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Obligation to deliberate on a draft resolution on a share capital increase reserved for employees: reminder of applicable provisions and starting point of the new 5-year time period

While many companies are in the process of approving their annual accounts for the past financial year, it may be useful to recall the rules laid down by the legislator in order to bolster the development of employee stock ownership, especially since the *Association Nationale des Sociétés par Actions* (French association of joint stock companies, hereinafter “ANSA”) has recently issued an opinion on the new starting point of the 5-year time period concerning the periodic obligation to deliberate on a share capital increase reserved for employees.

Obligation to deliberate on a share capital increase reserved for employees: Reminder of the provisions set forth in Article L.225-129-6 of the French Commercial Code

Pursuant to Article L.225-129-6 of the French Commercial Code, the extraordinary general meeting of shareholders (“EGMS”) of a joint-stock company must deliberate on a draft resolution providing for a share capital increase reserved for employees having subscribed to a Company Savings Plan⁽¹⁾, irrespective of whether such a Plan has already been implemented within the Company⁽²⁾ :

1. If the company has employees, at the time of any decision or authorization to **increase the share capital in cash**^[3], unless such increase results from a prior issuance of marketable securities granting access to the company's share capital (permanent obligation). If the company fails to do so, the decision to increase the share capital can be nullified^[4].
2. **Every 3 years**, if the shares held by company employees in the company or related companies^[5] represent **less than 3% of the share capital** (periodic obligation). This time-period is extended to 5 years if an EGMS has been consulted, pursuant to the permanent obligation mechanism referred to in 1 above, on a capital increase reserved for employees within the previous 3 years.

It should be specified, however, that the above provisions do not apply to "controlled companies", within the meaning of Article L.233-16 of the French Commercial Code, wherever the controlling company has implemented a company savings plan to which are eligible the employees of these controlled companies.

Periodic obligation to deliberate on a share capital increase reserved for employees: Starting point of the new 5-year time period

The introduction of this new time period by the so-called Warsmann II Law n°2012-387 of March 22, 2012 on the simplification of French Law and the reduction of the administrative burden has caused a great stir among legal practitioners because of its lack of clarity.

Fortunately, the ANSA has just made a number of clarifications supported by concrete examples^[6].

As such, according to the Issuer Committee of the ANSA, the 5-year time period starts running as from the date of the last EGMS having deliberated in the framework of the permanent obligation mechanism referred to in #1 above), **provided that this EGMS is not held beyond a period of three years as from the date of a EGMS having deliberated in the framework of the periodic obligation mechanism** referred to in #2 above.

In practice, if the EGMS of a joint-stock company deliberates (i) on a draft resolution in the framework of the **periodic** obligation mechanism referred to in #1 above during Year N, and then (ii) on a draft resolution in the framework of the **permanent** obligation mechanism referred to in #2 above during Year N+2 (i.e. less than three years since the EGSM held in Year N), the applicable time period is **5 years as from said date**: A new meeting must be held in the framework of the **periodic** obligation mechanism referred to in #1 above no later than in Year N+7.

If, in addition to the above, the EGMS of this company deliberates on a draft resolution in the framework of the **permanent** obligation mechanism referred to in #2 above during Year N+4 (i.e. less than 3 years after the EGMS held in Year N+2), the applicable time period will be **5 years as from said date** only if a EGMS deliberates during Year N+7 on a draft resolution in the framework of the **permanent** obligation mechanism referred to in #2 above.

[1] Pursuant to Article L.3332-1 of the French Labor Code, a company savings plan is “*a collective savings system that provides the company employees with an opportunity to build up a portfolio of marketable securities with the help of the company*”.

[2] Inter-ministerial circular of September 14, 2005.

[3] This excludes, in particular, share capital increases made in connection with mergers, demergers, partial contributions of assets governed by the rules applicable to demergers. This seems to include the issuance of marketable securities granting access to share capital (Bull. CNCC, December 2004, p. 708).

[4] Cf. Article L.225-149-3 of the French Commercial Code. It should, however, be noted that (i) this nullity could be cured through a regularization and (ii) the right to initiate an action for nullity expires after three months as from the date of the general meeting of shareholders that follows the challenged decision to increase the share capital (cf. Article L.235-9 of the French Commercial Code).

[5] Within the meaning of Article L.225-180 of the French Commercial Code.

[6] ANSA, Committee of Issuers, n°12-060, November 2012.

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