The Legal 500 Country Comparative Guides

Ireland: Employee Incentives

This country-specific Q&A provides an overview to employee incentives laws and regulations that may occur in Ireland.

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1. **What kinds of incentive plan are most commonly offered and to whom?**

   In Ireland, the main types of plans offered to employees and directors are share option plans and share plans. The type and size of the business will influence the suitability of a particular type of incentive arrangement.

   An employer may grant participants options to acquire shares at a fixed price as at the date of grant and on exercise of an option the participant is issued shares. Under a share plan, an employer can issue shares to participants upfront so that the participants have the same share rights as the other holders of the same class of shares.

2. **What kinds of share option plan can be offered?**

   There are broadly two types of share option plans which may be offered to employees in Ireland (i) Revenue approved SAYE share option plans and (ii) Non- approved share option plans.

   Revenue approved SAYE share option arrangements generally must be approved in advance by the Irish Revenue, comply with specific conditions to avail of and maintain Revenue approval, be made available to all employees on a similar terms basis and typically provide greater tax efficiency. Un-approved arrangements do not generally require Irish Revenue approval and can be a useful incentive as they may be offered to key employees only but are generally less tax efficient than Revenue approved arrangements.

   Income tax is not generally payable on the grant or the exercise of any Revenue approved options. Universal Social Charge (USC) and Pay Related Social Insurance (PRSI) will be payable by employees on the exercise of the options. No employer PRSI is payable on the exercise of the options.

   Income tax is not generally payable on the grant of an un-approved option but is payable on the exercise of un-approved options. USC and PRSI will be payable by employees. No employer PRSI is payable.

   The most common types of share option plans are as follows:-

   <u>Save as You Earn (SAYE) Schemes</u>

   SAYE Schemes provide for the grant of options to acquire shares by a company to its employees and full-time directors. There are two elements to an SAYE being a share option scheme and a savings scheme. The options may be granted at a discount of up to 25% of the market value of the shares as at the date of grant of the option. The options may be granted over a 3, 5 or 7 year term. The employee or director will be required to enter into a savings contract with a Revenue approved savings carrier and save between €12 and €500 per month

over a three or five year period. At the end of the relevant savings period the employees and directors can exercise their options using the proceeds from their savings contract.

Subject to compliance with relevant conditions, gains arising on the grant and exercise of the options will generally be exempt from income tax. USC and employee PRSI will be chargeable on the exercise of an option. No employer PRSI is payable. Capital Gains Tax (CGT) may be payable on a subsequent disposal of the shares.

Brexit is causing complications in terms of the future of SAYE Schemes but efforts are being made to arrange for alternate savings carriers.

KEEP Option Schemes

The Key Employee Engagement Programme (KEEP) is a relatively recently introduced tax efficient share option scheme for start-ups and small and medium-sized enterprises (SMEs). KEEP option schemes are broadly similar to the UK Enterprise Management Incentives schemes.

Prior Revenue approval is not required to operate KEEP share option schemes. There are a significant number of conditions which must be satisfied for a company to avail of a KEEP scheme and for individuals to participate in such schemes which may impact on KEEP's effectiveness. There are limitations on the total market value of KEEP options which may be granted to any qualifying employee or director. Furthermore, there are a number of conditions which must be satisfied throughout the life of the KEEP scheme.

Improvements have been made to the KEEP regime to date and further improvements are to be formally introduced soon as it is widely recognised that the current KEEP regime is overly restrictive and changes are required to facilitate a wider take up of the KEEP scheme by SMEs.

At present, qualifying SMEs may grant KEEP share options to qualifying key employees and directors at market value subject to compliance with relevant conditions. KEEP options may be granted during the period 1 January 2018 to 31 December 2023.

Subject to compliance with relevant conditions, income tax is not payable on the grant or the exercise of a KEEP option which is a major advantage to KEEP. USC and employee PRSI will not be chargeable on the grant or exercise of a KEEP option. CGT will be payable by the employee on any gain on a subsequent disposal of shares acquired on the exercise of the share option. No employer PRSI is payable.

Unapproved Share Option Schemes

An employer may grant options to acquire shares to employees and directors under an unapproved share option scheme. Options may be granted to key employees and directors only. The option holder is required to exercise the option within a specified period otherwise it will lapse. The company can impose conditions on exercise, for example, time-based vesting or satisfaction of specified criteria. Formal Revenue approval is not required to grant unapproved share options. Whilst unapproved share option schemes offer flexibility they are not tax advantageous.

