South Block
Longboat Quay
Grand Canal Harbour
Dublin 2

+353 1 663 1700
www.taxinstitute.ie

Minister Paschal Donohoe TD
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2

30 May 2018

Finance Bill 2018 Submission

Dear Minister

We set out in this submission a number of legislative changes for consideration in the drafting of Finance Bill 2018.

The submission focuses on various technical amendments to the legislation which we believe are required to mitigate certain 'unintended consequences' arising from recent legislative changes.

The submission does not address the legislative changes required to implement the provisions of the European Anti-Tax Avoidance Directive[1]. We have submitted our recommendations on how Ireland should implement this Directive as part of our response to the Department's public 'Consultation on Coffey' earlier this year.

Since the end of January, we have continued to engage with the Revenue Commissioners on the issues to consider when drafting the legislation to give effect to this Directive through the TALC forum, particularly the Controlled Foreign Company (CFC) rules which must be adopted into Irish tax legislation by 1 January 2019.

Given the importance of all the anticipated changes to the corporate tax code over the next two years, we highlighted in our submission last January the importance of consulting widely, not only on the policy choices required but also on draft legislation and Revenue guidance well in advance of the measures commencing.

As a broad range of taxpayers will be affected by the introduction of CFC rules in Ireland, it is essential that all stakeholders are given the opportunity to consult on draft CFC legislation well in advance of the publication of the Finance Bill next October.

[1] Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

We would welcome the opportunity to discuss the matters raised in this submission with you or your officials.

Yours truly

David Fennell
President

Summary of Recommendations

Our recommendations for Finance Bill 2018 focus on the nine key areas below, further details of which are provided in the body of the submission.

1. **Key Employee Engagement Programme (KEEP):** The KEEP contains seven significant limitations which significantly impact the feasibility of the scheme and ultimately, its success in achieving the policy aim of helping SMEs to attract and retain talent. These are:

   a) the impact of the remuneration test on high growth companies in start-up mode
   b) the definition of a 'qualifying individual'
   c) the definition of a 'holding company'
   d) the requirement for new issued shares
   e) share buy backs need to be facilitated to assist with liquidity
   f) reorganisations are not specifically catered for within the provisions of KEEP, and
   g) agreed approaches to share valuations and the development of 'safe harbours' are required.

   To address these limitations, we recommend the following amendments to the existing legislation:

   - The third part of the remuneration test requires KEEP share options to be below 50% of the employees' annual emoluments, which is restricting high-growth companies in start-up mode availing of scheme. To preserve cash in the start-up phase of such companies, the cash element of a key employee's remuneration package is often modest, with share options forming the majority of the package being paid. Share options may very well exceed 50% of annual emoluments in these circumstances; therefore, the third element of the remuneration test cannot be met and KEEP cannot be used.

     While we acknowledge the role of remuneration limits in a share option regime, they should be based on absolute values to ensure that high growth companies in start-up mode are not prevented from availing of the scheme.

   - The current KEEP provisions envisage that an individual will be an employee of and carry out duties for a single company. However, employees may carry out work for the holding company and one or more subsidiaries or transfer between group companies, as well as devoting their time to the qualifying KEEP company within the group. This will be dictated by business needs. We believe the definition of a 'qualifying individual' should be amended:

     - to allow an employee who transfers to a group company to retain their KEEP options (that qualify for CGT treatment), provided all the other conditions of section 128F TCA 1997 are satisfied, and
     - to allow more practical flexibility (particularly in SMEs), so that employees who spend substantial time in the KEEP company will qualify for the relief even where they carry out some duties for other group companies.

   - Holding companies generally do not only own shares (i.e. a holding company can hold money in a bank account to discharge its running expenses or advance a loan to a subsidiary) and are not always the 100% parent company, which is what is required under the existing provisions to qualify for KEEP. We recommend that the definition of a holding company under the scheme should be amended to adopt a similar definition to that contained within Revised Entrepreneur Relief where a holding company *"means a company whose business consists wholly or mainly of the holding of shares of all companies which are its 51 per cent subsidiaries"* and which provides for a qualifying group.

- For commercial reasons, it is common for company share schemes to manage the delivery of shares to eligible employees under a trust arrangement. Furthermore, they will often make available shares for key recruits from a pool of existing shares set aside for that purpose. The flexibility to operate these common and accepted practices is not available under KEEP and that is significantly limiting the use of the regime. To address this gap, the regime should enable existing, as well as new shares, to qualify for use. This could be achieved by deleting the reference to 'new' in part (a) of the definition of a qualifying share option under section 128F TCA1997.

- The provisions of the KEEP scheme do not accommodate the buy-back of shares and this can have significant implications for the liquidity of the business. A substantial challenge for SMEs wishing to operate a KEEP scheme will be to provide assured liquidity for their shares, as not all these companies are likely to be sold or listed on a stock exchange. Section 176 TCA 1997 should be amended to reflect that a buyback of shares acquired under KEEP can be expected to meet the conditions for the benefit of the trade test in that section and consequently, subject to CGT treatment.

- The current legislation does not provide for the continuing availability of CGT treatment if the SME undergoes a corporate reorganisation during the period in which the KEEP share option rights are outstanding. Therefore, we recommend the adoption of similar provisions in KEEP to those contained within the Revised Entrepreneur Relief legislation, which secure the entitlement of a qualifying individual and a qualifying company to meeting the scheme requirements when a reorganisation takes place.

- We believe that agreed 'safe harbour' approaches to share valuation for KEEP purposes should be developed, similar to the approach to valuations adopted under accounting standards. This will ensure the scheme is more accessible, easily understood and capable of implementation without undue duplication of effort and cost to SMEs.

2. **Professional Subscriptions:** In the best interests of the development and standards of Ireland's professions, we urge that the statutory basis for exemption from BIK under section 118 (5E) TCA 1997 is reinstated for professional subscriptions.

   We have attached a copy of our evidence-based report, *Building Ireland's Future – The Role of the Professions* that has been prepared with a number of other like-minded organisations, which demonstrates the role of professional bodies in Ireland's future.

3. **Special Assignee Relief Programme (SARP):** Under existing SARP legislation, an employer is required to notify the Revenue that an employee will be eligible for the relief within 30 days of that employee arriving in Ireland to perform his/her employment duties.

   When a new assignee arrives in Ireland, multiple practical issues need to be addressed, which can result in the SARP notice being inadvertently overlooked or delayed by the employer, resulting in the refusal of the relief. Refusing the employee relief on the basis that the employer has not submitted the notice on time can result in a financial penalty that is entirely disproportionate for something that is effectively outside the control of the employee.

To address this, we recommend removing the 30-day notice requirement from the part of the legislation that defines a 'relevant employee' for SARP purposes.

Alternatively, the current time limit of 30 days could be extended to 90 days, which would be a more adequate timeframe to allow for the multiple issues that need to be addressed first when a new assignee arrives in Ireland.

4. **Revised Entrepreneur Relief:** There are issues with the current Revised Entrepreneur Relief legislation[2] (as interpreted in Revenue's Operational Manual),[3] which are limiting its use in three significant situations and creating barriers to investment. These are:

   - where a dormant company is present in the group;
   - where the group is party to a joint venture;
   - where the group/company is holding investments and/or leasing trading premises.

   We recommend that section 597AA TCA 1997 is amended to remove restrictions to Revised Entrepreneur Relief in situations where a group holds a dormant company or has a shareholding in a joint venture company of less than 51%.

   The legislation should also be amended to allow for either an apportionment of relief when a company holds investments or earns rental income or alternatively full relief to be claimed provided such activities fall below a certain level.

