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SHAREHOLDERS' INFORMATIONAL RIGHTS IN AN ITALIAN LIMITED LIABILITY COMPANY (S.R.L.)

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**SHAREHOLDERS' INFORMATIONAL RIGHTS
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AN ITALIAN LIMITED LIABILITY COMPANY (S.R.L.)**

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Abstract:

The paper investigates features of, and limits to, the right to information a shareholder of a Limited Liability Company under Italian law (S.r.l.) has vis-a-vis the management. The broad extension of this right, coupled with the absence of objective standards in well-established case law, raises concerns that its exercise may be used as a means to exert illicit pressure on management and, in some cases, substantially paralyze a company's activities. There is widespread consensus among authors about the need to balance the right to information of a single shareholder with the interests of the company (e.g. confidentiality, protection of industrial secrets, and competition), as, in certain cases, this would allow directors to legitimately deny requests that could be detrimental to the company. The paper aims to identify the circumstances in which management opposition to shareholder requests may be considered legitimate. Furthermore, it investigates whether and how the right to information may be derogated or regulated through the inclusion of specific provisions in the corporate By-laws.

Keywords: corporation; limited liability; management; directors; shareholders; informational rights; right to control; right to inspect.

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1. RIGHT TO INFORMATION

1.1. *PRELIMINARY CONSIDERATIONS*

The reform of Italian company law has introduced, under Art. 2476, 2nd paragraph (“c.”), of the Italian Civil Code (“c.c.”) ⁽¹⁾, a significantly extended regulation on the right to information of a shareholder of a società a responsabilità limitata (“S.r.l.”, a Limited Liability Company under Italian law) *vis-a-vis* the management of the company.

The new regulation highlights the intention of the legislator to provide the shareholder who does not take part in the management with wide and penetrating powers of review over the directors of the company.

The extension of these powers, considering the standards currently available, raises some risks. Indeed, an investigation aimed at identifying possible limits to the shareholder’s informational rights unveils a regulatory system dangerously biased towards an ironclad protection of the shareholder’s rights.

Certainly the identification of the boundaries of a shareholder’s right to information appears difficult for three reasons:

As to statute law, the relevant code provisions contain numerous gaps that allow diverging interpretations on the extension of the shareholder’s rights.

As to court decisions, the available rulings pertain to companies of limited size that conduct business that does not involve confidentiality issues or critical industrial secrets, and mostly, arguably, without a board of auditors or external accountancy firm auditors. The absence of more articulated precedents combined with opinions usually very short and concise, are not useful in predicting case law in more complex situations.

As to the opinions of legal scholars, the large spaces left to interpretation appears to lead to a certain self restraint in providing clear-cut solutions. As will be explained better *infra*, most of the suggestions as to the possible arguments directors may employ to limit shareholders’ informational rights consist in suggestions on the drafting of possible By-law provisions.

As a consequence, current regulation on the limits to informational rights does not appear to be characterized by a set of objective standards that may help to determine solid grounds for opposing a

(1) See Legislative Decree January 17, 2003, No. 6. Previously the relevant code provision – Art. 2489 c.c. – provided for a shareholders’ much more limited right to information in that: (i) the right to information was recognized only in an S.r.l. without a board of auditors; (ii) the shareholder had the right to review only the corporate books; (iii) only shareholders representing at least one third of the corporate capital had the right to launch an audit on the company management at their own expense and once a year.

shareholder's power when its exercise constitutes serious disruption to the business activity of the company ⁽²⁾.

It has been argued that, given the absence of well-established case law that could provide safe guidance, the matter is characterized by a substantial dangerous *deregulation* ⁽³⁾. This, coupled with the objective extension of the right under the Civil Code, may entail the risk that the right to information may be used as a means to exercise illicit pressure on the management ⁽⁴⁾ and possibly substantially paralyze the company's activities ⁽⁵⁾.

Understandably, the right to information has even been described as a "poison pill", making it prudent and advisable to avoid adopting a corporate structure such as the S.r.l. ⁽⁶⁾.

In this context, the identification of a number of arguments that may support reasonable limits to such a broad right to information may positively contribute to the development of a wider and deepened regulation of the matter.

1.2. DEFINITION AND CONSEQUENCES OF FAILURE TO MEET A SHAREHOLDER'S REQUESTS

Pursuant to Art. 2476, 2nd c., c.c., a shareholder of an S.r.l. who "does not take part in the management" ⁽⁷⁾ has a right to information that consists of:

- a) a right to receive information and data from the directors concerning all business matters ("right to information and data");

⁽²⁾ Courts rarely allow the directors to oppose the exercise of the right to information (see, however, Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972), even though it is worth mentioning that case law is limited to the S.r.l. of limited size, most frequently without a board of auditors or external accountancy firm, and where the type of business does not raise critical issues pertaining to industrial secrets or other confidentiality duties.

⁽³⁾ Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata*, in *Giur. comm.*, 2005, 801.

⁽⁴⁾ Renna, *Il diritto di controllo del socio non amministratore di s.r.l.*, in *Giur. it.*, 2008, 130; Arato, *Il controllo dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1195; Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, edited by Maffei Alberti, Padova, 2005, 1977.

⁽⁵⁾ Cagnasso, *Diritto di controllo dei soci e revoca dell'amministratore per gravi irregolarità: primi provvedimenti in sede cautelare relative alla "nuova" società a responsabilità limitata*, in *Giur. it.*, 2005, 316.

⁽⁶⁾ Ambrosini, *Comment to art. 2476 c.c.*, in *Società di capitali*, edited by Niccolini and Stagno d'Alcontres, Napoli, 2004, 1609; Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, edited by Maffei Alberti, Padova, 2005, 1976. Furthermore, Abriani, *Controlli e autonomia statutaria; attenuare l'"audit" per abbassare la "voce"*, in *Analisi giur. econ.*, 2003, 342, evidences the risk of interference in an S.r.l. of larger size between the shareholder and the board of auditors/external auditors. In order to avoid the company becoming a victim of its minorities, it is advisable to employ an S.r.l. only in companies of limited size where all the shareholders cooperate directly in its management. The rigidity brought about by the right to information concerning an S.r.l. should advise to choose the S.p.A. type of corporation for more structured companies. See Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata*, in *Giur. comm.*, 2005, 808 and also Bartolomucci, *Configurazione e portata del diritto di controllo del socio non gestore di s.r.l.*, in *Società*, 2009, 1336.

