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FlexKapGG

Praxiskommentar zur Flexiblen Kapitalgesellschaft inklusive Kommentierung zu § 67a EstG

§ 12 FlexKapGG Form von Anteilsübertragungen und Übernahmeerklärungen

Abstract

Section 12 FlexKapGG regulates a core element of the new Austrian company type FlexCo: The notarial or lawyer's deed, which can be used (as an alternative to a notarial act) to fulfill the formal requirements for the transfer and acquisition of shares in the course of capital increases. This enables the acquisition of shares without the involvement of notaries.

The new form alternative leads to a number of **practical simplifications** and to significant **time and cost savings** compared to the otherwise required notarial act: No reading of the exhibits, simplified setting up of foreign-language deeds, no signature (oral declaration is sufficient) and the possibility of setting up a deed by way of circulation without the joint presence of the parties.

In order to avoid **conflicts of interest**, notaries and lawyers may not draw up notarial or lawyer's deeds in matters in which they are involved themselves (i.e. basically when they make a declaration in their own name or in the name of a third-party). The comprehensive processing of transfers by a single lawyer as a "one-stop shop" (i.e. giving legal advice on the transfer process, and subsequently also processing the formal act of drawing up deeds in accordance with Section 12) is, in principle, possible.

The new form alternative is accompanied by specific **duties to instruct** on the legal consequences and conditions of the validity of the transfer, as well as **duties to examine** the admissibility of the transfer, which must be observed by notaries and lawyers in the course of drawing up deeds in accordance with Section 12. However, much is still unclear in detail; clarification will most likely only be provided by case law. For the first time, the commentary on Section 12 offers a detailed discussion of lawyers' and notaries' duties, as well as instructions for their practical implementation. In principle, the wording of Section 12 leaves extensive room for interpretation of the scope of the duties to instruct and examine. Further, practical questions arise with regard to professional laws, which also contain regulations for setting up deeds (Section 10 (4) Attorney's Act and Section 5a Notaries' Act). In general, the duties to instruct pursuant to Section 12 are – against the background of the far-reaching professional duties, which ultimately require a general protection of the parties from risks to their interests – to be seen as a specification rather than as new or additional duties. In contrast, the duties to examine pursuant to Section 12 (admissibility of the transfer) barely overlaps with the duties under professional law. The examination of admissibility must generally include an inspection of the current status of the company register and the articles of association as well as an examination of any power of representation. In addition, special admissibility problems of the individual case must be taken into account in case there is a specific suspicion in this regard for the notary or lawyer drawing up the deed. In principle, however, the notary or lawyer cannot be expected to carry out a legal due diligence or investigate the underlying facts in the course of drawing up a deed.

Full chapter at <https://360.lexisnexus.at>