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**CORPORATE LAW AMENDMENT ACT (GESRÄG) 2023**

Long awaited and now sooner than expected. This is how the introduction of the "FlexKapG" can be described, which can alternatively also bear the legal form suffix "FlexCo" and - in line with its international orientation - will probably also usually bear the abbreviation for Flexible Company.

In terms of content, the FlexCo contains much of what the start-up and venture capital scene in particular has been calling for for years: Lower entry hurdles, liberalized transfer options and weakened formal requirements.

**HYBRID OF GMBH AND AG**

By its nature, FlexCo is a mixture of a GmbH and an AG, whereby the reference to the GmbHG - as evidenced by the general reference in § 1 para. 2 FlexKapGG - is much more pronounced than to the AktG.<sup>1</sup> The minimum share capital for FlexCo and now also for the GmbH is EUR 10,000, of which at least EUR 5,000 must be paid in.<sup>2</sup> The temporary formation privilege has therefore also been transformed into a permanent solution for limited liability companies. The formation of corporations has thus become much more accessible as a result of the GesRÄG.

The fact that the FlexCo - in keeping with its name - is even more liberal than the GmbH can be seen, for example, in the regulations on the capital contribution to be made by the shareholders. This is at least EUR 1 for FlexCo, but still EUR 70 for the GmbH.<sup>3</sup> The fact that different regulatory regimes now exist despite de facto identical interests is criticized in particular.<sup>4</sup>

One of the most formative innovations of the FlexKapGG stems from the AktG. The admissibility of written votes (circular resolutions) can be provided for in the articles of association. Previously, all shareholders of a GmbH had to agree to the circular resolution as a voting method. The consequence of this was that individual shareholders could prevent circular resolutions, which in turn meant that a general meeting had to be convened. This is now regulated differently at FlexCo.<sup>5</sup>

The resolution then also concerns two further flexibility measures. On the one hand, the sufficiency of the text form can be stipulated in the articles of association. On the other hand, there are no minimum participation quorums for passing resolutions. Although for sensitive issues - such as the appointment of managing directors or amendments to the articles of association (notarial

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<sup>1</sup> Kreuzer, CFOaktuell 2023, 235.

<sup>2</sup> Potyka, RWZ 2023, 35.

<sup>3</sup> Told, ÖJZ 2023, 153.

<sup>4</sup> Kalss, GesRZ 2023, 345.

<sup>5</sup> Rizzi/Ringhofer,, ÖJZ 2023, 152.

certification or notarial minutes) - special formal requirements also apply under the FlexKapGG, the adoption of resolutions by email is likely to become the rule in many cases.<sup>6</sup>

Finally, the FlexKapGG even contains a tightening compared to the GmbHG: A FlexCo is already obliged to have a supervisory board from 50 employees, provided that one of the two further requirements (balance sheet total of EUR 5 million or turnover of EUR 10 million) is exceeded. In contrast, a GmbH would only be required to have a supervisory board if it had 300 or more employees.

## COMPANY VALUE SHARE

The biggest innovation is probably the fact that employees can now simply participate in the company's economic success. FlexCo's most outstanding innovation is therefore the company value share. This represents a share in the profits and assets of FlexCo without granting any further influence on the management. However, a company value share is associated with significant information and inspection rights, as the economic situation of FlexCo is naturally of interest to the shareholders.<sup>7</sup>

The company value share must also be regulated in the articles of association. They may be issued up to a maximum of 25% of FlexCo's share capital, with a minimum contribution of 1 cent to be paid in full.<sup>8</sup> It is also mandatory to grant a tag-along right for company shareholders.<sup>9</sup>

## TRANSFER OF SHARES

The transfer of shares is also much easier. After instruction by a lawyer or notary, shares can be transferred by means of a simple written deed.<sup>10</sup> The transfer by notarial deed is therefore obsolete. In the case of enterprise value shares, the simple written form is sufficient. The explanatory notes justify the waiver of stricter formal requirements with the - already mentioned - limited rights and obligations of enterprise value shareholders.<sup>11</sup>

## ACQUISITION OF OWN SHARES

In contrast to the GmbHG and AktG, which are restrictive in this respect, the FlexKapGG also permits the acquisition of own company shares.<sup>12</sup> The scope of application of the regulation is diverse. As can also be seen from the materials, the liberalization of the acquisition of shares creates the basis for the buy-out of founding partners, the repurchase of shares from former

<sup>6</sup> Kreuzer, CFOaktuell 2023, 235.

<sup>7</sup> Told, ÖJZ2023, 153.

<sup>8</sup> Oberlechner, GES 2023, 211.

<sup>9</sup> Potyka, RWZ 2023, 35.

<sup>10</sup> Vgl. § 12 FlexKapGG

<sup>11</sup> Kalss, GesRZ 2023, 345.

<sup>12</sup> Vgl. § 65 AktG, § 81 GmbHG und § 15 FlexKapGG.

employees, innovative expansion and investment models as well as unbundling options in the event of conflicts.<sup>13</sup>

For reasons of creditor protection, the acquisition of treasury shares - even in the liberal FlexKapGG - is subject to various restrictions such as the setting of a maximum amount of one third of the share capital (all shares together), the restriction of the acquisition of shares to free funds and the obligation to pay in full.<sup>14</sup>

## CONCLUSION

With the FlexCo, a more flexible corporation was created in comparison to the GmbH and AG. The simplifications with regard to formation costs, decision-making and employee participation address some critical aspects of the existing company forms. In addition to the new features described above, there are other regulations that may speak in favor of founding a FlexCo or converting a GmbH into the new company form. These must be weighed up on a case-by-case basis and after individual consultation. However, a general statement can be made without any risk: The introduction of the FlexCo is a significant liberalization boost for Austrian company law.

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<sup>13</sup> *Kalss*, GesRZ 2023, 345.

<sup>14</sup> *Kalss*, GesRZ 2023, 345.