5. **The potential impact of section 135 TCA 1997 on the sale of family businesses/SMEs:** Finance Act 2017 inserted a new subsection 3A into section 135 TCA 1997. The policy intent at the time of introduction was *"to deal with a number of specific tax avoidance schemes which have been uncovered by the Revenue Commissioners."*[4]

   However, unlike other targeted anti-avoidance measures in Irish tax legislation, section 135 TCA 1997 does not include a *bona fide* test, which is normally used to prevent unintended consequences from arising.

   The effect of the new subsection 3A is to impose income tax (rather than CGT) treatment on selling shareholders in any situation where Revenue take the view that a company has retained profits in excess of the company's commercial needs. Without a *bona fide* test to target this measure, it is having a significant impact on succession within family businesses, management buy-outs (MBOs) and arrangements to provide liquidity in shares for employees involving 'close companies'.

   In our view, inserting an exclusion for *bona fide* commercial transactions into section 135 TCA 1997 would provide the necessary level of certainty to taxpayers when considering their scaling options.

[2] Section 597AA TCA 1997
[3] Revenue Operational Manual 19.06.02B – Capital Gains Tax Revised Entrepreneur Relief
4 Minister Paschal Donohoe, T.D. at the Committee Stage debate on Finance Bill 2017, 8 November 2017

6. **Merger of a closely held company and interaction with the close company surcharge:** Finance Act 2017 amended Irish tax legislation to reflect mergers and divisions, so to ensure that the successor company can step into the shoes of the transferor company for certain filing, reporting and payment obligations following a merger or division. A technical point has now arisen, which has not yet been considered in tax legislation, where the dissolving company in a merger is a closely held company.

   Section 400 TCA 1997 imposes a surcharge on undistributed investment and rental income of a close company. Where a dissolving company has income subject to the close company surcharge in the period before a merger but has not yet made a distribution before it takes place, the successor company should be permitted to step into the shoes of the transferor company for the purposes of making a distribution within the 18-month time period, stipulated in section 434(2) TCA 1997.

7. **Proportionality of Penalties and Interest:** Tax legislation and regulations contain numerous fixed penalties. Fixed penalties regularly apply to breaches of administrative requirements in tax law. The level of the penalty can be substantial, amounting to €3,000 or €4,000 for each instance of non-compliance, even when there is no loss of tax revenue to the Exchequer. The PAYE regulations contain several of these fixed penalty provisions.

   We believe it is now timely and necessary to examine the proportionality of fixed penalties, given the introduction of the new 'real-time' PAYE regime for employers from 1 January 2019. As Revenue continue to increase their focus on employers' compliance with PAYE obligations, the cumulative effect of these measures could result in the build-up of significant costs for taxpayers, which is disproportionate to any errors made, at a time when they are grappling with a new system.

   Interest is charged on the late payment of tax in Ireland at annualised interest rates of 8% and 10%, far in excess of the Irish mean overdraft rate[5]. In contrast, HMRC in the UK currently imposes interest at a rate of 3% (i.e. 2.5% above the current Bank of England Base Rate of 0.5%). In the Institute's view, the rate of interest imposed on the late payment of tax should reflect the actual cost to the Exchequer and be tracked to prevailing ECB market rates.

   It is unfair that taxpayers must pay for the delays, that they are not responsible for, which have accumulated in the tax appeal system at very high interest rates, should they prove to be unsuccessful with their appeal. Taxpayers are also being prevented from appealing assessments where they do not believe tax is due, because of the fear of these high interest charges. This impacts on their rights as taxpayers to natural justice.

   Statutory interest should be "stopped" on cases that are in our congested appeals process until at least such time as the current levels of congestion have been dealt with and taxpayers have a clear understanding of the time line for a decision.

8. **VAT Deferral Licence for Importers:** With the UK indicating that it may leave the European Single Market and Customs Union as part of the Brexit process, we believe the State should

[5] The Irish mean overdraft interest rate was 2.4% in 2016.

consider introducing an Irish VAT deferral licence regime for importers, similar to the regime that currently operates in the Netherlands. The ability to defer the time at which import VAT must be accounted for without affecting the transportation of the goods, would provide a clear cash flow benefit to importers in Ireland.

9. **Establish a Brexit working group to consider the potential tax implications:** Brexit will bring, not only customs and excise and VAT implications but also, knock-on effects for direct taxation. Irrespective of the outcome of the EU/UK negotiations, we could begin the work now to identify and consider the tax policy of such issues. Therefore, we recommend establishing a Working Group between practitioners and the Revenue Commissioners to discuss and explore such matters, similar to the forum that was set up at the time of the introduction of the new Companies Act in 2014, which proved useful in identifying how Irish tax legislation needed to be updated to reflect the new Act.

1. Key Employee Engagement Programme (KEEP)

We welcome the introduction of the new KEEP share scheme, which provides an opportunity for SMEs to compete with listed companies, to attract and retain key employees. However, KEEP contains six limitations which could significantly impact the feasibility of the scheme and ultimately, its success in achieving the policy aim of helping SMEs to attract and retain talent.

These are:

a) The potential impact of the remuneration test on high growth companies in start-up mode
b) The definition of a ‘qualifying individual’
c) The definition of a ‘holding company’
d) The requirement for new issued shares
e) Creating liquidity in KEEP shares
f) Where a SME undergoes a reorganisation
g) The need for agreed approaches to share valuations and the development of ‘safe harbours’

a) *The potential impact of the remuneration test on high growth companies in start-up mode*

Undoubtedly, it is challenging to draft measures for a broad population of SMEs in Ireland which includes companies still in start-up mode with high growth potential (but limited cash resources) and more mature companies (possibly of longstanding) which are owned by a family or related persons. These are very different types of company, but both have the commercial need to attract and retain key individuals, whilst competing for that talent with listed companies that can offer equity-based awards.

The design of the third part of the remuneration limits[6], which requires that KEEP share options must not exceed 50% of the employee’s annual emoluments, appears to restrict high growth companies in start-up mode availing of the scheme. This is particularly the case for companies in the hi-tech sector. To preserve cash in the start-up phase of such companies, pay practices have developed which often result in modest cash remuneration paid to key employees in tandem with share-based awards.

We suggest that, rather than discriminate 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 value limits, such as those included in subparagraph (i) and (ii) of part (d) of 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 award practices.

We suggest therefore that the remuneration test[7] be removed from the KEEP provisions so not to restrict high growth companies in start-up mode availing of the scheme.

[6] See definition of a “qualifying share option”, part (d) (iii) under section 128F (1) TCA 1997
[7] See definition of a “qualifying share option”, part (d) (iii) under section 128F (1) TCA 1997

b) *The definition of a 'qualifying individual'*

Under KEEP, the individual exercising the qualifying share option must be a full-time employee or full-time director of the qualifying company and devote substantially whole of his/her time to the service of that company throughout the entirety of the relevant period.

The current provisions[8] envisage that an individual will be an employee of and carry out duties for a single company. In reality, an individual may hold the office of director or have a formal contract of employment with one group member but their services are available to other group companies. For example, employees may carry our work for the holding company and one or more subsidiaries and devote their time to the qualifying KEEP company within the group, as the business needs dictate.

Furthermore, while the existing legislation provides for the exercise of a KEEP option within 90 days of an employee ceasing employment, there is no provision for continued ownership of the options where the employee works for or transfers to another group company.

We believe an employee, who transfers to a group company should be permitted to retain their KEEP options that qualify for CGT treatment, provided all the other conditions of section128F TCA 1997 are satisfied and that the manner in which employee relationships work within SMEs should be accommodated within the scope of the legislation.

c) *The definition of a 'holding company'*

The scheme recognises that an employee may acquire KEEP shares directly in a company, which is engaged in a qualifying trade or acquire shares in a holding company. However, the definition of 'holding company'[9] under the existing legislation makes it practically impossible to give employees KEEP shares where the business corporate structure has a holding company.

