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Multiple sole executive body: models and procedure for formalizing powers



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The so-called principles of "two keys", "four eyes" and others like them have long been known in business community. In an effort to follow the best international practices of corporate governance, the Russian legislator in 2014 carried out a reform of civil law, providing Russian business entities¹ with the right to create multiple sole executive bodies (hereinafter referred to as multiple SEB). It is important to note that the term "multiple SEB" is not a legislative term, but has been developed by the scientific community.

According to Article 53 of the Civil Code of the Russian Federation, the articles of a business entity may stipulate that several persons may act on behalf of the business entity, either jointly or independently. In this case, the fact of multiple managers in the company must be recorded in the Unified State Register of Legal Entities.

It should be noted that in the Civil Code the legislator uses the phrase "several persons", which implies the possibility of transferring the powers of the sole executive body to two or more persons. We draw your attention to this point, since in practice there are cases of limited interpretation of this provision: sometimes the impression is that the powers of the SEB can be distributed between two persons maximum.

The authors will consider the following aspects of the problem in the article:

- multiple SEB models;
- features of the provisions of the articles and company's internal documents in terms of the competence of multiple SEB;
- the problem of displaying information about multiple SEB in the Unified State Register of Legal Entities

¹ From here on we will talk specifically about business entities, since this type of legal entity is the most common in Russia.

MULTIPLE SEB MODELS

What opportunities for distributing competence between several directors does the current legislation provide?

From a literal interpretation of paragraph 3 of clause 1 of Article 53 of the Civil Code of the Russian Federation, one can conclude that there are only two models of distribution of competence: joint, when directors can form the will of a legal entity only by acting jointly, for example, when both must sign contracts, and separate, when directors can act independently of each other and make decisions on their own. However, the Supreme Court of the Russian Federation² also mentions "a different distribution of powers," which gives reason to talk about the existence of one more model—a hybrid one. Let us look at the existing models in more detail.

Joint exercise of powers

The essence of this model is that in order to express the will of a business entity, several directors must act together. A typical example is the situation when a contract with a counterparty is signed by several directors of a company where multiple SEB has been established.

In practice, the model of joint exercise of powers is often found in companies with several founders, each of whom, by appointing "his" director, seeks to ensure maximum control over operational activities. This model can also be implemented in companies with one founder in order to create a system of checks and balances. However, in practice it can be inconvenient due to the need to obtain the signatures of all directors to perform any actions.

² Clause 24 of the Resolution of the Plenum of the Supreme Court of the

Russian Federation No. 25 of 23.06.2015.

Separate exercise of powers

Within the framework of this model, each of the directors can act independently and autonomously, in accordance with the powers provided for by the articles and legislation. In this case, two types can be distinguished:

- directors act independently of each other from a friend, and the issues within their competence coincide;
- directors act independently of each other from each other, and the issues within the competence of each of the directors differ.

This approach is especially relevant for rapidly developing companies with a high pressure on the SEB, where the introduction of additional directors helps to distribute the work. This model is also suitable for companies with special qualification requirements for the executive body, for example, for organizations working with state secrets or any other specifics.

Hybrid model

This model of distributing competencies between several directors is not directly enshrined in law, but exists in practice thanks to the creative approach of judges to interpreting the basic norm. Moreover, several variants of the hybrid model can be distinguished:

1

directors act independently of each other, each within the framework of their competence, but on a number of issues the competence of directors may coincide;

2

directors act independently of each other, each within the framework of his or her competence.

but on a number of issues defined in the company's articles, joint exercise of powers is provided for.

The hybrid model may be useful and interesting for companies that conduct a variety of activities, each requiring special knowledge. It is also relevant for organizations that operate in different regions.

Thus, in practice, there are five established models of distributing competencies between directors when using a system of multiple SEB in a business entity:

- directors act jointly on all issues in their competence;
- directors act independently and have the same scope of competence;
- directors act independently, while the list of issues within their competence differs;
- directors act independently within the framework of their competence, but on a number of issues the competence of directors may coincide;
- directors act independently, each within the framework of his competence, but on a number of issues defined in the company's articles, joint exercise of powers is provided for.

FEATURES OF THE PROVISIONS OF THE ARTICLES AND INTERNAL DOCUMENTS OF THE COMPANY IN PART OF COMPETENCE THE MULTIPLE SEB

It is well known that, a sole executive body of a business entity has residual

competence. In other words, his powers include everything that is not assigned by law and the charter to the competence of the general meeting of shareholders/participants, the supervisory board/board of directors and the management board.

