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COMPANY LAW CHANGES IN 2023 / HOW FLEXIBLE IS THE FLEXIBLE COMPANY REALLY?

The year 2023 is set to bring a number of changes to company law - some key points are summarised below:

The Virtual Shareholders' Meetings Act (VirtGesG) came into force in July 2023. This is intended to create a permanent basis for the possibility of holding virtual shareholder meetings at corporations, cooperatives, associations, mutual insurance companies, small insurance associations and savings banks, which was temporarily introduced during the pandemic. One of the prerequisites for holding a virtual meeting is a corresponding provision in the articles of association or statutes.

In addition, the Federal Ministry of Justice submitted the ministerial draft of the Company Law Amendment Act (GesRÄG) 2023 to the National Council on 30 May 2023. This is to enter into force on 1 November 2023.

The Company Law Amendment Act (GesRÄG) 2023 is intended to pursue the objectives of the government programme; on the one hand, this is the creation of a new legal form, namely the Flexible Kapitalgesellschaft or Flexible Company (FlexKapG or FlexCo) and, on the other hand, the reduction of the statutory minimum share capital for a limited liability company from EUR 35,000.00 to EUR 10,000.00. The legislator is thus attempting to modernise Austrian company law and make it more competitive internationally. In addition to the introduction of the Flexible Kapitalgesellschafts-Gesetz (FlexKapGG), the GmbHG, FBG, RpfIG, NTG, RATG and WiEReG will also be amended.

In addition to the GesRÄG 2023, the introduction of the Corporate Law Digitalisation Act 2023 (GesDigG 2023) is also pending, with which the GmbHG, AktG, GenG, SEG, SCEG and FBG are to be amended. This is intended to implement the provisions of Directive (EU) 2019/1151 regarding the use of digital tools and procedures in company law. In brief, it is envisaged that persons with certain criminal convictions will be "disqualified" from assuming functions as management bodies of GmbHs, AGs, cooperatives, SEs and SCEs, i.e. they will not be allowed to assume these functions. The GesDigG 2023 is to enter into force on 1 December 2023.

In the following, we will briefly discuss the draft of the GesRÄG 2023 in more detail.

SIGNIFICANT CHANGES DUE TO THE GESRÄG 2023

The main change in GmbH law is that the minimum share capital will in future be EUR 10,000 instead of EUR 35,000 as previously.

It should also be possible to establish a FlexKapG with share capital of EUR 10,000.

The aim is to make the establishment of start-ups and innovative companies more attractive. The FlexKapG in particular is intended to offer greater freedom here - it is based on the law of the GmbH, but also adopts individual regulations from the law of stock corporations and can therefore also be regarded as a hybrid form between the GmbH and AG. Flexibilisation exists in particular for capital measures and employee shareholdings.

In principle, the provisions applicable to limited liability companies apply to FlexKapGs, unless otherwise stipulated in the FlexKapGG.

FlexKapG flexibility is to be promoted, among other things, by the fact that Section 7 FlexKapGG, in contrast to Section 34 GmbHG, provides the option of voting in writing without the consent of all shareholders if the articles of association provide for this.

What is new is that, in accordance with Section 8 FlexKapGG, a shareholder who is entitled to more than one vote can also exercise their voting rights unevenly. In the case of a GmbH, the voting right for a share pursuant to Section 39 GmbHG can only be exercised uniformly.

Furthermore, the new legal form of FlexKapG provides for the introduction of company value shares in Section 9. These are intended to enable company employees to participate in the success of the company. The extent of these company value shares must be less than 25% of the share capital. In principle, the provisions on company shares apply to these company value shares with the exceptions regulated by law. Among other things, written form is sufficient for the acquisition of an Enterprise Value Share. Another requirement is the payment of the capital contribution of the Enterprise Value Share in full. In contrast to shareholders, Enterprise Value Shareholders are not entered individually in the company register in accordance with § 5 no. 6 FBG. Instead, only the sum of the capital contributions of all enterprise value shares must be entered. However, the managing directors must keep a share register in which all enterprise value shareholders must be entered together with the capital contribution made. Enterprise value shareholders should generally not participate in the decision-making process of the company. They are therefore non-voting interests. They are only entitled to the information and inspection rights pursuant to § 22 (2) and (3) GmbHG. However, the company value shareholders are not subject to any default liability pursuant to § 70 Para. 2 GmbHG and § 83 Para. 2 GmbHG and no obligation to make additional contributions pursuant to § 72 GmbHG. As with the "regular" GmbH, only the company itself is liable for the liabilities of the FlexKapG. However, the shareholders are liable for raising the share capital agreed in the articles of association.

