



UK and Irish Plans for non-UK/Irish Companies

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Introduction

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What's in a name?

- Employees' share scheme
- Scheme or plan?
- Shares or stock?
- Employment-related securities

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UK Approved and Unapproved Share Plans

Prospectus Requirements

Compliance




Using a UK approved plan

- Income tax v capital gains tax

10%	20%
22%	
40%	
Annual exemption usually used up	£8,500 annual exemption
Full value taxed	Taper relief reduction


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Using a UK approved plan


- National Insurance contributions
 - Employer's NI (uncapped) at 12.8%
 - Employees' NI:
 - 11% up to £32,760
 - 1% over £32,760
- Pay-As-You-Earn (PAYE)
- No market = no cash
- Tax deductible set-up costs

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Approved executive options

- Discretionary
- Individual limit – £30,000
- Income tax and NI relief after 3 years
- 10 year life
- Market value options
- BUT early exercise subject to income tax and NI through PAYE
 - good leaver – 6 months
 - death – 12 months

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Approved executive options

- Company Share Option Plan
 - New plan or approved schedule?
- Calculating market value
 - New York / American Stock Exchange shares
 - Other markets
 - 20 day averaging for French plans
 - local requirements
- Mirror US options – ISOs and NQSOs

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Qualify for EMI?

- Highly tax-favoured options
- Discretionary
- Individual limit of £100,000
- Company limit of £3m
- No limit on exercise price (but under-value subject to income tax and NI)

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Qualify for EMI?


- Gross assets (balance sheet) – £30m
- UK trade (must be qualifying)
- All qualifying subsidiaries
- Notify grants within 90 days
- Exercise within 40 days of disqualifying event
- CGT treatment
- Taper relief from grant



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Save-As-You-Earn

- SAYE or Sharesave
- All-employee options
- Very popular with UK employees – no loss
- 20% discount to market value
- Monthly savings from net salary
- Limit of £250 per month
- 3 / 5 / 7 year contracts
- Tax-free bonus
- 6 month exercise period
- Effect of IFRS 2



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Share Incentive Plan

- All-employee plan
- Free Shares – up to £3,000
- Partnership Shares – up to £1,500
- Matching Shares – up to £3,000
- Dividend Shares – up to £1,500
- Requires UK trust
- Tax efficient after 5 years



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SIP: Free Shares

- £3,000 per tax year limit
- No sale within 3 years to 5 years
- Can include forfeiture up to 3 years
- Similar terms – salary/service/hours
- Performance criteria?
- Tax-free after 5 years

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SIP – Partnership Shares

- Up to £1,500 p.a. from *pre-tax* pay
 - 10% salary limit
 - Exclude certain aspects of salary
 - Monthly purchase
 - Lump sums (e.g. bonus/one-off)
 - Accumulation periods
- Market value purchases
 - Can withdraw at any time
 - Tax-free after 5 years

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Matching Shares and dividend reinvestment

- Matching Shares
 - Free shares linked to Partnership Shares
 - Ratio of up to 2:1
 - Same terms
 - Tax-free after 5 years
 - Holding period/forfeiture
- Dividends (Dividend Shares)
 - Pay out
 - Reinvestment (up to £3,000 per year)
 - Tax free after 3 years

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Mirroring a French “Classic Plan”

Classic Plan	SIP
Purchase shares at 20% discount	Purchase shares from pre-tax and NI pay – 41% to 23% discount – 1 for 4 match (20% effective discount)
5 year holding period	No holding period on Partnership Shares <u>BUT</u> tax relief only after 5 years
Dividend reinvestment	Dividend Shares
Held in FCPE	Held in UK trust
Employer abondement	Matching Shares

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Using SIP Free Shares

- Mirror US restricted stock plan
- Mirror French free shares
 - 2 year vesting plus
 - 2 year holding
- Mirror South African free shares
- Mirror Australian free shares

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Mirroring an ESPP

- SIP or SAYE?
- All-employee plan
- Shares acquired at 15% discount
 - 15% SAYE discount; or
 - 3 for 17 matching SIP shares
- 3 to 27 month option period
 - 3 year savings period for SAYE
 - 3 to 18 month accumulation period
- Financial limits

