

# Share incentivisation key considerations

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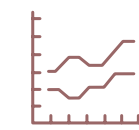
Our multi-disciplinary incentivisation team provides commercially focused advice on all aspects of incentive arrangements.

Matheson's dedicated multi-disciplinary incentivisation team is effectively placed to navigate complex legal, tax and governance considerations and to provide practical, bespoke and value-added advice, which is tailored to the individual needs and commercial objectives of our clients. Whether designing the structure, drafting and implementing a new incentivisation scheme or rolling out a global share plan for Irish-based employees, Matheson's multi-disciplinary team comprising corporate, tax, employment and data protection specialists works collaboratively to ensure that our clients' commercial objectives are achieved in a legally compliant and tax efficient manner.

Some of the key legal and tax considerations for companies in creating or adapting an incentive plan for its employees are considered below. For further information, please reach out to any member of our specialist team for an initial discussion on your company's incentivisation needs.

## Tax

Once the commercial objectives of a share incentivisation arrangement are clearly defined, the next step is to determine how those objectives can be achieved in the most tax efficient manner. The tax treatment of most forms of incentivisation is not particularly advantageous for employees / directors based in Ireland, as marginal rates of income tax, USC (universal social charge) and employee PRSI (social security) apply. However, where commercially feasible and with the appropriate protections in place, there are a couple of more tax efficient structures that may be worth considering, including:



**Clog shares:** If the shares that the employees receive qualify as "restricted shares" (often referred to as "clog shares"), there could be a material abatement of up to 60% of the taxable value of the shares for Irish tax purposes. The maximum 60% abatement can be achieved in broad terms if the shares are restricted (typically held in a trust with restrictions on disposal) for a period of more than 5 years (subject to certain qualifying conditions being met).



**Growth shares:** Also referred to as flowering / hurdle shares or sweet equity, growth shares can also be considered, the tax benefits of which hinge on a low value being placed on the shares issued at the outset for the purposes of the Irish employment tax charge.

### Other tax considerations

- **Potential employer social security cost:** For cash based or phantom plans (or generally where shares or awards are cash-settled), employer PRSI applies (at a current rate of 11.25%). This can result in a material extra cost for the employer company. By contrast, employer PRSI should not generally apply in the context of share-settled awards.
- **Share scheme reporting:** There are certain payroll tax and reporting obligations that a company should be aware of in implementing an incentive plan (or a phantom share plan). The precise nature and timing of these obligations will depend on the nature of the award.
- **Roll out of non-Irish plans:** Where non-Irish plans are rolled out for Irish-based employees, certain nuances / pitfalls can arise in an Irish context. The issues here can vary and some examples include (i) mismatches between the timing of the tax trigger point in Ireland compared to in the jurisdiction of the parent, and (ii) complexities where the entity issuing the equity has non-corporate features.
- **Long options:** In the context of stock options, where the option price for the shares is less than the market value of the shares at the date on which the option is granted, a charge to income tax may arise on the grant of an option where the option is capable of being exercised later than seven years after being granted. Accordingly, appropriately structured, this potential charge can be mitigated.

## Corporate



**Plan design:** Our corporate team works with our clients to design bespoke schemes to fit the organisation's commercial objectives and align plans to form a key part of the executive remuneration package. We advise on sector-specific regulations, for the financial services industry in particular, as well as relevant ESG and governance framework considerations.



**Irish-incorporated companies:** Where the relevant securities being issued or granted relate to shares, or rights to acquire shares, in an Irish-incorporated company, whether the shares are listed on an EEA regulated market, in the US or otherwise, the Companies Act 2014 will apply. Early advice should be sought from an Irish corporate perspective on the structuring of any incentive arrangement to ensure it does not contravene financial assistance and share capital requirements and to ensure compliance with disclosure obligations.





**Securities offered to Irish residents / securities listed on EEA regulated markets:** Irish securities law considerations apply where the securities are being issued or granted to individuals resident in Ireland and / or where those securities are listed on an EEA regulated market. Therefore, relevant companies will need Irish securities law advice, on the application of or exemption from the European Union Prospectus Regulation.




## Employment


Incentivisation arrangements must be designed to ensure compliance with Irish employment legislation without giving rise to unanticipated employment consequences. Careful planning can mitigate many employment risks. We have outlined some key employment law considerations below.

 **Discrimination:** Irish law prohibits discrimination – whether directly or indirectly – on specified grounds, including gender, civil status, family status, sexual orientation, disability, race, religion, age and membership of the Traveller community (an indigenous community in Ireland). Incentivisation arrangements must be structured in a way that ensures no participant is directly or indirectly treated less favourably because of the presence of a protected characteristic – for example, in the case of leaves of absence.


 **Eligible participants (atypical workers):** Another important consideration is the proposed inclusion or exclusion of certain types of workers from the participant pool. There are restrictions on the extent to which fixed-term or part-time employees can be treated less favourably in respect of their terms and conditions of employment than comparable permanent or full-time employees. The risk of independent contractors being found to be employees by virtue of their participation in incentivisation arrangements is also important to consider, having regard to the potential adverse tax and employment law consequences of misclassification. It is not uncommon for large US corporations to extend eligibility to independent contractors and, although there is nothing under Irish employment law that prevents organisations from doing this, if a plan states that

the incentivisation scheme only applies to employees, extending eligibility to the incentive scheme to an independent contractor may undermine their status and increase the misclassification risk. It is important, therefore, that an individual's status as an employee or independent contractor is made clear in all incentive documentation and correspondence.

