Irish Tax Monitor

Share options

Following approval by the European Commission, updates to Ireland's KEEP regime have recently commenced. Can you outline the changes and their implications for SMEs and employees utilising the share option scheme?

Lynn Cramer, Partner, Maples Group:

KEEP Scheme

Defining a staff incentive strategy is an important activity for any business, but particularly for SMEs in start-up or early growth phase. In response to stakeholder feedback, the Key Employee Engagement Programme (KEEP) was introduced in 2018. KEEP is a tax efficient share-based remuneration scheme for SMEs and start-up businesses which is designed to support and incentivise those businesses in their effort to attract and retain key employees. SMEs were traditionally at a disadvantage when hiring skilled workers as they have had to compete with salaries and benefits offered by larger companies and KEEP has been seen as a welcome means of tackling this issue.

Under general tax principles, where an employee or director exercises a share option, they are subject to income tax on the difference between the market value of the shares acquired and any price paid for those shares. Employees and directors can face

Lynn Cramer

difficulties in funding the tax liability where they do not immediately dispose of the shares received on exercise of the option. Under the KEEP regime, there is no tax charge when the share options are exercised. A capital gains tax liability will arise when the shares are actually disposed of. This provides the individual with a significant liquidity advantage in that it defers taxation until the time of share sale at which point, they can fund their tax liability using the proceeds of sale.

Enhancements to the Scheme

While the KEEP scheme was broadly welcomed on introduction, stakeholders and practitioners have continued to liaise with Irish Revenue and the Department of Finance to offer feedback on practical and technical issues with the scheme. As a result of that ongoing feedback process, KEEP was amended most recently in the Finance Act 2022. Certain of those amendments took effect on 1 January 2023 while others were subject to European Commission State Aid approval and a Ministerial Commencement Order. Those amendments were commenced on 20 November 2023 and offer additional enhancements to the KEEP regime.

Extension of the Scheme

The first change implemented allows for a time extension beyond the end of 2023 when the scheme was due to expire. KEEP is now available for qualifying share options granted before 31 December 2025.

Increase in Market Value Limit

There are a number of conditions which are required to bet met in order for a scheme to qualify for KEEP. Prior to the 2023 commencement order, one of those conditions was that the total market value of issued but unexercised qualifying share options was limited to €3 million. That limit has now been increased to €6 million giving SMEs an opportunity to share more value with employees.

Type of Shares

Another of the original conditions required to be met in order for KEEP to apply to share options was that the shares over which the KEEP options are granted were required to be "new" ordinary fully paid-up shares which required a new issuance before any additional grant of KEEP options. That administrative burden has now been eased that shares no longer need to be "new" and existing fully paid-up shares can now qualify for the regime.

Share Buyback

The commencement order also confirms the ability of a KEEP option holder to access capital gains tax treatment where the company itself redeems, repays or repurchases the KEEP shares. That allows for a more immediate return to the employee whereas otherwise they would have to wait for an opportunity to sell to a third party on the open market.

Date of Application and Potential Confusion for Companies

It is important to note that the commencement order specifies 20 November 2023 as the date on which the enhancements set out above come into effect. In addition to the enhancements mentioned above, there are a number of further amendments being made to the KEEP regime through the Finance (No.2) Act 2023 (the "2023 Act"). Those amendments were originally included in Section 11 of Finance Act 2019 subject to commencement order but Section 11 of Finance Act 2019 is repealed by Section 14 of the 2023 Act and those amendments are replicated and introduced directly in the 2023 Act with effect from 1 January 2023.

The approach to commencement for the two different sets of provisions contained in the 2023 Act has the capacity to cause some confusion for taxpayers. What isn't entirely clear is whether a scheme which was implemented in 2021 and which complied with the proposed amendments set out in Finance Act 2019 is considered compliant if those amendments are only introduced from 1 January 2023.