

Introducing a new type of legal entity - Flexible Company

In brief

Enhancing flexibility: Austria has introduced the flexible company (Flexible Kapitalgesellschaft, "**FlexCo**") as a new type of legal entity. After years of efforts to make its corporate law landscape more attractive to founders and venture capital investors, the Austrian legislator enacted a legislative package in December 2023, becoming effective as of 1 January 2024.

This legal alert aims to summarize the main characteristics of the FlexCo and its differences from the commonly used limited liability company (GmbH). The conclusion outlines considerations to take into account when deciding whether to incorporate in Austria in the legal form of the FlexCo instead of the GmbH.

Key takeaways

- Serving as a hybrid between the GmbH and the stock corporation (AG), the FlexCo attempts to combine advantages from both types of legal entity.
- The Act on Flexible Companies (Flexible Kapitalgesellschafts-Gesetz, "**FlexKapGG**") declares the Austrian Act on Limited-Liability Companies ("**GmbH Law**") to be subsidiarily applicable to the FlexCo and supplements 29 sections specific to the FlexCo.
- As of 1 January 2024, the FlexCo and the GmbH will have in common a minimum share capital in the amount of EUR 10,000.
- Due to mandatory bank account opening in general, the Know Your Client process remains the decisive timing factor for the formation.
- The FlexCo bolsters circular resolutions and digital voting, with active participation required for resolutions.
- Share transfers and subscriptions of new shares have been simplified by replacing the notarial deed with a private deed set up by a notary public or an attorney-at-law.
- Introduction of company value shares enhances employees' participation.
- There is greater flexibility due to capital measures similar to the AG, but it is also easier to reach thresholds for the application of mandatory supervisory board provisions.
- There are income tax incentives for employee-participation plans with the company value shares in the FlexCo, but these also apply to other legal forms, such as the GmbH and the AG.



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IN DEPTH

Background

Calls for greater flexibility in Austrian corporate law in recent years have finally been heard. The FlexCo is poised to emerge as a distinct legal entity. As a hybrid of the GmbH and the AG, the FlexCo aims to use advantages from both of these existing legal entity types. Traditionally, the GmbH has been the predominant legal form for launching a business in Austria, given its established framework. To benefit from this advantage, the FlexKapGG orders that the GmbH Law shall subsidiarily apply to FlexCos, leaving the FlexKapGG with merely 29 additional sections specifically for the FlexCo.

The entire legislative package unfolds into three parts. First, the FlexKapGG, which is part of the broader Austrian Corporate Law Amendment Act 2023 (Gesellschaftsrechts-Änderungsgesetz 2023, "**GesRÄG 2023**"). Notably, the GesRÄG 2023 includes several other technical amendments to special company law provisions. One particular "side effect" of the GesRÄG 2023 is reducing the minimum share capital in the GmbH from EUR 35,000 to EUR 10,000. Third, the Austrian Start-Up Promotion Act (Start-Up-Förderungsgesetz) introduces income tax benefits for employee participations (details below).

Incorporation/formation

As already mentioned, both the FlexCo and the GmbH shall have a minimum share capital of EUR 10,000, of which EUR 5,000 must be paid in (as the legislator reduces the GmbH's statutory minimum of EUR 35,000). The previous foundation-privileged GmbH, which currently allows the foundation of a GmbH with basically only EUR 10,000, will therefore be abolished.

The FlexCo allows individual shareholder contributions to amount to EUR 1. In contrast, shareholders of the GmbH are further bound by a minimum initial contribution of EUR 70. As a consequence, the FlexCo makes smaller participations possible without having to opt for a higher share capital.

The formation of a FlexCo will still be required in the form of an Austrian notarial deed, unless it is a simplified formation where the single shareholder (natural person) must also be the managing director (same as GmbH).

The FlexCo's company name must contain one of the following legal form identifiers: "Flexible Kapitalgesellschaft," "Flexible Company," "FlexKapG" or "FlexCo." The possibility to use an English term is an unprecedented novelty.