⁽⁷⁾ But a minority shareholder who appoints a non-executive director without proxy (or veto powers) maintains his right to information. See, among others, Trib. Taranto, July 13, 2007, in *Giur. it.*, 2008, 122; Cesiano, *Il (limitato?) diritto di consultazione del socio ex-amministratore nella S.r.l.*, in *Società*, 2010, 1140. The shareholder preserves his right to information when the company has appointed a board of auditors, see Rodorf, *I sistemi di amministrazione e di controllo nella nuova s.r.l.*, in *Società*, 2003, 664; Parrella, *Comment to art. 2476*, in *La riforma delle società. Commentario del d.lg. 17 gennaio 2003 n. 6*, edited by Sandulli e Santoro, Torino, 2003, 123; Santosusso, *La riforma del diritto societario*, Milano, 2003, 220; Zonarone, *Le altre società di capitali*, in *Diritto commerciale* edited by Allegri, Bologna, 2004, 316; Cagnasso, *Commento all'art. 2476 c.c.*, in *Il nuovo diritto societario. Commentario*, edited by Cottino, Bonfante, Cagnasso, Montalenti, Bologna, 2004, 1883; Ambrosini, *La responsabilità degli amministratori nella nuova s.r.l.*, in *Società*, 2004, 1587; Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata*, in *Giur. comm.*, 2005, 790; Abriani, *Comment to art. 2477*, in *Codice commentato delle s.r.l.* edited by Benazzo e Patriarca, Torino, 2006, 363. *Contra* Graziani – Minervini and Belviso, *Manuale di diritto commerciale*, Padova, 2004, 334; Buonocore, *La riforma delle società*, Milano, 2004, 93.

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- b) a right to inspect (including through trusted professionals): i) the corporate books and records, and, ii) documents pertaining to the management of the company (“right to inspect”).

The right to information and data basically involves anything, with the exception of personal data such as that of directors or shareholders ⁽⁸⁾.

The right to inspect comprises all corporate documents ⁽⁹⁾, i.e., not only corporate books, but also other documents pertaining to the management of the company, e.g., financial statements and related documents, contracts, agreements of any kind, and banking documents ⁽¹⁰⁾.

There are severe consequences for failing to meet shareholders' requests. A director who fails to satisfy a shareholder's *legitimately* exercised right to information may be subject to administrative and criminal law liability.

Indeed, pursuant to Art. 2625 c.c., a director who “(...) *impedes or, in any event, hampers the activities of review or of audit legally attributed to the shareholders (...)*” may receive an administrative fine of up to EUR 10,329. Moreover, if a complaint is filed against a director whose conduct has damaged the shareholders, that director may be sentenced to one year imprisonment ⁽¹¹⁾.

It is important to point out that the conduct punishable under this rule is the impeding of the right to information by (i) concealing documents, or (ii) engaging in other kinds of deception (e.g., an activity that impedes the exercise of the informational rights by altering the data). Neither type of conduct, therefore, appears compatible with omissions, i.e., simply not answering a shareholder's request for information ⁽¹²⁾.

⁽⁸⁾ See Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. merito*, 2008, 2279.

⁽⁹⁾ Except for an isolated opinion that does not include in the *documents* the accounting books and records (Associazione Disiano Preite, *Il nuovo diritto delle società*, edited by Olivieri, Presta, Vella, Bologna, 2003, 261), the majority of authors (for all see Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 448) and case law (see Trib. Milano, November 30, 2004, in *Giur.it.*, 2005, 1245; Trib. Chieti, May 31, 2005, in *Giur. it.*, 2005, 1652; Trib. Biella, May 18, 2005, in *Società*, 2006, 50; Trib. Ivrea, July 4, 2005, in *Giur. comm.*, 2007, 748; Trib. Catania, March 5, 2006, in *Giur. comm.*, 2007, 920; Trib. Pavia, June 29, 2007, in *De jure online*, 2008) make no distinction among the types of documents the shareholder is allowed to review.

⁽¹⁰⁾ Abriani, *Controlli e autonomia statutaria; attenuare l'“audit” per abbassare la “voce”*, in *Analisi giur. econ.*, 2003, 341, includes the shadow accounting in the *documents*. See also Buta, *I diritti di controllo del socio nella s.r.l.*, Milano, 2007, 609 ss.

⁽¹¹⁾ The administrative fines are applicable regardless of the subjective status (criminal intent *versus* negligence) of the wrongdoer. Given the description of the code provision, however, the conduct of the directors should be characterized by malice; see Giarda – Seminara (edited by), *I nuovi reati societari: diritto e processo*, Padova 2002, 468; Bernasconi, in Giunta (edited by), *I nuovi illeciti penali ed amministrativi riguardanti le società commerciali*, Torino, 2002, 76, *contra*, specifying that malice is required, Musco (and Masullo), *I nuovi reati societari*, Milano, 2007, 252; Antolisei, *Manuale di diritto penale. Leggi complementari. I, I reati e gli illeciti societari e bancari. I reati di lavoro e previdenza. La responsabilità degli enti*, edited by Grosso, Milano, 2007, 475.

⁽¹²⁾ Foffani, in Alessandri (edited by), *Il nuovo diritto penale delle società*, Milano, 2002, 387; Bernasconi, in Giunta (edited by), *I nuovi illeciti penali ed amministrativi riguardanti le società commerciali*, Torino, 2002, 74, Antolisei, *Manuale di diritto penale. Leggi complementari. I, I reati e gli illeciti societari e bancari. I reati di lavoro e previdenza. La responsabilità degli enti*, edited by Grosso, Milano, 2007, 307; but *contra* Giarda – Seminara (edited by), *I nuovi reati societari: diritto e processo*, Padova 2002, 462; see also App. Catania, November 11, 2009, n. 2012, in *Riv. pen.*, 2010, 175.

Where a director refuses a shareholder's request, the shareholder is entitled to seek an urgent decree from a court, pursuant to Art. 700 of Italian Civil Procedure Code, to order the directors to release the requested information or documents ⁽¹³⁾.

2. LIMITS TO THE RIGHT TO INFORMATION

2.1. THE BASIC LIMIT: THE ABUSE OF RIGHT

Case law almost unanimously defines the right to information ⁽¹⁴⁾ as a right (*diritto potestativo*), which is basically unlimited, provided that it is exercised in good faith ⁽¹⁵⁾.

A shareholder would be in breach of the duty of good faith for abusing the right to information, i.e., when exercising the right to information in a way that is: (i) anti-social, i.e., the shareholder's interests conflict with the corporate interests, or (ii) characterized by the intention to disrupt or thwart the company's activity ⁽¹⁶⁾.

In principle, where there is an abuse of the right to information, directors are legitimately entitled to refuse to release the requested information and documents to the shareholder (and the shareholder could be held liable for any possible consequential damage) ⁽¹⁷⁾.

As a matter of fact, asserting an abuse of right appears extremely difficult because:

- a) directors may oppose a shareholder's request only upon *evidence* of wrongdoing and, in most cases, such evidence is likely to be clear only "ex post", i.e., after the abuse has been committed, ⁽¹⁸⁾;
- b) the courts have applied the abuse exception quite strictly by substantially ruling out the possibility of directors refusing a request based on this exception when opposing a shareholder's request through: (i) arguments such as business confidentiality, industrial secrets

⁽¹³⁾ See Trib. Catania, March 3, 2006, in *Giur. comm.*, 2007, 920.

