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Employee Share Plans in Europe and the USA

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Introduction

The purpose of this guide

This guide is designed to summarise the main legal and tax issues arising on the operation of employee share plans in key European countries and in the USA.

It has been prepared with the assistance of Clifford Chance colleagues in Amsterdam, Brussels, Frankfurt, Madrid, Milan, Moscow, New York, Paris, Prague and Warsaw. We are also grateful for the assistance provided by the following firms in the other countries covered by this guide: DLA Piper Weiss-Tessbach Rechtsanwälte (Austria), Kromann Reumert (Denmark), Sorainen Law Offices (Republic of Estonia), Lakatos, Köves & Partners (Budapest), Roschier Holmber, Attorneys Ltd. (Finland), Bahas, Gramatidis & Partners (Greece), McCann FitzGerald Solicitors (Republic of Ireland), Skudra & Udris (Republic of Latvia), Lideika, Petrauskas Valiunas ir Partneriai LAWIN (Republic of Lithuania), Serra Lopes, Cortes Martins & Associados (Portugal) and Mannheimer Swartling Advokatbyrå (Sweden). Further details of all the offices which have assisted in preparing this guide are set out at the end of this guide.

Clifford Chance

The Clifford Chance Employee Benefits Group has extensive experience of advising on all aspects of employee share plans and other aspects of employee remuneration both in the UK and internationally. Our approach is multi-disciplinary, in that we cover securities and regulatory laws, employment laws, accounting, tax and institutional investor guidelines. We help clients decide which type of plan will meet their commercial objectives, as well as designing the rules of a new plan, or modifying existing plan rules in light of new tax or other technical developments. We also have extensive experience of helping clients project manage share plan launches and advising on their ongoing operation and we regularly advise on the share plan implications of flotations, mergers, takeovers and other corporate transactions.

We help public and private companies deal with various legal technicalities such as tax practice, stock exchange rules, securities and employment regulations.

Further information

This guide provides an outline of the legal and tax issues affecting employee share plans in Europe. We also have separate guides on Employee Share Plans in the United Kingdom, Employment and Benefits in the United Kingdom, Employment in the European Union and Employment in Eurasia and the Middle East.

Our regular newsletters are designed to keep you up-to-date with new developments in the world of share plans. If you would like to join our distribution list please contact Sally Robinson (sally.robinson@cliffordchance.com) or any other member of the Employee Benefits Group.

You can obtain further information and advice on all aspects of employee share plans and other remuneration techniques from Daniel Hepburn, Kevin Thompson or Robin

Tremaine. Further information about Clifford Chance and our network is set out at the end of this guide.

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Employee share plans in Europe and the USA: an outline

1. The aim of the guide

Employee share plans are an important way for companies to recruit, retain and motivate their employees. Companies which already have share plans frequently wish to extend the benefits of those plans throughout their international operations. The aim of this guide is to summarise the key legal and tax issues relevant to establishing and operating share plans in 21 European countries and the USA.

All of the European countries covered in this guide are, except for the Russian Federation, member states of the European Union (the EU). As a result, in some areas, notably data protection and employment, the relevant law in each member state is based on EU Directives. However, in other areas, in particular taxation, member states generally retain the ability to set their own laws independently of the EU.

2. What are the key regulatory issues?

The main issues which companies need to consider are the following.

2.1 **Securities laws:** All EU member states have implemented the EU Prospectus Directive (Prospectus Directive). However, the situation across Europe is still not a harmonised one, due to differences in the way in which the Prospectus Directive has been implemented and is being interpreted at a national level.

The Prospectus Directive has a number of implications for employers who wish to offer securities to employees in an EU country. An offer of shares to employees will in principle be classed as an offer of securities to the public under the Prospectus Directive, which requires the publication of a prospectus. However, an employer who wishes to offer shares to employees in the EU may benefit from certain exclusions or exemptions from the requirement to publish a prospectus if:

- the securities of the employer (or an affiliated company) are admitted to trading on a regulated market in the EU, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer ("the employee share plans exemption"); or
- the offer of securities is to fewer than 100 persons per EU member state; or
- the total consideration under the offer is less than, generally, €2.5 million (this limit is calculated over a period of 12 months).

Furthermore, securities for the purpose of the Prospectus Directive are defined as "securities which are transferable and negotiable on the capital market". Both the European Commission and the majority of the members of the Committee of European Securities Regulators (CESR) have indicated that in their view (which has no binding force) non-transferable options granted under an employee share plan generally fall outside the scope of the Prospectus Directive, which is very helpful for companies operating share option plans.

In February 2009, CESR published some "short-form prospectus" rules that will benefit many non-EU listed companies operating employee share plans in the EU. The short-form prospectus can omit various items of information (as set out in CESR guidance) which would otherwise be required under a full prospectus.

In June 2010, the EU Parliament approved (and the EU Council is expected to approve before the end of 2010) a number of amendments to the Prospectus Directive, including some amendments to the employee share plans exemption. The employee share plans exemption is to be extended to all companies whose head office or registered office is in the EU. This applies regardless of whether or not the company is listed (or where that listing, if any, is). Companies which are established outside the EU will qualify for the exemption if they are listed on an EU regulated market (as is the case under the current exemption wording) or if they are listed on a "third country market" which is recognised by the EU Commission (under a formal process) as being governed by a regulatory regime equivalent to the EU regulatory regime. In such a case, the company will be required to provide "adequate information" including the employee information note referred to above. Member states are expected to be given 18 months to implement the changes to the employee share plans exemption (and the other changes to be made to the Prospectus Directive) once those changes have been brought into force by the EU. In the meantime, the current employee share plans exemption remains in force.

Certain of the other exclusions/exemptions on which companies may be able to rely when making an offering under an employee share plan are to be extended:

- the exemption which applies to offers made to fewer than 100 individuals per member state is to be increased to fewer than 150 individuals per member state; and

- the exclusion which applies where the consideration for the offer over a period of 12 months is less than €2.5 million (across the EU) is to be increased to less than €5 million (across the EU).

Although the Prospectus Directive came into force more than 5 years ago, many of the issues raised by the Prospectus Directive remain unresolved. Further information on the effects of the Prospectus Directive and the implementing legislation is separately obtainable from Clifford Chance.

Offers of securities to employees in the US are regulated by both the federal and state governments, although it is often possible for companies to take advantage of one or more exemptions from the relevant registration requirements.

2.2 **Financial services issues:** Many countries have laws which limit the way in which companies can make offers of securities, unless certain conditions are met. For example, in the UK there are restrictions on arranging deals in securities (for which there is an employee share plan exemption) and giving investment advice on securities (for which, by contrast, there is no equivalent exemption).

2.3 **Exchange controls:** There are generally no exchange controls for employee share plans in the EU but they do exist in other European countries. The USA does not have exchange controls for employee share plans.

2.4 **Financial assistance:** Most countries in Europe prohibit a company from assisting others to acquire shares in itself or in its parent company (e.g. by way of a cash gift or loan). Financial assistance may be relevant where the parent company or any of its subsidiaries provides gifts, loans or guarantees to employees or the trustees of an employee benefit trust to acquire shares in the parent company. In many countries (such as Belgium, France and the UK) there is an exemption from the financial assistance rules for employee share plans. In general, US companies are permitted to give financial assistance for the purposes of an employee share plan.

2.5 **Data protection:** Data protection laws restrict the processing of employees' personal information. The restrictions apply to the employer's collection and processing of employees' personal information for the purposes of an employee share plan but also, for example, to the sharing of information with group companies, share plan administrators or other third parties. The position was harmonised to some extent across the EU member states by the 1995 framework directive on data protection, although significant differences remain between the various data protection regimes. Data protection laws will generally require employees to be fully informed about the processing of their personal information in connection with an employee share plan. In some member states it may be necessary for employees to consent to the processing. Processing of employee information will also be subject to a series of general requirements - for example, that the processing should be fair and lawful, that no excessive information should be processed and that steps should be taken to ensure that the information is accurate, secure and not retained when no longer needed. In many member states it is also necessary to register processing with a national data protection authority or to consult an internal data protection officer. There are specific restrictions which arise if personal information is transferred outside the European Economic Area.

3. What are the tax issues?

The tax issues depend on the structure of the relevant plan.

3.1 **Taxation of share acquisitions:** When an employee acquires shares for free or at a discount to their market value, he will usually be liable to income tax and, in some cases, social security contributions on the difference between the market value of the shares acquired and the price, if any, paid for them. Some countries, such as the USA, Denmark, Italy and the UK, have favourable regimes which can reduce or defer this tax charge.

3.2 **Taxation of share options:** When an employee is granted a share option, usually there is no tax liability at the time of grant. On exercise of the option, the employee will generally be liable to income tax and, in some cases, social security contributions on the difference between the market value of the shares acquired and the price paid for them. Some countries, such as Belgium, tax share options differently so that there can be a tax charge on grant instead of on exercise. In the USA, adverse tax consequences may arise if share options are granted at less than market value.

3.3 **Taxation of share disposals:** An employee who sells shares will usually be liable to tax on the difference between the sale price and the market value of the shares at the date they are acquired. Some countries reduce the amount of tax payable if the shares are held for a certain period (e.g. Austria and the USA).

3.4 **Tax favoured share plans:** In order to encourage wider share ownership, the USA and a number of European countries, including Denmark, France, Ireland, Italy and the UK, have tax-favoured employee share plans. Structuring a plan so that it meets the requirements of a favourable tax regime can provide beneficial tax consequences for both employee and employer.

3.5 **Employee benefit trusts:** Many UK companies operate their employee share plans using shares bought by the trustees of a discretionary employee benefit trust. Some countries, such as Ireland, recognise the concept of trusts but others, such as Lithuania, do not. This can impact on the tax treatment of the employees and the employer.

3.6 **Transfer pricing:** The principle behind transfer pricing is that subsidiaries should bear the cost of goods or services provided to them by the parent company and vice-versa. Some countries, e.g. the UK, have seen increasing interest from tax authorities in seeking to apply transfer pricing to employee share plans. It is often the case that a parent company will require its employing subsidiaries to bear the cost of participation of their employees in a share plan under a recharge arrangement. Apart from apportioning the costs between group members, this is often advantageous for the group as a whole because the subsidiary company can often obtain a corporation tax deduction for the payments made. However, in some jurisdictions no corporation tax deduction is available for the payment. If no arm's length recharge is operated, under the transfer pricing laws of certain countries, the profits of the parent company may be increased as if it had received payments on an arm's length basis from its employing subsidiaries. This will increase the tax liability of the parent company. Whether it is advantageous for each subsidiary to make a payment to the parent

company or whether it is better to allow a transfer pricing adjustment to be made, depends upon the overall tax treatment of the group companies concerned.

4. How does employment law affect employee share plans?

Employment law is a constantly developing area. In many countries, employee share plans are still relatively new and this means that the number of Court decisions is relatively limited. As a general trend, employment law claims in relation to employee share plans are increasing and the Courts are generally sympathetic to employees. Where there are specific issues in a country (e.g. in Denmark) in addition to the more general issues mentioned below, these are dealt with in the relevant chapter. However, the comments below highlight risks which are likely to be relevant to a greater or lesser degree in all countries.

4.1 Acquired rights and discrimination

During the course of employment, an employee may claim that he has acquired a right to receive an award (or a particular level of award) under an employee share plan. This is often referred to as a claim for an "acquired right". Alternatively, an employee may bring a claim on the grounds of unequal treatment or discrimination. For example, an employee who participates in a discretionary share plan may claim that he or she has received a lesser award than a colleague and they have therefore been discriminated against on the grounds of, e.g., age, sex or disability. Even if a plan is operated on an all employee basis, claims may arise. For example, there may be issues if part-timers, those employed on fixed term contracts or those absent from work due to parental leave or because of long-term sickness are excluded from participating.

4.2 Termination claims

In a number of EU jurisdictions, the Courts have included rights granted under employee share plans in calculating compensation due to employees on termination of employment. This is usually on the basis that the value of awards granted under share plans is treated like salary. In some jurisdictions this is only the case if the employee concerned has made previous gains under a share plan during employment.

In a small number of jurisdictions, the Courts have gone further and deemed the terms of a plan to apply differently from how the terms were originally drafted. For example, a plan may provide that on termination of employment in prescribed circumstances, certain (e.g. unvested) awards will lapse. Despite this express term, the Courts in some jurisdictions have deemed the terms of the plan to apply more favourably to employees so that, for example, the unvested awards do not lapse. This is of particular concern if an employee is dismissed a short way into a long vesting period. Assuming that the Court did not accelerate vesting of some or all of an award, the employee would have a right to continue to receive the unvested portion of the award, in accordance with the normal vesting schedule, long after he had ceased employment.

4.3 Jurisdiction/exclusion clauses

Employee share plans often contain clauses which specify the law which applies to the terms of the plan. This is generally the law of the jurisdiction in which the parent company is based. It is also usual to include a clause which seeks to exclude an employee's right to bring a claim for lost rights under the plan in the event of termination of employment. Some countries will respect these clauses and others will not. The problem is that claims are usually brought under local employment laws, rather than under the terms of the plan. Nonetheless, both types of clause should normally be included because (subject to some limited exceptions) they do no harm and may be effective in some jurisdictions.

4.4 Consultation

In some countries works councils may be established. Where this is the case, there may be an obligation on the employer to consult with the works council about the introduction or amendment of any employee share plan even though all decisions in respect of the plan are made by the parent company. In some countries, failure to inform and/or consult the works council may be a criminal offence and minimum time periods are often prescribed for consultation. Even where there is no obligation to consult, it is often expected as a matter of good employee relations that consultation will take place, especially if changes to an existing plan are proposed. It may also be the case that there is an obligation to consult with employee representatives about the introduction or amendment of an employee share plan under the terms of a collective bargaining agreement.

5. Do other factors affect employee share plans?

In practice, other issues will arise such as the role of double-tax treaties, accounting treatment and public disclosure requirements which are outside the scope of this guide. These issues need to be considered when establishing an employee share plan in a particular country and specific advice should be obtained.

6. Basis of the information

The following assumptions are made in this guide:

- The tax treatment of employees summarises the position for employees resident for tax purposes in the relevant jurisdiction.
- References to "the 2010 tax year" indicate the rates of tax applicable during some or all of 2010. However, the tax year in each jurisdiction will not necessarily be a calendar year and, as such, the applicable rates may differ from those stated.
- Unless otherwise stated, the sections on securities law refer to the offer of options and shares.

This guide is based on applicable laws in force in September 2010.

Austria

1. Securities law

1.1 **Offer of securities[1]:** The offer of securities to the public generally requires the publication of a prospectus. However, there is an exemption from that requirement where securities are only offered to existing or former directors or employees:

- by their employer (which has securities already admitted to trading on an EU regulated market); or
- by an affiliated undertaking.

To rely on this exemption, a document[2] must be made available containing information on the number and the nature of the securities and the reasons for, and details of, the offer.

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1 The Prospectus Directive was implemented into Austrian law in August 2005.

2 The Austrian Financial Market Authority (*Finanzmarktaufsicht*) (FMA) has issued a regulation which sets out the minimum content of any such document as follows:

- company name and seat of the issuer;
- details on where to find additional information about the issuer, particularly the last published yearly financial statement and other publications that have been disclosed within the last twelve months in fulfilment of disclosure obligations;
- a declaration on the reasons for the public offering or admission of the securities to trading on a regulated market;
- details on the legal provision on the basis of which the document is produced (in this case, this would be § 3 subsection 1 nr. 12 Austrian Capital Market Act (*Kapitalmarktgesetz*) (KMG); and
- details of the offer, such as: circle of offerees, timeframe for the offer, minimum and maximum amount for each acquirer and the issue price, details on the type of security and the rights associated therewith, the risks as well as details of any additional obligations attached to the distribution or admission of the securities. Further, where the issue price has not been determined at the point of the document's publication, then the criteria by which the price shall be ascertained must be given as well as the place where it may be inspected at a later point.

Pursuant to the KMG the document can be published in the following ways:

- in the Austrian official gazette to the "Wiener Zeitung" or otherwise in at least one newspaper with nationwide circulation; or
- in a printed form to be made available, free of charge, to the public at the offices of the market on which the securities are being admitted to trading, or at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents; or
- in an electronic form on the issuer's website and, if applicable, on the website of the financial intermediaries placing or selling the securities, including paying agents; or

There is also an exemption for offers made to fewer than 100 natural or legal persons per EEA member state (other than qualified investors).

1.2 **Regulatory issues:** There are no other regulatory issues which affect the offering of securities to employees.

1.3 **Disclosure:**[3] An Austrian joint stock company (AG) must report the grant of stock options under employee share plans to shareholders and stock options granted to employees or directors must not exceed 20% of the company's issued share capital. The annual financial statements of all Austrian companies must include a summary of the company's employee share plans and of rights granted under them. Companies listed on the Vienna stock exchange have additional reporting obligations.

2. Exchange controls

There are no applicable exchange controls.

3. Financial assistance

3.1 **Austrian company:** An AG and a limited liability company (GmbH) are generally prohibited from acquiring their own shares or shares in their parent, although an AG can acquire up to 10% of its own shares for an employee share plan.[4] In addition, an AG is prohibited from providing financial assistance to acquire its own shares or shares in its parent company. There is no such prohibition on a GmbH, although loans made by a GmbH to acquire its own shares or shares in its parent company could be subject to rules which prohibit a reduction of capital.[5]

3.2 **Austrian subsidiary of non-Austrian company:** The application of the restrictions on financial assistance to an Austrian subsidiary of a non-Austrian

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- in an electronic form on the website of the regulated market where the admission to trading is sought; or
- in electronic form on the website of the FMA or on the website of an organisation charged with this task for an adequate fee if the FMA has decided to offer this service.

[3] Certain additional factors will apply if the employee share plan is operated by an Austrian company, but will not apply if the plan is operated by a non-Austrian company, regardless of whether Austrian employees participate in that plan.

[4] An AG may acquire up to 10% of its own shares, or increase its authorised or unissued share capital, to provide shares under an employee share plan.

[5] However, as the issue or transfer of shares in a GmbH (as well as the granting of an option for the issue or transfer of shares in a GmbH) requires a notarial deed in Austria, employee share plans using GmbH shares are in practice of no significance in Austria.

company remains unclear. It is recommended that Austrian subsidiaries comply with the same requirements as are set out in paragraph 3.1 above.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employing company or its parent company free of charge or at a discount to market value will normally be liable to pay income tax. The tax charge is on the difference between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the 2010 tax year income tax rates range from 0% to 50%.

4.1.2 **Social security contributions:** An employee will be subject to social security contributions on the amount of his gross monthly salary (up to a maximum of €4,110) at rates ranging from 18.07% (white collar workers) to 18.20% (blue collar workers).

4.1.3 **Tax and social security contributions exemption:** Austrian employees can acquire shares with a value of up to €1,460 a year free of income tax and social security contributions, subject to certain conditions.[6]

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** The employer may obtain a corporation tax deduction for the employee share plan costs incurred.

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[6] See section 3, paragraph 1, subsection 15(b) of the Austrian Income Tax Act and section 49, paragraph 3 subsection 18(c) of the Austrian General Social Security Act. The detailed conditions are that:

- the shares are acquired directly by the employee;
- the employee does not sell the shares within 5 years of acquisition (unless the sale is due to termination of employment, regardless of the reason for the termination). The 5 year period starts from the end of the calendar year in which the shares were acquired. The employee must prove to his employer before 31 March of each year that he still retains ownership of the shares and must inform the employer without delay if he sells the shares before the expiry of the 5 year period;
- the shares are granted to all employees or to all employees within a defined group within the company (defined either by operational organisation (e.g. blue collar workers/white collar workers) or fields of work (staff salesman/mechanics etc.). The Austrian tax authorities apply the definition of "group of employees" rigorously;
- if the participation is in the form of securities, these must be deposited with an Austrian or EEA credit institution, or a trustee appointed by the employer and the works council.

4.2.2 **Social security contributions**: Employer social security contributions will be payable in respect of shares provided to employees for free or at a discount to market value if the employee is subject to social security contributions and the value of the shares is higher than the special exemption (€1,460 a year – see paragraph 4.1.3 above). The maximum rate of employer's social security contributions for the 2010 tax year is 21.70% for blue collar workers and 21.83% for white collar workers. The upper income limit for employer social security contributions in 2010 is an employee's gross monthly salary of €4,110.

Under certain circumstances, an amount equivalent to 1.53% of the employee's monthly gross salary must be paid by the employer into a fund for future severance payments (this is a scheme which has applied since January 2003).

4.3 Tax withholding

The employer must withhold any income tax and employee social security contributions due.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no tax or social security contributions charge on the grant of a share option unless the option is characterised as an economic good.[7]

5.1.2 **Exercise:** There is an income tax charge on the exercise of a share option on the difference between the market value of the shares at the date of exercise and the option exercise price. For the 2010 tax year income tax rates range from 0% to 50%.

5.1.3 **Social security contributions:** Social security contributions arise on the exercise of options at rates ranging from 18.07% (white collar workers) to 18.20% (blue collar workers). The basis for liability is the employee's gross monthly salary subject to an upper income limit for social security contributions of €4,110 for 2010.

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7 Pursuant to Austrian administrative practice. This will be the case if the option is transferable and granted unconditionally.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** The employer may obtain a corporation tax deduction for the employee share plan costs incurred.

5.2.2 **Social security contributions:** Employer social security contributions arise on the exercise of an option in circumstances where an employee is subject to social security contributions. The maximum rate of employer's social security contributions is 21.70% (blue collar workers) and 21.83% (white collar workers) for the year 2010 (the upper income limit for social security contributions is a gross monthly salary of €4,110).

Under certain circumstances, an amount equivalent to 1.53% of the employee's monthly gross salary must be paid by the employer into a fund for future severance payments.

5.3 Favourable tax regime

Previously, a favourable tax regime applied to non-transferable options if certain conditions were met. However, under the Tax Reform Act 2009[8], the favourable tax regime for share options was restricted so that it now only applies to options granted before 1 April 2009[9]. If non-transferable options, granted before 1 April 2009 meet certain conditions, then the favourable tax regime will continue to apply to them.

5.4 Tax withholding

The employer must withhold any wage tax and employee social security contributions and other duties due.

6. Taxation of share disposals

6.1 If the employee sells shares within one year of acquiring them, the difference between the market value of the shares on the date of acquisition and the sale proceeds will be subject to income tax at the employee's marginal tax rate.

6.2 If the employee disposes of shares more than one year after acquiring them, any gain on sale will be free of tax provided that the employee holds less than 1% of the company's total issued share capital at the time of sale.[10]

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8 "Steuerreformgesetz 2009".

9 See section 124b, subsection 151 of the Austrian Income Tax Act.

10 The one year holding period begins when the employee becomes the economic owner of the shares. If the shares are subject to sale restrictions, the employee may not be regarded as their economic owner.

7. Employee benefit trusts

There is a special form of employee benefit trust[11] in Austria. Under this arrangement, the trust holds shares in the employing company and dividends paid on those shares are transferred by the trust to employees. Such dividends are subject to a 25% withholding tax, up to a limit of €1,460 per employee per year. (Where the dividend amount exceeds €1,460 then the dividends are treated as income from employment, i.e. they are taxed at the employee's marginal tax rate and social security contributions also apply).

More generally, advantageous tax rules apply to Austrian trusts. When setting up an Austrian trust specific advice should be sought to determine the legal and tax issues.

8. Data protection

Employee consent must be obtained for the collection, processing and worldwide transfer of personal data in connection with an employee share plan.[12]

9. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

[11] "Belegschaftsbeteiligungsstiftungen".

[12] EU Directive 95/46/EC on data protection has been implemented in Austria by the Federal Act concerning the Protection of Personal Data. Section 1 recognises the individual's right to privacy and personal data can only be processed and transferred if the purpose and content of the data and the reason for its transfer is specifically defined and the employee's privacy is not infringed. The employee's explicit consent is required which can be revoked at any time in relation to "sensitive data" as defined by section 4 of the Act (that is, for example, data concerning trade union membership, political views or health).

Belgium

1. Securities law

1.1 **Offer of securities**[1]**:** Although the offer of securities to the public generally requires the publication of a prospectus, there are some exemptions from that requirement.

1.1.1 No filing, application or other formality need be made with the BFIC:

- for an offer of securities to fewer than 100 individuals in Belgium (even if, in our view, the offer is being made to more than 100 individuals in a different EU state);
- for an offer of securities (e.g. shares or stock options, whether or not listed) which are granted free of charge. However, any communication made within Belgium relating to such a free offer must contain information on the number and nature of the securities and the reasons for and details of the offer, which must be made available to employees;
- where transferable securities (e.g. listed shares or listed stock options) are offered to existing or former directors or employees by their employer (or an affiliated company) which has securities listed on a regulated market in the EEA, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer. For offers to the public in Belgium where the total consideration of the offer is less than €2,500,000, the exemption is also available for an employer (or an affiliated company) which is an issuer listed on a market other than a regulated market in the EEA, provided that the relevant market offers equivalent regulatory standards.

1.1.2 Offers to employees under the Prospectus Directive where a prospectus is required (e.g. an offer by an employer of securities which are not listed on a regulated market in the EEA, where the total consideration of the offer is more than €2,500,000) can benefit from the "short-form prospectus" regime adopted by CESR in February 2009.

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[1] The Prospectus Directive was implemented in Belgium by a law of 16 June 2006 on public offers of securities and admission of securities to trading on regulated markets.

1.1.3 In addition, offers to employees that fall outside the scope of the Prospectus Directive which do not benefit from any of the exemptions referred to in paragraph 1.1.1 above, will not normally be prospectus-exempt in Belgium, but the BFIC may grant a partial or total dispensation from the obligation to publish a prospectus, for example:

- where non-transferable securities are offered in Belgium to 100 or more existing or former directors or employees by their employer (or an affiliated company) which is a listed (either on a regulated market in the EEA or on any other market) or a non-listed issuer;

- for an offer of transferable securities in Belgium where the total consideration of the offer is less than €2,500,000 (but more than €100,000)[2] and the offer is made to 100 or more existing or former directors or employees by their employer (or an affiliated company) which is an issuer listed on a market other than a regulated market in the EEA and where the relevant market does not offer equivalent regulatory standards.

Where any offer of securities is subject to prospectus approval by the BFIC, then the marketing materials should also be submitted to the BFIC for approval.

1.2 **Regulatory issues:** There are no other significant regulatory issues that affect an offer of securities to employees. A company which issues securities direct to employees in Belgium does not need a licence as an investment firm or securities intermediary. However, if a company uses another entity (e.g. a securities broker) in connection with the issue of the securities, that other entity would require a licence as an investment firm unless an exemption applies.

1.3 **Disclosure**: In principle, disclosure requirements other than those resulting from the Transparency Directive and the Market Abuse Directive do not apply where securities are offered to employees and/or directors in Belgium.

2. Exchange controls

There are no applicable exchange controls.

3. Financial assistance

3.1 **Belgian company:** Belgian law allows a company to make loans (or grant security interests) to its employees (or to the employees of its affiliates) with a

[2] If the total consideration under the offer is less than €100,000 it will not constitute an offer of securities to the public in Belgium and no filing or other formality need to be made/adhered to with the BFIC.

view to the acquisition of the company's shares within the limits of the distributable reserves available to the company and provided that the company maintains a non-distributable reserve for the amount of the financial assistance.

3.2 **Belgian subsidiary of a Belgian or a non-Belgian parent company:** Assisting the acquisition of shares in a non-Belgian parent company is considered to be outside the scope of the Belgian financial assistance rules and assisting in the acquisition of shares in a Belgian parent company is generally also considered to be outside the scope of the Belgian financial assistance rules, provided certain conditions are met.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employing company or its parent company free of charge or at a discount to market value will normally be liable to pay income tax. The tax charge is on the difference between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the 2010 income tax year personal income tax rates range from 25% to 50%.

4.1.2 **Social security contributions:** Employees will be subject to social security contributions on the amount subject to income tax at a rate of 13.07%. Social security contributions are not due on discounts granted to employees if and to the extent the income tax exemptions described in paragraph 4.1.3 below apply.

4.1.3 **Tax exemption:** There are exemptions from tax and social security contributions for shares which are offered to employees at a discount:

- Newly issued shares may be offered with a tax-free discount of up to 20%,[3] provided certain conditions are satisfied, including a 5 year lock-up period.[4] This tax exemption is technically available only to Belgian companies, but in practice the tax authorities also agree to exempt the discount in the case of share issues by non-Belgian companies if all the main conditions are satisfied.
- Existing shares in listed entities may in certain circumstances be offered at a tax-free discount of up to 16.67%, subject to a lock-up

[3] Under article 609 of the Company Code.

[4] Article 609 of the Company Code and article 48 of the law of 26 March 1999.

period of 2 years.[5] This regime provides an attractive alternative to the tax exemption described above.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** The employer can normally claim a corporation tax deduction in respect of the costs incurred in establishing and administering an employee share plan. Capital losses on shares are not deductible.

4.2.2 **Social security contributions:** Employer social security contributions are due to the extent that the employee is subject to social security contributions. The employer's social security contributions amount to around 35%.

4.3 Tax withholding

4.3.1 **Belgian company:** A Belgian employing company must withhold any tax and employee social security contributions due.

4.3.2 **Belgian subsidiary of a non-Belgian company:** If the employing subsidiary is considered to be an intermediary for tax purposes, it must withhold the tax and employee social security contributions owed by the employee. If the subsidiary only plays a minimal role in the plan (for example, it is restricted to providing the names and addresses of the employees), then the subsidiary should not be considered an intermediary and would not be required to withhold the tax and employee social security contributions.

5. Taxation of share options

5.1 Employee tax and social security contributions[6]

5.1.1 **Grant:** There is a tax charge on the grant of a share option which is calculated using a formula based on the market value of the shares.[7]

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[5] This exemption results from a circular published by the tax authorities, rather than an express statutory provision. The lock-up period is interpreted strictly by the tax authorities, even in the case of the death of the employee.

[6] The description of the tax consequences summarised in this section is based on the 1999 tax legislation, applicable for options granted as of January 1999. A favourable tax regime was introduced on 27 December 1984 for certain share option plans but the requirements of this regime are so restrictive that it has been rarely used.

Tax is normally charged on an amount equal to 15% of the value of the shares at the time that the option is granted. If the option can be exercised more than 5 years after the grant of the option, the tax charge is increased by 1% for each year or fraction of a year beyond the fifth year that the option is exercisable.

It is possible to reduce the taxable basis by 50% (so that the initial standard taxable basis would be 7.5%, rather than 15%, of the value of the shares) if (i) the exercise price of the option is set at the time of grant, (ii) the exercise period begins no earlier than 1 January of the fourth calendar year after the year in which the option was granted and ends no later than the end of the tenth calendar year following the year of the offer, (iii) the option is non-transferable, (iv) the grantor of the option or any related party of the grantor does not provide any protection against a decrease in the value of the underlying shares, and (v) the underlying shares are shares of the employer or the parent of the employer.

If the exercise price is less than the market value of the shares at the time of the offer, the taxable benefit is increased by the discount. In addition, if the terms of the option include a guaranteed benefit (for example, a guaranteed minimum value for the shares), the taxable benefit is increased by the value of that benefit.

The employee is deemed to refuse the share option for tax purposes unless he accepts it in writing within 60 days following the offer of the option. If the employee accepts the option before the end of the 60-day period, the option is deemed to have been granted on the 60th day for tax purposes.

5.1.2 **Exercise:** There is no tax charge on exercise.

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[7] If the shares are listed on a stock exchange, the grantor may elect that the market value of the shares will be either the average stock market price of the shares over the 30 day period preceding the grant date or the stock market price on the trading day before the grant date.

If the shares are not listed, the board of the company must decide on the value of the shares after advice from an auditor or chartered accountant. The value must not be less than the intrinsic value per share of the company based on its latest accounts.

5.1.3 **Social security contributions:** Social security contributions do not arise on the grant of a "qualifying"[8] share option unless the exercise price is less than the market value of the shares at the time of the offer or the terms of the option include a guaranteed benefit. Where this is the case, social security contributions are due on the amount of the discount and/or the value of the guaranteed benefit.

In any event, where the options are granted by a company other than the employing company (e.g. an affiliate of the employer or the parent company), the grantor does not charge back the costs to the employer and the employer is not the contact point to whom employees must address any questions that may have in relation to the plan, no social security contributions should normally be payable.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** The employer can normally claim a corporation tax deduction in respect of the costs incurred in establishing and administering an employee share plan. Capital losses on shares are not tax deductible.

5.2.2 **Social security contributions:** Employer social security contributions are due to the extent that the employee is subject to social security contributions. The rate of employer's social security contributions is approximately 35%.

5.3 Tax withholding

5.3.1 **Belgian company:** A Belgian employing company must withhold any tax and social security contributions due.

5.3.2 **Belgian subsidiary of a non-Belgian company:** If the employing subsidiary is considered to be an intermediary for tax purposes, it must withhold the tax and employee social security contributions owed by the employee. If the subsidiary plays a minimal role in the plan (for example, it is restricted to providing the names and addresses of the employees), then the subsidiary should not be considered an intermediary and would not be required to withhold the tax and employee social security contributions.

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[8] In order to be qualifying options, they must meet the definition of an "option" under the law of 26 March 1999 which implies, for example, that the option is over a fixed number of shares and the exercise price must be determined or determinable on the basis of clear criteria.

6. Taxation of share disposals

No tax charge normally arises on the disposal of shares where the shares are sold by an employee.[9]

7. Data protection

There should be no data protection issues if the participant has given his consent to the collection, processing and worldwide transfer of his personal data in connection with each employee share plan in which he participates.[10] It is useful to specifically collect the employee's data which will be used for the plan and to obtain employee consent for the processing of their personal data, particularly since the validity of employee consent for the processing of non-sensitive data by the employer is not generally questioned in Belgium (as opposed to the situation in certain other European countries).[11] The Belgian Data Protection Commission must be notified of the data processing and of the data transfers to be carried out in connection with an employee share plan.

8. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination.

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[9] This assumes the shares are sold in the normal course of the management of the employee's private assets.

[10] Where employee share plans are set up at group level (with various subsidiaries taking part in the same plan), the first step is to determine the identity of the data controller. This will usually be the group entity setting up the plan, but could also be the local employer. Thereafter, exchanges of personal data within the group need to be considered carefully and will require, amongst other things, appropriate guarantees to safeguard this data.

