Irish Tax Institute

January 2024

Ireland’s Taxation of Share-based Remuneration

Response to the Consultation Questionnaire

Respondent profile

1. **In what capacity are you responding to this public consultation?**

   Representative body.

   If you are a representative body Please highlight throughout the questionnaire if a response is specific to a particular group that you represent. Who do you represent/what types of members to you have?

   The Irish Tax Institute is the leading representative and educational body for Ireland's Chartered Tax Advisers (CTA) and is the country's only professional body exclusively dedicated to tax.

   Do your members specialise in providing share schemes? If so, what types of schemes?

   Our members provide tax services and business expertise to thousands of Irish owned and multinational businesses as well as individuals in Ireland and internationally.

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?**

   Over the last few years, the publicity surrounding the Key Employee Engagement Programme (KEEP) has raised awareness of the benefits of share-based remuneration among start-ups and SMEs. Unfortunately, the feedback from our members is that while many of their clients may have sought professional advice, regarding the potential use of the KEEP in their business to help recruit and retain skilled workers, its inherent limitations meant they could not implement the scheme and instead, they explored other options for share-based remuneration.

   Since its introduction in Finance Act 2017, the Institute has continued to highlight limitations with the operation of the KEEP which are significantly impacting the feasibility of the scheme and ultimately, its success in achieving the policy aim of helping SMEs to attract and retain talent. Although the KEEP was designed to incentivise talent to take up employment in such companies and allow them to compete with listed companies, there has been a very low uptake of the scheme. As noted in the Consultation Paper, just 31 employers filed KEEP returns with Revenue for 2022.

   We welcome the amendments to the KEEP that were introduced in Finance Act 2022 and commenced in November 2023. We anticipate that these amendments should increase its uptake. However, we believe further difficulties with the operation of the KEEP need to be addressed if it is to fully achieve its policy objective. We have outlined these issues in detail in our response to Question 12.

As the KEEP is often not a viable option, many start-ups and SMEs that wish to reward employees with equity normally use alternative unapproved share schemes. But companies face challenges when using such schemes due to a number of factors, such as the tax cost arising for employees on the exercise of a share option; the need to value their company each time shares are issued and the lack of Revenue guidance on such valuations.

As there may be no open market for the shares, sometimes the company may buyback the shares from the employees. However, in many cases, this means that the share buyback provisions in sections 176 to 179 Taxes Consolidation Act (TCA) 1997 apply, resulting in income tax, rather than capital gains tax (CGT), chargeable on the employee's disposal. We have outlined each of these factors in more detail in our response to Question 6.

3. Given the advantages that the existence of share-based remuneration schemes, in their own right, provide to employers and employees, are there any justifications for providing additional advantages through the tax system?

Share-based remuneration can play an important role in rewarding key employees at all stages of development of a business. It can significantly reduce fixed labour costs and free up business cash-flow. Research has found that employee share ownership can be a key contributor to profitability, productivity and employment creation, with the resulting positive impact on economic growth and exchequer yield.[1]

However, there is an inherent cost for employers in establishing and operating a share scheme. This means that a tax benefit is necessary to encourage employers to offer share-based remuneration to their employees. If there is no tax benefit, larger companies are less likely to implement a share scheme as any benefit created from increased productivity would be offset by the cost of operating the share scheme.

For workers, accepting equity in a company rather than a cash bonus, carries an inherent risk, in particular for those employed by start-ups and SMEs. However, where there is a tax benefit for employees associated with share-based remuneration, this increases its attractiveness to workers over increases in basic salary.

[1] Nuttal Review of Employee Ownership July 2012.

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?**

   In the current challenging economic environment, where costs are increasing and employees are scarce, companies are looking for cash alternatives to remunerate employees. As a result, there is an increased focus on share-based remuneration.

   Where Irish-based companies, which are members of a multinational group, implement a share-based remuneration scheme, the scheme is generally a roll-out of the multinational group's share plan to the employees of the Irish subsidiary, rather than devising a bespoke scheme for the Irish staff. Typically, these schemes offer Irish-based employees share options and/or Restricted Stock Units (RSUs), followed by share awards.

   Often global share-based remuneration plans rolled out in Ireland will refer to other forms of share-based remuneration, such as phantom shares, which are not offered to Irish-based employees because there is no Irish tax or PRSI benefit associated with such remuneration.

   For private companies which are not members of a multinational group, restricted share schemes and growth share schemes tend to be the preferred choice, particularly for companies looking to incentivise and attract key executives and employees. Whist these schemes can have tax benefits for the relevant employees, they also carry significant costs for the employer companies.

   For example, third-party valuation experts are required to prepare valuation reports, sometimes on an annual basis, at a significant cost. As a result, in practice, these schemes are often only utilised 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 existing share-based remuneration schemes that should be discontinued. However, improvements are needed to existing schemes to ensure that share-based remuneration can be an effective tool in attracting and retaining workers. We have highlighted the key challenges relevant to the use of share-based remuneration and made suggestions as to how these can be addressed in our responses to Questions 6 and 12.

   Continuation of the Save As You Earn (SAYE) Scheme

   Under the SAYE scheme, employees enter into a savings contract with the savings being held in a qualifying savings institution. Following the departure of the UK from the EU, the Minister of Finance prescribed two UK financial institutions operating in Ireland as qualifying savings institutions so they could continue to be savings institutions for the purposes of the SAYE.

However, we understand there are currently no qualifying savings institutions which are taking on new SAYE schemes. Consequently, no new SAYE schemes have been approved over the last two years. To ensure that the SAYE can continue to be offered by companies to employees, it is important that a qualifying savings institution is identified.

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?

Companies that wish to reward employees with equity normally use unapproved share schemes. However, start-ups and SMEs face particular challenges in promoting employee share ownership due to a number of factors. These factors include:

(i) the upfront tax cost for employees;
(ii) the need for Revenue guidance on share valuations; and
(iii) the share buyback provisions.

While the KEEP sought to address a number of these factors, in most cases it is not a viable option given its limitations. Consequently, these factors represent a real challenge for employers who wish to implement a share-based remuneration scheme to incentivise their employees.

i. Upfront tax cost for employees

From 1 January 2024, employers are required to report and withhold tax under the PAYE system on any gains arising on the exercise, assignment or release of unapproved share options by employees/directors. This obligation applies notwithstanding that the shares are unlikely to have been sold and the tax liability must be funded from the employee's own resources. Similarly, where shares are awarded to an employee free of charge or at a discount, the employee is generally liable to tax on the difference between the market value and the price they paid for the shares.

