

The “Macron Bill”: Focus on the management packages

As announced[1], the Bill on growth, economic activity and equality of economic opportunity, commonly known as the “Macron Bill” was adopted on February 19, 2015 by the National Assembly. Currently discussed by the Senate, the Bill should be put to a formal vote shortly.

Articles 34 and 35 of the Macron Bill introduce changes to the rules governing the allocation of free shares and so-called *Bons de Souscription de Parts de Créateur d’Entreprise* (company founder share warrants, i.e. security giving access to share capital reserved for employees or executives of new companies, commonly referred to as “BSPCEs”) in order to make them more attractive[2].

The Macron Bill provides an opportunity to review the various incentives that are customarily included in so-called “management packages”.

Allocation of free shares

1.1. Beneficiaries

Pursuant to Articles L.225-197-1 and L.225-197-2 of the French Commercial Code, the following persons can be granted free shares:

- The **salaried employees** of the company allotting the shares, or certain categories of salaried employees;
- The salaried employees of companies or economic interest groupings; at least 10% of the capital or voting rights of which is directly or indirectly held by the company allotting the shares;
- If the allocated shares are **securities admitted to trading on a regulated market**, the following

persons can also be granted such shares: (i) the salaried employees of companies or economic interest groupings that directly or indirectly hold at least 10% of the capital or voting rights of the company allotting the shares, and (ii) the salaried employees of companies or economic interest groupings having at least 50% of their capital or voting rights directly or indirectly held by a company which itself directly or indirectly holds at least 50% of the capital of the company allotting the shares;

- The **chair of the board of directors**, the **general manager**, the **delegated general managers**, the **members of the executive board** or the **chief executive** of a joint-stock company; these persons may also be allotted shares in an affiliated company in the above mentioned conditions, provided that said company's shares are admitted to trading on a regulated market. It being specified that shares may not be allotted to **salaried employees** and **corporate legal representatives** who individually hold more than **10%** of the share capital, and that a free allocation of shares shall not result in individual salaried employees and corporate legal representatives holding more than **10%** of the share capital.

NB: Specific provisions apply to companies operating in the **banking-insurance industry**, as well as to managers of companies **whose securities are admitted to trading on a regulated market**.

1.2.Procedure

Pursuant to Articles L.225-197-1 and L.225-197-3 of the French Commercial Code, the **extraordinary general meeting of shareholders**, on the basis of a report from the board of directors or, as the case may be, the executive board, and the **statutory auditors'** special report, authorizes the board of directors or the executive board to proceed with a free allocation of existing or new shares, and determines, in particular:

- The **maximum percentage** of the share capital which may be allotted, it being specified that:
 - The aggregate number of shares freely allocated may not exceed **10%**[3] of the share capital as of the date of the decision of the board of directors or executive board to make such allocation;
 - This percentage is increased up to **30%** wherever the allocation of free shares is made to **all salaried employees** of the company;
 - The difference between the number of shares allocated to each salaried employee may not be higher than a **one to five ratio**[4];
- the **period** during which this authorization can be used by the board of directors or the executive board, it being specified that this period may not exceed thirty eight months;
- The duration of the so-called "**vesting**" period during which the rights resulting from the allocation of free shares are **non-transferrable**, it being specified that such period may not be less than **two years**[5];
- The minimum period during which the beneficiaries **must hold the shares**. This period starts running from the date on which the allotment of shares becomes definitive and shall never be less than **two years**[6], unless if the above-mentioned vesting period has a duration of at least **four years** for all or part of the allocated shares.

The board of directors or, where applicable, the executive board subsequently determines:

- The identity of the **beneficiaries** of the allocation of shares,
- The **conditions** and, as the case may be, the **allocation criteria** applicable to the shares.

In addition, if shares are allotted to the chair of the board of directors, general manager, delegated general managers, members of the executive board or chief executive of a joint-stock company, the board of directors or, as the case may be, the executive board, must either (i) resolve that such free shares may not be transferred by the allottees before they **cease to hold office**, or (ii) set the quantity of shares that they are required to retain, as registered shares, until they cease to hold office.

1.3. Tax and social treatment: Main characteristics

- Tax treatment:
 - The gain corresponding to the actual value of the shares on the vesting date is taxed as **wages and salaries**[7] at the allottee's level;
 - The **net gain**, corresponding to the difference between the price of the shares upon their resale and the value of the share on the vesting date, is taxed in the conditions provided for under Article 150-0 A of the French Tax Code, it being specified that if the shares are sold for a price below their actual value at the option exercise date, the loss is deductible from the above gain and only to the extent of that gain;

NB: Specific provisions apply to **non-resident** beneficiaries.