[11] If this consent is included in the general terms and conditions of the plan, it can, however, arguably be held to be invalid (since not freely given) if it extends to data or processing which are not strictly necessary for the share plan. It is therefore prudent to limit the data collected and the processing thereof to what is necessary for the performance of the plan or to that what is justifiable on the basis of the so-called "balance of interest" test. If data is collected or processed which does not meet this test, we recommend obtaining a freely obtained consent. This can be done by giving the employees the option to opt-in to this particular type of processing, rather than by obtaining this consent in the general terms and conditions. Even if such freely obtained consent is obtained, the data controller is still required to comply with the key principles of data protection regulations, i.e. the data should only be collected for specific, explicit and legitimate purposes and should be adequate, relevant and not excessive in relation to the purposes for which it is collected and/or further processed.

Companies should seek specific advice on these issues and other employment law issues which may be applicable.

Czech Republic

1. Securities law

1.1 **Offer of securities[1]:** Although the offer of securities to the public generally requires the publication of a prospectus, there is an exemption from that requirement where securities which are (i) issued by the employer or by a company in the same group as the employer; (ii) offered by a person in the same group as the employer; and (iii) admitted to trading on an EU regulated market, are offered to employees or to members of the "statutory body" (an executive body of the company), executive directors or persons who otherwise actually manage the activities of the employer, provided a document containing information about the number and the type of securities and the reasons for, and details of the offer are delivered to the Czech National Bank and are made available to the addresses of the offer.

There is also an exemption for an offer to fewer than 100 individuals in the Czech Republic (even if the offer is being made to more than 100 individuals in a different EU state).

1.2 **Regulatory issues:** There are no other regulatory issues which affect the offering of securities to employees assuming that no third party intermediary is involved in the offering.

1.3 **Disclosure:** Extensive disclosure obligations exist under the EU Market Abuse Directive as implemented in Czech law, in particular in relation to dealings in shares by persons discharging managerial responsibilities within the issuer and certain other persons closely associated with them.[2]

2. Exchange controls

The employee must notify the Czech National Bank of any acquisition or disposal of securities or related payments if certain thresholds are met and the Czech National Bank requires the information. The thresholds are met, in broad

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[1] The Prospectus Directive was implemented into Czech law in March 2006.

[2] Persons discharging managerial responsibilities within a company include members of the statutory body, the statutory body, executive directors or persons who otherwise actually manage the activities of the company, supervisory board or other supervisory bodies, members of the supervisory board or of other supervisory bodies, persons that make decisions within an issuer which may influence the future development and business strategy of the issuer and which have access to inside information.

terms, if the transactions amount to at least CZK 1 million or if an employee acquires 10% or more of the share capital of a non-Czech company.[3]

3. Financial assistance

3.1 **Czech company:** A Czech company is allowed to provide financial assistance (including the provision of security or a guarantee) to acquire its own shares or shares in its parent company provided certain conditions are met. These conditions are less onerous for employee share plans.

3.2 **Czech subsidiary of non-Czech company:** A Czech subsidiary is allowed to provide financial assistance (including the provision of security or a guarantee) to acquire its own shares or shares in its parent company provided certain conditions are met. Such conditions are less onerous for employee share plans.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employing company or its parent company free of charge or at a discount to market value will normally be liable to pay income tax. The tax charge is on the difference between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the 2010 tax year the income tax rate is 15%.

4.1.2 **Social security contributions:** An employee will only be subject to social security contributions if the cost of the share plan is borne by the employer (e.g. if a recharge payment is made to a parent company). If social security contributions are payable, these are charged on an amount equivalent to the cost of the share plan borne by the employer per employee at a rate of 11% for the 2010 tax year. There is a cap of CZK 1,707,048 on the amount which is subject to employee social security contributions for the 2010 tax year.

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[3] When an employee acquires, disposes of or makes payments in relation to securities, an obligation to notify the Czech National Bank may arise in circumstances where payments to or from the employee (in connection with the relevant securities) amount to CZK 1,000,000 or more. In these circumstances, an employee may also be required by the Czech National Bank to notify it of any payment made as consideration for securities for the purpose of establishing, acquiring or expanding a permanent economic relationship abroad (i.e. if the employee acquires 10% or more of the share capital of the non-Czech parent company).

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** A corporation tax deduction may be available for a Czech company which bears the cost of an employee share plan if the benefit is included in the employment contract, or in a collective agreement, or within the internal wage regulations of the employer.[4]

4.2.2 **Social security contributions:** Employer social security contributions will only be payable if the employee is subject to social security contributions. For the 2010 tax year the rate of employer's social security contributions is 34%. There is a cap of CZK 1,707,048 on the amount which is subject to employer social security contributions for the 2010 tax year.

4.3 Tax withholding

If the cost of a share plan is borne by the Czech employer, it must withhold any income tax and employee social security contributions due.[5]

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no tax or social security contributions charge on the grant of a share option.[6]

5.1.2 **Exercise:** There is an income tax charge on the exercise of a share option on the difference between the market value of the shares at the date of exercise and the option exercise price. For the 2010 tax year the income tax rate is 15%.

5.1.3 **Social security contributions:** An employee will only be subject to social security contributions if the cost of the share plan is borne by the employer (e.g. if a recharge payment is made to a parent company) at a rate of 11% for the 2010 tax year. There is a cap of CZK 1,707,048 on

[4] Where the local entity is asked to bear the administrative costs only, such costs would not be deductible.

[5] If withholding obligations of the local entity do not apply (i.e. there is no recharging arrangement in place), the benefits derived from the share acquisition must be reported by the employee to the financial authorities through the employee's annual Czech tax return.

[6] It should also be noted that an opinion exists that the taxable event could occur at grant if the options can be valued. This opinion represents a very aggressive approach in respect of the taxation of share options.

the amount which is subject to employee social security contributions for the 2010 tax year.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** A corporation tax deduction may be available for a Czech company for any costs which it bears in relation to an employee share plan if the benefit is included in the employment contract, or in a collective agreement, or within the internal wage regulations of the employer.[7]

5.2.2 **Social security contributions:** Social security contributions arise on the exercise of an option in circumstances where an employee is subject to social security contributions. For the 2010 tax year the rate of employer's social security contributions is 34%. There is a cap of CZK 1,707,048 on the amount which is subject to employer social security contributions for the 2010 tax year.

5.3 Tax withholding

If the cost of a share plan is borne by the Czech employer, it must withhold any income tax and employee social security contributions due.

6. Taxation of share disposals

If the employee sells shares within 6 months of their acquisition, the difference between the market value of the shares on the date of acquisition and the sale proceeds[8] will be subject to income tax at the rate of 15% for the 2010 tax year. If the employee sells the shares after a period of six months following their acquisition, the gain from the sale is exempt from taxation, assuming that the employee does not receive any purchase price payment during the six month holding period.[9]

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[7] Where the local entity is asked to bear the administrative costs only, such costs would not be deductible.

[8] Under the prevailing interpretation the taxable amount should be the difference between the sale proceeds and the fair market value of the shares at exercise, as the employee has already paid tax on the benefit at exercise.

[9] Provided that the employee's total direct ownership interest in the share capital or voting rights in the company has not exceeded 5% within the 24 months preceding the sale of its shares.

7. Employee benefit trusts

7.1 Employee benefit trusts are not recognised under Czech law. However, a Czech company may make a contribution to such a trust for the benefit of its employees.

7.2 It is currently unclear whether an employee who is a beneficiary of a discretionary employee benefit trust should be taxable for that reason alone. However, it is thought that he should be taxed only when he actually receives benefits from the trust, as if he had received those benefits directly from his employing company.

8. Data protection

Employee consent must be obtained for the collection, processing and worldwide transfer of personal data in connection with an employee share plan.[10] In addition, express consent must be obtained from employees for the processing of their birth numbers. Birth numbers are normally used by Czech businesses as the key identifier in databases as they provide unambiguous identification of all Czech citizens.

9. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

[10] If the employer is involved in collecting and/or processing the employees' personal data, it must (i) obtain permission from each employee to collect his/her personal data and to transfer the personal data abroad, (ii) register with the data protection office, and (iii) obtain prior approval from the data protection office to transfer the data abroad. The obligation to seek the approval of the data protection office does not apply if the processed data is handed over to the EU countries or Switzerland.

If the parent company processes the subscription forms, it should obtain an analogous consent from each employee to be allowed to process his/her personal data. No registration with or approval by the data protection office is needed.

Denmark

1. Securities law

1.1 **Offer of securities:** The Danish prospectus regime consists of three tiers.[1]

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[1] The Danish prospectus regime consists of "three tiers", of which only Tier 1 is a direct implementation of the Prospectus Directive. The layout below illustrates the three tiers of the Danish prospectus regime:

	OFFERING	LEGISLATION
Tier 1	Offerings of securities with an aggregate value above €2,500,000 and of securities which are listed or admitted to trading on a regulated market	• Prospectus Directive • Prospectus Regulation • CESR's recommendations • The Danish Securities Trading Act, Chapter 6 • Executive Order no. 223/2010 • Guidelines No. 9318/2005
Tier 2	Offerings of unlisted securities with an aggregate value between €100,000 and €2,500,000	• The Danish Securities Trading Act, Chapter 12 • Executive Order no. 222/2010 • Guidelines No. 9320/2005
Tier 3	Offerings of unlisted securities with an aggregate value below €100,000	• Not covered by prospectus rules. The Danish Marketing Act and other acts may be applicable

<u>The EU Prospectus Passport</u>

In the context of the Danish legislation regarding the EU Prospectus Passport, the distinction between the three tiers described above is essential. This is because the regulations implementing the Prospectus Directive only cover offerings of (a) securities with an aggregate value above € 2,500,000 and (b) securities which are listed or admitted to trading on a regulated market within EU/EEA (collectively, "Tier 1 Offerings").

- Tier 1 applies to offers of securities with an aggregate value above €2,500,000 and to securities which are listed or admitted to trading on a regulated market.
- Tier 2 applies to offers of unlisted securities with an aggregate value of between €100,000 and €2,500,000.
- Tier 3 applies to offers of unlisted securities with an aggregate value below €100,000.

Under the Danish prospectus regime, the main rule is that any offer of securities to the public[2] with an aggregate value above €100,000 (i.e. an offer within Tier 1 or Tier 2) results in the obligation to issue a prospectus.

There are, however, a number of exemptions in place, which may apply to share plans. The exemptions can be divided into three categories namely:

- those applying to the offer of securities which are not listed or admitted to trading on a regulated market ("Unlisted Securities");
- those applying to the listing of securities, which are to be listed or admitted to trading on a regulated market ("Listed Securities"); and
- those applying to the offer of securities which are to be listed or admitted to trading on a regulated market.

For Tier 1 Offerings the EU Prospectus Passport requires the EU/EEA member states to mutually recognise prospectuses approved by the competent authority in any other member state and thus enable the cross border passporting of prospectuses within the EU/EEA.

[2] In accordance with Section 2b of the Danish Securities Trading Act an offer of securities to the public is:

"a communication to natural or legal persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities".

It follows from the definition that a share plan under which securities of an aggregate value above €100,000 are offered will, in principle, be an offer of securities to the public and result in an obligation to publish a prospectus.

Non-transferable securities

To the extent that options offered under a share plan are non-transferable securities, the offering will not be covered by Danish prospectus rules.

In addition, at the time of exercise of the non-transferable securities under a share plan, there is no public offer within the meaning of Article 2.1 (d) of the EU Prospectus Directive as interpreted by the Danish FSA.

The exemptions outlined below apply equally to Tier 1 and Tier 2 offerings although they follow different sets of rules.[3]

Exemptions for offers of Unlisted Securities

The following are the relevant exemptions (for offers of Unlisted Securities) from the requirements to issue a prospectus:

- **100-offeree exemption**. Offers of Unlisted Securities addressed to fewer than 100 natural or legal persons in Denmark (even if the offer is being made to more than 100 individuals in a different EU state).

- **Employee exemption**. Unlisted Securities offered, allotted, or to be allotted to existing or former directors, members of the supervisory board or employees of the issuing company or an affiliated company. If the offer constitutes a Tier 1 offering of Unlisted Securities (offer of Unlisted Securities with an aggregate value above €2,500,000), the exemption only applies if the Unlisted Securities are offered, allotted, or to be allotted by the issuing company, provided it already has securities admitted to trading on a regulated market, or by an affiliated company.[4]

- **Free offers with no element of choice on the part of the employee**. If the share plan entails an offer of shares free of charge with no element of choice on the part of the employee there is no obligation to publish a prospectus.

- **Free offers with an element of choice on the part of the employee**. If the share plan entails an offer of shares free of charge with an element of choice on the part of the employee (the employee decides whether to accept the offer), the offer is regarded as an offer for zero consideration and will as such be subject to the exemption for offers of less than €100,000.

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3 Executive Order no. 223/2010 and Executive Order no. 222/2010, respectively.

4 According to CESR's Frequently Asked Questions regarding Prospectuses: Common positions agreed by CESR Members 8th Updated Version published in February 2009, CESR has adopted a temporary approach that applies in cases where a prospectus is required in connection with an offer of securities to employees. The approach regarding a short-form disclosure regime shall, in accordance with CESR, apply to offerings of shares, which will be listed or admitted to trading in Denmark, by issuers which have securities already admitted to trading on a market or by an affiliated undertaking. The competent authority of the issuer shall scrutinise and approve the prospectus prepared following the short-form disclosure regime. Once approved, this prospectus can be passported to other Member States.

Exemptions for listings of Listed Securities

The following are the relevant exemptions (for listings of Listed Securities) from the requirements to issue a prospectus:

- **10% exemption**. Shares representing, over a period of 12 months, less than 10% of the number of shares of the same class already admitted to trading on the same regulated market.

- **Employee exemption**. Listed Securities offered, allotted, or to be allotted to existing or former directors, members of the supervisory board or employees of the issuing company or an affiliated company by the issuing company, provided it already has securities admitted to trading on a regulated market, or by an affiliated company[5]. The securities offered, allotted or to be allotted must be of the same class as the securities already admitted to trading on the same regulated market.

Exemptions for offerings of Listed Securities

The following are the relevant exemptions (for offers of Listed Securities) from the requirements to issue a prospectus:

- **100-offeree exemption**. If the Listed Securities (i.e. listed or admitted to trading on a regulated market within the EU/EEA) will not be listed or admitted for trading on a regulated market in Denmark, the 100-offeree exemption is available. This exemption applies in Denmark even if the offer is being made to more than 100 individuals in a different EU state.

- **Employee exemption**. Listed Securities offered, allotted or to be allotted to existing or former directors, members of the supervisory board or to employees of the issuing company of an affiliated company[6] by the issuing company,

[5] According to CESR's Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members 8th Updated Version from February 2009, CESR has adopted a temporary approach that applies in cases where a prospectus is required in connection with an offer of securities to employees. The approach regarding a short-form disclosure regime shall, in accordance with CESR apply to offerings of shares, which will be listed or admitted to trading in Denmark, by issuers which have securities already admitted to trading on a market or by an affiliated undertaking. The competent authority of the issuer shall scrutinise and approve the prospectus prepared following the short-form disclosure regime. Once approved, this prospectus can be passported to other Member states (see below).

[6] It is currently unclear whether an offer of securities to the employees of a company affiliated with the issuing company (which has its shares admitted to trading on a regulated market) fall within the scope of the exemption from the prospectus requirement in Section 12(5) of Executive Order no. 885/2009.

provided it already has securities admitted to trading on a regulated market or by an affiliated company.[7]

- **Free offers with no element of choice on the part of the employee**. If the share plan entails an offer of shares free of charge with no element of choice on the part of the employee there is no obligation to publish a prospectus.

- **Free offers with an element of choice on the part of the employee**. If the share plan entails an offer of shares free of charge with an element of choice on the part of the employee (the employee decides whether to accept the offer), the offer is regarded as an offer for zero consideration and will as such be subject to the exemption for offers of less than €100,000.

  Under the specific employee share plan exemption for both Listed Securities and Unlisted Securities, the employer must provide the employees with a document containing information on the number and class of the securities and the reasons for and details of the offer.[8]

1.2 **Regulatory issues:** If the offer is made by entities other than the issuer, marketing, promoting, soliciting, offering, transferring, selling and delivering the securities must always be conducted by an entity licensed to carry out such activities in Denmark, unless these investment services are provided by an undertaking whose investment services solely consists of management of a scheme for employee participation.

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[7] According to CESR's Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members 8th Updated Version from February 2009, CESR has adopted a temporary approach that applies in cases where a prospectus is required in connection with an offer of securities to employees. The approach regarding a short-form disclosure regime shall, in accordance with CESR apply to offerings of shares, which will be listed or admitted to trading in Denmark, by issuers which have securities already admitted to trading on a market or by an affiliated undertaking. The competent authority of the issuer shall scrutinise and approve the prospectus prepared following the short-form disclosure regime. Once approved, this prospectus can be passported to other Member States (see below).

[8] CESR has published "CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses no 809/2004" (CESR/05-054b) (CESR Recommendations) in which paragraphs 173-176 specify that the document should normally include:

- information on the employer, and where additional information on the employer can be found;
- the reasons for making the offer and the exemption due to which no prospectus is required;
- standard details of the offer (terms and conditions); and
- the rights attaching to the securities offered.

The employer does not need to make any applications, filings or fulfil any other requirements under Danish securities laws. Furthermore, the Danish employees will not be required to report the grant and/or exercise to the Danish FSA.

1.3 **Disclosure:** In relation to a company whose shares are quoted on the NASDAQ OMX Copenhagen A/S (OMX), the OMX must be notified immediately of all decisions regarding the establishment of share based remuneration programmes. Information regarding the share based remuneration programme must also be provided in the company's annual accounts. Furthermore, if a company quoted on the OMX buys or sells its own shares in connection with the grant or exercise of share options, additional disclosure obligations may arise. If a prospectus must be published, it must be made available to the Danish public.[9]

2. Exchange controls

There are currently no exchange controls in Denmark.[10]

3. Financial assistance[11]

3.1 **Danish company:** A Danish company may issue shares to employees free of charge if it complies with the requirements of Danish company law relating to bonus shares (which principally requires that free shares are only provided out of available distributable reserves). A Danish public or private limited company may acquire existing shares[12] and hold them (subject to the aggregate purchase price not exceeding company's available distributable reserves and provided that the remaining share capital amounts to (i) DKK 500,000 in relation to public limited companies and (ii) DKK 80,000 in relation to private limited companies).

The employee exemptions and the CESR Recommendations do not contain any language requirements. Hence, the document may be made available to the Danish employees in a Danish or English version.

[9] The Danish requirements for publication correspond to article 14(2-8) of the Prospectus Directive.

[10] The Danish Central Bank has the authority to impose a reporting obligation on specifically named major Danish enterprises. This reporting is merely for statistical purposes and to date has been imposed on between 1,000 – 2,000 enterprises.

[11] A new Danish Companies Act has been passed and relates to both Danish private limited companies and Danish public companies. The majority of the Act came into force on 1 March 2010. However, new regulations relating to financial assistance have not yet entered into force. Under these forthcoming regulations, a limited liability company will be permitted to provide financial assistance with a view to a third party's acquisition of the company's shares or shares in its parent company subject to the satisfaction of certain conditions.

[12] A Danish company cannot subscribe for its own shares.

As a general rule, a Danish company is prohibited from making loans to its managers, directors and shareholders. This applies irrespective of the reason for the loan or use of the loan proceeds. Furthermore, subject to certain exceptions (see below), a Danish company is prohibited from making loans (or in any way providing funds) to employees (or anyone else) in connection with the acquisition of shares in the company or in its parent company.

However, subject to certain conditions, a Danish company may provide loans to enable its employees to buy shares in the company or in a subsidiary (but not a parent company). The main conditions are that the loans are provided in connection with an all-employee share plan and are only provided out of reserves which could be used to pay dividends.[13]

3.2 **Danish subsidiary of a non-Danish company:** The general prohibitions on the making of loans for the acquisition of shares set out in paragraph 3.1 above generally also apply where the loan is being made by a Danish subsidiary to its employees for the acquisition of shares in its non-Danish parent company.[14]

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employer or its parent company free of charge or at a discount to market value will be liable to pay income tax at his marginal tax rate unless a favourable tax regime as described in paragraph 4.1.3 below applies. The tax charge is on the difference between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the 2010 tax year the highest marginal income tax rate is 51.5% (excluding compulsory labour market fund contributions).

[13] However, such loans may only be provided if made in connection with the establishment of a general share programme (i.e. a programme established for all employees or, to the extent the eligibility criteria are balanced and reasoned, for almost all employees) as opposed to a programme for managers or a few selected employees. If a Danish company makes a loan with no or low interest to its employees in order to enable them to invest in the company itself or a subsidiary, the employees will be taxed on the difference between the agreed interest rate and a minimum interest rate fixed in the legislation.

[14] The scope of the definition of "parent company" in relation to financial assistance is not clear. It is expected that only a company situated in (i) an EU/EEA country or (ii) Australia, Canada, Hong Kong, Japan, South Korea, New Zealand, Singapore, Taiwan or the US will be considered to be a "parent company". Based on such an interpretation, any company situated outside these countries may not necessarily be covered by the prohibition.

4.1.2 **Social security contributions:** An employee will be subject to compulsory labour market fund contributions of 8% for the 2010 tax year on the amount subject to income tax, unless a favourable tax regime as described in paragraph 4.1.3 below applies. No other social security contributions apply.

4.1.3 **Favourable tax regime:** There are two tax-favoured plans available in Denmark.[15] One of the plans provides for deferral of the tax due on the

[15] The relevant provisions governing these types of plans are contained in sections 7A and 7H of the Danish Tax Assessment Act (DTAA).

Section 7A DTAA: There are two types of favourable tax regimes within section 7A DTAA. Both types of plan must satisfy a number of common requirements, the main one being that the shares are offered to all employees.

The first plan type is known as a profit sharing plan and allows employees to receive shares with a value of up to DKK 22,800 (for 2010) from their employer tax-free provided that the shares are held for at least 7 years.

The second is known as a share acquisition plan, under which employees are granted a right to acquire shares from their employing company at less than market value, tax free. Among other things, the share acquisition plan (which is not an option plan) must impose a holding period of at least 5 years, during which the shares are deposited in a Danish bank or a bank within the EU/EEA, and the benefit received must not exceed 10% of the employee's annual salary at the time of the employees' final acceptance of the shares or when it is decided to grant shares to the employees, i.e. at a General Assembly or a Board meeting.

The following conditions must be satisfied in order to qualify under section 7A:

- the right must in principle be open to all employees of the company or its subsidiaries;
- the value of the shares offered must not amount to more than 10% of an employee's annual income;
- the shares must have the same rights as other shares of the same class;
- the shares must be held for at least 5/7 years (see further above) and the shares must be deposited with a bank; and
- the company's auditor/lawyer must give a certificate certifying the information submitted to the tax authorities.

Section 7H DTAA: Under the provision in section 7H, employees receiving share-based incentives as part of their employment remuneration may elect taxation under this scheme provided that:

- the employee and the company agree in writing to opt for the new regime;
- the value of the shares does not exceed 10% of the employee’s annual salary;
- the shares are offered by the employee’s employer company or a group company;
- the offered shares are shares in the employer company or a group company;
- no special share classes are created for the shares;
- either the employee or the employer has a right to receive or issue shares, respectively, i.e. instruments that can only be settled against cash do not qualify for the scheme;

employee shares until the employees sell them, provided the plan is offered to all employees of the company in question. Another plan allows employees to defer the tax due on their shares until they sell them, without any requirement for a general roll-out to all employees, but subject to certain conditions, the most important being that the value of the shares must not exceed 10% of the employee's annual salary and the employee and employer must agree on the tax deferral.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** The employer can obtain a corporation tax deduction for the cost of an employee share plan. However, under one of the favourable tax regimes described in paragraph 4.1.3, only limited corporation tax deductions are available.[16]

4.2.2 **Social security contributions:** No employer social security contributions are due.

4.3 Tax withholding

The employer is not required to withhold tax or employee social security contributions. The employee is responsible for paying any tax and employee social security contributions due himself. The employer will, however, be required to inform the tax authorities of each employee’s total income, including the amount of any discount provided to the market value of the shares at the time the employee acquires them.

- the company’s external legal counsel or accountant must certify that the above conditions are met; and
- a copy of this attestation and of the agreement regarding the application of section 7H must be filed with the tax authorities within a certain time limit.

Where all the above conditions are met, the employee will not be taxed until the shares are sold. The effective tax rate (for 2010) is 28% or 42% depending on the level of the employee’s income from shares etc., and provided the employee is not trading with shares. From 2012 the 28% tax rate will be decreased to 27% (i.e. as from 2012 the two rates will be 27% and 42%).

The provision in section 7H became effective as of 1 July 2003. It is, however, possible to apply the rules to incentives granted before 1 July 2003 provided that taxation of such incentives occurs after 1 January 2003.

[16] Where the plan falls within section 7A DTAA, the employer company can deduct expenses for the granted shares (including the discount) as well as administrative costs. Where the plan falls within section 7H DTAA, the employer company cannot deduct the cost of the shares against its taxable income but the costs attributed to the administration of the share plan are deductible.

5. Taxation of share options

5.1 Employee tax and social security contributions[17]

5.1.1 **Grant:** In limited circumstances, the grant of an option may give rise to income tax on the value of the option at grant.[18] However, where an employer (or its parent company) grants options to employees, the options are normally taxed on exercise. If income tax arises on grant, tax will be due at ordinary employment income marginal tax rates of up to 51.5% for the 2010 tax year (excluding compulsory labour market fund contributions).

5.1.2 **Exercise:** If the option was not subject to tax at grant,[19] as is normally the case for an employee share option, income tax arises on the exercise of the option on the difference between the market value of the shares at the time of exercise and the option exercise price.[20] The gain will be taxed as ordinary employment income at marginal rates of up to 51.5% for the 2010 tax year (excluding compulsory labour market fund contributions).

5.1.3 **Social security contributions:** An employee will be subject to compulsory labour market fund contributions of 8% for the 2010 tax year on the amount subject to income tax unless the favourable tax regime referred to in paragraph 5.1.4 below applies.

5.1.4 **Favourable tax regime:** The tax-favoured share plans referred to at paragraph 4.1.3 can also apply to the grant of share options.[21] In broad

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[17] For most practical purposes, share options (the right to acquire shares) and warrants (the right to subscribe for new shares) are taxed identically, provided that they were granted after 1 January 2001. If the options/warrants are granted by the Danish employing company or by another group company (for example, the foreign parent company), taxation will be governed by the specific provisions of section 28 DTAA, unless one of the tax-favoured regimes are explicitly opted for.

[18] Section 4 Danish State Tax Act and section 16 DTAA.

[19] If the option was subject to tax at grant, no tax arises on exercise.

[20] Section 28 DTAA.

[21] Section 7A DTAA: This tax exemption may apply to schemes offered generally to all employees. Where the tax exemption applies no tax will fall due at grant or exercise, but any gain on the shares at disposal is taxed as a capital gain. The effective tax rate (for 2010) is 28% or 42% depending on the level of the employee's income from shares etc., and provided the employee is not trading with shares. From 2012 the 28% tax rate will be decreased to 27% (i.e. as from 2012 the two rates will be 27% and 42%).

Section 7H DTAA: This tax scheme, applying from 1 July 2003, makes it possible to postpone taxation of options and shares until the shares acquired under the incentive scheme are disposed of. The share gain will be taxed as a capital gain. The effective tax rate (for 2010) is 28% or 42% depending on the

terms, options must satisfy the same requirements as share awards to fall within the favourable tax regime. However, the tax-favoured plan which does not have to be rolled-out to all employees previously had an alternative method of defining the maximum value of share options granted, which depends on the exercise price of the options.[22] However, this alternative method has been abolished in relation to options where the employee has not received "unconditional rights" in relation to an option before 1 January 2010. Although the Danish tax authorities have issued guidance as to what constitutes "unconditional rights" for these purposes, there remains some uncertainty as to its exact definition. Where the conditions for favourable treatment are met, no tax or social security contributions apply at the time of grant or exercise of the options.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** The employer can obtain a corporation tax deduction for the cost of an employee share plan. However, under one of the favourable tax regimes described in paragraph 5.1.4, only limited corporation tax deductions are available.[23]

5.2.2 **Social security contributions:** No employer social security contributions are due.

5.3 Tax withholding

The employer is not required to withhold tax or employee social security contributions. The employee is responsible for paying any tax and employee social security contributions due himself. The employer will, however, be required to inform the tax authorities of each employee's total income, including

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level of the employee's income from shares etc., and provided the employee is not trading with shares. From 2012 the 28% tax rate will be decreased to 27% (i.e. as from 2012 the two rates will be 27% and 42%).

[22] The value of the options shall not exceed 10% of the employee's annual salary; <u>or</u> the exercise price for the options is at least 85% of the market value of the underlying shares. As noted above, the "85%" rule referred to has been abolished in respect of options where the employee does not have an "unconditional right" in relation to that option before 1 January 2010.

[23] Incentives under Section 7A DTAA, under section 28 DTAA, section 4 of the Danish State Tax Act, the company can deduct expenses for the granted shares including the discount as well as the administrative costs mentioned above in 5.2.1, under section 7H DTAA the employer company cannot deduct the cost of the shares against its taxable income. However, costs attributed to administration of the share plan are deductible.

the amount of any discount in the market value of shares at the time the employee acquires them.

6. Taxation of share disposals

Any gain realised on a share disposal is taxable as a capital gain. The effective tax rate (for 2010) is 28% or 42% depending on the level of the employee's income from shares etc, and provided the employee is not trading in shares. From 2012, the 28% rate is to be reduced to 27% (i.e. from 2012 the two rates will be 27% and 42%). Grandfathering provisions apply to shares acquired prior to January 2006. These provide for, amongst other things, a tax exemption for gains on minor holdings of listed shares owned for at least 3 years on the date of disposal.

7. Employee benefit trusts

7.1 A Danish resident who is a potential beneficiary of a discretionary trust, but has no right to any benefits, is not likely to be subject to any Danish tax on property held in the trust. A Danish resident who receives benefits from a discretionary employee benefit trust is normally subject to income tax on the value of the benefits.

7.2 A Danish company that makes voluntary payments to an employee benefit trust may, under normal circumstances, be able to obtain corporation tax relief for the payments.

8. Data protection

There should be no data protection issues provided that the employee has given his specific written consent to the collection, processing and worldwide transfer of his personal data in connection with employee share plans.[24]

[24] The Act on Processing of Personal Data imposes a number of restrictions on the processing of data, including data relating to employee share plans. In most cases, the processing of data relating to such plans will be considered necessary for the performance of a contract to which the employee is a party (i.e. the share plan contract). On this basis, the data processing can take place within the EU/EEA without the specific consent of the employee. If there is any doubt regarding whether the processing is necessary for the performance of the contract to which the employee is a party, it would be advisable to obtain the prior written consent of the employee for the processing of the data and consent is required for the transfer of the data to a group company or other person (for example, a plan administrator) located in a non-EU/EEA country (unless some other legal basis e.g. a "safe harbour" exists), should the latter be required under the plan. Please note that if a Danish company processes personal data that reveals the employee's racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, information about the employee's health or sex life, the data can only be processed if the employee gives his explicit written consent and the processing of

9. Employment law

9.1 Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable. In addition to these general employment law issues, specific issues arise in Denmark which are mentioned below.

9.2 Share awards granted on or after 1 July 2004: The Stock Option Act 2004

The Stock Option Act 2004 (SOA)[25] applies to all awards of share options, restricted share units and other rights to acquire or subscribe for shares at a later date granted to employees on or after 1 July 2004.[26] All of these rights are referred to as "share options" for the purposes of the information on Danish employment law set out below.[27] The SOA applies to all employees,[28] including directors who are salaried employees.

The SOA provides that an employee whose employment is terminated by the employer (for reasons other than the employee's misconduct) retains all rights to share options already granted to him at the date of termination, whether vested or unvested. (The same principle applies if (i) the employee resigns because of the employer's gross misconduct, (ii) the employment is terminated because of the employee's illness, or (iii) the employee has reached his retirement age[29]).

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data is notified to the Danish Data Protection Agency and the Danish Data Protection Agency has authorised the processing.

[25] The SOA was enacted on 1 July 2004.

[26] The relevant date is the date of grant. Therefore, the SOA applies to grants made on or after 1 July 2004, regardless of whether the underlying employee share plan was established before 1 July 2004.

[27] The SOA applies to rights granted to employees to buy existing shares, to subscribe for new shares and to the award of restricted shares. The SOA does not apply to shares that have been granted to employees or purchased at a discount by employees to the extent the employees become the immediate owners of the shares, regardless of whatever lock-up or repurchase arrangements may be attached to such shares. The SOA cannot be deviated from to the detriment of the employees, even if the employees give their specific written consent.

[28] I.e. not just salaried employees but also ordinary workers. The SOA does not apply to members of a company's "senior management" (which broadly appears to mean directors) to the extent such senior managers or directors are not salaried employees. This must be considered on a case-by-case basis.

[29] The SOA stipulates that the value of share options shall not be taken into account when calculating holiday allowances, holiday bonuses and statutory compensation wholly or partly calculated on the basis of salary.

Provisions in employee share plans purporting to restrict employees' rights to share options upon termination of their employment will be set aside by Danish courts as invalid. Instead, the employees' exercise rights will continue as if they were still employed with the employer on the original terms and conditions of the share option plan.

An employee whose employment is terminated as described above is also entitled to receive a share, proportionate to the length of his employment in the accounting year, of the grants of share options to which he would have been entitled, according to agreement or custom, had he still been employed at the end of the accounting year or at the date of grant.[30]

An employee who resigns from his position by giving notice of termination to his employer or an employee who is terminated for misconduct automatically forfeits all his rights to share options already granted whether vested or unvested. The employee also forfeits his rights to any future share options that he could have expected to receive, had he continued his employment. However, it is permissible to agree more favourable rights in a share plan, e.g. that an employee may exercise his vested share options within a certain period after his termination.

The SOA also introduces an obligation on the employer to give the employee certain information in writing and in Danish about the terms and conditions of the employee share plan.[31] The actual plan documents need not be in Danish.

9.3 Share awards granted before 1 July 2004

Grants of share options made before 1 July 2004 are not subject to the SOA. Such grants are instead subject to the Danish Salaried Employees Act and principles of Danish employment law as outlined by the Supreme Court and other Danish courts in cases already decided and in future cases. It is likely that share options granted before 1 July 2004 will be considered part of an

[30] Thus, taking as an example, an employee who is employed in a company with an accounting year from 1 January to 31 December is terminated from his employment on 30 June. Had the employee continued his employment with the company in the full accounting year he would, according to agreement or custom, have been granted 100 share options. In this situation the employee is entitled to receive a proportionate part of the anticipated share options amounting to half of the share options (50) at the time of grant that he would have been granted, had he continued his employment in the full accounting year.