In many cases, a restriction will apply which prevents the employee from selling the shares for a defined period. Deferring the tax arising until such time as the employee is permitted to dispose of the shares would mean that the employee is in a position to fund the tax arising. However, it would be important that the tax is calculated based on the market value of the award when it is received rather than when the restriction on sale is lifted.

Notably a number of other EU Member States allow a deferral of tax until the point of sale, including Germany and the Netherlands. In Poland, the payment of tax can be deferred to the sale of shares in certain circumstances if the company is head-quartered in Poland, the EU/EEA or in a double tax treaty country. In Portugal, in addition to a deferral of tax until sale, only 50% of the gain is taxable for start-ups and

SMEs.

Some employers may wish to mitigate the cash-cost to an employee of share ownership, by providing a loan to purchase the shares or exercise a share option and discharge the tax due. However, loans of this nature are treated as a benefit-in-kind (BIK) with a preferential rate of interest deemed to apply to the loan. The employee is taxed on a benefit equal to 13.5% of the amount of the loan annually until it is paid off. This treatment operates as a further barrier to employee participation in share ownership.

Even with interest rates having increased over the last two years, 13.5% does not represent a commercial rate of interest. Applying a penal 13.5% preferential rate of interest is not in line with the approach adopted in other jurisdictions which apply more commercial rates of interest.

In our view, the take-up of share ownership by employees could be further supported by removing the BIK charge on loans by an employer to an employee to fund the purchase of shares in the employer company or fund the tax arising on a share award. If policymakers consider the removal of the BIK charge is not appropriate, then, at a minimum, the preferential rate of interest for the purposes of calculating the BIK charge should be reduced to reflect a more commercial rate of interest.

ii. Need for clear Revenue guidance on share valuations

Broadly speaking, tax is payable by the employee on the difference between the market value and the option price at exercise/price paid for the shares. However, for unquoted companies, as there is no market or benchmark against which to measure the value, it can be difficult to accurately determine the market value of the shares. The preparation of share valuations results in costs for companies in engaging third-party professional valuers and duplication of effort where a company is recruiting employees and awarding share-based remuneration on an ongoing basis. There is also no certainty that Revenue will not challenge the valuation and Revenue have provided very limited guidance to assist in the valuation of shares.

Currently, the lack of clear guidance on share valuations can influence the manner in which employers structure their share schemes. For example, if an employer wants to give an employee 100 shares over 4 years subject to certain performance criteria being met, generally their preference would be to award 25 shares each year for the four years. If the employee leaves after the first year, only 25 shares would have been awarded.

However, as there is a cost associated with preparing a valuation each year, an employer is likely to award the 100 shares in the first year with a forfeiture clause applying if the employee terminates their employment before the end of the 4 years. But if the employee terminates their employment early, the employer must enforce the forfeiture clause to recover the excess shares awarded to the employee, which can cause difficulties from an employment law perspective.

Clear principle-based guidance on share valuations, including acceptable methodologies and safe harbours, is required to support companies that wish to use share-based remuneration. This would mean that a business could value themselves and would not be required to hire a third-party valuer each time shares are issued.

In addition, we believe that a valuation should be valid for a six-month period subject to there being no fundamental changes in the facts and circumstances of the business. Such Revenue guidance would make the valuation process more accessible, easily understood, and capable of implementation without undue cost.

It is worth noting that in the US, companies issuing share options to employees must complete a 409A valuation which is a formal, independent appraisal of a company's common stock's fair market value. The 409A valuation remains valid for 12 months or until a material event occurs. In the UK, it is possible to agree a valuation of a company with HMRC for the purposes of the Enterprise Management Incentive (EMI), a share scheme similar to the KEEP. The EMI valuations from HMRC are valid for 90 days from the date of the agreement.

iii. Share buyback provisions

Any gain arising on the sale of shares by an employee is generally liable to CGT at 33%. However, if a private company buys back their shares from its shareholders, this can mean that income tax (rather than CGT) can arise on the share disposal, if certain conditions are not met.[2]

For example, to avail of CGT treatment:

- The purchase must be wholly and exclusively for the benefit of the trade.
- The shareholder must have held the shares for at least 5 years.
- The buyback must result in the individual’s shareholding being reduced by at least 25%.

If these, and other conditions are not met, the buyback is treated as a distribution and liable to income tax at the marginal rate. These restrictions were introduced as anti-avoidance provisions to curb any measures to remunerate shareholders from company profits without the payment of a dividend.

However, they have a much broader application and act as an impediment to companies that wish to incentivise employees using share-based remuneration. It would be welcomed if policymakers could consider providing for a disapplication of these provisions in the context of share-based remuneration.

[2] Section 176 TCA1997.

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?**

   See response to Question 6.

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

   With the implementation of the Pillar Two minimum tax rate of 15% in Ireland and globally, an increasingly important factor in determining where multinational groups will invest is the attractiveness of a country's personal tax system and the cost for employers to locate workers in a country.

   The unprecedented mobility in the current labour market internationally means that there is a real risk that quality jobs will not come to and/ or remain in Ireland given the high rates of personal taxation. Consequently, it is now even more important than ever that Ireland's offering in relation to share-based remuneration compares favourably with other jurisdictions, both in terms of simplicity and cost, so that it is an effective tool available to employers to attract and retain key talent; and also to incentivise further investment in Ireland by employers.

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.**

   Our response to this question is based on feedback from members who provide services to Irish-owned and multinational businesses.

   Share-based remuneration has the potential to support enterprise and promote economic growth as employees with an ownership interest are incentivised to achieve the goals of the business. Employee ownership fosters a growth mindset among employees and helps to create better morale which in turn drives growth.

   Growth share schemes and restricted share schemes have the potential to attract and incentivise key executives and employees to Ireland, as these regimes can provide a tax benefit to employees, as well as being commercially favourable.

   As set out in our response to Question 8, an increasingly important factor in determining where multinational groups will invest is the attractiveness of a country's personal tax system and the cost for employers to locate workers in a country. Therefore, it is essential that Ireland's offering in relation to share-based remuneration compares favourably with other jurisdictions.

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.**

N/A

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

Rather than introducing additional incentives, we believe that the focus of policymakers should be on improving the existing incentives.

