THE EXECUTIVE REMUNERATION REVIEW

EIGHTH EDITION

Editors
Arthur Kohn and Janet Cooper

THE LAWREVIEWS

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Editors
Arthur Kohn and Janet Cooper

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CONTENTS

PREFACE

Executive remuneration encompasses a diverse range of practices and is consequently influenced by many different areas of the law, including tax, employment, securities and other aspects of corporate law. We have structured this book with the intention of providing readers with an overview of these areas of law as they relate to the field of executive remuneration. The intended readership of this book includes both in-house and outside counsel who are involved in either the structuring of employment and compensation arrangements, or more general corporate governance matters. We hope this book will be particularly useful in circumstances where a corporation is considering establishing a presence in a new jurisdiction, and is seeking to understand the various rules and regulations that may govern executive employment (or the corporate governance rules relating thereto) with regard to newly hired (or transferring) executives in that jurisdiction.

The most fundamental considerations relating to executive remuneration are often tax-related. Executives will often request that compensation arrangements be structured in a manner that is most tax-efficient for them, and employers will frequently attempt to accommodate these requests. To do so, of course, it is critical that employers understand the tax rules that apply in a particular situation. To that end, this book attempts to highlight differences in taxation (both in terms of the taxes owed by employees, as well as the taxes owed – or tax deductions taken – by employers), which can be the result of:

a the nationality or residency status of executives;
b the jurisdiction in which executives render their services;
c the form in which executives are paid (e.g., cash, equity (whether vested or unvested) or equity-based awards);
d the time at which executives are paid, particularly if they are not paid until after they have 'earned' the remuneration; and
e the mechanisms by which executives are paid (e.g., outright payment, through funding of trusts or other similar vehicles, or personal services corporations).

In addition to matters relating to the taxation of executive remuneration, employment law frequently plays a critical role in governing executives' employment relationships with their employers. There are a number of key employment law-related aspects that employers should consider in this context, including:

a the legal enforceability of restrictive covenants;
b the legal parameters relating to wrongful termination, constructive dismissal or other similar concepts affecting an employee's entitlement to severance on termination of employment;

c any special employment laws that apply in connection with a change in control or other type of corporate transaction (e.g., an executive's entitlement to severance or the mechanism by which an executive's employment may transfer to a corporate acquirer); and

d other labour-related laws (such as laws related to unions or works councils) that may affect the employment relationship in a particular jurisdiction.

The contours of these types of employment laws tend to be highly jurisdiction-specific, and therefore it is particularly important that corporations have a good understanding of these issues before entering into any employment relationships with executives in any particular country.

Beyond tax and employment-related laws, there are a number of other legal considerations that corporations should take into account when structuring employment and executive remuneration arrangements. Frequently, these additional considerations will relate to the tax or employment law issues already mentioned, but it is important they are still borne in mind. For example, when equity compensation is used, many jurisdictions require that the equity awards be registered (or qualify for certain registration exemptions) under applicable securities laws. These rules tend to apply regardless of whether a company is publicly or privately held. In addition to registration requirements, it is critical for both employers and employees to understand any legal requirements that apply in respect of executives' holding, selling or buying equity in their employers.

Given the heightened focus in many jurisdictions on executive remuneration practices in recent decades – both in terms of public policy and public perception – the application of corporate governance principles to executive compensation decisions is crucial to many companies. Decisions about conforming to best practices in the field of executive remuneration may have substantial economic consequences for companies and their shareholders and executives. Corporate governance rules principally fall into two categories. The first concerns the approvals required for compensatory arrangements: a particular remuneration arrangement may require the approval of the company's board of directors (or a committee thereof). Many jurisdictions have adopted either mandatory or advisory say on pay regimes, in which shareholders are asked for their view on executive remuneration. The second concerns the public disclosure requirements applicable to executive remuneration arrangements: companies should be aware of any disclosure requirements that may become applicable as a result of establishing a new business within a particular jurisdiction, and in fact may wish to structure new remuneration arrangements with these disclosure regimes in mind. In recent years, there has also been increased legislative and shareholder focus in many jurisdictions on environmental and social governance issues, such as the gender pay gap, tying executive compensation to environmental and social goals and diversity initiatives.

We hope that readers find the following discussion of the various tax, statutory, regulatory and supervisory rules and authorities instructive.

