



BSPCE: a French mechanism encouraging employee share ownership favoured by start-ups

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On 3 February 2021, the French tax authorities commented the latest changes introduced by the *Loi Pacte* and the *Loi de finances* for 2020 to the French *Bons de Souscription de Parts de Créateur d'Entreprise* (a French employee incentive scheme). An opportunity for us to review in a few questions the main characteristics and advantages of this employee incentive and loyalty scheme dedicated to start-ups (BOI-RSA-ES-20-40).

WHAT IS A BSPCE?

A *bon de souscription de parts de créateur d'entreprise* ("BSPCE") is an ***intuitu personae* legal instrument allowing employees or corporate officers of a company to take an interest in its future results within a favorable tax framework.**

Legally, it is an option that gives its beneficiary under certain conditions, the right to subscribe to a share of the issuing company at a price which is pre-defined at the time of it being granted, known as the strike price.

WHY ISSUE BSPCE?

The issuance of BSPCEs aligns the interests of the employees with those of the issuing company (the employer).

On the one hand, the employee benefiting from the BSPCE participates in the growth of the company and in any consequent increase in its future value. The BSPCE offers him the possibility to realize a gain should there be an increase in the issuing company's share value between the granting date of the BSPCE and the sale date of the share obtained by its exercise. In practice, the granting of BSPCEs can be a powerful mean of strengthening employee involvement in the company's projects.

On the other hand, the company gives itself a better chance to attract new talents with attractive financial packages that offer more than the usual fixed or variable remunerations, and this without impacting its cash flow. At a time when companies are engaged in a real war for

talent, this type of scheme has become a strategic point of attractiveness for many companies. Similarly, the conditions attached to the exercise of BSPCEs, in particular the *vesting period* or the inclusion of a presence requirement, will help to retain employees for longer dissuading them from leaving too soon for the competition.

Finally, unlike other incentive schemes such as the granting of free shares (in French, "AGAs" *attributions gratuites d'actions*), the granting of BSPCEs does not entail any cost for the issuing company. Moreover, the BSPCE is issued free of charge to the beneficiary who will not have to pay anything as long as the BSPCE is not exercised.

WHO CAN GRANT BSPCE?

BSPCEs are mainly used by start-ups due to the strict conditions set out in Article 163 bis G, II of the General Tax Code.

To be eligible for the scheme, the company must:

- be a joint stock company (SA, SCA or SAS) subject to corporate income tax in France;
- have been registered in the trade and companies register for less than 15 years;
- have at least either 25% of its capital directly and continuously held by natural persons, or by legal entities where at least 75% of their own capital is directly held by natural persons.



These conditions have been relaxed by the *Loi de finance* for 2020. Indeed, since 1 January 2020, BSPCEs may be issued by a company with its registered office in a European Union Member State or in a State or territory which has concluded a tax treaty with France containing an administrative assistance clause to combat tax evasion or avoidance and where the company is subject in that same State to a tax equivalent to corporate income tax. These foreign companies will obviously have to comply with the conditions set by French law in order to benefit from the favorable legal and tax framework.



While companies created in the context of a restructuring, a merger, an expansion or a takeover of pre-existing activities cannot issue BSPCEs, by exception, if all the companies taking part in the operation meet the conditions referred to above or if the company is created by spin-off, the issuing of BSPCEs will then be possible.

Finally, listed companies may also issue BSPCEs provided they have a market capitalization of less than or equal to EUR 150 million.

WHO ARE THE BENEFICIARIES?

BSPCEs may be issued to all employees of the company as well as to corporate officers if the latter are subject to the employee tax regime (chairman, managing director, deputy managing directors, members of the management board). They may also be issued to employees and corporate officers of subsidiaries in which the company holds at least 75% of the shares and which meet the conditions set out above.

► Since 23 May 2019, these categories of beneficiaries have widened to also include members of the board of directors, the supervisory committee and, in the French *sociétés par actions simplifiée* (SAS), members of any equivalent statutory body.

