REFORMS UNDER CORPORATE LAW

I. INTRODUCTION

At the beginning of the year, there were significant reforms in corporate law, particularly in Austria and Germany. However, in China, as well, extensive changes in corporate law will be made starting in the middle of the year.

In Austria, the catalogue of companies has been expanded to include a new legal form. With the "flexible corporation", as of 1 January 2024, there is now the possibility of carrying out business activities in a new legal form. The contribution from Austria shows how a flexible corporation is established, which bodies are required, what benefits the flexible corporation offers compared to a normal GmbH, and finally how a GmbH can be converted into the legal form of the flexible corporation.

In Germany, as of 1 January 2024, the Partnership Law Modernisation Act (MoPeG for short [Personengesellschaftsrechtsmodernisierungsgesetz]) came into force. The Civil Code dates back to 1 January 1900, i.e. it was adopted over 120 years ago. Since then, there has been no fundamental reform of partnership law. The evolution of partnerships was exclusively characterised by case law and legal science in the last century. With the reforms as of 1 January 2024, the most important unwritten principles have now been established by law. The article from Germany provides an overview of the most important reforms and changes.

In China, comprehensive reforms will come into force on 1 July 2024 for limited liability companies, which also affect foreign-invested companies and the respective management in particular.

The article from France outlines the most important changes following Decree No. 2023-657, dated 25 July 2023. With the decree, the threshold values for the share capital of a company were determined depending on the company's balance sheet total

The report for Italy addresses the existing obligation after longer delays to ultimately disclose the economic beneficiaries of private legal entities, trusts and comparable legal institutions effective as of 9 April 2024.

In Slovakia, a new law on the conversion of commercial companies and cooperatives was adopted effective 1 March 2024. The article provides an initial overview of the reforms.

The article concerning Turkey outlines the reforms with regard to the increase in the minimum share capital in limited liability companies and stock corporations.

II. AUSTRIA

Since 01/01/2024, there has been a new form of company in Austria with the "flexible corporation". This is intended in particular to take into account the needs of start-ups and founders. But even outside the start-up scene, choosing the legal form of a flexible corporation can be an interesting option. Even for an existing GmbH (*Gesellschaft mit beschränkter Haftung* [limited liability company]), the conversion into a flexible corporation can be attractive. In this newsletter, we give you an initial overview and answer the most important questions about the flexible corporation.

1. WHAT IS THE MINIMUM SHARE CAPITAL OF A FLEXIBLE CORPORATION?

The minimum share capital of a flexible corporation is EUR 10,000. The contributing deposits to be made in cash must be at least EUR 5,000. Since over the course of launching the flexible corporation, the minimum share capital of the GmbH was also generally reduced (from EUR 35,000) to EUR 10,000, there is no difference between the flexible corporation and GmbH.

The initial contribution of a shareholder must be at least EUR 1 for the flexible corporation (in GmbH law, however, the minimum initial contribution is EUR 70). In the case of company value shares (see below), a limit of only one cent applies. This enables lower shares than with the GmbH – this option is particularly important for employee participations.

2. HOW IS A FLEXIBLE CORPORATION ESTABLISHED?

The establishment of a flexible corporation is comparable to the establishment of a GmbH:

Initially, the conclusion of articles of association is necessary. This requires the form of a notarial act. If the managing directors are not appointed directly in the articles of association, a shareholder resolution is required for the appointment of managing directors. This resolution must be signed by a notary. The managing directors must submit a (notarised) signature sample and register the incorporation of the flexible corporation with the company register, with proof of the payment of capital contributions. The company register application requires the notarised signature of all managing directors.

As with a GmbH, however, a “simplified electronic establishment” is also possible with a flexible corporation: Such an option comes into question if (i) the company only has one shareholder who will also be the sole managing director, (ii) the share capital amounts to EUR 10,000, and EUR 5,000 is paid on it, and (iii) the articles of association (certificate of incorporation) only has a certain minimum content. The articles of association (certificate of incorporation) then does not require the form of a notarial act. The signature sample is submitted via the credit institution where the initial contribution is paid. Registration in the company register takes place via the company service portal (CSP).

3. WHICH BODIES ARE ENVISAGED FOR A FLEXIBLE CORPORATION?

In any case, the bodies of a flexible corporation are the management and the general meeting. In cases defined in more detail by law (such as with more than 300 employees in particular), a supervisory board must be set up. These cases basically correspond to those in which a GmbH must also set up a supervisory board. In addition, a supervisory board must also be set up in the case of a flexible corporation, provided it is at least a “medium-sized corporation” within the meaning of the Corporate Code. This is the case if a flexible corporation exceeds at least two of the following three characteristics:

- EUR 5 million in balance sheet total,
- EUR 10 million in sales revenues,
- annual average of 50 employees.