Arthur Kohn
Cleary Gottlieb Steen & Hamilton LLP
New York
August 2019

Chapter 6

FRANCE

Yoan Bessonnat, Gabriel Flandin and Philippe Grudé[1]

I INTRODUCTION

In France, as everywhere else, salaried executive remuneration is a major topic in the life and management of companies, which concerns both legal entities, as employers, and executives or future executives.

However, it is not easy for the persons and legal professionals concerned to master all the issues and optimisation levers existing in this field to the extent that:

a executive remuneration covers many areas of law, and requires sound skills in tax law and company law as well as labour law;

b the principles applicable in this area, stemming from international and European regulations, law, case law, branch bargaining agreements and sometimes even administration opinions, are not gathered in the same code but dispersed in many texts; and

c the regulations governing the matter are fluctuating and are regularly subject to changes, which presupposes a quasi-permanent legal watch.

This chapter, the result of the combined work of tax law, company law and labour law specialists, aims to summarise the principles and practices governing the setting of executive remuneration as well as its tax and social regime.

II TAXATION

i Income tax for employees

In France, executive remuneration is generally included in the overall income of executives, which is thus subject to personal income tax at a progressive rate even if the category of income depends on the form of a company and the interest held by an executive in that company.

Taxable income includes all amounts paid and any benefit in kind available to an executive. It is determined by deducting, inter alia, mandatory social security contributions. Professional expenses are normally taken into account through a 10 per cent deduction capped at a certain threshold, which is reviewed every year, although the executive may elect to deduct the actual amount of professional expenses incurred, provided such expenses are duly justified.

1 Yoan Bessonnat is a partner at Chassany, Watrelot & Associés. Gabriel Flandin is a partner and Philippe Grudé is a counsel at Willkie Farr & Gallagher LLP.

In France, personal income tax is calculated on the basis of the amounts declared by taxpayers, who are required to file a single return per tax household reporting all income received in the previous year. These amounts are subject to a progressive rate.

In 2019, the progressive rate (for one part[2]) applicable to income received in 2018 is as follows:

Portion of taxable income	Rate (%)
For the portion below €9,964	Zero
For the portion between €9,965 and €27,519	14
For the portion between €27,520 and €73,779	30
For the portion between €73,780 and €156,244	41
For the portion exceeding €156,245	45

From 1 January 2019, and the enforcement of the retention of income tax at source, employers are compelled to collect the withheld income tax every month on the basis of the remuneration they pay to their employees and declare and remit it to the French tax authorities.

In addition, a further temporary tax (an exceptional contribution to high income) is applicable to French taxpayers whose taxable income exceeds a certain threshold. This additional temporary tax is based on the amount of income and capital gains of taxpayers taken into account to calculate their income tax liability, increased by certain expenses that are deductible and other profits that are exempt from income tax or subject to a deferral.

This additional temporary tax is calculated at a progressive rate as follows:

Taxable amount	Rate of the additional temporary tax (%)	
	Single, separated or divorced taxpayers	Married taxpayers or taxpayers in a civil union
Less than €250,000	Zero	Zero
Between €250,000 and €500,000	3	
Between €500,000 and €1 million	4	3
Over €1 million	4%	4%

ii Social taxes for employees

In France, in principle,[3] all the benefits granted to executives in consideration or on the occasion of work are subject to social taxes (sickness, retirement, unemployment, etc.). This covers all the elements of, inter alia, fixed and variable remuneration, various bonuses, allowances and benefits in kind.

2 'Part' refers to a very specific aspect of the French personal income tax system according to which a tax household's taxable income is divided into a certain number of parts (e.g., one for a single person, two for a married couple plus a half for each of the first two dependent children, and one additional for each child thereafter; the progressive tax scale is then applied to the taxable income per part).

3 Article L242-1 of the Social Security Code.

Given the level of executive remuneration and in view of the capping of the social tax base, social taxes account, on average, for 40 per cent of gross executive remuneration (25 per cent of employer contributions and 15 per cent of employee contributions).[4]

Note, however, that:

a certain benefits from which executives might profit are subject to a specific social regime, particularly supplementary defined benefit retirement schemes, share subscription and purchase options or allotments of free shares (see Section II.iii); and

b within certain limits and under certain conditions, other benefits largely escape social taxes. Thus, there are in particular employer contributions funding supplementary defined contribution pension schemes, benefit schemes and sums paid under employee savings arrangements (optional profit-sharing, mandatory profit-sharing, savings plans, etc.) (see Section II.iii).

Specific rules apply in favour of executives sent abroad as part of a secondment or expatriation. In this respect, France has entered into various social security treaties with other countries; in addition, a number of EC regulations must be observed.

iii Tax deductibility for employers

Principle

Executive remuneration represents staff costs and is therefore deductible from the taxable profit of companies making industrial and commercial profits.