The question is raised as to whether in practice, this scheme should be open to all employees or only to some, in particular, the employees who have been with the company since its inception or top management? The issue is not clear-cut, as each situation is unique.

Indeed, some companies will decide to grant BSPCEs to all their employees which will have a dilutive effect on the

capital, even if the percentage of the capital potentially granted in the form of BSPCEs is generally not very significant, ranging from 10% for the first rounds of financing to 15% for following rounds.

Other companies will prefer to keep this scheme for only some of their employees, considering the granting of BSPCEs to all employees as a factor of complexity in the management of relations between shareholders. Indeed, in practice, the issuing company should make each BSPCE holder sign a simplified shareholders' agreement, also known as a contractual undertaking, which governs the rights and obligations of employees who will become shareholders once they have exercised their BSPCE.

This document will however have to be updated at each round of financing by the company which may prove complex to manage in practice if there is a large number of employees concerned.

WHAT IS THE PROCESS FOR GRANTING BSPCE?

BSPCEs must be issued under the conditions set out in Articles L. 288-91 and L. 288-92 of the French Commercial Code governing the issuance of securities.

The issuing of BSPCEs **must be agreed to and authorized by the extraordinary general meeting or, in the case of SASs, by the general meeting of shareholders, upon presentation of a special report by the management body** (board of directors, management board or chairman) and a special report by the auditor. In practice, the shareholders gathered in a general meeting will usually delegate this competence of allocation and the determination of the list of beneficiaries to the management body.

The shareholders will have to waive individually or collectively their preferential right to subscribe for BSPCEs in favor of the beneficiaries or a category of beneficiaries. That said, the shareholders shall be deemed to have expressly waived this right for the subscription of shares resulting from the exercise of the BSPCE.

The capital increase resulting from the exercise of the BSPCE is decided at the time of issuance. It should be noted that the mandatory 5-year period for the completion of a capital increase¹ is not applicable. However, the granting of the BSPCEs shall take place within the 18 months following the general meeting where it was approved or agreed to by delegation².

This decision will determine the exercise price, the timeframe and the conditions of exercise of the BSPCEs.

¹ Provided for in Article L. 225-129 of the Commercial Code.

² Article L. 225-138 of the Commercial Code.



WHAT SHOULD THE BSPCE SUBSCRIPTION PLAN PROVIDE FOR (PRICE, VESTING, LEAVER, AND ACCELERATION CLAUSE)?

– [the strike price](#)

Each BSPCE gives the right to subscribe to one share at a pre-defined price fixed by the granting decision. Therefore, the actual exercise is an option. However, it is difficult to see why the employee would decide not to exercise this option right unless the exercise price of the BSPCE turns out to be higher than the value of the company's shares. This would be the case for example, if the shares of the issuing company are sold by the holder of BSPCE at a price per share that is lower than the strike price.

The strike price fixed at the time of granting the BSPCE must reflect the market value of the company. If this is not the case the tax authorities may reclassify the granting as additional salary subject to income tax.

A special rule provides for the possibility of setting the *strike price* by reference to the price of shares issued during a capital increase of the company that took place less than 6 months beforehand.

► Since 23 May 2019, however, this price may also be reduced by the equivalent of the loss in economic value of the company's shares since the last issuance. In the event of a significantly reduced exercise price, it is recommended that an independent third-party valuation of the company be carried out in order to minimize the risk of any dispute.

► A further relaxation has been introduced since 1 January 2020. In the event that the rights of the shares issued from the BSPCEs are not at least equivalent to those of the shares issued during a capital increase carried out less than 6 months beforehand, the issue price set for the capital increase may, if necessary, be reduced by an amount equivalent to this difference in rights in order to determine the exercise price of the BSPCEs ([CGI art. 163 bis G, III-al. 1 modifié par loi 2019-1479 du 28-12-2019](#)).