The increased flexibility in Austrian corporate law does not translate into an expedited company formation process. Opening a bank account to deposit the share capital (or to deposit the share capital to a notary's bank account) remains a mandatory step, which the company must evidence to the Austrian companies register before its registration. Thus, the KYC process will continue to be the most decisive time factor in establishing an Austrian legal entity.

In this context, converting an AG or a GmbH into a FlexCo might also be an option for a FlexCo formation. Such conversions are expressly allowed in the FlexKapGG. Converting the GmbH into the FlexCo and vice versa does not require creditor protection measures or right to a cash compensation. However, if company value shares have been issued, the conversion will require accompanying capital measures and, in certain cases, company value shares participants' consent will be required.



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Decision-making

The FlexCo does not introduce any amendments as to the management of the company. Same as at the GmbH, the managing director(s) of the FlexCo will have the ultimate responsibility for its management and will be responsible for managing the FlexCo on a day-to-day basis. The shareholder(s) will continue to act as a superior executive corporate body of the FlexCo in the sense that they will have unlimited power to determine the FlexCo's actions.

As opposed to the GmbH, the FlexCo allows for circular resolutions, where the consent of all shareholders will not be required and voting in text form (i.e., digital voting) will be sufficient. Both of these deviations from the GmbH must be specifically set out in the FlexCo's Articles of Association. However, all voting-eligible shareholders must, without exception, have the opportunity to participate in the voting process. Consequently, to adopt a shareholders' resolution, more than half of all entitled voters must actively participate in the vote and support the proposed resolution.

A shareholder who is entitled to more than one vote may also exercise its voting rights unevenly. The reason for such split voting may be primarily that the respective shareholder holds its share partially as a trustee for another beneficial owner.

Simplified share transfers

The FlexCo offers another notable simplification in terms of form requirements. A notarial deed is no longer required for share transfers or subscriptions of shares during a capital increase. Instead, the aforesaid transactions might be documented in the form of a private deed, to be set up by a notary public or an attorney-at-law.

The notary public or the attorney-at-law setting up the private deed must check the admissibility of the share transfer/share subscription and inform the respective parties of the legal consequences of their declarations and possible further requirements for the effectiveness of the share transfer/subscription. A lack of informative instruction will, however, not lead to an ineffective share transfer/subscription.

More and new share classes – company value shares

While each shareholder in the GmbH is only allowed to hold one type of share, the FlexCo opens the door to fractional shares (Stückanteile). Practically speaking, a shareholder who participated in different funding rounds might be provided with diverse share classes, each carrying distinctive rights and obligations. The former practice to be managed through contractual arrangements will now be governed by corporate law.

The essence of the FlexCo lies, however, in the introduction of a new share class, the so-called company value shares (Unternehmenswert-Anteile). These can be issued up to less than 25% of the share capital, with a minimal nominal value of one euro cent. Such shares do not carry voting rights, rather than rights on dividends and liquidation proceeds. However, company value shares participants are entitled to participate in the FlexCo's general meetings and to be informed about holding circular resolutions.

In contrast to ordinary shares registered with the Austrian companies register, the company value shares participants should only be entered into a share register. Such share register will be filed with the Austrian companies register without revealing the amount of the participation.

The form requirements concerning transfers of shares are, in the case of company value shares, even more simplified. Such shares can be transferred in a simple written form without the need to involve a notary public or an attorney-at-law. More importantly, company value shares participants enjoy a mandatory tag-along right, triggered as soon as the "founding shareholders" divest the majority of their shareholdings.

A further instructive information obligation concerns company values shares to be acquired by the FlexCo's employees. To this end, the employee must be provided with a comprehensible information document two weeks before the first subscription or acquisition of a company value share in legal and economic terms. The Articles of Association must also specify to whom and on what terms employees might sell their company value shares if their employment with the FlexCo is terminated.

Flexible capital measures

Similarly to the AG, the FlexCo will be equipped with the possibility to issue authorized and conditional capital as well as to acquire own shares in certain situations. Provided there is a respective authorization in the articles of association, the managing directors of the FlexCo may, within the FlexCo's first five existing years, issue new shares without having to involve the shareholders' meeting. The nominal amount of the authorized capital may not exceed 50% of the share capital. The conditional capital shall mainly be used to grant share options to employees and grant conversion and subscription rights to creditors of financing instruments. Apart from other use cases, the acquisition of own shares (treasury shares) might be practiced when acquiring company value shares or holding such shares in stock for later participations. In each case, treasury shares might only be acquired if the acquisition can be financed from the FlexCo's freely distributable assets.