This deductibility covers not only salaries, emoluments, various allowances, employment costs and benefits in kind but also social taxes and various expenses incurred in the interest of executive salaried staff.[5]

General conditions of deduction

Deductibility of remuneration paid to executives is subject to compliance with the following conditions: the remuneration must correspond to an actual and justified cost, and may affect only the results for the period during which it is incurred; the remuneration must correspond to actual work; and it must not be excessive having regard to the importance of the service provided.[6]

On this last point and in general, the authorities take the view that a payment allotted in favour of its beneficiary in return for the service provided may be regarded as excessive when it exceeds:

a that corresponding to his or her professional qualifications;

b the scope of his or her activity;

c his or her abilities specific to the company's results;

d the amount of the company's salaries;

4 Average rate not taking account of any supplementary benefit and pension schemes set up in favour of interested parties.

5 Deferred remuneration (non-compete compensation, defined benefit pension schemes, contractual redundancy compensation, etc.) granted by companies listed on a regulated market to their chairs, chief executive officers, deputy chief executive officers and board members are only permitted for deduction from the net profit up to the limit of three times the annual social security cap per beneficiary.

6 Articles 39(1)1°, Paragraph 2 and 111(d) of the General Tax Code.

e the remuneration allotted to identical jobs in the company or elsewhere; or
f the employer's salary policy.

The tax services are particularly attentive to compliance with this last condition concerning executives who personally have sizeable holdings in the capital or are united by emotional ties or interests in persons holding control of a company. In other situations, the authorities take the view that reintegration of excess remuneration must be pursued solely in exceptional situations, particularly when the remuneration paid is manifestly exaggerated in relation to the service provided, or when factual circumstances make it possible to presume that the benefit granted has not been accorded in the direct interest of the company on account in particular of emotional ties or interests uniting the beneficiaries to persons possessing control of the company.

Fiscal year of deduction

In principle, only remuneration of which a company has become a debtor during any determined fiscal year is liable to be deducted from the taxable income for this fiscal year.

Staff expenses not yet paid at the end of a fiscal year such as gratuities, bonuses and contractual mandatory profit sharing may be deducted from the results for said fiscal year only if a company has taken, in respect of executives, firm commitments as regards the principle and method for calculating the sums owed and if the obligation to pay them during a subsequent fiscal year is therefore certain. This condition being fulfilled, these costs may, when the elements needed for calculating the sums owed are not yet known exactly on the closing date of the fiscal year, give rise to the creation of provisions corresponding with sufficient approximation to their likely amount; or, when the amount of them is determined exactly, to be deducted in respect of the costs to be paid.

iv Other special rules

Allotment of free shares and share subscription or purchase options

Subject to certain conditions, specific social and tax rules apply to the allotment of free shares and share subscription or purchase options. These two tools originally followed a similar treatment: lawmakers now unquestionably favour allotments of free shares.

In both cases, the benefit is exempt from the social contributions usually owed on remuneration elements. On the other hand, the benefit is subject to specific social contributions. Free shares may also benefit from a more advantageous tax regime. From 2018, benefits derived from the sale of shares acquired under these arrangements are able to benefit from the system of a single flat-rate levy on investment income, making it possible to benefit from a reduced rate of income tax.

The benefits derived from these arrangements are broken down as follows:

a the discount that corresponds to the difference between the value of the share on the day of allotment of the option and the exercise price of the option (share subscription or purchase option only);
b the acquisition gain that corresponds to the difference between the value of the shares at the time of their definitive acquisition or exercise of the option, and the exercise price (option) or any reduced mandatory profit-sharing (free shares); and
c the capital gain on disposal that corresponds to the difference between the value of the shares when they are sold and the value at the time of the definitive acquisition or exercise of the option.

The social and tax treatment of these benefits is marked by great instability. The table below summarises the latest rules applicable, knowing that, depending on the date on which these benefits were authorised or allotted, it will be possible to apply different conditions to them.