⁽¹⁴⁾ See Trib. Biella, May 18, 2005, in *Società*, 2006, 50; Trib. Ivrea, July 4, 2005, in *Giur. comm.*, 2007, 748; Trib. Bologna, December 6, 2006, in *Giur. comm.*, 2008, 213; Trib. Trento, October 27, 2006, in *Società*, 2007, 12; Trib. Roma January 16, 2008, in *Riv. not.*, 2009, 668; Trib. Civitavecchia, April 21, 2004, in www.dircomm.it; Trib. Taranto, July 13, 2007, in *Giur. it.*, 2008, 305; Trib. Pavia, June 29, 2007, in *De Jure Online*, 2008.

⁽¹⁵⁾ The recognition of a *diritto potestativo* evidences the individualistic approach to the right to information after the abolition of the judicial review of the Sr.l.; see on this point Cesiano, *Il (limitato?) diritto di consultazione del socio ex-amministratore nella S.r.l.*, in *Società*, 2010, 9, 1134, especially footnote 13.

⁽¹⁶⁾ See Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972; Trib. Catania, March 3, 2006, in *Giur. comm.*, 2007, 920; Grasso, *"Documenti relativi all'amministrazione" e diritto di consultazione di socio di s.r.l. non amministratore*, in *Giur. comm.* 2007, 929, who specifies the shareholder may act out of *non-corporate* interests but not out of interests against the company. On the abuse of right, generally, see Monateri, *La responsabilità civile*, Torino, 2006, 88. It has been pointed out that an abuse occurs when: i) the shareholder has no real need to obtain information/documents because his requests have already been met; ii) the shareholder's only purpose is to thwart the normal course of the business; and iii) the shareholder is a competitor of the company see Cesiano, *Il (limitato?) diritto di consultazione del socio ex-amministratore nella S.r.l.*, in *Società*, 2010, 1136-1137.

⁽¹⁷⁾ Fregonara, *I nuovi poteri di controllo del socio di società' a responsabilità limitata*, in *Giur. comm.*, 2005, 805-806; see also Patti, *Abuso del diritto*, in *Digesto*, Torino, 1991, 1 ss; Levi, *L'abuso del diritto*, Milano, 1993; Ferrari, *L'abuso del diritto nelle società*, Padova, 1998.

⁽¹⁸⁾ See Fregonara, *I nuovi poteri di controllo del socio di società' a responsabilità limitata*, in *Giur. comm.*, 2005, 806. Expressly on this issue Trib. Roma, January 16, 2008, in *Riv. notariato*, 2009, 668.

or competition issues ⁽¹⁹⁾ (see *infra* paragraph 2.2.); or (ii) other kinds of practical constraints (see *infra* paragraph 2.3.).

The following paragraphs 2.2. and 2.3. provide a brief overview of the content and boundaries of the abuse exceptions developed to date, and currently being discussed by courts and authors.

2.2. ABUSE EXCEPTIONS BASED ON CONFIDENTIALITY AND CONFLICT OF INTEREST

2.2.1. Confidentiality

2.2.1.1. The main view: No Abuse Based on Confidentiality

Case law has established the principle that directors may not refuse to release information or documents to a shareholder by invoking a confidentiality duty ⁽²⁰⁾.

Authors, instead, are divided. According to some scholars, confidentiality issues never prevail over a shareholder's right to information ⁽²¹⁾. According to others, directors should always take confidentiality issues into account ⁽²²⁾.

The argument employed by the courts and the authors who have ruled out confidentiality as a means to oppose a shareholder's request hold that the exchange of information between a shareholder and directors is an internal affair that does not involve any third parties. It is the shareholder who has the duty not to reveal ⁽²³⁾ to third parties any information received ⁽²³⁾.

This argument is usually based on the assumption that a shareholder has a duty of confidentiality that prevents the divulgence of information acquired by exercising the right ⁽²⁴⁾. However, the confidentiality duty of shareholders is not grounded on any specific statutory provision. Moreover, it

⁽¹⁹⁾ With exceptions like Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972, pertaining to a case of (plain) conflict of interests; Trib. Bologna, December 6, 2006, in *Giur. comm.*, 2008, 213; Trib. Catania, March 3, 2006, in *Giur. comm.*, 2007, 920; Trib. Nocera Inferiore, October 13, 2005, in *Giur. comm.*, 2007, 159; Trib. Chieti, August 25, 2005, in *Giur. it.*, 2006, 305; Trib. Ivrea, July 4, 2005, in *Giur. comm.*, 2007, 748; Trib. Chieti, May 31, 2005, in *Giur. it.*, 2005, 1652; Trib. Biella, May 18, 2005, in *Società*, 2006, 50; Trib. Parma, October 25, 2004, in *Società*, 2005, 758; Trib. Milano, November 30, 2004, in *Giur. comm.*, 2006, 682.

⁽²⁰⁾ See, *infra*, decisions under footnote 45 and Trib. Roma, December 4, 2007, in *Riv. notariato*, 2009, 672.

⁽²¹⁾ Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 02, 160, and in *Scritti in onore di Vincenzo Buonocore*, Milano, 2005, 1816; Perrino, *Il controllo individuale del socio di società di capitali tra funzione e diritto*, in *Società*, 24; Parrella, *Comment to art. 2476 c.c.*, in *La riforma delle società*, edited by Sandulli e Santoro, Torino, 2003, 125; Ricciardello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio*, in *Giur. comm.*, 2008, 237; Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. merito*, 2008, 2288.

⁽²²⁾ Mainetti, *Il controllo dei soci e la responsabilità degli amministratori nella società a responsabilità limitata*, in AA. VV., *La riforma delle società*, edited by Ambrosini, Torino, 2003, 90; Salafia, *Comment to art. 2476 c.c.*, in *Codice commentato delle nuove società*, edited by Bonfante, Corapi, Marziale, Rordorf, Salafia, Milano, 2004, 1065; Santosuosso, *La riforma del diritto societario*, Milano, 2003, 220.

⁽²³⁾ See Ricciardello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio*, in *Giur. comm.*, 2008, 1, 238. Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 160; Cagnasso, *La società semplice*, in *Trattato di diritto civile*, edited by Sacco, Torino, 1988, 179; Ambrosini, *Comment to art. 2476 c.c.*, in *Società di capitali*, edited by Niccolini e Stagno d'Alcontres, Napoli, 2004, 1587.

⁽²⁴⁾ See Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. merito*, 2008, 2288.

seems quite evident that a shareholder may not only harm the company by divulging information acquired, but also by simply making use of it ⁽²⁵⁾.

Considering how critical the confidentiality on company data is, some authors have developed a number of arguments aimed at identifying (arguably) legitimate means of protecting restricted corporate information. Below is a brief outline of these.