Supervisory board

If the FlexCo exceeds two of the following size criteria: (1) EUR 5 million in balance sheet total; (2) EUR 10 million in revenues; and (3) an annual average of 50 employees (i.e., a medium-sized company), it will have to establish a mandatory supervisory board, compared to the GmbH, for which this is typically the case if it exceeds 300 employees on average.

Tax benefits

To accompany the corporate rules on the FlexCo, the so-called "Start-Up Promotion Act" (Start-Up-Förderungsgesetz) introduced income tax benefits for "start-up employee participations" in the start-up.

The following conditions must be met to qualify as an employee participation in a start-up:

- The shares must be granted by the employer or one of its shareholders with respect to the employer company at no more than the participation's nominal value.
- The company must not employ more than 100 employees on annual average.
- The company must not generate revenues exceeding EUR 40 million.
- The company must not be included in any consolidated financial statements (this also applies to the company's shareholder holding a participation exceeding 25%).
- The participation must be granted within 10 years of the company's founding.
- The employee must not already hold a participation equal to or exceeding 10%.
- The employee and the employer agree in writing that a transfer by the employee is only possible with the employer's consent (transfer restriction).
- Upon receiving the shares, the employee declares in writing to the employer to opt for start-up employee participation, which is to be recorded in the salary account accordingly.

If qualified as an employee participation, valuation and taxation are postponed until (among others) the participation is sold or the employment is terminated. The postponement prevents immediate taxation, which resolves the current noncash taxation event for employees ("dry income" issue)

The legislator has adopted special rules in connection with FlexCos' company value shares: If the employment is terminated, the employer may declare that the taxation remains postponed until the employee disposes of the company value shares in the FlexCo. Moreover, converting the company value shares in an FlexCo into ordinary shares in the same entity should also not be regarded as a taxable event.

If employment lasted two years and the participation was held for at least three years, 75% of these sale proceeds are subject to a flat tax rate of 27.5%, while the residual 25% is subject to the respective individual progressive tax rate. The tax base, in the case of the participation's disposal, is the sales price, whereby subsequent adjustments (i.e., "earn-outs") have to be considered.

This preferential tax treatment is not exclusive to the FlexCo but also applies to other legal forms, such as the GmbH or the AG.

Conclusions

- The intended deregulation of Austria's rigid corporate law is to be welcomed. The legislator attempted to combine the best from the GmbH and the AG and to cast it into a new legal entity. Although designed to meet the demands of the start-up industry, the FlexCo will be open to all founders and existing companies. The FlexCo fulfills most of the characteristics expected of an Austrian GmbH, such as the limited liability for the shareholders, the managing directors being bound by the shareholders' instructions, as well as the majority principle for the shareholders' decisions.
- The GmbH's reduced share capital as of 1 January 2024 will make the FlexCo and the GmbH equal rivals in terms of minimum capital requirements at the company's inception.
- The FlexCo's less stringent form requirements will represent not only a time and cost advantage, but also higher legal certainty compared to the notarial deed required by the GmbH Law. This is because it has become more frequent for Austrian courts to rule notarial deeds null and void based on formal defects (e.g., notarial deed or its annexes have not been read out).
- Together with the flexible capital measures and more share classes, all these comparative advantages make the FlexCo more attractive than the GmbH.
- However, for foreign investors incorporating in Austria or nationals establishing a group subsidiary without the demand for employee participations and flexible capital measures, the expected benefits will not be groundbreaking. On the contrary, the FlexCo will easily fall under the obligation to establish a supervisory board. Thus, as the case may be, the shareholder(s) might want to convert the FlexCo into a GmbH to prevent a mandatory supervisory board at an earlier stage.
- Lastly, even if the Austrian GmbH Law will largely apply to the FlexCo, it still might end up being interpreted differently in some cases as the GmbH Law, leaving legal uncertainties compared to the GmbH.

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