	Allotment of free shares		**Share subscription or purchase option**	
	Social treatment	**Tax treatment**	**Social treatment**	**Tax treatment**
When allotted	N/A	N/A	Specific employer contribution (30%) calculated either on the fair value of the options or on 25% of the value of the shares under option on the date of allotment of the options	N/A
Discount	N/A	N/A	If <5%: exempted If >5%: subject to social contributions in the same way as salary*	If <5%: exempted If >5%: subject to income tax†
Acquisition gain	Specific employer contribution (20%)‡ + specific salary contribution for the share of the acquisition gain >€300,000 over the year (10%)§ + Social levies¶	Share <€300,000 over the year: subject to income tax after an allowance of 50% Share >€300,000 over the year: subject to income tax without allowance‖	Specific salary contribution (10%) + social levies on business income (9.7%)	Subject to income tax in the same way as salary
Capital gain on disposal	Social levies on investment income (17.2%)§	Taxation as part of the single flat-rate levy (12.8%) and application, as the case may be, of the exceptional contribution on high income (3 or 4%)‖	Social levies on investment income (17.2%)§	Taxation as part of the single flat-rate levy (12.8%) and the application, as the case may be, of the exceptional contribution on high income (3% or 4%)‖

* Payable when the option is exercised
† Payable in respect of the year in which the option is exercised
‡ Payable in the month following definitive acquisition
§ Payable when sold
¶ If the acquisition gain is less than €300,000 over the year, application of the social levies applicable to investment income (17.2 per cent); the share greater than €300,000 is subject to social levies on business income (9.7 per cent)
‖ Payable in respect of the year of sale

Supplementary pension schemes

Many companies allow their executives to benefit from a supplementary pension scheme with a view to supplementing the benefits of mandatory schemes, either as a defined contribution or a defined benefit scheme.

In tax terms, employer contributions paid to insurers to finance such schemes are deductible for the company on the double condition that the payments made correspond to a real legal commitment enforceable against the employer and that this commitment is of a general and impersonal nature (i.e., it concerns all staff or one or more determined categories of staff).[7]

7 On this last point, according to case law, an objective category is for example represented by 'corporate officers and employees whose total remuneration exceeds twice the cap of the executive pension scheme' (i.e., €79,464 in 2018) or senior executives. Conversely, the grant of a personal retirement benefits cannot profit from tax-deductibility (Council of State, 9 November 1990, No. 88765).

In respect to the treatment of the funding of these schemes and regarding income tax and social taxes, it is necessary to distinguish defined contribution schemes from defined benefit schemes.

In respect of defined contribution schemes, the employer contributions that fund them are, within certain limits and under certain conditions, exempt from social contributions[8] and income tax. This supposes in particular that a scheme has mandatory membership and that it benefits an objective category of staff. Otherwise, the contributions that fund them are deemed to be part of the salary and do not enjoy any particular social or tax benefit.

For their part, random defined benefit schemes benefiting from a specific social regime come under a social regime. Funding of these schemes is excluded from the base of social security contributions owed on salaries; on the other hand, an employer pays a specific contribution based, at its option, on annuities or the funding of the scheme. Originally advantageous, this social treatment has been eroded over the past few years by increases in the rate of these contributions and by the creation of additional contributions.

Given the required transposition of Directive 2014/50/EU of 16 April 2014,[9] note that the rules applicable to defined benefit schemes and their social and tax treatment are currently being modified. The condition of completion of a career in a company specified to benefit from the preferential social regime referred to above is in fact contrary to the Directive, according to which a condition of length of service to acquire supplementary pension rights may not exceed three years. In the future, all of the schemes that are currently in operation should be closed to new entrants. For their part, the new schemes would no longer subject an acquisition of rights to the presence of beneficiaries in a company when they retire.

III TAX PLANNING AND OTHER CONSIDERATIONS

i Impatriates

Article 155 B of the French Tax Code

Executives who are called upon by a company based outside of France to work for a limited period for a company based in France, and other executives who are directly recruited in a foreign country by a company based in France, are entitled to exemptions in respect of their earned income. These arrangements apply to persons who were not domiciled in France for tax purposes during the previous five years and who set their tax domicile when taking up their position in France.

Such executives are exempt until 31 December of the eighth year following the year in which they take up their position for the years when they are domiciled in France. The income tax exemption also applies to 50 per cent of certain investment income and income from intellectual or industrial property rights received in other countries (passive income), and certain capital gains on the disposal of transferable securities and shares held in other countries.

8 With the exception of the CSG-CRDS (social charges) borne by beneficiaries at a rate of 9.1 per cent and the specific 20 per cent employer contribution named '*forfait social*' borne by a company at a rate of 20 per cent.

9 Directive 2014/50/EU of 16 April 2014 on the acquisition and preservation of supplementary pension rights.

ii Executives carrying out part of their activity out of France

Article 81 A of the French Tax Code

Subject to treaty relief, executives who are French residents sent abroad by an employer located in France or in another Member State of the European Union are subject to taxation in France under the same conditions as a person lawfully residing in France. However, they may benefit from full or partial exemptions.

