard that should be used for determining shareholders' right to additional information, which surpasses the shareholders' statutory right to information. Authors conducted research on the random sample of SHA in Croatian practice. It was found that Croatian SHA often contain provisions which grant various additional information rights to selected shareholders and provisions dealing with the due diligence right of the potential buyers of the company shares. The authors took the standpoint that the practice of providing information above the statutory minimal rights could be questioned as a breach of confidentiality issue depending on the circumstances of the case. If the information clauses in SHA could be interpreted as an advance consent of the managers to provide certain information without applying the duty of confidentiality for assessing each particular case, such clauses should be considered void. The same conclusion applies for providing confidential information under the NDA to potential buyer, because the managers' duty of care, especially duty of confidentiality requests assessing the company's interest in each particular case. Additional research should encompass the specific challenges of information disclosure, including, but not limited, to insider trading prohibition for listed companies. Finally, authors call for future rethinking and debate on the new moments in corporate governance caused by the rise of shareholders to whom the company granted an extended access to corporate information.

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