As we have highlighted in our response to Question 12, there are a number of limitations with the KEEP which has resulted in its limited take up. Companies face challenges when seeking to use other unapproved share schemes due to factors such as the upfront tax cost for employees on the exercise of a share option (or receipt of a share award), the lack of clear Revenue guidance on share valuations and the impact of the share buyback provisions which need to be considered when there is no ready market for the shares.

We have set out in our response to Question 6, our recommendations to address some of these issues which include deferring the tax due on the exercise of a share option until an employee can sell the shares and clearer Revenue guidance on the valuation of shares.

In our response to Question 12, we have also outlined amendments which we believe are necessary to the existing legislation governing share schemes.

If policymakers wish to increase share-based remuneration across the board, consideration could be given to introducing an incentive similar to the Approved Profit-Sharing Scheme (APSS) but without an approval process. Such a scheme could operate similar to a salary sacrifice arrangement where the employee would invest in the employer business and the employer could match such investment, tax free, up to an appropriate cap. For such a scheme to be effective in increasing the uptake of share-based remuneration, it would be important that it is straightforward to operate with minimal terms and conditions.

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. KEEP

The KEEP was introduced in Finance Act 2017 to assist SMEs to attract and retain skilled workers through the provision of share-based awards. It provides for an exemption from income tax, USC and PRSI for any gain arising on the exercise of a share option by a qualifying individual in a qualifying company.

The Institute has responded to the Department of Finance's public consultation on the KEEP in 2019[3] and 2022[4] setting out recommendations to improve the feasibility of the KEEP. The Institute has also included these recommendations in our Pre-Finance Bill Submissions in 2018,[5] 2019,[6] 2020,[7] 2021[8] and 2023[9] and in our response to the Commission on Taxation and Welfare Consultation in January 2022.[10]

Finance Act 2022 introduced a number of amendments to the KEEP as follows:

- To allow companies that operate through a larger group structure to qualify for KEEP.
- To provide for part-time/flexible working by qualifying employees and their movement within group structures.
- The extension of the sunset clause from end 2023 to end 2025.
- The removal of the requirement that the qualifying shares must be newly issued.
- The facilitation of the company buyback of shares acquired under KEEP to receive CGT treatment, by deeming the benefit of trade condition in section 176 TCA 1997 to be met.
- The amendment of the limit for the total market value of issued but unexercised qualifying share options from €3,000,000 to €6,000,000.

These amendments were commenced by Ministerial order in November 2023 following receipt of State aid approval from the European Commission.

The Institute welcomes these amendments to the KEEP, however, we believe further

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[3] https://taxinstitute.ie/wp-content/uploads/2019/06/2019-05-24-FInal-ITI-response-to-KEEP-consultation-May-2019.pdf
[4] https://taxinstitute.ie/wp-content/uploads/2022/06/2022-06-17-Irish-Tax-Institute-Response-to-Key-Employee-Engagement-Programme-KEEP-Questionnaire-2022-FINAL.pdf
[5] https://taxinstitute.ie/wp-content/uploads/2019/06/2017-05-30-ITI-Finance-Bill-2018-submission.pdf
[6] https://taxinstitute.ie/wp-content/uploads/2019/07/2019-06-21-ITI-Finance-Bill-2019-Submision-FINAL.pdf
[7] https://taxinstitute.ie/wp-content/uploads/2020/07/2020-07-02-ITI-Pre-Finance-Bill-2020-Submission.pdf
[8] https://taxinstitute.ie/wp-content/uploads/2021/07/2021-07-01-ITI-Pre-Finance-Bill-2021-Submission.pdf
[9] https://taxinstitute.ie/wp-content/uploads/2023/06/2023-05-31-ITI-Pre-Finance-Bill-Submission-FINAL.pdf
[10] https://taxinstitute.ie/wp-content/uploads/2022/01/Commission-on-Taxation-and-Welfare_vfinal.pdf

legislative reforms are needed to improve the feasibility of the scheme. Irish SMEs continue to experience difficulties recruiting and retaining skilled workers.

Attracting the best talent is central to building a successful company and is crucial to the future growth and export potential of the business. In our view, the policy intention of the KEEP to help SMEs attract and retain key employees, can only be achieved if the following limitations are addressed.

We recommend the following legislative amendments:

i. **Amend the definition of a 'qualifying holding company'**

While the amendments introduced by Finance Act 2022 are welcome and are likely to go some way to increasing the number of groups that can now qualify for the KEEP, there are certain conditions attaching to the new definitions of 'qualifying holding company' and 'qualifying group' which will continue to hinder certain groups availing of the scheme.

For example, it is common for a new business to start up as a single trading entity, then, as the business grows and expands into new territories or delivers new products, it can become necessary for commercial reasons to incorporate another entity. Often, such new entities are established as subsidiaries of the original trading company. As the business activities expand, the original company often continues to carry on the existing trade but also evolves into a holder of the shares in the new trading subsidiary.

Generally, such businesses would not put a company in place whose sole or main business is that of holding shares, as the stage of development of the business may not warrant it or it may not be commercially necessary to do so, particularly given the complexity and cost that can be involved in undertaking a group restructure to put a holding company in place. Many businesses that wish to set up a KEEP scheme are prevented from doing so because of the restrictive definition of a 'qualifying holding company' under the legislation.

The following conditions for a 'qualifying holding company' are particularly problematic:

- A 'qualifying holding company' for KEEP purposes cannot be a trading company. If it is trading, it is not a 'qualifying holding company', even if it is wholly or mainly holding shares in trading subsidiaries.
- Company structures with an intermediate holding company may not be regarded as a qualifying company if there is no qualifying subsidiary held directly by the ultimate holding company. By way of comparison, Revenue guidance for Revised Entrepreneur Relief (Section 597AA TCA 1997) acknowledges that structures with a double holding company are not precluded from that relief.

- A holding company can only hold shares in a qualifying subsidiary and a 'relevant subsidiary' and no other companies. A 'relevant subsidiary' is one in which the 'qualifying holding company' holds more than a 50% interest in the ordinary share capital. Therefore, if the holding company had a 50% joint venture interest in another company it cannot be a 'qualifying holding company', even if it had a qualifying subsidiary that was a qualifying company.

We believe that the definition of 'qualifying holding company' in section 128F(1) TCA 1997 should be amended to permit the group as a whole to be considered, rather than simply considering the holding company in isolation.