Other bodies (such as an advisory board) can be set up voluntarily.

4. HOW CAN THE SHAREHOLDERS OF A FLEXIBLE CORPORATION PASS RESOLUTIONS?

As with a GmbH, the shareholders of a flexible corporation can pass resolutions in general meetings or in writing. General meetings can also be held virtually in accordance with the Virtual Shareholders' Meeting Act (VirtGesG [Virtuelle Gesellschafterversammlungen-Gesetz]) if a basis is provided by the articles of association.
If the vote will take place in writing, all shareholders must fundamentally agree to this form for passing resolutions. Each shareholder can thus block written resolutions. However, unlike in GmbH law, the articles of association of a flexible corporation may stipulate that the consent of all shareholders is not required for a vote in writing. The articles of association of a flexible corporation can also stipulate that the text form is sufficient for written resolutions instead of the written form (= signature). This makes it possible, for example, to sign a resolution digitally or cast a vote by e-mail (whereby the e-mail must identify the sender at the end).

The formal requirements for passing written resolutions sometimes lead to errors at GmbH in practice, which often only arise in the event of disputes within the shareholder group or in the course of M&A transactions, but can then become problematic. The leeway for passing written resolutions in flexible corporations under the articles of association is thus significantly and, above all, practically easier compared to GmbH law.

If a shareholder of a flexible corporation has more than one vote, he/she does not have to cast his/her votes consistently. This means that he/she does not have to cast a yes or no vote with all the votes or abstain from voting, but can vote "yes" with some of his/her votes and "no" with the other part, for example. This is relevant, for example, if a shareholder holds a part of the company share for a trustor, and the trustor desires a different voting behaviour for the share held in trust than the trustee for his own share. However, it is disputed whether and under what conditions an inconsistent casting of votes is permissible. The clear statement of FlexKapGG (*Flexible Kapitalgesellschafts-Gesetz* [Flexible Corporation Act]) should therefore be welcomed.

5. WHAT ARE THE MAIN ADVANTAGES OF A FLEXIBLE CORPORATION COMPARED TO A GMBH?

The legal form of the flexible corporation has numerous advantages compared to the GmbH. Particularly worth mentioning are

- the lower minimum stock contribution of a shareholder in the amount of EUR 1 (compared to EUR 70 for a GmbH),
- the possibility of planning for passing written resolutions easier in the articles of association,
- the possibility of inconsistent voting,
- the lack of a notarial requirement for the transfer of shares,
- the possibility of issuing company value shares, and
- more flexible capital measures (conditional capital increase, approved capital).

Some of these advantages could also make the legal form of the flexible corporation interesting for existing GmbHs.
A disadvantage is the fact that a supervisory board must already be established for "medium-sized" flexible corporations. In addition, as always when a legally "new country" is entered, there is a certain degree of legal uncertainty that will be reduced over time through court decisions.

6. CAN AN EXISTING GMBH BE CONVERTED INTO A FLEXIBLE CORPORATION?

Existing GmbHs can be converted into the legal form of a flexible corporation. The law stipulates a relatively simple procedure for this. A resolution by the general meeting of shareholders is essentially required, which can generally be passed with a majority of three quarters of the votes cast. Subsequently, the conversion resolution must be registered in the company register.

III. CHINA

On 29 December 2023, the National People's Congress Standing Committee of China adopted the largest corporate law reform of the PRC to date. The related changes to the law will officially come into force on 1 July 2024.

The most important legislative changes for limited liability companies ("LLCs") will apply to the following areas:

- Intensification of the obligations of shareholders regarding capital contribution;
- Changes to the rules for the transfer of shares;
- Changes in the area of corporate governance; and
- Increased liability of management.

These changes also apply to foreign-invested companies and their management.

We have already published a separate newsletter series on the details of the very extensive

changes to the law and the resulting need for action for foreign-invested companies and their management. You can access these newsletters at the following links:

Impacts of New Chinese Company Law - Part I

Impacts of New Chinese Company Law – Part II

IV. CZECH REPUBLIC

The most recent changes to commercial regulations are primarily about accelerating and simplifying certain processes in connection with increasing digitalisation. As early as last year, a register was established containing persons who are excluded from exercising the office of a selected body of a trading company. Courts and notaries have access to this register. Although the functionality of this register is still quite unreliable in practice, it could replace the need in the near future to submit certain documents when these persons are registered in the commercial register, in particular with regard to the excerpt from the criminal register.