Practically speaking, this rule will only be applicable when a capital increase carried out in the 6 months preceding the granting of the BSPCEs is performed through the issuing of preference shares which as an example, give their holders preferential rights in the event of liquidation or distribution of dividends, and whereby such shares have a higher value than ordinary shares.

– [Vesting conditions](#)

In practice, the exercise of the warrant will be subject to various conditions freely defined by the shareholders. However, these conditions must be achievable and their realization cannot depend exclusively on the will of the

company as in such a case the clauses providing for the said conditions would be deemed null and void³.

With regard to temporal conditions, the exercise schedule known as the vesting period, will determine the rate at which the BSPCEs become exercisable. The BSPCEs may be immediately exercisable or become exercisable in portions at the end of each of the periods set out in the allocation plan.

A so-called cliff period may be provided for, during which no BSPCE will be exercisable. In this case, the first portion of BSPCEs will only be exercisable *ipso facto* at the end of this cliff period which is generally set at one year. Companies typically decide to grant these BSPCEs over a period of four years (48 months). During this period, the BSPCEs become exercisable in portions, typically after periods of one or three months.

As an example, if a company decides to grant 480 warrants over four years (48 months) in three-month instalments (3/48ths) with a cliff year provided for, the beneficiary would be able to exercise 120 BSPCEs at the end of the first year and would subsequently be able to exercise 30 additional BSPCEs every three months. At the end of the four-year period all the BSPCEs will have become exercisable.

The share option scheme may also provide an acceleration clause, whereby a fraction or all of the BSPCEs will become exercisable due to a change of control in the issuing company. This clause will however, reduce the value of the company as the potential buyer will have to provide in addition to the acquisition price of the purchased shares, an additional budget to "re-boost" the employees who will have previously exercised their BSPCEs under the acceleration clause.

– [Conditions of objectives or performance](#)

As well as temporal conditions, the plan may also provide conditions relating to the objectives or performance of the beneficiary or the company (e.i. reaching turnover objectives, operating profit or gross margin thresholds, meeting environmental targets, etc.).

Finally, the plan may include conditions concerning the employee's presence within the company. In principle, beneficiaries of BSPCEs may exercise their rights even if they leave the company following the issue of warrants and this regardless of the reason for their departure. However, the decision to grant the BSPCEs may provide that the beneficiaries can only exercise their warrants if they are still part of the company. Generally, the allocation plan entered into by the employee when the BSPCEs are granted will stipulate that a BSPCEs holder leaving the company must exercise their BSPCEs within 30 or 60 days of their departure.

3. Article 1304-2 of the Civil Code.

WHICH TAX REGIME IS APPLICABLE TO BSPCE?

The net gain realized by the beneficiary will be taxed at the time of the sale of the shares subscribed upon exercise of the BSPCE. This corresponds to the difference between the sale price of the shares net of expenses and taxes paid by the seller, and their strike price set at the time of their granting.

For BSPCEs granted from 1 January 2018, the applicable rate varies according to the employee's seniority within the company. If the employee has been with the company for more than three years, the common law rate of 12.8% will be applied unless the employee has opted for the progressive income tax scale. In both cases, a fixed deduction of EUR 500,000 for the sale of SME shares by managers on retirement may apply if the conditions are met to benefit from it.

For beneficiaries who have been working in the company for less than three years, or who have not totaled the equivalent of three years' active work in the company, the net gain is taxable at 30% without the possibility of opting for the progressive income tax scale and without the benefit of the EUR 500,000 allowance.

The gain is subject to social security contributions on income from assets at the overall rate of 17.2%, and from the first euro.

In the event where an employee holding a BSPCE moves for international mobility reasons, the gain on exercise (difference between the value of the share on the exercise date and the acquisition price) must be allocated and is taxable in each State in which the employee has exercised an activity during the reference period since the date of the granting of the BSPCE, if the remuneration received in respect of this activity is taxable in the State in question pursuant to treaty provisions.

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