



Business Law Committee in collaboration with the Taxation Committee January 2024

Submission on Consultation on Ireland's Taxation of Share-based Remuneration

The format of this submission followed the structure set out in the consultation and the answers to the specific questions were uploaded to the text boxes on the online Department of Finance portal on the 23 January 2024.

The Law Society of Ireland appreciates the opportunity to provide responses to the consultation questions raised by the Department of Finance in the Consultation on Ireland's Taxation of Share-Based Remuneration. We have not addressed every question raised. We are responding to the questions as the representative body of solicitors practicing in Ireland. Our responses derive from the experience of our solicitor member firms acting for clients in this area and are not relating to the solicitor members in their own right.

Rationale for share-based remuneration schemes and related tax supports

2. What Government initiatives have been most impactful in attracting companies to establish share-based remuneration schemes in Ireland in recent years?

We are of the view that there have not particularly been Government initiatives that have been impactful in attracting companies to establish share-based remuneration schemes in Ireland in recent years. The KEEP scheme was certainly positive in its purpose but has been of limited use due to unnecessary restrictions being included in overly complex legislation. Other jurisdictions (for example, the UK) have much more tax advantageous and accessible options for businesses (including, for example, the UK CSOP/EMI scheme).

3. Given the advantages that the existence of share-based remuneration schemes, in their own right, provide to companies in terms of increased engagement and retention of staff what, do you believe, are the justifications for providing additional advantages through the tax system to employers and employees using share schemes?

We are of the view that the stated justifications in this question are of sufficient importance as to justify enhancement, improvement and reduction of the administrative burden associated with existing schemes and the consideration of further such schemes.

In relation to share-based remuneration, the perceived advantages inherent in the manner in which the question is formulated are impacted greatly by the tax system rules. A number of points fall to be made in this regard.

Firstly, the lack of an accessible and tax efficient scheme for employers (when compared with, for example, the UK) acts as a deterrent to the introduction of share-based remuneration schemes (which would assist with employee retention and participation in the growth of the enterprise) for most employers as complexity and tax cost make the process simply not worthwhile.

Secondly, most share-based remuneration schemes require taxation costs to be incurred at the date of grant of share benefit at higher income tax rates. This tax cost requires a means

of liquidity to exist to discharge taxes resulting in immediate share disposals (thereby undermining the long-term employee retention and participation motivation behind such schemes). These factors inhibit a medium to long term view being taken in relation to such schemes by employees.

Thirdly, for employees to participate in such share-based arrangements, on top of tax efficiency should be the opportunity to benefit from increased performance through a share-based remuneration that is tax efficient. In this regard, having an annual share-based remuneration limit that would be either tax free or at a reduced rate would greatly assist in building loyalty and performance. Ironically, such a scheme does exist on the statute books – the approved profit-sharing scheme - but the annual limit of €12,700 for share appropriations has not increased in nearly 30 years.

Future of share schemes in Ireland

4. What do you think are the most important trends currently evident in terms of the use, and type, of share-based remuneration, and why?

Often, in practice, where Irish-based companies (which are members of a multinational group) implement share-based remuneration schemes, the scheme is rolled out from the corporate group's international head-office to employees of an Irish subsidiary and, more often than not, a standalone local share-based remuneration plan is not put in place. Typically, and most commonly, these schemes tend to offer Irish-based employees share options and / or Restricted Stock Units (RSUs), followed by share awards.

Often the 'global' share-based remuneration plan being rolled out in Ireland will refer to other forms of share-based remuneration, but which not be applicable to Irish-based employees (eg, phantom awards). These awards are typically not offered to Irish-based employees, as there is no associated Irish tax or PRSI benefit.

In terms of 'domestic' companies which are not members of a multinational group, restricted share schemes and growth share schemes tend to be attractive choices, particularly for companies looking to incentivise / attract/ lock in particular key executives and employees. The motivation behind such schemes is not to deliver a tax advantage but to lock employees into the employer through share-based remuneration that requires the executive or employee to remain with the employer company. The long-term nature and focus of these schemes requires the tax liabilities on gains to be aligned with a future exit event. The purposes of these arrangements is not to deliver tax advantages for the relevant employees but achieve their retention and locking in in a manner that suits the employer but in doing so, they also carry significant costs for the employer companies. For example, often, third party valuation experts need to be retained to prepare valuation reports (sometimes on an annual basis) and this results in significant additional cost – with the result that these schemes, in practice, are often only availed of by larger domestic (and international) companies, as opposed to SMEs and start-ups.