2.2.1.2. Criticism: Possible Limits based on Confidentiality

a) Specific provisions in the By-laws

A reasonably safe means of protecting reserved corporate data is including a specific provision in the By-laws that requires the shareholder and/or hired professionals to sign a confidentiality agreement. This solution may be considered legitimate and particularly useful where the shareholder exercises the right through a professional who has no duty of confidentiality under law. Alternatively, the right to information may be restricted to professionals enrolled in a professional affiliation due to the duty of confidentiality that normally accompanies such qualification ⁽²⁶⁾.

b) Signing a Confidentiality Agreement

The majority of authors ground a shareholder's duty of confidentiality through the drafting of a specific provision in the By-laws.

However, it seems that directors may legitimately request a shareholder to abide by the duty of confidentiality by signing a specific confidentiality agreement and by employing professionals who have a legal duty of confidentiality for the reviewing of documents. Directors may require the appointed professionals to be members of a professional affiliation that imposes a duty of confidentiality and also – but by virtue of a specific By-law provision – may only allow the professionals access in the presence of one of directors' delegates or an auditor ⁽²⁷⁾.

⁽²⁵⁾ Sangiovanni holds the same opinion, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. merito*, 2008, 2288; *contra* Trib. Biella, May 18, 2005, in *Società*, 2006, 50.

⁽²⁶⁾ See Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria*, in *Riv. notariato*, 2008, 679.

⁽²⁷⁾ See Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata*, in *Giur. comm.*, 2005, 799, Perrino, *Il controllo individuale del socio di società di capitali tra funzione e diritto*, in *Società*, 25; Ambrosini, *Diritto di controllo del socio di s.r.l. alla luce della riforma societaria e tutela innominata*, in *Società*, 2005, 1546. In the absence of supporting case law Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. merito*, 2008, 2289, argues that the directors should have this decision adopted by a shareholders' meeting in order to be relieved from a possible liability.

c) *Intellectual Property*

Some authors ⁽²⁸⁾ believe that an objective standard that could be employed by directors as a legitimate means to deny a shareholder's request can be identified in Arts. 98 and 99 of Legislative Decree February 10, 2005, No. 30 (the Intellectual Property Code) ⁽²⁹⁾.

Indeed, Art. 99 of the Intellectual Property Code forbids disclosure to third parties of the data described under Art. 98 (a set of corporate and technical-industrial information) or their acquisition or use. According to some authors, this standard highlights the presence of clear and unequivocal rules in the legal system pertaining to the protection of intellectual property that prevents directors from revealing sensitive information such as business, technical, industrial, or commercial information pursuant to Art. 98 of the Intellectual Property Code. This data may touch upon activities pertaining to production, distribution, organization, or financing aspects that ultimately compose the know-how of the company.

From this viewpoint, a denial of a shareholder's request based on this law provision should be considered legitimate.

d) *Confidentiality Duties based on Contract Signed by the Company*

It has been argued that another legitimate reason for directors opposing a shareholder's request may occur when the company has signed a contract containing a confidentiality clause.

Certainly the directors cannot insert such a clause as a means to withhold information from a shareholder. However, in certain contracts, confidentiality is a feature that is even part of the nature of the agreement, and cannot be removed by the parties (*a naturalia negotii*, e.g., in a know-how contract). In such cases, the directors should be allowed to oppose a shareholder's request by invoking the confidentiality duty ⁽³⁰⁾.

e) *Removal of Information*

Sometimes, directors protect sensitive corporate information by removing part of the data, including names, from the documents provided to shareholders.

⁽²⁸⁾ Guidotti, *Ancora sui limiti all'esercizio dei diritti di controllo nella S.r.l. e sul (preteso) diritto di ottenere copia dei documenti consultati*, in *Giur. comm.*, 2008, 225; Bartolomucci, *Configurazione e portata del diritto di controllo del socio non gestore di s.r.l.*, in *Società*, 2009, 1343; Di Bitonto, *Comment to App. Milano February 13, 2008*, in *Società*, 2009, 211.

⁽²⁹⁾ Art. 98 refers to "*corporate information and technical-industrial experience, including of a commercial nature, subject to the legitimate control of the holder, provided that such information: (a) is secret?*" (i.e. not generally known or easily accessible by experts and other persons active in that business sector); "*(b) has economic value because of its being secret; (c) is subject (...) to measures reasonably adequate to keep it secret?*". The protection of the Code also applies to "*data for testing or other secret data, whose development involves a considerable commitment*" and subject to the "*marketing authorization of chemical products, pharmaceuticals or agricultural products involving the use of new chemicals?*".

⁽³⁰⁾ Guidotti, *Ancora sui limiti all'esercizio dei diritti di controllo nella S.r.l. e sul (preteso) diritto di ottenere copia dei documenti consultati*, in *Giur. comm.*, 2008, 225, believes the directors can oppose the request but – to counteract a claim by the shareholder – they should file a claim aimed at obtaining a court decision on their duty to reveal the content of the information. Bartolomucci, *Configurazione e portata del diritto di controllo del socio non gestore di s.r.l.*, in *Società*, 2009, 1343, recognizes in such a case an objective limit to the shareholder's right.

Unless this choice is supported by further arguments – beyond the mere confidentiality of the data – this is likely to be considered an illegitimate action. The possibility of protecting the confidentiality of some information by removing some sensitive data has been expressly ruled out by the courts ⁽³¹⁾.

2.2.2. Conflict of Interest

Frequently the right to information is exercised by a shareholder who has an interest that competes against the corporate interests, thus potentially causing significant damage to the company ⁽³²⁾.

To ensure that possible competition between the interests of the shareholder and of the company is safely and efficiently managed, certain authors suggest including a non-competition clause in the By-laws as a means of preventing such a situation ⁽³³⁾.

It is reasonable to argue that in the case of conflicts of interests, the insertion of a specific provision in the By-laws should not be considered a precondition to a legitimate denial of a shareholder's request if detrimental to the company ⁽³⁴⁾. Nevertheless, in the absence of strong, corroborative evidence of the shareholder's wrongdoing, the absence of well-established case law supporting this principle prevents directors from safely putting forward a legitimate denial ⁽³⁵⁾.

2.3. ABUSE EXCEPTIONS BASED ON OTHER CONSTRAINTS

2.3.1. Timing

In principle, no limit has been placed on how frequently a shareholder may exercise the right to information nor in the timeframe within which a shareholder's request should receive a prompt answer from the management.

As a consequence, the timing of the request could potentially disrupt the course of business. As this would be analogous to a breach of the duty of good faith by the shareholder ⁽³⁶⁾, it is arguable that a denial by management, in such a case, may be (at least temporarily) justified.

⁽³¹⁾ See Trib. Milano, November 30, 2004, in *Giur. comm.*, 2006, 682. See also Grasso, "Documenti relativi all'amministrazione" e diritto di consultazione di socio di s.r.l. non amministratore, in *Giur. comm.*, 2007, 930.

⁽³²⁾ The regulation of the S.r.l. does not contain provisions that prevent the shareholder from exercising a business in competition with the company; see Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. merito*, 2008, 2287.