- Social treatment:
 - Application of the **employer's social security contribution** at the rate of **30%**[8] and of the employee's social security contribution at the rate of **10%**[9], determined as per the provisions set forth in Articles L.137-13 and L.137-14 of the French Social Security Code;

Exclusion of the acquisition gain from the basis of calculation of the contributions

in respect of social insurance, occupational accidents and family allowances, subject to due compliance by the employer with the provisions set forth in Article L.242-1 of the French Social Security Code.

2. The *bons de souscription de parts de créateur d'entreprise* (company founder share warrants or "BSPCEs")

2.1 Issuers

Pursuant to Article 163 bis G of the French General Tax Code, such warrants – that are **non-transferable** – can be issued by joint stock companies that satisfy the following requirements:

- **companies whose securities are not admitted to trading on a French or foreign regulated market** operated by a market undertaking or an investment services provider or any other similar foreign bodies, **or whose securities are admitted to trading** on such a market of a country member of the European Economic Area but whose **market capitalization** is below **150 million euros**, or has not exceeded this threshold since more than **three years**;
- companies that have been incorporated with the Registry of Trade and Companies since **less than fifteen years**;
- companies that are liable to **corporate income tax** in France;
- companies whose at least **25% of their capital** has been **directly and uninterruptedly** held by natural persons or legal entities having at last **75%** of their own capital held by natural persons;
- companies that have not been set up within the framework of **a merger, a restructuring, an extension or resumption** of pre-existing business activities, unless if they meet the requirements set forth in Article 39 quinquies H I of the French Tax Code[10].

2.2 Beneficiaries

Pursuant to Article 163 bis G of the French Tax Code, the following persons can be granted BSPCEs[11] :

- The **salaried employees** of the issuers;
- Their **corporate officers who are subject to the employee tax regime**.

2.3 Procedure

Pursuant to Articles 163 bis G of the French Tax Code, L.228-91 and L.228-92 of the French Commercial Code, the **extraordinary general meeting of shareholders**, on the basis of a report from the board of directors or, as the case may be, the executive board, and the **statutory auditors'** special report, resolves to issue, or authorizes the board of directors or executive board to issue, BSPCEs. In the event the board of directors or executive board is granted a delegation of authority to issue BSPCEs, the extraordinary general meeting of shareholders determines, in particular:

- the **period** during which this authorization can be **used** by the board of directors or the executive board, it being specified that this period may not exceed twenty six months;
- the overall ceiling of this increase.

The extraordinary general meeting of shareholders may delegate to the board of directors or, as the case may be, the executive board, the task of determining the list of beneficiary of BSPCEs. In that case, the board of directors or, as the case may be, the executive board must specify the name of the allottees and the number of BSPCEs allotted to each of them.

The acquisition price of the securities subscribed to as a result of the exercise of the BSPCEs is set on the date on which the extraordinary general meeting of shareholders resolves to issue such BSPCEs, or, in the event the board of directors or executive board is granted a delegation of authority to issue BSPCEs, the date on

which such body resolves to issue such BSPCEs. If the issuer has, in the six months preceding the allocation of the BSPCEs, carried out a share capital increase through the issuance of securities conferring rights similar to those resulting from the exercise of the BSPCEs, the acquisition price must be at least equal to the issue price that has been fixed for such securities.

NB: Specific provisions apply to companies **whose shares are admitted to trading on a regulated market**.

2.4 Tax and social treatment: Main characteristics

- Tax treatment: The net gain realized upon the sale of the securities subscribed to as a result of the exercise of the BSPCEs is taxed under the conditions laid down in Article 150-0 A of the French Tax Code and at the rate of 19%. This rate is increased to 30% if, as of the sale date, the beneficiary has been performing his business activity within the company for less than three years.

NB: Specific provisions apply to **non-resident** beneficiaries.

- Social treatment: The net gain realized upon the sale of the securities subscribed to as a result of the exercise of the BSPCEs is excluded from the social security contribution calculation basis provided for in Article L. 242-1 of the French Social Security Code. Consequently, such gains are not subject to all payroll deductions, the calculation basis of which is aligned with that of the social security contributions. Yet, such gains are subject to social levies on income from personal assets.

3. Share subscription and purchase options (stock-options)

3.1. Definitions

- Share **subscription** option: Rights that enable their holders to ultimately subscribe to the shares to be issued by a company, at a price determined on the date on which the option is granted.
- Share **purchase** option: Rights that enable their holders to ultimately purchase, at a price determined on the day on which the option is granted, shares of a company that have been bought back by such company prior to the opening of the option.

