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Companies with more than 50 employees that distribute increased dividends must pay a bonus to their employees

The debates generated a few months ago by the announced enactment of legal provisions imposing on certain companies that distribute increased dividends the obligation to pay a bonus to their employees were largely echoed in the media. These provisions were adopted as part of Law n° 2011-894 of July 28, 2011, known as the Social Security Corrective Financing Law for 2011 (the “Law”). This Law was followed by a “Questions/Answers” circular dated July 29, 2011.

The enacted provisions are in line with what had been previously announced: effective as from 2011, commercial companies with more than 50 employees that distribute dividends higher than those distributed in the previous years have the obligation to negotiate and pay a bonus to their employees.

The key points of the provisions governing the creation and implementation of this so-called increased dividend related bonus (“Bonus”) are set forth below.

Concerned companies:

Commercial companies with at least 50 employees that distribute to their

shareholders dividends that are higher to the average of those distributed over the past two financial years (“Increased Dividends”)

1. The workforce: the workforce is calculated in the same way as for the implementation of mandatory profit-sharing plans. As such, the workforce requirement is met when the company has had at least 50 employees for six months, consecutive or not, during the relevant financial year.
2. Increased Dividends: the Law refers to the increase of dividends per share, not to the global amount of dividends distributed.

Companies belonging to groups:

The dividend requirement is assessed at the level of the dominant company, not at the level of each group subsidiary.

Consequently, if the dominant company distributes Increased Dividends, **not only this company but also its French subsidiaries must pay the bonus** to all employees insofar as such subsidiaries are commercial companies with at least 50 employees. This rule also applies when the dominant company has no employee but distributes Increased Dividends.

Correlatively, if the dominant company does not distribute Increased Dividends, none of its subsidiaries will be required to pay the Bonus, even if some of them distribute Increased Dividends at their own level.

If the parent company that distribute dividends is located abroad, the trigger for the payment of the Bonus is assessed at the level of the French subsidiaries, not at the level of the foreign company.

Exemptions:

Companies that have entered after May 25, 2011 into an agreement for the distribution of a compensatory pecuniary benefit to their employees are exempted from the obligation to pay the Bonus, subject, however, to the following conditions:

- The agreement must be negotiated, i.e. unilateral decisions are excluded;
- The agreement must have a collective scope and benefit to all employees;
- The agreement must have a connection with the increase of the dividends;
- The pecuniary benefit must in no event replace another element of remuneration.

This compensatory pecuniary benefit can take several forms: payment of a performance bonus, implementation of an optional profit-sharing plan or payment of an additional sum under the existing mandatory or optional profit-sharing plan, implementation of a funded pension scheme or contribution to a PERCO (collective pension savings plans).

This compensatory pecuniary benefit does not qualify for the preferential social contribution regime that

applies to the Bonus (see #6 hereafter). As such, the social contribution rules applicable to the compensatory pecuniary benefit vary according to the form in which such benefit is granted to the employees.

Implementation date:

The Bonus is paid in relation to the dividends distributed in 2011 for the 2010 financial year. Such dividends must, therefore, be compared with the average of the dividends distributed for the 2008 and 2009 financial years.

Implementing conditions:

- The company must open negotiations.
- These negotiations must be concluded. If negotiations fall through, a formal statement acknowledging the existing disagreement (*procès-verbal de désaccord*) must be drawn up within a **maximum of three months following the distribution of dividends** by the general meeting of shareholders. The timeline for concluding the agreement or for the employer to take a unilateral decision is extended to October 31, 2011 for companies that have distributed Increased Dividends before the law entered into force.
- The Bonus can be put in place:
 - in a collective agreement,
 - in an agreement between the employer and the delegates of the representative trade-unions existing within the company,
 - in an agreement entered into by the works council,
 - pursuant to a unilateral decision of the employer ratified by a 2/3 majority vote of the employees.
- The agreement can be concluded for an indefinite period of time or be renegotiated each year.
- If negotiations fall through, a formal statement acknowledging the existing disagreement (*procès-verbal de désaccord*) must be drawn up. This statement must include the employer's initial proposals, the last proposals/counter-proposals of each party as well as the amount that the employer unilaterally commits to pay to the employees.
- The unilateral decision of the employer must be submitted to the opinion of the works council, or if there is no works council, to the employees' representatives, if any.
- In addition to the information communicated to the employee representative bodies, an information note must be delivered to all employees. This information note can be distributed by any means (hardcopy or electronic copy) and must include the amount of the Bonus, the calculation method and the date of payment.

The features of the Bonus:

- The Law does not impose any amount. The amount can be determined either through negotiations or by unilateral decision of the employer. The amount, however, must not be purely symbolic.

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- The Law does not set forth a maximum amount but only Bonuses up to EUR 1,200 per employee and per year are exempted from social security contributions.
- The Bonus must be collective and paid to all employees of the company. When the Bonus is put in place pursuant to an agreement (as opposed to a unilateral decision of the employer), a minimum seniority of 3 months can be required.
- The Bonus can be paid to all employees in a uniform manner or adjusted according to the salary and/or the time spent by the employees within the company during the relevant reference period.
- The Bonus may not replace any other element of remuneration that is paid by the employer or that has become mandatory; it may not replace pay rises provided for under the applicable collective bargaining agreement, a previous wage agreement or the employment contract.

The tax and social security contribution regime applicable to the Bonus:

As mentioned above, the Bonus is **exempted from social security contributions**, except for the general supplementary social contribution (CSG), the contribution for the reimbursement of the social security debt (CRDS) (both of which are borne by the employee at the rate of 8% on 97% of the relevant sum), and flat social contribution (borne by the employer at the rate of 6% on the relevant sum – this rate being applicable since January 1, 2011) within the limit of EUR 1,200 per employee and per year.

The requirements to be met in order to benefit from this exemption are the same as for those applicable to optional profit-sharing plans: the bonus must not replace another element of remuneration and **the agreement or unilateral decision pertaining to the grant of the Bonus must have been previously filed** with the Regional Directorate for Companies, Competition, Consumption, Work and Employment (*Direction Régionale des Entreprises, de la Concurrence, de la Consommation, du Travail et de l'Emploi*).

The Bonus does not benefit from any tax exemption.

Transitional additional provisions, the 1-year optional profit-sharing plan:

Up to December 31, 2012, companies with less than 50 employees have the possibility to enter into an agreement for the creation of a 1-year optional profit-sharing plan, as opposed to the 3-year plan provided for by standard legal provisions.

This 1-year optional profit-sharing plan must meet all the requirements applicable to standard three-year optional profit-sharing plans: it must be negotiated, it must be collective, payment under the scheme must not be certain and depend on unpredictable elements (for instance the payment may not correspond to a percentage of the achieved sales but rather to a percentage of the sales increase) and the agreement must have been concluded before the end of the first calculation reference period. By way of derogation for 2011,

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agreements can be concluded up to October 31, 2011 insofar as the aforementioned calculation requirement is met on the date of signature of the agreement.

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