[31] The following information must be given in Danish: the time of grant, conditions for grants, exercise time, exercise price, the rights of employees upon termination and financial aspects of participating in an employee share plan. The employees will be entitled to compensation (the level of which is left at the court's discretion) if the employer does not comply with these obligations.

employee's salary for severance purposes, regardless of whether the share option plan contains provisions stating that share option benefits are not considered part of the employee's salary.

Provisions in an employee share plan purporting to restrict or limit employees' exercise rights upon termination of employment will most likely be set aside and/or held invalid by Danish courts. This risk applies equally to vested and unvested share options. In a termination situation, an employee is entitled[32] to receive all salary components that he has already earned and will or could have expected to earn during his notice period.[33]

[32] Pursuant to the Danish Salaried Employees Act (SEA) and general employment law principles.

[33] Employees are entitled to receive a proportionate share of any bonus part of their remuneration when they cease employment (Section 17a of the SEA). Any agreement between the employer and the employee contradicting the provisions of the SEA or general employment law principles will be held null and void. These principles of employment law apply regardless of whether the termination was voluntary or involuntary and whether or not it was for cause.

The application of the SEA and other employment laws to option benefits has been interpreted on several occasions. There are currently four leading cases from the Supreme Court (the Novo, the Alpharma, the Intel and the Mobilix cases) regarding the applicability the SEA and the Holiday Act to option benefits.

Republic of Estonia

1. Securities law

1.1 **Offer of securities[1]:** In accordance with the provisions of the Estonian Securities Market Act (the Act)[2], an offer of securities is not an offer to the public requiring the publication of a prospectus if it is:

- addressed solely to qualified investors; or
- an offer of securities addressed to fewer than 100 persons per EU state (other than qualified investors); or
- addressed to investors who acquire securities for a total consideration of at least €50,000 per investor (in respect of each separate offer); or
- an offer whose denomination or book value per unit amounts to at least €50,000; or
- an issue or offer of securities with a total consideration of less than €100,000 in a period of 12 months.

If the offer does not fall within one of these exemptions then the offer is a public offer and a prospectus must be published.

1.2 The Act also provides an exemption from the requirement to publish a prospectus where securities are offered to current or former employees or management of the issuer (or of an affiliated company) where those securities are traded on a regulated market. Where this is the case, the issuer must produce a document which contains relevant information regarding the securities being offered and the nature of the offer. The required information is determined by the Estonian Financial Supervisory Authority on a case-by-case basis.

1.3 **Regulatory issues:** Other than the above exemption from the requirement to publish a prospectus, the Act does not include any specific provisions for employee share plans. Regulatory matters are unlikely to be an issue in relation to offers of shares to employees in Estonia.

1.4 **Disclosure:** No specific disclosure regulations apply in Estonia.

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[1] The provisions of the Estonian Securities Market Act were harmonised with the requirements of the Prospectus Directive (and other European regulations) in November 2005.

[2] The Securities Market Act applies to public listed companies only, although in principle shares in other types of company can be awarded to employees in Estonia.

2. Exchange controls

There are no exchange controls for employee share plans in Estonia.

3. Financial assistance

3.1 **Estonian Company:** The Estonian Commercial Code prohibits a company from making loans for the purchase of its own shares. Similarly, the granting of guarantees or otherwise providing security for such loans is prohibited. No specific exemptions apply in relation to employee share plans.

3.2 **Estonian subsidiary of non-Estonian company:** An Estonian subsidiary is generally prohibited from providing financial assistance in the form of loans or guarantees for the acquisition of shares in its non-Estonian parent company. No specific exemptions apply in relation to employee share plans.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** Where an employee acquires shares free of charge or at a discount to market value, the benefit to the employee (being the difference between the market value of the shares at acquisition and the amount, if any, paid for the shares) is taxable as a fringe benefit. Fringe benefits give rise to income tax liabilities for the employer but not for the employee.

4.1.2 **Social security contributions:** Fringe benefits give rise to social tax liabilities for the employer but not for the employee.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** Under the Estonian corporation tax system, undistributed corporate profits are exempt from tax and corporation tax deductions are not available. The profits of an Estonian company are instead taxed when they are distributed (or deemed to be distributed).

4.2.2 **Tax and social security contributions:** The employer will be liable to income tax and social tax on the fringe benefit. Fringe benefits are charged to income tax at a rate of 26.58% and charged to social tax at a rate of 33% on the difference between the market value of the shares acquired and the price paid for them by the employee.

5. Taxation of share options[3]

The general tax treatment of an option may differ if the option is granted by a non-resident parent company of the employer and the costs of the option are not recharged to the Estonian employer (a "non-resident option").

5.1 Taxation of share options

5.1.1 **Grant:** As a general rule, no income tax or social tax liability arises on the grant of a share option. However, income tax may arise on the grant of a non-resident option if it has a monetary value i.e. it has a market value by virtue of being openly and regularly traded and may be sold by the employee. The amount of tax charged would be based on the monetary value of the option.

5.1.2 **Exercise:** As a general rule, there is no income tax charge for the employee on the exercise of an option. However, income tax may arise at exercise if a non-resident option had a monetary value on grant. In this case, the taxable amount would be based on the market value of the shares at exercise less (1) the price paid for the option (if any) and (2) the exercise price (if any).

5.1.3 **Social security contributions:** There is no social tax liability for the employee on the exercise of an option.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** Under the Estonian corporate income tax system, undistributed corporate profits are exempt from tax, and corporate income tax deductions are not available. The profits of an Estonian company are instead taxed when they are distributed (or deemed to be distributed).

5.2.2 **Tax and social security contributions:** The employer will be liable to income tax and social tax on the fringe benefit (unless the option is a non-resident option). Fringe benefits are subject to income tax at the rate of 26.58% and social tax at the rate of 33%.

5.2.3 **Timing of fringe benefit tax:** The tax liability arises at the time the fringe benefit is provided. If the option has no monetary value the fringe benefit is provided at option exercise. If the option does have a market

[3] As of September 2010, there are no regulations in Estonian law which specifically address the taxation of share options. However, amendments to the Income Tax Act, which are expected to come into force on 1 January 2011 will, if adopted, bring greater clarity to this issue.

value the fringe benefit is provided at the time of the option grant. If tax arises at grant then the amount of the fringe benefit equals the monetary value of the option. If tax arises at exercise then the fringe benefit is based on the monetary value of the shares less (1) the price paid for the option (if any) and (2) the exercise price (if any).

6. Taxation of share disposals

On a sale of shares (or the option), the employee will be liable to income tax on the capital gains at a rate of 21%. If the acquisition of the shares was taxed as a fringe benefit, then the acquisition cost for the purposes of determining the gain is the amount taxed as a fringe benefit plus any amount paid for the acquisition of the option and shares by the employee.

7. Employee benefit trusts

7.1 Employee benefit trusts are not recognised under Estonian law. However, an Estonian company may make a contribution to such a trust for the benefit of its employees.

7.2 Contributions made by a company to a discretionary employee benefit trust will be deemed to be fringe benefits and the employer (but not the employee) will be subject to tax and social taxes at the time the contribution is made to the trust.

8. Data protection

8.1 In accordance with the Estonian Personal Data Protection Act, employee consent is generally required for the processing of personal data except in limited circumstances where the employer is ensuring the performance of a contract.

8.2 As there are no specific regulations for employee share plans, the general requirement for consent needs to be considered on a case-by-case basis.

9. Employment law

There are no specific employment laws in relation to employee share plans. Depending on the terms of the particular share plan and the nature of the awards, the grant of a share award may be deemed to be either (i) an agreement regarding other benefits that is governed by employment law or (ii) an ordinary sales agreement between the employer and the employee. If the former, then the employee is afforded additional protection under Estonian employment law. However, in practice, shares are normally offered to management level employees only, in respect of whom Estonian employment laws do not apply (provided they are members of the management board).

Finland

1. Securities law

1.1 **Offer of securities[1]:** The Prospectus Directive has been implemented in Finland and the exemption regarding employee offerings under the Prospectus Directive is therefore available where an employer offers securities to employees in Finland.[2]

There is also an exemption for an offer to fewer than 100 individuals in Finland (even if the offer is being made to more than 100 individuals in a different EU state).

Where the total consideration of the offer is less than €2.5 million (calculated over a period of 12 months) the offer falls outside the scope of the Prospectus Directive. In these circumstances Finnish regulations will apply. These provide for an exemption from a prospectus requirement where securities are only offered to directors or employees of the issuer or a group company.[3] Employees must be given information on anything that may significantly affect the value of the securities being offered. The information required is not prescribed. However, at a minimum, employees should be provided with details of the issuing company (including recent financial information) and information on the tax implications of acquiring the securities.[4]

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[1] The Prospectus Directive was implemented into Finnish law on 1 July 2005.

[2] The employee share plan exemption at Article 4(1)(e) of the Prospectus Directive was incorporated into the Securities Market Act (SMA). No further requirements have been set out in Finnish law as compared to the requirements of Article 4(1)(e). Therefore there should not be any further requirements in Finnish law in addition to those set out in the CESR Recommendations.

[3] The marketing and advertising of securities in Finland (even if carried out by a foreign company) is regulated by the SMA which implements the EU Prospectus Directive and which regulates, among other things, the public issue and trading of securities. The SMA does not expressly define the term "public" but an offer of securities to people who are part of a pre-selected group of investors not exceeding 99 persons will not constitute a public offer for the purposes of the SMA, provided that only the named, pre-selected investors can participate in the offer. Under the SMA, a company which publicly offers its securities must publish a prospectus (which meets the requirements of the SMA) and submit it to the Financial Supervisory Authority (the FSA). The Ministry of Finance issued the Decree on Certain Offer Documents (which became effective as of 1 September 2007), applicable to offerings falling outside the scope of the EU Prospectus Directive, following which the offer of securities by an employing company (or by a company which is related to that company) to existing or former directors or employees of the employing company is not subject to the prospectus requirements under the SMA.

[4] The financial information could be provided on the company's website, provided that this is accessible to employees. The employee documents can be drafted in any language (not necessarily Finnish or Swedish) provided that the recipient employees have sufficient understanding of the language used.

Employee offerings should normally be exempt from the Finnish prospectus requirements if employees are granted non-transferable options which do not, by definition, qualify as securities under Finnish Law.

1.2 **Regulatory issues:** There are no other regulatory issues which affect the offer of securities to employees.

1.3 **Disclosure:** Employees must continuously be provided with all information that may significantly affect the value of the securities concerned.

2. Exchange controls

There are no applicable exchange controls.

3. Financial assistance

3.1 **Finnish company:** Finnish company law prohibits all forms of financial assistance by a Finnish limited liability company in connection with the acquisition of its own shares or shares in its parent company.

3.2 **Finnish subsidiary of non-Finnish company:** Under the Finnish Companies Act only domestic entities qualify as parent companies. Therefore, the prohibition referred to in paragraph 3.1 above would not appear to prevent a Finnish subsidiary of a non-Finnish company from providing financial assistance in connection with the acquisition of shares in e.g. its foreign parent company. However, this is only possible if doing so is in the best commercial interests of the company at a company level (group level is not sufficient).

3.3 **Employees of Finnish company**: The prohibition referred to in paragraph 3.1 above does not apply to the provision of financial assistance for the purpose of facilitating the acquisition of shares by employees of the company or of a related company (including loans to certain qualifying personnel funds) up to an amount corresponding to the distributable assets of the company.[5]

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** If an employee is offered the opportunity to acquire shares free of charge or at a discount to market value and if the offer is attributable to the employment relationship, the discount will normally be construed as earned income and subject to progressive income tax. The taxable

[5] The managing director is not regarded as an employee of the company but as an appointed official. It is therefore unclear whether this exemption also applies to the managing director.

income is the difference between the market value of the shares at the time of acquisition and the price, if any, paid for the shares. For 2010, the highest rate of tax is 55.40% (including a medical care premium at a rate of 1.47% and a daily allowance premium at a rate of 0.93%).

4.1.2 **Partial exemption:** If a right to subscribe for new shares at a discount to market value is offered to the majority of employees, the discount will be tax exempt to the extent that it does not exceed 10% of the market value. Any discount in excess of 10% will be subject to income tax as referred to above.

4.1.3 **Social security contributions:** In general, all social security related payments are payable (being medical care premium of 1.47%, a daily allowance premium of 0.93%, a pension premium of 4.5%[6] and an unemployment security premium of 0.40% (2010 rates). However, where the partial exemption at paragraph 4.1.2 above applies or in certain circumstances where listed shares are offered, no pension or other social security related payments will be due other than the medical care premium at a higher rate of 1.64%[7].

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** Expenses charged to a Finnish employer on arm's length terms are generally deductible for Finnish corporation tax purposes where market purchase shares are used.[8]

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[6] 5.74% for employees of age 53 or over.

[7] The medical care premium payable on the benefit in question is increased by 0.17% in comparison to the normal amount (i.e. from 1.47% to 1.64%) (2010).

[8] Generally, computed costs incurred in relation to share-based incentive plans, such as the cost of share-based remuneration under IFRS 2 are not deductible, unless the costs are deemed to correspond to the "factual" expenses of the employer. Cash bonuses, including cash payments made on the basis of the increase in value of the employer's shares are generally deductible. If the company acquires own shares to be used in share-based incentive plans (e.g. employee option plans and employee issues) in public trade, the amount paid for the own shares is a deductible expense for the company in the tax year the employee receives or subscribes for the shares. The deductible amount cannot exceed the fair market value of the shares at the time of grant less the subscription price paid by the employee, i.e. the value on which the employee is liable to pay tax. The deduction is available only for the company's existing own shares (i.e. treasury shares), not for newly issued shares. Where treasury shares are used, 1.6% transfer tax on the subscription price is also payable by the employee. If shares of other group companies (typically parent companies) are used in incentive plans, the compensation paid by the employer company to the issuing company in respect of the shares may also be deductible.

4.2.2 **Social security contributions:** In general, the employer must pay statutory social security contributions (at a rate of 2.23% for 2010) on the amount of the taxable income.[9] However, if the right to subscribe for newly issued shares at a discount to market value is offered to the majority of employees (i.e. the partial exemption referred to in paragraph 4.1.2 above applies) or in certain circumstances where listed shares are offered, no statutory social security contributions are payable by the employer. In these circumstances, no pension or other social security related payments are payable by the employer either.

4.3 Tax withholding

Advance income tax (including the medical care premium and the daily allowance premium referred to above) must be withheld monthly by the employer. The final tax assessment takes place in the calendar year following the year in which the income or benefit was received. If the amount of advance income tax withheld is insufficient to cover the final amount of income tax due, the employee has to pay the difference, together with interest, usually in December of the tax assessment year and in February of the year following the tax assessment year. Employees can avoid the interest charge by topping up the advance income tax by the end of January in the tax assessment year.

If a tax audit reveals that the employer has failed to withhold advance income tax, tax on the income from which the employer has failed to withhold advance income tax is levied on the employer at a rate of up to 40% (and interest and penalty charges may also become payable).[10] This tax can be refunded to the employer upon application, once it has been established that the employee has fully paid the final tax in respect of the employment income.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no tax charge on the grant of a share option.

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[9] In addition to the statutory social security contribution the employer is obliged to pay a pension premium of 16.9%, an unemployment security premium of 0.75% (2.95% where the employee's salary amount exceeds €1,846,500), a group life insurance premium of 0.07% and an accident insurance premium of 1% on the amount of the taxable income (2010). The aforementioned percentages are average figures.

[10] It should be noted that in circumstances where the employer has neglected its reporting obligation in relation to the advance taxes or intentionally gives a false document relating thereto, the amount of income tax payable may be doubled. Furthermore, in the case of fraud, the amount of income tax will be increased by 50% and potentially tripled.

5.1.2 **Exercise:** On the exercise of a share option, progressive income tax is levied on the value of the option benefit, calculated as the difference between the market value of the shares received upon exercise and the aggregate of the exercise price paid and the price (if any) paid for the option. For 2010, the highest rate of tax is 55.40% (including a medical care premium at a rate of 1.47% and daily allowance premium at a rate of 0.93%).

5.1.3 **Social security contributions:** No pension or other social security related payments other than the medical care premium at a rate of 1.64%[11] are payable by the employees.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** Expenses charged to a Finnish employer on arm's length terms are generally deductible for Finnish corporation tax purposes where market purchase shares are used.[12]

5.2.2 **Social security contributions:** No statutory social security contributions, pension or other social security related payments are payable by the employer.

5.3 Tax withholding

The employer must withhold advance income tax as described at paragraph 4.3 above.

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[11] The medical care premium payable on the benefit in question is increased by 0.17% (2010) in comparison to the normal amount (i.e. from 1.47% to 1.64%) (2010).

[12] Generally, computed costs incurred in relation to share-based incentive plans, such as the cost of share-based remuneration under IFRS 2 are not deductible, unless the costs are deemed to correspond to the "factual" expenses of the employer. Cash bonuses, including cash payments made on the basis of the increase in value of the employer's shares are generally deductible. If the company acquires own shares to be used in share-based incentive plans (e.g. employee option plans and employee issues) in public trade, the amount paid for the own shares is a deductible expense for the company in the tax year the employee receives or subscribes for the shares. The deductible amount cannot exceed the fair market value of the shares at the time of grant less the subscription price paid by the employee, i.e. the value on which the employee is liable to pay tax. The deduction is available only for the company's existing own shares (i.e. treasury shares), not for newly issued shares. Where treasury shares are used, 1.6 per cent transfer tax on the subscription price is also payable by an employee. If shares of other group companies (typically parent companies) are used in incentive plans, the compensation paid by the employer company to the issuing company in respect of the shares may also be deductible.

6. Taxation of share disposals

6.1 If an employee disposes of his shares, he will be subject to capital gains tax at a fixed rate of 28% on the sale proceeds less the acquisition cost.

6.2 The acquisition cost is the aggregate of the price paid for the shares (and, if applicable, the options) and the amount, if any, treated as taxable employment income at the time of acquisition/exercise. Sales related expenses can be deducted for the purpose of calculating the capital gain.[13]

6.3 As an alternative to using the actual acquisition cost, the employee may elect to apply a so-called hypothetical acquisition cost. The hypothetical acquisition cost is 20% of the sale price or, where shares have been held by the employee for a minimum of 10 years, 40% of the sale price. If the hypothetical acquisition cost is used, no sales related expenses can be deducted.

7. Employee benefit trusts

The concept of a trust is not recognised as such in Finland. The tax status of a foreign trust is determined on a case-by-case basis in accordance with the general principles of law.[14]

8. Data protection

8.1 Employee consent is not required for the collection and processing of personal data by the employer or companies belonging to the same group of companies as the employer provided that the processing is necessary for the employment relationship.

8.2 If the processing of personal data in relation to an employee share plan does not fall within the scope of processing activities that the employees have previously

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[13] Capital income is not subject to any social security contributions or similar charges.

[14] The Finnish Employee Fund Act (FEFA) provides a framework for employees and employers to collectively establish a fund to enable employees to, amongst other things, purchase shares in their employing company. A new Employee Fund Act comes into force in January 2011. Currently under FEFA, employee funds may be established where a company employs at least 30 employees, or where business units in that company employ at least 10 employee. Companies with 10-30 employees may, in certain circumstances, establish employee funds. Under the new Employee Fund Act, companies with 10 employees may establish employee funds, but there are restrictions regarding the turnover of the company. The fund established under FEFA is tax-exempt and is not liable to income tax. 80% of the income received from the fund is taxable at progressive income tax rates and 20% of the income is exempt from tax. The new Employee Fund Act, among other things, expands the scope of the employers within which such fund can be established.

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been informed of, the employer must inform the employees of such processing activities[15]. If the data processing is outsourced to an outside plan administrator, the employer must notify the outsourcing to Finland's Data Protection Ombudsman.

8.3 International transfers of personal data within the EU/EAA or to countries which the European Commission has included on its list of countries which provide adequate protection for personal data are treated as domestic transfers. In addition, transfers outside the EU/EEA may also be permitted based on the employee's consent or by providing adequate protection through contractual arrangements. Other bases for transferring personal data related to international share plans are seldom relevant.

8.4 Transfers based on adequate protection in the destination country as confirmed by the European Commission, the data subject's unambiguous consent or on European Commission model documents do not need to be notified to the Data Protection Ombudsman. If other contractual arrangements or bases for the transfers are used, these will generally require notification.

9. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

[15] Where the number of employees is at least 30, the employer must inform the employees of the intended data processing in co-determination proceedings as required under the Act on Co-operation within Undertakings (334/2007).

France

1. Securities law

1.1 **Offer of securities[1]:** In principle a public offering[2] will generally require the prior publication of a prospectus.[3] However, certain offers of securities in France are not considered to be public offerings and therefore do not require the publication of a prospectus. These include in particular (but are not limited to):

- offers made through a mutual fund (Fonds Commun de Placement d'Entreprise – FCPE)[4], i.e. an undertaking for collective investments in transferable securities ("OPCVM") dedicated to employee saving schemes and regulated by articles L. 214-39 or L. 214-40 of the French Monetary and Financial Code. (Note that OPCVMs must still be approved by the AMF, although this is under a different set of rules than those applicable to public offers;)

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[1] The Prospectus Directive was implemented into French law in September 2005 by modification of the articles of the French Monetary and Financial Code relating to public offering and the General Regulation of the *Autorité des marchés financiers* (AMF).

[2] Public offering (offre au public) is defined under article L. 411-1 of the French Monetary and Financial Code as: (i) a communication made to the public by any way and any form, providing sufficient information in relation to the terms and conditions of the offer and on the financial instruments to be offered in order to make an investor able to decide to subscribe or purchase the financial instruments or (ii) an offer of financial instruments by way of a financial intermediary. Financial instruments are listed in article L. 211-1 of the French Monetary and Financial Code and include: shares (or other securities giving access to voting rights or the capital of issuer, which are transferable by book-entry or delivery), debt securities, shares or units in a collective investment vehicle and certain forward or future contracts (including swaps, options etc.).

[3] The competent authority for such prospectus will depend on the issuer, the type of securities offered and the characteristics of the offer. It can either be the AMF or another European authority. The language of the prospectus will also derive from the characteristics of the offer and the competent authority and can either be in French or in English (as the usual financial language). The summary will be in French.

[4] An FCPE allows employees to make an investment in the shares of their employer (or a group company) by subscribing for units in the FCPE (which is itself invested in shares of the company). All shares acquired by the employees through the FCPE are then held within a single vehicle, which simplifies their management and administration. Furthermore, as an FCPE has no legal personality, it is a joint co-ownership structure and employees are co-owners of the shares acquired through the FCPE.

- offers of stock options and free shares provided that they are granted in accordance with French Commercial Code requirements[5];

- offers (i.e. the issue or transfer) made to a restricted circle of investors i.e. fewer than 100 persons acting on their own account other than qualified investors in France (even if the offer is being made to more than 100 persons in a different EU state)[6];

- offers (i.e. the issue or transfer) of shares or debt securities by French *sociétés anonyme* or *sociétés en commandite par actions* or any equivalent foreign corporate structure where the total consideration of the offer is less than €100,000 or between €100,000 and €2.5 million (these limits are calculated over a period of 12 months) provided, in this case, that the securities offered do not represent more than 50% of the issuer's capital;

- offers (i.e. the issue or transfer) of shares or debt securities by French *sociétés anonymes* or *sociétés en commandite par actions* or any equivalent foreign corporate structure where the securities offered have a nominal value of at least €50,000 or where the minimum investment by an investor is at least €50,000.

Other offers of securities, although within the scope of the public offering regulations, are exempt from the requirement to publish a prospectus. In particular, an offer of securities to directors, executive officers and to existing or former employees by their employer (or an affiliated company) where such securities are of the same category as those already admitted to trading on an EU regulated market does not require a prospectus provided that a document is made available containing information on the number and nature of the securities as well as the reasons for and details of the offer.[7]

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5 The AMF, in its September 2007 monthly review, stated that it considers that stock options do not constitute financial instruments (*instruments financiers*) and therefore do not give rise to any registration or approval requirements, provided that such stock options have the usual features of French law-governed stock options, notably that they are not transferable by book-entry or by delivery. The AMF also considers that the offering of shares for no financial consideration (for free) to employees and/or officers of the company does not fall within the qualification of public offering as provided by article L. 411-1 of the French Monetary and financial code and is therefore exempt from the production of a prospectus. This position is consistent with the CESR position.

6 Articles L. 411-2 and D. 411-4 of the French Monetary and Financial Code implementing article 3 of the Prospectus Directive.

7 Article 212-4(5) and 212-5(5) of the AMF regulation. According to AMF Instruction n° 2005-11 dated 13 December 2005 and last amended on 21 January 2010, this document should indicate at a minimum: (i) the maximum number of shares to be issued; (ii) the reason for the offer; (iii) whether a demand for

1.2 **Regulatory and corporate governance issues:** No regulatory problems should arise in relation to employee share plans. However, the French rules which apply to the solicitation of investments must be considered on a case-by-case basis[8].

In relation to corporate governance, according to the French Commercial Code, no stock options or free shares may be granted to executive officers of a French listed company, unless the company implements, for the benefit of all its employees and 90% of the employees of its affiliated companies in France, a qualifying stock option or free share plan[9] or a profit-sharing scheme (*accord d'intéressement* or *accord de participation*).[10]

Furthermore, the management body of a French listed company must decide either (1) that the exercise of the stock options must be deferred, or the disposal of the underlying shares or the free shares must be deferred, until the termination of the executive officer's position with the company or (2) to fix the number of shares (resulting from the exercise of the stock options or the free shares) which must be held by the executive officer until the termination of his

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admission to listing on a regulated market or a multilateral system of negotiations will be addressed in respect of these shares; (iv) the nature and the category of shares offered; (v) the rights attaching to the shares, including any applicable restrictions and the modalities of exercising these rights; (vi) subscription price or modalities of determination of the subscription price; (vii) the amount of the offer; (viii) subscription period. This document should be addressed to the beneficiaries by letter or be kept at their disposal at the company's head office. Furthermore, if the company has an intranet site, the document should be made available on it. Should the issuing company apply for the newly issued shares to be admitted to trading, this document must be made available on the company's website in the form of a press release on the date on which the management body of the company makes the offer (or if the offer provides for a reservation period, at the latest on the start date of such a reservation period).

[8] Solicitation activities are regulated under French law and can only be exercised by specific entities and in compliance with rules aimed at protecting investors. A partial exemption, however, applies to French employee share plans but since this exemption is aimed specifically at an employee share plan complying with Part III Book III Title III of the French Labour Code, employee share plans governed by foreign law may not benefit from it. With respect to stock options plans and free shares plans, it may be argued that the solicitation rules do not apply since solicitation is defined under French law as any unsolicited contact by any means with an individual or corporate entity with a view to obtaining its consent on financial and banking transactions, whereas in the case of a grant of stock options or free shares to employees the latter’s consent is, in principle, neither required nor sought.

[9] I.e. plans which fulfil conditions provided for under articles L. 225-177 to L. 225-186-1 of the French Commercial Code for stock option plans and L. 225-197-1 to L. 225-197-6 for free share plans.

[10] Articles L. 225-186-1 and L. 225-197-6 of the French Commercial Code.

position. Information regarding this decision should be communicated to the shareholders of the company on an annual basis[11].

1.3 **Disclosure:** If an employee share plan requires the publication of a prospectus, the issuing company must disclose any information which may affect the share price or shareholders' rights. Where the issuer is a foreign company, the information given in France must be equivalent to the information given in the issuer's home country. With respect to an offer of French tax-approved options[12] and free shares[13], specific reports must be made annually to inform the shareholders of the options and free shares granted.

2. Exchange controls

There are no applicable exchange controls. However, certain filings must be made for statistical and information purposes.

3. Financial assistance

3.1 **French company:** A French company is not permitted to provide funds, make loans or act as a guarantor to assist a third party in acquiring shares in the company[14]. However, there is a specific exemption relating to certain employee share plans where the company provides financial assistance to allow employees of the group to acquire shares in the company or an affiliated company[15]. Only employees benefit from this exemption and a French company cannot make a loan or provide a guarantee to an individual who is a director[16].

3.2 **French subsidiary of non-French company:** A French employer may make loans or provide guarantees to enable employees to acquire shares in a non-French parent company.

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[11] Articles L. 225-185 and L. 225-197-1 of the French Commercial Code.

[12] Tax-approved share option plans are regulated by articles L. 225-177 to L. 225-185 of the French Commercial Code.

[13] Tax-approved free shares plans are regulated by articles L. 225-197-1 to L. 225-197-5 of the French Commercial Code.

[14] Article L. 225-216 of the French Commercial Code.

[15] This exemption is only available for shares offered under a French employee saving plan (*Plan d'Epargne Entreprise)*.

[16] This covers for example a loan to an *administrateur, directeur général, directeur général délégué,* representatives of legal entities which are *administrateurs, gérants de SARL, membres du conseil de surveillance* and *membres du directoire*.

4. Taxation of "non-qualified" employee share plans

The taxation of employee share plans which do not qualify for French favourable tax and social security treatment is as follows:

4.1 Taxation of share acquisitions[17]

4.1.1 Employee tax and social security contributions

Tax: Where shares are acquired for free or at a discount, employees are subject to income tax on the difference between the value of the shares at the date of acquisition and the amount paid by the employee (if any). For the tax year 2010, the rate of income tax varies from 0% to 40%.

Social security contributions: The amount subject to income tax is also subject to employee social security contributions at an approximate rate of 20-30%, subject to earnings caps. The applicable rates and earnings caps depend on the nature of employment.[18] The rates of social security contributions and the earnings caps may be varied twice a year (in January and July).

4.1.2 Employer tax and social security contributions

Corporation tax deduction: No corporation tax deduction is available for a French employing company on the acquisition by French resident employees of shares in a French or a non-French parent company by way of gift or at a discount to market value. However, where a French or a non-French parent company recharges the costs of providing existing shares to employees of the French employing company, the French

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[17] The acquisition by a French employee of shares in the foreign parent of his French employer, either as a gift or at a discount to market value, is considered to be a benefit-in-kind, with the consequences described in paragraph 4.

[18] These rates vary depending upon the professional category of the employee concerned (executive/non-executive), the business sector in which the employing company operates, the collective agreements applicable to the employing company and the commitments made by the employer, if any. These rates decrease quite substantially along with the increase in remuneration above €250,000 (e.g. for an annual remuneration of €500,000: approximately 35% of employer's social security contributions and 15% of the employee's contributions). This is because the basis on which most social security contributions are calculated are capped between one to eight times the social security ceiling (fixed at €2,885 per month for 2010).

employing company may normally deduct these costs from its taxable profits.[19]

Social security contributions: The employer must pay social security contributions on any discount on shares which is taxable in the hands of the employee. The amount subject to income tax is subject to employer social contributions at an approximate rate of 45-50% subject to earnings caps. The applicable rates and earnings caps depend on the nature of employment.[20] The rates of social security and the earnings caps may be varied twice a year (in January and July).

4.2 Taxation of share options

4.2.1 Employee tax and social security contributions

Grant: There is no tax charge on the grant of a share option.

Exercise: There is an income tax charge on the exercise of a share option on the difference between the market value of the shares at the date of exercise and the option exercise price. For the 2010 tax year, the income tax rates range from 0% to 40%. However, the tax position on exercise is different if the option complies with the favourable tax regime described in paragraph 5 below.

Social security contributions: Employee social security contributions are due at an approximate rate of 20-30% on the exercise of the option, subject to earnings caps.

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[19] Specific provisions of the French tax code specifically allow the tax deduction of such costs in relation to free shares/options granted under qualifying free share plans and stock option plans (i.e. plans which fulfil the conditions provided for under articles L. 225-177 to L. 225-186-1 of the French Commercial Code for stock option plans and under articles L. 225-197-1 to L. 225-197-6 of the French Commercial Code for free share plans, as described under paragraph 5 below). However, there are arguments to sustain that the deduction should also be possible in the case of non-qualifying free shares/stock option plans on the grounds of the general French tax law principles, providing, *inter alia*, that the company can justify that the costs are borne in accordance with the company's corporate interest, that the costs are not excessive and are paid in consideration for services performed by the beneficiaries of the free shares/stock options.

[20] These rates vary depending upon the professional category of the employee concerned (executive/non-executive), the business sector in which the employing company operates, the collective agreements applicable within the employing company and the commitments made by the employer, if any. These rates decrease quite substantially along with the increase in remuneration above €250,000 (e.g. for an annual remuneration of €500,000: approximately 35% of employer's social security contributions and 15% of employee's contributions). This is because the basis on which most social security contributions are calculated are capped between one to eight times the social security ceiling (fixed at €2,885 per month for 2010).

4.2.2 Employer tax and social security contributions

Corporation tax deduction: French companies may deduct from their taxable profits, subject to certain limitations, the expenses incurred as a result of the exercise by their employees of options to buy existing shares[21]. Allowable expenses would include the cost of buying shares in the market to satisfy the exercise of options, to the extent that the cost of buying the shares exceeds the exercise price due from the employee[22].

Where a French or a non-French parent company recharges the costs of providing options to employees to the French company, the French company may deduct the costs from its taxable profits where the options are to buy existing shares[23] (see also paragraph 5).

Social security contributions: Employer social security contributions are due at an approximate rate of 45-50% on the exercise of the option, subject to earnings caps[24].

4.3 Tax withholding

The employee is responsible for paying any income tax due but the employer is responsible for withholding employee social security contributions.

4.4 Taxation of share disposals

An employee may be liable to capital gains tax on the disposal of shares. Tax is charged on the difference between the proceeds of sale received by the employee and the price paid by the employee to acquire the shares (or, if the

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[21] Again, as indicated under footnote 19, the provisions of the French tax code allowing the tax deduction of such costs refer to qualifying stock option plans (cf. paragraph 5.1.2). There are however arguments to sustain that the deduction should also be possible in the case of non-qualifying stock option plans on the grounds of general French tax law principles.

[22] In the case of options to subscribe for new shares, the French tax authorities and the courts consider the exercise of the option to be, both from a legal and accounting point of view, a contribution which cannot result in a deductible capital loss. However, pursuant to a law dated 30 December 2006 for the development of employees' participation and shareholding, in the year of exercise by the employees of their options to subscribe for new shares of the company, the company will benefit from a deduction for corporation income tax purposes of an amount equal to the difference between the value of the shares at the time of the increase of capital and subscription price of the shares, provided that the options (i) benefit all employees of the company and (ii) are granted either uniformly or based on time of presence in the company/salaries or on a combination of these criteria (see paragraph 5.1.2 below).

