

# Flexible Company

*(Originally published on LinkedIn, Stephan Schmalzl, 25.07.2023)*

On May 30, 2023, the ministerial draft of the Flexible Capital Companies Act (FlexKapGG) was published for review. The draft introduces the new "more flexible" form of the Flexible Capital Company (FlexKapG) or Flexible Company, which can be understood as a legal hybrid between a GmbH and an AG. However, the draft also addresses several other new and partly controversial topics.

The most significant innovation from the perspective of corporate financing is the concept of Corporate Value Shares (CVS). Although these shares are comparable to shares in a GmbH, there are significant differences. CVS may only be issued up to 25% of the share capital and are intended to be "more flexible," as evident by the minimum capital contribution being set at only € 0.01. Holders of CVS are entitled to participate in profit distribution, but do not have voting rights, additional capital obligations or default liability. Due to the lower economic risks associated with CVS, they are expected to be more attractive to employees. However, two additional legal provisions would be desirable. Firstly, according to the draft, holders of CVS are not required to be registered in the companies' register. However, the legislature plans to require the management to maintain a list of names of the holders and submit it to the company register. It is at least questionable whether users will be willing to retrieve the information derivable solely from the collection of documents. Secondly, it appears that creditor protection in connection with the conversion of CVS into "real" shares through capital reduction and increase is implemented only to a minimal extent compared to a nominal capital increase under the Capital Amendment Act (KapBG). According to the draft, the "proceeds" from the capital reduction can be used directly for the capital increase, with the general formal requirements applying, but a review of non-cash contributions should not explicitly be required. Especially with regard to "older" CVS, the question arises whether the originally provided contribution is indeed still present in the company's assets. This could lead to problems for the managing directors arising from the liability for discrepancies according to § 10 (4) GmbHG. Perhaps flexibility should be sacrificed here, and a mechanism to ensure the actual capital inflow should be introduced.

Another proposal that triggers strong emotions is § 12 FlexKapGG, which provides an alternative to the notarization requirements for the transfer of shares and assumption declarations regarding shares. Unlike in a GmbH, where the notarization requirements primarily serve the purpose of legal certainty through immobilization, the transfer of shares in a FlexKapG can also be done via private legal document, which can be prepared by notaries or lawyers. From the available statements, it becomes

apparent that by choosing this alternative, the legislator sacrifices a certain degree of legal certainty since the instructions and examination requirements for private documents are not intended to be as extensive in comparison. We consider this to be inaccurate. Even a lawyer has the obligation, stemming from professional ethics, to represent and advise their clients with "diligence, loyalty, and conscientiousness." We see this as advantageous in terms of financial and time savings. One of the formal requirements of a notarial deed is that the entire document must be read aloud in the presence of the parties and witnesses. This is often a lengthy and costly process in practice, which is eliminated by the legislature's alternative. According to the explanation of § 12 FlexKapGG, the intention of the legislature is to facilitate international investors. Although it is already possible to have notarial deeds in multiple as well as foreign languages, these incur higher costs due to the necessary additional qualification of the notary and the certified translation. Therefore, it is a noticeable step towards reducing bureaucracy, but whether it can function as intended by the legislature remains to be seen.

It is easy to see that this draft brings many new elements that legal professionals will need to examine intensively. This also applies to other proposed changes, such as an amendment to the GmbHG, which would result in a reduction of the minimum share capital from €35,000 to €10,000 and the complete elimination of the privileged founding GmbH. It is doubtful whether this will shake the foundations of Austrian corporate law, as feared by some, since it is still unclear which of the proposed changes will survive the further legislative process. The entry into force is scheduled for November 1, 2023. The current status of the parliamentary procedure is that the draft was transmitted to the Federal Ministry of Justice on the 10th of July 2023, after the end of the review period on the 7th of July 2023. Whether and to what extent the statements made during the parliamentary process will be taken into account and, in particular, whether the criticized weakness in creditor protection concerning the capital increase from CVS will be amended, remains to be seen.



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