V. FRANCE

The last significant reform in French company law was introduced by Decree No. 2023-657, dated 25 July 2023. The changes introduced by this decree relate in particular to stock corporations (S.A. for Société anonyme), simplified stock corporations (S.A.S. for Société par actions simplifiée), limited partnerships on shares (Société en commandite par actions) and limited liability companies (S.A.R.L. for Société à responsabilité limitée), which have their registered office in France. The aim of the decree was to set thresholds for share capital, beyond which companies must reduce their capital if they have not restored their equity within the statutory period after discovering its inadequacy. The decree follows Article 14 of Law No. 2023-171 of 9 March 2023, whose objective was to end the implementation of Directive (EU) 2017/1132 of 14 June 2017 on certain aspects of company law in order to adapt French law to the law of the European Union. The decree thus defines the threshold values for the share capital depending on the balance sheet total of the company, whereby, in particular, the threshold value for the share capital pursuant to Articles L. 223-42 and L. 225-248 of the Commercial Code is set at 1% of the balance sheet total when the financial year was last concluded.

VI. GERMANY

Effective 1 January 2024, there has been an important change to partnership law in Germany. The Partnership Law Modernisation Act (MoPeG) came into force on this date. On this basis, a new register was set up at the local courts for registration of companies under civil law. The registration is mandatory for a GbR (*Gesellschaft bürgerlichen Rechts* [company under civil law]) if it would like to acquire or sell a property. Since 1 January 2024, a GbR can also only be registered in the shareholder list of a GmbH if the company has previously been registered in the company register.

1. DIFFERENCE BETWEEN LEGALLY INCORPORATED AND NON-LEGALLY INCORPORATED COMPANIES UNDER CIVIL LAW

The new law differentiates between a legally incorporated and a non-legally incorporated GbR. A GbR is legally incorporated if it participates in legal transactions with the consent of all shareholders or if it is registered in the new company register. Legal incorporation may already exist due to participation in legal transactions if the company is not registered in the company register. The intent to participate in legal transactions together is presumed in accordance with Section 705 para. 3 BGB (*Bürgerliche Gesetzbuch* [German Civil Code]) new version if the object of the company is the operation of a company under a common name. A legally incorporated GbR can conclude contracts under its name or file a lawsuit or be sued.

In case of registration in the company register, a GbR is obliged to bear the suffix "registered company under civil law" or "eGbR [eingetragene Gesellschaft bürgerlichen Rechts]" in its name. If no natural person is liable as a shareholder in a company under civil law, the limitation of liability must be identified in the name, for example by the designation as "GmbH &

Co. eGbR" or with the suffix "eGbR with limited liability". The name, registered office and address of the company, information on the shareholders and power of representation must be published in the company register.

Registration in the company register is likely to make day-to-day legal transactions easier. Since the persons who can represent eGbR are explicitly named in the company register, legal certainty arises for possible contractual partners. There is protection of trust in accordance with Section 707 a para. 3 BGB new version in conjunction with Section 15 para. 1 HGB (*Handelgesetzbuch* [German Commercial Code]). Without registration in the company register, examining the representation regulations is significantly more difficult for external persons and connected with uncertainties. Possible contractual partners of a GbR may indeed demand the filing of the articles of association. However, since a GbR's articles of association can be changed in any form, external third parties cannot rely on articles of association that were once submitted to them continuing to apply unchanged. If a representative acts for the company without power of representation, the company is not liable for the legal transaction. The person who actually wanted to conclude the contract with the GbR can only hold the person liable who acted as a representative without power of representation. Registering a company in the company register can therefore be a trust-building measure.

2. CONTINUED APPLICATION OF PREVIOUS REGULATIONS CONCERNING POWER OF REPRESENTATION OF SHAREHOLDERS AND MAJORITY REQUIREMENTS IN ARTICLES OF ASSOCIATION

As in the previous legal situation, it will continue to be possible to regulate in the articles of association that GbR shareholders have sole power of representation or two shareholders can only represent the company jointly. Only the shareholders have the power to represent the company. Third parties still need a power of attorney to represent the GbR. Managing shareholders can also object to the execution of a transaction by another managing partner under the new legal regulations; in the event of an objection, the transaction must be stopped. The shareholders are also entitled in the future to agree on majority requirements for the adoption of shareholder resolutions in the articles of association.