[23] Such costs may normally not include a capital loss on options to subscribe for newly issued shares, unless the conditions mentioned under footnote 21 are fulfilled.

[24] The comment in footnote 19 also applies for employee’s social contributions.

shares were subject to income tax when they were acquired, the market value of the shares at that time). For 2010 income (declared in 2011), the rate of tax is 30.1% (capital gains tax at 18%, CSG at 8.2%, CRDS at 0.5%, social tax of 2% and an additional contribution of 1.4%).The capital gains tax charge only arises if the total sale proceeds of all shares disposed of by the employee in any one calendar year exceed a certain level (€25,830 for sales realised in 2010).

5. Tax favoured employee share plans[25]

5.1 Favourable tax regime for options

A favourable tax regime is available for employees of French companies for options granted by their employer, or by a parent of their employing company in accordance with article L. 225-177 to L. 225-186 of the French Commercial Code. This favourable tax regime can also apply to options granted by a foreign parent company of the French employing company provided the options are granted in accordance with the relevant provisions of articles L.225-177 to L.225-186 of the French Commercial Code. However, the French tax authorities have confirmed that only the "essential" French law requirements need be met for the favourable tax regime to apply to a foreign parent company.[26] A non-exhaustive

[25] The French Government has made a number of announcements in relation to proposed changes to the rates of, amongst other things, social security charges payable by both the employer and the employee on qualified share plans. These changes are included in current end of year finance bills, which are to be voted on later this year. The proposals include (1) an increase in the employer social security charge at grant from 10% to 14% (2) an increase in the employee social security charge on qualified share plans, due in the year of sale of the acquired shares from 2.5% to 8%. In addition, under the proposals, (1) the highest marginal rate of income tax will increase from 40% to 41% and (2) the current capital gains tax exemption for gains below the current threshold of €25,830 is expected to be removed.

[26] The main conditions are as follows:

- the option plan has been authorised by a shareholder meeting of the company granting the options or by any other committee or board of the company in accordance with the local corporate law of the foreign company. Under French commercial law, such authorisation must be limited to no more than 38 months from the date of the shareholder meeting. However, the French tax authorities will accept a longer authorisation than 38 months provided that it is in compliance with the legislation applicable to the relevant foreign issuer and is reasonable (an authorisation of 10 years is not considered to be reasonable by the French tax authorities);
- the beneficiaries of the stock options must be:
  - (a) if the underlying shares are listed on a stock exchange, employees or executive officers of (i) the French issuing company, (ii) a company which directly or indirectly holds at least 10% of the share capital or voting rights of the French issuing company, (iii) a company which is directly or indirectly held to more than 10% by the issuing company (at least 10% of the share capital or voting rights), or (iv) a company which is directly or indirectly held to more than 50% by a company which holds at least 50% of the issuing company;

list of such requirements was published in a revenue ruling. The scope of this ruling is not clearly defined but further guidance in particular cases could be sought from the tax authorities if required.

If the conditions apply, the following tax regime applies:

5.1.1 **Grant:** French employers are subject to a 10% employer social security contribution payable on the grant date of qualified stock options (options granted prior to 16 October 2007 are not subject to this charge)[27].

The amount subject to this social security charge is 25% of the fair market value of the underlying shares on the grant date. However, companies which report on a consolidated basis under international accounting standards[28] may instead choose to determine the amount of the employer

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(b) if the underlying shares are not listed on a stock exchange, the rules are the same as mentioned above under (a) subject to the following exceptions: (i) in the case of an option to purchase existing shares, the options should be granted only to employees of the issuing company, or to employees of a French company at least 10% of whose share capital is held by the issuing company and (ii) only executive officers of the issuing company may benefit from stock options;

- the option holders must not hold more than 10% in total of the issued share capital of the foreign parent company;
- if the shares subject to the option are listed on a stock exchange, the price payable under the option must not be less than 95% of the average share price over the 20 stock exchange dealing days immediately preceding the date the option is granted;
- in the case of options to purchase existing listed shares, the company must acquire the shares before the date on which the options become exercisable. However, the shares cannot be held for more than one year before the grant of the options. The exercise price cannot be less than 95% of the average purchase price of the shares owned by the company at the date the options are granted. Therefore it is advisable to operate French approved plans over newly issued shares only;
- if the shares subject to the option are not listed, the option exercise price must be determined in accordance with objective stock valuation methods;
- if the shares of the company issuing the options are listed, no option may be granted during specific black-out periods;
- the options are not transferable;
- the options must be granted for nil consideration.

[27] The 10% contribution was introduced by Article 13 of the 2008 French Social Security Financing Bill and applies to options granted since 16 October 2007. It applies to options granted to beneficiaries whose remuneration or gains are subject to a compulsory French social security regime.

[28] Consolidated financial statements in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002.

social security contribution on the basis of the fair value of the options under IFRS 2. The choice made by a company is irrevocable for all options granted in the same year.

The above employer social security charge is triggered on grant, regardless of whether the exercise of the options is subject to any conditions.

5.1.2 **Exercise:** Where an approved option relates to shares quoted on a stock exchange, tax and social security contributions only arise on exercise if the option exercise price was set at a discount exceeding, in broad terms, 5% of the average price of the shares over the 20 dealing days before grant[29].

The part of the discount which exceeds 5% is subject to income tax at the time of exercise at the employee's marginal rate which, for the 2010 tax year varies from 0% to 40%. In addition, employer and employee social security contributions (at a combined rate of approximately 20%-30% for employee contributions and 45%-50% for employer contributions) are due.

For the employer, the costs incurred in relation to the exercise of the options are deductible from its taxable income. A deduction would also be available for a capital loss realised in respect of (i) the difference between the value of the treasury shares and the exercise price in the case of options to acquire existing shares or (ii) the difference between the value of the stock on the date of the share capital increase and the exercise price in the case of options to subscribe for newly issued shares, provided, in the latter case, that the following conditions are met:

- the options to subscribe for shares benefit all of the employees of the company; and
- the options are granted on a uniform basis, either in proportion to the length of presence in the company during the relevant financial year

[29] To fall within the exemption from tax, for options to subscribe for new shares, the discount must not exceed 5% of the average quoted price of the shares over the 20 dealing days preceding grant. For options to purchase existing shares, the discount must not exceed 5% of the highest of:

- the average purchase price of the shares held by the company at the date of grant of the options; and
- the average quoted price of the shares over the 20 dealing days preceding grant.

or in proportion to wages, or by virtue of a combination of these criteria.

5.1.3 **Disposal:** Tax is charged at disposal on both the acquisition gain and the disposal gain. The acquisition gain is the difference between the market value of the shares on exercise and the exercise price, less any gain taxed on exercise. The disposal gain is the difference between the sale proceeds and the market value of the shares on exercise.

There are three possible tax treatments of the acquisition gain, depending on how long the shares have been held. The tax charge is reduced the longer the shares are held from the date of grant (not the date of exercise) [30]. The disposal gain is subject to capital gains tax at the rate of 30.1% for 2010 income.

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[30] The three treatments are as follows:

a) Shares sold before the 4th anniversary of the date of grant:

- income tax at the employee's marginal rate; and
- employee social security contributions (approximate rate of 20-30%) and employer social security contributions (approximate rate of 45-50%).

In the event of dismissal, death, disability and compulsory retirement, shares sold before the 4th anniversary will be taxed in accordance with (b) below.

b) Shares sold between the 4th and 6th anniversaries of the date of grant (regardless of how long they have been held) and shares sold after the 6th anniversary of the date of grant but which have not been held for two years from option exercise:

- 42.1% (30% + CSG 8.2% + CRDS 0.5% + social tax 2% + additional contribution of 1.4%) up to €152,500 for the 2010 income;
- 52.1% (40% + CSG 8.2% + CRDS 0.5% + social tax 2% + additional contribution of 1.4%) above that amount for the 2010 income.

Alternatively, the option holder may elect to be charged to income tax at his marginal rate of up to 40% (e.g. if his actual marginal income tax rate is lower) plus additional contributions of 12.1% (CSG 8.2% + CRDS 0.5% + social tax 2% + additional contribution of 1.4%) for 2010 income.

c) Shares sold after the 6th anniversary of the date of grant having been held for at least 2 years from option exercise:

- 30.1% (18% + CSG 8.2% + CRDS 0.5% + social tax 2% + additional contribution of a 1.4%) up to €152,500;
- 42.1% (30% + CSG 8.2% + CRDS 0.5% + social tax 2% + additional contribution of 1.4%) above €152,500.

Alternatively, the option holder may elect to be charged to income tax at his marginal rate of up to 40% plus additional contributions of 12.1% as above. The income tax rates range from 0% to 40% for 2010 income.

In addition, the acquisition gain resulting from the exercise of options granted since 16 October 2007[31] is subject to a 2.5% employee social security contribution.

To benefit from the favourable tax regime, it is also necessary to comply with certain filing requirements. Companies offering options to their employees are required to issue, on or before 15 February in each year, individual statements in respect of each employee who (i) has exercised options during the course of the preceding calendar year[32] and/or (ii) during the course of a calendar year, has sold or converted into bearer shares, shares acquired on the exercise of an option before the end of the four-year holding period from the date of grant.

5.2 Favourable tax regime for free shares

In order to encourage employee share ownership in France, the French 2005 Finance Act introduced a new regime consisting of the grant of free shares to employees and executive officers[33]. Prior to this law, the grant of free shares was not governed by any specific regulation and the tax and social security regime was not favourable.

The favourable tax regime is available for employees of French companies in relation to free shares granted by their employer or by a domestic or a foreign

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[31] The 2.5% contribution was introduced by Article 13 of the 2008 French Social Security Financing Bill and applies to options granted since 16 October 2007. It applies to options granted to beneficiaries whose remunerations or gains are subject to a compulsory French social security regime.

[32] Where options are granted over the shares of a non-French parent company, these individual statements must be issued by the French employing company.

Two copies of each individual statement must be issued. One copy must be sent to the tax authorities on or before 15 February. The other copy must be given to the employee and should be filed, together with his tax return (generally around 1 March), at his local tax office.

If, in the course of a calendar year, shares acquired on the exercise of an option are sold or converted into bearer shares before the end of the four-year holding period, the company must issue an individual statement (again two copies are required), on or before 15 February of the following calendar year, indicating the date on which the sale or conversion occurred, the date of the grant and exercise of the corresponding options, the number of shares concerned, the purchase or subscription price of the shares and their value on the date of exercise. In the event of an exchange of shares (as a result of a public offer of exchange, a merger etc.), the above-mentioned filing obligations are transferred to the company whose shares are granted in exchange (or its French subsidiary, if it is a foreign company).

[33] Articles L. 225-197-1 to L. 225-197-6 of the French Commercial Code. New provisions were also introduced by Law No 2006-1770 dated 30 December 2006 relating to employees' participation and shareholdings.

parent company of their employing company[34] if certain conditions are met, i.e. if the grant of free shares is made in accordance with the relevant conditions of the French Commercial Code[35]. These include, in particular, a minimum four-year

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[34] Guidelines issued by the French tax authorities on 24 May 2005 (5F-14-05) and 10 November 2006 (5F-17-06).

[35] The main conditions provided by the French Commercial Code are the following:

- the grant of free shares must be approved by an extraordinary shareholders' meeting which authorises the board of directors (*conseil d'administration* or *directoire*) to proceed with the grant. Such authorisation has a limited duration which shall not exceed 38 months from the date of the shareholders' meeting. If the issuer of the free shares is a foreign company, the grant must be approved in accordance with the local law requirements.
- employees of the company and executive officers (i.e. the chairman of the board, the chief executive officer, the general managers (*Directeurs généraux délégués*) and the members of the management board (*Directoire*)) may be granted free shares. However, free shares cannot be granted to an employee or an officer who holds more than 10% of the share capital of the company or who would hold more than 10% of the share capital of the company further to the grant of the free shares;
- the overall number of shares which may be granted cannot exceed 10% of the total share capital of the issuing company at the moment when the board of directors decides to grant free shares. The shares to be granted can either be outstanding shares or newly issued shares;
- a minimum four-year lock-in period is required as from the initial grant and before the shares are sold. This period is divided into a minimum two-year vesting period and a further holding period of at least two years (during which the beneficiary owns the shares but is prohibited from selling them);
- companies may reduce/withdraw the holding period, provided the vesting period is of at least four years. This possibility is particularly interesting for the implementation of an international free shares plan by a French company, in order to allow foreign beneficiaries to sell the shares at the time taxation and social security charges are due (i.e. generally at the vesting of the shares). However, such mechanism is without particular interest from a French tax viewpoint, since the benefit of the French favourable tax and social security regime is subject to a mandatory holding period of at least two years following the vesting of the free shares;
- the extraordinary shareholders' meeting is able to provide for the definitive grant of the shares before the end of the vesting period in case of the disability of the beneficiary. The shares are then immediately transferable. In the case of death, shares are immediately transferred to the heirs of the beneficiary and are transferable;
- the board of directors of the company are permitted to identify the persons entitled to benefit from the grant of free shares and to determine the conditions attaching to the free shares;
- the vesting of the free shares can be subject to a presence condition and/or performance condition which shall be determined precisely in the free share plan rules. The French Supreme Court considers that a presence condition does not constitute an infringement of the employee's freedom to resign nor represents an illicit financial penalty. As to the performance criteria, it must be objective, feasible and the realisation should not exclusively depend on the will of the employer; and

lock-in period. Where the free shares are granted by a foreign company, the French tax authorities have confirmed that only the "essential" requirements of the French Commercial Code need be met.[36]

5.2.1 **Grant:** French employers are subject to a 10% employer social security contribution payable on the grant date (free shares granted prior to 16 October 2007 are not subject to this charge)[37].

This social security charge arises on the fair market value of the shares on the grant date. However, companies which report on a consolidated basis under international accounting standards[38] may instead choose to determine the amount of the employer social security contribution on the basis of the fair value of the shares under IFRS 2. The choice made by a company is irrevocable for all awards granted in the same year.

The above employer social security charge is triggered on grant, regardless of whether the definitive transfer of the shares is subject to any conditions.

5.2.2 **Vesting:** The benefit of the free shares (the so-called “acquisition gain”), equal to the market value of the shares at the time of the vesting (i.e. at the end of the vesting period) is subject to income tax at a flat rate of 30% plus 12.1% of additional contributions[39]. However, tax is payable only at the time of disposal of the free shares by the employee. The employee can also elect to be taxed on the acquisition gain at the progressive taxation rate of employment income (this election is

- in addition to the two-year holding period, if the shares are listed on a regulated stock market, the free shares cannot be sold: (i) within ten trading days before and after the date of when the consolidated accounts or annual accounts are published; (ii) within a period starting from the date when the management bodies of the company become aware of information which may have a significant impact on the stock market price of the shares and ending ten trading days after this information is publicly disclosed.

[36] Revenue ruling 5F-17-06 dated November 2006.

[37] The 10% contribution was introduced by Article 13 of the 2008 French Social Security Financing Bill and applies to free shares granted since 16 October 2007. It applies to free shares granted to beneficiaries whose remunerations or gains are subject to a compulsory French social security regime.

[38] Consolidated financial statements in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002.

[39] The acquisition gain will be exempt from social security contributions and other contributions owed by the employer and assessed on the same basis as social security contributions, provided the employer notifies the competent authorities of (i) the identity of the employees and officers, who benefited from the grant of free shares during the preceding civil year as well as (ii) the number and (iii) the value of the shares granted to each of them.

favourable if the employee's marginal income tax rate is lower than 30%)[40].

The acquisition gain is also subject to a 2.5% employee social security contribution calculated on the basis of the fair market value of the shares on the acquisition date (date of transfer of the shares to the employee). The 2.5% contribution is due at the time of the disposal of the shares (free shares granted prior to 16 October 2007 are not subject to this charge)[41].

As regards the employer, French tax law provides that a French company issuing free shares to its employees can deduct the difference between the value of the free shares on the date of the increase in share capital and the subscription price (being zero in the case of free shares), if the following conditions are met:

- the free shares benefit all employees of the company; and
- the free shares are granted on a uniform basis, either in proportion to the length of presence in the company during the relevant financial year or in proportion to wages, or by virtue of a combination of these criteria.

5.2.3 **Disposal:** The disposal gain, which is equal to the difference between the sale price and the market value of the shares at the time of vesting is taxed at a flat rate of 18% plus employee social contributions amounting to 12.1%.[42]

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40 The income tax rates range from 0% to 40% for 2010 income, increased by additional contributions of 12.1%.

41 The 2.5% contribution was introduced by Article 13 of the 2008 French Social Security Financing Bill and applies to free shares granted since 16 October 2007. It applies to free shares granted to beneficiaries whose remunerations or gains are subject to a compulsory French social security regime.

42 Under the provisions of a law dated 30 December 2006 for the development of employees' participation and shareholding, the employees will have the possibility of transferring their free shares into an employee savings plan at the end of the vesting period subject to conditions (in particular, that all of the employees benefited from the free shares grant). In such a case, at the end of the five-year holding period as from the transfer, the employee will be exempt from personal income tax on the disposal gain.

6. Employee savings plan (PEE)

French employees may subscribe for/acquire shares issued by their employer or its parent company (including a non-French parent company)[43], whether directly or through a FCPE), within the scope of an employee savings plan (Plan d'Epargne d'Entreprise or PEE), which benefits from favourable terms such as an employer contribution (*abondement*) and/or a discount on the subscription/acquisition price (either in the form of cash or free shares). A favourable tax and social security regime applies if a number of conditions are met[44], including the requirement that the PEE is offered to all employees, that

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[43] The parent company is defined under the provisions of the French Commercial Code on the issue of consolidated accounts. According to these provisions, the parent company has to comply with one of the following conditions:

- it holds directly or indirectly the majority of the voting rights in the employer company;
- it has appointed the majority of the directors or the executives of the employer company during the two previous tax years;
- it shares the control of the employer company with a restricted number of shareholders, so that the decisions taken by the employer company are derived from the agreement of the controlling shareholders.

[44] The main conditions are as follows:

- the PEE is offered to all employees (a minimum service period of no more than three months and/or a minimum investment amount can be specified);
- the employer's contribution (*abondement*) does not exceed three times the employee's contributions and is in any event limited to 8% of the annual social security ceiling (i.e. 0.08 x 34,620 = €2,769.60) per year for 2010). However, to the extent that the employee's contributions are invested in the employing company's shares or the shares of an affiliated company within the meaning of Article L. 225-180 of the French Commercial Code, this limit is increased to 14.4% of the annual social security ceiling (i.e. €4,985.28 for 2010);
- the employee's annual contribution to the PEE (which normally comes from his after-tax income) cannot exceed 25% of his annual gross salary; and
- the shares acquired through the PEE are held over a 5-year period, subject to the following exception, listed in Article R. 3324-22 of the French Labour Code:
  - marriage or a *Pacte Civil de Solidarité* (PACS) (solidarity civil agreement). PACS is an agreement entered into between two individuals over 18 years, having the same sex or a different sex, in order to organise their everyday life within the meaning of Article 515-1 of the Law n° 99-944 dated 15 November 1999;
  - birth or arrival at home for adoption of a third and any subsequent child;
  - divorce or termination of the PACS (if the employee retains the custody of at least one minor child);
  - disability of the employee, his/her spouse, his/her child or the person with whom he/she has concluded a PACS;

the employee's annual contribution to the PEE is not in excess of 25% of his annual gross salary and that the investment of the employee is kept in the plan over a minimum five-year holding period.

6.1 **Tax free discount**: Employees may invest in shares at a discount to market value of up to 20% if the shares are either listed on a stock exchange or not listed[45] and subject to a 5-year holding period without a liability to income tax or social security contributions arising for the employee or employer (the early release of shares within the holding period is permitted in a number of circumstances, including termination of employment for any reason). This discount may amount to up to 30% if the shares are subject to a holding period of 10 years. The discount may however be subject to social taxes at the combined rate of 12.1% (2010 income)[46] as part of the capital gain when the employee disposes of his investment (see paragraph 6.3 below).

French companies may deduct an amount equal to the difference between the value of the shares issued on the date of the increase in share capital and their subscription price, in the case of an increase of share capital reserved to the employees participating in a PEE.

- termination of the employment contract for whatever reason (termination, dismissal, retirement, resignation);
- acquisition or extension of the employee's main home or reparation of the employees' main home following an act of God recognised as such by an act of authority;
- bankruptcy (*situation de surendettement*) of the employee as determined by any local competent authority;
- death of the employee or of his/her spouse or of the person with whom he/she has concluded a PACS; and
- creation or takeover by the employee, his/her spouse, his/her child, or the person with whom he/she has concluded a PACS of an industrial, commercial, craft or agricultural enterprise or a decision to undertake a non-salaried profession.

[45] Article L. 3332-21 of the French Labour Code states that companies whose shares are not listed on a stock exchange, can also benefit from the capital increase regime. The subscription price is determined by objective methods (It is necessary to weigh the net equity, the profit return and the future prospects of the company's activity. It is also important to take into account the investments in the significant subsidiaries). If it is impossible to determine such a price with the above methods, the subscription price is calculated in dividing the number of existing shares by the revaluation of assets.

For companies whose shares are not listed on a stock exchange, the subscription price cannot be higher than the subscription price or lower than 20% of the subscription price (30% if the shares are subject to a 10-year holding period).

[46] CSG at the rate of 8.2%, plus CRDS at the rate of 0.5%, plus social levy at the rate of 2%, plus an additional contribution of 1.4% (2010 income declared in 2011).

6.2 **Employer contribution:** The employer may make a contribution[47] into the PEE (i.e. for the benefit of an employee), which is deductible for corporation tax purposes and is not subject to employer social security contributions. The employee is not subject to income tax or employee social security contributions on the contribution, provided that the contribution remains invested in the PEE for five years (subject to certain exceptions). However, 97% of the employer contribution is subject to CSG (7.5%) and CRDS (0.5%[48]). The full amount of the employer contribution is subject to a 4% social security contribution (*forfait social*).[49]

There are also tax benefits in connection with dividends[50] and loans made to employees to subscribe for shares[51].

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[47] *Abondement.*

[48] The CSG and the CDRS are to be withheld by the employer before the termination of the five-year holding period.

[49] The 4% contribution (*forfait social*) was introduced by the 2009 French Social Security Financing Bill and has been applicable since 1st January 2009 (originally set at 2%, it was raised to 4% as from 1 January 2010).

[50] Dividends and tax credits received while the shares are held in the PEE are not subject to tax as long as they are reinvested in the PEE and are subject to the same holding period as applies to the shares from which the dividends derive (at least 5 years). The exemption continues to apply even if the shares are sold before the end of the holding period in the limited circumstances specified in article R. 3324-22 of the French Labour Code.

[51] Following the provisions of article L. 225-216 of the French Commercial Code, in the case of subscription or acquisition of shares of the company (or a subsidiary or an affiliated entity within the meaning of article L. 3344-1 of the French Labour Code) the employees may be granted a loan by the company. As far as personal income tax is concerned, if the loan is interest free, the benefit corresponding to it will not be subject to personal income tax as a benefit-in-kind, provided it is granted for a maximum period of twelve months from the day of the paying up of the shares. If the delay for the repayment is longer than one year, the benefit corresponding to a loan granted at a preferential rate will be subject to personal income tax (i) if the interest rate reduction exceeds 30% of the lowest interest rate usually offered to the general public if the employer is a financial institution or (ii) if the interest rate is lower than the legal interest rate provided for by article L. 313-2 of the French Monetary and Financial Code and published yearly by the French Ministry of Finance (0.65% for the year 2010) if the employer is not a financial institution or if the loan is not of those that are habitually offered to the general public. As far as social security contributions, CSG and CRDS are concerned, (i) if the employer is a financial institution, the interest rate reduction will be treated as benefit in kind, subject to social security contributions, CSG and CRDS, if the reduction exceeds 30% of the lowest interest rate usually offered to the general public by the employer, regardless of the duration of the spreading instalments; (ii) if the employer is not a financial institution or if this kind of loan is not usually granted to the general public, the preferential interest rate will constitute a benefit in kind if it is lower than the legal interest rate provided for by the article L. 313-2 of the French Monetary and Financial Code (0.65% for the year 2010), thus the benefit corresponding to the difference between the legal interest rate and the interest actually charged to the employee will be subject to social security contributions,

6.3 **Capital gains:** Capital gains realised by the employees on the disposal of their investment are exempt from income tax provided that the disposal occurs after the 5-year (or, if applicable, 10-year) holding period (or before 5 or 10 years in the early release circumstances specified by French law referred to above apply). The gains remain subject to social taxes payable at 12.1% by the employee.

6.4 **Other tax advantages of a PEE:** An employee may use the funds in his PEE at any time during the holding period to exercise stock options that satisfy the requirements of the French tax-favoured option regime. This is subject to the condition that the shares acquired on exercise of the options are immediately placed in the PEE for a holding period of 5 years from the date of exercise with no possibility of an early release. In these circumstances, the funds used to exercise the options will be subject to (i) CSG at 8.2% (ii) CRDS at 0.5% (iii) social levy at 2% and (iv) an exceptional contribution of 1.4% at the time of exercise. The shares will be treated as having been acquired at the exercise price plus the proportion of any discount exceeding broadly 5% of the market price of the shares at grant and will benefit from the normal PEE tax treatment[52].

CSG and CRDS (rate of 8%) regardless the duration of the spreading of instalments (Circular 14 September 2005, Employee Savings Plan, Schedule 4).

[52] Where the option relates to listed shares, the shares will be treated as having been acquired at the option exercise price plus the proportion of any discount exceeding:

- in the case of options to subscribe for new shares, 5% of the average quoted price of the shares over the 20 dealing days preceding grant; and
- in the case of options to purchase existing shares, 5% of the higher of:
  - the average purchase price of the shares held by the company at the date of the grant of options; and
  - the average quoted price of the shares over the 20 dealing days preceding grant.

Although profit sharing bonuses (*intéressement*) are, under certain conditions, exempt from social security contributions, they are normally subject to income tax at the progressive rates, and to CSG and CRDS (8%) on 97% of their amount. Furthermore, the employer should pay a 4% contribution (*forfait social*).

An income tax exemption is available, under certain conditions and subject to certain limits, if the employee transfers his profit sharing bonus into a PEE and the following conditions are met:

- the transfer must occur no later than 15 days after the bonus has been paid;
- the funds invested in the PEE must not be available to the employee for a period of five years (subject to certain exceptions); and
- the bonus amount which may be exempted from income tax under these rules is limited to 50% of the annual social security ceiling for the year concerned (i.e. 50% x €34,620 = €17,310 in 2010).

It is also possible to channel profit sharing bonuses (*intéressement*) into a PEE, which would then invest in a company's shares, in a tax efficient way.

7. Employee benefit trusts

7.1 If a French resident is a potential beneficiary of a discretionary employee benefit trust, he does not face any adverse tax consequences purely by virtue of being a potential beneficiary. If a French resident actually receives benefits from such a trust, these will be treated as benefits-in-kind subject to income tax and social contributions (employee social contributions at the approximate rate of 20%-30% and employer social contributions at the approximate rate of 45%-50%, subject to earnings caps in each case).

7.2 A French company cannot claim a corporation tax deduction for a contribution to an employee benefit trust.

8. Data protection

8.1 The French Data Protection Law No. 78-17 of 6 January 1978 (as amended[53]) (the French DPL) requires a company to inform employees of the identity of the data controller and/or its representative, the purpose of the processing, whether replies to questions are obligatory or voluntary and the possible consequences of a failure to reply, the recipients or categories of recipients of the data, the existence of rights (in particular) to access and correct the data, the name and address of the person or service to whom data subjects should address their requests with respect to their rights and the envisaged transfers of their personal data to countries outside the European Economic Area (EEA). The employees must be informed of the above at the time of collection, unless they have already been provided with such information[54].

8.2 All employers must file a prior declaration with the French Data Protection Authority, the *Commission Nationale de l'Informatique et des Libertés* (CNIL) to allow them to use the personal data they collect about employees in the course of employment where the personal data is processed by automated means. Unless a share plan is specifically covered in a declaration, a new declaration will be required when a new plan is introduced.

[53] Amended by Law No. 2004-801 of 6 August 2004.

[54] Under Article 32 of the French DPL and decree no. 2007- 451 of 25 March 2007 modifying decree no. 2005-1309 dated 20 October 2005. Note that decree no. 2005-1309 dated 20 October 2005 as modified in 2007 provides that certain additional information must be provided to the data subjects where transfers of data outside the EEA are envisaged.

8.3 The consent of each employee should in principle be obtained for the use and transfer of personal data to a country situated outside of the EEA and which does not ensure adequate protection of his personal data in connection with each employee share plan in which he takes part. However, the CNIL has expressed some doubt as to whether consent obtained from existing employees meets the requirement for consent to be "freely given, specific and informed". Therefore, it is recommended that a data transfer agreement should be entered into (between the transferor and the recipient situated outside the EEA) which is then submitted to the CNIL for approval[55]. An exception exists for the transfer of personal data to the US and a transfer to entities located in the US is possible if these entities have adhered to Safe Harbour principles.

8.4 The employees of French entities participating in an employee savings plan (PEE) must be informed that they have a right to object, on legitimate grounds, to the processing of their personal data before or after such processing.

9. Employment law

9.1 Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

9.2 Where the employee share plan is to be offered to a significant number of employees in France, this will be subject to the prior notice to and consultation with the relevant French works council. Under the French Labour Code, failure to inform and consult the works council may constitute a criminal offence.

9.3 Companies operating employee share plans in France should ensure that they are aware of the risks associated with the operation of any "good/bad leaver" rules in those plans.

The French Labour Code provides that any "fines or other financial sanctions" imposed on an employee are null and void. This provision has, in the past, been successfully invoked by employees in relation to their entitlement to a number of different types of employment-related benefits on termination and there had long

[55] Articles 68 and 69 of the French DPL. It is highly recommended that the standard clauses published by the European Commission in its decisions be used in the data transfer agreement.

been a concern that the French courts might also take a similar approach in the context of entitlements under employee share plans.

At the end of 2009 the French Supreme Court[56] held that a rule in a share option plan providing for the forfeiture of share options if an option-holder was dismissed from employment for serious misconduct breached the French Labour Code. The rule was therefore unenforceable against the ex-employee.

It is not entirely clear whether the scope of this Supreme Court decision is limited to plan rules which differentiate between different categories of leaver, or whether it could also apply to a general "presence" condition even if that condition does not differentiate between different kinds of leaver (i.e. a provision under which all employees forfeit their awards on termination, regardless of the reason for termination). However, even if a general "presence" condition remains valid for French Labour Code purposes, this may not be an attractive solution from an employee incentive/commercial perspective.

However, there may be other ways in which more "normal" good/bad leaver provisions can be retained whilst minimising the risk of the French Supreme Court decision applying. For example, the risks may be minimised if awards are structured so that no rights are acquired until such time as the awards vest (rather than being structured as an award which provides "rights" from grant which are then forfeited if the award does not vest).

[56] Cass. Soc., 21 October 2009 n°08-42.026, *Mme Nebon Carle,* FS-P+B.

Germany

1. Securities law

1.1 **Offer of securities:**[1] The Prospectus Directive was implemented in Germany by the Securities Prospectus Act (*Wertpapierprospektgesetz*) (WpPG)[2]. Generally, the principles referred to in paragraph 2 on pages 1-3 of this guide will apply. Some possible exceptions to those principles are outlined below:

- The German Federal Financial Services Supervisory Authority[3] (BaFin) takes the view that non-transferable options do not qualify as securities within the meaning of the WpPG. However, in case of options being offered under employee participation plans, the BaFin takes into account not only the option but also the exercise of the option and the subsequent delivery of the underlying securities when deciding whether, and at what point, a "public offer of securities" is made which triggers the prospectus requirements. The decisive factor is whether the underlying security is delivered automatically or whether the option has to be exercised by submitting a notice etc.

  Where a physically-settled option directly results in the acquisition of shares in the relevant company on the maturity date (i.e. there are no intermediate steps such as the requirement to submit an exercise notice etc.), BaFin considers the offer of the options to be a public offer of securities. Where the offer requires an exercise, it will depend on the circumstances of the case as to whether the acquisition of the underlying securities is to be considered as a public offer of securities within the meaning of the WpPG.

- The wording of the employee share plans exemption as implemented into the WpPG could potentially be construed as not covering the offer of

[1] The offer of participation in the form of closed-end funds, trust structures and other pooled vehicles in which participation is granted other than by way of an issue of transferable securities may be subject to prospectus requirements under the German Sales Act (*Verkaufsprospektgesetz).* However, where this is the case, various exemptions may apply.

In addition, there exists a general civil law-based liability for offers and marketing material used in the context of offering securities and financial instruments where no approved prospectus is used. Under this concept of civil law-based liability, the offeror of securities may be held liable for misleading and incomplete marketing material on the basis of which it offers such products to investors.

[2] The WpPG forms part of the Act implementing the Prospectus Directive ("*Prospektrichtlinie-Umsetzungsgesetz*") of 22 June 2005, BGBl. I 2005, p. 1698.

[3] Bundersanstalt für Finanzdienstleistungsaufsicht.

shares in an affiliated company of the employer. However, in practice, this exemption may be construed more broadly.

- A company considering the use of a "short-form prospectus" (see further paragraph 2.1 on pages 1-3 of this guide) should discuss this in advance with BaFin.

1.2 **Regulatory issues:** Provided the offering of securities to employees by the employer does not include the provision of banking business to the employees[4], no German banking licence requirements apply. When offering securities to employees under an employee share plan, general rules under German civil law regarding the way in which securities are offered must be observed. In particular there are doorstep-selling restrictions, which in certain circumstances also apply to offers of securities and related services made in person to employees at their workplace.

Furthermore, even if no prospectus is published, any written selling material which is provided to an actual or potential investor (i.e. employees) and which contains information on an investment can qualify as a prospectus which can lead to a general civil law prospectus liability in Germany (i.e. a liability for false, missing or misleading information may be incurred).[5]

1.3 **Disclosure:** Disclosure and publication requirements apply for German and, in principle, also to non-German companies which are listed on an organised market in Germany (or to which admission has been applied for) in relation to insider information and directors' dealings. Furthermore, registers must be maintained by companies listed on a German exchange, or acting upon instruction or on account of such a company, of persons having knowledge or insider information in the course of their business.