Holding companies generally do not only own shares (i.e. a holding company can hold money in a bank account to discharge its running expenses or advance a loan to a subsidiary) and are not always the 100% parent company, which is what is required under the existing provision to qualify for KEEP.

A holding company often oversees and manages the activities of subsidiaries and in doing so, may charge and recoup management expenses whether in the course of the conduct of a services trade or otherwise. This means that the assets of a typical holding company do not consist wholly of the holding of shares that comprise the entirety of the issued share capital of another company, as is required by the existing provisions.

We recommend that the definition of a holding company under KEEP should be amended to adopt a similar approach to Revised Entrepreneur Relief, where a holding company *"means a company whose business consists wholly or mainly of the holding of shares of all companies which are its 51 per cent subsidiaries"*[10] and which provides for a qualifying group.[11]

[8] See definition of a 'qualifying individual' in section 128F (1) TCA 1997'
[9] Section 128F (4) TCA 1997
[10] Section 597AA (1) (a) TCA 1997
[11] See definition of a 'group' and 'qualifying group' in section 597AA (1) (a) TCA 1997

d) *The requirement for 'new' issued shares*

A qualifying share option under the KEEP scheme requires that "*new ordinary fully paid up shares*"[12] are provided to a qualifying individual when the option is exercised. However, in many cases, an SME may wish to use shares set aside, for example, 5% or 10% of the shares in the company, as a pool of shares that would be available to key employees as they are recruited.

By removing the requirement to have new shares, this would allow a company to appropriate and deliver existing shares to qualifying individuals. Delivery of existing shares to employees upon exercise of an option could also be appropriate in circumstances where an employee leaves the company and is replaced by a new recruit (e.g. where existing scheme shares could be bought back from the departing employee by the SME).

It is common in the case of other share schemes that a company may choose for commercial reasons to manage the delivery of shares to eligible employees under a trust arrangement or they may choose to set aside a pool of shares to be made available as key employees are recruited. Such flexibility could be permitted under the KEEP if existing rather than new shares qualified under the scheme.

We suggest that this flexibility of delivering existing shares could be permitted by deleting the reference to 'new' in part (a) of the definition of a qualifying share option under section 128F TCA1997.

e) *Creating liquidity in KEEP shares*

A substantial challenge for SMEs wishing to operate a KEEP scheme will be to provide assured liquidity for their shares, as not all these companies are likely to be sold or listed on a stock exchange. SMEs may need to consider how to create a market in the absence of a third-party exit, such as the owner, other employees or the company itself buying back the shares from an employee.

In general, a company buyback of shares is treated as income rather than capital. However, section 176 TCA 1997 provides that CGT treatment can apply to a buyback or redemption of shares if it is considered to be for the benefit of the trade. The KEEP provisions include a *bona fide* commercial reasons test[13] to be met as part of the scheme's requirements. We therefore ask that that section 176 is amended to reflect that a buyback of shares acquired under KEEP can be expected to meet the conditions for the benefit of the trade test in the section.

In addition, KEEP does not impose an ownership or holding period for the shares on the employee once the shares have been acquired under the terms of a KEEP scheme. Section 177(6) TCA 1997 should be amended to align its application with the understood policy intent of the KEEP provisions which is not to impose a post-acquisition holding period on scheme shares. The section should also clarify that CGT treatment can apply to KEEP shares acquired by the employee (the 'vendor' for the purposes of section 177). This subsection already includes

[12] See part (a) of the definition of a 'qualifying share option' in section 128F (1) TCA 1997
[13] Section 128F(11) TCA 1997

provisions related to approved employee share schemes which, unlike KEEP, impose certain holding period requirements on the scheme shares, once acquired by the employee.

An ancillary amendment should also be made to section 178 TCA 1997 to remove the requirement to substantially reduce shareholder ownership where the shares have been acquired under KEEP. As outlined above, it is foreseen that many SMEs will need to put in place redemption or buyback mechanisms to provide liquidity in scheme shares to employees. An amendment to section 178 is necessary to allow the SME to buyback employee KEEP shares in tranches and not be required to repurchase the entire employee's holding at one time.

Furthermore, KEEP shares should be excluded from the requirement under section 178(1) TCA 1997 to have a substantially reduced shareholding immediately following the buyback/ redemption.

We believe that without the amendments outlined above, KEEP will be unworkable for many companies who will not be in a position to offer listed shares e.g. on ESM or a third-party sale event to provide liquidity in their shares.

f) *Where a SME undergoes a reorganisation*

The current KEEP legislation does not provide for the continuing availability of the relief in the event that the SME (e.g. holding company and its subsidiaries) undergoes 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,[14] which seeks to address reorganisations[15] that might affect the entitlement of a qualifying individual and a qualifying company to meet the scheme requirements.

g) *The need for agreed approaches to share valuations and the development of 'safe harbours'*

One of the most significant practical issues that will face SMEs implementing KEEP will be to achieve as much certainty as possible that the valuation conditions have been met (e.g. that the share option price is not less than the market value of the shares at the date of grant).

The valuation of shares can be a complex exercise; especially for non-listed SMEs and valuation costs can place a significant burden on smaller enterprises in delivering share awards employees.

Revenue published guidance[16] on the operation of KEEP in April. However, in addition to providing general guidance on the KEEP provisions, we believe comprehensive guidance on share valuations is also required to support companies adopting the scheme. We believe this

---

[14] Section 597AA (1) (b) (i) and (ii) TCA 1997
[15] Corporate reorganisations under section 586 and 587 TCA 1997
[16] Chapter 9, Share Schemes Tax and Duty Manual

would make the process more accessible, easily understood and capable of implementation without undue duplication of effort and cost.

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.

- Agreeing that, for the purposes of meeting a market value requirement for an employee share, a market value determined by reference to:

  - a third-party share valuation event (such as investment by a private equity or angel investor),
  - a valuation exercise that meets the safe harbour requirements described above, or
  - standard share valuation exercise

  that has occurred within the previous 12 months can meet the tax requirements for establishing the market value of the shares, provided there was no material change in the circumstances of the company.

Institute Recommendations:

To address the limitations of the KEEP scheme, we recommend the following amendments to the existing legislation:

- The third part of the remuneration test requires KEEP share options to be below 50% of the employees' annual emoluments, which is restricting high-growth companies in start-up mode availing of scheme. To preserve cash in the start-up phase of such companies, the cash element of a key employee's remuneration package is often modest, with share options forming the majority of the package being paid. Share options may very well exceed 50% of annual emoluments in these circumstances; therefore, the third element of the remuneration test cannot be met and KEEP cannot be used.

- While we acknowledge the role of remuneration limits in a share option regime, they should be based on absolute values to ensure that high growth companies in start-up mode are not prevented from availing of the scheme.

- The current KEEP provisions envisage that an individual will be an employee of and carry out duties for a single company. However, employees may carry out work for the holding company and one or more subsidiaries or transfer between group companies, as well as devoting their time to the qualifying KEEP company within the group. This will be dictated by business needs. We believe the definition of a 'qualifying individual' should be amended (a) to allow an employee who transfers to a group company to retain their KEEP options (that qualify for CGT treatment), provided all the other conditions of section 128F TCA 1997 are satisfied, and (b) to allow more practical flexibility (particularly in SMEs), so that employees who spend substantial time in the KEEP company will qualify for the relief even where they carry out some duties for other group companies.