A full exemption of income earned in consideration for their activities out of France applies if:

a the executives were subject to a foreign income tax equal to two-thirds of that which would be due in France on the same basis (Section 81 AI of the Revenue Code); or

b the compensation that is earned relates to an activity carried out abroad for a period exceeding 183 days during a period of 12 consecutive months if the activity relates to construction site or installation, commissioning and exploitation of industrial plants or research and resource extraction. The period is reduced to 120 days only for employees engaged in the business of prospection.

A partial exemption applies if any of the preceding conditions are not met.

In this case, executives posted abroad are taxed on the compensation they would have received if they had carried out their business in France (additional compensations paid in consideration for stays outside France are exempt) provided that:

a time spent outside France is used in the sole and direct interest of their employer;

b the amount of time spent outside France is determined beforehand and relates to duration and place of stay. The supplementing of compensation may not exceed 40 per cent of earnings; and

c the additional compensation is justified by a move requiring a residence of an effective duration of at least 24 hours in another country.

IV EMPLOYMENT LAW

In France, with the exception of the legal provisions on working time, executives enjoy the same legal and contractual rights as other employees.

i Working time

Executives meeting the definition given in the Labour Code[10] are excluded from the provisions of the Labour Code on working time, various breaks and public holidays. In practice, therefore, their working time is not counted; in particular, they cannot claim payment for overtime. On the other hand, they benefit from paid leave like other employees.

10 Article L3111-2, Paragraph 2, of the Labour Code states: 'Regarded as having the capacity of executive are executives to whom are entrusted responsibilities whose importance entails great independence in organising their employment of time, who are authorised to take decisions in a largely autonomous manner and who receive remuneration in the highest levels of the remuneration systems practised in their company or institution.'

ii Employment contract termination

Dismissal

French law does not contain any specific provision concerning the method for terminating executives' employment contracts. Employment contracts may therefore end in the context of a resignation, dismissal for personal or economic reasons, approved contractual termination[11] or following a voluntary retirement or retirement.

Any personal dismissal must be justified by a real and serious cause. It may be decided for a disciplinary reason, which presupposes that an executive has committed one or more instances of misconduct sufficiently serious to justify dismissal.[12] It may also be decided outside any misconduct committed by an executive. Thus, the following may justify dismissal: inadequate results, professional incompetence or an executive's physical unfitness to exercise his or her duties. On the other hand, a simple change of control cannot in itself justify the dismissal of an executive.[13]

In all cases employers must comply with a procedure defined by the Labour Code that, in particular, involves inviting the employee in question to an interview prior to dismissal, and notifying the dismissal in writing.

Severance pay

An executive dismissed for a reason other than serious or gross misconduct is entitled to payment of compensation, which amount may not be less than that fixed by law[14] or a sector's collective bargaining agreement. Note that, when hired, executives often negotiate the insertion of a clause in their employment contracts specifying payment of compensation in a higher amount. In practice, these clauses generally specify payment of flat-rate compensation fixed between 12 and 24 months' salary.

Under certain conditions and within certain limits, severance pay is exempt from social taxes[15] and income tax.[16]

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11 Contractual termination enables an employer and an employee in a permanent contract to agree jointly on the conditions for terminating the employment contract binding them. Individual or collective contractual termination is possible under conditions and compensation. A legal procedure sets out the steps to be followed (drafting of a termination agreement and validation by the authorities).

12 The consequences of dismissal vary depending on the categorisation retained by the employer (simple misconduct, serious misconduct or gross misconduct). For example, dismissal for serious or gross misconduct deprives an executive of severance pay and his or her right to notice.

13 Note, however, that according to case law, a contractual clause that enables an employee to terminate an employment contract, said termination being ascribable to the employer, in the event of change of management, control, merger, absorption or significant change in the shareholder base bringing about a substantial modification of the management team, is lawful provided it is justified by the employee's duties within the company and does not hinder the right of unilateral termination of the contract by one or other of the parties (Court of Cassation, social chamber, 26 January 2011, No. 09-71.271 (No. 278 FS-PB), *Sté Havas v. Audier*).

14 Statutory severance pay is calculated from the gross remuneration received by the employee before his or her employment contract is terminated. Compensation may not be less than the following amounts: one-quarter of a month's salary per year of service for the first 10 years; or one-third of a month's salary per year of service with effect from the 11th year.