This could be achieved by amending the wording of the definition of a 'qualifying holding company' at subsection (c) to state that it means a company where "the business of the company, its qualifying subsidiary or subsidiaries, and as the case may be, its relevant subsidiary or subsidiaries, taken together consists wholly or mainly of the carrying on of a trade or trades." This approach would be similar to the approach taken for the CGT holding company exemption in section 626B TCA 1997.

In addition, the legislation is unclear as to whether it is possible to issue the KEEP options in a single company within a group that meets the 'qualifying company' tests or whether it is necessary for the group, of which the qualifying company is part, to be a 'qualifying group'. This should be clarified in the legislation.

ii. **A Revenue agreed 'safe harbour' for share valuations**

In our responses to the 2019 and 2022 consultations on KEEP, we highlighted that one of the most significant practical issues that SMEs face when implementing KEEP is the ability to achieve as much certainty as possible that the valuation conditions have been met. For example, that the share option price is not less than the market value of the shares at the date of grant.

Currently, there is no clear guidance on how to determine what market value is for the purposes of the KEEP. If qualifying options are not granted for market value or the market value is subsequently determined by Revenue to be higher than originally projected, the options would not qualify as KEEP options under section 128F TCA 1997, resulting in no exemption from income tax, USC and PRSI on exercise.

As with other share-based remuneration schemes, comprehensive guidance on share valuations is required to support companies adopting the KEEP. This could be achieved by developing templates or safe harbour approaches for valuing shares in a SME. This would mean that a taxpayer would have assurance from Revenue that the share valuation is not less than market value for tax purposes, where the taxpayer had adopted the safe harbour approach to valuing the KEEP shares.

As we highlighted in our response to Question 6, it is possible to agree a valuation of a company with HMRC for the purposes of the Enterprise Management Incentive (EMI), a share scheme in the UK which is similar to the KEEP. An application request for a share valuation in connection with the EMI can be made online by the SME and are given priority by HMRC.

In addition, where options are granted at an undervalue, we believe that a more proportionate sanction would be for a charge to income tax to arise on the exercise of the options on the difference between the market value at the date of grant and the option price. This would allow the options to remain qualifying share options, but it would also enable Revenue to collect income tax on the portion of the gain attributable to the undervalue.

The income tax arising on exercise could be collected under the same mechanism as section 128 TCA 1997 (i.e., a charge to income tax under Schedule E is imposed on any gain realised by a director or employee from a right granted to him/her, by reason of his/her office or employment, to acquire shares or other assets in a company).

iii. **Remove the annual emoluments cap from the qualifying share option limit**

Currently, the total market value of all shares, in respect of which qualifying share options have been granted by the qualifying company to an employee or director, must not exceed €100,000 in any year of assessment, €300,000 in all years of assessment or 100% of the annual emoluments of the qualifying individual in the year of assessment in which the qualifying share option is granted.

In our response to the 2019 and 2022 consultations, we outlined that linking the amount of share options that can be awarded under the KEEP to the employee’s annual emoluments restricts high growth companies in start-up mode availing of the scheme. Often in start-up businesses, employees and directors have lower salaries, compared with larger multinationals, which can prohibit such companies under the KEEP offering equity as an incentive for these individuals to stay in the business.

We suggest that rather than discriminating in practice against the remuneration strategies of these companies and the mix of cash-based and equity-based remuneration that they offer employees, the KEEP measures should simply set absolute values, such as those included in subparagraph (i) and (ii) of part (d) of the definition of a qualifying share option in section 128F (1) TCA 1997. It should be left to companies to determine the proportionate mix of cash and share-based remuneration as a commercial matter and to follow market driven pay awards.

We believe that such an amendment to the qualifying limit of 100% of the annual emoluments of the qualifying individual would take account of situations where an employee's salary has reduced because of reduced working hours or a temporary layoff. It would also address situations where employees, who are temporarily absent from work due to maternity or paternity leave, are limited in terms of the relief which may apply, as often their salary levels would be reduced during this time.

In addition, we have received feedback from members that the lifetime limit of €300,000 can act as a barrier to claiming relief under the scheme where shares have increased in value. In our view, consideration should also be given to applying the limit on a rolling basis. It is noteworthy that in the UK scheme, the cap is on the value of the share options as opposed to the value of the shares, which can be rolled over every three years.

iv. **Allow for the continuation of the relief where a SME undergoes a reorganisation**

The current KEEP legislation does not provide for the continuing availability of the relief in the event of the SME (e.g., holding company and its subsidiaries) undergoing a corporate reorganisation during the period in which the KEEP share option rights are outstanding.

We would suggest amending the KEEP legislation to include similar provisions to those contained within the Revised Entrepreneur Relief legislation, which seeks to address reorganisations that might affect the entitlement of a qualifying individual and a qualifying company to meet the scheme requirements.

v. **Provide for ‘roll over relief’ of the KEEP share options**

We believe that section 128F TCA 1997 should be amended to provide ‘roll over relief’ of KEEP share options, similar to that provided in section 128(8)(a) TCA 1997. Where share rights are exchanged between directors and employees or a company grants a new right in exchange for the surrender of an original right, the new right and the original right are looked at as one for the purpose of the charge to tax under Section 128.

This ‘roll over relief’ effectively means that the tax charge arises at the point of exercise of the new right, with the history of the original share right taken over in respect of a future exercise of the new right. A similar relief is not included in the KEEP legislation.

For example:

- Company A grants share options that meet the conditions of the KEEP under Section 128F TCA 1997 and would qualify for an exemption from income tax on exercise.
- During the exercise period, a transaction is entered into which results in the share capital of Company A being acquired, and unexercised share options are exchanged or assigned for new options in the acquiring company.

In our view, Section 128F should be amended to provide ‘roll over relief’ in respect of KEEP share options. This would apply where during the exercise period, a transaction is entered into which results in the share capital of a company being acquired, and unexercised KEEP share options are exchanged or assigned for new options in the acquiring company.

In such circumstances, we believe that if the acquiring company meets the qualifying company/ group criteria set out in the legislation, the future exercise of the new replacement options should qualify for relief, with the history of the original share option being taken over for the purposes of determining the charge to tax.

