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The New Austrian Flexible Company (FlexCo)

Drawing up complex articles of association, opening a separate bank account as well as mandatory registrations with courts, financial and trade authorities, and the Austrian social security system – all of this can easily deter aspiring founders from choosing Austria as their base. In line with international legal structures (such as the British limited), the intro-duction of the “flexible company” (“Flexible Kapitalgesellschaft”, “FlexCo” or “FlexKapG”) from 1 January 2024 aims to make Austria more appealing to start-ups looking for interna-tional investors by creating a tailored regulatory framework with fewer formal requirements that enables the flexible allocation of employee and investor shares.

Above all, the aim of the new Austrian Act on Flexible Companies is to ensure legal certain-ty, as company founders will be able to rely on existing case law on Austrian limited liability companies (GmbH). Therefore, although the FlexCo is a newly introduced corporate form in Austria, it can also be seen as a special form of limited liability company (GmbH). Apart from the special rules applicable to FlexCos set out in the Austrian Act on Flexible Compa-nies, the Austrian legal provisions on limited liability companies (GmbH), which in turn also include harmonized principles of EU company law, will apply in a subsidiary manner.

A FlexCo will be a company with its own legal personality, whose shareholders have limited liability. It may even be a single-member company.

From 1 January 2024, the minimum nominal share capital for Austrian limited liability com-panies (GmbH) as well as for Austrian FlexCos will be EUR 10,000 (instead of the previous EUR 35,000), which only has to be paid up in part (50% or EUR 5,000). For both types of company, the nominal share capital can be paid up in cash or in kind (the latter requiring a more complex formation procedure).

Compared to an Austrian limited liability company (GmbH), the new FlexCo differs primarily in the following ways:

- The minimum nominal amount for a share in a FlexCo is just EUR 1 (as opposed to EUR 70 for a GmbH).
- The procedure for adopting written (circular) shareholders’ resolutions is simplified compared to a GmbH and any shareholder with more than one vote – other than in a GmbH – does not have to vote uniformly when casting all his votes.
- Less than 25% of a FlexCo’s shares may be “enterprise-value shares”, which are a completely new feature of Austrian company law. These enterprise-value shares, designed to be issued to employees of a FlexCo as an incentive, entitle the holder to a (proportionate) share in the FlexCo’s profit and liquidation proceeds. The holder of such enterprise-value shares, however, does not have voting rights (with but a few exceptions) and only has limited information rights. Written form is sufficient for the transfer of such enterprise-value shares and these shares are subject to reduced registration obligations. If the shareholders who are defined as the founders of a FlexCo sell part of their shareholdings, the holders of enterprise-value shares are able to exercise a tag-

along right (right to co-sell their shares). The employees of a FlexCo holding enterprise-value shares are even entitled to dispose of their enterprise-value shares if their employment relationship with the FlexCo ends (for any reason whatsoever).

- Neither the transfer of shares in a FlexCo nor a subscription declaration for such shares needs to take the form of an Austrian notarial deed. Instead, a deed drawn up by a lawyer or a notary would also suffice. Compared to a GmbH, where costly notarial deeds are required for any share transfer and subscription declarations, this measure is intended to reduce costs for start-ups and investors and make Austria a more attractive place for internationally oriented companies and their founders and investors alike.
- Different from a GmbH but similar to an Austrian stock corporation (AG), a FlexCo may (subject to certain limits) acquire its own shares or take them as security and it may subsequently dispose of or cancel such shares that it holds.
- Again, similar to an Austrian stock corporation (AG), the registered share capital of a FlexCo may not only be increased ordinarily but also by way of a conditional capital increase or by utilizing authorized capital.
- Unlike a GmbH, every medium-sized FlexCo (i.e. where two out of the following three thresholds are exceeded: EUR 5 million balance sheet total, EUR 10 million turnover within the past 12 months, and a workforce of 50 employees on average over the course of the year) has to have a supervisory board which must also include employees' representatives (1/3 of the supervisory board members) delegated by the works council. This rule, unfortunately, constitutes a disadvantage compared to an Austrian GmbH, where usually a supervisory board need only be established if the GmbH has on average more than 300 employees over the course of the year.

In a nutshell, the new Austrian FlexCo offers more flexibility than an Austrian GmbH while – at least to a certain extent – reducing formalities. Still, there are also some disadvantages to be taken into consideration (e.g. requirement for a supervisory board with employee rep-resentatives to be established for medium-sized FlexCos, enterprise-value shares requiring complex provisions in the Articles of Association). The next few months will show whether founders and investors embrace this new corporate form and whether the new Act on Flexi-ble Companies will prove successful.

For more information

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