Generally, income tax is not payable on the grant of an unapproved share option if the option exercise period is less than seven years or the option is granted at market value. Income tax is payable on the exercise of the option on the difference between the market value at the exercise date and the option price paid on exercise. USC and employee PRSI are chargeable on the exercise of the option. This may be problematic as typically employees do not have the resources to fund (i) the tax on exercise and (ii) the exercise price, as there is no market for the shares in an unquoted company. CGT will be payable by the employee on any gain on a subsequent disposal of shares acquired on the exercise of the share option.

3. **What kinds of share acquisition/share purchase plan can be offered?**

There are broadly two types of share acquisition/share purchase plans which may be offered to employees in Ireland (i) Revenue approved share plans and (ii) Non- approved share plans.

Revenue approved share plan arrangements generally must be approved in advance by the Irish Revenue, comply with specific conditions to avail of and maintain Revenue approval, be made available to all employees on a similar terms basis and typically provide greater tax efficiency. Un-approved arrangements do not generally require Irish Revenue approval and provide flexibility to employers as they may be offered to key employees only but are generally less tax efficient than Revenue approved arrangements.

The most common types of share plans are as follows:-

Approved Profit Sharing Schemes (APSS)

Under an approved profit sharing scheme (APSS) typically employees are granted the right to convert a profit sharing bonus into shares in their employer company or its parent company. In addition, current Revenue practice permits an employee to voluntarily apply a percentage of salary towards the purchase of shares and the amount of ‘salary foregone’ cannot exceed 7.5% of the basic salary or the amount of the employer funded bonus. Employees may be permitted to purchase shares from their own salary and a 7.5% of basic salary limit also applies to such additional purchases. Shares are acquired by the trustees on behalf of employees from the profit sharing bonus and salary, if applicable, and are held in trust on behalf of the employees for a minimum two-year period. There is the possibility of the shares being held by the trustees for a further one-year period.

Generally, all employees must be entitled to participate on similar terms but eligibility criteria may be imposed based on length of service of up to three years. Shares may be allocated on the basis of various criteria including attendance, basic salary level and length of service.

Generally, a maximum allocation of €12,700 per annum applies per participant. There is no income tax chargeable on the appropriation of shares. USC and employee PRSI is chargeable on appropriation. If the shares are held in trust for a three year period before being sold no income tax is chargeable and employees will not pay USC and employee PRSI on the transfer of shares to them at the end of the three year period. CGT may apply on the disposal of shares by the employee.

Restricted Share Schemes/Clogged Share Schemes

An employer may give employees shares up front which are generally held in trust for a specified period (clog period) other than on death or specified take over scenarios. The shares are subject to restrictions on the sale or transfer of such shares for the clog period of up to five years and such restrictions must be genuine and for bona fide purposes. Such shares may be offered to employees on a select basis. The shares cannot be pledged or held as security during the clog period. The shares may be disposed of by the employee at the end of the clog period.

Where the shares contain genuine restrictions on the sale or transfer then the income tax chargeable on the acquisition of the shares may be abated by up to a maximum of 60% for restrictions of in excess of five years. Employee PRSI and USC applies on the acquisition of shares but employer PRSI does not apply. CGT may arise on the disposal of the shares. If the shares are subsequently forfeited, the employee may be entitled to a rebate of tax paid.

Growth or Flowering Shares

An employer may issue shares to select employees with very limited rights attaching to such shares at the date of issue and upon certain specified events the shares may grow into more valuable shares. Formal Revenue approval is not required to issue such shares.

It may be possible to structure growth or flowering shares so as to minimise income tax arising on the issue of the shares and ensure CGT treatment on the subsequent disposal only.

Free or Discounted Shares

An employer may award employees with free or discounted shares under a formal share plan or as a once off award. These shares are a benefit in kind for employees.

Income Tax and USC are payable on the fair market value of the shares at the date of the award less the amount paid by the employee, if any. Employee PRSI applies but employer PRSI does not apply.

4. **What other forms of long-term incentives (including cash plans) can be offered?**

There are a wide range of employee incentive arrangements which an employer can establish and which do not involve the issue of shares to an employee. Such arrangements are unapproved arrangements and are essentially a form of bonus or incentive arrangement for employees. The arrangements are not generally tax efficient but afford an employer flexibility and avoids the issuance of shares in the company.