2. Unapproved Share Options

i. **Tax arising on the exercise of a share option**

As set out in our response to Question 6, a key issue for employees is the funding of the tax liability which arises when a share option is exercised. Deferring the tax arising on the issue of a share option until such time as the employee is permitted to dispose of the shares would mean that the employee is in a position to fund the tax arising. However, it would be important that the tax is calculated based on the market value of the award when it is received rather than when the restriction on sale is lifted.

Alternatively, the removal of BIK on employer loans, or at a minimum reducing the 13.5% interest rate on such loans to a more commercial rate of interest, could make unapproved share option schemes a more viable option for many companies.

ii. **Extend the sell to cover provisions in section 985A(4B) TCA 1997**

Section 12 of Finance (No.2) Act 2023 amended the collection mechanism for tax on gains arising on the exercise, assignment or release of a right to acquire shares or other assets under section 128 TCA 1997 so that the gains will no longer be subject to self-assessment but taxed under the PAYE system. Employers will be responsible for accounting for the income tax, USC and employee PRSI as part of the payroll process in respect of share options or other assets from 1 January 2024.

In principle, the Institute welcomed the move to collect tax on exercise of share options through payroll. However, we raised concerns with Revenue via the Tax Administration Liaison Committee (TALC) following the publication of the Finance Bill, as to how employers would implement this change in practice as the employees would need to be able to fund the tax liability collected through the PAYE system. Concerns were also raised regarding how the requirement would apply where the individual concerned is no longer an employee.

Section 985A(4B) TCA 1997 was introduced in Finance Act 2012 following the introduction of PAYE on share awards. We understand that the rationale for its introduction was to clarify that the employer has a statutory entitlement to ‘sell to cover’ in situations where share awards are made to an employee and that individual has not otherwise made good the amount of tax required to be remitted to Revenue via PAYE.

Section 985A(4B) is limited to instances where the "employer pays emoluments....in the form of shares...". Consequently, in our view, section 985A(4B) is not sufficiently broad to capture liabilities arising under section 128 as these are triggered by the employee exercising a right to acquire shares. Notably, many share option plan documents, particularly in the SME sector, do not currently include a provision to operate a ‘sell to cover’ arrangement on the exercise of share options. The absence of such a provision could create cashflow issues for employers where employee funds are not available to reimburse the business.

We believe that section 985A(4B) should be amended to put beyond doubt that there is a statutory entitlement on employers to ‘sell to cover’ where a section 128 gain arises and is required to be subject to PAYE.

In addition, some SMEs and private companies may not have an ability to ‘sell to cover’ where there is no liquidity on the exercise of an option. In such cases, they would need additional time to recoup the tax due on exercise where this cannot be recouped through payroll, similar to other BIK charges.

iii. **Collection of PAYE, USC and PRSI**

Paragraph 2.5 of Revenue’s Tax and Duty Manual (TDM) Chapter 2 - Restricted Stock Units (RSU) confirms that where the RSU is share settled (i.e. shares are issued to the employee/director) and an employee wishes to sell their shares to fund the tax, USC and PRSI due, Revenue is prepared to delay the collection of tax, USC and PRSI until the date on which the shares are actually settled, provided that the settlement date is within 60 days of the vesting date.

In those circumstances, the TDM confirms that PAYE, PRSI and USC should be remitted with the payment for the month following the month in which the settlement date (or the 60th day following vesting) occurs. We believe it is important that a similar approach is adopted by Revenue for options which are exercised but not necessarily settled in shares until a date post exercise and indeed, we would envisage that a slightly extended timeline would be necessary in the case of assignees (i.e. for option gains where a non-Irish tax resident element is present during the vesting period).

At a meeting of the TALC Direct/Capital Taxes Sub-committee in December 2023, Revenue stated there was no intention to extend the treatment set out in the TDM on RSUs (where a 60-day period is provided for payment) to share options. We do not believe that extending this treatment to share options would be a cost for the Exchequer, albeit there would be a small timing impact.

iv. **Share issued under share options that are subsequently acquired by the employer group**

Any gain arising on upon the exercise of an option is subject to income tax, USC and PRSI under section 128 TCA 1997. Part 6 Chapter 2 TCA 1997 (sections 130 to 135 TCA 1997) contain provisions which operate to deem certain share acquisitions as distributions (and consequently, a receipt of an income nature) for tax purposes.

As a result of the operation of section 135(3A) TCA 1997, where an employee exercises options, is issued shares, and the shares are subsequently acquired by the employer company or another entity in the corporate group, the employee is potentially subject to income tax, USC and PRSI twice in respect of the same economic benefit. This means the employee is subject to the tax on the gain arising on the exercise of the share options and they are also subject to tax on the entire sales proceeds received for the shares.

This is a very unfair result for the employee, as they are effectively being double taxed. This issue has been discussed at TALC and Revenue has confirmed that the issue arises as there are two separate transactions with different parts of the TCA 1997 applying to each transaction. On the exercise of the share options, the legislation regarding share options is applicable. When the shares are subsequently acquired/ redeemed the legislation regarding distributions applies.

In our view, the rules contained in Part 6 Chapter 2 TCA 1997 should be amended so that in calculating the amount taxable under section 135(3A) TCA 1997, account is taken of the amount that the employee is taxable on pursuant to section 128 TCA 1997.

v. **Remove the distinction between long and short options**

Section 128 TCA 1997 distinguishes between share options which are capable of being exercised within 7 years of grant (short options) and those capable of being exercised more than 7 years after grant (long options). For short options, no charge to income tax arises on the date that the right is granted. However, for long options, a charge to income tax arises on grant if it is below market value.

The distinction between long and short options is not in line with other jurisdictions. For many multinational groups, the 7-year rule means that they have to operate a separate plan or sub-plan of their share-based remuneration scheme for Ireland resulting in additional costs. In our view, the distinction between long and short options should be removed and no charge to income should arise on the date that the right is granted.

vi. **Issues arising from a recent Tax Appeals Commission Determination**

A recent Determination[11] by the Tax Appeals Commission (TAC) illustrates that individuals can pay income tax, PRSI and USC at an effective rate greater than 52% on the net proceeds received by them, following the sale of shares on the same day that an option to obtain those shares was exercised. This outcome, which in our view is unfair and should be reviewed by policymakers, arises due to two issues:

a. commissions payable on the sale of the shares are not deductible in calculating the 'gain' (for income tax purposes); and
b. the application of official European Central Bank (ECB) foreign exchange rates in circumstances where a different foreign exchange rate is used in calculating the net proceeds payable to an employee and where the employee has no control over the application or determination of that foreign exchange rate.