- Holding companies generally do not only own shares (i.e. a holding company can hold money in a bank account to discharge its running expenses or advance a loan to a subsidiary) and are not always the 100% parent company, which is what is required under the existing provisions to qualify for KEEP. We recommend that the definition of a holding company under the scheme should be amended to adopt a similar definition to that contained within Revised Entrepreneur Relief where a holding company "means a company whose business consists wholly or mainly of the holding of shares of all companies which are its 51 per cent subsidiaries" and which provides for a qualifying group.

- For commercial reasons, it is common for company share schemes to manage the delivery of shares to eligible employees under a trust arrangement. Furthermore, they will often make available shares for key recruits from a pool of existing shares set aside for that purpose. The flexibility to operate these common and accepted practices is not available under KEEP and that is significantly limiting the use of the regime. To address this gap, the regime should enable existing, as well as new shares, to qualify for use. This could be achieved by deleting the reference to 'new' in part (a) of the definition of a qualifying share option under section 128F TCA1997.

- The provisions of the KEEP scheme do not accommodate the buy-back of shares and this can have significant implications for the liquidity of the business. A substantial challenge for SMEs wishing to operate a KEEP scheme will be to provide assured liquidity for their shares, as not all these companies are likely to be sold or listed on a stock exchange. Section 176 TCA 1997 should be amended to reflect that a buyback of shares acquired under KEEP can be expected to meet the conditions for the benefit of the trade test in that section and consequently, subject to CGT treatment.

- The current legislation does not provide for the continuing availability of CGT treatment if the SME undergoes a corporate reorganisation during the period in which the KEEP share option rights are outstanding. Therefore, we recommend the adoption of similar provisions in KEEP to those contained within the Revised Entrepreneur Relief legislation, which secure the entitlement of a qualifying individual and a qualifying company to meeting the scheme requirements when a reorganisation takes place.

- We believe that agreed 'safe harbour' approaches to share valuation for KEEP purposes should be developed, similar to the approach to valuations adopted under accounting standards. This will ensure the scheme is more accessible, easily understood and capable of implementation without undue duplication of effort and cost to SMEs.

2. Professional Subscriptions

Section 118 TCA 1997 was amended in 2011, so that the payment of a subscription to a professional body by an employer on behalf of an employee is treated as a taxable benefit-in-kind (BIK), subject to PAYE, PRSI and USC.

With the withdrawal of the statutory basis for exemption from BIK from 2011 onwards, professional membership fees are only deductible for tax purposes under the general legislative framework[17] governing the deduction of employment expenses, where the fees are incurred wholly, exclusively and necessarily by an individual in the performance of the duties of his or her employment.

Revenue recently issued a new Manual[18] on the tax treatment of professional subscriptions. Revenue's interpretation in their new Manual appears to apply a stricter interpretation of the "wholly, exclusively and necessarily" test to narrow the range of circumstances in which an employee's professional membership subscription can be paid by their employer without deduction of PAYE, when compared to their previous guidance[19] issued in 2011.

Revenue's new Manual[20] identifies three circumstances in which professional fees will be considered incurred wholly, exclusively and necessarily in the carrying on of an office or employment. The Manual makes it clear that Revenue will only consider the test to be met (so that no BIK is due), if either:

1. Membership of the professional body is a statutory requirement for the role involved;
2. A practising certificate or licence is required to carry out the role; or
3. The role requires a right to plead or be heard before a court/tribunal (and that right is only available through membership of the professional body).

Membership of professional bodies and the necessary adherence to codes of professional conduct, continuous professional development, lifelong learning and knowledge-development are important in the delivery of high quality service and in growing the Irish economy.

Through lifelong learning, professional bodies ensure that their members are highly informed, educated and equipped to deal with the latest developments in their respective specialisms. This ranges from new law and EU Directives, through to the latest technical advances and trends that both the public and industry need to adjust to and for which they absolutely require professional services.

Now, more than ever, the promotion of the highest standards and continuous learning are essential to supporting businesses with international challenges and opportunities, such as Brexit. The skills of our professions in Ireland will be central to this country remaining agile and capable of dealing with change. We need a skilled labour force who are performing at the highest standards of quality, professionalism, knowledge and innovation.

Many State agencies require membership of a professional body as evidence of achieving the necessary high standards of practice. For example, the Central Bank of Ireland require employees of financial institutions to have a level of fitness and probity[21] appropriate for their function. The Central Bank's fitness and probity standards[22] expect banks to satisfy themselves that employees in a controlled function/pre-approved controlled function or minimum competency roles have relevant professional qualifications and ensure that the employees

[17] Section 114 TCA 1997
[18] eBrief No. 04/2018
[19] eBrief No. 19/2011
[20] eBrief No. 04/2018
[21] Part 3, Central Bank Reform Act 2010
[22] Guidance on Fitness and Probity Standards 2017

annually maintain those professional qualifications through continuous professional development.

If such bank employees do not keep their professional qualifications up-to-date each year, then the employer bank will be in breach of their fitness and probity statutory obligations.[23] We understand from members working in banks that Revenue has accepted professional subscriptions paid by an employer on behalf of an employee, as not being taxable, where the employee's role falls within the Minimum Competency Code 2017, while a narrower view has been taken by Revenue regarding controlled/pre-approved controlled function roles, resulting in taxable BIK being imposed on a significant number of these subscriptions.

The Central Bank of Ireland is actively pursuing a policy for increased professionalisation of financial services staff to ensure the highest possible standards within the industry going forward. We believe employer banks should be helped to accomplish this important policy goal and providing a clear statutory exemption for employer paid professional subscriptions would achieve this.

The payment of a professional subscription, and the adherence to the ethical and professional codes of one's membership body, is a clear expression of a desire and commitment to keep professionally informed, educated, connected and knowledgeable and to practice to the highest standards of one's chosen profession. It is a statement of commitment to the highest international standards of practice, that best serve our country and its people.

The specific requirements of the "wholly, exclusively and necessarily" test in section 114 are overly restrictive and make it very difficult for many employees across a wide range of sectors to have their professional membership subscriptions paid by their employer without deduction of PAYE. This is a situation which is at cross purposes with Ireland's need for a skilled labour force who should be encouraged to continue their knowledge development and to perform at the highest standards.

In the best interests of the development and standards of Ireland's professions, we urge that the statutory basis for exemption from BIK is reinstated for professional subscriptions. This could be achieved by amending section 118 (5E) (c) to reactivate the relief.

Institute Recommendations:
In the best interests of the development and standards of Ireland's professions, we urge that the statutory basis for exemption from BIK under section 118 (5E) TCA 1997 is reinstated for professional subscriptions.

3. Special Assignee Relief Programme (SARP)

SARP provides income tax relief to a particular group of employees who are assigned to work in Ireland from another group company abroad. The aim of the relief is to reduce the cost to employers of assigning skilled individuals in their companies from abroad to take up positions in the Irish-based operations, in order to facilitate the expansion of the business in Ireland.

[23] Section 21 Central Bank Reform Act 2010

Under the current SARP legislation,[24] an employer is required to notify the Revenue that an employee will be eligible for the relief within 30 days of that employee arriving in Ireland to perform his/her employment duties.

We are aware of cases where the strict application of the 30-day rule has resulted in the refusal of the relief to eligible employees, in circumstances where the employer has not sent the notice within the 30-day period. We believe the application of a rule which makes a relief dependent on the actions of a third party (the employer) is at odds with the basic principle that a relief is personal to the individual and ultimately must be claimed on the individual's statutory tax return.

There is no obligation on the individual to claim SARP relief during the course of the year. Like any other relief, SARP can be (and in many cases, is) claimed by way of refund at the end of the tax year.

The present time limit of 30 days takes little account of practical realities. When a new assignee arrives in Ireland, multiple practical issues need to be addressed. Often, the new assignee is taking over a senior role in the company, in addition to organising housing and perhaps schools for their children. The assignee must also obtain a PPS number. All of this takes time, and in such circumstances, the SARP notice can be inadvertently overlooked or delayed by the employer.