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Obtaining approval


- No awards before IR approval
- 4 - 6 weeks for approval
- Submit:
 - plan rules
 - articles of association (translated if necessary)
 - approval stencil – CT and PAYE references for all UK participating companies
- Types of share/company
- Restrictions on shares

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Approved all-employee plans in the UK - 2004

- 1,333 SAYE schemes – up 12%
- Average SAYE savings £69.28 – up 2%
- 84% of SAYE schemes offer full 20% discount
- 3 year contract most popular – 32% take-up
- 600 SIP schemes approved
- 31% offer Free Shares (22.5% decrease)
- 88% offer Partnership Shares (7% decrease)
- 26% take-up of Partnership Shares (18.75% decrease) – 31% of Matching Shares offered

(Source: #sProShare)

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Implementing Unapproved Plans in the United Kingdom

- Approved plans may not always be appropriate:
 - Cost of setting up and administering
 - Some companies may not qualify
 - Company may lack authority under the main plan rules or stock exchange rules may prohibit implementation unless fresh shareholder approval is obtained (e.g. NYSE and NASDAQ)

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Implementing Unapproved Plans in the United Kingdom

- Most types of foreign employee stock plans can be implemented in the UK without significant amendment
 - Stock option plans
 - Restricted stock/Restricted Stock Units (“RSUs”)
 - ESPPs
 - Tradable options
- However, plans will not have the benefit of any tax/social security exemptions they may enjoy in their country of origin



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Implementing Unapproved Plans in the United Kingdom

- Beware unanticipated tax charges:
 - In the case of RSUs there is an upfront tax charge for employees who are not ordinarily resident in UK (i.e. working in UK on shorter than three year assignments) – reserve right to settle RSUs in cash or shares to avoid



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Implementing Unapproved Plans in the United Kingdom

- Where shares are subject to clawback or repayment of gain due to breach of post-termination restraints after acquisition, will be further income tax charges unless employer and employee elect to pay tax on full market value at acquisition (“section 431 election”)
- US style ISOs (Incentive Stock Options) and ESPP stock purchases do not qualify for income tax exemption in UK



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Implementing Unapproved Plans in the United Kingdom

Recommended changes:

- Expand tax withholding provisions
 - Withholding from any payments due at any time
 - Collect direct from employee
 - Authority to sell shares to raise tax/NICs



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Implementing Unapproved Plans in the United Kingdom

- Waiver of claims on termination
 - Effective in England and Wales (Micklefield v. SAC Technology), but not Scotland
- Data privacy
 - Obtain employee consent to transfer of data



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Implementing Unapproved Plans in the United Kingdom

Consider:

- Transfer of employer NICs to employee for stock options and RSUs
 - Employer NICs tax deductible by employee
 - Increases overall tax/NICs liability of employee subject to higher rate tax to 48.7%



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Do you need a prospectus?

- Currently no requirement in the UK to publish a prospectus in connection with an employees' share scheme offer
- From 1 July 2005 new EU Prospectus Directive to take full effect
- In effect since 31 December 2003 in relation to "home member state"
- "Passporting" of single approved prospectus across the EU
- Offer of securities to the public in any EU country
- Some exemptions available

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Home member state

- Non-EU companies may select the regulatory regime which will apply to all offers and filings to be made by them
- Home member state is the first country into which an offer is made after 31 December 2003
- Choice is permanent
- Watch out for employee incentive plan offers!

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What is an "offer"?

- Any communication in any form and by any means presenting sufficient information on the terms of the offer and the securities to enable an investor to decide to purchase or subscribe
- The grant of options/awards itself may not be an offer to the public, but written materials provided at the same time or later may make it an offer
- Free shares may not be covered as there is no purchase or subscription by an investor

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What are “securities”?


- Transferable securities, including shares, warrants, options etc.
- Are non-transferable employee options caught?
- Guidance requested as to whether to “look through” to the underlying securities
- Even if the grant of options is not caught, will the exercise be caught?



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Employee share plan exemption


- Securities offered to existing or former directors or employees by their employer
- Employer must have securities admitted to trading on a regulated market
- Simplified document must be available such as brochure or fact sheet
- Potential problem for non-EU issuers



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Other exemptions


- Directive does not normally apply to offers with a total consideration payable of less than €2.5m
- Offers with a total consideration payable of less than €100K over a 12 month period
 - Free shares – no consideration?
 - Options
- Offers only to “qualified investors”
- Offers to less than 100 persons



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If no exemption...