⁽³³⁾ Cagnasso, *Diritto di controllo dei soci e revoca dell'amministratore per gravi irregolarità: primi provvedimenti in sede cautelare relativi alla "nuova" società a responsabilità limitata*, in *Foro it.*, 2005, 316; Pasquariello, *Commento to art. 2476 c.c.*, in *Il nuovo diritto delle società*, a cura di Maffei Alberti, Padova, 2005, 1977; Perrino, *La "rilevanza" del socio nella s.r.l.: recesso, diritti particolari, esclusione*, in www.associazionepreite.it.

⁽³⁴⁾ Sangiovanni concurs on that point, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. merito*, 2008, 2297.

⁽³⁵⁾ See Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972, where the shareholder requested to inspect documents pertaining to a contract between the company and the same shareholder. Considering that the contract was the subject matter of a litigation between the parties, the shareholder's request was considered illegitimate in that aimed at pursuing an interest against the company's interests. See also Trib. Milano, November 30, 2004, in *Giur. comm.*, 2006, 682.

⁽³⁶⁾ Grasso, "Documenti relativi all'amministrazione" e diritto di consultazione di socio di s.r.l. non amministratore, in *Giur. comm.* 2007, 928.

2.3.2. Generic Requests

In principle, generic requests from a shareholder may be followed by generic answers by the directors⁽³⁷⁾. Indeed, it has been stated that a generic or too widely framed request to see *all* the documents may be legitimately rejected by directors⁽³⁸⁾.

As a matter of fact, more than the request of the shareholder, it seems that it is the nature of the request that may – objectively – determine directors' responses. Directors should be free to decide how to respond, whether by documents or by releasing information. In any event, the duty to act in good faith implies that a shareholder may not object to a different method of release if the requested method is particularly onerous for the company.

It is also worth mentioning that shareholders do not have the duty to expressly justify their requests. However, since requests must be “reasonable”, the absence of justification may constitute another element that could affect the legitimacy of the request (e.g., the shareholder cannot keep the management busy with several unrelated questions over a long time)⁽³⁹⁾.

2.3.3. Repetitive Requests

Repetitive and unjustified (in their reiteration) requests are usually considered evidence of the (malicious) intention of the shareholder to keep the management under illicit pressure⁽⁴⁰⁾.

Indeed, directors can legitimately refuse to provide the shareholder with information or documents that have already been granted. Also, directors can legitimately refuse to provide a shareholder with information or documents that were previously made available but were not reviewed by the shareholder.

2.3.4. Copies

In contrast to the regulation in force before the company law reform, the new code provision, Art. 2476 c.c. does not reproduce the disposition set forth in Art. 2490 c.c., which expressly stated the shareholder's right to obtain copies, at his own expense, of the inspected documents. As a consequence, the existence of such a right of the shareholder is currently under debate.

Some authors support the view that a shareholder has the right to make copies of the documents reviewed⁽⁴¹⁾ arguing that denial would nullify the exercise of the right to information, making the collecting of information aimed at contesting the directors' behavior too troublesome. Some authors

⁽³⁷⁾ Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. merito*, 2008, 2279.

⁽³⁸⁾ Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. Merito*, 2008, 9, 2279.

⁽³⁹⁾ Trib. Civitavecchia, April 21, 2004, in www.dircomm.it.

⁽⁴⁰⁾ App. Milano, February 13, 2008, in *Società*, 2009, 205; Trib. Catania, March 3, 2006, in *Giur. comm.*, 2007, 920.

⁽⁴¹⁾ Ricciardello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio*, in *Giur. comm.*, 2008, 237; Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. merito*, 2008, 2285-2286, who also specifies the directors should set up a data room and provide the shareholder with the personnel required to carry out such task (arguably at the shareholder's expenses); Ambrosini, *Diritto di controllo del socio di S.r.l. alla luce della riforma societaria e tutela innominata*, in *Società*, 2005, 1547; Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 449.

⁽⁴²⁾ even doubt that a provision in the By-laws forbidding the making of photocopies may be legitimate because time to review the documents is often required.

Other authors ⁽⁴³⁾, conversely, deny the survival in the current regulation of shareholder's right to obtain copies, observing that: i) whereas the old Art. 2490 c.c. expressly recognized this right, Art. 2476 c.c. does not mention anything in this regard; ii) the right to copy was only permitted for the shareholders' ledger and shareholders' meeting records, not for other, maybe more reserved, documents; iii) the same fact that the shareholder may consult the documents through hired professionals implies that there is no need to make copies ⁽⁴⁴⁾.

Court decisions are divided on this issue, although the majority of courts appear to favour the shareholder's right to make copies of the documents reviewed ⁽⁴⁵⁾. Decisions to not permit the making of copies are fewer ⁽⁴⁶⁾, and comprise the position of the Court of Milan ⁽⁴⁷⁾. In any event, an established principle is that copies must be made: i) at the shareholder's expense; and ii) at the company's offices ⁽⁴⁸⁾.

2.3.5. Scope of Inspection

Authors are currently discussing whether the shareholder's right to inspect includes:

- a) the business assets;
- b) the right to inspect the business premises, by visiting the warehouses, controlling the quantity and quality of the products, and reviewing the cash assets.

⁽⁴²⁾ Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria*, in *Riv. notariato*, 2008, 679.

⁽⁴³⁾ Guidotti, *Ancora sui limiti all'esercizio dei diritti di controllo nella S.r.l. e sul (preteso) diritto di ottenere copia dei documenti consultati*, in *Giur. comm.*, 2008, 226; Menicucci, *Il "contenuto" del controllo del socio nella società a responsabilità limitata*, in *Giur. comm.*, 2007, 167-168, evidencing that in consideration of the broadening of the shareholder's right to information, the legislator has balanced the need to protect confidentiality by excluding the right to make copies.

⁽⁴⁴⁾ This argument has been used by Trib. Bologna, December 6, 2006, in *Giur. comm.*, 2008, 217, to state the opposite principle, i.e. that copies of the documents are needed to enable the professionals to carry out the review; the shareholder is only required to draft a list of the documents he intends to copy.

⁽⁴⁵⁾ Trib. Taranto, July 13, 2007, in *Giur. it.*, 2008, 305; Trib. Pavia, August 1, 2007, in *Società*, 2009, 504; Trib. Pavia, June 29, 2007, in *De Jure Online*, 2008; Trib. Bologna, December 6, 2006, in *Giur. comm.*, 2008, 213; Trib. Nocera Inferiore, October 13, 2005, in *Giur. comm.*, 2007, 159; Trib. Ivrea, July 4, 2005, in *Giur. comm.*, 2007, 748; Trib. Biella, May 18, 2005, in *Società*, 2006, 50; Trib. Civitavecchia, April 21, 2004, in www.dircomm.it; Trib. Roma, December 4, 2007, in *Riv. not.*, 2009, 668; Trib. Roma, January 16, 2008, in *Società*, 2009, 668; Trib. Novara, December 19, 2009, in *filodiritto.it*.

