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EQUITY-BASED INCENTIVE PLANS (FREE SHARES AND BSPCE): THE CHANGES WROUGHT BY THE MACRON LAW

The law for growth, activity and equality of economic opportunities (known as the "Macron law") was published on 7 August 2015.

Among the various measures of the Macron law, those relating to free share plans¹ are likely to result in a significant increase in the use of such instruments as equity-based incentive plans for employees and officers.

The legal and tax regime of founders' warrants (BSPCEs, which stands for "*bons de souscription de parts de créateurs d'entreprises*")² has also been amended, unlike the regime of stock-options, which remains unchanged.

FREE SHARE PLANS

The amended provisions apply to free shares plans approved by a shareholder's extraordinary general meeting held after publication of the Macron law, i.e. after 7 August 2015.

Acquisition period ("*période d'acquisition*") and lock-up period ("*période de conservation*")

Until now, free shares allotted to certain beneficiaries were only definitively acquired by such beneficiaries on the expiration of a period, known as the acquisition period, of at least 2 years (provided in most cases that the beneficiary has remained within the company until such time). After the acquisition period, free shares were then subject to a second period, known as the lock-up period, of at least 2 years during which the beneficiaries that had definitively acquired their free shares were not permitted to dispose of their free shares. However, if the acquisition period were equal to 4 years or more, it was possible to impose a lock-up period of less than 2 years or not to impose any lock-up period.

Since the Macron law:

- the minimal duration of the acquisition period is 1 year;
- the shareholders' general meeting is no longer required to set a minimal lock-up period;
- the aggregate duration of the acquisition period and lock-up period cannot be lower than 2 years.

¹ Article L. 225-197-1 et seq. of the French Commercial Code.

² Article 163, bis G of the French Tax Code.

Maximum ratio rule

A previous law enacted in March 2014³ had introduced a specific rule in case of free share plans for the benefit of all employees, pursuant to which the difference between the number of shares allotted to each employee could not exceed a 1:5 ratio.

This maximum ratio is no longer applicable to free share plans for the benefit of all employees that do not represent more than 10% of the share capital (or 15% in private SMEs when such a cap is provided in the by-laws). However, this maximum ratio remains applicable to free share plans for the benefit of all employees that exceed 10% (or 15%) of the share capital (the cap legally applicable in case of free share plans for the benefit of all employees being 30% of the share capital).

Changes in the social and tax regime

Employer and employee social security contributions

The employer's social security contribution rate has been reduced from 30% to 20%.

In addition, this employer's contribution is now due on the month following the date of the acquisition of the free shares by the beneficiary (i.e. after the acquisition period), and not on the month following the date of allotment of the free shares.

The tax base for such employer's contribution is also simplified, and now corresponds to the value of the free shares on the date of their definitive acquisition by the beneficiary.

Companies falling within the European definition of SMEs that have not paid any dividends since their creation are exempted from paying such employer's contribution within the limit of the social security cap per beneficiary (currently € 38,040 per annum). These conditions must be met on the date of allotment of the free shares.

Companies exempted from the employer's contribution are also exempted from the "*forfait social*" contribution.

The 10% employee's social security contribution is no longer applicable to free share plans.

Taxation upon sale of the shares

The beneficiary is no longer considered as making a profit upon the acquisition of free shares and a capital gain upon the sale of free shares, but only as making a profit equal to the value of the free shares on the date of their sale.

Such profit is deemed to be a capital gain and can give rise to tax reliefs based on the length of the period during which the free shares have been held by the beneficiary. However, the ownership period starts on the date of acquisition of the free shares and not on the date of their allotment.

³ Law n° 2014-384 dated as of 29 March 2014.

BSPCEs

The amended provisions apply to BSPCEs allotted after publication of the Macron law, i.e. after 7 August 2015.

Extension to subsidiaries

BSPCEs may now be allotted to employees and officers (subject to the tax regime for employees) of a subsidiary of the issuing company, provided that 75% of share capital or voting rights of such subsidiary is held by the issuing company.

However, the subsidiary is required to meet the criteria for the allotment of BSPCEs⁴, apart from the condition relating to its ownership by individuals⁵ (such condition must be met by the parent company issuing the BSPCEs).

In such case, the condition relating to the maximum market capitalization of the issuing company is calculated by aggregating the market capitalization of the issuing company and that of its subsidiaries whose employees have been allotted with BSPCEs of the issuing company in the last 12 months.

The periods during which a beneficiary has been employed in a subsidiary and in the parent company issuing the BSPCEs are now taken into account in determining whether the 3-year employment period beyond which the tax rate of the capital gain is reduced to 19% (instead of 30%) is reached.

Exception in case of continuation of existing activities

The Macron law has also introduced new exceptions in order to allow the issuance of BSPCEs by companies created in the context of a combination, reorganization, extension or takeover of existing activities, which was previously prohibited (subject to rare exceptions).

Such companies may now issue BSPCEs, provided that all companies involved in the corresponding operation meet the criteria required for the issuance of BSPCEs (cf. *supra*). To that effect, the condition relating to the maximum market capitalization is assessed by aggregating the capitalization of all the companies resulting from the operation, and the condition relating to the age of the company is assessed by taking into account the incorporation date of the oldest of the companies involved in the operation.

CONTACTS

CHRISTIAN NOUEL
christian.nouel@gide.com

BRUNO DONDERO
bruno.dondero@gide.com

BENOÎT MARTIN
benoit.martin@gide.com

⁴ Substantially: i) be subject to corporate income tax in France, ii) not to have been created in the context of a combination, reorganization, extension or takeover of existing activities, iii) not be listed or have a market capitalization lower than € 150 million (such rule being subject to a transitional exception for 3 years if such cap is exceeded), iv) be incorporated for less than 15 years.

⁵ Be continuously and directly held at least for 25% by individuals or by legal entities themselves held directly at least for 75% by individuals (provided that certain shareholders (e.g. venture capital vehicles) are disregarded to assess whether such percentages are reached).

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