

# ARTICLE

## FREE SHARE AWARDS – CONSTITUTIONAL COURT RULING OF APRIL 28TH, 2017: IS IT POSSIBLE TO GET A REFUND FROM URSSAF OF THE EMPLOYER'S SHARE OF SOCIAL SECURITY CONTRIBUTIONS?

Employment and Social Security Law Real Estate and Construction European Law Public Law and Public Procurement Law | 03/05/17 | Emmanuelle Barbara Emmanuelle Mignon

Under §L. 137-13 of the French Social Security Code employers are required to pay a specific contribution on free awards of shares in consideration of the fact that they are not subject to social security contributions under the ordinary rule of law.

Until the Macron Act dated August 6<sup>th</sup>, 2015, this employer contribution was payable to Urssaf within the month following the formal decision to grant the shares by the board of directors (or the directorate) of the company.

However, the effective award of the shares is often subject to a requirement of presence within the company on the share vesting date, as well as being linked to individual or collective performance conditions. Such conditions are not legally mandatory, but are strongly recommended by "soft law" instruments such as the AFEP-MEDEF corporate governance code for listed companies, the Middlednext corporate code, or recommendation 2012-02 of February 9<sup>th</sup>, 2012 of the French Financial Markets Authority.

The question that arose was whether, when shares are ultimately not awarded because the conditions in the award plan have not been met, Urssaf is required to refund companies for the employer contribution already paid by them. The French Supreme Court answered this question in the negative, its rationale being that no such refund had been contemplated by the legislature (Cass. civ. 2<sup>e</sup>, May 7<sup>th</sup>, 2014 Bull. Civ. II No. 105; Cass. civ. 2<sup>e</sup>, May 7<sup>th</sup>, 2014 No. 13-15791; Cass. civ. 2<sup>e</sup>, April 2<sup>nd</sup>, 2015 No. 14-16453). The Supreme Court went so far as to dismiss any arguments based on a right to the protection of property under Article 1 of the First Additional Protocol to the European Convention on Human Rights.

Having been denied a refund by Urssaf for a free share award plan that had not resulted in any effective awards of shares because the performance condition had not been met, the employer challenged this position before the Social Security Affairs Tribunal, and also requested a preliminary ruling on constitutionality in connection with the violation of the principle of the equality of citizens vis-à-vis burdens imposed by the State. In effect, while free awards of shares form an additional method of compensation of employees in respect of which it is only natural that they should contribute to the financing of the social security system, the refusal to refund payments made by an employer when no share was ultimately awarded results in arbitrary and confiscatory taxation without cause, since no additional compensation is actually paid to the employees.

The initial triers of facts refused to pass on the request for a preliminary ruling on constitutionality, so the company brought its case to the Supreme Court. To better its prospects of having the request for a preliminary constitutional ruling submitted to the Constitutional Court, it also went before the Council of State, challenging the implementing circular, and also making the same request for a preliminary constitutional ruling as the Council of State has the power to cancel mandatory circulars issued by the Administration when they fail to duly apply the provisions of the law they are intended to clarify, as well as when they cite provisions of a law that is itself in conflict with a higher or constitutional, European or international rule. Within a day of each other, both the Council of State and the Supreme Court decided to pass on the same request for a preliminary ruling on constitutionality to the Constitutional Court, an event in its own right.

By ruling 2017-627/628 of April 28<sup>th</sup>, 2017, the Constitutional Court sided with the claimant, finding that *"by introducing the employer contribution on awards of free shares, the lawmakers' intent was that this additional compensation, excluded from the calculation base of Social Security contributions in application of §L. 242-1 of the Social Security Code, contribute to the financing of social protection. However, while lawmakers may provide for the payability of this contribution before the effective grant, they cannot, without violating the principle of equality vis-à-vis burdens imposed by the State, impose this payment on the employer on the basis of compensation that has not effectively been paid. Accordingly, the contested provisions of law cannot impede the refund of this contribution when the conditions to which the free award of shares was subject were not met."*

The Constitutional Court did not strike down the law, but issued a mandatory "reservation of interpretation", which in the case at hand is tantamount to the same thing. It does not subordinate its decision to conditions in application over time: the decision therefore applies to the claimant, as well as to any other company finding itself in the same situation, subject to the statute of limitations.

In addition to the companies having already made a refund claim and whose lawsuits are underway, any company having paid an employer contribution under a plan to award free shares is eligible to seek a refund if it meets the following cumulative criteria:





- implementation of the plan was authorized by decision of its extraordinary shareholders' meeting on or before August 7<sup>th</sup>, 2015;

- the promised shares were not awarded either due to non-fulfillment of a collective performance condition, which was the case of the claimant in the case before the Constitutional Court or, it would seem to us, considering the very broad terms in which the latter framed its ruling, due to non-fulfillment of an individual performance condition or a presence requirement.

It remains to be determined, for companies not yet having requested a refund, when the statute of limitations period begins to run, in the knowledge that the non-fulfillment of the condition or requirement may not yet be known.

This is a delicate issue inasmuch as §L. 243-6 of the Social Security Code does not provide a clear response to this point and three starting points for the statute of limitations would seem to be possible:

- the date of payment of the employer contribution;
- the date when the employer had knowledge that one or the other condition had not been met; and
- the date of the ruling finding §L. 137-13 of the Social Security Code, as framed prior to the Macron Law, to be unconstitutional.

An analysis on a case-by-case basis is thus required before seeking any refund from the local Urssaf on this basis.

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