Often this is forgotten when formulating articles. Each director is assigned with a closed list of competence issues. At the same time, it is obvious that it is impossible to describe in the articles all the diversity of life situations that a company encounters in its business activities. **Therefore, when forming closed lists of powers of the SEB, it may happen that none of the directors is able to make a decision on a certain issue until the necessary changes are made to the articles.**

For this reason, when forming the provisions of the articles in terms of the competence of multiple sole executive bodies, when the scope of powers of the directors includes different issues, it is necessary to leave an open list of powers for one of them. Moreover, in practice, situations arise when one of the directors resigns or otherwise terminates his powers, while the other directors continue to work. The question arises: is it permissible to elect a new director to those already existing?

If, according to the articles, the directors act jointly, they constitute one sole executive body. According to judicial practice, in the event of the dismissal of one of the directors from the composition of multiple sole executive bodies, the other directors lose their powers.³ Thus, it is necessary to re-elect the entire SEB.

³ See the ruling of the Arbitration Court of the Central District dated 30.01.2020 No. F10155/2020 in case No. A14 6663/2018.

PROBLEM of displaying the INFORMATION ON multiple sole EXECUTIVE BODIES In the Unified State Register of Legal Entities

As mentioned earlier, the rules on multiple executive bodies were introduced in the Russian legislation in 2014, requiring mandatory display in the Unified State Register of Legal Entities of information on the presence of multiple sole executive body in an organization and on the form of exercise of powers by directors - jointly or separately. However, the technical possibility of registering such data appeared only in 2020 with the introduction of amendments to the Federal Law of 08.08.2001 No. 129-FZ "On State Registration of Legal Entities and Individual Entrepreneurs" (hereinafter referred to as the Law on State Registration).

At the same time, the mechanism for reflecting in the Unified State Register of Legal Entities the procedure for exercising powers by multiple SEB contains a number of significant lacks.

Thus, at the moment, the Unified State Register of Legal Entities can only reflect the fact of joint or separate exercise of the powers of the SEB by directors, which clearly does not correspond to the diversity of distribution of competence between directors that we mentioned above.

In addition, the Unified State Register of Legal Entities may indicate that directors act independently, however, as we said, this may mean either that directors have the right to independently make decisions on an identical list of issues, or that the list of issues included in

their powers may not coincide. This gives rise to the problem of ensuring that third parties know about the limitations of the directors' powers.

The pro-creditor approach, voiced by the Supreme Court of the Russian Federation, currently dominates Russian legislation and the judicial practice.⁴ A counterparty analyzing information in the Unified State Register of Legal Entities may see that the directors act independently and, without checking the entity's articles, consider it sufficient that any of the directors sign the agreement. At the same time, such director, according to the provisions of the articles of the business entity, may not have the authority to conclude such transactions on behalf of the entity.

In such situations, the legislator and the courts stand up for the stability of civil circulation and recognize the concluded transaction as voidable, but in order to recognize it invalid, the company will need to prove that the counterparty knew or should have known that the signatory did not have the authority to do so. Considering that when concluding transactions, the parties are not obliged to check each other's articles, proving knowledge of the restrictions will be extremely difficult.

Judicial practice on this issue adheres to a similar approach, according to which the priority reference point for counterparties will be information from the Unified State Register of Legal Entities, and not from the company's articles. In one case, the court indicated that the company's articles may provide for both joint and separate exercise of powers by multiple SEB, and third parties, as a general rule, are not obliged to be informed of this. Consequently, the persons specified in the Unified State Register of Legal Entities are recognized as equivalent for third parties.⁵

⁴ Clause 22 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 23.06.2015 No. 25.

⁵ See the ruling of the Eighth Arbitration Court of Appeal dated 22.12.2020 No. 08AP-11055/2020 in case No. A70-7708/2020.

Another panel of judges ruled that when indicating two independent directors in an extract from the Unified State Register of Legal Entities, regardless of the provisions of the articles on directors acting jointly that contradict this information, third parties should be guided by the information from the Unified State Register of Legal Entities and perceive the sole executive body of the company as acting independently.

At the same time, since April 2024, the Federal Tax Service has launched a new service⁶, which allows you to obtain online copies of the constituent documents of a business entity in a matter of minutes, which greatly simplifies the verification of counterparties and allows you to dispute the stated position of the Supreme Court of the Russian Federation. With a high probability, this will lead to attempts by companies with multiple SEB to reconsider the established pro-creditor approach in this category of disputes.

CONCLUSION

It should be noted that the use of models of multiple SEB can improve the quality and efficiency of management by introducing different points of view and competencies, which ensures greater flexibility and adaptation to the specifics of business turnover. However, it is necessary to take into account potential risks associated with possible conflicts between SEB and difficulties in coordinating their actions.

Multiple SEB is a promising institution, but it requires careful planning. The efficiency of its implementation largely depends on the clear distribution of responsibilities and rules of interaction between directors, as well as on the corporate governance culture in the company.

⁶ <https://service.nalog.ru/puchdoc/sign-in>.

⁷ [html?nextUrl=%2Fpuchdoc%2F](https://service.nalog.ru/puchdoc/sign-in.html?nextUrl=%2Fpuchdoc%2F).