15 Article L242-1 of the Social Security Code.

16 Article 80 duodecies of the General Tax Code.

In tax terms, severance pay paid outside a job protection plan is exempt from income tax at the highest of the following three amounts: the amount of statutory or conventional severance pay;[17] twice the amount of annual gross remuneration received in the year preceding termination; or 50 per cent of the amount of severance pay received. In the last two cases, the exempted fraction may not exceed €243,144.[18]

Severance pay amounting to more than €3,405,240[19] is entirely subject to social taxes. Above this, it may be exempt from social taxes[20] within a limit of €81,048.[21]

Note that if the duties of corporate officer and employee are combined within the same company, or companies in the same group, it is necessary to group together all the compensation received to assess the social exemption and tax deductibility thresholds.[22]

Notice of dismissal

Except in the case of dismissal for serious or gross misconduct, a dismissed executive benefits from a notice period that is fixed by law or a collective bargaining agreement. As regards executives, the dismissal notice is generally fixed at three months by sector-specific collective bargaining agreements. Note that an employment contract may specify a longer dismissal notice period and that, in all cases, employers may exempt an executive from working his or her notice. In this case, the employment contract is maintained and the exemption period must be remunerated.

Disputes and settlement

The dismissal of executives is very regularly followed by the conclusion of a settlement under which the executive waives contesting this measure and more generally from instituting any action against his or her former employer. On the other hand, the employer undertakes to pay him or her settlement compensation, which may be exempt from social contributions and income tax within certain limits and under certain conditions.

Non-compete

During the period of execution of an employment contract, an executive may not engage in acts of unfair competition. In principle, this obligation ceases at the end of the employment relationship (at the end of the notice, whether it is worked or not) unless the executive is subject to a non-compete clause, which in practice is often the case.

17 Amount provided by a branch collective agreement.

18 Amount applicable in 2019.

19 Amount applicable in 2019.

20 The fraction exceeding the amount of the statutory or contractual severance pay is in any case subject to 9.7 per cent of payroll taxes.

21 Amount applicable in 2019.

22 In this case, there are also provisions specific to compensation paid in the event of forced termination of the duties of corporate officers, which must be applied to all compensation paid in respect of termination of an employment contract and a corporate mandate. These rules are less favourable. Thus, the tax exemption is limited to €121,572 (2019 amount), and compensation in an amount greater than €202,620 (2019 amount) is entirely subject to social taxes.

To be lawful and enforceable against a former employee, a non-compete clause must meet a number of cumulative conditions posed by case law.[23] The clause must therefore:

a be vital to protecting a company's legitimate interests;

b be limited in time: in practice, the periods of application of clauses are fixed at between 12 and 24 months;

c be limited geographically: in practice, the scope of clauses is generally limited to the national territory;

d take account of the specifics of an employee's job, and leave him or her with the possibility of working; and

e include an obligation for employers to pay financial consideration to the employee in question. For a clause to be valid, this financial compensation must not be derisory. In practice, the amount of the consideration is paid monthly to the former executive and represents between 25 and 50 per cent of the remuneration that he or she received as an employee.

Note that when an employee is exempted from working his or her notice, the non-compete clause binds him or her with effect from his or her departure from the company; and an employer may waive application of the clause if this right is specified by the employment contract.

In the event of a breach of the clause by a former executive, he or she loses the benefit of the financial consideration. He or she may also be compelled to redress any loss caused to his or her former employer and to cease his or her competitive activity.

In the absence of a non-compete clause, executives will be free to work when their employment contracts end. This freedom is not, however, without its limits. In particular, former executives must not engage in acts of unfair competition, on pain of being exposed to civil sanctions (the award of damages) or even criminal damages in the event of proven corruption. The following may, for example, constitute acts of unfair competition: diverting a former employer's clients,[24] or hiring its employees after the creation of a competing company.[25]

V SECURITIES LAW

i Prospectus

French securities law derives from EU regulations and any share issuance must therefore comply with prospectus regulations[26] (see the EU Overview chapter), provided that:

a securities offered, allotted or to be allotted to existing or former directors or employees by their employer or an affiliated undertaking are exempted from the obligation to publish a prospectus if:

23 These conditions are imposed even if, as regards a shareholder employee or associate of the company that employs him or her, the clause is specified in the shareholder agreement and not in the employment contract (Court of Cassation, Social Chamber, 23 November 2011 No. 10.21.089).