5. Are there any existing share-based remuneration schemes that no longer serve their purpose, and so should be discontinued? Please provide details.

We do not believe that there are any. However, some schemes such as the approved profit-sharing scheme could be updated with increased limits for annual appropriations of shares.

6. What are the key risks and challenges relevant to the use of share-based remuneration in the medium-to long-term and why? How can they be managed?

We have focused on the risks to businesses in our reply. In order to attract and retain talent, SMEs need to be competitive with multinational businesses so equity offerings are an attractive reward on an exit/liquidity event given SMEs generally can't compete on salaries. In addition, a CGT rate on the sale of shares is more attractive than income tax rate on salary.

Giving loans to staff to buy shares is not attractive given that BIK applies if the interest rate is less than 13.5% as it is not tax efficient so this needs to change to permit uptake of this going forward. We would not expect a material cost since employee loans are not widely used given the prohibitive tax cost.

The KEEP scheme is well regarded, and recent changes made are welcome, but it is still too restrictive and needs to be expanded, for example to better cater for group situations.

For larger companies we welcome the continuance of the employer PRSI exemption, the SAYE scheme (once a new savings carrier is approved) and the APSS. The PRSI exemption is particularly important given the high rates of tax that apply to most share rewards (other than approved schemes).

Our view is that it follows from the foregoing that (i) Irish SME's need assistance to compete for talent with multinational business in the area of share incentives and are at risk without that assistance; (ii) Applying BIK to giving loans to employees gives rise to restrictive inefficiency and reduces the ability of employers to assist in widening employee share ownership; and (iii) the KEEP scheme should be expanded and made less restrictive to assist in mitigating this risk.

7. What are the key opportunities relevant to the use of share-based remuneration in the medium-to long-term and why? How can they be delivered on?

Employers in high demand sectors continue to struggle to attract key talent and in addition to traditional remuneration and benefits and career progression, need to either stand out from peers (in the case of early-stage enterprises) or be at least competitive with peers (in the case of more mature enterprises). A key factor in their ability to do this is the introduction of a stakeholder mentality, a reduction of "churn" and the knowledge that the fortunes of the individual are reflected by the fortunes of the enterprise. Share based remuneration schemes are the best method of achieving this and Irish enterprises have traditionally struggled to offer parity with particularly UK and US enterprises.

8. How will the continued global mobility of the workforce influence the use, and development, of share-based remuneration in the future, and why?

See the answer to questions 4, 7 and 9.

Share Schemes and their place in the wider economy

9. Where relevant, detail how by using share-based remuneration your organisation, or the wider sector within which you operate, contributes to meeting Government policy objectives of supporting enterprise and promoting economic growth.

We answer this question in relation to the sectors in which clients of our solicitor member firms operate (as opposed to in relation to the legal sector itself).

Clearly, share-based remuneration has the potential to support enterprise and promote economic growth as employees with an ownership interest (or the potential for an ownership interest) are incentivised to 'grow the business'. In short, it helps to ensure alignment between employees and shareholders, it fosters a growth mindset, it helps to create better morale and it 'drives growth'.

In particular, growth share schemes and restricted share schemes have the potential to attract and incentivise key executives / employees to Ireland (and indeed to particular companies), as these regimes can give rise to a tax saving for employees, as well as being commercially beneficial. This potential in attracting and incentivising key executives and employees to and in Ireland is effectively lost where the only feasible form of share remuneration gives rise to payroll taxes as the share benefits arise. This simply does not attract long term loyalty or 'stickiness' in building a modern workforce.