A phantom share scheme is one of the main types of non-equity based employee incentive arrangements employers adopt in Ireland. A phantom share scheme is a cash bonus arrangement linked to a company's performance or the growth in its share value. A phantom share scheme is not an equity based arrangement and a participant does not receive an interest in a share. Arrangements of this nature avoid the issue of new shares to participants as the company pays out cash and does not dilute existing shareholdings. Participation in the scheme can be offered to key employees only rather than to all employees on similar terms.

Employees are given options over "notional shares" (i.e. phantom units) and later receive cash payments related to any increase in the value of those shares (or other metric of performance as the employer may decide) above a certain amount known as the base price on the crystallisation date (or the sale of the business if earlier). In a sale scenario, a participant typically receives a bonus linked to the price paid by the purchaser for a share (in a share sale) less costs etc. The period of the scheme over which growth/value is measured needs consideration e.g. 3 years, 4 years and/or 5 years and is of particular importance if the purpose of the scheme is to incentivise key staff to remain in service for a certain time period.

Careful consideration needs to be given by a company to giving an open-ended financial commitment of this nature. For example, its share value could rise higher than its ability to pay the related bonus (if the share value is to be the metric). Banking arrangements also need to be considered to ensure any relevant consents are obtained and confirmed that the bank has no veto on any payments to be made pursuant to incentive arrangements.

There are other forms of bonus arrangements that may also be adopted.

5. **Are there any limits on who can participate in an incentive plan and the extent to which they can participate?**

Un-approved plans do not tend to have specific limitations on the extent to which individuals participate. This gives employers greater flexibility in offering such incentive arrangements

to key employees only or select employees the employer may be keen to retain in service for a defined period. Revenue approved plans do typically impose strict conditions and limitations on employee participation in such plans, for example:-

KEEP Share Options

There are a number of limitations in a KEEP share scheme in terms of who can participate and to what extent. For example,   the total market value of KEEP share options which may be granted to any one qualifying employee/director cannot exceed the below amounts:-

1. €100,000 in any one year of assessment;
2. €300,000 in all years of assessment; or
3. 100% of the qualifying individual's annual emoluments in the year of assessment in which the qualifying share option is granted.

Furthermore, an employee or director will cease to be a qualifying individual if they acquire beneficial ownership of, or the ability to control, directly or indirectly, or through the medium of a connected company or connected companies or by any other indirect means, in excess of 15% of the ordinary share capital of the qualifying company.

SAYE Schemes

There are limitations on participation in an SAYE scheme, for example, savings of up a minimum of €12 up to a maximum of €500 per month can be saved out of after tax income per employee.

APSS Schemes

Limitations in an APSS include an individual employee cap of €12,700 worth of shares per annum.

6. **Can awards be made subject to performance criteria, vesting schedules and forfeiture?**

It is a common feature of many share option plans that the exercise or vesting of an option or part thereof is subject to performance criteria and/or time-based vesting. It would be uncommon for certain Revenue approved arrangements to provide for performance criteria. Many share plans provide for forfeiture of rights, for example, when an employee leaves service.

7. **Can awards be made subject to post-vesting and/or post-employment holding periods. If so, how prevalent are these provisions both generally and by reference to**

specific sectors?

Yes, generally awards may be made subject to post vesting or post employment holding periods, for example, an employee with clogged or restricted shares may be required to hold his shares until the end of the clog period notwithstanding that he has left service. Generally, post vesting/post employment holding is not commonplace as a company will typically include a right to take back the shares or relevant award rights on leaving service.

8. **How prevalent malus and clawback provisions are and both generally and by reference to specific sectors?**

Such provisions are becoming more commonplace in all sectors, and, in particular, financial services sectors and regulated entities. Some financial institutions and listed companies are required to have mandatory claw back arrangements for variable pay for specified employees.

9. **What are the tax and social security consequences for participants in an incentive plan?**

Generally, the tax point occurs when the share rights are converted to shares.

- on grant;

No tax is payable on the grant of a Revenue approved SAYE share option and generally tax is not payable on the grant of an unapproved share option. For other incentive plans PAYE only arises when shares are allotted. PAYE comprises income tax, USC and PRSI.