3. INVALIDITY OF LIABILITY LIMITATIONS AGREED TO IN THE PAST

Any previously agreed provisions regarding a limitation of liability towards third parties have been invalidated by the MoPeG. Section 720 para. 3 BGB new version also stipulates that any restrictions on the power of representation are ineffective against third parties.

MoPeG does not permit a restriction on the personal liability of shareholders of a GbR. There is unlimited liability of the shareholders of a GbR for new and old liabilities. If something must also be enforced against shareholders, the legal dispute must not only be brought against the company as such, but also against its shareholders.

4. TRANSFER AND TRANSITION OF COMPANY SHARES

As before, the transfer of a company share requires the approval of the other shareholders. Consent can also be granted in the articles of association. In addition, it was clarified in the new statutory regulation that the company cannot acquire its own shares. The GbR thus continues to differ in this respect from a GmbH that can hold its own shares itself. In the event that company shares fall into the estate and it is agreed that the company will be continued with the heirs, the company share will be accrued to each heir by law in accordance with the inheritance quota. The legal succession in a GbR share in the form of a community of heirs is not possible.

5. NO DISSOLUTION OF A GBR DUE TO THE DEATH OF A SHAREHOLDER

It was previously the case that a civil law association was dissolved by the death of a shareholder, unless it was agreed in the articles of association that the company would be continued by the remaining shareholders or that, instead of the deceased shareholder, his heir would become a shareholder of the GbR. According to the MoPeG, in the event of termination or death

of a shareholder, the corresponding persons leave the company. Furthermore, a shareholder leaves the company with the opening of insolvency proceedings over his assets. This also applies in the event of termination of the membership of a shareholder by a private creditor or in the event of exclusion for good cause. These legally defined reasons for leaving cannot be waived in the articles of association. On the other hand, it can be agreed in the articles of association that in the event of the death of a shareholder, his heir or heirs will succeed the deceased shareholder. If an heir becomes a legal successor of the deceased shareholder, he can then, if the company could also be registered in the commercial register as such, demand that his position as a personally liable shareholder be converted into a limited partnership share. If the heir's request is not granted, or if it is not possible to register the company as a limited partnership in the commercial register, he can terminate his membership in the company without observing a notice period.

6. REGULATIONS ON THE DURATION OF THE COMPANY AND NOTICE PERIODS

Shareholders may terminate a company concluded for an indefinite period with a notice period of three months to the end of a calendar year. It is also possible to conclude a company for a certain period of time. Notice periods may also be agreed that deviate from the new statutory regulation in Section 725 para. 1 BGB new version.

7. NEW REGULATIONS ON THE NON-LEGALLY INCORPORATED CIVIL LAW ASSOCIATION

According to Section 740 para. 1 BGB new version, a non-legally incorporated GbR has no assets. Consequently, only the internal relationship between the shareholders requires regulation. Concerning the legal relationship of shareholders of a non-legally incorporated GbR with each other, individual regulations from the area of legal GbRs must be applied accordingly.

VII. ITALY

In the course of legislation regulating the prevention of money laundering and terrorist financing, the fundamental obligation to disclose the economic beneficiaries behind corporations (as well as trusts and certain associations) was introduced in Italy with the legislative Regulation (D.Lgs.) 231/2007.

In substance, however, the provision was never actually implemented, since the said regulation referred to the details of an implementing regulation that was only issued at the end of 2022 with Ministerial Regulation (DM) No. 55/2022. The entry into force envisaged for 11/12/2023 was further delayed due to various actions.

With the resolution dated 09/04/2024, the Regional Administrative Court (RAC) of Latium responsible for government acts rejected the actions and put the rules into effect immediately.

1. THE REGISTRATION OBLIGATION IN DETAIL

Who does the obligation apply to?
The obligation to disclose the economic beneficiaries applies to:

- private legal entities;
- trusts
- "comparable" legal institutions

Who is the "economic beneficiary"?
This refers to the natural person who directly or indirectly holds at least 25% of the company shares through a holding company, trust company or another intermediary person ("straw man").
Particularly in the case of trust solutions, it must be noted that the (real) beneficial owner is also the party that transfers the company shares (legally effective) to a third party, but in which case rules on decision-making and profit distribution apply in the internal relationship (so-called "Romanistic trust solution").
If the shareholder structure does not reveal a clear economic beneficiary in view of the criteria mentioned above, recourse will be made to whoever is able to exercise control over the company, i.e. for example

- control of voting rights in the shareholders' meeting;
- sufficient voting rights to be able to exercise a determining influence in the shareholders' meeting;

- existence of agreements among the shareholders that allow decisive influence to be exercised.