However, in terms of the more typical share schemes operating in Ireland, which tend to be rolled out to more than a select few key employees – such as share options and RSU schemes – there is room for improvement as, currently, the Irish tax regime for these schemes is not particularly beneficial or attractive for employees. Ireland's current share-based remuneration regime does not compete with other jurisdictions and is a weakness in attempting to attract and retain employees in a cost-efficient manner for employers; which in turn ultimately contributes to meeting Government policy objectives of supporting enterprise and promoting economic growth.

10. If you are an individual who is/has been in receipt of share-based remuneration, provide details of how the current tax incentives have assisted you in your decision to move to Ireland, take up an Irish employment or remain in your role.

Not applicable.

11. What additional incentives could be put in place, or measures taken (or further supported if already in place or underway) so that the Irish tax system continues to meet the requirements of a changing financial and economic environment, with a highly mobile working force?

See the answers to questions 2, 6, 12, 14, 15 and 19.

Legislation underpinning the taxation of share schemes

12. Are there any amendments needed to the current taxation legislation governing share schemes? If yes, in respect of each scheme, please outline in detail what these amendments should be, the reasons for them, and the Exchequer impact.

1. In the context of restricted shares granted pursuant to section 128D TCA, it would be appropriate if the legislation could be amended to provide that a share-for-share exchange transaction does not result in the removal of the restriction (and the application of section 128D(5) TCA), in circumstances where the restriction period continues in respect of the new shares in the new TopCo (provided other relevant conditions of section 128D TCA continue to apply). Not possible to quantify the Exchequer impact.

2. For clarity, it would be helpful for the Stamp Duties Consolidation Act 1999 to provide a clear exemption from any potential stamp duty charge on the grant of a share option (or equivalent) to employees or contractors of a corporate group.
3. For clarity, it would be helpful for the Taxes Consolidation Act 1997 to provide a clear exemption under section 540 TCA in respect of the grant of a share option (or equivalent) to employees or contractors of a corporate group.
4. As noted above, a change to the BIK rules on employer loans is required.

13. Are there differences within Revenue approved schemes and unapproved schemes which should be addressed? Please explain your answer.

We refer to the experience in the UK as it is a comparable jurisdiction with a wider base of employees and enterprises from which lessons may be learned. Take-up of UK 'revenue approved schemes' depends on the type of scheme, but they are very common in the UK. Our overall impression is that they are more common amongst UK companies than amongst Irish companies. For small private companies, take-up of 'Enterprise Management Incentive' (**EMI**) option schemes (equivalent to the Irish Key Employee Engagement Programme) is extremely common. It is available only for small companies (sub-250 employees; less than £30m gross assets) and, where implemented, allows market-value options to be granted to an individual up to £250k worth of shares (£3m in aggregate across the grantor). The tax relief is very generous (no income tax or social security; only capital gains tax on the gain, and then in most cases at a lower rate). More or less every UK SME which wants to reward employees with shares will have an EMI share option scheme.

The 'Company Share Option Scheme' (**CSOP**) is less common, principally because although there are no size restrictions on the grantor company, tax relief is limited to CSOP options over shares having a market value of up to £60,000. We do see some companies (both private and public) grant CSOP options, but it is noticeably less common.

The 'Savings-related Share Option Plan' (equivalent to the Irish SAYE approved scheme) is common for listed companies, as is the 'Share Incentive Plan' (equivalent to the Irish Approved Profit Sharing Scheme). Virtually all UK public companies will have one (or both) of an SAYE and a SIP. There is also a live UK government consultation of how these types of schemes might be updated and made more accessible for the modern workforce.

14. Are there any new share-based remuneration schemes which should be specifically legislated for in the Irish tax system? If yes, please provided details and outline the reasons for your answer, including the Exchequer impact.

The Employee ownership trust (EOT) business model is a fast-growing success in the UK. Even countries without trust law, are looking at the idea.

EOTs provide a business succession solution and benefit all stakeholders as instead of a business closing, it is sold to its employees. This benefits everyone.

EOTs have been used in Ireland but the tax cost and complexity is a deterrent for many. Specific legislation could address issues such as close company rules, discretionary trust tax and other matters which currently create unnecessary obstacles to using such a structure.

15. Are there areas where the administrative requirements relevant to share schemes could be simplified or modernised? If yes, please outline in detail what these areas are, what steps should be taken, and the reasons for them.