Employees who are in possession of inside information at the time of subscription under an employee share plan are not permitted to participate in the

[4] Such as e.g. safe custody business or lending business (if the company extends loans to its employees to enable them to take part in the employee share plan, this would constitute licensable banking business in Germany and a German banking licence would be required). There is no exemption available for a licensable banking businesses. However, for certain brokerage activities an exemption is available if the licensable services are provided by a company for the sole purpose of administering a participation scheme for the benefit of their employees and/or the employees of their affiliated companies.

[5] Under the scope of the WpHG, the offer of shares (and derivatives) is subject to certain specific information and advisory obligations in order to avoid liability (see article 19 of Directive 2004/39/EC on markets in financial instruments and article 31 of Directive 2006/73/EC implementing Directive 2004/39/EC.

employee share plan as section 14 of the Securities Trading Act prohibits the acquisition of shares on the basis of inside information. Receipt of inside information after subscription is, however, irrelevant.

2. Exchange controls

There are no exchange controls.[6]

3. Financial assistance

3.1 **German company:** Although a German stock corporation (*Aktiengesellschaft*) (AG) is not allowed to finance the acquisition of its own shares by any third party, there is an exemption for advances, loans or the provision of security for the purpose of the acquisition of shares by employees of the company or employees of group companies provided that the company has certain capital reserves. An AG is in principle permitted to acquire its own shares for the purposes of an employee share plan, provided (i) this has been, in certain circumstances, approved by shareholders, (ii) it has certain capital reserves and (iii) shares already held and to be acquired do not exceed 10% of the company's share capital.[7,8]

3.2 **German subsidiary of non-German company:** The restrictions set out in paragraph 3.1 above also apply to a German AG which is a subsidiary of a non-German company.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** A German employee who acquires shares in his employing company or its parent company free of charge or at a discount to market value will normally be liable to pay wage tax and a solidarity surcharge (and church-tax, if any). The tax charge is on the difference between the

[6] For purely statistical purposes any transfer into or out of Germany of more than €12,500 or the equivalent amount in another currency must be notified to the Deutsche Bundesbank Servicezentrum Außenwirtschaftsstatistik at Mainz, which is the competent federal office of the German Central Bank (Deutsche Bundesbank) for such notifications in Germany. This is generally handled by the bank remitting the funds. Notifications may also be effected online.

[7] A GmbH is, in principle, not subject to financial assistance restrictions applicable to an AG; however, the capital preservation rules apply.

[8] The BaFin has further restricted the buy-back of own shares in the regulation specifying the prohibition of market manipulation (*Marktmanipulations-Konkretisierungsverordnung*) which further defines activities which may generally qualify as market manipulation. However, there is an explicit safe harbour for share buy-backs if these meet the criteria in EU Regulation 2273/2003/EC.

market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the 2010 tax year wage tax ranges from 0% to 45%. The solidarity surcharge amounts to 5.5% of the wage tax liability. The maximum income tax rate applies from an annual overall income of €250,001 or €500,002 in the case of jointly-assessed couples. The rates of church-tax currently vary between 8% to 9% upon income tax subject to certain caps.

4.1.2 **Tax exemption:** A tax exemption for share-based payments has been available since 1 April 2009.

Any discount on the acquisition of the shares is tax exempt to the extent this does not exceed €360 per year. In order for the new exemption to apply, two requirements must be met: (1) participation in the plan must be an additional benefit for the employee (i.e. the benefit may not be deducted or credited against the employee's agreed wage) and (2) the employer (i.e. the German subsidiary) must offer participation in the plan to all employees. Companies may amend their existing plans to benefit from the new exemption for future share acquisitions.

Where the tax exemption applies, then an equivalent exemption from social security contributions will also apply.

4.1.3 **Social security contributions:** Social security contributions are due where the employee is subject to wage tax. The rates in 2010[9] are 19.9% for retirement benefit insurance, 2.8% for unemployment insurance (to be increased to 3% from 1 January 2011),[10] 1.95% (plus an additional charge of 0.25% for childless employees born after 1 January 1940 and older than 23) for nursing insurance[11] and 14.9% for statutory health insurance. Social security contributions are, in principle, borne 50/50 by the employer and the employee.

For any income in excess of specific salary thresholds, no further social security contributions have to be paid. The applicable annual salary thresholds in 2010 are: €66,000 for retirement benefits insurance, €66,000 for unemployment insurance, €45,000 for statutory health insurance and €45,000 for nursing insurance. These thresholds only

[9] The rates for 2011 are not yet available.

[10] Section 341 para 2 Social Security Code III (*Sozialgesetzbuch III*).

[11] Section 55 Social Security Code XI (*Sozialgesetzbuch XI*).

apply to the West German federal states and the thresholds for the East German federal states are considerably lower.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** A German company cannot generally claim a corporation tax deduction for the cost of providing shares, but if it buys shares in its foreign parent or its own shares and delivers those shares to its employees for less than the purchase price through an employee share plan, it should be able to claim a tax deduction.[12] The corporation tax deduction would be for the difference between the price that the employer paid for the shares and any amount paid by the employees. If the German employing company makes a payment to a parent company or to an employee benefit trust, that payment should also be tax deductible.

A German employing company can generally claim a tax deduction for any ancillary costs and expenses of establishing an employee share plan.

4.2.2 **Social security contributions:** Social security contributions are due where the employee is subject to wage tax.[13]

4.3 Tax withholding

The employer must withhold wage tax and social security contributions (and church-tax, if any) if the employer provides the shares directly or if the shares are provided by another person (for example, the parent company or a trust)

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[12] There is discussion whether the difference between the price paid by the employer and the price paid by the employees qualifies as tax deductible expense because according to section 8b of the Corporate Income Tax Act losses generated through a sale of shares in a corporation are not tax deductible. Accordingly, it is disputed whether losses stemming from a sale of shares at a reduced price to a company's employees qualify as losses generated through a sale of shares for tax purposes or a tax deductible personnel expense. There are no court decisions or guidelines from the German tax administration in this respect.

[13] The rates in 2010 are: 19.9% for retirement benefit insurance, 2.8% (from 1 January 2011, 3%) for unemployment insurance, 1.95% (additional charge of 0.25% for childless employees born after 1 January 1940 and older than 23) for nursing insurance and 14.9% for statutory health insurance which are, in principle, borne 50/50 by the employer and the employee.

However, for any income in excess of specific salary thresholds, no social security contributions have to be paid. The applicable salary thresholds are in 2010: €66,000 for retirement benefits insurance, €66,000 for unemployment insurance, €45,000 for statutory health insurance and €45,000 for nursing insurance. These thresholds only apply to the West German federal states and the thresholds for the East German federal states are considerably lower.

under an agreement with the employer. In the latter case, a withholding obligation of the employer arises if the employer is aware or should be aware of the provision or grant of shares or is involved in any activities in relation to the plan, which is assumed to be the case where a group company makes the awards.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no tax charge on the grant of a share option provided that the share option is non-transferable.[14]

5.1.2 **Exercise:** Wage tax and solidarity surcharge (and church-tax if any) arise on the exercise of a non-transferable share option on the difference between the market value of the shares at the date of transfer (the date on which the shares are booked out from the account of the transferor) and the option exercise price and the price (if any) paid for the option.[15] For the 2010 tax year wage tax ranges from 0% to 45%. The solidarity surcharge amounts to 5.5% of the income tax liability.

5.1.3 **Tax exemption:** A tax exemption for share-based payments has been available since 1 April 2009.

The gain on the exercise of a share option is tax exempt to the extent it does not exceed €360 per year. In order for the new exemption to apply, two requirements must be met: (1) participation in the plan must be an additional benefit for the employee (i.e. the benefit may not be deducted or credited against the employee's agreed wage) and (2) the employer (i.e. the German subsidiary) must offer participation in the plan to all employees.

Companies may amend their existing plans in order to benefit from the new exemption for future option grants. In addition, in principle, the tax

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[14] If the option is transferable, the employee may be deemed to have received a taxable benefit. The Federal Fiscal Court decided that the grant of a transferable stock option should only be taxable on exercise unless such options have been acquired on the market from third parties. Due to that decision there is some uncertainty as to how the tax authorities will treat transferable options. In one of the Federal States the tax authorities have announced that all options should be treated as giving rise to income the time of exercise.

[15] Pursuant to the tax authorities no tax charge will arise when a transferable option is exercised or becomes unconditionally exercisable, if it has been subject to wage tax at the date of grant. Please see footnote 14 above with regard to the view of the Federal Fiscal Court.

exemption may apply to options granted prior to 1 April 2009 if the relevant conditions are met and the option was not taxed at grant.

Where the tax exemption applies, then an equivalent exemption from social security contributions will also apply.

5.1.4 **Social security contributions:** The same principles apply as set out at paragraph 4.1.3.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** A German company cannot generally claim a corporation tax deduction for the cost of providing shares. However, if it buys shares in its foreign parent or its own shares and delivers those shares to its employees on the exercise of a share option and the price paid by the German company is more than the exercise price, the company should be able to claim a corporation tax deduction.[16] If the employing company makes a payment to the parent company or to an employee benefit trust equal to the difference between the price paid for the shares (paid by such parent company or employee benefit trust) and the exercise price, a corporation tax deduction should be available for the amount paid in these circumstances.

5.2.2 **Social security contributions:** In principle, 50% of the social security contributions due (see paragraph 4.1.3) are borne by the employer.

5.3 Tax withholding

The employer must withhold wage tax, social security contributions (and solidarity surcharge and church-tax if any) from the employee's earnings.[17]

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[16] There is discussion whether the difference between the price paid by the employer and the price paid by the employees qualifies as a tax deductible expense because according to Section 8b of the Corporate Income Tax Act losses generated through a sale of shares in a corporation are not tax deductible. Accordingly, it is disputed whether losses stemming from a sale of shares at a reduced price to a company's employees qualify as losses generated through a sale of shares for tax purposes or a tax deductible personnel expense. There are no court decisions or guidelines from the German tax administration in this respect.

[17] If the participant's salary for the month of exercise is not sufficient to cover his tax liability, the employer will request the employee to provide it with additional funds (which the employer will then remit to the competent tax authority). If the employee does not comply with this request, the employer must notify the tax authority. The tax authority will then pursue the employee for the wage tax due and the employer is no longer liable for the wage tax it should have withheld.

6. Taxation of share disposals

6.1 Shares acquired before 1 January 2009

In relation to shares acquired before 1 January 2009, an employee will generally not be subject to tax on capital gains realised upon the disposal of shares acquired under an employee share plan provided that the employee holds the shares as private assets (*Privatvermögen*) and a holding period of one year from acquisition has elapsed.[18] If the shares are sold within one year of acquisition, 50% of any capital gains will qualify as income from so-called private disposals (*private Veräußerungsgeschäfte*); such income will be subject to income tax at the employee's individual tax rate (which ranges from 0% to 45%) and solidarity surcharge and church-tax, if any, provided that the sum of all capital gains from private disposals in one calendar year is €750 or more.[19] Capital gains means the difference between (i) the sales price and (ii) the sum of the acquisition cost and any income-related expenses (*Werbungskosten*).

6.2 Shares acquired after 31 December 2008

In relation to shares acquired after 31 December 2008, 100% of any capital gains will qualify as income from capital investments (*Einkünfte aus Kapitalvermögen*) irrespective of any holding period.[20] Income from capital investments will, in general, be subject to income tax at a flat tax rate for income from capital investments (25%), together with a solidarity surcharge and church-tax, if any. Such tax will be withheld and no expenses are deductible.[21]

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[18] 60% (from 1 January 2009) of any capital gain will be subject to income tax (and solidarity surcharge and church-tax, if any) in the following circumstances:

- if the shares are held by the employee as part of a business and not as a private asset; or
- if the employee held more than 1% of the company’s share capital in the 5 years before the sale.

[19] If the sum of all capital gains from private disposals in one calendar year is less than €750, then the income from private disposals is tax-free.

[20] 60% of any capital gain will be subject to income tax (and solidarity surcharge and church-tax, if any) in the following circumstances:

- if the shares are held by the employee as part of a business and not as a private asset; or
- if the employee held more than 1% of the company's share capital in the 5 years before the sale.

[21] Withholding tax will be levied if the shares are held in a custodial account maintained with a German branch of a German or foreign credit or financial services institution or with a German securities trading business (*Wertpapierhandelsunternehmen*) or securities trading bank (*Wertpapierhandelsbank*) which pays or credits the disposal proceeds. If no withholding tax is levied, the employee is obliged to file a tax return.

7. Employee benefit trusts

The tax status of a foreign trust is determined on a case-by-case basis, and specific advice should be sought in relation to a plan that involves a trust.

8. Data protection

Depending on the structure of the employee share plan administration, employee consent may be necessary for the collection, processing and transfer of personal data.[22] In most cases, the requirement to obtain consent can be avoided if all recipients of employee data are located in the EU or there is an adequate level of data protection as further defined in EC Directive 95/46. In any event, the data collection should be limited to the extent necessary for the plan administration and employee data should only be shared on a need-to-know basis.

9. Employment law

9.1 Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide.

9.2 There is a risk that employees may claim a right to initial or continued participation in an employee share plan or that rights under a plan may be included in compensation on termination or may be considered pensionable income. However, following a decision of the Federal Labour Court, any entitlements under an employee share plan are, as a rule, not considered part of the employment relationship with the employing company where its parent company grants the share rights to the employees and the employing company is not (directly or indirectly) involved in the grant of the rights or the provision of benefits and the operation of the plan and the costs of the plan are not recharged by the parent company to the employing company. If the entitlements

[22] German data protection law imposes certain duties on the employing company in relation to its employees. For example, most employing companies must have a data protection officer, who must be informed in advance about any data processing that is required. A registration of the employer as a data processor is not required if a data protection officer has been appointed. For an employee's consent to be valid under German data protection law, it has to be obtained in advance and should be given in writing once the employee has been informed about the planned data processing and data transfer. The employees should be informed of the purpose of the data processing and data transfer, the categories of data processed and/or transferred and the identity of all parties to whom their data will be transferred and the country where each party is located. If employee data is collected for the first time without the knowledge of the employee, then there can be an obligation to inform the employee of the collection. Employee data is not per se regarded as sensitive data, but care should be taken not to collect or process sensitive types of data as defined in EC Directive 95/46 without the explicit consent of the employee.

under an employee share plan are deemed to be part of the employment relationship with the employing company, then the share plan rules will be considered "general terms" (*Allgemeine Geschäftsbedingungen*) falling within the scope of terms that may be reviewed by the Labour courts. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

9.3 Under the "German Act on the Adequacy of Directors' Remuneration", the minimum vesting period for share options granted by a German public company to its directors and employees has been increased from two to four years. The remuneration of directors of German public companies must be oriented towards long-term success and be based on long-term incentives for sustainable business development. Consequently, shares granted to such directors should be conditional upon a holding period of at least four years, and phantom options or similar awards should also only reward directors based on comparably long-term stock-exchange rate increases.

10. Consumer Protection Law

In accordance with German consumer protection law, consumers have a right of revocation in relation to contracts concluded in certain situations where the consumer is "taken by surprise" or where the consumer may make imprudent decisions (e.g. doorstep transactions, distance selling transactions). In accordance with general case law, employees qualify as consumers, and if they enter into transactions at their place of work, this may, depending on the circumstances, qualify as a doorstep transaction leading to right to revocation for the employee/consumer.

The general revocation period is two weeks. However, if the consumers are not informed that they have this right to revocation, then such right will not expire. If revocation occurs then the whole transaction would have to be unwound.

Although it is arguable that participation in an employee share plan would not fall within the scope of consumer protection law, it is considered advisable to provide information on the right of revocation so as to avoid the possibility of the right of revocation lasting beyond the two week period.

Greece

1. Securities law

1.1 **Offer of securities:** The Prospectus Directive was implemented into Greek legislation by Greek Law 3401/2005 on the "prospectus for securities offered to the public or admitted to trading". In principle, it applies to share plans offered in Greece, including both share option plans and free share plans. Although the offer of securities to the public generally requires the publication of a prospectus, there is an exemption from that requirement where securities are only offered to existing or former directors or employees by their employer (or an affiliated company) which has securities listed on an EU regulated market provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.[1] This document must be registered with the Greek Capital Market Committee (GCMC) before the grant date, although the GCMC's approval for the document is not required.

In addition, the obligation to publish a prospectus does not apply to certain other types of offer, including:

- an offer of securities addressed solely to qualified investors; and/or
- an offer of securities addressed to fewer than 100 natural or legal persons per EU member state, other than qualified investors.[2]

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[1] This document should be a notification of no more than 2 pages and should include information on the number and nature of securities and the reasons for and details of the offer. More specifically, the notification usually will include the following information: 1. total number of offered shares; 2. price of each share; 3. eligible beneficiaries; 4. number of shares that are to be awarded to each eligible beneficiary; 5. duration of the plan; 6. grant date and exercise date/s; and 7. provisions regarding the termination of the relationship between the company and the eligible beneficiary prior to the exercise date/s. The above-mentioned notification is just a simple summary of the plan, is not as detailed as a prospectus and is not subject to any approval by the GCMC.

[2] Other exemptions include (a) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 50,000 per investor, for each separate offer; and/or (b) an offer of securities whose denomination per unit amounts to at least EUR 50,000; and/or (c) an offer of securities with a total consideration of less than EUR 100,000, which limit shall be calculated over a period of 12 months.

The obligation to publish a prospectus does not apply to offers to the public of shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase in the issued capital.

The obligation to publish a prospectus does not apply to the admission to trading on a regulated market of the following types of securities; (a) shares representing, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated

market; (b) shares issued in substitution for shares of the same class already admitted to trading on the same regulated market, if the issuing of such shares does not involve any increase in the issued capital; (c) shares resulting from the conversion or exchanging of other securities or from the exercise of the rights conferred by other securities, provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market.

The obligation to publish a prospectus also does not apply to the following cases:

- for securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;
- for securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;
- for shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;
- for securities offered, allotted or to be allotted to existing or former directors or employees by their employer which has securities already admitted to trading on a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer;
- for securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;
- for securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;
- for shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market and that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;
- for securities offered, allotted or to be allotted to existing or former directors or employees by their employer or an affiliated undertaking, provided that the said securities are of the same class as the securities already admitted to trading on the same regulated market and that a document is made available containing information on the number and nature of the securities and the reasons for and detail of the offer;
- for securities already admitted to trading on another regulated market, on the following conditions; (i) that these securities, or securities of the same class, have been admitted to trading on the other regulated market for more than 18 months; (ii) that, for securities first admitted to trading on a regulated market after the date of entry into force of the Directive, the admission to trading on that other regulated market was associated with an approved prospectus made available to the public in conformity with Article 14; (iii) that, except where (ii) applies, for securities first admitted to listing after 30 June 1983, listing particulars were approved in accordance with the requirements of Directive 80/390/EEC or Directive 2001/347/EC; (iv) that the ongoing obligations for trading on that other regulated market have been fulfilled; (v) that the person seeking the admission of a security to

1.2 **Regulatory issues:** There are no other regulatory issues which affect the offering of securities to employees.

1.3 **Disclosure:** There are no relevant requirements.

2. Exchange controls

There are no applicable exchange controls. Payments must be made through a commercial bank in Greece (which is obliged to keep records of foreign exchange transactions).

3. Financial assistance

3.1 **Greek company:** Greek Law 3604/8-8-2007 provides that Greek companies may acquire their own shares for an employee share plan. The nominal value of the shares so acquired must not exceed 1/10 of the paid up share capital. Loans by group companies are prohibited.

3.2 **Greek subsidiary of non-Greek company:** There is no prohibition on the provision of financial assistance by a Greek company to allow its employees to acquire shares in a non-Greek parent company.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employing company or a foreign company in the same group free of charge or at a discount to market value is liable to pay income tax. The tax charge is on the difference between the stock exchange value of the shares at the time of acquisition and the amount, if any, paid for the shares.[3] This income is aggregated with the other income of the employee (salary and income from other sources, if any) and the total income is subject to income tax calculated by reference to the tax scale applicable for individuals. The

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trading on a regulated market under this exemption makes a summary document available to the public in a language accepted by the competent authority of the Member State of the regulated market where admission is sought; (vi) that the summary document referred to in (v) is made available to the public in the Member State of the regulated market where admission to trading is sought in the manner set out in Article 14(2); and (vii) that the contents of the summary document shall comply with Article 5(2). Furthermore the document shall state where the most recent prospectus can be obtained and where the financial information published by the issuer pursuant to his ongoing disclosure obligations is available.

[3] Article 45(1) of Income Tax Law 2238/94.

tax scale is increased progressively through thresholds of €31,600 and €100,000 and, for income over €100,000, the tax rate is 45%[4]

4.1.2 **Social security contributions:** No social security contributions will arise where an employee acquires shares free of charge or at a discount to market value (although the employee will be subject to social security contributions on his salary, including any amount of salary used to pay for the shares (at a rate of 16% for the 2010 tax year).[5]

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** If a parent or foreign company in the same group recharges the cost of providing shares to its Greek employing subsidiary under a written recharge agreement, the recharged amount should be accounted for as a salary cost and in principle should be deductible by the subsidiary in Greece.

4.2.2 **Social security contributions:** A Greek employer must pay social security contributions on the amount subject to income tax at a rate of 28.06% for the 2010 tax year. [6]

4.3 Tax withholding

No tax withholding is required. At the start of the year following the year in which the shares were acquired, the employer must provide a certificate to the employee with the information necessary (date of acquisition of shares, value of shares, number of shares purchased etc) so that the employee can include the income in his/her annual income tax return.

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[4] The tax rate is 0% for income up to €12,000, provided that the taxpayer retains receipts for goods and services purchased for his/her personal or dependants' needs.

[5] An employee is obliged to pay social security contributions each month. The payment of social security contributions is independent of taxation in Greece. Regardless of the Greek employee's participation in an employee share plan, social security contributions must be paid once a month before the payment of salary takes place. In the case of a salary-based relationship, social security contributions must be withheld and paid by the Greek employer each month. Each Greek employer is required to pay in social security contributions at a fixed percentage of the Greek employee's monthly salary including the taxable value of employee share benefits. Social security contributions are equivalent to 44.06% of the Greek employee's monthly salary. From this amount, 16% is paid by the Greek employee and withheld from his/her salary by the Greek employer.

[6] The social security contributions must be accounted for before the securities are offered to employees.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** A tax charge arises at the time an amount is paid by the employee for the shares. Therefore, there is no tax charge on the grant of a share option.

Exercise: As noted above, a tax charge arises at the time the employee pays for the shares, i.e. normally at exercise. (If no amount is payable for the shares then it is considered that the taxable date is when the employee "exercises" the option, as defined in the relevant plan rules.) The tax charge is on the difference between the stock exchange value of the shares when the employee pays for the shares and the amount paid (if any). Income tax is charged on a progressive scale, through thresholds of €31,600, and €100,000. Income over €100,000 is taxed at a rate of 45%.

5.1.2 **Social security contributions:** No social security contributions will arise in relation to the acquisition of the shares under the option (although the employee is subject to social security contributions on his salary, including any amount of salary that is used to fund the exercise price (at a rate of 16% for the 2010 tax year)).

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** If a parent or foreign company in the same group recharges the cost of providing shares to its Greek employing subsidiary under a written recharge agreement, the recharged amount should be accounted for as a salary cost and in principle should be deductible by the subsidiary in Greece.

5.2.2 **Social security contributions:** A Greek employer must pay social security contributions on the amount subject to income tax at a rate of 28.06% for the 2010 tax year.[7]

5.3 Tax withholding

No tax withholding is required. At the start of the year following the year in which the shares were acquired, the employer must provide a certificate to the employee with the information necessary (date of acquisition of shares, value of shares, number of shares purchased etc) so that the employee can include the income in his/her annual income tax return.

6. Taxation of share disposals[8]

Capital gains realised on a disposal of shares purchased before the end of 2010 are tax-free.

For shares purchased on or after 1 January 2011, the following tax regime will apply:

- If the shares are sold within a period of twelve months from the date of acquisition, there will be a tax charge on the difference between the sale value of the shares and the stock exchange value of the shares at the time of the acquisition of shares. This taxable amount is added to income from other sources and will be taxed based on an individual's tax scale. Upon sale of the shares, a tax withholding must be applied, which is offset against the ultimate tax liability of the employee. The tax withholding is 20% if the shares are sold within a period of three months from the date of acquisition and 10% if the shares are sold between four and twelve months from the date of acquisition. The Societe Anonymes of Investment Services and the bank institutions, which maintain the share accounts of their clients, must make the tax withholding and provide their clients with the relevant tax withholding certification.

- If the shares are sold more than twelve months from the date of acquisition, the capital gain realised upon a disposal of the shares is tax-free.

7. Employee benefit trusts

7.1 A Greek employee who is a beneficiary of a discretionary employee benefit trust will not be taxable for that reason alone but he may be taxed on the receipt of benefits from the trust.

7.2 Employee benefit trusts are not recognised under Greek law and a corporation tax deduction will not be available for contributions made to a trust, for example to allow the trust to purchase shares in the market.

8. Data protection

Employee consent must be obtained for the collection, processing and worldwide transfer of personal data in connection with an employee share plan.[9]

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[7] The social security contributions must be accounted for before the securities are offered to employees.

[8] Art. 38 Income Tax Law 2238/1994.

9. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

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[9] Greek Law 2472/1997 implemented the European Directive (95/46/EC) on personal data protection. Under Law 2472/1997, a person's personal data is fully protected. This means that employees must consent to the disclosure of their personal data to a third party and may specify how the data is to be used.

Hungary

1. Securities law

1.1 **Offer of securities:** As a general rule, the Hungarian Capital Markets Act (the Act) applies to offers of securities. Although not an explicit provision of the Act (nor explicit in any another regulation or guidance) in interpreting the definition of securities the Hungarian Regulator appears to take the view that the provisions of the Act relating to offers of securities only apply to securities that are transferable and negotiable on capital markets ("transferable securities"). Consequently, where transferable securities are offered to employees, then the prospectus requirement must be followed, if applicable. Where a prospectus exemption applies, then private offer rules will apply instead. Where securities offered to employees are not transferable securities then the provisions of the Act do not apply.

Practice indicates that most companies operating share plans in Hungary offer securities which do not meet the Hungarian Regulator's view of what constitutes transferable securities. The procedure which then appears to be accepted by the Hungarian Regulator is that in such cases the issuers should follow the rules for private offers. Under these rules, an information document setting out the relevant elements of the offer is prepared and a notification is made to the Hungarian Regulator.

1.2 **Regulatory issues:** In the absence of specific legal provisions covering employee share plans where the securities or options being offered are not transferable securities, it may be advisable to request a ruling from the Hungarian Regulator regarding the launch of such a share plan.

1.3 **Disclosure:** Where the securities or options being offered to employees are not transferable securities, a notification must be sent to the Hungarian Regulator and information on the features of the share plan must be provided to employees in accordance with general practice.

The Company should also consider requesting clarification from the Hungarian Regulator regarding any other disclosure requirements.

2. Exchange Controls

There are no applicable exchange controls in Hungary.

3. Financial assistance

3.1 **Hungarian company**: A company limited by shares is generally prohibited from providing financial assistance for the acquisition of its own shares. A company limited by shares cannot grant loans, provide any security or satisfy third party payment obligations in connection with the acquisition of its own shares. However, there is an exception to this prohibition where financial assistance is provided to employees of the company to acquire shares in the company.

3.2 **Hungarian subsidiary of a non-Hungarian company**: The same considerations apply as set out in paragraph 3.1 above.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employer or its parent company free of charge or at a discount to market value is deemed to have received employment income. The employment income is equal to the difference between the fair market value of the shares at the date triggering the tax liability and the amount paid by the employee for the shares, if any. The tax liability is triggered on the date the employee acquiring the shares acquires any rights (dividends, voting rights etc.) attaching to those shares.

Employment income arising from the acquisition of shares is subject to consolidation with other income and the consolidated income not exceeding HUF 3,937,000 (approximately €13,000) per annum is subject to tax at 17.1%. Income in excess of that amount is subject to tax at 32%.

Shares (worth up to HUF 1,000,000 per annum) received under a share plan which is reported to, and registered with, the Hungarian fiscal authorities are exempt from income tax provided a number of criteria are met and certain administrative requirements are complied with (an "approved employee share plan").[1] One such requirement is that the shares must be subject to a minimum holding period of at least 2 years.

Under such approved employee share plans, the capital gain arising on the sale of the shares is taxed at the time of sale and the income (i.e. the difference between the value of the shares when they are first acquired by the employee and the amount paid for them, if any) is classified as a capital gain, taxed at a rate of 25% (or 20% if the sale takes place on a regulated capital market of an OECD or EEA member state).

4.1.2 **Social security contributions**: Social security charges are payable by the employee at a rate of 17% on employment income up to HUF 7,453,300 and at a rate of 7.5% on employment income in excess of that

[1] The criteria and administrative requirements are complex and impose a signification administrative burden on local employers. In practice, local employers may find that the tax benefits derived from registering the share plan are outweighed by the costs of registering and running such an approved plan.

amount. Note that if the awards are granted by a foreign tax resident parent company then the employee is also required to pay the social security due from the employer (see paragraph 4.2.2 below), unless this is paid by the local employer.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction**: The costs of a share plan borne by the employer (e.g. via a recharge payment to the parent company) are normally tax deductible for the employer.

4.2.2 **Social security contributions:** The employer is subject to social security charges at a rate of 27%.

4.3 Tax withholding

Where the awards are made by, or the plan is arranged via, the local employer, then the local employer is required to withhold any income tax and social security contributions payable by the employee. A foreign parent company making awards which does not have a taxable presence in Hungary is not subject to tax withholding obligations.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no tax or social security liability on the grant of an option to acquire shares.

5.1.2 **Exercise:** The difference between the income earned by exercising the option (i.e. the value of the shares acquired on exercise) and the amount paid by the employee to exercise the option (together with the amount paid for the option, if any) is deemed to be employment income (see paragraph 4.1.1 above for the applicable tax rates). A tax liability is also triggered if the employee receives consideration for e.g. selling, cancelling or waiving the option based on the difference between the consideration received and the price paid by the employee for the option, if any (see paragraph 4.1.1 above for the applicable tax rates).

5.1.3 **Social security contributions:** The same rules apply as set out in paragraph 4.1.2 above.

5.1.4 **Approved employee share plan:** Shares acquired under an option exercise are eligible for the preferential tax treatment referred to in paragraph 4.1.1 above, provided the relevant plan is reported, and registered with, the Hungarian fiscal authorities and all of the relevant criteria and administrative requirements are complied with.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction**: The costs of a share plan borne by the employer (e.g. via a recharge payment to the parent company) are normally tax deductible for the employer.

5.2.2 **Social security contributions:** The employer is subject to social security charges at a rate of 27%.

5.3 Tax withholding

Where the awards are made by, or the plan is arranged via, the local employer, then the local employer is required to withhold any income tax and social security contributions payable by the employee. A foreign parent company making awards which does not have a taxable presence in Hungary is not subject to tax withholding obligations.

6. Taxation of share disposals

6.1 The capital gain (being the difference between the sale price of the shares and the fair market value of the shares at the point income tax was charged in respect of the acquisition of the shares) is taxable when the shares are sold. For shares acquired under an approved employee share plan, the capital gain is equal to the difference between the sale price and the amount paid by the employee for the shares, if any.

6.2 The capital gain is subject to tax at a rate of 25%. If the shares are sold on a regulated capital market of any EEA or OECD member state, the gain is subject to 20% tax (instead of tax at 25%). A capital gain subject to 25% tax (but not the capital gain realised on a regulated capital market transaction) may also be subject to a 14% health care tax, if the amount of social security contributions paid on behalf of the employee does not amount to HUF 450,000 in the relevant fiscal year.

7. Employee benefit trusts

7.1 Employee benefit trusts are not recognised under Hungarian law. However, a Hungarian company may make a contribution to such a trust for the benefit of its employees.

7.2 An employee who is a beneficiary of a discretionary employee benefit trust should not be taxable for that reason alone. He should only become taxable on benefits he actually receives from the trust, which in the case of shares will be

when he has acquired the rights (dividends, voting rights etc.) attaching to those shares.

8. Data protection

8.1 As a general rule, the transmission of personal data out of Hungary requires the express consent (in writing) of the individual to whom the data relates.[2] This rule applies in relation to an employer when transferring data in relation to employees and the employees should be informed of the purpose of the data transmission. However, information and data concerning employees may be used for statistical purposes without obtaining consent provided it is used in a manner that precludes identification of the relevant employees.

8.2 The employer must notify the Hungarian Data Commissioner of the relevant data transfers.[3]

9. Employment law

Information regarding the terms of the employee share plan to be offered to employees should be provided to the local works council on the basis that it provides an employment-related benefit that is an incentive.[4]

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[2] In relation to employees this consent may be incorporated in the mandate form for the reservation and subscription of shares.

[3] Please note that this is a simple notification (that may be made by filling out a form) and no formal consent/authorisation of the Data Commissioner is required.

[4] The works council is required to provide its opinion on the arrangements within 15 days from the notification. However, the Company is not obliged to into take the opinion into account. If the Company does not ask for the opinion of the works council the action of the Company will be deemed invalid and the workers' council may challenge it before the labour courts. The foregoing rule is only relevant in cases where the company issues shares directly to its employees. It is not relevant if shares in a parent entity of the company are offered to the employees of the company by such parent company, in which case the company is under a mere informing requirement towards the works council about the share issuance taking place at a parent level.

Republic of Ireland

1. Securities law

1.1 **Offer of securities:** The Prospectus Directive has been implemented into Irish law and therefore in general the principles referred to in paragraph 2 on pages 1-3 of this guide will apply.[1]

In addition to the employee share plans exemption referred to in paragraph 2 on pages 1 - 4 of this guide, the obligation to publish a prospectus does not apply to an offer of securities in Ireland if:

- the offer is made to fewer than 100 people in Ireland (other than those registered as sophisticated investors) (even if the offer is being made to more than 100 individuals in a different EU state); or
- the offer is made only to people who are registered as sophisticated (or "qualifying") investors in Ireland; or
- the offer of securities is addressed to investors where the minimum consideration payable pursuant to the offer is at least €50,000 per investor, for each separate offer; or
- the denomination per unit of the securities concerned amounts to at least €50,000; or
- the offer expressly limits the amount of the total consideration for the offer to less than €100,000 calculated over a period of 12 months.