In some cases, employees frequently buy and sell shares acquired pursuant to share options on a same day basis. Such individuals may never have a CGT liability on the disposal of shares and so, commission fees will often be a non-deductible cost in practice.

The application of the official ECB foreign exchange rate is particularly problematic as an individual is very unlikely to ever obtain such a beneficial exchange rate. Consequently, in most cases the application of the ECB exchange rate is likely to increase the effective tax rate.

In cases where shares are bought and sold on the same day pursuant to a share option right, to mitigate against the unfairness of paying tax at an effective rate greater than 52%, in our view, it should be possible to calculate the tax liability arising based on the euro amount received. We believe such an approach could potentially be provided for in Revenue guidance.

[11] TAC determination 140TACD2023

3. Restricted Shares – Section 128D TCA 1997

i. Tax arising on the receipt of shares (upon exercise of a share option or otherwise)

While restricted share schemes, or ‘clog’ schemes, are an attractive prospect for many employers, the upfront tax cost for employees on the grant of such shares is problematic. In our view, this issue could be addressed by deferring the tax until the shares are sold. Alternatively, the removal of the BIK charge on employer loans, or at a minimum reducing the 13.5% interest rate imposed on such loans to a more commercial rate of interest, would make restricted share schemes a more viable alternative for many companies.

ii. Remove anomaly where restricted shares are exchanged for shares with equivalent restrictions

Section 128D TCA 1997 provides a reduction in the taxable value of shares that employees receive where there is a restriction on selling those shares for a certain period. This “clog” varies from 10% to 60% depending on the number of years for which there is a prohibition on sale. Section 128D(4) TCA 1997 provides that the amount chargeable to income tax is reduced by taking account of the number of years during which there is a restriction on sale. The maximum relief is available where the period of restriction lasts for 5 years or more.

If the director or employee disposes of the shares before the period of restriction has elapsed, the relief under section 128D(4) is clawed back. However, this clawback also arises in circumstances where the restricted shares are exchanged for shares with equivalent restrictions. We do not believe that such an outcome is intended and believe that the legislation should be amended to address this anomaly.

iii. Pre-approval process where shares are not held in a trust

One of the conditions in section 128D includes a requirement that the shares are held in a trust established by the employer for the benefit of employees and directors, or “held under such other arrangements as the Revenue Commissioners may allow”. This means that where a trust is not used, the employer must seek approval from Revenue. This process can cause delays which can be problematic when establishing the scheme is time sensitive. For example, where the employer is seeking to use the scheme to incentivise a new employee to come on board or to retain an existing employee who may have an alternative offer of employment.

In our view, if policymakers consider it necessary to retain the requirement for pre-approval by Revenue, then it is important that there are definitive timelines provided for completion of the pre-approval process and that there are dedicated Revenue personnel that taxpayers can liaise with to understand any issues which may cause delays in obtaining approval.

iv. **Expand the scope of section 128D to include instruments other than shares**

Under section 128D TCA 1997, the interest acquired by the director or employee must be in shares. However, US and Canadian private equity investor vehicles are frequently established as partnerships. Where such partnerships seek to implement a clog share scheme in Ireland under their existing share incentive plans, the question often arises as to whether the interest in the partnership can be considered an interest in a share. Consideration could be given to expanding the scope of section 128D to include such structures. In a similar manner, consideration could also be given to expanding the definition of "share-based remuneration" in the Social Welfare Consolidation Act 2005 to clearly capture such partnerships (or clarifying the position in guidance).

4. Approved Profit-Sharing Scheme (APSS) and Save As You Earn (SAYE) scheme

Large private businesses need flexibility to selectively reward key staff. The requirement in the APSS and the SAYE scheme that all eligible employees/directors must be allowed to participate in a scheme on similar terms, means that these schemes are ineffective as a tool to reward employees who have excelled. In our view, the requirement that all employees participate in the scheme on similar terms should be removed so that it is possible for a company to differentiate between employees and reward good performance. Currently, such an approach is not feasible as Revenue must pre-approve the company's award system.

Consideration should also be given to increasing the limit in the value of shares employees can receive under the APSS without deduction of income tax, USC and employee PRSI. The existing limit stands at €12,700 and has remained unchanged for many years. An increase in the limit would further improve the flexibility of the scheme and its attractiveness for both employers and employees.

Under the SAYE scheme, employees must enter a 3, 5 or 7-year savings contract. Once, the savings period is completed the employee can decide if they want to exercise their option to buy the shares. However, employees tend to change employment more frequently than they may have done in the past and in many cases, employees now change employment at least every two years.

To reflect this trend, we believe it would be appropriate to permit employees to enter into a shorter-term savings contract of between 1 and 2 years. Such a change could incentivise employees to remain with their existing employer if they are rewarded through the provision of share options at more regular intervals. Notably, the requirement under KEEP is that the share option cannot be exercised within the first 12 months of the grant date.

5. **Carried interest in a fund**

It is typical for executives that work as fund or investment managers to be remunerated by means of a “carried interest”. Carried interest is essentially a percentage interest in a partnership based on the return that the fund makes. It is normally established through a limited partnership with the fund manager being a limited partner and they receive a payout when the fund is wound up. It can be unclear as to how such interests should be taxed under Irish legislation. In the US, their Profits Interests regime applies to carried interest such that it is treated as a capital gain.

Notably, section 541C TCA 1997 applies to carried interest received by venture capital managers for managing investments in certain venture capital funds. This section ensures the share of profits of an investment that a venture fund manager receives for managing an investment in a venture capital fund is deemed to be a chargeable gain.

Consideration could be given to extending the treatment afforded under section 541C to certain venture fund managers so that it applies more widely to fund managers having carried interest in a fund. This would ensure that Ireland offers an attractive regime for private equity fund managers having a carried interest in the underlying fund and would assist in incentivising such highly qualified talent and investment locating in Ireland.

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

In our view, there is a need for both Revenue approved share schemes and unapproved share schemes. As the Revenue approved schemes offer little flexibility, in most cases, unapproved share schemes prove to be a more suitable option for smaller businesses. Please see our response to Question 12 also in this regard.

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.

Please see our response to Question 11.

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. **A single employer return of share-based remuneration**

      Currently, there are five different returns which employers must file annually to provide information to Revenue about share-based remuneration, depending on the share schemes utilised.

