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Allocation of free shares under French law

The Finance Bill for 2017 introduces amendments to the tax and social regime applicable to free shares, and backtracks on some provisions laid down by the so-called “Macron” reform dated August 6, 2015.

This shift in policy provides the opportunity to review the legal, tax and social regime governing the allocation of free shares under French law.

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**, or certain categories of salaried employees, of the company allotting the shares;
- 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

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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, **the securities of which are admitted to trading on a regulated market**.

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%**^[1] 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;
 - Above the aforementioned 10% limit^[2], the difference between the number of shares allocated to each salaried employee may not be higher than a **one to five ratio**;
- 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 **one year**^[3];
- The minimum period during which the beneficiaries **must hold the shares** from the date on which the allotment of such shares becomes definitive, it being specified that the cumulated duration of the

vesting and holding periods may not be less than **two years**^[4].

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.

3. Tax and social regime applicable to free shares allocated pursuant to a decision of the extraordinary general meeting of shareholders held after December 30, 2016:

Main changes

- Tax regime:
 - The fraction of the acquisition gain that **does not exceed 300,000 euros** continues to be taxed, at the allottee's level, at the ordinary progressive income tax rates, **with a rebate based on the duration of the holding period**, and is subject to social levies applicable to property income at the global rate of **15,5 %**;
 - The fraction of the acquisition gain that **exceeds 300,000 euros** is taxed, at the allottee's level, according to the common rules applicable to wages and salaries and is subject to **social levies applicable to professional income at the global rate of 8 %**.

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

- Social regime:
 - The **rate of the employer's contribution** is increased to **30%**.
- **The 10% rate of the employee's contribution** is restored for the portion of the acquisition gain **exceeding EUR 300,000**.

^[1] 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

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2003/361/EC of 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.

[2] Or 15% (cf. note 1).

[3] 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.

[4] 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 or dies.

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