1. It would be helpful if the share scheme reporting system, using the Forms RSS1, KEEP1, ESS1, and ESA, could be improved and modernised. In particular, more user-friendly forms would be welcomed or ideally a streamlined system with a single portal to file reports for all types of share plan. In the view of our members, clients often struggle to complete the forms both due to uncertainty as to the various items to be included and also due to issues with the forms themselves, resulting in the reporting process being a very time-consuming task for companies.

Now that the tax and PRSI due in respect of the exercise of share options must be collected by employers (and the detail included in payroll returns) (since 1 January 2024), the need for the various returns and the information currently set out therein should be reconsidered.

2. The current version of Revenue's RSU guidance provides that, where an RSU is 'share-settled', Revenue is prepared to delay the collection of tax until the date on which the shares are actually settled, provided that the settlement date is within 60 days of vesting. As a practical matter, it would be helpful if the 60-day limit could be removed or, at least, extended to 90 days.

3. There are a number of administrative burdens relating to trusts that impact on the nominee arrangements that are common in Irish share schemes where the legal interest in shares is often held by a nominee company for the benefit of the participants. This includes the requirement to register the trust under S.I. No 194/2021 the EU (Anti Money Laundering) Beneficial Ownership of Trusts Regulations, 2021. These should be reviewed to see can some of the administrative burdens be relaxed.

4. Additional clarity around valuations for share schemes, particularly KEEP and growth share schemes, would be appreciated. How recent does a valuation need to be for example? An update of Revenue manuals would be helpful in this regard to reflect the various tax rules around valuations as well as the accounting principles.

16. What further could be done to assist employers to facilitate the collection of tax on share based remuneration in global mobility scenarios?

Guidance should be provided that where employers take "reasonable efforts" to quantify Irish tax due – in particular in respect of options (noting that there could be situations where an individual / employee may be uncooperative, that in a hybrid environment that an employer may not know exactly where an individual is based at all times, and in situations where an individual has ceased employment) – that that is sufficient in terms of the discharge of their withholding and payment obligations.

17. Do you consider that the current taxation treatment of Restricted Stock Units fits the current global environment?

We consider that a longer period for consultation and a more in depth study would be required to satisfactorily answer this question.

18. Should the tax treatment of Restricted Stock Units be aligned with that of share options in non-resident scenarios?

We consider that a longer period for consultation and a more in depth study would be required to satisfactorily answer this question.

19. Are there favourable tax measures in peer jurisdictions, most notably other EU jurisdictions, in the taxation treatment of share-based remuneration that could be replicated in Ireland? If yes, please detail the measures and outline the benefits of introducing such measures in Ireland, and relevant operational considerations.

As outlined above, we consider that the introduction of legislation to facilitate EOTs should be introduced.

The deemed interest rate of 13.5% on loans to employees is out of line with peer jurisdictions and means that employer loans to facilitate share acquisitions are not common. This should be changed to bring Ireland in line with other jurisdictions.

20. Companies have different needs based on their size (micro, small, medium or large) and stage in their lifecycle (start-up, scaling or established company). They also have different needs depending on whether they are quoted or unquoted. For unquoted companies:

i. What are the important features of share-based remuneration schemes by unquoted company type/lifecycle stage?

The most important features in our view are that the schemes can be documented simply, that there is an easy and cost efficient way for companies to value their shares (given that the valuation of private companies is very often hard to assess) or that there are clear and defined safe-harbours as regards valuation methodology and that there is not an undue administrative or compliance burden in relation to the schemes and that they are cost efficient to administer.

ii. Should the tax treatment of share-based remuneration schemes be tailored to work for different company types?

We don't consider that such schemes should be tailored for different company types, there should alternatively be a range of available structures and tax treatments that are available, and an individual company/employer can then decide as to which structure is most suitable for its own circumstances.

iii. If yes, describe how? Please consider State aid constraints when providing your response.

See above. We have not addressed any State aid considerations.

For quoted companies:

i. What are the important features of share-based remuneration schemes by quoted company type/lifecycle stage?

ii. Should the tax treatment of share-based remuneration schemes be tailored to work for different quoted company types?

iii. If yes, describe how? Please consider State aid constraints when providing your response.