What is the registration requirement?
Anyone who is designated as the economic beneficiary in this sense must be reported to the commercial register; for non-Italian persons, it must be noted that the notification also requires an Italian tax number (codice fiscale).
The communicated data must be reviewed once a year and reconfirmed, which can also be done at the same time as the annual financial statements are submitted to the commercial register in accordance with the legal requirements.

2. PRACTICAL EFFECTS

The aforementioned resolution of the regional administrative court did not grant a transitional period, so the obligation now applies immediately to all shareholders of Italian companies. Particularly in the case of foreign corporations with Italian subsidiaries (which are often 100% controlled!), the shareholders of the group must note that they will often fall under these rules; this is all the more true since, as is often the case in Europe, they are family businesses.

VIII. SLOVAKIA

In Slovakia, a new law on the conversion of commercial companies and cooperatives (hereinafter “law”) came into effect as of 1 March 2024. This law implements Directive (EU) 2017/1132, dated 14 June 2017, regarding certain aspects of corporate law (codified text amended by the directive of the European Parliament and Council (EU) 2019/2121, dated 27 November 2019 (hereinafter referred to as “Directive”).

Until the new law came into force, the statutory regulation in the area of conversions of commercial companies (i.e. merger, demerger, conversion of the legal form and corresponding alternatives with an international background) was anchored in the Commercial Code. With the adoption of the new law, these regulations were removed from the Commercial Code. The law thus contains a uniform and comprehensive legal regulation of various forms of dissolution of legal entities with legal successors, i.e. takeovers, mergers, demergers, for all legal forms of commercial companies and cooperatives, as well as the legal regulation of spin-offs, conversions of the legal form, including their cross-border variants.

In addition, the law also entails further changes and introduces new institutes. For example, it introduces the so-called “conversion project”, which replaces the previous take-over contracts. It introduces the special (co-)responsibility of the corporate body in legally defined situations. It defines the auditor's liability for damages with the possibility of a liability exemption. The law specifies binding details of an auditor report on the audit of a conversion project, etc.

The law thus represents an independent statutory regulation for the conversions of trading companies as a comprehensive system that takes into account the special features of a specific legal form and at the same time strengthens the protection of the holders of shares, stockholders and creditors and employees.

IX. TURKEY

In 2023 and 2024, there were some significant changes in Turkish company law. These relate to the increase in the minimum capital in limited liability companies and stock corporations, changes in the requirement for the audit of non-listed stock corporations by an independent auditor and the calculation of technical insolvency.

1. INCREASE IN THE MINIMUM CAPITAL OF LIMITED LIABILITY COMPANIES AND STOCK CORPORATIONS

With the presidential decree dated 25/11/2023, the minimum capital of limited liability companies and stock corporations was increased as follows and effective as of 01/01/2024:

Companies with limited liability must now be established with a minimum share capital of TRY 50,000.00 and stock corporations with a minimum share capital of TRY 250,000.00. If the articles of association of an unlisted stock corporation stipulate approved capital, the share capital of this stock corporation must be at least TRY

500,000.00. Companies established before 01/01/2024 with limited liability and stock corporations that do not meet the new minimum requirements for the share capital do not currently have to adapt their share capital to the new regulation.

2. REQUIREMENT FOR AN INDEPENDENT AUDITOR TO AUDIT UNLISTED STOCK CORPORATIONS

By presidential resolution of 05/04/2024, non-listed stock corporations that are not subject to the supervision of the capital market committee must be audited by an independent auditor, provided they meet at least two of the requirements listed below in two consecutive accounting years:

(a) If their assets are more than TRY 150,000.00;
(b) If the annual net turnover is more than 300,000.00 TRY;
(c) If they have more than 150 employees.

This new regulation applies to the financial year starting on 01/01/2024 and the subsequent financial years.

3. CALCULATION OF TECHNICAL INSOLVENCY

According to Article 376 of the Turkish Commercial Act, a stock corporation or limited liability company is deemed to be technically insolvent if two thirds of the total capital and statutory reserves in the company's last annual balance sheet are not covered.

The Communiqué amending the Communiqué on the procedures and principles for the implementation of Article 376 of the Turkish Commercial Code (the Communiqué), which came into force on 31/10/2023, made changes regarding the calculation of technical insolvency. Accordingly, it is now permissible to leave out account foreign currency losses from foreign currency liabilities that have not yet been fulfilled and half of the total leasing or rental expenses, depreciation and personnel expenses incurred in 2020 and 2021 with regard to calculations that must be made by 1 January 2025.

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