In addition, the Companies Act 2005 sets out certain requirements for local offers. The Companies Act 2005 defines a "local offer", among other things, as an offer of securities to the public in the State (i.e. Ireland) where the offer expressly limits the amount of the total consideration for the offer to less than €2.5 million (the Local Offer Exemption). The Local Offer Exemption is relevant for local offers where the consideration payable for the securities is between €100,000 and €2.5 million. An offering document prepared for a local offer must

[1] Part V of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (Companies Act 2005) together with the Prospectus Directive Regulations 2005 (Prospectus Regulations) implemented the Prospectus Directive in Ireland with effect from 1 July 2005.

contain certain statements which are detailed in section 49 of the Companies Act 2005.[2]

1.2 **Disclosure:** Under Irish company law a company is required to maintain a register of Irish directors' and secretary's interests in the shares of the company or its parent company.[3]

The Market Abuse (Directive 2003/6/EC) Regulations 2005 which implement the EU Market Abuse Directive in Ireland introduced a regime for the disclosure of transactions in shares and other securities by "persons discharging managerial responsibilities" and "persons closely associated with them". These rules apply to (i) Irish issuers whose financial instruments are admitted to trading on a regulated market whether in Ireland or elsewhere in the EU and (ii) to any non-European Economic Area issuer for which Ireland is a 'home state' under the Irish law implementing the Prospectus Directive.

2. Exchange controls

There are no applicable exchange controls.

3. Financial assistance

3.1 **Irish company:** Irish law prohibits an Irish-incorporated subsidiary from giving financial assistance, directly or indirectly, in connection with the purchase of or subscription for shares in its parent company, whether the parent company is

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[2] Such statements must state that the offering document has not been prepared in accordance with the Prospectus Directive and include specific consumer warnings in relation to the performance of investments. A copy of the offering document must be registered with the Irish Companies Registration Office on or before the date of its publication.

[3] The important points to note are as follows:

- there is no legal obligation to notify an interest in shares in a company which is a wholly owned subsidiary (direct or indirect) of another company;
- every director, shadow director or secretary of a company must notify that company within five days of acquiring or disposing (or their spouse or minor child acquiring or disposing) of an interest in the shares of that company (or its parent company). In practice this means that notification must be made within five working days of grant or exercise of a share option, or the subsequent disposal of the shares;
- the notice should contain the date of the grant or exercise of the option, or the disposal of the shares; the number and class of shares involved in such grant, exercise or disposal; and the notice must state that it is given pursuant to the Companies Act 1990; and
- the company is required to maintain a register and to enter into it the information contained in the notification within three days of receipt of the notification. In practice the responsibility falls on the company secretary to maintain the register of directors' interests.

Irish-incorporated or not. Three exceptions are relevant to employee share plans. First, there is an exception for the provision by a company, in accordance with any plan for the time being in force, of money for the purchase of, or subscription for, shares[4] in the parent, where the shares are to be held by or for the benefit of employees or former employees of the company, including any salaried director. Secondly, there is also an exemption for loans to employees (other than directors[5]) with a view to enabling them to purchase or subscribe for fully paid shares in the parent to be held by themselves as beneficial owners.[6] Thirdly, there is an exemption for the provision of financial assistance by a holding company in connection with the subsidiary purchasing or subscribing for shares in the holding company on behalf of:

- the present or former employees of the holding company or any subsidiary of it;
- an employees' share scheme within the meaning of the Companies (Amendment) Act 1983;[7] or
- an employee share ownership trust referred to in section 519 of the Taxes Consolidation Act 1997.

3.2 **Irish subsidiary of non-Irish company:** The restrictions (and exemptions) set out above apply equally to an Irish subsidiary of a non-Irish company.

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[4] The shares must be fully paid.

[5] Specific restrictions apply to the provision of loans to directors. Irish companies legislation prohibits a company from, amongst other things, making loans to (or giving a guarantee or security in connection with a loan made by a third party) a director. There is no exemption for loans to directors in connection with employee offerings. There is, however, an exception where the amount of the loan and all previous transactions within the regulated categories does not exceed 10% of the company's net assets.

[6] The Companies Act 1990 allows limited companies to purchase their own shares, subject to certain conditions. Shares which have been repurchased may then be reissued, for example, to the trustees of an employee share incentive scheme. It is also possible for a company to provide in the terms of a proposed scheme that, on retirement, the company will repurchase the shares from the retiring employee. The shares need not be reissued and the company may cancel them.

[7] An employees' share scheme means any scheme for the time being in force, in accordance with which a company encourages or facilitates the holding of shares or debentures in the company or its holding company by or for the benefit of employees or former employees of the company or of any subsidiary of the company including any person who is or was a director holding a salaried employment or office in the company or any subsidiary of the company.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employing company or its parent company free of charge or at a discount to market value will normally be liable to pay income tax and an income levy. The income tax and income levy charges are on the difference between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the 2010 tax year the income tax rates are either 20% or 41% depending on the level of the employee's income. The amount of the income levy depends on the level of the employee's income. For the 2010 tax year, the levy rates are 2% on annual income up to and including €75,036, 4% for annual income in excess of €75,036 but less than €174,980 and a charge of 6% on income from €174,980.

4.1.2 **Social security contributions:** Social security contributions are not payable.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** A corporation tax deduction may be available to the employer in respect of amounts expended in providing benefits consisting of shares to employees where it can be shown that the relevant expenses are of a revenue nature and are incurred wholly and exclusively for the local employer's trade.

If the employer's contribution exceeds the amount on which employees are subject to tax, then the amount of the deduction will be restricted to that lower amount.

4.2.2 **Social security contributions:** Employer social security contributions are not payable.

4.3 Tax withholding

The employee must account for the income tax due. There is no withholding obligation on the employer.

4.4 Favourable tax regime

Where shares are provided under a tax approved profit sharing plan,[8] the employee will be entitled to an exemption from income tax on the value of the

[8] Chapter IX of the Finance Act 1982 (as re-enacted in Part 17, Chapter 1 of the Taxes Consolidated Act 1997) contains provisions aimed at promoting employee ownership of shares in the employing

shares he receives if he holds the shares for at least 3 years. A tax approved profit sharing plan must satisfy a number of conditions of which the most important are that all full time employees are offered participation and the scheme is approved by the Irish tax authorities. Employees may acquire shares with a value of up to €12,700 each year under such a plan.

In addition, an employer will be able to claim a tax deduction in respect of the cost of issuing shares to a tax approved employee share plan. Payments made to the trustees of an approved profit sharing plan are tax deductible, provided the

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company or its parent company. Provided certain conditions are complied with, and the prior approval of the Irish Revenue authorities is obtained for both the scheme itself and the related trust deed, beneficiaries under these schemes will incur no income tax liability. There may, however, be a capital gains tax charge on a subsequent disposal of shares received under the scheme. The main features of such approved schemes are as follows:

- the trustees of the scheme are persons resident in Ireland;
- the trustees are put in funds by the Irish company;
- the trustees must acquire shares which form part of the ordinary share capital of the company and must allocate these to qualifying employees up to an initial market value of €12,700 per annum each;
- the scheme must be open to all full-time employees and directors of the company who have been employed by the company for three years or more. However, the company may also extend the scheme to include part-time employees, or employees with less than three years service;
- the employee must undertake not to assign, charge or dispose of his beneficial interest in the shares within the period of retention (that is, either two years from the date the shares are first allocated or, if earlier, the cessation of the employee’s employment in certain compassionate circumstances);
- the trustees retain the shares during the retention period;
- in general, the employee must pay to the trustees a sum equal to income tax at the standard rate (for the 2010 tax year 20%) on the value of the shares if he directs the shares to be transferred within three years of appropriation;
- special provisions apply where there is a reconstruction or take-over of the employer company; and
- an employee is not eligible to participate if he owns 15% or more of the share capital of the employer company if it is a "close" company (that is, in broad terms, a company controlled by five or fewer persons, or by its directors).

There are certain conditions applicable to the shares used for such schemes. They must be ordinary shares of the company establishing the scheme, or those of a company controlling that company, or those of a company which is a member of a consortium owning the company establishing the scheme. If the shares are not of a class quoted on a recognised stock exchange, the company must not be under the control of another company.

The Revenue authorities have confirmed that profit sharing schemes with an employee contribution element are capable of approval under the legislation. These can be on a "buy one, get one free" basis, in which case the employee contributes out of after-tax salary, or on a non-compulsory “buy extra shares” basis, in which case the employee may contribute by foregoing salary.

relevant sums are applied by the trustees in acquiring shares for appropriation to participants.

A favourable tax regime also exists where employees subscribe for shares in an Irish company. Under this regime employees can deduct the acquisition cost of the shares from their taxable income, subject to certain conditions, the most important of which is that the employee holds the shares for at least 3 years.[9] The maximum deduction allowable is €6,350 and this is a lifetime limit.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no income tax charge (or income levy) on the grant of a share option unless the option exercise price is less than the market value of the shares at the date of grant and the option is capable of being exercised later than 7 years after grant.

5.1.2 **Exercise:** There are income tax and income levy charges on the exercise of a share option on the difference between the market value of the shares at the date of exercise and the option exercise price.[10] If the employee has been taxed on grant, the income tax and income levy paid on grant is credited against the income tax/income levy charged on exercise. Income tax must be paid within 30 days after the date of

[9] Where a director or employee of a company subscribes for eligible shares in a company, he is entitled, in estimating the amount of his total income for the year of assessment in which the shares are issued, to a deduction of an amount equal to the amount of the subscription.

The conditions for the above relief are as follows:

- the individual must subscribe for the shares in his employing company, which must be incorporated and resident in Ireland and not resident elsewhere. The company must be a trading or a holding company;
- the deduction is granted for the tax year in which the shares are issued but if the individual sells the shares within three years, any income tax relief granted is withdrawn; and
- the relief will not be withdrawn where the employee ceases employment with the company, where he ceases to be a resident or where he ceases to be a full-time employee.

An amount equivalent to the tax deduction granted is excluded from the base cost of the shares in calculating the capital gains tax liability on the sale of the shares.

[10] The Finance Act 2003 (which came into force on 28 March 2003) abolished the provisions which enabled an individual to defer the income tax arising on the exercise of his share options. From 30 June 2003 onwards, any income tax due on the exercise of an option must be paid within 30 days from the date of exercise. Income tax is payable at the higher rate of 41% for the 2010 tax year (although an employee who is only a lower rate tax payer can apply to the Irish Revenue for income tax to be levied at the lower rate).

exercise of the option[11]. For the 2010 tax year the income tax rates are either 20% or 41% depending on the level of the employee's income. The amount of the income levy depends on the level of the employee's income. For the 2010 tax year, the levy rates are 2% on annual income up to and including €75,036, 4% for annual income in excess of €75,036 but less than €174,980 and a charge of 6% on income from €174,980.

5.1.3 **Social security contributions:** Social security contributions are not payable.

5.2 **Employer tax and social security contributions**

5.2.1 **Corporation tax deduction:** In circumstances where an employer meets the cost of the difference between the option exercise price and the market value of the shares at the date of exercise (the spread) a corporation tax deduction may be allowed provided that the cost of the spread is recharged or otherwise met by the employer, on an arm's length basis.[12]

Costs associated with implementing a share option plan may be tax deductible where the costs are of a revenue nature and are incurred wholly and exclusively for the purpose of the employer’s trade.

5.2.2 **Social security contributions:** Social security contributions are not payable.

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[11] The income levy is payable under the self-assessment regime. The income levy should be taken into account by the employee when making preliminary tax payment on account for the tax year in which the taxable benefit arises. If the income tax is not paid within 30 days then the optionholder may incur interest for late payment.

[12] A corporation tax deduction will only be allowable in respect of the employer contribution in a particular accounting period to the extent that the employees are subject to tax (or would be subject to tax if they were resident and domiciled in Ireland) in that accounting period or within nine months of the end of that accounting period. Where any amount is disallowed in a particular accounting period (i.e. because there is a mismatch between the timing of the employer contribution and the time at which the employees are subject to tax), a tax deduction will be allowed in a subsequent accounting period to the extent that the employees actually receive taxable benefits in that subsequent accounting period. If the employer's contribution exceeds the amount on which employees are liable to tax, then the amount of the deduction will be restricted to that lower amount.

5.3 Favourable tax regime

There are two tax favoured share option plans in Ireland: the Revenue approved savings related share option plan (SAYE Plan)[13] and the Revenue approved share option plan (Approved Plan).[14]

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[13] The detailed requirements of an SAYE Plan are:

- participation must be open to all employees or full-time directors who have been employed at all times during a specified qualifying period (which must not exceed three years). All employees must be eligible to participate on similar terms;
- options cannot be exercised within three years from the date of grant unless the participant ceases employment due to injury, disability, redundancy or reaches pensionable age (66);
- savings must be accumulated over a period of three or five years (in the case of 5-year savings contracts, the rules may provide for savings to be held for a further two years);
- the shares must be listed on a recognised stock exchange;
- shares must be paid for by monthly contributions of between €12 and €500. These contributions are paid into a Revenue approved certified contractual savings scheme held with a qualifying savings institution. A qualifying savings institution includes, amongst other things, a person who is a holder of a licence granted under Section 9 of the Irish Central Bank Act 1971, or a person who holds a licence or other similar authorisation under the law of any other Member State of the European Union, which corresponds to a licence granted under that section;
- the shares must satisfy other conditions for example they must be fully paid up ordinary shares, not redeemable and not subject to any restriction other than restrictions which attach to all shares of the same class; and
- the option exercise price can be at a discount of up to 25% of the market value of shares at the date of the grant.

Gains on the exercise of options under the plan are exempt from income tax. No social security contributions are payable.

Capital gains tax rules apply to gains realised on the disposal of shares acquired through the exercise of a share option. The base cost for capital gains tax purposes is the price paid for the shares on the exercise of the option plus the cost of the option (if any).

Any terminal bonus or interest paid to a participating employee by a qualifying savings institution under the Revenue approved savings contract is exempt from income tax and social security.

The legal and accountancy expenses of establishing an SAYE Plan will be allowed as a deduction from Irish corporation tax.

[14] Approved Plans (known as ASOPs) were introduced by the Finance Act 2001. The main requirements are:

- an Approved Plan must be open to all employees and full-time directors;
- at least 70% of options granted must be granted on a "similar terms" basis to all eligible employees. Similar terms can include options granted on the basis of length of service and level of remuneration. An Approved Plan may contain a service requirement but, if so, this must not exceed 3 years;

Participation in a SAYE Plan must be offered to all employees on similar terms and the employee must agree to make monthly savings for at least 3 years. The option exercise price under a SAYE Plan may be set at a discount to market value of up to 25% at grant (the option price cannot be less than market value under an Approved Plan). Where an option is granted under a SAYE Plan, no tax is due on the exercise of the option provided that the exercise takes place more than 3 years after the date the option was granted. Where an option is granted under an Approved Plan, no tax is due on its exercise provided that the shares acquired on exercise of the option are not disposed of within 3 years after the date on which the option was granted.

5.4 **Tax withholding**

The employee must account for the income tax and levy due. There is no withholding obligation on the employer.

6. Taxation of share disposals

6.1 A charge to capital gains tax may arise on the disposal of shares on the difference between the proceeds of sale and (i) the value of the shares at the time of acquisition (where they were acquired free or at a discount to market value) or (ii) the exercise price paid for the shares plus any amount assessed to income tax in respect of exercise, where the shares were acquired on exercise of an option.

6.2 Where the employee disposes of shares acquired on the exercise of an option under a SAYE Plan or an Approved Plan, the capital gains tax charge will be on

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- the remaining 30% of options may be granted to "key employees" without regard to the "similar terms" test. A "key employee" is one whose specialist skills, qualifications or experience are considered to be vital to the future success of the company. The "key employee" must be certified as such by the Revenue;
- options must be granted with an option exercise price which is not less than market value at the date of grant;
- the shares subject to the option must form part of the ordinary share capital of the grantor (which must be the employing company or the parent company of the employing company provided, in the latter case, that the shares are quoted on a recognised stock exchange). The shares must be fully paid up, not redeemable and not subject to restrictions that do not apply to other shares of the same class;
- options must be non-transferable (except that the Approved Plan rules may provide that, in the event of death of the optionholder, the options may be exercised by the optionholder's personal representatives within 12 months); and
- options may be exercised free from income tax provided that the shares acquired on the exercise of the option are not disposed of within three years after the date on which the option was granted.

the difference between the sale proceeds and the price paid on exercise, plus the cost of the option (if any).

6.3 Irish capital gains tax is charged at the rate of 25% on disposals made on or after 8 April 2009. There is an annual exemption from capital gains tax on the first €1,270 of gains made by an individual in the 2010 tax year.

7. Employee benefit trusts

7.1 An Irish employee who is a beneficiary of a discretionary employee benefit trust will not be taxable for that reason alone but he may be taxed on the receipt of benefits from the trust.

7.2 Certain employee trusts which require shares to be transferred on similar terms to employees carry tax advantages which allow the employer guaranteed corporation tax deductions for contributions made to the trust.[15]

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[15] The Taxes Consolidation Act 1997 provides for a number of tax incentives in respect of employee share ownership plan trusts (ESOTs) which have obtained the approval of the Revenue. An ESOT is a trust, which is set up by a company (known as the founding company), for the benefit of its employees and directors. There is no requirement for the founding company to be an Irish resident; for example, the founding company can be the foreign parent company. The trust acquires shares in the founding company (financed through cash or loans) which it then distributes to the beneficiaries of the trust either directly or through a Revenue approved profit share scheme. In addition, an ESOT may make cash payments and grant share options to beneficiaries.

There are no limits in the tax legislation on the value of the shares which may be acquired by the trust or distributed to a Revenue approved profit sharing scheme other than a requirement that no beneficiary may have a material interest in the company, that is, own or control more than 5% of the ordinary share capital of the company.

- In order for an ESOT to be granted "approved" status by the Revenue, certain conditions must be satisfied. The main conditions are as follows:
  - a founding company (establishing the trust) must not be controlled by another company at the time the trust is set up;
  - all the employees and directors of the founding company, or of any group company which is a party to the trust, who have been such for a qualifying period of not more than 3 years, must be beneficiaries. Directors must work as directors of the company for at least 20 hours a week. Former employees and directors (within 18 months of ceasing employment or in certain circumstances up to 15 years) may be beneficiaries;
  - the shares acquired by the trust must form part of the ordinary share capital of the company and must be transferred to beneficiaries within 20 years of their acquisition by the trustees;
  - the shares must be transferred to beneficiaries on qualifying terms, that is all shares that are offered at the same time must be offered to all beneficiaries and on similar terms. It is permissible for terms to vary according to levels of remuneration or length of service, or similar factors; and

8. Data protection

Employee consent must be obtained for the collection, processing and worldwide transfer of personal data in connection with an employee share plan.[16]

- the trustees must be Irish residents and at least one of the trustees must be a professional trustee.

- The tax position of the Revenue approved ESOT is as follows:
  - the trustees are liable to income tax at the standard rate on the income of the trust;
  - the transfer of shares directly by the trustees to beneficiaries will be disposals for Capital Gains Tax (CGT) purposes and any chargeable gain will be taxable at 25% on disposals made on or after 8 April 2009;
  - the transfer of shares by the trustees to Revenue approved profit sharing schemes will be exempt from CGT; and
  - the sale of shares in the open market by the trustees will be exempt from CGT where the proceeds are used to repay borrowings.
- The tax position of the beneficiaries is as follows:
  - no tax consequences arise as a result of being a beneficiary of the trust;
  - a tax charge will arise on the transfer of shares by the trustees directly to beneficiaries. The amount will be liable to income tax at the marginal rate of tax of the beneficiary, and the obligation will be on the beneficiary to include the taxable benefit in their tax return;
  - no tax liability will arise on the employee where the shares are transferred from a Revenue approved profit sharing scheme.
- The tax position of the company is as follows:
  - the company can claim a tax deduction for the costs incurred in setting up a Revenue approved ESOT. The company can also claim a tax deduction for contributions to the trustees provided the trustees spend those contributions on "qualifying purposes" during the "expenditure period";
  - the qualifying purposes are:
  - the acquisition of shares in the company setting up the ESOT;
  - the repayment of loans;
  - the payment of interest on loans;
  - the payment of any sum to a person who is a beneficiary under the trust; and
  - to meet expenses;
  - the expenditure period is within nine months of the end of the accounting period in which the costs and contributions are made by the company, or longer with the approval of the Revenue Commissioners.
- The Revenue Commissioners may give notice in writing to the company of any information they require in order to satisfy themselves that the ESOT continues to qualify for Revenue approval and to determine the tax liability of any beneficiary under a Revenue approved ESOT.

[16] In Ireland, the Data Protection Acts 1988 and 2003 impose certain obligations in respect of "personal data" (i.e. data relating to living individuals) which is in electronic form or manual data held in a relevant

9. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

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filing system (i.e. structured in such a way that specific information relating to living individuals is readily accessible) which is controlled or processed by an Irish subsidiary or branch operation in connection with an employee share plan. (Additional obligations apply in respect of sensitive personal data which includes, amongst other things, data relating to the physical or mental health of an individual). Data Controllers are required to take adequate security measures for the protection of personal data and the extent to which personal data may be transferred outside the EEA is restricted. Personal data cannot be transferred out of the EEA unless the receiving country is deemed to be a jurisdiction which provides adequate data protection. If the receiving country is not such a jurisdiction, one of the alternative exceptions to the prohibition on transfers to such countries must be obtained. The best alternative would be for the data transferor to enter into a data transfer agreement (in the form approved by the European Commission) with the data transferee. Employees should also be notified that such transfers may occur. Data transfers would also be justified where the transfer occurs within a group of companies which has adopted a set of binding corporate rules. If neither of these options is available, employee consent must be obtained. In addition, where processing of personal data is carried out by a data processor on behalf of a Data Controller, there must be a contract between the parties which contains provisions requiring the data processor to carry out the processing in accordance with the instructions of the Data Controller and to comply with the same security obligations as are imposed on the Data Controller.

The grantor company, in its capacity as Data Controller, is required to notify participants that it holds information about them, to inform them of the uses and disclosures being made of the data and to ensure that they are aware of their right to access their data and modify it if it is incorrect.

At present, only certain categories of data controllers are required to be registered with the Data Protection Commissioner in Ireland. In addition, the Irish Data Protection Commissioner has the power to prohibit a particular transfer of data and a data controller or processor who is obliged to register with the Data Protection Commissioner must include in their registration information in relation to transfers of personal data outside Ireland.

Italy

1. Securities law

1.1 **Offer of securities[1]:** Although the offer of securities to the public generally requires the publication of a prospectus[2], there are exemptions which are relevant to offerings under employee share plans. In particular, in accordance with article 34-*ter*, paragraph 1, lett. (m) of CONSOB Regulation No. 11971, as subsequently amended (which mirrors article 4(1)(e) of the Prospectus Directive), offers of securities to existing or former directors or executives[3] or employees by their employer which has securities already admitted to trading on a regulated market or by other companies in the same group are exempt from the prospectus requirements, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer[4].

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[1] Italy implemented the Prospectus Directive by passing Legislative Decree 51 of 28 March 2007, which came into force on 23 April 2007.

[2] The regulatory framework on the offering of securities to employees is set out in Legislative Decree No. 58 of 24 February 1998 (commonly known as the Consolidated Law on Financial Intermediation) and CONSOB Regulation St. 11791 of 14 May 1999, as amended (CONSOB Regulation 11971) which implements, among other things, the section of the Consolidated Law on Financial Intermediation on investment solicitation. Under the Consolidated Law on Financial Intermediation, in principle, all investment solicitations are subject to CONSOB approval and must be accompanied by the publication of a prospectus (together, the "Solicitation Requirements"). Certain categories of offers such as, for example, offers to qualified investors, offers below a certain value and offers to less than a certain number of investors, are exempt from the Solicitation Requirements. The Consolidated Law on Financial Intermediation does not expressly exclude offers to employees from the Solicitation Requirements. However, it does grant CONSOB the power to add additional categories of exempted offerings to those contemplated in the Consolidated Law on Financial Intermediation, a power exercised by CONSOB in CONSOB Regulation 11971. On 19 March 2009, CONSOB published a new version of Regulation 11971. Under the revised CONSOB Regulation 11971, employee share plans (including share option plans) addressed to existing or former directors or employees of issuers whose financial instruments have been already admitted to trading on a regulated market will be exempt from the obligation to prepare a prospectus, provided an information document is made available containing information as to the number and nature of the securities, the reasons for, and other details of the offer. There are no special information or other requirements in addition to the recommendations set out in the CESR Recommendations.

[3] *Dirigenti*.

[4] Other exemptions include, amongst other things, offers to no more than 100 employees; offers for which the minimum investment is €50,000; or for an aggregate value not exceeding €2,500,000, which limit shall be calculated over a period of 12 months. A complete list of the exemptions is set out in Article 34-*ter* of CONSOB Regulation 11971.

1.2 **Regulatory issues:** Where a company promotes or offers in a communication its shares or options somewhere other than in its registered office or in an office which is "dependent" (*dipendenza*) on its registered office, such offer must be made either through an authorised financial promoter (*promotore finanziario*, a category of financial adviser), or at the premises of a bank or a financial intermediary duly authorised in Italy.

1.3 **Disclosure:** Offerings of shares in Italy (whether or not to the public) must be notified to the Bank of Italy by the 10th day of the month following the month in which the offer took place if the value of the securities offered, when aggregated with the value of securities offered by the same offeror in Italy in the preceding 12 months, exceeds €500,000.

2. Exchange controls

2.1 There are no applicable exchange controls.

2.2 Transfers of cash or securities into or out of Italy which are in excess of €5,000 must be reported in writing to the Financial Information Unit[5]. Italian money laundering legislation provides that all payments with a value in excess of €5,000 must be made through an authorised intermediary (e.g. a bank).

2.3 Authorised intermediaries and, in general, entities undertaking financial activities, as well as registered auditors and professionals, must for the purposes of Legislative Decree n. 231/2007 undertake mandatory anti-money laundering checks where a client transfers cash or securities into or out of Italy which are in excess of €15,000 and/or where they are aware of a transaction that may be deemed to entail a money laundering purpose. Clients are obliged to provide stipulated information relating to such transactions where required to do so by the professionals/entities referred to above.

2.4 In addition, Italian tax residents must report on their annual income tax return any investments or financial assets held outside Italy and/or transfers from and to a country other than Italy (as well as transfers from one foreign country to another foreign country) where the value exceeds €10,000 in total. If the financial

[5] *Unità di Informazione Finanziaria.* The transfer must be reported by residents or non-residents who make transfers directly, or by banks, securities dealers or *Poste Italiane S.p.A* (the Italian postal company) that effect such transactions on their behalf.

assets are deposited with an Italian based intermediary, this reporting obligation falls on the intermediary[6].

3. Financial assistance

3.1 **Italian company:** An Italian company may make loans or provide guarantees for the purpose of enabling or facilitating the subscription or acquisition of its shares by employees (or by employees of its subsidiaries or its controlling companies). However, the overall amount of the loans granted and/or of the guarantees provided must not exceed the aggregate of the Italian company's profits and its distributable reserves, as shown in that company's latest duly approved financial statements.

3.2 **Italian subsidiary of non-Italian company:** In the absence of a specific rule under the Italian Civil Code, and by way of interpreting the rationale behind the financial assistance regime applicable to Italian companies, it can be argued that an Italian employer may make loans or provide guarantees for the purpose of enabling or facilitating the subscription or acquisition by its employees of shares in its non-Italian parent company. However, the overall amount of the loans granted and/or of the guarantees provided must not exceed the aggregate of the Italian company's profits and its distributable reserves, as shown in that company's latest duly approved financial statements.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employing company, its parent company or another group company free of charge or at a discount will normally be liable to pay income tax. The tax charge is on the relevant employment income, which is equal to the difference between the market value of the shares (calculated under Italian tax law)[7] at the time of acquisition and the amount, if any, paid for the shares. For the 2010 tax year personal income tax rates range from 23% to 43%. Personal income taxes are increased by regional and municipal surtaxes applicable at different rates depending on the region and

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[6] Furthermore, in cases where foreign financial assets are held through an Italian based financial intermediary under specific optional regimes, full relief from such reporting obligations may be obtained.

[7] Market value of listed shares is usually defined as the average trading price of the shares during the one-month period immediately preceding the acquisition date. If the shares are unlisted, market value must be determined by reference to the net worth of the issuing company (generally determined by an independent expert).

municipality of residence of the employee (in general, the regional surtax rates vary from 0.9% to 1.4% and municipal surtax rates vary from 0% to 0.8%).

However, where shares are offered (free of charge or at a discount) to all employees[8], the difference between the market value (for tax purposes) of the shares and the amount (if any) paid is not taxable up to a threshold of approximately €2,065[9] for each tax year. However, the shares must not be repurchased by the issuing company or the employer (if different) and must be held by the employee for a minimum of 3 years. If the holding period requirement is not met, or if the shares are repurchased by the issuing company or the employer (if different), income tax will be payable in the tax period in which the sale takes place on the amount that was not taxed when the shares were acquired.

4.1.2 **Social security contributions:** In principle, social security contributions are due if and to the extent income tax is due. An employee will be subject to social security contributions on the amount subject to income tax at rates ranging from approximately 8% to 10%[10] for the 2010 tax year. The rates depend on the employer's industry and on the number and category of employees.

However, there are some specific exceptions to this principle, i.e. there are circumstances in which employment income arises for tax purposes but is not subject to the payment of social security contributions. One such exception is that social security contributions are not due on employment income arising for tax purposes from share option plans

[8] In circumstances where certain employees are expressly excluded from the share offer, the exemption regime would not be applicable. In this respect in the opinion of the Italian tax authority (expressed in Resolution 2002, n.3) the requirement to offer to all employees is considered satisfied if the grant of the right to acquire shares is aimed at all employees with a permanent contract. The exclusion from the share plan of employees with a fixed term contract should not prevent the €2,065 exemption from applying.

[9] Precisely €2,065.83.

[10] There are minimum earnings thresholds which vary depending on the business industry and according to the employees' category. The Italian Social Security Agency has fixed a maximum annual earnings cap (€92,147.00 for 2010). Once exceeded, social security contributions are not due, but this applies to employees only if (i) the employee had registered with the mandatory social security system starting from 1996 and had no social security contributions paid before 1996; or (ii) the employee was already registered before 1996 but had opted for a new way of calculating his pension, having met the relevant requirements; and to some kinds of consultants falling within the category of the so-called "co-ordinated and continuous collaborators", which in principle also includes directors not otherwise enrolled in a professional pension scheme.

where the option is exercised on or after 25 June 2008. This exception applies to "stock option" plans.

Moreover, in its Circular Letter No. 123 issued on 11 December 2009, the Italian Social Security Agency provided its interpretation[11] on, amongst other things, the meaning of "stock option" plans for this purpose. On the basis that (1) the exception does not require any specific requirements to be met and (2) the Italian legislation does not provide a definition of "stock option", the exception, in addition to applying to traditional stock option plans (whether broad-based or not), may also apply to all "non-general" share plans (i.e. those plans which are not broad-based but which are instead offered to a select group of employees) that provide for free awards of shares. Such plans must incorporate certain performance and/or vesting conditions, e.g. a requirement that the award holder is employed by the grantor company at the time of vesting.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** As a general rule, any actual cost incurred by the employer in relation to a plan offering shares to employees is tax deductible. A case-by-case analysis is required, especially for intra-group charges.

4.2.2 **Social security contributions:** Employer social security contributions are due if and to the extent employee social security contributions are due. Employer social security contributions vary from approximately 26% to 38% of the employee's gross remuneration (the exact thresholds vary depending on the employer's industry and on the number and category of employees).

4.3 Tax withholding

Income tax and employee social security contributions must be withheld by the relevant employer, shown on the employee's monthly payslip and then paid to the relevant agencies. If the salary is not sufficient, the employee is required by Italian law to provide the employer with the funds necessary to pay the taxes and employee social security contributions which are due.

[11] The Italian Social Security Agency's Circular Letters are not legally binding under Italian law. However, they are taken into account by the social security inspectors.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no tax charge on the grant of a share option, provided the share option is not transferable.

5.1.2 **Exercise:**

Current tax regime

There is an income tax charge on the exercise of a share option on the difference between the market value of the shares (calculated under Italian tax law)[12] at the date of exercise and the purchase price of the shares (exercise price plus any premium payable on grant). For the 2010 tax year personal income tax rates range from 23% to 43%[13]. Personal income taxes are increased by regional and municipal surtaxes applicable at different rates depending on the region and municipality of residence of the employee (in general, the regional surtax rates vary from 0.9% to 1.4% and municipal surtax rates vary from 0% to 0.8%).

Current social security contributions regime

In accordance with new legislation[14], the income for tax purposes on the exercise of a share option will not be subject to social security contributions. The reason for this exemption is to avoid the income arising on a share option exercise from being included in the calculation of pensionable income for the year (so as to avoid distorting the calculation of a pension which is based on such income).

[12] Market value for listed companies is usually defined as the average trading price of the shares during the one-month period immediately preceding the acquisition date. If the shares are unlisted, market value must be determined by reference to the net worth of the issuing company (generally determined by an independent expert).

[13] In accordance with new legislation introduced by Legislative Decree n.78 of 31 May 2010, as amended by Law n. 122 of 30 July 2010, an additional tax rate of 10% applies on the portion of income derived from share options and exceeding three times the fixed part of remuneration received by executives and "co-ordinated and continuous collaborators" (which in principle includes directors not otherwise enrolled in a professional pension scheme) in the financial services industry.

[14] The new legislation was introduced by Legislative Decree n.112 of 25 June 2008, as amended by Law n.133 of 6 August 2008.

Pursuant to its Circular Letter No.123 issued on 11 December 2009, the Italian Social Security Agency provided its interpretation[15] of the social security contributions exception. According to this interpretation, there are no specify requirements that need to be met in order for a stock option to qualify for the exception.

Previous tax and social security contributions regime

In respect of options exercised prior to 25 June 2008, a favourable tax regime applied to options if certain conditions were met including: (i) the amount paid by the employee was at least equal to the market value of the shares (calculated under Italian tax law)[16] at the date of grant of the options; (ii) shares held by the employee represented less than 10% of the voting rights or of the capital of the issuing company; (iii) the options were not exercisable before three years from the date of grant; (iv) when the options were exercisable, the issuing company was listed and (v) the employee maintained a minimum investment in the shares equal to the difference between the market value of the shares (calculated under Italian tax law)[17] at the date on which the options were exercised and the amount paid by the employee for at least 5 years from the date of the exercise. If the relevant conditions were met, the employees were not subject to any tax or social security contributions on the grant or exercise of the options.