There are so few Irish incorporated quoted companies and they vary so much in scale and sector that it is not possible to answer this question satisfactorily. Insofar as quoted companies are early stage enterprises, they will broadly have the same requirements as unquoted early stage enterprises. Quoted companies also have listing regime and investor protection guidelines and proxy agency guidelines to follow in addition to any other administrative burdens and in general, it is important that Irish quoted companies are not disadvantaged in administrative requirements in comparison to other jurisdictions. Please also see the answer to questions 4 and 7. With respect to non-Irish quoted companies, the same difficulty in commenting by quoted company type/lifecycle stage and the same considerations arise.

Revenue approved schemes

21. Are there specific challenges to meet the conditions attached to participating in schemes that require approval from Revenue? If yes, please explain your answer and outline any recommendations you may have.

The obligation to offer participation to all employees on similar terms (including temporary employees) can result in APSS (approved profit-sharing schemes) not being a viable option for some businesses. It would be helpful to allow some flexibility for companies in this regard.

In particular as Revenue approved schemes do not allow the rewarding of key staff on a selective basis they're not attractive for startups or SME's. It would be helpful to allow some flexibility for companies in this regard. The annual limit and a reduced CGT rate ought to be revied and considered.

22. Do you see opportunity to simplify the administrative processes related to scheme approvals and alterations that currently require approval from Revenue? Please explain your answer.

As suggested at the answer to 15 above in relation to the reporting system, it would be helpful if the approval and alteration process was modernised and improved.

23. How would the transfer of schemes that require Revenue approval from an approval process to a self-administered and/or notification process contribute to the simplification of the administrative burden for all stakeholders dealing with share-based remuneration? Please explain your answer.

Self-administration or notification may simplify the administrative burden. As we say above a positive step would be to have schemes which can be documented simply with for example proxy or model forms that can be easily adopted for use. Timing and the removal of a dependency on waiting for Revenues notification of approval would also contribute to the simplification.

Commission on Taxation and Welfare Recommendations

24. Can you please provide your observations on the recommendations of the Commission on Taxation and Welfare with regard to share-based remuneration, in particular in relation to the following:

i. Broadening the PRSI base such that PRSI should extend to all sources of employment income including, as a general rule, share-based remuneration.

See comments under (ii) immediately below.

ii. Limiting the exemption from employer PRSI on share-based remuneration through an appropriate annual cap or restricting the exemption to SMEs.

The exemption from employer PRSI on (certain) share-based remuneration is a key positive in our current regime. We would strongly oppose any proposal to limit this exemption in any way. The imposition of employer PRSI would greatly increase the costs associated with offering share-based remuneration to Irish-based employees and would make operating share schemes in Ireland impossible for many businesses. For instance, if employer PRSI was to apply, then such a cost would become a contingent liability that employers would have to provide for, and which could become materially large – as it would depend on the rise in value of the underlying shares. Clearly, imposing such a potential cost on employers would be materially detrimental, and would result in less share-based remuneration being provided by employers; and would lead to a loss in competitiveness from an Ireland Inc. perspective.

iii. Aligning the taxation of internationally mobile employees who receive share-based remuneration (including Restricted Stock Units) to the general treatment of unapproved share options.

This deserves further consideration by relevant stakeholders.

Other Matters

25. In addition to the matters covered in this public consultation, are there other issues relevant to the taxation of share-based remuneration, which you wish to bring to the attention of the Department? Yes / No 13 i. [If yes] Please provide a brief summary of those issues, providing any information or references to material that you consider relevant in support of your view.

None save as referred to in these responses.

26. Are State aid considerations required for any of the measures suggested in your responses to this consultation? If yes, please provide details.

We consider this to be a specialist review which should take place by reference to any specific proposals being considered and that a statement of general principles applicable would not be of much assistance.

27. This consultation is necessarily wide-ranging. What do you think the top two priority proposals are which should be implemented in advance of all others, and why?

Suggested priorities are:

- Introduction of EOT
- Expansion of the KEEP scheme
- Lowering the 13.5% BIK rate for loans to buy shares

/End

