**13 May 2025**

# Feedback on the Key Employee Engagement Programme (KEEP)

In follow up to our meeting of 29 April, we outline below further feedback on the operation of the KEEP outlining some reasons as to why there has been a low take-up of the scheme to date, as requested. We also include some information we have gathered on similar share schemes in other Member States where relevant.

As discussed, we strongly urge for the KEEP to be extended beyond its current expiry date of 31 December 2025. For qualifying companies, the KEEP affords the possibility to provide a financial incentive to employees, in addition to their basic remuneration, linked to the future growth and success of the SME. We believe the KEEP has the potential to enable SMEs to compete with multinationals for key talent, through share-based remuneration, in circumstances where they find it difficult to match the salaries offered by larger companies.

While the take-up of the KEEP has been low to date, we consider this is due to limitations with the operation of the scheme which have significantly impacted its feasibility since its introduction.

## Feedback on the impact of recent amendments to the KEEP

To help us formulate our response to the Department of Finance's last public consultation on the KEEP in June 2022, we carried out a member survey. Full details of the survey findings were included in the Institute's response to the public consultation at the time.[1]

[1] Irish Tax Institute Response to the Consultation on KEEP, 17 June 2022

In our survey, we asked members for their views on whether the amendments made to the KEEP in Finance Act 2019 would increase its uptake. These amendments, which were subject to a commencement order and subsequently commenced in Finance Act 2022, related to companies operating through a group structure qualifying for the scheme; extending the definition of a 'qualifying individual' to include certain part-time employees and permitting the grant of KEEP options over existing shares, as opposed to newly issued shares.

70% of the members who completed the Institute survey in June 2022 considered extending relief under the KEEP to certain companies operating in a group would increase the uptake of the scheme. 63% of the respondents indicated they believed the 2019 amendment to permit part-time/flexible workers qualify for the KEEP would increase the uptake of the scheme. 57% respondents considered the 2019 amendment to allow existing shares, as well as newly issued shares, to qualify for the KEEP would help to increase its uptake by SMEs.

The Finance Act 2022 amendments to the KEEP, which included extending the scheme to 1 January 2026, doubling the lifetime company limit for the KEEP shares from €3 million to €6 million, and enabling CGT treatment to apply to the buyback of KEEP shares by a company from a relevant employee, were subject to State aid approval and were commenced on 20 November 2023. While it will take some time before the full impact of all of these changes is known, based on recent feedback from our members, there has been an increased level of interest in the KEEP since these amendments were commenced.

## Feedback on reforms needed to improve the feasibility of the KEEP

Notwithstanding the recent amendments to the KEEP, we believe further legislative reforms are needed to improve its feasibility. In our view, the policy intention of the KEEP to help SMEs attract and retain key employees can only be achieved if these limitations are addressed.

We have outlined these limitations, together with our recommendations for reforms to the existing legislation, in response to numerous consultation processes over the last four years including our responses to the public consultations in June 2022[2] and January 2024[3]. We also highlighted these issues during the discussions at the TALC Sub-committee on Simplification of Business Reliefs for SMEs[4] last year, and in our Pre-Finance Bill 2024 Submission[5] to the Minister for Finance.

In addition to the member survey which the Institute undertook in June 2022, we obtained feedback from SMEs/ entrepreneurs on the limitations of the KEEP and the reforms needed to the existing legislation as part of an Enterprise Ireland Tax Stakeholder Event in April 2023.

Based on the feedback we gathered from our 2022 member survey and directly from entrepreneurs in 2023, the two most important reforms identified were:

i. developing an agreed 'safe harbour' approach to share valuation and imposing an appropriate sanction where there is an undervalue; and
ii. amending the definition of a 'qualifying holding company' to permit the group as a whole to be considered, rather than simply considering the holding company in isolation.

**Share Valuations**

As we highlighted at our meeting in April, one of the most significant practical issues that SMEs face when implementing KEEP is the ability to achieve as much certainty as possible regarding its share valuation so that the share option price is not less than the market value of the shares at the date of grant.

Currently, there is very limited guidance on how to determine what market value is for the purposes of the KEEP. The absence of clear Revenue guidance means that there is an inherent risk for companies if options are not granted for market value or the market value is subsequently determined by Revenue to be higher than originally projected that the options will not qualify as KEEP options under section 128F TCA

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2 Irish Tax Institute Response to the Consultation on KEEP, 17 June 2022
3 Irish Tax Institute Response to the Consultation on Ireland's Taxation of Share-based Remuneration, January 2024
4 Report of the TALC Sub-committee on Simplification of Business Reliefs for SMES, June 2024
5 Irish Tax Institute Pre-Finance Bill 2024 Submission, May 2024

1997, resulting in no exemption from income tax, USC and PRSI on exercise. This risk is a significant obstacle for companies that wish to implement the KEEP.