Refusing the relief on the basis that the employer has not submitted the notice within 30 days can result in a financial penalty that is entirely disproportionate. For example, where an individual is earning €500,000, the effective penalty would be as much as €255,000 for something that may effectively be outside of their control. This effectively creates a 'penalty', which is not provided for in the legislation.

We understand from Revenue that the information is required for statistical purposes. However, there is a separate statutory requirement[25] for employers to make an annual return of the employees qualifying for SARP, which requires significantly more detail than the notice required within 30 days. The 30-day requirement was inserted by an amendment which became effective from 1 January 2015. There is no indication that the absence of this procedure in prior years critically affected the operation of the relief, nor indeed that the operation of the relief in the latter years has been significantly enhanced by its existence.

To address this issue, we would recommend removing the 30-day requirement from the part of the legislation that defines a 'relevant employee'[26] and perhaps, place it elsewhere in the section, for example, within the reporting provisions.[27] This would break the link, which creates the automatic 'penalty' for the employee referred to above, arising from an employer failing to lodge the notice within 30 days of arrival.

Alternatively, the current time limit of 30 days could be extended to 90 days, which would be a more adequate timeframe to allow for the multiple issues that need to be addressed first when a

[24] Section 825C (2A) (e) TCA 1997
[25] Section 825C (10) TCA 1997
[26] Section 825C (2A) (e) 1997
[27] Section 825C (10) TCA 1997

new assignee arrives in Ireland, including the employee obtaining a PPS number. Any amendment that would have the effect of extending the notice period would be entirely tax neutral, as changing the notice period would not result in any actual tax cost to the Exchequer.

Institute Recommendations:

Under existing SARP legislation, an employer is required to notify the Revenue that an employee will be eligible for the relief within 30 days of that employee arriving in Ireland to perform his/her employment duties.

When a new assignee arrives in Ireland, multiple practical issues need to be addressed, which can result in the SARP notice being inadvertently overlooked or delayed by the employer, resulting in the refusal of the relief. Refusing the employee relief on the basis that the employer has not submitted the notice on time can result in a financial penalty that is entirely disproportionate for something that is effectively outside the control of the employee.

To address this, we recommend removing the 30-day notice requirement from the part of the legislation that defines a 'relevant employee' for SARP purposes.

Alternatively, the current time limit of 30 days could be extended to 90 days, which would be a more adequate timeframe to allow for the multiple issues that need to be addressed first when a new assignee arrives in Ireland.

4. Revised Entrepreneur Relief

There are issues with the current Revised Entrepreneur Relief legislation[28] (as interpreted in Revenue's Operational Manual),[29] which are limiting its use in three significant situations:

a) where a dormant company is present in the group;
b) where the group is party to a joint venture;
c) where the group/company holds investments and leasing of trading premises.

a) *A dormant company is present in the group*

According to Revenue's Operational Manual, Revised Entrepreneur Relief is not available in situations where a dormant company is present in the group. This is a very significant limitation to the relief because a subsidiary company can commonly become dormant over time. This might happen where the company has ceased to trade or where the trade has been transferred to another group company and the company cannot be wound up or liquidated due to company law legislation for the protection of creditors. A group company could have dozens of trading subsidiaries, out of which only one is dormant, yet the relief is completely denied to the entrepreneur in this situation.

[28] Section 597AA TCA 1997
[29] Revenue Operational Manual 19.06.02B – Capital Gains Tax Revised Entrepreneur Relief

b) *The group is party to a joint venture*

One of the conditions of Revised Entrepreneur Relief is that all subsidiaries must be minimum 51% subsidiaries for the relief to apply. If a group is party to a joint venture and holds less than 51% of the joint venture company, this again can result in full denial of the relief.

c) *The holding of investments and leasing of trading premises*

When either the holding of investments or the leasing of trading premises takes place within a group company, this can exclude an entrepreneur from claiming Revised Entrepreneur Relief.

In the current low interest rate climate, it is common for businesses to invest cash generated from trading activities rather than leaving it on deposit – this results in them holding investments. Similarly, many companies who expect high growth in the short-term will often buy or lease premises that exceed their current needs but will meet their future expectations. These businesses will occasionally rent the excess space out to a third party until they need to expand into the space. Both these activities are efficient from a commercial perspective. They improve cash flow, while utilising the companies' assets to their full potential. Yet they can impact on this important tax relief.

We would ask that consideration be given to either apportioning relief in circumstances where there is a mix of investments and qualifying activities (similar to the retirement relief provisions[30]) or to allowing the relief in full where non-trading activities are below a certain *de minimus* level. This is the approach adopted in the UK, where Entrepreneur's Relief is available on the sale of shares in a holding company, provided non-trading activities in the group do not comprise of more than 20% of the group's overall activities.

Institute Recommendations:

There are issues with the current Revised Entrepreneur Relief legislation (as interpreted in Revenue's Operational Manual), which are limiting its use in three significant situations and creating barriers to investment. These are:

- where a dormant company is present in the group;
- where the group is party to a joint venture;
- where the group/company is holding investments and/or leasing trading premises.

We recommend that section 597AA TCA 1997 is amended to remove restrictions to Revised Entrepreneur Relief in situations where a group holds a dormant company or has a shareholding in a joint venture company of less than 51%.

The legislation should also be amended to allow for either an apportionment of relief when a company holds investments or earns rental income or alternatively full relief to be claimed provided such activities fall below a certain level.

[30] Section 598 TCA 1997

5. The potential impact of section 135 TCA 1997 on the sale of family businesses and SMEs

Finance Act 2017 inserted a new provision into section 135 TCA 1997 which is impacting the passing on of a wide range of family businesses and management buy-outs (MBOs) involving 'close companies.'[31]

The new section 135(3A) TCA 1997 is an anti-avoidance provision which applies to situations involving close companies. However, the vast majority of companies in the SME sector are 'close companies', so the impact of the provision has been extensive.

Subsection 3A now imposes income tax treatment on selling shareholders in any situation where Revenue take the view that a company has retained profits in excess of the company's commercial needs, rather than allowing those shareholders to obtain capital gains tax (CGT) treatment. Unlike other anti-avoidance provisions in Irish tax legislation, section 135 TCA 1997 does not include a *bona fide* test. It is normal practice in targeted anti-avoidance legislation to exclude transactions effected for *bona fide* commercial reasons, so as to avoid any unintended consequences that could arise as a result of the legislation.

Considerable concern exists regarding the potential effect of section 135 on scaling up and passing on of businesses in the SME sector, in the absence of a statutory *bona fide* test. Feedback from our members is that the provision is causing uncertainty in circumstances where owners of family businesses or SMEs are implementing transactions, notwithstanding the existence of Revenue guidance.[32]

Why it is important that businesses can be passed on to the next generation

There comes a stage in the life of many businesses when they reach the limit of their potential with the current ownership structure and funding. If the business is not sold at the point when the owners are ready to sell, then it is effectively left in the hands of reluctant owners and can stagnate. In most cases, the sale or part sale of a company is a positive decision. The business does not stop with the sale, it simply continues with new funding and under a new ownership and governance structure. The purchase and sale of businesses is an indication of health in an economy and should be encouraged. It provides a vibrant environment for investment and creates confidence in the business ecosystem.

In January, Revenue published guidance[33] on section 135 which includes an example to illustrate the situation the new subsection 3A is targeting.

