FRANCE

Fabien Pouchot
Partner
Altana
45 rue de Tocqueville, 75017 Paris, France
+33(0)1 799 793 00
fpouchot@altanalaw.com

Q&A

Please provide a brief overview on how an ESOP in a start-up is usually structured in your jurisdiction (of particular interest: virtual or real participation programs, market practice with regard to vesting, participation (exits, proceeds and dividends) and voting rights).

In recent years, and in particular since the so-called "Macron Law" in 2015, France has sought to increase its attractiveness in favor of the French Tech by making legal and regulatory changes in favor of employee profit-sharing.

As of today in France, the two main ESOP mechanisms used by startups are the founders warrants (Bons de souscription de parts de créateurs d'entreprise or BSPCE) and the free shares (actions gratuites or RSU).

The BSPCE is the ESOP that is the most widespread in France. BSPCE are warrants that are allocated to employees, usually for free, and which give them the right to subscribe to newly issued shares at a fixed price and at, or as from, a specific future date.

In case the employee exercised his/her BSPCE, he/she will then hold ordinary shares without any special features regarding voting rights and may exercise his/her voting rights as an ordinary shareholder.

In practice, a vesting is usually provided for a few years with a first-year cliff and then a progressive allocation of the warrants over the years. Sometimes, the applicable BSPCE plan provides for an acceleration provision in case of a change of control or an IPO.

The BSPCE are mainly intended for start-ups to incentivize their employees with the benefit of an attractive tax and social treatment. BSPCE may only be issued by companies that (i) have been registered for less than 15 years, (ii) at least 25% of the share capital is held by individuals or companies that are at least 75% owned by individuals, (iii) are non-listed or listed on an EU regulated market, (iv) with less than EUR150 million capitalization and (v) are subject to corporate income tax in France.

Last year, in the context of Brexit, a very strong and meaningful move toward internationalization has been made to extend the scope of the BSPCE regime beyond French borders. Further to the 2020 Finance Law, foreign companies are now authorized to grant BSPCE to the employees of their French subsidiaries, affiliates or branch in France.

The other most commonly used ESOP mechanism are the RSU. RSU allow employees to become shareholders of the company free of charge at the end of a fixed period set in advance and after a minimum holding period for the shares.

The company defines the conditions, e.g., presence, performance, etc., and the period after which the employee becomes the owner of the shares, free of charge. This period of time, known as the acquisition period, is at least one year. The company may also apply a minimum retention period to the shares. The cumulative acquisition and retention periods may not be less than 2 years.

After the end of such period, the holder of RSU becomes shareholders with the same voting rights as other shareholders; it being specified that the shares may either be ordinary shares or preferred shares with specific voting rights

Beneficiaries who individually hold more than 10% of the share capital may not benefit from RSU, nor may they cross this threshold of 10% of the share capital through RSU.

RSU may be granted by foreign issuing companies to employees and managers who carry out their activity in one of the group’s companies established in France.

Other financial instruments may be used such as stock-options or shares subscription warrants, however the employees shall pay a subscription price and are subject to tax uncertainties.

Also, under French law, a company that employs 50 or more employees must implement an employee profit-sharing (participation) to all its employees. The company must therefore allocate a part of its profits made during the last financial year to its employees and pay a premium that may either be paid immediately or locked up for a couple of years and invested on an employee profit-sharing plan (see tax advantages in question 4 below).

Please provide an overview of the respective tax situation an employee finds him-/herself in when he/she participates in a real/virtual equity investment program (applicable taxes and approximate tax burden (a) at the time of the investment and (b) at the time when revenues therefrom are received).

For the beneficiary of BSPCE, the tax and social regime is as follows:

- Upon acquisition of the BSPCE: no tax or social security charges

- Upon exercise of the BSPCE to acquire the underlying shares: no tax or social security charges

- Upon sale of the underlying shares: income tax at a specific rate of 12.8%, or 30% if the employee has performed his/her business activity in the company for less than three years at the date of sale on the gain realized at sale. Also, 17.2% social security charges apply

For the beneficiary of RSU, the tax and social regime is as follows:

- Upon acquisition of the RSU: no tax or social security charges

- Upon expiration of holding period of the RSU: no tax or social security charges

- Upon sale of the RSU: (i) acquisition gain, i.e., fair market value of the shares at time of acquisition, is subject to income tax with a specific discount if the purchase gain is less than € 300,000, and (ii) capital gain, i.e., difference between sale price and fair market value of the shares at time of acquisition, is subject to flax tax (12.8%) and social security charges (17.2%)

Are there any tax advantages for an employee if the revenues based on the equity investment are reinvested in start-ups or other companies?

There are no specific tax advantages for an employee if he/she decides to reinvest his/her capital gain in start-ups or other companies.

However, any individual investing in an SME that meets certain conditions may benefit from an income tax reduction, provided he/she keeps its shareholding for at least 5 years. For 2021, such tax reduction is equal to 25% of the invested amount and is capped at €50,000 for a single individual.

Are there any tax advantages for the company if an ESOP is established in the company?

The reason why the BSPCE is the most attractive ESOP mechanism in France is that it is not subject to taxation nor employer social contribution.

RSU also benefit from an attractive tax and social security regime but, compared to BSPCE, RSU are subject to specific social contributions equal to 20% of the value of the shares upon acquisition and payable on the first anniversary of the acquisition date. However, this regime remains attractive compared with remuneration which is subject to higher tax and social security charges.

Also, the company may decide to set up a company savings plan (“plan d’épargne entreprise” – “PEE”), which is a form of collective voluntary savings scheme that allows employees to participate in a portfolio of securities (including sometimes shares of the employer group companies), and that is eligible for a specific tax and social security regime.

Please highlight one pro and one con of the legal set up with regard to ESOPs in your jurisdiction.

Pro: Both the BSPCE and RSU may easily be implemented, does not usually require any cash-in for the employee and the applicable tax regime is very attractive for the employee and the company. They may also be implemented in worldwide group having employees in France.

Con: BSPCE holders often do not have the wherewithal to subscribe to the underlying shares, even if the predefined value is low. However, as is common in the Silicon Valley, new platforms have recently emerged to offer liquidity to these employees. For example, Cityscoot is currently setting up a transaction allowing former historical employees to sell their shares to go into entrepreneurship.