⁽⁴⁶⁾ Trib. Catania, March 3, 2006, in *Giur. comm.*, 2007, 920; Trib. Chieti, May 31, 2005, in *Giur. it.*, 2005, 1652; Trib. Chieti, August 25, 2005, in *Giur. it.*, 2005, 305; Trib. Milano, November 30, 2004, in *Giur. comm.*, 2006, 682; Trib. Parma, October 25, 2004, in *Società*, 2005, 758; App. Milano, February 13, 2008, in *Società*, 2009, 205. In Trib. Catania, March 3, 2006, *cit.*, the court ordered that the documents had to be deposited at a Notary's office.

⁽⁴⁷⁾ Trib. Milano, November 30, 2004, in *Giur. comm.*, 2006, 682, ruled out the shareholder's right to make copies as well as any other kind of document reproduction. The court also denied the shareholder's right to question employees and to access the company's premises without the prior consent of the directors and outside office hours. See also App. Milano, February 13, 2008, in *Società*, 205. *Contra*, recently, Trib. S. Maria Capua Vetere, June 10, 2011, in *De Jure Online*, 2011.

⁽⁴⁸⁾ See Trib. S. Maria Capua Vetere, June 10, 2011, in *De Jure Online*, 2011. See also Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 160; Ambrosini, *Diritto di controllo del socio di S.r.l. alla luce della riforma societaria e tutela innominata*, in *Società*, 2005, 1547; Mainetti, *Il controllo dei soci e la responsabilità degli amministratori nella società a responsabilità limitata*, in *Società*, 2003, 938. Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata*, in *Giur. comm.*, 2005, 800; Salafia, *Comment to art. 2476 c.c.*, in *Codice commentato delle nuove società*, edited by Bonfante, Corapi, Marziale, Rordorf, Salafia, Milano, 2004, 1064.

Although the issue is debated, the majority of authors believe that the right to inspect the documents does not include the business assets or the company premises⁽⁴⁹⁾. Indeed, such a broad interpretation would imply a shareholder's right to check the physical premises and goods used for the business that the provision of the code certainly has not covered. As a consequence, it appears reasonable to argue that, unless the By-laws expressly provide for such an extensive right, an inspection with this scope may be legitimately opposed by the directors.

2.3.6. Recording

Finally, another constraint or limit that may be encountered by a shareholder exercising the right to information, is the duty to record the shareholder's activities.

It has been pointed out that a provision in the By-laws may legitimately impose the obligation to record shareholder activity⁽⁵⁰⁾. This provision is legitimate and, while certainly making the exercise of the informational rights somewhat more onerous, also provides transparency to these activities in the interest of the same shareholder.

3. CONCLUSIONS

3.1. THE NEED FOR A BALANCE OF INTERESTS

The principles developed by case law on Art. 2476, 2° c., c.c., deliver a regulation of the S.r.l. where directors are *subject* to the shareholder's right to information even when its exercise is likely to be harmful to the company⁽⁵¹⁾.

⁽⁴⁹⁾ Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria*, in *Riv. notariato*, 2008, 680; Abriani, *Comment to art. 2477*, in *Codice commentato delle s.r.l.* edited by Benazzo e Patriarca, Torino, 2006, 369; Grasso, "Documenti relativi all'amministrazione" e diritto di consultazione di socio di s.r.l. non amministratore, in *Giur. comm.*, 2007, 928; Cagnasso, *Diritto di controllo dei soci e revoca dell'amministratore per gravi irregolarità: primi provvedimenti in sede cautelare relative alla "nuova" società a responsabilità limitata*, in *Giur. it.*, 2005, 316; Guidotti, *Ancora sui limiti all'esercizio dei diritti di controllo nella S.r.l. e sul (preteso) diritto di ottenere copia dei documenti consultati*, in *Giur. comm.*, 2008, 227; Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 159, who rules out that the shareholder may conduct inspections such as visiting plants and warehouses or examine the cash inventory; Cagnasso, *La società semplice*, in *Trattato di diritto civile*, edited by Sacco, Torino, 1998, 184; Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata*, in *Giur. comm.*, 2005, 796, who refers to the By-laws for a regulation of the inspection. *Contra* see Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 449-450 and *Il diritto di controllo del socio non amministratore di s.r.l.*, in *Giur. it.*, 2008, 126, who, however, limits the inspection to situations where "it turns out difficult, if not impossible, to exercise the right of control on the documentation alone".

⁽⁵⁰⁾ See Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria*, in *Riv. notariato*, 2008, 689 and Abriani, *Comment to art. 2477*, in *Codice commentato delle s.r.l.* edited by Benazzo e Patriarca, Torino, 2006, 369.

⁽⁵¹⁾ Differently from the previous Art. 2489 c.c. where the legislator clearly intended to avoid the possibility that the company might incur risks and disruption – not least a paralysis of the business – consequent to the exercise of the powers attributed to a single shareholders See Rivolta, *La società a responsabilità limitata*, in *Trattato di diritto civile e commerciale* edited by Cicu e Messineo and continued by Mengoni and Schlesinger, Milano, 1982, 339. Guidotti, *Sulla derogabilità della norma relativa ai diritti di controllo del socio nella S.r.l.*, in *Giur. comm.*, 2010, 437; Menicucci, *Il "contenuto" del controllo del socio nella società a responsabilità limitata*, in *Giur. comm.*, 2007, 164, recognizes the limit of the duty of good faith but clarifies that (only) under "extreme circumstances" can the managers legitimately express a denial.

Only in few cases have the courts allowed directors to place a limit on shareholder requests ⁽⁵²⁾ and, in such case, mostly by making limited tools available to the management, such as denying the right to make copies, questioning employees, and to freely accessing the company premises ⁽⁵³⁾.

Case law, however, meets with strong criticism by authors who point out the need to find a fair balance between the right to information of a single shareholder and the interests of the company (e.g., confidentiality, protection of industrial secrets, and competition) ⁽⁵⁴⁾. Even authors more keen to recognize a wide right to information ⁽⁵⁵⁾ acknowledge the necessity, in certain circumstances, to allow directors to legitimately deny requests that could be detrimental to the company, also considering that directors may be held responsible *vis-a-vis* the company for, e.g., divulging information that could be harmful.

Without prejudice to the undeniable limits of the code provision and its application under case law, there are a number of circumstances where opposition to a shareholder's request, even in the absence of a By-law provision pertaining to the right to information, may be considered legitimate (see paragraph 3.2.).

Moreover, in the quest for a fair balance of interests, investigating whether the right to information may be derogated or, more importantly, regulated through the insertion of specific provisions in the By-laws (see paragraph 3.3) cannot be omitted.

3.2. GROUNDS FOR A LEGITIMATE DENIAL OF THE SHAREHOLDER'S REQUESTS

Subject to all the limits evidenced above in terms of absence of safe standards (see paragraph 2.3.), it seems that directors may legitimately implement a number of actions aimed at preventing possible abuse of the informational rights of a shareholder.

