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An alternative for minority shareholders to obtain information from the company?

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Information is one of the essential rights recognized by the Spanish Companies Act (SCA) to all shareholders. The general view is that the information right has an autonomous nature and is independent from, not ancillary to, the voting right. The rationale is that all shareholders –even those with no voting rights- are entitled to control the company's businesses, the way directors are running the company and the decisions taken by the board and the general shareholders meetings (GSM). Furthermore, as the Supreme Court has put it[1], this right is particularly important for minority shareholders in closed companies, with a small number of shareholders, given the difficulty they have to sell their shares.

However, generally speaking, shareholders' right of information is limited to information relating to the specific items in the agenda of the GSM.

Following the reform of the SCA in 2014, breach of this right not always entitles the aggrieved shareholder to challenge the GSM resolutions, as corporate resolutions can only be challenged based on a breach of the information right provided (i) the latter has been exercised, at least, seven days before the GSM, and (ii) the specific information requested was essential for the shareholder to exercise its voting or "participation" rights.

Additionally, only shareholders holding, at least, one per cent of the share capital have legal standing to challenge GSM resolutions; otherwise, they are only entitled to seek damages.

When the right is not exercised prior to, but at the very GSM and the information requested is essential, then shareholders may seek (i) specific performance of the company's obligation to provide information and (ii) damages (article 197.5 SCA). However, the consequences of denying information which is not essential are unclear (a recent judgment from a Court of Appeals seems to consider that in those cases there is also resort to specific performance).

Shareholders who have not received the relevant information may request it through full-fledged or preparatory contentious court proceedings, but also through a relatively new, non-contentious court petition, pursuant to articles 112 et ss. of the Act on Voluntary Jurisdiction (AVJ).

Indeed, it seems that the AVJ may be used as an alternative to the traditional contentious proceedings to request corporate information, with three advantages: (i) it does not prevent the petitioner from eventually bringing a contentious court action (preparatory or fully-fledged), (ii) it allows the petitioner to gauge the merits of a subsequent action in the light of the information obtained and (iii) there are reasons to claim that the petitioner does not run the risk to pay defendant's legal costs if the petition is dismissed.

[1] Judgment num. 531/2013 of 19 September 2013.

The problem that arises is that (i) articles 112 et ss. of the AVJ refer to the right to seek the production of "books, documents and accounting materials", while (ii) the items in the GSM agenda not always refer to accounting matters. The question is therefore whether shareholders may still resort to the AVJ to request non-accounting information.

There is scarce jurisprudence on the matter, as the AVJ only came into force on 23 July 2015. However, some Courts of Appeals have already ruled that:

- The AVJ is one of the means that shareholders have to enforce their information rights. For instance, in an order of 6 February 2017, the Valencia Court of Appeals[2] expressly declared that the AVJ contains an appropriate way to "request compliance with the obligation to provide information" set out in article 197.5 SCA. Other Court of Appeals have adhered, directly or indirectly, to the same principle.

- As to the type of information that may be requested through the AVJ,

  (i) the relationship between the information requested and the specific items included in the agenda has to be interpreted extensively[3], and

  (ii) the terms used by the AVJ –"books, documents and accounting materials"– have also to be construed broadly, so as to include, not only purely accounting matters, but also documents which may refer to the company's financial situation, including banking and tax documentation, customers' and suppliers' lists, invoices, etc.

This broad interpretation is in line with the Spanish Commercial Code, when it refers to the obligations of all merchants to keep certain documentation (articles 25 et ss.). The Code goes as far as to refer to "books, correspondence, documentation and receipts related to their business".

This is also the doctrine laid down by the Supreme Court when construing the shareholders information right regarding annual financial statements and directors' and auditors' reports. For instance, in a judgment dated 13 December 2012 the Supreme Court ruled that the type of information that shareholders are entitled to request is not only "numbers", but any document that may reasonably allow them to (i) control the management of the company and the fulfilment by its directors of their duties (loyalty, diligence, etc.) and (ii) propose the commencement of directors' liability actions.

In conclusion and bearing in mind that there is not yet a totally settled jurisprudence on the matter, the AVJ may be an interesting, less aggressive and less costly court proceeding available to minority shareholders to demand information about the items in the agenda of a GSM when the company does not voluntarily provide it; and one which does not compromise subsequent traditional, fully-fledged actions.

[2] Order num. 53/2017 of 6 February 2017.
[3] Note that this conclusion is in line with the doctrine of the Supreme Court on the information right in general.