- on vesting;

If vesting results in an option being exercised the income tax, USC and employee PRSI may arise on the exercise of an unapproved share option. Where income tax, USC and employee PRSI arises on the exercise of an unapproved share option it must be paid by the employee within 30 days after the exercise date. Generally, income tax does not arise on the exercise (or vesting) of an SAYE share option but USC and employee PRSI are payable on exercise. For other incentive plans PAYE arises when shares are allotted.

- on exercise;

Where income tax, USC and employee PRSI arises on the exercise of an unapproved share option it must be paid by the employee within 30 days after the exercise date. Generally, income tax does not arise on the exercise of an SAYE share option but USC and employee PRSI are payable on exercise. For other incentive plans PAYE arises when shares are allotted.

- on the acquisition, holding and/or disposal of any underlying shares of securities; and

Income tax, USC and employee PRSI may arise on the exercise of an unapproved share option (being the date the shares are acquired or allotted) and it must be paid by the employee within 30 days after the exercise date. Generally, income tax does not arise on the exercise (being the date the shares are acquired or allotted) of an SAYE share option but USC and employee PRSI are payable on exercise. For other incentive plans PAYE arises when shares are allotted. CGT may be payable on the subsequent disposal of shares acquired by virtue of the exercise of an SAYE option and an unapproved share option.

- in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

Depending on the type of plan and assuming the relevant loan is permissible an employee may be liable to benefit-in-kind on the loan and be required to pay income tax, employee PRSI and USC on a loan or part thereof. The employer is required to deduct these taxes through the PAYE system.

10. **What are the tax and social security consequences for companies operating an incentive plan?**

The company is required to operate PAYE on the value of shares allotted to employees (except for share options). The PAYE can either be deducted from the employee's net salary or a proportion of the shares can be sold to discharge the tax liability (sell to cover). The employer is not required to operate PAYE on the granting of share rights (e.g. options or RSUs). The tax point occurs when the share rights are converted to shares. Employer PRSI does not apply to share related awards.

- on grant;

No tax or social security is payable by the company on the grant of a Revenue approved SAYE share option and generally tax or social security is not payable on the grant of an unapproved share option. For other incentive plans PAYE only arises when shares are allotted.

- on vesting;

No tax or social security is payable by the company on vesting of a Revenue approved SAYE share option or an unapproved share option. For other incentive plans PAYE only arises when shares are allotted.

- on exercise;

No tax or social security is payable by the company on exercise of an unapproved share

option. If income tax, USC and employee PRSI arises on the exercise of an unapproved share option it must be paid by the employee within 30 days after the exercise date. The company is required to deduct USC and PRSI, but not income tax, on the value of shares allotted under Revenue approved SAYE schemes on the exercise of an approved SAYE option. For other incentive plans PAYE only arises when shares are allotted.

- on the acquisition, holding and/or disposal of any underlying shares of securities;

No tax or social security is payable by the company on acquisition, holding and/or disposal of a Revenue approved SAYE share option or an unapproved share option. If income tax, USC and employee PRSI arises on the acquisition of shares acquired by virtue of the exercise of an unapproved share option it must be paid by the employee within 30 days after the exercise date. The company is required to deduct USC and PRSI, but not income tax, on the value of shares allotted under Revenue approved SAYE schemes. For other incentive plans PAYE arises when shares are allotted.

- in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

Depending on the type of plan and assuming the relevant loan is permissible an employee may be liable to benefit-in-kind on the loan and be required to pay income tax, employee PRSI and USC on a loan or part thereof. The employer is required to deduct these taxes through the PAYE system.

11. **What are the reporting/notification/filing requirements applicable to an incentive plan?**

Applicable reporting, notification and/or filing requirements which may apply to an incentive plan will depend on the type of such plan. For example, there are Revenue reporting requirements for both employers and employees in an unapproved share option scheme on certain events. Under a KEEP share option scheme there are very strict reporting requirements for both the company and the qualifying employee on certain events. Failure to file a return may result in the company ceasing to qualify for the KEEP scheme. Under an SAYE scheme, both the company and employees have reporting and filing obligations. Failure by an employer to file a return on time may result in withdrawal of the Revenue approval of the SAYE scheme. In an APSS, the trustees and the employees have reporting and filing obligations. Failure by an employer to file a return on time may result in withdrawal of the Revenue approval of the SAYE scheme. Under a clogged share scheme, both the company and employees have reporting and filing obligations.

Under Irish law, filings must be made in the Irish Companies Registration Office on the allotment and issue of shares and such information is publicly available.