 **Exercise of discretion:** Incentivisation arrangements often reserve discretion to relevant persons of authority, such as a Board or Remuneration Committee. Under Irish law, an employer is required to exercise any discretion in relation to employees reasonably, including to ensure it exercises such discretion honestly and in good faith and in a manner that does not breach the implied term of trust and confidence. Those with decision making authority should be mindful of these duties when exercising any discretion under plan rules.

 **Enforceability of clawback provisions:** The enforceability of malus and / or clawback provisions is always an important point to consider. It is also a particularly important assessment when it comes to "cause" related terminations, and must be considered having regard to the constitutional right to fair procedures under Irish law, and the legal presumption that a dismissal is presumed to be unfair unless an employer can show substantial grounds to justify it. In short, incentivisation arrangement documentation must be drafted clearly so that the consequences for the incentive are unambiguous when the employment

relationship ends. This is particularly important in respect of the forfeiture of options (and in particular, the extent to which this applies to options that have already vested) to ensure their enforceability. Ideally, language should also be included which expressly excludes compensation claims for any loss of rights relating to any such award.

 **Corporate transactions:** Employment law also plays a significant role in corporate transactions. For example, case law suggests that the right to participate in incentive arrangements may transfer under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 ("TUPE") and so, considerations arise in respect of what rights those employees have and to what extent the new employer will be required to offer a replacement award or otherwise. Potential change of control scenarios should also be considered when drafting the incentive arrangements to ensure that unanticipated costs do not arise, such as the establishment of an implied right of employees to maintain certain incentive arrangements due to custom and practice. Lastly, if the transaction results in redundancies or renegotiated remuneration packages, incentives will often be a key component of such discussions.

## Data Protection

Any incentivisation arrangement implemented by an Irish (or other European Economic Area) company must be carried out in compliance with applicable domestic and EU data protection laws, deriving mainly from the EU General Data Protection Regulation 2016/679 (the “**GDPR**”), and in particular the requirements of lawfulness and transparency.

### Lawful basis

Companies must first identify a “lawful basis” to process any employee personal data. While “consent” may be the most familiar legal basis to non-European lawyers, it is very rarely the most appropriate legal basis in an employment situation due to the imbalance of power in the employer / employee relationship and, in the Irish context, we would typically recommend avoiding reliance on consent as a lawful basis. In the context of incentivisation schemes, the following lawful bases are most likely to be applicable:



Performance of a contract (ie, processing is lawful where it is necessary for the performance of a contract to which the data subject is party to – in this instance the incentivisation agreement).



Compliance with a legal obligation (ie, processing is lawful where it is necessary for compliance with a legal obligation to which the company is subject, such as anti-money laundering requirements).



Legitimate interests (ie, processing is lawful where the company has a legitimate interest to do so, for example fraud prevention or for commercial interests).

Details on the lawful bases relied upon must be set out in the company’s privacy notice (sometimes called a privacy statement) which itself must conform to the requirements of Articles 13 & 14 and to any additional local legal or regulatory requirements. It is important that companies ensure that their privacy notices cover the processing of personal data necessary to implement incentivisation arrangements. The privacy notice should not only clearly set out the relevant lawful bases, but also the specific purposes of processing and the types of personal data used for each purpose, as well as provide information about onward sharing of personal data with third parties (for example administrators and / or trustees). If this information is not contained in the global / central privacy notice, an Irish-specific or scheme specific supplementary notice containing this information may be issued to employees with the incentive plan documentation.

### Other considerations

- **Retention of data:** The storage limitation principle in the GDPR requires personal data to be retained only for as long as is necessary to fulfil the purpose for which it was collected, subject also to mandatory requirements / retention periods applying to specific types of data.
- **Transfer of data:** Any agreements with data processors, such as administrators, must contain the mandatory provisions as set out in Article 28 of the GDPR. If personal data is being transferred from Ireland or other EEA jurisdictions to recipients (including intragroup recipients) located outside the EEA, special compliance steps may be required, including potentially having to put the EU Standard Contractual Clauses in place in order to ensure the transfers are lawful.
- **Privacy notices:** Privacy notices are not contracts – and transparency information is intended to be informational rather than contractual. While deviation from the practices / information set out in the privacy notice may give rise to breaches of data protection law, it does not necessarily give rise to breaches of contract between companies and the relevant person(s) whose personal data is being processed. For that reason, it is preferable to keep transparency information clearly separate from contractual obligations so as not to create any inference that information on the employer’s data processing practices amount to contractual obligations on the employer.

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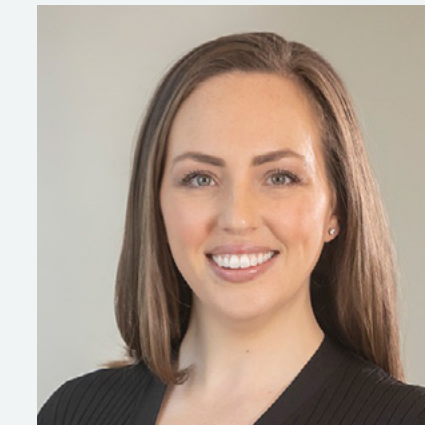


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