3.2. Beneficiaries

Pursuant to Articles L.225-177 to L.225-186-1 of the French Commercial Code, the following persons can be granted share subscription or purchase options:

- The **salaried employees** of the company granting the options, or certain categories of salaried employees;
- The salaried employees of companies or economic interest groupings; at least 10% of the capital or voting rights of which is directly or indirectly held by the company granting the options;

- If the options provide entitlement to **securities admitted to trading on a regulated market**, the following persons can also be granted such options (i) the salaried employees of companies or economic interest groupings that directly or indirectly hold at least 10% of the capital or voting rights of the company granting the options, and (ii) the salaried employees of companies or economic interest groupings having at least 50% of their capital or voting rights directly or indirectly held by a company which itself directly or indirectly holds at least 50% of the capital of the company granting the options;
- The legal representatives who are natural persons, i.e. in practice the **non-salaried members of the board of directors or executive board**, subject to certain conditions[12];
- The **chairman of the board of directors**, the **general manager**, the **delegated general managers**, the **members of the executive board** or the **chief executive** of a joint-stock company; these persons may also be granted options to subscribe to or to purchase shares in an affiliated company in the above mentioned conditions, provided that said company's shares are admitted to trading on a regulated market;

It being specified that options may not be granted to **salaried employees** and **legal representatives** who individually hold more than 10% of the share capital[13].

NB: Specific provisions apply to companies operating in the **banking-insurance industry**, as well to managers of companies **whose securities are admitted to trading on a regulated market**.

3.3.Procedure

Pursuant to Articles L.225-177 and L.225-179 of the French Commercial Code, the **extraordinary general meeting of shareholders**, on the basis of a report from the board of directors or, as the case may be, the executive board, and the **statutory auditors'** special report, authorizes the board of directors or the executive board to grant share subscription options or share purchase options, and determines, in particular:

- the **number** of options that may be granted, it being specified that the aggregate number of options open and not yet exercised may not constitute entitlement to subscribe to a number of shares in excess of **one third** of the share capital;
- the **conditions** in which the **subscription price** or the **purchase price** is determined, as per Article L.225-177 of the French Commercial Code;
- the **period** during which this authorization can be **used** by the board of directors or the executive board, it being specified that this period may not exceed thirty eight months;
- The **period** during which the options may be **exercised**, it being specified that the rights resulting from the granted options **may not be transferred** until the options have been exercised.

The board of directors or, where applicable, the executive board subsequently determines the identity of the beneficiaries of the options and the subscription price or purchase price - it being specified that such price may not be changed during the option period, save in accordance with the provisions set forth in Article L.225-181 of the French Commercial Code - as well as the conditions in which such options shall be granted, in particular:

- **Retention of the beneficiary** within the company;
- **Prohibition to transfer** all or part of the shares received under the options, it being specified that such period must not exceed three years as from the date of exercise of the options;
- **Obligation to transfer**, e.g. if the beneficiary ceases working for the company;
- In addition, if shares are allotted to the chairs of the board of directors or executive board, the general manager, delegated general managers, members of the executive board or chief executive of a joint-stock company, the board of directors or, as the case may be, the executive board, must either (i) resolve that such options may not be transferred by the above persons before they cease to hold office, or (ii) set the quantity of shares resulting from the exercise of options that they are required to retain, as registered shares, until they cease to hold office.

3.4. Tax and social treatment: main characteristics

- Tax treatment:
 - For the issuer:
 - **Corporate income tax**: the provisions set forth in Article 217 quinquies of the French Tax Code apply, including deduction of the expenses incurred as a result of the exercise of the granted options;
 - **Payroll tax**: taxation of the gain corresponding to the difference between the actual value of a share on the option exercise date and the option exercise price;
 - For the beneficiary:
 - When the exercise price is less than **95%** of the reference value^[14], the difference (i) is taxed as **wages and salaries** for the year in which the option is exercised, and (ii) is subject to **social security contributions**, the **contribution sociale généralisée** (general social contribution, commonly referred to as “CSG”) and the **contribution pour le remboursement de la dette sociale** (social debt repayment contribution, commonly referred to as “CRDS”);
 - Except if the options are exercised by using assets acquired through an **employee-saving plan** and in compliance with the **five-year** holding period obligation provided for under Article L.3332-25 of the French Labor Code:
 - The gain corresponding to the difference between the actual value of the share on the option exercise date and the subscription or purchase price of that share (acquisition gain), minus, as the case may be, the above mentioned difference, is taxed as **wages and salaries**;
 - The **net gain**, corresponding to the difference between the price of the shares upon their resale and the share subscription or purchase price, increased, as the case may be, by the above acquisition gain, is taxed in the conditions provided for under Article 150-0 A of the French Tax Code, it being specified that if the shares are sold for a price below their actual value as of the option exercise date, the loss is deductible from the gross acquisition gain and only to the extent of that gain;
 - If the options are exercised by using assets acquired through an **employee-saving plan**

and if the five-year holding period obligation provided for under Article L.3332-25 of the French Labor Code is complied with, the above gains are not taxable but will be subject to **social levies**.