12. **Do participants in incentive plans have a right to compensation for loss of their awards when their employment terminates? Does the reason for the termination matter?**

Applicable reporting, notification and/or filing requirements which may apply to an incentive plan will depend on the type of such plan. For example, there are Revenue reporting requirements for both employers and employees in an unapproved share option scheme on certain events. Under a KEEP share option scheme there are very strict reporting requirements for both the company and the qualifying employee on certain events. Failure to file a return may result in the company ceasing to qualify for the KEEP scheme. Under an SAYE scheme, both the company and employees have reporting and filing obligations. Failure by an employer to file a return on time may result in withdrawal of the Revenue approval of the SAYE scheme. In an APSS, the trustees and the employees have reporting and filing obligations. Failure by an employer to file a return on time may result in withdrawal of the Revenue approval of the SAYE scheme. Under a clogged share scheme, both the company and employees have reporting and filing obligations.

Under Irish law, filings must be made in the Irish Companies Registration Office on the allotment and issue of shares and such information is publicly available.

13. **Do any data protection requirements apply to the operation of an incentive plan?**

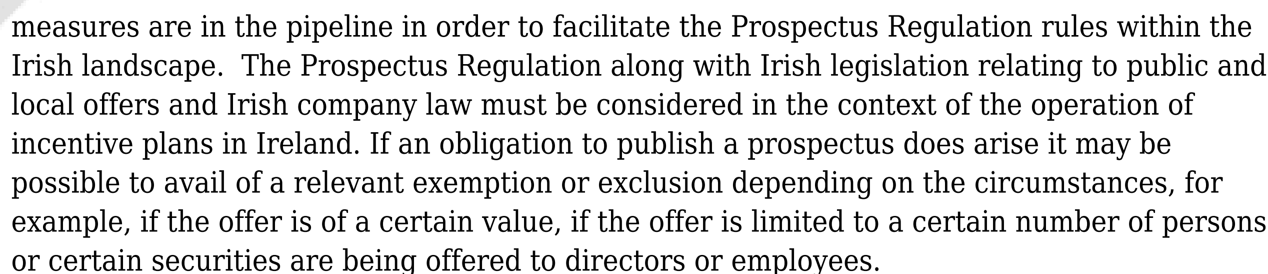
Data privacy must be considered in the context of any incentive plan and plan documentation should be reviewed from a data privacy perspective to ensure compliance with current Irish data protection law. The plan documentation should refer a participant to the relevant data privacy notice.

14. **Are there any corporate governance guidelines that apply to the operation of incentive plans?**

The Irish corporate governance regime comprises statutory provisions, guidelines, and codes and the applicability of any such provisions will depend on the specific industry, type of company, its relevant business and whether it is a listed company.

15. **Are there any prospectus or securities law requirements that apply to the operation of incentive plans?**

The Prospectus Regulation 2017/1129/EU (the “Prospectus Regulation”) came into full effect on 21 July 2019 and completely repealed the Prospectus Directive 2003/71/EC (“PD”) regime that had been in place in Ireland since 2005. A prospectus may be required to be published by a company and approved by a competent authority in certain circumstances where there is an offer of transferable securities to the public in the EU. The Prospectus Regulation has direct effect across the EU. Accordingly, Ireland does not have to enact any implementing legislation. However, a number of national measures have been introduced and additional



measures are in the pipeline in order to facilitate the Prospectus Regulation rules within the Irish landscape. The Prospectus Regulation along with Irish legislation relating to public and local offers and Irish company law must be considered in the context of the operation of incentive plans in Ireland. If an obligation to publish a prospectus does arise it may be possible to avail of a relevant exemption or exclusion depending on the circumstances, for example, if the offer is of a certain value, if the offer is limited to a certain number of persons or certain securities are being offered to directors or employees.

The implications of securities on individual incentive plans may require consideration in the context of Brexit.

16. **Do any specialist regulatory regimes apply to incentive plans?**

Companies operating incentive plans need to consider various issues including Irish company legislation, tax legislation, Irish employment and equality law, the prospectus directive legislation, listing rules, Revenue practice and other applicable legislation and codes and guidelines for financial services business and directors and others. The applicable legislation will differ depending on the industry.

17. **Are there any exchange control restrictions that affect the operation of incentive plans?**

While there are no general currency restrictions in force in Ireland, the position ought to be considered on a case by case basis having regard to the particular industry in question.