Indeed, directors may legitimately:

- a) request the shareholder and any professional to sign a confidentiality agreement;
- b) deny requests that are unreasonable in terms of timing (e.g. that, as a result of frequency and deadlines imposed on the management, disrupt the business);
- c) deny repetitive and, in the first instance, generic requests;

⁽⁵²⁾ See Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972.

⁽⁵³⁾ Courts acknowledge the clear unbalance between certain needs of the company, e.g. confidentiality, and the right to information of the shareholder. See Trib. Milano, November 30, 2004, in *Giur. comm.*, 2006, 682; Trib. Catania, March 3, 2006, in *Giur. comm.*, 2007, 920.

⁽⁵⁴⁾ Especially criticized is the case law on confidentiality in the light of the fact that the regulation of the S.r.l. does not provide any rule that obliges the shareholder to maintain a secret. Resorting to *analogia legis* in such a case, invoking similar provisions addressed to subjects other than shareholders (e.g. auditors ex Art. 2407 c.c., or stakeholders of other types of company, e.g. s.n.c., ex Art. 2301 cc) does not appear to comply with the intention of the legislator; see Codazzi, *Il controllo dei soci di S.r.l.: considerazioni sulla derogabilità dell'art. 2476, 2° comma*, in *Giur. comm.*, 2006, 689, who suggests the drafting a provision in the By-laws setting out a non-competition duty and a just cause of exclusion of the shareholder who abuses his right.

⁽⁵⁵⁾ Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. merito*, 2008, 2287.

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- d) deny requests to make copies ⁽⁵⁶⁾;
- e) deny inspection of business assets;
- f) deny inspection of business premises;
- g) impose a recording of shareholder activity.

Doubts, conversely, should be expressed in relation to the possibility – argued by certain authors (mostly by resorting to the principles developed by the case law under the previous regulation) ⁽⁵⁷⁾ - that directors might deny the release of the requested information or documents if:

- a) the requests are from a shareholder whose interests conflict with those of the company ⁽⁵⁸⁾;
- b) the requests are from a shareholder who conducts a business that is in competition with the company⁽⁵⁹⁾;
- c) the requests imply a breach of industrial secrets or confidentiality duties undertaken by the company;
- d) there is evidence that the shareholder intends to pass the information to third parties ⁽⁶⁰⁾.

Notwithstanding the uncertainties necessarily inherent in any *assumption* about how courts could possibly decide, it is reasonable to argue that where strong, corroborative evidence is available to directors (especially in the form of documents from the shareholder), management may well refuse to meet a shareholders' requests when the demand is characterized by the circumstances above specified.

3.3. DEROGATION AND REGULATION OF THE RIGHT TO INFORMATION THROUGH BY-LAWS

The discussion on the possibility of derogating the shareholder's right to information through the insertion of a provision in the By-laws was prompted by the absence in Art. 2476 c.c. of a provision similar to Art. 2489 c.c. pursuant to which any agreement among shareholders contrary to the code regulation was void. Notwithstanding the fact that the Civil Code gap could allow diverging interpretations, only a minority of authors support the view that shareholders be allowed to depart

⁽⁵⁶⁾ Based on the current orientation of the Court of Milan.

⁽⁵⁷⁾ Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 455; Renna, *Il diritto di controllo del socio non amministratore di s.r.l.*, in *Giur. it.*, 2008, 130; Arato, *Il controllo dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1195; Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, edited by Maffei Alberti, Padova, 2005, 1977; Di Bitonto, *Comment to App. Milano February 13, 2008*, in *Società*, 2009, 211.

⁽⁵⁸⁾ Unless based on clear evidence, see Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972. See Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 455, who refers to grounded suspicion that the shareholder is acting to pursue an “*interest which is conflicting with the company's interest*”. See also Trib. Piacenza, August 12, 1994, in *Foro it.*, 1995, 3009.

⁽⁵⁹⁾ Trib. Milano, March 22, 1990, in *Società*, 1990, 915, that applied *analogia legis* with Art. 2301 c.c. with regard to the non-competition; Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, edited by Maffei Alberti, Padova, 2005, 1976.

⁽⁶⁰⁾ Ghidini, *Le società personali*, 1972, 451.

from the code regulation by way of a different provision in the By-laws ⁽⁶¹⁾. Indeed, such a possibility is excluded by the majority of case law ⁽⁶²⁾ and authors ⁽⁶³⁾.

Conversely, there is widespread consensus that the By-laws may regulate the exercise of the right to information ⁽⁶⁴⁾. In this regard, several authors have identified a number of possible provisions that shareholders can insert in the By-laws, and that should be legitimately accepted as a means of providing a balanced regulation of the exercise of the right to information ⁽⁶⁵⁾.

Besides the limited constraints to shareholder requests evidenced under paragraph 3.2., it is possible to claim that the company By-laws may provide for a set of rules that – where carefully drafted – may efficiently address the issues of possible abuse of the informational rights of the shareholders.

Namely, the main By-law provisions may certainly include:

⁽⁶¹⁾ In any event, provided that such regulation is supported by the unanimous vote of the shareholders. See Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 180; Guidotti, *Sulla derogabilità della norma relativa ai diritti di controllo del socio nella S.r.l.*, in *Giur. comm.*, 2010, 436; Codazzi, *Il controllo dei soci di S.r.l.: considerazioni sulla derogabilità dell'art. 2476, 2° comma*, in *Giur. comm.*, 2006, 692.

⁽⁶²⁾ Trib. Milano, November 30, 2004, in *Giur.it.*, 2005, 1245; Trib. Chieti, May 31, 2005, in *Giur. it.*, 2005, 1652; Trib. Chieti, August 25, 2005, in *Giur. it.*, 2006, 305; Trib. Catania, March 5, 2006, in *Giur. comm.*, 2007, 920; Trib. Bari, May 10, 2004, in *Foro it.*, 2004, 3229. No doubts on the fact that the right to information may be regulated *in melius*, e.g. by attributing more powers to the shareholder.