Example 3.3 states:

"Barry and Bob run a bakery and own 100% of the shares of BB Bakery Limited ('BBBL') equally. The company has built up cash reserves over the years and has retained profits of €1,400,000. Bob wishes to exit the business and have BBBL buyout his shares. However, rather than have BBBL purchase his shares directly, where the buy-back would trigger an

---

[31] Section 430 TCA 1997 defines a close company as an Irish resident company that is under the control of 5 or fewer participators, or by participators who are directors, whatever the number.
[32] eBrief 03/18: Tax and Duty Manual 06.02.05 – Section 135 TCA – Anti-avoidance, Part 6/Chapter 2, January 2018
[33] eBrief 03/18: Tax and Duty Manual 06.02.05 – Section 135 TCA – Anti-avoidance, Part 6/Chapter 2, January 2018

income tax charge for Bob, Barry arranges to set up a new company ('NewCo') to purchase the shares. NewCo purchases Bob's shares for €700,000. The consideration in respect of the acquisition is left outstanding. BBBL subsequently pays a dividend of €700,000 to NewCo which NewCo uses to pay the deferred consideration to Bob.

The provisions of section 135(3A) TCA apply to treat the payment of €700,000 to Bob as a distribution made by BBBL to Bob on which Bob is subject to income tax. Barry has entered into an arrangement to secure the payment of consideration to Bob from the assets of BBBL and the assets of BBBL have been depleted by €700,000. Previously Bob may also have sought to claim retirement relief in relation to the €700,000 payment received.

It should be noted that had Barry sourced the payment from his own resources then Bob would have been subject to CGT on the disposal of his shares."

In Example 3.3 above, the provision seeks to treat the payment as an income tax distribution, preventing Bob from claiming CGT treatment and retirement relief on his exit from the business, where the payment for his shares has been sourced from BBBL. Revenue's rationale for challenging this disposal is not expressly stated in the example but outlined further on in the guidance, where it is confirmed that if a selling shareholder "*in contemplation of the sale … retains profits in excess of the company's commercial needs, rather than taking a dividend,"*[34] then it is subject to income tax rather than CGT.

It is unclear why CGT is not the appropriate tax treatment in the circumstances set out in Example 3.3, given Bob is disposing of his interest in the business and incurring the genuine economic consequences of that disposal.

If Bob in the given example was a sole shareholder, he could simply liquidate the company, obtain CGT treatment on the proceeds returned to him, and claim retirement relief. The application of subsection 3A could arguably encourage Bob and Barry to alter their approach and decide to liquidate BBBL to qualify for CGT treatment, which would unfortunately necessitate the closing of the bakery, the redundancy of its employees, and the local economy losing the benefit of the future output from that business. It is unfortunate that shareholders of SMEs may now consider liquidating a viable business, rather than passing it on to the next generation who can expand and grow it into the future.

Exiting the business via a MBO

Revenue's guidance[35] on section 135 also includes an example of a MBO. A typical MBO involves the management team of a company, setting up a new company to purchase the company (the target) from the existing shareholders. Generally, the funds used by the management team to buy-out the owner are initially sourced from a bank/equity house, and that bank loan is then repaid from dividends paid up from the target company to the new company. The purchase price is essentially being funded from the target company's resources, as the new company does not have any assets (other than the shares it has acquired in the target company), nor any income stream (other than from the target company) and in most cases a management team will not have the sufficient personal resources to fund the purchase.

[34] Example 3.4.2, Tax and Duty Manual 06.02.05 – Section 135 TCA – Anti-avoidance, Part 6/Chapter 2, January 2018
[35] Tax and Duty Manual 06.02.05 – Section 135 TCA – Anti-avoidance, Part 6/Chapter 2, January 2018

Revenue guidance confirms that *"… subsection 3A only has application where a member enters into the relevant arrangements and does not apply to bona-fide financing arrangements entered into by a purchaser. Therefore, whereas a bona fide MBO may involve the provision of financing out of the assets of the target company, the provisions of section 135(3A) TCA will not apply unless the member has engaged in an arrangement to ensure that the consideration is met from the assets of the company."*

However, as there is no statutory *bona fide* test in the legislation, it is a matter therefore for Revenue to decide which transactions will or will not satisfy the *bona fide* motive test.

Banks and equity houses will often only provide funds where appropriate security is in place and will insist on knowing how the funds lent will be repaid. As outlined above, in MBO situations, repayments are typically from funds sourced from the target company, by way of a dividend. Providing security to the bank will necessarily involve some action on the part of the target prior to completion of the sale.

For example, the Companies Act 2014 prohibits a company from granting financial assistance in connection with the acquisition of its own shares unless a Summary Approval Procedure (SAP) is completed. As the SAP requires the members to pass a resolution approving the financial assistance, the exiting shareholder would necessarily be involved in those arrangements. There is a risk therefore, in the absence of a statutory *bona fide* test, that complying with the SAP procedure could result in *bona fide* MBOs falling foul of the new provision, notwithstanding the existence of Revenue guidance.

It is arguable there should be no distinction between a MBO and a family member taking over the business in any case, as the objective in both scenarios is for the business to survive and continue into the future.

Liquidity arrangements for shares in private companies

Where a closely held private company has shares held by employees, the shareholders of the company may put arrangements in place to allow a connected company to purchase shares of exiting employees on agreed terms. The connected company used as the share acquisition vehicle is typically funded by the employer company. It acts as a type of warehouse to provide liquidity in the shares upon agreed terms, in circumstances where shareholders have agreed to have a pool of shares available for employee awards. It also facilitates timely purchase of shares from exiting employees as there can be greater legal complexity associated with buyback/redemption of shares at a particular point in time.

For example, senior management who were required to take an 'equity stake' in their employer company may hold small shareholdings in the company and now wish to exit. They are not eligible for retirement relief or entrepreneur relief on capital gains arising on the share disposals. These arrangements provide a market (liquidity) in the shares which would not otherwise be available for shares in a private company.

The employees have the assurance that they will be able to sell their shares upon departure from the company, whether upon termination, leaving to take up another position or retirement. The remaining shareholders in the company, having agreed to make a pool of shares available for employees, do not have to manage fluctuations in their respective holdings and have provided a mechanism to acquire shares from exiting employees in an orderly manner.

Measures taken by private companies to provide liquidity in their shares, by putting in place buy-out arrangements for exiting employees is wholly aligned with the wider policy objective of encouraging share-based remuneration in private companies and SMEs. Such arrangements should not be expected to be within scope of section 135 (3A) where the sale and purchase of the shares is for *bona fide* commercial reasons.

We know that SMEs form the backbone of the Irish economy. They account for 99.8% of enterprises in Ireland and 69% of the employment in Ireland,[36] with family businesses accounting for more than 40%[37] of all private employment. The new section 135 (3A) is causing uncertainty for these companies, which is delaying and preventing the scaling of many businesses, at a time when they are already facing significant Brexit challenges.

In our view, inserting an exclusion for *bona fide* commercial transactions into section 135 TCA 1997 would provide the necessary level of certainty to taxpayers and their advisers when implementing transactions involving the disposal of shares in a company with cash on its balance sheet.

A *bona fide* test is included in the anti-avoidance provision section 817 which can treat certain payments arising on disposal as a distribution. As section 817 operates to apply distribution treatment in certain scenarios we suggest that a *bona fide* test could be applied to subsection 3A along similar lines.

The bona fide test in Section 817(7) reads as follows:

"*This section shall not apply as respects a disposal of shares in a close company by a shareholder where the disposal was made for bona fide commercial reasons and not as part of a scheme or arrangement the purpose or one of the main purposes of which was the avoidance of tax.*"

Institute Recommendations:

Finance Act 2017 inserted a new subsection 3A into section 135 TCA 1997. The policy intent at the time of introduction was *"to deal with a number of specific tax avoidance schemes which have been uncovered by the Revenue Commissioners."*[38]

However, unlike other targeted anti-avoidance measures in Irish tax legislation, section 135 TCA 1997 does not include a *bona fide* test, which is normally used to prevent unintended consequences from arising.