24 Court of Cassation, Commercial Chamber, 12 May 2004, No. 02-19.199.

25 Court of Cassation, Commercial Chamber, 7 May 1980, No. 78-14.831.

26 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

- a document is made available containing information on the number and nature of the securities, and the reasons for and detail of the offer or allotment; and
- in the case of admission to trading, the offered securities are of the same class as the securities already admitted to trading on the same regulated market; and

b the allotment of free shares and share subscription or purchase options is not deemed to be an offering under French laws, as free shares and share options are not actual securities,[27] but merely rights to obtain securities; therefore, they fall outside the scope of the prospectus regulations, even though the delivery of underlying shares may subsequently require compliance with said rules.

ii Market abuse

Executive and other employees holding securities (or exercising options) are subject to all directives and regulations governing market abuse[28] (see the EU Overview chapter), of which they are a particular focus because of the likelihood of their possession of price-sensitive information. They may notably be subject to disclosure of director dealings, it being specified that the *de minimis* threshold applied in France is €20,000 per year; and also to a black-out period during which they must avoid any transaction.

iii Share retention

Executive directors who benefit from the allotment of stock option[29] or free shares[30] are subject to certain obligations to retain all or part of the options or the underlying shares. These restrictions must be established by companies' boards of directors. While in listed companies they have to take into account recommendations under the corporate governance code, said restrictions may be more symbolic in private companies.

VI DISCLOSURE

i Public companies

Disclosure requirements regarding executive remuneration are primarily driven by EU rules and regulations, including in particular the Prospectus Regulation[31] (see the EU Overview chapter) as well as Article L225-37-3 of the French Commercial Code, which provides that boards of directors of companies whose securities are admitted to trading on a regulated market (or are controlled by such a company) shall disclose in a corporate governance report, inter alia, the overall remuneration and benefits (including allotment of free shares and option) paid by a company on a consolidated level for each director (whether executive or not). The report shall notably detail base and variable compensation, as well as long-term benefits such as pension

27 AMF Position No. 2007-15 regarding stock option plans or free shares plans.

28 Directive 2014/57EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse and Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation).

29 Article L225-185 of the French Commercial Code.

30 Article L225-197-1 of the French Commercial Code.

31 Commission Regulation (EC) No. 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.

plans or severance packages. In addition, boards are required to disclose the remuneration of executive directors in comparison with the average and median remunerations of other employees, and to provide historical data on the evolution of corresponding ratios.

ii Private and public companies

Shareholders of the French *société anonyme* and *société en comandite par actions* must be informed of the total amount paid in aggregate to the five or 10 persons (depending on company size) who have received the highest remuneration.

VII CORPORATE GOVERNANCE

The requirements imposed on executive remuneration derive initially from soft law requirements in France, including in particular two codes of governance drafted by employers' associations: the AFEP–MEDEF code,[32] mainly followed by CAC 40 companies,[33] and the Middlenext code,[34] followed by small and medium-sized listed companies. However, further to press scandals, French lawmakers progressively enacted one of the most stringent say-on-pay regulations in Europe. Said regulation is applicable to executive corporate officers in companies whose securities are admitted to trading only.

i Employees who are not corporate officers in a listed company

Currently, the remuneration received by employee executives under their employment contract is governed by the principle of the free setting of salaries[35] and is not subject to particular governance rules,[36] whether those rules are used by private companies or by state-owned companies. Within these companies, only the remuneration of corporate officers is capped at 20 times the average of the lowest salaries of these companies (i.e., €450,000 per year).[37]

ii Corporate officers of listed companies

Remuneration of corporate officers of listed companies is now subject to a stringent two-step control by shareholders:

a the shareholders' meeting shall every year approve the principle and criteria of remuneration of each executive director for the coming year. This approval shall include each of the components of the remuneration including, inter alia, base compensation, yearly variable compensation, long-term variable compensation, allotment of free shares and options, exceptional remunerations and bonuses, and deferred benefits (retirement

32 AFEP is the French Association of Private Companies and MEDEF is the French Enterprise Movement.

33 CAC 40 is a free float market capitalisation weighted index that reflects the performance of the 40 largest and most actively traded shares listed on Euronext Paris, and the most widely used indicator of the Paris stock market. CAC 40 serves as an underlying for structured products, funds, exchange traded funds, options and futures and is operated by Euronext. Source: https://www.bloomberg.com/quote/CAC:IND.