      – Form ESA: Return of Employee Share Awards
      – Form RSS1: Return of Share Options and other rights (unapproved)
      – Form KEEP1: Return of Qualifying Share Options granted
      – Form SRSO1: Return of Information of an Approved Savings Related Share Option Scheme
      – Form ESS1: Return of Information by the Trustees of an Approved Profit Sharing Scheme

      Feedback from our members suggests that these forms can be cumbersome to complete resulting in the reporting process being a time-consuming task for companies.

      In our view, it should be possible for an employer to report information on share awards via a single annual online return. The form should also be simplified to facilitate ease of completion by employers and avoid duplication of reporting. For example, as the tax due in respect of the exercise of share options must be collected by employers (and the detail included in payroll returns) from 1 January 2024, the need for the various returns and the information currently set out therein should be reconsidered.

      The current filing deadline for employer returns is three months after the year end. This deadline should be extended by a least a further month to allow for collation and aggregation of the data.

   2. **Retain optional reporting for the granting of RSUs**

      Currently, the Form ESA includes an option to report the grant of a RSU. It is important that this reporting is kept optional as it is possible that the RSU will fall away. For example, where the RSU does not vest as the employee does not meet certain performance criteria. We are not aware of a reporting requirement for the grant of RSUs existing in other jurisdictions.

   3. **Exempt APSSs from the requirement to file a Form 1 (Trusts and Estates)**

      For an APSS, in addition to filing the Form ESS1, a number of other forms are also required to be completed. A nil return must be completed for the purposes of FATCA and DAC2-CRS. Furthermore, a Form 1 (Trusts and Estates) is required to be completed in respect of the APSS trust.

The Form 1 requires the trustees to declare the income and capital gains of the trust for a tax year. However, the majority of APSS trusts do not have any income or gains accruing to the trust itself because all the shares held by the trustees are appropriated to the participants. Although, all the entries on the Form 1 will be nil/zero, it is necessary to complete each part of the form as there is no nil return option. In our view, a tick-box option to file a nil return should be provided on the Form 1 (Trusts and Estates).

4. Valuations of private companies

As set out in our response to Question 6, clear principle-based Revenue guidance on share valuations, including acceptable methodologies and safe harbours, is required to support companies that wish to use share-based remuneration.

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

From 1 January 2024, employers will need to understand the personal circumstances of each cross-border employee (including those foreign employees on assignment to/from Ireland) when assessing the payroll withholding obligations where share options are exercised. The calculation of the assessable gain can be complex in such cases.

For example, the employer will need to take into account the tax residency status of the employee at exercise as well as the level of Irish workdays performed during the vesting period, as these factors can have a significant impact on the taxable gain for an individual.

However, the employer may not have the full information necessary to determine an employee’s residency status for the purposes of a double taxation treaty. Such difficulties are particularly likely to arise in cases where the individual is no longer an employee.

In our view, it would be important that Revenue provides confirmation in guidance that an employer will not be penalised where reasonable efforts are made to determine the correct tax due on the exercise of a share option.

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

A RSU is a promise to an employee that on the completion of a vesting period they will receive shares (or cash equivalent to the value of such shares). Vesting typically occurs a number of years after the grant of the RSU and in most cases, is subject to certain performance criteria. An employee is liable to tax at their marginal rate on the full market value of the shares delivered at the date the RSU vests, if the employee is Irish resident at that time. This tax is collected through payroll, often by a sale of a portion of the employee's shares by the employer who withholds the proceeds to pay the PAYE due. In the case of employees seconded to work in Ireland, double taxation can arise with taxes due in Ireland and in the assignee's home country at the same time.

The Irish tax treatment of RSUs differs from the practice in other OECD countries. The Irish approach to tax the entire gain at the time the RSU vests, regardless of whether the employee was working in Ireland throughout the vesting period, is also inconsistent with the tax treatment of share options in Ireland. In contrast, a share option gain is time apportioned and taxed on a pro-rata basis by reference to the period working in Ireland during the vesting period, in line with OECD recommendations in this area.

In our view, the tax treatment of RSUs should be amended so that the amount of the benefit taxable in Ireland is apportioned by reference to any part of the vesting period during which the individual is present in Ireland, rather than the full amount of the reward where resident on the date of vesting. This approach would be in line with the tax rules followed in other OECD countries and also align with the existing Irish tax treatment of share options exercised by non-residents.

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

Please see our response to Question 17.

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?

A key obstacle in promoting employee share ownership can be the tax cost faced by employees on the exercise of a share option or the award of shares (whether subject to a restriction or not). As we have detailed in our response to Question 6, a number of other EU Member States allow a deferral of tax on share options/awards until the point of sale.

Employers may try to mitigate the cash cost to an employee of share ownership by providing a loan to purchase the shares/exercise a share option and/ or discharge the tax. However, this is not a viable option in Ireland as loans of this nature are treated as a BIK with a preferential interest rate of 13.5% deemed to apply to the loan. Applying a penal 13.5% preferential rate of interest is not in line with the approach adopted in other jurisdictions which impose more commercial rates of interest.

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?**

SMEs and start-ups in many instances cannot match the salaries paid by large multinationals. For such companies, share-based remuneration is an important mechanism to help them attract and retain key talent.

Large private companies may have significantly more cash resources than SMEs. However, they face similar challenges using share schemes. They need the flexibility to reward skilled staff with equity, due to employee expectations and sectoral norms. They directly compete with listed companies which may have sophisticated share plans for high-calibre internationally-experienced senior executives.

In addition, there are often existing investors or institutional investors who may not be willing to dilute their shareholdings meaning share plans that require a common approach (e.g. the APSS or the SAYE scheme) are not commercially feasible.

Start-ups, SMEs and large private companies all face difficulties in determining share valuations in the absence of a market disposal or investment. Large companies need to use complex methodologies to try to ascertain the share value. We have outlined in our response to Question 6 a range of ways this administrative complexity could be minimised for all unquoted companies.

Large private companies will often seek to reward key personnel with shares/stocks with certain restrictions or conditions on sale, in order to prevent dilution or transfer of ownership. Section 128D TCA 1997 provides a reduction in the taxable value of shares that employees receive where there is a restriction on selling those shares for a certain period. This “clog” varies from 10% to 60% depending on the number of years during which there is a prohibition on sale. This relief is useful but there are certain limitations with section 128D, as outlined in our response to Question 12.

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

Please see our response to (i).