In addition, in relation to the exemption from social security contributions only, plans approved before 6 July 2006 needed only to meet conditions (i) and (ii) referred to above for the exemption to apply (even if the relevant option was granted/exercised after that date).

If the holding requirement under condition (v) above was not met, income tax (and social security contributions, if the plan was not approved before 6 July 2006) was payable on the amount that was not

[15] The Italian Social Security Agency's Circular Letters are not legally binding under Italain law. However, they are taken into account by the social security inspectors.

[16] Market value for listed companies is usually defined as the average trading price of the shares during the one-month period preceding the date of grant of the options. If the shares are unlisted, market value must be determined by reference to the net worth of the issuing company (generally determined by an independent expert).

[17] Market value for listed companies is usually defined as the average trading price of the shares during the one-month period preceding the date of exercise of the options. If the shares are unlisted, market value must be determined by reference to the net worth of the issuing company (generally determined by an independent expert).

taxed when the option was exercised. If social security contributions were due, an employee would be subject to social security contributions on the amount subject to income tax at rates ranging from approximately 8% to 10%[18] (the rates depended on the number and category of employees). For options exercised on or after 25 June 2008 (regardless of when they were granted) the above regime no longer applies (see further paragraph 5.1.2 above). For options exercised before that date the holding requirement referred to in (v) above continues to apply.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** As a general rule, any actual cost incurred by the employer in relation to a plan granting share options to employees is tax deductible. A case-by-case analysis is required, especially for intra-group charges.

5.2.2 **Social security contributions:** Employer social security contributions will not be payable on the exercise of an option unless the employee is subject to social security contributions.

5.3 Tax withholding

Income tax (and employee social security contributions, if any) must be withheld by the relevant employer, shown in the employee's monthly payslip and then paid to the relevant agencies. If the salary is not sufficient, the employee is required by Italian law to provide the employer with the funds necessary to pay the taxes and employee social security contributions which are due.

6. Taxation of share disposals

6.1 If the employee sells shares, the capital gain will be subject to capital gains tax.

6.2 If income tax was not payable at the time the shares were acquired, the capital gain will be the difference between the sale proceeds and the price paid by the employee for the shares.

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[18] There are minimum earnings thresholds which vary depending on the business industry and according to the employees' category. The Italian Social Security Agency has fixed a maximum annual earning cap (€92,147.00 for 2010). Once exceeded, social security contributions are not due, but this applies to employees only if (i) the employee had registered with the mandatory social security system starting from 1996 and had no social security contributions paid before 1996; or (ii) the employee was already registered before 1996 but had opted for a new way of calculating his pension, having met the relevant requirements; and to come kinds of consultants falling within the category of the so-called "co-ordinated and continuous collaborators", which in principle also includes directors not otherwise enrolled in a professional pension scheme.

6.3 If the shares were subject to income tax at the time of acquisition (including where shares are acquired on the exercise of a share option), the capital gain will be the difference between the sale proceeds and the market value of the shares at the time of acquisition of the shares/exercise of the share option.

6.4 If the shares disposed of in a 12-month period are a "non-qualified shareholding"[19], any capital gains are subject to a flat 12.5% capital gains tax charge for the 2010 tax year[20].

7. Employee benefit trusts

There is no legislation dealing specifically with employee benefit trusts. As a general principle, an employee who is a beneficiary of a discretionary employee benefit trust should not be taxable for that reason alone (provided the trust cannot be regarded as transparent for Italian tax purposes). The employee should be taxed when he actually receives benefits from the trust, as if he had received those benefits as employment income directly from his employing company[21].

8. Data protection

As a general rule under Italian law, employee consent must be obtained for the collection, processing and worldwide transfer of personal data. However, it is arguable that there are circumstances where this would not be required in connection with an employee share plan. Specifically, Legislative Decree No.

[19] In particular, a shareholding is defined as a "non-qualified-shareholding" if it amounts to no more than 5% of the share capital or 2% of the shares with voting rights of a company whose shares are listed on a regulated stock market, in Italy or abroad, or to no more than 25% of the share capital or 20% of the shares with voting rights of a company whose shares are not listed on a regulated stock market. If the shareholding disposed of in a 12-month period is a "qualified shareholding", any capital gains are subject to personal income tax at progressive rates (ranging from 23% to 43% for the 2010 tax year) to the extent of 49.72% of their amount (100% in the case of a company whose shares are disposed of is resident in a State with a preferential tax regime).

[20] The capital gain is subject to taxation at the applicable marginal rate where the company whose shares are disposed of is resident in a State with a preferential tax regime and it is not listed on a regulated stock market.

[21] Although it is not possible to constitute an employee benefit trust under the laws of Italy, alternative solutions have been devised to achieve similar goals. For example, by the creation of a "shareholders association" (as provided by Legislative Decree n.58/98) or a "fiduciary mandate" or a "voting shareholders agreement". Furthermore, under the Aja Convention of 1985 (which is applicable in Italy), an employee benefit trust could be, in principle, recognised under Italian law when duly constituted under the law of a foreign country in which it is possible to constitute such a trust. Therefore there is no prohibition on an Italian employing company making a contribution to such a trust for the benefit of an Italian company's employees. The only case in which recognition could be denied is when the effects of such recognition conflict with the Italian Constitution.

196 of 30 June 2003 (the Data Protection Act) requires all processing of personal data to be authorised by the interested persons (the so-called data subjects), who are requested to give their consent. However, the data subject's consent is not necessary where the processing is justified by meeting at least one of a series of specified conditions. If personal data is collected and processed in connection with an employee share plan, the justifying condition known as "contractual necessity" (i.e. the processing being necessary for the performance of a contract to which the data subject is a party or in order to take steps at the data subject's request prior to entering into such a contract) could apply, in which case the employee's consent, should not be necessary. [22]

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[22] As a general rule, any entity (the data controller) who intends to process third parties' personal data: (i) within Italian territory or in a place that is under the Italian State's sovereignty, or (ii) outside the EU, and in either case the entity processing the data makes use, in connection with the processing, of electronic or other equipment, located in Italian territory, and such equipment is not used only for the purpose of transiting the data through the EU, must comply with the Data Protection Act.

An authorisation from the Data Protection Authority is required if personal data processed in connection with an employee share plan is transferred to a non-EU country, as under the Data Protection Act international transfers of data to non-EU countries must also be authorised by the Data Protection Authority unless one of the following conditions is met: (a) the data subject has given consent, which in the case of a transfer of sensitive data must be in writing; (b) the transfer is necessary in order to fulfil obligations under a contract to which the data subject is a party, or to take steps at the data subject's request prior to entering into a contract, or to obtain pre-contractual information at the request of the data subject, or to conclude or execute a contract made in favour of the data subject; (c) the transfer is necessary to safeguard a public interest identified by law; (d) the transfer is necessary for the purposes of a criminal investigation or to establish or defend a legal claim, provided that it takes place only for that specific purpose and that the data are only used for the period of time needed to achieve that purpose; (e) the transfer is necessary to safeguard the life and physical safety of the data subject or a third party, in circumstances where the data subject is physically or legally unable to give consent; (f) the transfer is made pursuant to a request for access to a public document or public information; (g) the transfer is authorised by the Data Protection Authority on the basis either of guarantees of the rights of the data subject outlined in a contractual agreement, or decisions by the European Commission under Articles 25 and 26 of the EU Data Protection Directive that a non-EU Member State affords an adequate level of protection or that certain contractual clauses afford sufficient safeguards; (h) the transfer is made exclusively for scientific research or statistical purposes and in compliance with codes of conduct and professional practice; or (i) the processing concerns data relating to organisations (i.e. legal entities, bodies or associations).

As a general rule, the data controller must provide - either orally or in writing (the latter is advisable because the written consent of the data subject is required in the event that the data processed includes sensitive data) - the data subject with certain information regarding (a) the purposes of processing and how data will be processed. If processing is for marketing purposes, the data subject must also be informed of the right to object to such processing; (b) whether providing the data is mandatory or optional; (c) the consequences if the data subject fails to reply; (d) the recipients or categories of recipients to whom data may be disclosed (the Disclosed Entities), or who may have knowledge of the data in their capacity of data processors or persons in charge of processing, in the scope of dissemination of the data; (e) the data subject's access and amendment rights; and (f) the

9. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in remuneration for termination purposes. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

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name and address of the data controller or of the data controller's representative in Italy, and if there are several data processors the name of at least one, along with either the site on the communications network or the mechanisms for easily accessing an updated list of data processors. If personal data is not collected from the data subject, the above information must be given to the data subject when the data is first recorded, or, in the case of disclosure of the data to Disclosure Entities and third parties, before they are first disclosed.

The Data Protection Act requires appropriate technical and organisational security measures to be taken to protect personal data against accidental or unlawful destruction, accidental loss, alteration, unauthorised disclosure or access, and other unlawful processing.

Republic of Latvia

1. Securities law

1.1 **Offer of securities[1]:** Although the offer of securities to the public generally requires the publication of a prospectus, there is an exemption from that requirement where securities are offered to employees or persons discharging managerial responsibilities within the employer[2] which are (i) issued by the employer or by a company in the same group as the employer; (ii) offered by a person in the same group as the employer; and (iii) admitted to trading on a Member State's (European Union or European Economic Zone state) regulated market, provided that a document containing information about the number and the type of securities and the reasons for, and details of the offer is publicly available.

There is also an exemption for an offer to fewer than 100 individuals or legal entities that are not qualified investors in Latvia (provided that the offer is also made to fewer than 100 persons in every other EU member state in which the offer is being made).

1.2 **Regulatory issues:** There are no other regulatory issues which affect the offering of securities to employees, assuming that no third party intermediary is involved in the offering.

1.3 **Disclosure:** Extensive disclosure obligations exist under the EU Market Abuse Directive, as implemented in Latvia, particularly in relation to dealings in shares by directors and other persons discharging managerial and internal auditing/controller responsibilities within the issuer.

2. Exchange controls

There are no exchange control restrictions in Latvia.

3. Financial assistance

3.1 **Latvian company:** A Latvian joint stock company is generally prohibited from providing financial assistance (including the provision of security or a guarantee) to acquire its own shares. There are no exceptions to this prohibition for employee share plans.

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[1] The Prospectus Directive was implemented into Latvian law in June 2006.

3.2 **Latvian subsidiary of non-Latvian company:** A Latvian subsidiary that is incorporated as a joint stock company is generally prohibited from providing financial assistance (including the provision of security or a guarantee) to acquire its own shares but there is no express prohibition on financial assistance for the acquisition of shares in a non-Latvian parent company.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employing company or its parent company free of charge or at a discount to market value will normally be liable to pay income tax. The tax charge is on the difference between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the 2010 tax year, the personal income tax rate for Latvian residents is 26%.

4.1.2 **Social security contributions:** An employee will only be subject to social security contributions if the cost of the share plan is borne by the employer (e.g. if a recharge payment is made to the parent company). If social security contributions are payable, these are charged on the amount subject to income tax at a rate of (generally) 9% (which is part of a total rate of 33.09% which is allocated between the employer (24.09%) and the employee (9%)) for the 2010 tax year. There is no cap on the amount of an employee's earnings that are subject to employee social security contributions.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** It is unlikely that any corporation tax deduction will be available for a Latvian company which bears the cost of an employee share plan.[3]

4.2.2 **Social security contributions:** Employer social security contributions will only be payable if the cost of a share plan is borne by the employer (e.g. if a recharge payment is made to a parent company). If social security contributions are payable, these are charged on the amount

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[2] The persons discharging managerial responsibilities within a company include a member of the supervisory council (*padome*), the executive board (*valde*), or the general proxy (*prokūrists*) or a person who otherwise actually manages the activities of the company.

[3] The corporation tax deduction in relation to share plan costs is not explicitly addressed in the Latvian tax legislation. However, the current prevailing view is that a corporation tax deduction is unlikely to be available in most circumstances.

subject to income tax at a rate of (generally) 24.09% (which is part of a total rate of 33.09% which is allocated between the employer (24.09%) and the employee (9%)) for the 2010 tax year. There is no cap on the amount of an employee's earnings that are subject to employer social security contributions.

4.3 Tax withholding

If the cost of a share plan is borne by the Latvian employer, it must withhold any income tax and employee social security contributions due.[4]

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no liability to tax or social security contributions on the grant of a share option.

5.1.2 **Exercise:** There is an income tax charge on the exercise of a share option on the difference between the market value of the shares at the date of exercise and the option exercise price. For the 2010 tax year, the personal income tax rate for Latvian residents is 26%.

5.1.3 **Social security contributions:** An employee will only be subject to social security contributions if the cost of the share plan is borne by the employer (e.g. if a recharge payment is made to the parent company) at a rate of (generally) 9% for the 2010 tax year. There is no cap on the amount of an employee's earnings that are subject to employee social security contributions.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** It is unlikely that a corporation tax deduction will be available for a Latvian company for any costs which it bears in relation to an employee share plan.

5.2.2 **Social security contributions:** Employer social security contributions arise on the exercise of an option in circumstances where an employee is subject to social security contributions. For the 2010 tax year the rate of employer's social security contributions is (generally) 24.09%. There

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[4] Where the withholding obligations for the local entity do not apply (e.g. because no recharge is made to the local entity), the benefits derived from the share acquisition must be reported by the employee to the financial authorities on the employee's annual Latvian tax return.

is no cap on the amount of an employee's earnings which are subject to employer social security contributions.

5.3 **Tax withholding**

If the cost of a share plan is borne by the Latvian employer, it must withhold any income tax and employee social security contributions due.

6. Taxation of share disposals

A new capital gains tax regime was introduced in Latvia from the start of the 2010 tax year. This new law applies to capital gains made on the disposal of shares. An employee who sells shares will usually be liable to capital gains tax at a rate of 15% for the 2010 tax year on the difference between the sale price and the market value of the shares on the date they were acquired.

7. Employee benefit trusts

7.1 Employee benefit trusts are not recognised under Latvian law. However, a Latvian company may make a contribution to such a trust for the benefit of its employees.

7.2 An employee who is a beneficiary of a discretionary employee benefit trust should not be taxable for that reason alone.[5] It is likely that the employee will be taxed when he actually receives benefits from the trust, as if he had received those benefits directly from his employing company.

8. Data protection

Employee consent must be obtained for the collection, processing and worldwide transfer of personal data in connection with an employee share plan.[6]

[5] It should be noted that this issue is not entirely clear under Latvian law.

[6] If the employer is involved in collecting and/or processing the employees' personal data, it must (i) obtain permission from each employee to collect his/her personal data and to transfer the personal data abroad, (ii) register with the Data State Inspector, and (iii) obtain prior approval from the Data State Inspector to transfer the data abroad, except where each respective employee has expressly agreed to the transfer of personal data abroad and the system manager has undertaken to ensure compliance with applicable security procedures.

If the foreign parent company processes the subscription forms, it should obtain an equivalent consent from each employee in order to be allowed to process his/her personal data.

9. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

Republic of Lithuania

1. Securities law

1.1 **Offer of securities:** In accordance with the Law on Securities of the Republic of Lithuania (Law on Securities), the offer of securities to the public generally requires the publication of a prospectus. However, there is an exemption from this requirement where securities, which are admitted to trading on a regulated market, are offered, are allotted or are to be allotted to existing or former directors or employees of the issuer or an affiliated group undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer[1].

Under the Law on Securities, there are also other exemptions to the prospectus requirements, for example, where securities are offered only to professional investors, or the offer is made to fewer than 100 individuals or legal entities in each EU and EEA member state.

1.2 **Regulatory issues:** There are no other regulatory issues that affect the offering of securities to employees. However, under the Law on Securities, if an employee acquires a block of shares in a public company and this results in the crossing, in either direction, of certain percentage thresholds[2] in relation to the total voting shares in the relevant company, then the employee must notify the Lithuanian Securities Commission (the Commission) and the company of the total number of voting shares which the employee owns[3].

1.3 **Disclosure:** Under Lithuanian legislation[4], the head[5] of an issuer (which includes members of the board and certain other employees having access to non-public information) must provide a notice[6] to the Commission and the issuer

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[1] Law on Securities of the Republic of Lithuania (No X-1023, 2007).

[2] The threshold percentages are: 5, 10, 15, 20, 25, 30, 50, 75 and 95%.

[3] This notification must be made as soon as possible but in any event no later than within four trading days of the relevant event.

[4] Lithuanian Securities Commission "Rules on Notices by the Head of the Issuer on Transactions of the Issuer’s Securities”, (No 1K-9, 2007).

[5] The head of the issuer includes: the head of the company, members of the Board and the Supervisory Board and employees having a permanent right to acquire non-public information which is directly or indirectly related to the issuer and to adopt decisions having an impact on the issuer or its activities.

[6] The notice must contain certain information set out in the "Rules on Notices by the Head of the Issuer on Transactions of Issuer’s Securities”.

in relation to the execution of transactions in the issuer's securities at the head's expense[7].

2. Exchange controls

Exchange controls are not applicable in Lithuania.

3. Financial assistance

3.1 **Lithuanian company:** A Lithuanian company is generally prohibited from providing financial assistance (including the provision of security or a loan) for the acquisition of its own shares. There are no exceptions to this prohibition for employee share plans.

3.2 **Lithuanian subsidiary of non-Lithuanian company:** There is no direct prohibition on the provision of financial assistance by a Lithuanian subsidiary for the acquisition of shares in the non-Lithuanian parent company.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** As from 1 January 2010, shares granted to employees either by the employing company or by a group company at a discount to market value or free of charge are treated as taxable "income-in-kind" received by the employee. The taxable value is the difference between the market value of the shares at the time of acquisition and the amount paid by the employee. Income-in-kind is taxed as employment-related income (subject to personal income tax at a rate of 15%).

4.1.2 **Social security contributions:** Where the grantor of the share award is the employing company then, as from 1 January 2010, the acquisition of shares by an employee at a discount to market value or free of charge is subject to social security contributions (at a rate of 3%) and health insurance contributions (at a rate of 6%).

However, if the grantor of the share award is a group company established outside Lithuania, then the acquisition of shares is not subject to social security contributions or health insurance contributions.

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[7] Such notice must be submitted as soon as possible but in any event no later than within four trading days of the relevant event.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** From 1 January 2010, a Lithuanian company bearing the cost of an employee share plan is entitled to a corporation tax deduction, as the benefit received by employees is treated as employment-related income subject to personal income tax.

4.2.2 **Social security contributions:** As from 1 January 2010, the employer is subject to social security contributions (at a rate of 30.98%), where shares are granted to an employee by the employing company at a discount to market value or free of charge.

4.3 **Tax withholding:** As from 1 January 2010, tax withholding obligations arise for the Lithuanian employer where shares are granted to an employee at a discount to market value or free of charge by the employing company. The following taxes must be withheld by the Lithuanian employer in relation to the taxable amount: (i) personal income tax (at a rate of 15%), (ii) employee social security contributions (at a rate of 3%), and (iii) health insurance contributions (at a rate of 6%).

If the share awards are granted by a group company established outside Lithuania, then there is no obligation on the employing company to withhold the personal income tax arising and social security/health insurance contributions do not arise.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no income tax charge on the grant of a share option.

5.1.2 **Exercise:** Shares acquired by employees at a discount to market value or free of charge upon the exercise of a share option granted by the employing company or a group company are treated as taxable income-in-kind received by the employee. The taxable value is the difference between the market value of the shares at exercise and the amount paid by the employee. These new rules apply regardless of when the option was granted (i.e. the rules extend to options granted prior to 1 January 2010).

5.1.3 **Social security contributions:** Where the grantor of the share award is the employing company then the acquisition of shares by an employee at a discount to market value or free of charge upon the exercise of a share option is subject to social security contributions (at a rate of 3%) and health insurance contributions (at a rate of 6%).

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** From 1 January 2010, a corporation tax deduction is available for a Lithuanian company for any costs which it

bears in relation to an employee share plan, as the benefit received by employees is treated as employment-related income subject to personal income tax.

5.2.2 **Social security contributions:** Where the options are granted by the employing company, the employer is subject to social security contributions (at a rate of 30.98%), if shares are acquired by an employee at a discount to market value or free of charge upon exercise of a share option.

5.3 **Tax withholding:** Tax withholding obligations arise for the Lithuanian employing company if shares are acquired by an employee at a discount to market value or free of charge upon exercise of a share option granted by the employing company. The following taxes must be withheld by the Lithuanian employer in relation to taxable amount: (i) personal income tax (15%), (ii) social security contributions (3%) and (iii) health insurance contributions (6%).

If the share options are granted by a group company established outside Lithuania, then there is no obligation on the employing company to withhold the personal income tax arising and social security/health insurance contributions do not arise.

6. Taxation of share disposals

6.1 Income received by an employee who is a tax resident of Lithuania from the sale of shares is tax exempt provided that (i) the shares are sold not earlier than 366 days after the date of their acquisition and (ii) the individual was not the owner of more than 10%[8] of the shares in the company in respect of which the shares are being sold for the 3 years preceding the end of the tax year during which those shares were sold.

[8] Or more than 20% if the ownership of the shares is classified as being held as a "joint conjugal ownership".

6.2 This relief does not apply if the shareholder sells the shares to the issuer of those shares or the sale proceeds are received from a company established in a tax haven.

6.3 Where the exemption does not apply, the capital gains (being the difference between the sale proceeds and acquisition costs of the shares) are subject to Lithuanian personal income tax at a rate of 15%[9]. As from 1 January 2010, where an employee disposes of shares in his employing company or in a group company (whether acquired from the exercise of an option or otherwise), the taxable capital gains is calculated based on the difference between the sale proceeds and the market value of the shares at the time they are acquired by the employee. Any income taxes computed and paid upon the acquisition of the shares are also not deductible for capital gains tax purposes as part of the acquisition costs when those shares are sold.

7. Employee benefit trusts

7.1 Employee benefit trusts are not recognised under Lithuanian law, but a Lithuanian company may make contributions to such a trust for the benefit of its employees.

7.2 The tax treatment of benefits received by employees from employee benefit trusts is unclear under Lithuanian tax legislation and advice should be sought on a case-by-case basis.

8. Data protection

It is recommended that the employee's consent is obtained for the collection, processing and worldwide transfer of personal data in connection with an employee share plan.

9. Employment law

Under Lithuanian employment law, there is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in any compensation due on termination of employment. Companies should seek advice on a case-by-case basis on these issues and/or other employment law issues that may be applicable.

[9] The income tax should be paid and declared by the individual by the 1st of May of the calendar year following the tax year in which the shares are sold.

The Netherlands

1. Securities law

1.1 **Offer of securities:**[1] The Prospectus Directive is implemented into Dutch law and therefore in general the principles referred to in paragraph 2 on pages 1-3 of this guide will apply.[2]

1.2 **Regulatory issues:**[3] There are no other significant regulatory issues which affect an offer of securities to employees. A company which issues securities directly to employees in the Netherlands does not need a licence as an investment firm or securities intermediary. However, if a company uses another entity (e.g. a securities broker) in connection with the issue of the securities, that other entity would require a licence as an investment firm unless an exemption applied.[4]

Entities which take deposits (repayable monies) from the Dutch public should in principle be authorised under the Financial Markets Supervision Act and registered with the Dutch Central Bank, unless an exemption applies. One of the exemptions applies where deposits are obtained or solicited from within a closed circle, as defined in Dutch law (*besloten kring*). The definition of a closed circle includes, amongst other things, the relationship between an employer and its employees or the relationship between group companies. However, the authorisation requirement for deposit-takers may be relevant in participation

[1] The Netherlands' securities market is regulated by the Financial Markets Supervision Act (*Wet op het financieel toezicht)* (FMSA). The rules applicable to offers of securities are set out in Chapter 5.1 of the FMSA.

[2] From 1 July 2005, when the Prospectus Directive was implemented in Dutch law, any public offer of securities in the meaning of the Prospectus Directive should be done in accordance with such Directive. As for the specific exemption for employee offerings under section 4 of the Prospectus Directive, the Dutch legislator has indicated that the securities offered to the employees should actually be of the same category or class as the securities that are traded on a regulated market within the EEA.

[3] With respect to the Netherlands restrictions concerning insider trading, there is a specific exemption for employee participation plans. This exemption, which requires certain conditions to be met, may permit an offer of any securities to an employee, or an employee to exercise an option and/or sell the shares acquired under an employee participation scheme while that employee or the employer is in possession of inside information.

[4] Note that there is an employee participation plan exemption from the requirement to have a licence. Furthermore, if a collective investment vehicle is used, such vehicle may require a licence under the FMSA. Several exemptions from such licence requirement are available, e.g. if the vehicle offers its units to less than 100 persons per state or if the vehicle offers its units exclusively to its directors/employees and/or a group company's directors/employees.

plans where employees save monies through an account held with a third party bank.

1.3 **Disclosure:** In principle, ongoing disclosure and filing requirements other than those resulting from the Prospectus Directive and the Market Abuse Directive do not apply if and to the extent securities are offered to employees and/or directors in the Netherlands, in accordance with the Prospectus Directive and the Dutch Financial Markets Supervision Act.

2. Exchange controls

Dutch foreign exchange control rules do not apply specifically to employee share plans and are unlikely to apply in practice to dealings in connection with an employee share plan.[5]

3. Financial assistance

3.1 **Dutch company:** A Dutch company (NV or BV) may not provide financial assistance to enable third parties to purchase or to subscribe for shares in its capital, subject to the following exemptions.

- The restrictions do not apply to an NV if the shares are acquired by, or on behalf of, employees of the NV or its group companies. If that is the case, the NV may also lend money to enable the employees to acquire the shares.[6]
- A BV may lend money to enable a third party (including an employee) to purchase or subscribe for shares in its capital, but only to the extent that it has distributable reserves and provided that (i) its articles of association allow such a loan to be made; and (ii) the company maintains a non-distributable reserve for the amount outstanding on such a loan from time to time. (Note

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[5] Foreign exchange rules are generally applicable to persons or entities which have been designated by the Dutch Central Bank as a so-called "reporting entity" under the External Financial Relations Act (*Wet financiële betrekkingen buitenland*).

[6] Furthermore, there is a general exemption from the financial assistance prohibition if such financial assistance consists of providing a loan and provided certain conditions are met. These conditions include, amongst others, that (i) the provisions of the loan must be based on a resolution of the board of directors (ii) the company's general meeting of shareholders must approve such board resolution (in the case of a listed NV with a 95% majority of the votes cast at the meeting, in the case of a non-listed NV with a simple majority except where less than 50% of the issued capital is represented at the meeting in which case a two-third majority applies) (iii) the company must maintain a non-distributable reserve for the amount outstanding on such a loan from time to time and (iv) the loan, the interest rate and any security or collateral must be agreed on reasonable market conditions. A separate exemption from the financial assistance prohibition is available for authorised banks that act in the ordinary course of business.

that it is expected that the financial assistance prohibition for BV's will be abolished following a legislative proposal that is expected to enter into force in the course of 2011).

3.2 **Dutch subsidiary of non-Dutch company:** From a Dutch law perspective it is arguable that the general restriction on a Dutch subsidiary providing financial assistance (e.g. a loan) for the acquisition of shares in its Dutch parent company should not apply where the parent company is not Dutch. However, there is no specific case law on this point and the position is not free from doubt.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions[7]

4.1.1 **Tax:** An employee who acquires shares in his employing company or its parent company free of charge or at a discount to market value will normally be liable to pay income tax. The tax charge is on the difference between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the 2010 tax year the progressive rates of income and social security charges range from 33.45% to 52%.

4.1.2 **Social security contributions:** An employee will be subject to general social security contributions as part of the income tax due (these contributions are capped on income at €33,189 for 2010). The rates of general social security contributions are included in the progressive income tax rates referred to in paragraph 4.1.1.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** In respect of shares awarded after 24 May 2006, the amount of any discount charged to the Dutch company by the foreign parent company or, as the case may be, the difference between the arm’s length purchase price and the lower purchase price charged to the employee is no longer deductible for corporate income purposes. Furthermore, the Dutch employing company is no longer able to deduct the cost of establishing and administering a share plan to enable employees to acquire shares in a foreign parent company. The costs of cash-settled stock appreciation rights should still qualify for a tax deduction if paid by, or charged to, a Dutch company.

[7] Please note that the comments made in this section assume that the Dutch rules on so-called "lucrative investments" do not apply. (In general, these rules do not apply to "regular" employee share plans.)

4.2.2 **Social security contributions:** Employer social security contributions will be payable in respect of shares provided to employees for free or at a discount to the extent that the employee's income for the relevant year (excluding the share-based income) does not exceed €48,716 (i.e. such contributions are capped on income at this level). The rate of employer social security contributions is approximately 11.6% for 2010.

4.3 Tax withholding

The employer must withhold any income tax and social security due.[8]

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** No taxation of share options occurs at grant.[9]

5.1.2 **Exercise:** Income tax will arise on the exercise of a share option on the difference between the option exercise price and the market value of the shares at the time of exercise. For the 2010 tax year the progressive rates of income and social security charges range from 33.45% to 52%.

Social security contributions:

5.1.3 An employee will be subject to general social security contributions as part of the income tax due (these contributions are capped on income at €33,189 for 2010). The rates of general social security contributions are included in the progressive income tax rates referred to in paragraph 5.1.2.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** For options granted after 24 May 2006 the amount of the taxable benefit for employees on exercise of the options is no longer tax deductible for the Dutch employing company. It should be noted that the costs of cash-settled stock appreciation rights will still qualify for a tax deduction if paid by or charged to a Dutch company.

5.2.2 **Social security contributions:** Employer social security contributions will be payable where an employee's income for the relevant year

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[8] The Dutch employing company is responsible for the withholding and payment of the relevant amounts regardless of whether it, or the foreign parent company, granted the option or awarded the shares.

[9] As from 1 January 2005 the regime, whereby the employee (jointly with the employer) could elect to be taxed (i) at grant (or if later, vesting) or (ii) upon exercise, was abolished.

(excluding the share-based income) does not exceed €48,716 (i.e. such contributions are capped on income at this level). The rate of employer social security contributions is approximately 11.6%.

5.3 Favourable tax regime

Although there are no tax approved employee share plans in the Netherlands, it is possible to replicate savings-related employee share purchase and/or share option plans to a certain extent by using a special employee savings plan. The plan allows an employee to make contributions to a special savings account on a pre-tax basis (maximum of €613 a year for the 2010 tax year). The contributions can be invested in shares in the employing company (or a group company). In addition, the contributions can be made in the form of shares in the employing company (or a group company), in which case the maximum amount is doubled. There are a number of requirements, including that the savings must be held for at least four years. The employing company is obliged to pay a 25% tax charge on the contributions.

5.4 Tax withholding

The employer must withhold any income tax and social security due.[10]

6. Taxation of share disposals

The employee is not subject to capital gains tax or income tax on a disposal of shares.

7. Employee benefit trusts

7.1 If a resident of the Netherlands is a potential beneficiary of an employee benefit trust, he will not be subject to tax simply by being a potential beneficiary.

7.2 The receipt of benefits from an employee benefit trust by an employee will constitute taxable income in the hands of that employee[11] and the benefit may be subject to income tax and employee and employer social security if the cost of the benefit is borne by the employer.

7.3 The Dutch employing company can only claim a tax deduction for payments made to an employee benefit trust if (i) the employer has no influence on the

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[10] As a rule, the Dutch employing company is responsible for the withholding and payment of the relevant amounts regardless of whether it, or the foreign parent company, granted the option or awarded the shares.

[11] Taxable at progressive income tax rates.

trust and (ii) the employer is not entitled to any payments from the trust (in other words, the payments made to the trust must have been irrevocably made by the employing company).

8. Data protection

8.1 The processing of personal data by the Dutch employer in the context of an employee share plan must be carried out in accordance with the Dutch Data Protection Act.[12]

This Act requires personal data to be processed (i) for specified and legitimate purposes, (ii) in accordance with the law and (iii) in a careful and proper manner.[13]

8.2 Under the Dutch Data Protection Act, the employer is required to inform its employees of the purpose of the intended data processing and to provide the relevant contact details before the personal data is collected.[14]

8.3 In principle, all personal data processing activities must be notified to the Dutch Data Protection Commission (*College Bescherming Persoonsgegevens*) before the collection of the personal data.[15]

8.4 If, in connection with an employee share plan, the personal data of employees is being transferred to countries outside the EEA, additional requirements must be met. In principle, transfers of personal data to such countries are only permitted if the recipient country provides an adequate level of protection for such data. However, there are a number of ways of legitimising an international transfer,

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[12] The Dutch Data Protection Act (*Wet bescherming persoonsgegevens*, the "DPA") has implemented the EU Directive on Data Protection (95/46/EC). Under the DPA, the Dutch employer shall in principle be considered as the "data controller" with respect to the transfer of personal data of employees.

[13] Articles 6 and 7 of the DPA. Furthermore, in order for the processing to be legitimate a general processing condition needs to be met, the relevant condition in the case of employee share plans being that the processing is necessary to perform a contract to which the employee is party, or in order to take steps at the request of the employee prior to entering into a contract. Another relevant processing ground could be that the processing is necessary to achieve the legitimate interests of the employer or the recipient, and provided that the (privacy) interests of the employee involved do not prevail over these interests.

[14] Article 33 of the DPA. Depending on factors such as the sensitivity of the data and whether personal data will be internally transferred, the employer may be required to provide the employee with further information as regards the processing. The employer could, for example, provide the information by attaching a data protection policy to the employee share plan.

[15] Article 27 of the DPA. Depending on the type of personal data that will be processed and for what purpose, the data processing may be exempt from notification under the Dutch Decree on Standardised Exemptions (*Vrijstellingsbesluit*).

such as obtaining a data transfer licence from the Dutch Ministry of Justice, even if the country to which the personal data is being transferred does not offer an adequate level of protection.[16]

8.5 A system regarding the processing and protection of personal data of employees may require Works Council approval.[17] Whether such Works Council approval is required must be considered on a case-by-case basis.

9. Employment law

9.1 Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable. In addition to these general employment law issues, specific issues in the Netherlands are mentioned below.

9.2 Following a case in the Dutch Court of Appeal in 2002, management decisions relating to the implementation, amendment or withdrawal of an employee share plan may require the prior approval of the relevant Works Council if the plan is considered a system for the remuneration of (a group of) employees. In the case of an international group plan, the extent of the involvement of the Dutch management in decisions to implement, amend or withdraw the plan is one of the aspects taken into account in determining whether such decisions can be attributed to the Dutch management and therefore whether the plan will be subject to Works Council approval. The requirement for Works Council approval and the scope thereof must be decided on a case-by-case basis.

[16] Article 77 of the DPA.

