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Objective categories of personnel eligible to company-sponsored supplemental death and disability insurance schemes

French rules governing company-sponsored death and disability insurance schemes and supplemental retirement schemes have substantially evolved over the years.

French Tax and Social Authorities have increasingly challenged the collective and mandatory nature of death and disability insurance schemes and supplemental retirement schemes implemented within companies, i.e. two essential criteria allowing businesses to benefit from tax deductibility and exemption from employer social-related contributions, and have accordingly conducted tax and social reassessments and ordered significant adjustments.

This exemption has become more and more relative since the sums paid by the employer to fund such schemes have been successively subjected to the CSG/CRDS taxes, the special tax on supplemental death and disability and retirement schemes and then to the employer flat contribution called *forfait social* , not to mention the fact that the exemption is capped.

Decree n° 2012-25 of January 9, 2012 on the collective and mandatory nature of supplemental guarantees (the "Decree") has introduced six new Articles (Articles R.242-1-1 to R.242-1-6) in the French Social Security Code (the "FSSC") that list and detail the requirements to be met in order to benefit from an exemption from employer social-related contribution, and define the concepts of "objective category of personnel" and "collective nature" of supplemental insurance schemes.

Circular DSS/SD5B/2013/344 of September 25, 2013 related to the conditions in which the sums paid by employers to finance supplemental retirement, death and disability benefits are subject to social security contributions (the "Circular") has specified the scope of the exemption.

This Article outlines the main provisions of these regulations, some of which could lead to tax and social reassessments in the near future.

A) Assessment of the collective nature of the guarantees provided for under company-sponsored death and disability insurance schemes and supplemental retirement schemes

The applicable principle is set forth in Article R.242-1-1 of the FSSC: *"To be excluded from the contribution base stipulated in Article L. 242-1§6, the guarantees mentioned in the same Article, irrespective of whether they are provided for under one or several schemes implemented in compliance with the procedures laid down in Article L. 911-1, must benefit to all employees.(...)"*

The collective nature of the guarantees is also established if such guarantees only cover part of the employees, insofar as such employees belong to one or several objective category(ies).

B) Definition of objective criteria

Article R.242-1-1 of the FSSC also lists 5 objective criteria to define the categories of personnel that may benefit from the exemption. It makes a distinction between a "general framework" and "particular frameworks".

The general framework (criteria 1, 2 and 3, subject to certain conditions) concerns legally defined objective categories. The particular frameworks (criteria 3 to 5) apply to situations where the employer must prove that the categories of personnel implemented within the company have been defined objectively.

1. **Criterion n° 1: executive/non-executive category**

This criterion must be assessed on the basis of the National Collective Bargaining Agreement applicable to Executive Employees dated March 14, 1947 that defines 3 categories of personnel likely to benefit from the retirement scheme applicable to executive employees (AGIRC).

These three categories are as follows:

- Employees mentioned in Article 4: engineers, employees with a managerial position, officers affiliated to the social security general regime, some *V.R.P.* (i.e. a specific category of salespersons);
- Employees mentioned in Article 4 Bis: employees, technicians or supervisors who are "*assimilés cadres*" – i.e. who have been granted the executive status – with a coefficient of 300 or above, according to the PARODI orders dated 1945 or equivalent orders;
- Employee mentioned in Article 36: employees, technicians or supervisors with a coefficient of at least 200, according to the PARODI orders dated 1945 or equivalent orders.

There is often some confusion between these categories, notably between the Article 4 and Article 4 Bis categories, in the company payroll, death and disability insurance schemes and supplemental retirement schemes. Such confusion may expose companies (i) to claims from employees deprived of the corresponding

benefits, and (ii) tax or social reassessments.

In this respect, the Circular recalls that "managing executives" within the meaning of Article L.3111-2 of the FSSC do not constitute an objective category of personnel.

2. **Criterion n° 2: remuneration brackets**

Article R.242-1-1 of the FSSC is also very clear on this point and refers to specific remuneration brackets, i.e. remuneration brackets used for the calculation of retirement contributions for executive and non-executive employees (AGIRC and ARRCO).

Given the applicable thresholds, the remunerations brackets that can legitimately be retained by companies are those corresponding to 1, 3, 4 or 8 times the social security ceiling.

A remuneration bracket corresponding to 6 times the social security ceiling will not be compliant but, by way of tolerance, the Circular specifies that a remuneration bracket corresponding to 2 times the social security ceiling will be deemed compliant. Yet, to avoid any adjustments, it is advisable to apply only the remuneration brackets set forth in the Decree.

3. **Criterion n° 3: professional categories and classifications set forth in the industry-wide collective bargaining agreement**

This criterion concerns only the first classification level of employees, as defined by the applicable **industry-wide** collective bargaining agreement. As such, this criterion must be assessed on the basis of each industry-wide collective bargaining agreement. Internal classifications implemented within companies, even though by way of a company-wide collective agreement, are irrelevant.

4. **Criterion n° 4: sub-categories set forth by collective bargaining agreements**

These potential sub-categories must correspond to a specific definition. Coefficients are not deemed as sub-categories.

5. **Criterion n° 5: inclusion in the defined categories according to constant, general and permanent practices applicable in the relevant industry**

The applicable standards are those in force within the industry, not within the company. This will concern, for example, freelancers, home-workers, contract workers, etc.

The Circular recalls that the criteria related to the working time, the nature of the contract, the age or the seniority of the employee may not be applied, it being specified, however, that the last paragraph of Article R.242-1-2 admits a seniority requirement of (i) 12 months for supplemental retirement, death and disability insurance schemes and (ii) 6 months for other guarantees. The Circular includes the dependence guarantee in the death and disability schemes.

Rules governing death and disability insurance schemes and medical expenses coverage schemes will soon further change.

It should be recalled that pursuant to the Law on securing employment all companies must implement before January 1, 2016 a so-called "medical expenses" complementary insurance providing for a minimum level of guarantees to the benefit of their employees.

In addition, pursuant to the 2014 Finance Bill, as it currently stands, the sums paid by employers to fund the medical expenses complementary insurance schemes should be subject to income tax, even if such schemes are collective and mandatory. As such, these sums would be added to the employees' taxable net income, effective for the 2013 income.

To conclude this update on company-sponsored death and disability insurance schemes, it is worth mentioning that judgment n°12-15.161 issued by the *Cour de Cassation* (French Supreme Court) on September 18, 2013 provides a good reminder of the risks to which companies can be exposed if they do not ascertain that the guarantees subscribed from their insurers match their obligations under the applicable collective bargaining agreement. In this particular case, a salaried surgeon obtained from his employer the payment of the disability pension provided for under the applicable collective bargaining agreement while the insurance policy subscribed by the company stipulated that only employees under 60 years old were eligible to this pension. This pension represents a cost of several hundreds of thousands of euros for the company.