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

Please see our response to (i).

For quoted companies

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

The majority of listed companies implement some form of employee share plan. Share ownership is frequently a key component of a competitive remuneration package. It aligns the employees' interests with shareholder interests and promotes corporate identity.

Share plans are often an extension of headquarter-country plans which cannot be customised for each jurisdiction without incurring additional costs. A key priority for these large organisations is to minimise the complexity involved in managing these global plans across multiple jurisdictions with different tax and reporting rules. Increased global mobility in recent years has further added to this complexity.

As outlined in our response to Question 15, it should be possible for an employer to report information on share awards to Revenue via a single annual online return. The form should also be simplified to facilitate ease of completion by employers and avoid duplication of reporting. In addition, the current filing deadline for employer returns which is three months after the year end should be extended by a least a further month to allow for collation and aggregation of the data.

Staff mobility can also have a major impact on employees with equity-based remuneration and can give rise to unexpected personal tax liabilities. These must be monitored carefully to ensure that the tax does not act as a disincentive to the take-up of an overseas assignment and lead to increased costs for the employee or employer.

Many companies, especially US headquartered companies, use RSUs to reward key executives. As we have highlighted in our response to Question 17, the Irish tax treatment of RSUs differs from the practice in other OECD countries. The Irish approach to tax the entire gain at the time the RSU vests, regardless of whether the employee was working in Ireland throughout the vesting period, is also inconsistent with the tax treatment of share options in Ireland. In contrast, a share option gain is time apportioned and taxed on a pro-rata basis by reference to the period spent working in Ireland.

In our view, the tax treatment of RSUs should be amended so that the amount of the benefit taxable in Ireland is apportioned by reference to any part of the vesting period during which the individual is present in Ireland, rather than the full amount of the reward where resident on the date of vesting. This approach would be in line with the tax rules followed in other OECD countries and also align with the existing Irish tax treatment of share options exercised by non-residents.

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

Please see our response to (i).

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

Please see our response to (i).

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 transfer of schemes that require Revenue approval from an approval process to a self-administered and/or notification process could potentially contribute to the simplification of the administrative burden for all stakeholders dealing with share-based remuneration. Given so much information is now readily available to Revenue through real-time reporting and PAYE, the need for the current approval process should be reconsidered.

However, member feedback suggests it is the lack of flexibility associated with Revenue approved schemes rather than the approval process, that makes them unattractive for businesses. The requirement in the APSS and the SAYE scheme that all employees/directors (including temporary employees) must be allowed to participate on similar terms, means that these schemes are ineffective as a tool to reward high performing employees.

As set out in our response to Question 12, we believe the requirement that all employees participate in the scheme on similar terms should be removed so that it is possible for a company to differentiate between employees and reward good performance. Currently, such an approach is not feasible as Revenue must approve the company’s award system.

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.**

    Please see our response to Question 21.

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 dealing with share-based remuneration?**

    Please see our response to Question 21.

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.**

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

    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.**

    The exemption from employer PRSI on certain share-based remuneration is a key positive in Ireland's current share-based remuneration regime. The PRSI exemption represents a significant benefit for SMEs who are under pressure due to increasing costs and may not have the funds to pay cash bonuses but can use share-based remuneration to incentivise and keep workers motivated in a manner that is affordable.

    The PRSI exemption also makes Ireland a more attractive location for MNEs to roll-out their global share-based remuneration plans. MNEs relocating key talent to Ireland may have to equalise their existing pay which can be a significant cost given Ireland's high marginal tax rates. The exemption from employer PRSI is essential to help compensate for the high cost of employment in Ireland.

    We would strongly oppose any proposal to limit the exemption from PRSI. 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 unfeasible for many businesses.

Our members have raised concerns that if employer PRSI applies, then such a cost could be considered a contingent liability that employers would have to provide for in their accounts. The contingent liability could be material as it would depend on the rise in value of the underlying shares. Imposing such a potential liability on employers would be damaging and is likely to result in a reduction in the provision of share-based remuneration. This would in turn mean that Ireland would become a less competitive location for companies seeking to roll-out share-based remuneration to their employees.

Notably, while other EU Member States do not exempt share-based remuneration from social security contributions, as they operate a cap or ceiling (i.e., no social security contributions apply to earnings over a certain level), social security contributions on share awards are limited. For example, the level of earnings on which social insurance charges are applied is capped in Bulgaria, Cyprus, Germany, Greece, Malta, the Netherlands and Spain. In addition, Denmark applies a fixed contribution per employee regardless of their earnings.

Retaining the PRSI exemption but limiting it to SMEs would only present difficulties as it would mean that companies operating share-based remuneration schemes would need to determine if they were a SME each time they run a payroll.

Professional employer organisations or employers of record

On a related point, many MNEs choosing to set up operations in Ireland may consider doing so, in the first instance, for administrative convenience, through the use of what are often termed professional employer organisations (PEOs) or employers of record (EORs). These may be used as a starting point when a MNE commences relatively minor Irish operations, often with a view to potential expansion. A group company (usually an Irish company) will frequently be incorporated in due course to act as the direct employer of Irish employees.

The use of PEOs / EORs gives rise to a technical uncertainty as to whether employer PRSI applies to any share-based remuneration. This is because, strictly speaking, the shares are not issued in a company that 'controls' the employer (assuming the PEO/ EOR is viewed as the employer for these purposes). It would be helpful if the use of PEO/ EOR arrangements could be addressed in Revenue guidance, and it could be clarified that, for the purpose of interpreting the employer PRSI exemption for share-based remuneration, the underlying de facto employer/ enterprise is considered the employer.

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?
No

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

State aid considerations may arise in the context of the recommendations made on KEEP, which is a notified State aid scheme.

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?

In our view, a key focus of policymakers must be to make share-based remuneration more accessible for Irish business. Further legislative amendments to the KEEP are needed to improve the feasibility of the scheme. However, there are limitations inherent in its design which inevitably will limit its uptake.

Consequently, it is important the significant obstacles to the use of other types of share-based remuneration by SMEs and start-ups are addressed. These include providing clear Revenue guidance on the valuation of shares and addressing the upfront tax cost faced by employees on the receipt of a share award (or exercise of a share option).

For larger companies, given the high cost of employment in Ireland, it is essential that the benefits associated with existing share-based remuneration schemes are retained. It is also important that the complexity and administration associated with operating such schemes in Ireland is minimised.