⁽⁶³⁾ An agreement that limits the right to information to certain qualified minorities or to those types of S.r.l. where no board of auditors has been appointed or limits the right to information to certain corporate documents has been deemed equivalent to an agreement that “cancels” more than “regulates” the code provision, see Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 174. See, among others, Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata*, in *Giur. comm.*, 2005, 796; Pasquariello, *Commento to art. 2476 c.c.*, in *Il nuovo diritto delle società*, a cura di Maffei Alberti, Padova 2005, 1976; Cagnasso, *Diritto di controllo dei soci e revoca dell'amministratore per gravi irregolarità: primi provvedimenti in sede cautelare relative alla “nuova” società a responsabilità limitata*, in *Giur. it.*, 2005, 316; Nigro, *La Società a responsabilità limitata nel nuovo diritto societario: profili generali*, in *La nuova disciplina delle società a responsabilità limitata* edited by Santoro, Milano, 2003, 10; Parrella, *Commento to art. 2476*, in *La riforma delle società. Commentario del d.lg. 17 gennaio 2003 n.6*, edited by Sandulli and Santoro, Torino 2003, 123 ss.; Cagnasso, *Commento all' art. 2476 c.c.*, in *Il nuovo diritto societario. Commentario*, edited by Cottino, Bonfante, Cagnasso and Montaleni, Bologna, 2004, 7883; Ibba, *In tema di autonomia statutaria e norme derogabili*, in *Le grandi opzioni della riforma del diritto e del processo societario*, edited by Cian, Padova, 2004, 147 ss.; Rescigno, *Le regole organizzative della gestione della s.r.l.*, in *Le grandi opzioni della riforma del diritto e del processo societario*, edited by Cian, Padova, 2004, 328; Ambrosini, *Commento to art. 2476*, in *Società di capitali, Commentario*, edited by Niccolini, Stagno d'Alcontres, Napoli, 2004, 1558; Zannarone, *Le altre società di capitali*, in *Diritto commerciale* edited by Allegri, Bologna, 2004, 317; Renna, *Il diritto di controllo del socio non amministratore di s.r.l.*, in *Giur. comm.*, 2008, 126 ss. The view is supported by a number of arguments: (i) the right to information is aimed at allowing the shareholder a meaningful and effective exercise of the action against the directors for violation of their duties as well as the exercise of the power to remove them from their position (Guidotti, *Sulla derogabilità della norma relativa ai diritti di controllo del socio nella S.r.l.*, in *Giur. comm.*, 2010, 432); (ii) the administrative and criminal sanctions under Art. 2625 c.c. evidence the mandatory nature of the legal rule (Arato, *Il controllo dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1105) - both views appear ungrounded in that the exercise of the right to information is by no means conditional upon the exercise of the right to act against the directors or ask for their removal; neither may the mandatory nature of Art. 2476 c.c. be derived from the existence of Art. 2625 c.c. that assumes the mandatory nature of the rule it refers to, and does not determine it - (iii) the right to information is aimed at guaranteeing the good functioning of the S.r.l. (Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria*, in *Riv. notariato*, 2008, 675, believes this is a public interest principle that does not allow the By-laws to exclude the right to information); (iv) the right to information is legitimate in itself, without any further aim other than accomplishing the shareholder's interest to monitor the management of the company as a useful means of negotiating some management decisions with the management (see Renna, *Commento to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 453-454) - neither view is convincing; it is seriously doubtful that the exercise of a right to information necessarily benefits the functioning of the S.r.l. if the exercise is not proper; and what is “proper” is exactly what needs to be ascertained.

⁽⁶⁴⁾ See Arato, *Il controllo dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1105; Benazzo, *I controlli nelle società a responsabilità limitata: singolarità del tipo od omogeneità della funzione?*, in *Riv. soc.* 2010, 18; Abriani, *Controllo individuale del socio e autonomia contrattuale nella società a responsabilità limitata*, in *Giur. comm.*, 2005, 170; Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata*, in *Giur. comm.*, 2005, 806.

⁽⁶⁵⁾ Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 162; Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria*, in *Riv. notariato*, 2008, 678; Ricciardiello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio*, in *Giur. comm.*, 2008, 238-239; Arato, *Il controllo individuale dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1195.

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- a) express confidentiality duties of the shareholder;
- b) express non-competition duties of the shareholder ⁽⁶⁶⁾;
- c) express provision of just cause of exclusion of the shareholder who abuses the right to information;
- d) express provision as to shareholder liability for damage ⁽⁶⁷⁾.

The By-laws may also require the shareholder to exercise the right to information by ⁽⁶⁸⁾:

- a) respecting certain formalities (e.g., sending a written request);
- b) respecting a reasonable notice period, or providing directors a feasible deadline ;
- c) respecting reasonable restrictions in terms of timing of the access to the documents (e.g., office hours and days);
- d) appointing a maximum number of professionals; appointing professionals meeting certain requisites (e.g., belonging to a professional affiliation that entails confidentiality duties) ⁽⁶⁹⁾;
- e) obliging the shareholder and hired professionals to sign a confidentiality agreement ⁽⁷⁰⁾.

Furthermore, the By-laws may:

- a) request the prior identification of the appointed professionals;
- b) forbid the shareholder to divulge the information acquired or use it for purposes in competition with the company's business;
- c) require the directors to set up a data room and identify a person with whom the shareholder should liaise;
- d) forbid the shareholder and any professionals from questioning personnel;
- e) forbid making copies and not allow shareholders free access to offices when searching for documents ⁽⁷¹⁾;
- f) specify how the shareholder may make copies – at the shareholder's own expense – of the documents reviewed;

⁽⁶⁶⁾ Codazzi, *Il controllo dei soci di S.r.l.: considerazioni sulla derogabilità dell'art. 2476, 2° comma*, in *Giur. comm.*, 2006, 689.

⁽⁶⁷⁾ Shareholders need to insert clear rules of exclusion of the shareholder in the By-laws since, pursuant to Art. 2473-bis, 1° c., c.c., the exclusion of the shareholder is allowed only upon a detailed just cause. See Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, a cura di Maffei Alberti, Padova 2005, 1976. Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 02, 160, and in *Scritti in onore di Vincenzo Buonocore*, Milano, 2005, 1821; Ambrosini, *Diritto di controllo del socio di s.r.l. alla luce della riforma societaria e tutela innominata*, in *Società*, 2005, 1547; Codazzi, *Il controllo dei soci di S.r.l.: considerazioni sulla derogabilità dell'art. 2476, 2° comma*, in *Giur. comm.*, 2006, 689; Cagnasso, *Diritto di controllo dei soci e revoca dell'amministratore per gravi irregolarità: primi provvedimenti in sede cautelare relative alla "nuova" società a responsabilità limitata*, in *Giur. it.*, 2005, 316; Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 455; Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata*, in *Giur. comm.*, 2005, 806, Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 164; Arato, *Il controllo individuale dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1195.

⁽⁶⁸⁾ Although supported though varying levels of detail by the authors.

⁽⁶⁹⁾ Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 163; Ricciardello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio*, in *Giur. comm.*, 2008, 238-239; Arato, *Il controllo individuale dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1195.

⁽⁷⁰⁾ Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 163; Ricciardello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio*, in *Giur. comm.*, 2008, 238-239.

⁽⁷¹⁾ Arato, *Il controllo individuale dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1195.

- g) specify the duty to record any session of inspection;
- h) state that the exercise of the right to information cannot hinder the activity of the management and of other corporate bodies (e.g., by providing for a suspension of the informational rights during the weeks preceding the preparation of the financial statements).

Although the current status of case law on the matter does not allow a more detailed development of the abovementioned provisions, the insertion in the By-laws of a more exhaustive regulation on the exercise of the informational rights can certainly contribute to effectively balance the conflicting interests of the company and of the single shareholder.