The effect of the new subsection 3A is to impose income tax (rather than CGT) treatment on selling shareholders in any situation where Revenue take the view that a company has retained profits in excess of the company's commercial needs. Without a *bona fide* test to target this

[36] CSO Statistical Yearbook of Ireland 2017, 20 October 2017
[37] The Irish Times "There's business, and then there's the family business", 27 February 2017
38 Minister Paschal Donohoe, T.D. at the Committee Stage debate on Finance Bill 2017, 8 November 2017

measure, it is having a significant impact on succession within family businesses, management buy-outs (MBOs) and arrangements to provide liquidity in shares for employees involving 'close companies'.

In our view, inserting an exclusion for *bona fide* commercial transactions into section 135 TCA 1997 would provide the necessary level of certainty to taxpayers when considering their scaling options.

6. Merger of a closely held company and interaction with the close company surcharge

Finance Act 2017 inserted a new chapter[39] in tax legislation to reflect mergers and divisions effected under Companies Act 2014. Broadly, it ensures that certain filing, reporting and payment obligations of the transferor company, transfer to the successor company following a merger or division.

A technical point has now arisen in circumstances where the dissolving company is a closely held company which has not yet been considered in tax legislation. Section 400 TCA 1997 imposes a 20% surcharge on the investment and rental income of a close company,[40] which is not distributed to its shareholders within 18 months of the end of the company's accounting period.

The issue arises therefore where a dissolving company has income which is subject to the close company surcharge in the period(s) before the merger, but it has not yet made a distribution before the merger has taken place and it cannot make a distribution post-merger.

The successor company should be permitted to step into the shoes of the transferor company for the purposes of making a distribution within the 18-month time period stipulated in section 434(2) TCA 1997, for example, by reference to the distributable reserves position of the transferor company at the time of the merger.

Institute Recommendations:

Finance Act 2017 amended Irish tax legislation to reflect mergers and divisions, so to ensure that the successor company can step into the shoes of the transferor company for certain filing, reporting and payment obligations following a merger or division. A technical point has now arisen where the dissolving company in a merger is a closely held company which has not yet been considered in tax legislation.

Section 400 TCA 1997 imposes a surcharge on undistributed investment and rental income of a close company. Where a dissolving company has income subject to the close company surcharge in the period before a merger but has not yet made a distribution before it takes place, the successor company should be permitted to step into the shoes of the transferor

[39] Part 21, Chapter 2 TCA 1997
[40] Section 430 TCA 1997 defines a close company as an Irish resident company that is under the control of 5 or fewer participators, or by participators who are directors, whatever the number.

company for the purposes of making a distribution within the 18-month time period, stipulated in section 434(2) TCA 1997.

7. Proportionality of Penalties and Interest

The Institute fully appreciates the rationale for imposing penalties and charging interest on late filings. However, there are two important areas where we believe the level of sanction imposed is disproportionate to any error made.

a) Fixed penalties

Tax legislation and regulations contain numerous fixed penalties. Fixed penalties regularly apply to breaches of administrative requirements in tax law, such as, notifications to Revenue, invoicing and the maintenance of books and records. The level of the penalty can be substantial, amounting to €3,000 or €4,000 for each instance of non-compliance, even when there is no loss of tax revenue to the Exchequer.

The PAYE regulations contain several of these fixed penalty provisions. In our view, the matter of proportionality of penalties is particularly important now, in light of the introduction of the new 'real-time' PAYE regime for employers, beginning next January – a transition that will undoubtedly be very challenging for taxpayers.

Often, taxpayers can be completely unaware that they have breached their tax obligations and liable to a penalty. For example, one of the lesser-known requirements in the PAYE regulations is that all employers are required to maintain a Register of Employees at their business premises. This register must include the name and address of each employee, the date an employee commenced/ ceased employment and it must be available to Revenue for inspection. Employers who fail to maintain this register (or a copy of it) at their business premises can be liable to a penalty of €4,000, notwithstanding that their tax adviser or payroll agent may already hold this information.

Another example is the €3,000 fixed penalty that can be imposed on an employer who does not notify Revenue when taking on a new employee either by submitting a P45 from their previous employment or by submitting a P46 (Notification to Revenue of particulars of a new employee for whom a Tax Credit Certificate (P2C) is required). In addition to this, if the employer is a company, then the Company Secretary can be liable to a further penalty of €4,000 for each breach of this requirement.

We have been informed of a case where Revenue sought fixed penalties of €14,000 from a jointly assessed couple, who were the sole employees and directors of their own company, on the basis that they did not have a register of their (two) employees and a P45/P46 had not been submitted on commencement of their employment with the company. These penalties were imposed as part of a Revenue audit, notwithstanding that the couple had, otherwise, been given a clean bill of health on their tax affairs.

The cumulative effect of these measures is that taxpayers who may have no outstanding tax liability can be subject to significant penalties.

In our view, the level of fixed penalties can often be disproportionate to the errors to which they relate. We believe that the penalty rates in legislation and regulations should be re-examined to ensure that they do not result in overly harsh treatment of taxpayers who make innocent mistakes.

We have included a summary of fixed penalties in the Taxes Consolidation Act 1997 and the offence to which they relate at Appendix I for illustrative purposes. There are also a significant number of fixed penalties applying to offences under the VAT Act, CAT Act and stamp duty legislation. For example, if any of the stamp duty levies imposed on cash cards, debit cards, credit card accounts, charge cards, life insurance premiums, pension schemes and banks remain outstanding, current legislation[41] imposes a fixed penalty of €380 a day for each day the levy remains unpaid (in addition to interest on late payments of tax), which equates to €138,700 a year, regardless of the levy payable.

We believe it is now timely and necessary to review fixed penalties imposed under Irish tax legislation, as new PAYE regulations will be drafted over the coming months in preparation for the new real-time reporting regime commencing next year. As Revenue continue to increase their focus on employers' compliance with PAYE obligations, the current penalty regime could result in significant costs for taxpayers who are otherwise broadly compliant with their tax obligations.

b) Interest on delayed payment of tax

Interest is charged on the late payment of tax in Ireland at annualised interest rates of 8% and 10%, far in excess of the Irish mean overdraft rate, which was 2.4%[42] in 2016. Indeed, Irish stamp duty legislation[43] imposes an annualised interest rate of 30% on the failure to deliver a statement for certain payments of interest that are re-characterised as distributions.

In contrast, HMRC in the UK currently imposes interest at a rate of 3%, i.e. 2.5% above the current Bank of England Base Rate of 0.5%.[44] In applying the UK interest penalty regime the rate applied by HMRC is tracked at 2.5% above Bank of England base rate.

This is an issue that the Institute has raised on a number of occasions in the past but continues to be challenging for taxpayers. It is right and proper that interest should be imposed to recompense the Exchequer for the time delay in receiving any underpayment of tax and provide a level playing field for taxpayers who do not pay on time. However, current high levels of interest charged on the late payment of tax in Ireland far outweigh the cost to the State and, in some cases, are causing considerable hardship.

Institute Recommendations:

- We believe it is now timely and necessary to examine the proportionality of fixed penalties, given the introduction of the new 'real-time' PAYE regime for employers from 1 January

[41] Part 9, Stamp Duties Consolidation Act 1999.
[42] National Competitiveness Council Report: Cost of Doing Business in Ireland 2017, June 2017, p. 48
[43] Section 126 (7), Stamp Duties Consolidation Act 1999
[44] http://www.bankofengland.co.uk/Pages/home.aspx

2019. As Revenue continue to increase their focus on employers' compliance with PAYE obligations, the cumulative effect of these measures could result in the build-up of significant costs for taxpayers, which is disproportionate to any errors made, at a time when they are grappling with a new system.

