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Shareholders must negotiate the right to obtain information

We pointed out previously that shareholders do not benefit from an extensive right to be kept informed of the affairs of the company in which they are shareholders. Article 697 of the Swiss Code of Obligations (CO) only gives them that right to a limited extent, i.e. for the affairs of the company, but only to the extent required to exercise their rights as shareholders and only at the company's ordinary general meetings.

The way of extending this right therefore would involve negotiating such an extension, either in the articles of association or in a shareholder agreement. The articles of association seldom contain a clause of this type. The founders do not consider issues of this kind because, as a rule, they sit on the Board of Directors and, that being so, are able to obtain all the information needed to administer the company directly.

In reality, the question of the right to information only arises when a new investor subsequently joins the company's capital. He will want in fact to obtain the indicators necessary to enable him to ascertain for himself whether the conditions for his investment are fulfilled. This investor will therefore be well-advised to negotiate a clause in the shareholder agreement or in the investment contract enabling him to obtain all the information he wishes to have from the Board of Directors.

In practice, this investor will wish to obtain regular reports (monthly or quarterly) on the company's financial situation. He will ask to obtain regular updates of the company's business plan. He will require access to the company's accounting and financial indicators and to the terms and results of its internal audit system. Incidentally, provision of this information, however legitimate it may be, will create a substantial workload for the company.

On the other hand, even if he makes a demand to this effect, we take the view that, if this investor intends simply to remain a shareholder and does not wish to take a seat on the Board of Directors with the responsibilities carried by that position, he cannot be granted the right to access the company's business secrets. The investment contract or the shareholder agreement are in fact contractual relationships concluded between investors and shareholders. The latter cannot therefore contribute something to which they do not themselves have access because these secrets are owned by the company. Moreover, assuming that the Board of Directors is a party to these contracts, it cannot give access to such secrets without a substantial consideration or commitments which guarantee that the long-term interests of the company represented by it, and whose interests it is responsible for defending, will not be jeopardised.

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