34 Middlenext is an independent professional association representing mid-cap listed companies.

35 This remuneration should not, however, be less than the legal and contractual minimums.

36 Except when an employment contract and a corporate mandate are combined.

37 Decree No. 2012-915 of 26 July 2012 on supervision by the state of the remuneration of executives of state-owned companies.

benefits). If shareholders fail to approve the remuneration package, the relevant executive director shall benefit from the previous year's package, and, failing approval of previous packages, on the basis of previously applied practices in the company; and

b the shareholders' meeting shall also approve the payment of variable and exceptional compensation (for the previous year). Failing approval of the variable and exceptional compensation (and even if previously approved in the context of the above-mentioned shareholders' meeting), the relevant executive director is prohibited from receiving variable and exceptional compensation.

This approval process is in addition to the previously existing requirements to have shareholders approve, upon grant, the entry into force of retirement payments, remunerated non-compete undertakings and golden parachutes, which will again have to be approved prior to payment.

The above requirements strongly reduce the ability for an executive director to fully negotiate a compensation package when hired. Indeed, no agreement can be binding upon a company regarding variable compensation until payment is actually approved by its shareholders.

VIII SPECIALISED REGULATORY REGIMES

Although they cannot be discussed in detail in this chapter, two layers of specific rules must be mentioned as an outline of the French legal context regarding compensation.

i Collective agreements

Branches, companies and establishments may negotiate collective agreements, which may provide for additional rules and regulations. These rules and regulations need to be reviewed on a case-by-case basis. They may notably set a minimum wage requirement, improve the amount of severance pay provided for in the payment of seniority or 13th-month bonuses, or introduce additional social protection guarantees.

ii Specific regulations

Some sectors may be subject to additional binding requirements regarding the setting of compensation packages. This is notably the case regarding the banking and financial industry where lawmakers have tried to impose a shift towards long-term incentives by limiting yearly bonuses. These specific regulations also need to be reviewed on a case-by-case basis.

IX DEVELOPMENTS AND CONCLUSIONS

i Equity remuneration

After a great deal of to-ing and fro-ing by French lawmakers in this respect, the allocation of free shares seems to now be considered in a positive light to the extent that the amount at stake does not exceed €300,000.

On the listed company side, the remuneration of executive corporate officers has been placed under intense scrutiny, and it has been claimed that this will be detrimental to French companies when they compete to hire the best managers. The medium to long-term consequence of the new regime remains to be seen, most notably in determining whether it will be amended or remain in its current form.

Appendix 1

ABOUT THE AUTHORS

YOAN BESSONNAT

Chassany Watrelot & Associés

Yoan Bessonnat joined Chassany Watrelot & Associés in 2003, where he has been a partner since 2012.

Yoan Bessonnat advises and assists French and international companies on all issues relating to social law and to compensation policies, and more specifically on supplementary welfare protection and employee savings schemes.

His expertise in URSSAF (the French social security contributions collection office) litigation is also much sought after.

GABRIEL FLANDIN

Willkie Farr & Gallagher LLP

Gabriel Flandin is a partner in the corporate and financial services department. He focuses on mergers and acquisitions involving public and private companies, including both private equity and strategic acquirer transactions, as well as bankruptcy-based asset sales. He also regularly advises on corporate governance issues and joint venture structuring.

In addition to his transactional work, Gabriel regularly advises clients in the financial regulatory and infrastructure industries. *IFLR1000* ranks Gabriel as a 'Highly Regarded' practitioner in the areas of M&A and private equity in France.

Gabriel is a lecturer on corporate law topics at the Université de Montpellier, where he teaches several courses on LBO structuring. He served for one year as external general counsel for Deutsch Group in New York.

PHILIPPE GRUDÉ

Willkie Farr & Gallagher LLP

Philippe Grudé is special European counsel in the tax department of Willkie Farr & Gallagher LLP in Paris. He focuses on the tax aspects of IPOs, LBOs, mergers and acquisitions and other reorganisations of businesses.

Mr Grudé regularly handles complex tax issues relating to mergers and acquisitions and other high-profile transactions. He has significant experience in the areas of tender offers, stock or asset purchases and private offerings of securities.

Prior to joining Willkie Farr & Gallagher LLP, Mr Grudé was an associate at Price Waterhouse Juridique & Fiscal (1991–1997) and at Jones Day Reavis & Pogue (1997–1998).

WILLKIE FARR & GALLAGHER LLP

21-23 rue de la Ville l'Évêque
75008 Paris
France
Tel: +33 1 53 43 45 00
Fax: +33 1 40 06 96 06
gflandin@willkie.com
pgrude@willkie.com
www.willkie.com

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