As outlined in our previous submissions to the Department, we believe that where options are granted at an undervalue within say a certain percentage of the Revenue determined value (e.g. 75%), 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 KEEP 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).

Notably, a similar approach is adopted for the Enterprise Management Incentive (EMI) scheme in the UK. Under the EMI, where an option is exercised to acquire shares for less than their market value, section 531 of the Income Tax (Earnings and Pensions) Act 2003 provides for a charge to tax to arise on the difference between the market value of the shares at the time the option was granted and the market value of the shares at the time when the option is exercised. We understand that this provision formed part of the legislation underpinning the EMI prior to Brexit when the scheme was subject to EU State aid requirements.

We understand that the rationale for the sanction which applies under the KEEP when share options are granted at a value other than market value (i.e., they are no longer considered KEEP options) is due to State aid requirements. However, we note that this requirement does not exist for similar share schemes in other Member States.

For example, in Portugal, new legislation was enacted in 2023 on the taxation of share and stock options for employees of start-ups, SMEs and companies in the innovation sector. Under the new rules, 50% of the income arising from employee share ownership will be taxable at a flat rate of 28%, once the underlying assets are held for more than one year. Taxation of the income received by employees under these share plans is postponed to the earliest of the following:

(i) disposal of shares or gift of shares, or
(ii) loss of tax residency status in Portugal.

Under the scheme, the taxable income on the disposal of shares is the difference between the sales proceeds and the price paid by the employee.[6] Therefore, it would appear there is no requirement under the Portuguese scheme for the share options to be granted at market value.

We understand that because the KEEP is a notified State aid, the Commission adopts a strict position on compliance with the conditions for the relief meaning if any of the conditions are not met, such as a share option being granted at an undervalue, then the relief does not apply.

In this regard, we note the State aid decision issued by the European Commission in respect of the KEEP in 2017[7] includes a requirement for the monitoring of the scheme's eligibility conditions. In contrast, no such requirement was included in the decisions issued by the Commission in 2017[8] and 2021[9] in respect of the Swedish scheme for the taxation of SME employee stock options, which is also a notified State aid.

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

Under existing legislation, 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

[6] Information based on KPMG GMS Flash Alert 2023-116 I, 7 June 2023 - https://kpmg.com/xx/en/our-insights/gms-flash-alert/flash-alert-2023-116.html
[7] State Aid SA.47947 (2017/N) – Ireland. SME-focussed, share-based incentive scheme - Key Employee Engagement Programme. Brussels, 19.12.2017, C(2017) 8500 final.
[8] State Aid SA.47144 (2016/N) – Sweden. Tax reduction of employee share options. Brussels, 26.6.2017, C(2017) 4237 final.
[9] State Aid SA.63421 (2021/N) – Sweden Relief in the taxation of SME employee stock options – Amending SA. 47144. Brussels 14.10.202, C(2021) 7490 final.

is wholly or mainly holding shares in trading subsidiaries.

Company structures with an intermediate holding company will not be regarded as a qualifying company if there is no qualifying subsidiary held directly by the ultimate holding company. 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.

In our view, 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 '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."*

We understand that the rationale for the current legislative drafting of the definition of a 'qualifying holding company' is due to State aid requirements. The proposed amendment outlined above would, in our view, be in line with the approach adopted for the Employment Investment Incentive (EII) in Part 16 TCA 1997, which is State aid measure falling within the requirements of the General Block Exemption Regulation (GBER). It would seem logical that if such a definition satisfies State aid requirements for the purposes of GBER, it should also satisfy State aid requirements where the measure is a notified State aid.

**Impose a fixed penalty for late filing of the Form KEEP1**

For share based remunerations schemes such as the Approved Profit Sharing Scheme (APSS) and the Save as You Earn Scheme (SAYE), the late filing of a return may result in a fixed penalty for the employer[10] in accordance with sections 1052 and 1054 TCA 1997. In contrast, where an employer files the Form KEEP1 late, it could result in the full withdrawal of relief as the exemption from income tax, USC and PRSI on the exercise of the KEEP share options no longer applies. This approach seems unfair considering the KEEP is a targeted relief for SMEs which are less likely to have the available resources and expertise available to manage the complexities of the scheme compared to larger companies operating an APSS or a SAYE.

The late filing of a Form KEEP1 may only come to light where there is a subsequent disposal of the qualifying company. Based on feedback we have received, the reason for late filing can vary from case to case and can, for example, be due to a change of personnel in the business. We understand that most KEEP schemes include a clause which means that if the tax relief is withdrawn, the liability can be recovered from the employee. This means that the employee may be penalised for a failure by their employer which is outside of their control.

In our view, withdrawal of relief if the Form KEEP1 is filed late is disproportionate. A more proportionate sanction for the late filing of the Form KEEP1 would be to impose a fixed penalty on the employer, akin to what applies to the APSS and SAYE.

[10] Section 1052 and 1054 TCA 1997.