...file a full-scale prospectus?



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Compliance


- Tax and NICs withholding
 - Required where shares are "readily convertible assets" (RCAs) or where corporation tax deduction not available
 - UK approved plans
 - Unapproved plans
- Time Limits
 - Employer must pay tax/NICs to Revenue within 14 days after end of tax month
 - Collect from employee within 90 days after taxable event



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Compliance

- Consequences of failure to withhold within time limits:
 - Employer becomes liable to pay tax
 - "Deemed benefit" charge for employee increases overall income tax to 56% (where employee is higher rate taxpayer)





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Compliance



- Penalties and interest under PAYE (Pay As You Earn) System

NB: Very important to incorporate adequate withholding language in share plan documents





Compliance

- Reporting requirements
 - Approved plans
 - > Separate return form for each type of plan
 - Unapproved plans – Form 42
 - > Very wide scope – all share acquisitions and disposals even if outside the scope of employee share plans



Compliance

- Unapproved plans – Form 42 (cont/d...)
 - > Reporting required for 7 years after employee/director leaves
 - > Can exclude shares listed on a recognised stock exchange where rights issue, bonus shares or independent acquisition and certain conditions are met (but not for directors)



Compliance

- Return of Benefits Forms (P11D) and PAYE Returns (P14, P35)
- Penalties
 - Up to £300 per entry



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Modelling Plans for Ireland Irish Approved and Unapproved Share Plans



Ireland - tax

- Income tax v capital gains tax

20%	v	capital gains tax	20%
42%			
Once-off lifetime exemption - €6,350			€1,270
Full value taxed, save for restricted stock			No tapering relief reduction from 1/1/05



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Classification of Plans in Ireland (Tax)

- Approved plans
 - submitted to the Revenue Commissioners for review and approval
 - approved by the Revenue Commissioners as complying with tax law
 - qualify for favourable tax treatment





Classification of Plans in Ireland (Tax)

- Semi-approved plans
 - submitted to the Revenue Commissioners for review
 - given confirmation as benefiting from extra-statutory concession
 - qualify for favourable tax treatment
- Unapproved plans



Irish Approved Plans

- Approved share option scheme
- Save-as-you-earn (SAYE) scheme
- Approved profit sharing scheme (APSS)
- Employee share ownership trust (ESOT)
- Share subscription (scheme)



Approved share option scheme - tax

- No income tax on grant or exercise
- Capital gains tax at 20% on full gain at disposal
- Option cannot be exercised <3 years
- Company can claim deduction of costs for corporation tax purposes



Approved share option scheme - participation

- Participation must be open to
 - all full or part-time employees and full-time directors of each participating company
 - who has been an employee/ director at all times during a qualifying period not exceeding 3 years
 - chargeable to Irish PAYE in respect of employment / directorship





Approved share option scheme - participation

- All participants must participate on 'similar terms' as to:
 - share price
 - when options can be granted or exercised
 - number of shares
- Scheme may allow key employees and directors to obtain options which do not comply with similar terms
- Up to 30% of shares under option may be used for key employees



Approved share option scheme – shares/stock

- Scheme shares / stock must be part of the ordinary share capital (common stock) of a company which:
 - establishes the scheme
 - controls the company which establishes the scheme
 - is part of a consortium which controls the company which establishes the schemes





Approved share option scheme – shares/stock

- Shares must be:
 - quoted / traded on a stock exchange;
 - of a company not under the control of another company; or
 - of a company under the control of another company whose shares are quoted / traded; and
 - fully paid up / not redeemable / not subject to restrictions which do not apply to all shares of the same class





Approved share option scheme

- Does it work for US and other non-Irish companies?
 - YES





Save As You Earn (SAYE) scheme – tax

- Two elements:
 - a contractual savings agreement
 - a related share option scheme
- Participants save for a certain period (3, 5 or 7 years)
- At end of savings period, participant can use savings to exercise share options





Save As You Earn (SAYE) scheme – tax

- Option price can be at a discount of up to 25%
- Tax:
 - interest / bonus paid on savings tax-free
 - no income tax charge on grant or on discount to market value
 - on disposal, difference between option price and disposal proceeds subject to CGT