18. **What is the formal process for granting awards under an incentive plan?**

The formalities of granting awards under an incentive plan will depend on the type of plan involved. For example, when granting a share option, the company will typically approve the grant of the options by resolution, enter into a share option agreement with each participant to evidence the grant of the option and there may be a requirement to obtain advance shareholder approval and/or waivers of pre-emption rights.

19. **Can an overseas corporation operate an incentive plan?**

Generally, an overseas corporation may be able to operate an incentive plan in Ireland but the type of plan involved should be considered on a case by case basis.

20. **Can an overseas employee participate in an incentive plan?**

Generally, an overseas employee may participate in an incentive plan but the employee’s particular circumstances and the type of plan involved should be considered on a case by case basis. Local law advice ought to be obtained. Generally, an overseas employee may participate in an incentive plan but the employee’s particular circumstances and the type of

plan involved should be considered on a case by case basis. Local law advice ought to be obtained.

21. **How are share options or awards held by an internationally mobile employee taxed?**

The tax treatment of share options or awards held by an internationally mobile employee may be complex and advice should be sought on a case by case basis.

22. **How are cash-based incentives held by an internationally mobile employee taxed?**

The tax treatment of cash-based incentives held by an internationally mobile employee may be complex and the relevant taxation treatment is similar to the taxation of salary. Advice should be sought on a case by case basis.

23. **What trends in incentive plan design have you observed over the last 12 months?**

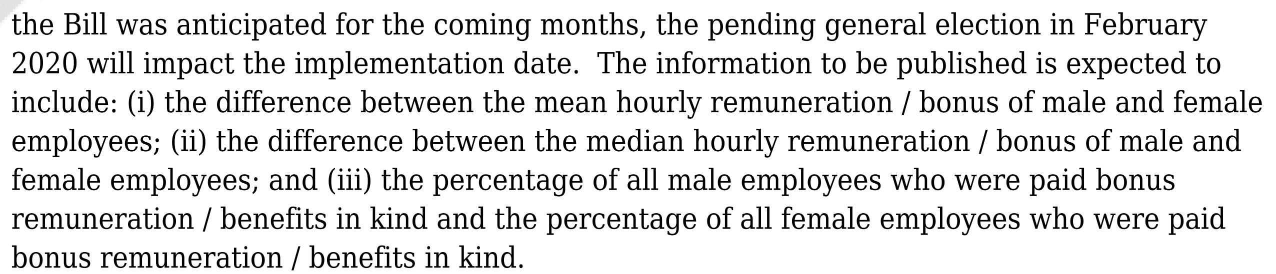
There has been an increased interest in KEEP Schemes in light of recently made and soon to be introduced improvements. Furthermore, there has been a growing trend of companies issuing growth or flowering shares.

24. **What are the current developments and proposals for reform that will affect the operation of incentive plans over the next 12 months?**

Brexit will have an impact on incentive plans and the full effects are currently unclear. For example, Brexit is currently causing complications in terms of the future of new SAYE Schemes but efforts are being made to arrange for alternate savings carriers. Furthermore, there will be increased focus on securities laws and on data protection compliance (e.g. international data transfers) in the context of Brexit.

Ireland introduced the European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2019 (2019 Regulations) to comply with obligations based on the EU Fourth Anti-Money Laundering or Terrorist Financing Directive (4AMLD). The 2019 Regulations impose obligations on trustees to obtain and hold specific information on the beneficial ownership of trusts in beneficial ownership registers. The 2019 Regulations have wide application so employee incentive arrangements require careful consideration on a case by case basis to ascertain whether such arrangements fall within the ambit of the 2019 Regulations. Ireland will be obliged to establish a central register of beneficial ownership of trusts by March 2020 whereby trustees will be required to provide information regarding the beneficial ownership of trusts to a centrally maintained register. Further developments are awaited in this regard.

The Gender Pay Gap (Information) Bill 2019 will require employers of a certain size to publish information relating to the gender pay gap of their employees, as well as the reasons for such differences and outline proposed measures for improvement. Whilst enactment of



the Bill was anticipated for the coming months, the pending general election in February 2020 will impact the implementation date. The information to be published is expected to include: (i) the difference between the mean hourly remuneration / bonus of male and female employees; (ii) the difference between the median hourly remuneration / bonus of male and female employees; and (iii) the percentage of all male employees who were paid bonus remuneration / benefits in kind and the percentage of all female employees who were paid bonus remuneration / benefits in kind.