NB: Specific provisions apply to **beneficiaries posted abroad** and to **non-resident beneficiaries**.

- Social treatment:
 - Application of the **employer's social security contribution** at the rate of **30%** and of the **employee's social security contribution** at the rate of **10%**, determined as per the provisions set forth in Articles L.137-13 and L.137-14 of the French Social Security Code;
 - **Exclusion of the acquisition gain from the basis of calculation of the contributions** in respect of social insurance, occupational accidents and family allowances, subject to due compliance by the employer with the provisions set forth in Article L.242-1 of the French Social Security Code.

[1] <https://www.soulier-avocats.com/en/blog/the-macron-bill-focus-on-the-confidentiality-of-accounts/>

[2] Cf. in this respect: <https://www.soulier-avocats.com/en/blog/clarification-on-the-tax-treatment-of-management-packages-the-conseil-detat-punishes-shareholding-managers/>

[3] In companies whose securities are not admitted to trading on a regulated market or on a multilateral trading facility and that do not exceed, at the close of a financial year, the thresholds used to define small- and medium-sized businesses, as provided for by Article 2 of Annex I to Commission Recommendation 2003/361/EC of 6 May 6, 2003 concerning the definition of micro, small and medium-sized businesses (i.e.: less than 250 employees, or an annual turnover not exceeding 50 million euros, or an annual balance sheet total not exceeding 43 million euros), by-laws can, in case of allocation of free shares to certain categories of salaried employee only, provide for a higher percentage that may not, however, exceed **15%** of the share capital as of the date on which the decision to allocate shares is made by the board of directors or the executive board.

[4] *Article 34 of the Macron Bill: abolition of this ratio when the allocation represents less than 10% of the share capital, or 15% for non-listed companies.*

[5] The general meeting of shareholders may, however, provide for the definitive allocation of the shares before the end of the vesting period if the beneficiary suffers from a disability falling within the second or third category provided for by Article L.341-4 of the French Social Security Code. *Article 34 of the Macron Bill: minimum vested period reduced to one year.*

[6] Shares are, however, freely transferrable if the beneficiary suffers from a disability falling within one of the above-mentioned categories provided for by Article L.341-4 of the French Social Security Code. *Article 34 of the Macron Bill: abolition of this minimum period of two years and possibility to freely set the cumulated duration of the vesting and holding periods, provided that such cumulated duration is not less than two years.*

[7] *Article 34 of the Macron Bill: taxation of the gain no longer according to the common rules applicable to wages and salaries but according to the main terms and conditions that govern capital gains derived from the sale of securities, thereby allowing for a potential rebate for holding period.*

[8] *Article 34 of the Macron Bill: reduction of the rate of the employer's social security contribution to 20%, and exemption available (under certain conditions) for small- and medium-sized businesses that meet the European definition of SMBs.*

[9] *Article 34 of the Macron Bill: submission of the acquisition gain to social levies on income derived from personal assets and exemption from employee's social security contribution.*

[10] *Article 35 of the Macron Bill: companies set up within the framework of a merger, a restructuring, an extension or resumption of pre-existing business activities should be allowed to issue BSPCEs, subject to certain conditions.*

[11] *Article 35 of the Macron Bill: possibility to allot (subject to certain conditions) BSPCEs to salaried employees and corporate officers subject to the employee tax regime working in companies in which the issuer holds at least 75% of the capital or voting rights.*

[12] *Article L.225-185 of the French Commercial Code stipulates that options giving entitlement to subscribe to shares may be granted for a period of two years, starting as from the company incorporation date, to legal representatives who are natural persons and "who participate with employees in the formation of a company".*

Such options may also be granted, for a period of two years as from the purchase, to legal representatives who are natural persons "who combine with employees to purchase the majority of the voting rights in order to ensure the company's continued existence".

[13] *If options are granted within two years as from the creation of a company or the purchase of the majority of the capital of a company by its salaried employees or legal representatives, this ceiling is increased to 1/3 of the capital.*

[14] *Determined in accordance with the provisions of Articles L.225-177 and L.225-179 of the French Commercial Code.*

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