Save As You Earn (SAYE) Scheme

- Savings contract with a qualifying financial institution
- All employees and full-time directors employed for a qualifying period of ≤ 3 years must be eligible to participate
- Conditions as to shares / stock as for approved share option scheme





Save As You Earn (SAYE) Scheme

- At start of savings period, participant given option to acquire a fixed quantity of shares / stock at the end of the savings period
 - option price equal to market value less a discount of $\leq 25\%$
 - amount of shares / stock determined by amount saved, option price





Save As You Earn (SAYE) Scheme

- Does it work for US and other non-Irish companies?
 - YES





Approved Profit Sharing Scheme (APSS) - tax

- APSS enables remuneration of employees by way of shares / stock in the employer company free of income tax
- Employee can receive shares / stock $\leq \text{€}12,700$ per year
- If held in a trust for ≥ 3 years, they can be received tax free





Approved Profit Sharing Scheme (APSS) - tax

- If sold < 3 years:
 - income tax on 100% of value of shares
 - CGT on any gain
- If the shares are sold ≥ 3 years:
 - no income tax on value of shares
 - CGT on any gain from appropriation only





Approved Profit Sharing Scheme (APSS)

- All employees and full-time directors employed for a qualifying period of ≤3 years must be eligible to participate
- Shares can only be appropriated to employees at time of participation or 18 months prior to appropriation
- Participation must be on 'similar terms'
- Similar requirements regarding the shares as for other approved schemes



Approved Profit Sharing Scheme (APSS)

- Does it work for US and other non-Irish companies?
 - YES





Employee Share Ownership Trust (ESOT)

- A “warehouse” that acquires and holds shares until they can be distributed to participants at a later date
- Tax advantages :
 - contributions by employer to the ESOT are tax deductible
 - costs of operating an ESOT are tax deductible



Employee Share Ownership Trust (ESOT)

- trustee can receive income free of tax provided funds are used within a certain time for ‘qualifying purposes’
- trustee can transfer shares from ESOT to APSS exempt from CGT
- shares can be appropriated tax-free to participants through the APSS



Employee Share Ownership Trust (ESOT)

- All employees and full-time directors employed for a qualifying period of ≤3 years must be eligible to participate
- Employees who have left in previous 18 months and overseas employees can be included in certain circumstances
- Participation must be on ‘similar terms’
- Shares must be transferred out of the ESOT within 20 years of the ESOT acquiring them
- In Ireland, ESOP = ESOT + APSS





Employee Share Ownership Trust (ESOT)

- Does it work for US and other non-Irish companies?
– YES





Share Subscription Scheme

- Not strictly scheme-based – can be one-off subscriptions by employees for new shares
- If employee subscribes for newly issued shares at market value, then employee can deduct subscription amount from income for tax purposes in the year of subscription
- Maximum lifetime amount is €6,350
- Conditions as to shares as for approved share options / SAYE





Share Subscription Scheme

- Where employee disposes of the shares within 3 months of acquisition, relief withdrawn
- Relief not withdrawn where employee ceases to be:
 - employed by employer;
 - resident in Ireland; or
 - a full-time employee
- On disposal, amount equal to the tax relief deducted from base cost when calculating gain





Share Subscription Scheme

- Does it work for US and other non-Irish companies?
– YES





Irish semi-approved schemes

- Restricted stock – extra-statutory exception
- Immediate tax payment on receipt by scheme trustee of shares / stock
- Amount subject to tax dependent on lock-in period – e.g. 45% for a 5-year lock-in



Irish semi-approved schemes

- Employee takes risk of diminution in value of shares / stock
- Revenue Commissioners review but do not officially approve scheme documentation
- CGT on any gain
- Works for US and other non-Irish issuers, but review process may outweigh benefits




Most popular US plans in Ireland

- Restricted stock
 - extra-statutory status, tax advantages
- Performance share awards
 - no tax advantage, unless new shares, once-off tax advantage
- Stock accumulation plans
 - if constituted as APSSs or SAYEs, tax advantages
- Employee Share Purchase Plans
 - if new shares, once-off tax advantage



Questions?



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