With regard to the form of share transfers and takeover declarations, Section 12 (2) FlexKapGG stipulates that a deed issued by a notary or lawyer may be used instead of a notarial deed. The weakening of the formal requirements relates to the takeover declaration in the case of a capital increase or authorised capital as well as the exercise of subscription rights.

A further innovation comes from the law governing public limited companies, namely the FlexKapGG introduces two instruments unknown to the GmbH: the conditional capital increase and the authorised capital. The FlexKapGG regulates these two instruments in Sections 19 and 21.

The GesRÄG 2023 is scheduled to enter into force on 1 November 2023. After entry into force, the formation privilege must be removed in accordance with Section 127 (29) GmbHG for every registered amendment to a GmbH articles of association. Existing GmbHs and AGs can be converted into FlexKapG from the date of entry into force pursuant to Sections 25 f FlexKapGG.

CRITICISM

In the course of the review process, numerous comments were submitted on the draft of the GesRÄG 2023. The general tenor was predominantly positive; however, some points were also criticised, a few of which are summarised here. Concerns were expressed, for example, regarding the structure of the conversion of company value shares into shares: The draft law provides for a capital increase coupled with a capital reduction for the conversion. In the event that the assets of the company do not change as a result of the conversion, Section 9 (9) FlexKapGG stipulates that neither the creditor call pursuant to Section 55 (2) GmbHG nor the non-cash contribution test pursuant to Section 52 (6) GmbHG are required with regard to the capital reduction. It was pointed out that this regulation saves companies time and money on the one hand, but on the other hand legal transactions could be misled by the labelling of the measures in the commercial register as capital reduction and capital increase. This is particularly because the terms used do not correspond to the usual terms used in company law.

It was also criticised, for example, that the reduction of the required share capital for limited liability companies from EUR 35,000.00 to EUR 10,000.00 would result in the loss of important protection against dubious start-ups and that the high susceptibility to insolvency of newly founded companies could therefore no longer be adequately counteracted.

It was also noted in comments that Section 6 FlexKapGG on the obligation to appoint a supervisory board resulted in unjustified unequal treatment compared to the GmbH, as this rule also stipulates the obligation to appoint a supervisory board for medium-sized corporations within the meaning of Section 221 (2) and (4) UGB. In contrast, a GmbH is only obliged to appoint a supervisory board if it has more than 300 employees ().

Opinions also differ on the simplification of the formal requirements for the FlexKapG.

Overall, the fact that Austria is to become more attractive as a business location through the flexibilisation of the corporation, in particular through the flexible forms of financing pursuant to sections 19-22 FlexKapGG, is predominantly viewed as positive. In some cases, however, it was

considered more desirable to further develop and adapt the GmbHG instead of introducing a new company form.¹

CONCLUSION

The aim of the GesRÄG 2023 is, on the one hand, to reduce the economic risk of shareholders of a GmbH and, on the other hand, to introduce a new Austrian form of capital company (FlexKapG/FlexCo).² These objectives have been partially achieved and the draft is a step in the right direction. In particular, the possibility of employee participation in the form of company value shares should be emphasised positively. Only time will tell whether the new regulations will be sufficient to make Austria more internationally competitive as a business location in this area of company law.

¹ See in particular the statements of the Higher Regional Court of Vienna, the Austrian Chamber of Notaries, Associate Professor Dr Christian Zib, Associate Professor Dr Friedrich Rüdfler LL.M., Associate Professor Dr Ulrich Torggler LL.M. (Cornell) on the draft of the Company Law Amendment Act 2023.

² cf. ErlME 276 BlgNR 27. GP 1.