- Interest is charged on the late payment of tax in Ireland at annualised interest rates of 8% and 10%, far in excess of the Irish mean overdraft rate. In contrast, HMRC in the UK currently imposes interest at a rate of 3% (i.e. 2.5% above the current Bank of England Base Rate of 0.5%). In the Institute's view, the rate of interest imposed on the late payment of tax should reflect the actual cost to the Exchequer and be tracked to prevailing ECB market rates.

8. VAT Deferral Licence for Importers

In light of Brexit, consideration could be given to introducing a VAT deferral licence regime for importers, should the UK leave the European Single Market and Customs Union. The importation of goods into Ireland from outside the EU is a taxable event for Irish VAT purposes and Irish VAT must be paid at the time of importation.

The Netherlands has introduced a special import VAT deferral regime (known as an Article 23 licence) for taxpayers with non-EU imports, which results in a cash flow benefit for them. An 'Article 23 licence' in the Netherlands allows a business to account for the VAT on imported goods in its Dutch VAT return under the reverse-charge mechanism, instead of paying the import VAT at the time of importation. The ability to defer the time at which import VAT must be accounted for without affecting the transportation of the goods, provides a clear cash flow benefit to importers in the Netherlands.

In general, the following conditions must be fulfilled to apply for the VAT deferral licence under the Dutch VAT system:

- the applicant must be resident or have a permanent establishment or a fiscal representative in the Netherlands;
- the applicant must import goods on a regular basis and
- the applicant must keep clear administrative records of the imported goods.

Institute Recommendation:

With the UK indicating that it may leave the European Single Market and Customs Union as part of the Brexit process, we believe the State should consider introducing an Irish VAT deferral licence regime for importers, similar to the regime that currently operates in the Netherlands. The ability to defer the time at which import VAT must be accounted for without affecting the transportation of the goods, would provide a clear cash flow benefit to importers in Ireland.

9. Establish a Brexit working group to consider the potential tax implications

Brexit will be challenging for all businesses and it will bring, not only customs and excise and VAT implications but also, knock-on effects for direct taxation. Even though the final Brexit package has yet to be brokered, with still many unknowns, there are some tax issues that we can reflect on now.

Take for example, the availability of group relief which currently applies to EU companies. Post-Brexit how will the group structures of companies with a UK subsidiary or an Irish branch of UK company be impacted? Will UK companies effectively be leaving capital gains tax groups following Brexit?

There are also property issues to consider. For example, land in Northern Ireland will no longer be land in the EU and this could create CAT issues when evaluating agricultural relief.

Irrespective of the outcome of the EU/UK negotiations, we could begin the work to identify and consider the tax policy of such issues. This could be achieved by establishing a Working Group between practitioners and the Revenue Commissioners to discuss and explore such matters. A similar forum was set up at the time of the introduction of the new Companies Act in 2014 to identify how Irish tax law needed to be aligned and updated for the provisions in the Companies Act. We recommend that such a forum is established in the coming months, in advance of the UK's exit from the EU in March 2019.

Institute Recommendations:

Brexit will bring, not only customs and excise and VAT implications but also, knock-on effects for direct taxation. Irrespective of the outcome of the EU/UK negotiations, we could begin the work now to identify and consider the tax policy of such issues. Therefore, we recommend establishing a Working Group between practitioners and the Revenue Commissioners to discuss and explore such matters, similar to the forum that was set up at the time of the introduction of the new Companies Act in 2014, which proved useful in identifying how Irish tax legislation needed to be updated to reflect the new Act.

Appendix I

Table of fixed penalties in the Taxes Consolidation Act 1997

Section	**Matter**	**Penalty Amount €**
152	Dividend warrant	200
305	Claiming repayment of tax	3,000
486B	Renewable energy generation investments	4,000
783	Retirement annuities	3,000
886	Obligation to keep records	3,000
887	Electronic records	3,000
889	Third-party returns	3,000
895	Foreign accounts	4,000
896	Offshore products	4,000
898N (9)	Savings Directive	3,000
898N (10)	Savings Directive	19,045 plus 2,535 per day
898Q	Savings Directive	3,000
900	Production of books and records	4,000
902	Request for information	4,000
903	PAYE inspections	4,000
904	RCT inspections	4,000

Section	Matter	Penalty Amount €
904A (8)	DIRT inspections	1,265
904A (9)	DIRT inspections	19,045 plus 2,535 per day
904C (7)	Life assurance companies – inspection of records	1,265
904C (8)	Life assurance companies – inspection of records	19,045 plus 2,535 per day
904D (7)	Investment undertakings – inspection of records	1,265
904D (8)	Investment undertakings – inspection of records	19,045 plus 2,535 per day
904E (6)	Authorised insurers – inspection of records	1,265
904E (7)	Authorised insurers – inspection of records	19,045 plus 2,535 per day
904F (7)	Qualifying lenders – inspection of records	1,265
904F (8)	Qualifying lenders – inspection of records	19,045 plus 2,535 per day
904G (6)	Qualifying insurers – inspection of records	1,265
904G (7)	Qualifying insurers – inspection of records	19,045 plus 2,535 per day
904H (4)	Qualifying savings managers – inspection of records	1,265
904H (5)	Qualifying savings managers – inspection of records	19,045 plus 2,535 per day
904I (6)	Dividend Withholding Tax – inspection of records	1,265
904I (7)	Dividend Withholding Tax – inspection of records	19,045 plus 2,535 per day
904J (7)	PSWT – inspection of records	1,265
904J (8)	PSWT – inspection of records	19,045 plus 2,535 per day
904K (7)	Notices of attachment – inspection of records	1,265
904K (8)	Notices of attachment – inspection of records	19,045 plus 2,535 per day

Section	Matter	Penalty Amount €
905	Inspection of records	4,000
906A	Information from financial institutions	19,045 plus 2,535 per day
907	Application to Appeal Commissioners - Information from financial institutions	19,045 plus 2,535 per day
907A	Application to Appeal Commissioners - Information from third-party	19,045 plus 2,535 per day
917A	Property transfers to non-resident trustees	4,000
917B	Non-resident trustees	4,000
917C	Returns by trustees	4,000
939	Summoning of witnesses by Appeal Commissioners	3,000
987(1)	PAYE regulations	4,000
987(2)	PAYE regulations	3,000
1052 (1)	Request to make returns under Columns 1 and 2 of Schedule 29	3,000
1052 (2)	Request to make returns under Column 3 of Schedule 29	4,000
1054 (2) (a)	Company Secretary – re request under Column 1of Schedule 29	2,000
1054 (2) (b)	Company Secretary – other	1,000
1054 (3)	Company Secretary – re s1053/ s1077E	1,500/3,000
1055	Assisting in making incorrect returns	4,000
1058	Refusal to allow deduction of tax	3,000
1071 (1) (a)	Corporation tax returns	2,000
1071 (1) (b)	Corporation tax returns – Company Secretary	1,000
1071 (2)	Corporation tax returns	4,000

Section	Matter	Penalty Amount €
1071 (2)	Corporation tax returns – Company Secretary	2,000
1073 (1) (a)	New companies	4,000
1073 (1) (b)	New companies – Company Secretary	3,000
1074 (a)	Corporation tax	4,000
1074 (b)	Corporation tax – Company Secretary	3,000
1075 (1)	Corporation tax	3,000
1075 (2)	Corporation tax	3,000
1075 (3) (a)	Corporation tax	4,000
1075 (3) (b)	Corporation tax – Company Secretary	3,000
1091 (3)	Interest warrants	200
1091 (3)	Interest warrants	3,000