[17] Article 27 paragraph 1 sub k of the Works Council Act.

Poland

1. Securities law

1.1 **Offer of securities[1]:** In accordance with the Prospectus Directive, the Polish legislation provides an exemption from the obligation to prepare, to obtain approval for, and to publish a prospectus in respect of an offer of securities to existing or former directors or employees by their employer (or an affiliated undertaking) which has its securities already admitted to trading on an EU regulated market.[2] [3] Under this exemption, Polish legislation requires the preparation of an information memorandum, which must be in Polish.[4] [5]

There is also an exemption for offers where the total consideration under the offer is less than €2.5 million (calculated over a period of 12 months). In the

[1] The Prospectus Directive was implemented into Polish law in October 2005.

[2] The Polish legislation contains a reference to accounting provisions in relation to the definition of an affiliate undertaking. The definition contained in the accounting provisions is very broad, but will require a detailed check each time an affiliate undertaking is proposing to offer securities to employees or directors in Poland.

[3] The view of the Polish Financial Supervisory Authority ("PFSA"') is that the offer of non-transferable options and the exercise of such options should be assessed as part of a single financial operation. In accordance with this view, when an offer of non-transferable share options is launched, there is a simultaneous announcement of an offering (the execution of which will be deferred) of the shares which the person will be entitled to acquire when the options are exercised. Therefore, the obligation to prepare an information memorandum applies (see footnote 4 below). Otherwise a prospectus should be submitted for approval by the competent authority.

[4] In October 2005 the Minister of Finance published an ordinance specifying the requirements to be satisfied by the information memorandum, which should reflect some of the requirements set out for a prospectus in the Commission Regulation (EC) 809/2004. In particular, an information memorandum should include the issuer's identification data (and indicate where additional information on the issuer and its corporate documents may be found), key details regarding the legal nature of the offered securities, the date and place of the preparation of the information memorandum and the terms and date of issue of the offered securities. The information memorandum does not need to be approved by the PFSA.

[5] There is also a corresponding exemption concerning admission to trading on a regulated market, provided that shares of the same type as ones having been recently offered within the framework of an offer to existing or former directors or employees, are already admitted to trading on the same regulated market as that intended for the shares offered. If this is not the case and the issuer intends to introduce its shares to trading on a regulated market, it may rely on another exemption which applies if the offer consists of shares representing, over a period of 12 consecutive months, less than 10% of the issuer's shares of the same type admitted to trading on the same regulated market.

case of this exemption, Polish legislation requires the preparation of an information memorandum, which must be in Polish.[6]

A further exemption is available in Poland if, under the strict interpretation of Polish law, the offer is addressed to fewer than 100 individuals in each EU state in which the offer is being made. In this case, the offer is deemed not to be a public offering and therefore there is no obligation to prepare either a prospectus or an information memorandum. Note that, in practice, the Polish Regulator will allow the application of the exemption if the offer is to fewer than 100 individuals in Poland, regardless of the number of offerees in other EU states. However, this is only an interpretation of the law by the Polish regulator and therefore may be subject to change.

1.2 **Regulatory issues:** If the share plan is directed at Polish employees, the plan documentation addressed to them should be translated into Polish.

1.3 **Disclosure:** If the securities offering requires the publication of a prospectus, the issue of shares must comply with detailed disclosure requirements.

2. Exchange controls

There are generally no exchange controls relevant to employee share plans in Poland, although there may be restrictions where transactions take place with companies or persons that are outside the EU, EEA or OECD. There are some notification requirements for statistical purposes.

3. Financial assistance

3.1 **Polish company:** Generally, joint stock companies may not provide financial assistance, directly or indirectly, for the purchase or subscription of their own shares. This does not apply to payments made to the company's employees or employees of its subsidiaries to facilitate the purchase of or subscription for the company's shares if those payments are made from a special capital reserve of the company.[7]

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[6] Approval from the PFSA is not required for this memorandum. Please note however that in the case of the €2.5 million exemption there is no corresponding exemption concerning admission to trading on a regulated market. Thus, if the issuer plans to introduce shares to trading, it has to prepare a prospectus. The prospectus will not have to be prepared if another exemption were to simultaneously apply, i.e. the offer were to consist of shares representing, over a period of 12 consecutive months, less than 10% of the issuer's shares of the same type admitted to trading on the same regulated market.

[7] This special capital reserve should previously have been created from accumulated profits.

3.2 **Polish subsidiary of non-Polish company:** Polish law does not prohibit a Polish company from providing financial assistance to its Polish employees in order to enable them to acquire shares in a non-Polish parent company.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** There is no tax on an employee's acquisition of newly issued[8] shares[9] at a discount or free of charge. The acquisition of existing shares is subject to tax at progressive rates of 19%-32% (the 32% rate starts from approximately €21,000) on income determined at the point of acquisition, i.e. on the difference between the market value of the shares and the purchase price paid by the employee (if any).

4.1.2 **Social security contributions:** There is no social insurance (social security contributions) on an employee's acquisition of shares at a discount or free of charge.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** No corporation tax deduction will be available.

4.2.2 **Social security contributions:** There is no employer social insurance (social security contributions) on an employee's acquisition of shares at a discount or free of charge.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no tax on the grant of a share option.

5.1.2 **Exercise:** There is no tax on the exercise of a share option to acquire newly issued shares. The exercise of a share option to acquire existing shares is subject to tax at standard progressive rates of 19%-32% (the

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[8] Newly issued shares means "shares subscribed for by persons entitled on the basis of the resolution of the shareholders' meeting to acquire these shares as well as shares subscribed for by a company, which made it solely for the purpose of transferring these shares to persons entitled on the basis of the resolution of shareholders' meeting to acquire these shares."

[9] In April 2010 the Polish tax authorities issued a ruling stating that the exemption from tax in relation to the surplus of the market value of shares over the costs of acquisition in relation to subscribed shares, applies only to shares in non-Polish companies. However, there is a view that this ruling is inconsistent with the law and with positions taken previously by the tax authorities and the Polish courts.

32% rate starts from approximately €21,000) on income determined at the point of exercise, i.e. on the difference between the market value of the shares and the exercise price paid by the employee (if any).

5.1.3 **Social security contributions:** There is no social insurance (social security contributions) on the grant and exercise of share options.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** No corporation tax deduction will be available.

5.2.2 **Social security contributions:** There is no employer social insurance (social security contributions) on the grant and exercise of share options.

6. Taxation of share disposals[10]

If the employee sells shares, the capital gain (i.e. the surplus of the sale proceeds over the acquisition costs/exercise price increased by the income determined at the point of acquisition of the shares or the exercise of the share option - if any) is taxed at a flat rate of 19%.

7. Employee benefit trusts

7.1 Employee benefit trusts are not recognised under Polish law. However, a Polish company may make a contribution to such a trust for the benefit of employees.

7.2 An employee who is a beneficiary of a discretionary employee benefit trust will not be taxable for that reason alone. He will be taxed when he actually receives benefits from the trust, as if he had received those benefits directly from his employing company.

8. Data protection

Employee consent must be obtained for the collection, processing and worldwide transfer of personal data in connection with an employee share plan.

9. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees

[10] Dividends paid to employees will be subject to a rate of 19% income tax. In accordance with the relevant double tax treaties, withholding tax paid abroad should generally be deductible against Polish income tax.

may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

Portugal

1. Securities law

1.1 **Offer of securities**[1]**:** Although the offer of securities to the public generally requires the publication of a prospectus,[2] there is an exemption from that requirement where securities are offered to existing or former directors or employees by their employer (or an affiliated company) which has securities listed on an EU regulated market, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.

There is also an exclusion from the prospectus requirements for an offer to fewer than 100 non-qualified investors in Portugal (as this is not treated as a public offer), even if the offer is being made to more than 100 individuals in a different EU state.

1.2 **Regulatory issues:** There are no other regulatory issues which affect the offer of securities to employees.

1.3 **Disclosure:** Where the securities are offered to fewer than 100 employees there are no disclosure requirements unless the offer is made by a Portuguese

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[1] The Prospectus Directive was implemented into Portuguese law in March 2006.

[2] Where an offer of securities qualifies as a public offer, a prospectus must be published. An offer will be classed as a public offer where the offer is:

- addressed to undefined addressees;
- addressed to the existing shareholders of an "Open Company" (i.e. a public company);
- publicly advertised or there is any solicitation of undefined addressees; or
- addressed to at least 100 non-qualified investors resident or established in Portugal.

Article 30 of the Securities Code lists the entities considered "qualified investors", which includes banks, investment companies, insurance companies, investment and pensions funds and other financial institutions, Governments, central banks etc.

Any advertisement material relating to a public offer is subject to the prior approval of the Securities Regulator (CMVM).

Where the total consideration under the offer is less than €2.5 million (this limit is calculated over a 12 month period), a prospectus is not required (even if the offer is made to more than 100 addressees). This is relevant where the shares are offered to employees for free as CMVM's view is that this falls within this exclusion.

Public offers to acquire shares (i.e. a public takeover) are subject to a mandatory prior registration requirement with the CMVM.

public company classified as an open company[3] or by a company whose securities are traded on a securities market,[4] in which case the Portuguese securities regulator (the CMVM) must be notified for statistical purposes only.

2. Exchange controls

There are no applicable exchange controls.

3. Financial assistance

3.1 **Portuguese company:** A company may not make loans or issue guarantees to members of its board of directors. Although under Portuguese law members of the board of directors are not considered employees of the company, it is usual for members of the board of directors to be included in employee share plans. Subject to certain restrictions a Portuguese employer may, however, make loans or issue guarantees to enable its employees to acquire its own shares, or shares in its parent company, provided that as a result of such loans, the net asset value of the company does not fall below its issued share capital plus its non-distributable reserves.

3.2 **Portuguese subsidiary of non-Portuguese company:** The financial assistance position for a Portuguese subsidiary of a non-Portuguese parent company is the same as described in paragraph 3.1 above.

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[3] An "Open Company" is basically a public company, legally defined in article 13 of the Securities Code as being a company:

- incorporated through a public offer of subscription addressed specifically to entities resident or established in Portugal;
- whose shares or other securities grant the right to the subscription or acquisition of shares which have been the object of a public offer of subscription addressed specifically to entities resident or established in Portugal;
- issuer of shares or other securities granting the right to its subscription or acquisition, which are or have been listed in a ruled market placed or operating in Portugal;
- where more than 10% of its shares have been disposed in a public offer of sale or exchange addressed specifically to entities resident or established in Portugal;
- resulting from the spin-off of an open company;
- which acquires, by merger, all or part of the assets of an open company.

[4] Although there are no formal rulings, it is understood that the CMVM's view is that disclosure is not required where a company's securities are listed in a market outside Portugal.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employing company or its parent company free of charge or at a discount to market value[5] will normally be liable to pay income tax. The tax charge is on the difference between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the 2010 tax year the income tax rates range from 11.08% to 45.88%.[6]

4.1.2 **Social security contributions:** An employee will be subject to social security contributions on the amount subject to income tax at the rate of 11% for the 2010 tax year. However, social security contributions will not arise if the gain is viewed as a non-recurring bonus (which will depend on how the relevant employee share plan is operated in practice).[7]

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** Costs incurred by the Portuguese employer in relation to an employee's acquisition of shares at a discount or as a free bonus should be deductible.[8]

4.2.2 **Social security contributions:** Employer social security contributions will be payable in respect of shares provided to employees for free or at a discount if the employee is subject to social security contributions. The maximum rate of employer social security contributions is 23.75%[9] for the 2010 tax year.

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[5] The price paid by subscribers who are not employees will be used instead of market value if there are other subscribers.

[6] Employment income is taxed at progressive rates (ranging from 11.08% to 45.88% for 2010).

[7] Certain amendments to social security legislation have been approved and were expected to be in force as from 1 January 2010. However, implementation of the changes has now been postponed to 1 January 2011. The changes which have been approved include (1) to the rates, (2) clarification of what is considered to be a recurring bonus and (3) clarification on the treatment of discounts granted to employees on the acquisition of shares in the employer. According to the new law ("Contributive Code") there is a specific provision excluding from social security contributions the "discounts granted to employees on the acquisition of shares of the employer or of companies within the employer's group of companies". Once the new law comes into force, discounts granted under employee share plans will be excluded from social security contributions (both employee and the employer contributions).

[8] A deduction is available provided that the acquisition forms part of the employee's remuneration.

[9] Please refer to footnote 7.

4.2.3 **Reporting requirements:** The employer must declare the existence of the employee share plan to the tax authorities by the 30th June of the following year (even if the plan relates to a group company).[10]

4.3 Tax withholding

The employee is responsible for accounting for income tax. The employer must withhold any social security contributions.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no tax charge on the grant of a share option.

5.1.2 **Exercise:** There is an income tax charge on the exercise of a share option on the difference between the market value of the shares at the date of exercise and the option exercise price. For the 2010 tax year income tax rates range from 11.08% to 45.88%.

5.1.3 **Social security contributions:** Social security contributions arise on the exercise of options at the rate of 11% for the 2010 tax year. However, social security contributions will not arise if the gain is viewed as a non-recurring bonus (which will depend on how the relevant employee share plan is operated in practice).[11]

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** Costs incurred by the Portuguese employer in relation to an employee's acquisition of shares on exercise of an option at a discount to the then market value of shares should be tax deductible.[12]

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[10] If the employer bears the costs of the plan (including the gains arising for the employees) it must:

- keep a record of all the participant employees, respective tax numbers and codes as well as of the dates of exercise, disposal or waiver to exercise or repurchase, amounts, prices or benefits arising from the plan and provide a copy of the pertaining part of the record to each participant up to the 20th January of the following year; and
- include the said amounts prices or benefits in an annual statement that is submitted annually, up to the end of February, to the tax authorities.

These obligations are applicable to the local subsidiary in case the plan is created by its non resident parent company. These reporting obligations also apply to share options.

[11] Please refer to footnote 7.

[12] A deduction is available provided that the acquisition forms part of the employee's remuneration.

5.2.2 **Social security contributions:** Employer social security contributions will be payable if the employee is subject to social security contributions. The maximum rate of employer social security contributions is 23.75% for the 2010 tax year.[13]

5.2.3 **Reporting requirements:** The employer must declare the existence of the employee share plan to the tax authorities by the 30th June of the following year (even if the plan relates to a group company).[14]

5.3 Tax withholding

The employee is liable to account for any income tax due. Social security contributions must be withheld by the employer.

5.4 Other tax rules

The vesting of rights attaching to shares may give rise to income tax in certain circumstances if the shares were subject to certain restrictions.[15]

Payments made to the employee on account of the right to any income inherent in the shares as well as on account of any increase in value in the shares are deemed to be employment income.

6. Taxation of share disposals

6.1 If the employee sells shares, the difference between the market value of the shares on the date of acquisition and the sale proceeds will be subject to tax at the rate of 20% for the 2010 tax year. The annual positive balance between capital gains and capital losses arising from the sale of shares and debt securities during that year is subject to an exempt amount of up to €500.[16]

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[13] Please refer to footnote 7.

[14] Please refer to footnote 10.

[15] In employee share plans, where:

- the shares are neither acquired nor registered in the name of the employee;
- the employees cannot sell or otherwise dispose of the shares; and
- the employees will cease to participate in the plan on the termination of their employment,

the vesting of the rights attaching to the shares (that is, the right to dispose of the shares) will be a taxable event. The employees will be taxed on the difference between the market value of the shares at the time of vesting and the price paid by the employee, if any, for the shares. Employee and employer social security contributions will also be due on the same amount.

[16] The 20% tax rate is applicable to the annual positive balance between the capital gains and losses arising from the sale of shares and other securities during the year. In the case of shares of micro or

6.2 If the shares are bought back from the employee by the employer or by a group company, the gain may be taxed as employment income (and not as a capital gain).

7. Employee benefit trusts

Trusts are not recognised under Portuguese law.[17] If a Portuguese resident is a beneficiary of a discretionary employee benefit trust, he will not be taxable for that reason alone but he may be taxed when he actually receives a benefit from the trust.

8. Data protection

Employee consent must be obtained for the collection, processing and worldwide transfer of personal data in connection with an employee share plan.[18]

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small companies not listed on a regulated market, only 50% of that positive balance is subject to tax. For this purpose, small companies are those with less than 50 employees and less than €10 million annual turnover or balance sheet and micro companies are those with less than 10 employees and less than €2 million annual turnover or balance sheet.

[17] Except within the free zone of Madeira.

[18] Portuguese law on data protection is based on the EU Directive (Directive 95/46/EC) and requires the creation or implementation of a database containing personal data to be notified to the National Data Protection Commission, unless specifically exempt.

The company responsible for the data processing should notify the National Data Protection Commission before processing data by electronic means. The notice should set out the purpose of the data processing, a description of the categories of data subjects, the names (or categories) of recipients and the circumstances in which they will receive the data.

These notification requirements do not apply to data processing relating to employees solely in connection with payroll payments, including the calculation and payment of salary, fringe benefits and other bonuses. It is not clear whether the data processing in relation to employee share plans falls within the scope of this exemption but it is understood that the National Data Protection Commission take the view that notification is required.

Consent (as opposed to notification) from the National Data Protection Commission is required in the following cases:

- processing of data relating to an individual's philosophical, political or religious beliefs, sexual orientation, race or health;
- processing of personal data relating to an individual's credit status or solvency;
- use of data (about the same individual) collected from different sources or for different purposes; and
- use of data for purposes other than those for which it was collected.

Under Portuguese law, the collection of personal data is permitted whenever the consent of the data subject has been obtained. Such consent is not necessary when personal data is collected for the following purposes:

9. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

- to conclude (or with the aim of concluding) and execute agreements entered into with the data subject;
- to enable the data controller to comply with any legal obligations;
- to protect vital interests of the data subject when he/she is physically or legally incapable of granting his/her consent;
- where it is in the public interest or in fulfilment of the public duty of the data controller or third party to whom the data is disclosed; and
- where it is necessary to satisfy a legitimate interest of the data controller or a third party to whom the data is disclosed, except where such interest is overridden by the fundamental rights of the data subject.

In relation to an employee share plan, the collection, processing and transfer of personal data will, in principle, require the consent of the employee, irrespective of the fact that the transfer is made to his employing company or to a recipient in another EU Member State.

An employee's consent will not be required where the collection, processing and transfer of data is needed for concluding and executing any agreements entered into with that employee.

Russian Federation

1. Securities law

Offer of securities: Employee share plans are not explicitly regulated under Russian law. Any offering under an employee share plan is, therefore, subject to general Russian legal requirements and restrictions.

Shares in foreign companies and options relating to shares in foreign companies

With effect from May 2009, the Federal Law "On the Securities Market" No. 39-FZ dated 22 April 1996 (as amended) ("Securities Market Law") was significantly amended to incorporate provisions governing the "placement" and "circulation" of foreign securities in Russia. These amendments were followed by substantial additional amendments to the Securities Market Law, which introduced the regulation of derivative financial instruments from 1 January 2010. It is now the case that shares in foreign companies may only be offered[1] in Russia to qualified investors[2] unless:

(a) the shares are assigned with both an International Securities Identification Number (ISIN) and a Classification of Financial Instruments Code (CFI);

(b) the shares are classified as "securities" in accordance with the procedure established by the Federal Service for Financial Markets ("FSFM") (in the absence of such a qualification, foreign securities are regarded as "foreign financial instruments"); and

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[1] The term "offering" is not specifically defined in the Securities Market Law and as the current version of the Securities Market Law is relatively new, clarification from the FSFM or relevant court practice is not yet available. At this stage it seems that the term "offering" may be interpreted rather broadly and may include any dealings (whether private or public, solicited or unsolicited) in shares and/or other financial instruments.

[2] Under the Securities Market Law, Russian banks, brokers, dealers, fund managers, joint stock investment funds, non-government pension funds, management companies of investment funds, mutual funds and non-government pension funds, insurance companies, the Central Bank of the Russian Federation, the Bank for Development (Vnesheconombank (VEB)), the Russian Deposit Insurance Agency, the Russian Corporation of Nanotechnologies, certain not-for-profit organisations in the form of funds and supranational financial organisations (including the World Bank, IMF, ECB, EBRD etc.) are recognised as "qualified investors" by operation of law.

In addition, the Securities Market Law allows a company or an individual to obtain the status of a qualified investor through a special procedure provided that such company or individual satisfies certain specified criteria. The status of a qualified investor may be granted with respect to either a particular type or several types of securities or financial instruments.

(c) such shares are admitted to public placement and/or public circulation in Russia.[3]

Where the shares fail to satisfy any of the criteria referred to above, they may only be offered to employees who are qualified investors. The necessary transactions with the shares should be undertaken through a Russian broker (although it is understood that the securities market regulator intends to remove this requirement for employee option plans in the future). In addition, a prospectus should be registered with the FSFM if the shares in a foreign company transferred to employees are newly issued shares placed with employees for the first time.

Options relating to shares in a foreign company are likely to be treated as "foreign financial instruments"[4] and as such may only be offered in Russia to qualified investors.

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[3] In order to be admitted to a public placement and/or public circulation in Russia, shares in foreign companies must satisfy the requirements described in (a) and (b) and the issuer must either be:

- a legal entity incorporated in a member state of either (i) the Organisation for Economic Cooperation and Development (OECD), (ii) the Financial Action Task Force (FATF) and/or (iii) the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL); or
- a legal entity incorporated in a jurisdiction whose securities market regulator has a cooperation agreement with the FSFM (to date, such treaties have been signed with the securities market regulators of Brazil, Belarus, Turkey, China, Cyprus, India, UAE, Kyrgyzstan, Germany, Venezuela, Syria, Oman and France); or
- a supranational financial organisation included into the list approved by the Russian Government; or
- an OECD, FATF or MONEYVAL member state or its central (national) bank.

In addition, admission to public placement and/or public circulation is also subject to registration of a prospectus with the Russian financial markets regulator and compliance with certain other formalities.

[4] The Securities Market Law contains a definition of the term "financial instrument". This definition extends to any proprietary right that arises out of a transaction pursuant to which:

- a party is obliged to make payments subject to a change in prices for the securities or goods, change in exchange rates, rates of inflation, other indexes comprising any or all of these, or the occurrence of an event, which is provided for in the legislation but the occurrence of which is uncertain (including transactions contemplating an obligation to transfer securities, goods or currency); or
- a party is obliged to buy or sell securities or currency on the terms and conditions agreed upon the execution of a transaction; or
- a party is obliged to transfer title to securities, currency or goods to the other party not earlier than on the third day after entering into the transaction and the other party is obliged to accept and pay

Under the current regulatory regime, a qualified investor (e.g. a broker) is not permitted to buy foreign securities or foreign financial instruments for, and hold them on behalf of, an individual non-qualified investor (e.g. an employee). However, the Securities Market Law allows an individual to obtain the status of a qualified investor. The criteria which an individual must satisfy to obtain this status includes, in particular, reference to the value of securities owned by the investor or the amount (value) of obligations under derivative contracts to which he is a party and the volume of his dealings in securities and derivatives.[5]

There is a considerable degree of ambiguity in the new rules governing the offering of foreign financial instruments and securities in Russia. The application of these provisions will depend in particular on their interpretation by the FSFM[6].

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for the said securities, currency or goods (as the case may be) and such transaction stipulates that it should be treated as a derivative transaction.

[5] An individual can be recognised as a qualified investor if such individual satisfies any two of the following requirements:

- an individual owns securities and/or other financial instruments with an aggregate value in excess of 3 million roubles; or
- an individual has working experience in a Russian or foreign company which is dealing in securities or other financial instruments, provided that the work experience should be at least: (i) 1 year in a company, which is a qualified investor by operation of law (rather than a company that obtained that status), if he or she has already ceased working with that company; (ii) 3 months in a company, that is a qualified investor by operation of law, if he or she is still an employee of that company; or (iii) 2 years in any other case; or
- an individual (i) has been a party to at least 10 transactions with securities and other financial instruments during the last 4 quarters provided that the aggregate value of such deals is at least 300,000 roubles; or (ii) has been a party to at least 5 transactions with securities and other financial instruments during the last 3 years provided that the aggregate value of such deals is at least 3 million roubles.

[6] One possible interpretation could be that the basic purpose of the amendments to the Securities Market Law is to protect Russian investors against the risk of losses as a result of investments in unfamiliar financial instruments. On this basis, arguably, where an acquisition of foreign securities/financial instruments does not constitute an investment (e.g. such securities are acquired solely for the purpose of establishing an offshore SPV in a holding structure), such acquisition should not be caught by the restrictions on the offering of foreign securities/financial instruments. Taking into account this approach, the offering of options to buy shares should not be restricted where such options are offered to a limited number of employees free of charge. A similar exemption is unlikely to be available in relation to the exercise of an option relating to foreign shares, as an employee is normally asked to pay consideration for the shares when exercising the option (i.e. asked to invest). Therefore, in order to be eligible for offering to non-qualified investors, the underlying shares are likely to still have to comply with the requirements regarding the offering of foreign securities/financial instruments to non-qualified investors. We note that while this approach seems reasonable to us, it is untested and there is no guarantee that it will be shared by Russian authorities or courts.

So far the FSFM has not issued any relevant clarifications. Once such clarifications have been issued, the interpretation and implementation of the Securities Market Law may change. Therefore, advice in relation to the proposed launch of an employee share plan in Russia should always be sought on a case-by-case basis.

One possible alternative to an international employee share option plan for Russian employees would be to use a discretionary bonus plan (with the bonuses being calculated by reference to the value of a number of shares).

Shares in Russian companies and options relating to shares in Russian companies

The Securities Market Law allows the offer of shares in a Russian company to employees subject to compliance with certain regulatory and corporate requirements.

Depending on how an employee share option plan is structured, options relating to shares in a Russian company may be categorised as "mass-issued securities" under Russian law[7]. If this is the case, their offer in Russia will be subject to the general requirements and restrictions of the Russian securities market legislation.

1.1 Regulatory issues

Shares in foreign companies

As discussed above, shares in a foreign company which are not admitted to public placement and/or public circulation in Russia may only be offered to qualified investors in Russia and the relevant transactions should be undertaken through a Russian broker. Furthermore, where shares transferred to the employees are newly issued shares, there is a requirement to register a prospectus in respect of those shares with FSFM.

Options relating to shares in foreign companies

To the extent that an option to buy shares in a foreign company is treated as a "foreign financial instrument" under the Securities Market Law, such options may only be offered to qualified investors in Russia.

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[7] Broadly, according to the Securities Market Law, "mass-issued securities" are securities that: (i) confer certain proprietary rights to the holder of such securities; (ii) grant the same rights within one issue of such securities; and (iii) provide for the same term for enforcement of these rights, irrespective of the time when securities were acquired.

Shares in Russian companies

The offer of newly issued shares in a Russian company is subject to a registration of the issue with the securities market regulator. However, registration of a prospectus is only required where the offer is to be made to more than 500 persons or otherwise to an indefinite number of persons.

Options relating to shares in Russian companies

The offer of "mass-issued securities" is subject to certain registration procedures with the securities market regulator. If the options are recognised as "mass-issued securities", such options will be subject to the same procedures as for securities. However, these procedures are not designed for the registration of options offered in the context of an employee share plan. As a result, the registration of such options and, consequently, their offer, may be impeded.

1.2 Disclosure

Shares in Russian companies

If, in acquiring ordinary shares, a person reaches or exceeds a 5% shareholding threshold, then that person is obliged to disclose the acquisition.[8] Where implementation of an employee share plan involves the registration of a prospectus, or where a prospectus has been previously published in relation to the underlying shares, an issuer will be subject to Russian disclosure rules. Such rules include, in particular, an issuer's obligation to disclose shareholders who hold in excess of a 5% shareholding.[9]

Shares in foreign companies

There are no specific regulations in Russia governing the disclosure by a person of his acquisition of shares in a foreign company.

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[8] Information on any change in a shareholding whereby a person's shareholding becomes more or less than 5%, 10%, 15%, 20%, 25%, 50% or 75% is also subject to disclosure.

[9] Our comment in footnote 8 applies to an issuer's obligations as well.

2. Exchange controls

Foreign currency transactions between a Russian resident and a non-resident are generally unrestricted.[10] As a general rule, foreign currency transactions between Russian residents are prohibited. It is recommended that exchange control issues are analysed on a case-by-case basis.

3. Financial assistance

3.1 **Russian company:** A Russian company is not prohibited from providing financial assistance (including the provision of a security or a guarantee) to acquire its own shares or shares in a Russian parent company. However, the provision by a Russian company of financial assistance to acquire shares in its Russian parent company may require the Russian company to obtain certain corporate approvals.

3.2 **Russian subsidiary of non-Russian company:** A Russian subsidiary is not prohibited from providing financial assistance (including the provision of a security or a guarantee) to acquire its own shares or shares in its parent company. However, the provision by a Russian subsidiary of financial assistance to acquire shares in its parent company may require the Russian subsidiary to obtain certain corporate approvals.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Income Tax:** An employee who acquires shares in his employing company or its parent company free of charge or at a discount to their market value will normally be liable to pay income tax. The tax is assessed on the so-called "material benefit" where shares are acquired at less than market value, i.e. on the difference between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares.[11] [12]

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[10] A Russian individual, who has opened a bank account outside the Russian Federation, is obliged to notify the Russian tax authorities of such account and report the balance of the account to the tax authorities annually.

[11] From 1 January 2011 the market value will be determined based on rules to be set by the FSFM. Before 1 January 2011 the market value should be equal to an average-weighted value calculated by a stock exchange. In the absence of such information from the stock exchange, the market value is deemed to be equal to an average-weighted value determined at the closest trading date, provided that such securities were traded at least once within the period of three months prior the sale date. In the absence of a determination from the FSFM as to a methodology for determining market value, it is not entirely clear as to whether the above approach can also be applied to securities which are not traded

For the 2010 tax year the tax rate is 13% for Russian tax residents (individuals who have spent more than 182 days during 12 consecutive months in the Russian Federation) and 30% for non-residents.

4.1.2 **Social security contributions:** Social security contributions should not be due from employees, since, in general, social security contributions in Russia are payable by the employer rather than the employee.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction**: Generally it is unlikely that any corporation tax deduction will be available to a Russian company for any costs related to granting shares to its employees for free or at less than their market value. However, if the opportunity to purchase shares in an employer's parent company at less than market value is expressly provided for in the relevant employment contract (e.g. by reference to an incentive plan offered by the employer, in which the terms and conditions for purchasing such shares at less than market value are set out), then the Russian employer could attempt to argue before the Russian tax authorities that the relevant costs are deductible.

4.2.2 **Social security contributions:** A Russian employing entity may become liable for payment of social security contributions in circumstances where it sells its shares to its employees at less than market value or otherwise absorbs the costs of the securities being sold to its employees at less than market value (e.g. if the costs are charged back to the Russian employing entity).

Although the position is less clear in circumstances where a Russian employing entity neither provides its securities to its employees at less than market value nor incurs any costs associated with the employee share plan, there may be good arguments to support the view that no social security contributions should be due from the employer. This is because, as a matter of Russian law, in the absence of partial satisfaction of the securities price or payments to third parties which are

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on a stock exchange. The Russian tax authorities have indicated that in the absence of rules for determining the market price of non-traded securities established by the FSFM, the material benefit on the acquisition of such securities shall be determined based on methodology approved by a selling entity. It is not entirely clear that this is correct from a legal standpoint.

[12] To determine the taxable income arising upon the purchase of Russian securities at less than market value, the fair market price is adjusted downward by a statutory price fluctuation coefficient of 20% (i.e. for tax purposes the market value is considered to be 80% of the market price). It is not entirely clear whether this statutory fluctuation coefficient is also applicable to the purchase of foreign securities.

providing the securities, there are no payments or compensation connected to the employee's employment contract and, consequently, no basis on which social security contributions can arise.

Social security contributions are paid to the social security funds, (i.e. the Pension Fund, the Social Insurance Fund and the Compulsory Medical Insurance Fund). Social security contributions are capped on income up to RUB 415,000 for 2010. The total contribution rate is set at 26% for the 2010 calendar year and 34% for 2011.[13]

4.3 Tax withholding

The employer has the duty to withhold individual income tax if an employee purchases shares at less than market value directly from the employer. However, it is less clear whether the withholding obligation arises for the employer if the shares are provided to an employee by the employer's parent company or another third party.[14]

Should the duty to withhold arise, the employer must withhold the income tax from any cash payments made to the employee, i.e. from the employee's salary or other remuneration. If the employer is not able to withhold the income tax (e.g. if the amount of salary paid in cash is insufficient to cover the amount of income tax for the particular month in which it is to be withheld), the employing entity must notify the tax authorities of this in writing within one month after the date on which the withholding obligation arises. It should be noted that withholdings from

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[13] The 34% rate, which comes into effect from 1 January 2011, will be unified for most categories of taxpayers (e.g. there will be no exemption available for taxpayers using the simplified tax system). However, certain groups of taxpayers will benefit from a 4-year transitional period (e.g. the rates for residents of special economic zones would be limited to 20.2% in 2011 – 2012 and 27.1% in 2013 – 2014.

[14] According to the Russian Tax Code, individual income tax is to be withheld by the employing entity from any income that an individual employee receives from it or which originates *as a result of the relationship* with it. This wording can be interpreted quite broadly, and if an employee purchases shares in its employer's parent company at less than their market value, whether directly from the parent or from a third party, there may be room to argue that the employee has obtained the benefit only due to his employment with the employer, i.e. as a result of the relationship with the employer, which may give rise to the further argument that the employer should withhold individual income tax. On the other hand, however, one might argue that as long as (i) the parent company does not provide the employer with any calculation of the benefits realised by individual employees in Russia, and (ii) no costs associated with selling the shares to the employees at less than market value are charged back to the Russian employer, then no withholding tax liability should arise for the local employer, as it would simply lack the information necessary to calculate and withhold the tax due.

an employee's salary made by an employer cannot exceed 50% of the employee's monthly salary.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no income tax or social security contributions charge on the grant of a share option.

5.1.2 **Exercise:** There is an income tax charge on the exercise of a share option, at a rate of 13% for Russian tax residents and 30% for non-residents. As mentioned in paragraph 4.1.1, the tax is assessed on the so-called "material benefit" on the purchase of shares at less than market value. The comments made in paragraph 4.1.1 also apply here.

5.1.3 **Social security contributions:** Social security contributions should not be due from the employee.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** Generally, it is unlikely that a corporation tax deduction will be available for a Russian company that bears the cost of an employee share plan. However, if the opportunity to purchase shares in an employer's parent company at less than market value is expressly provided for in the relevant employment contract (e.g. by reference to an incentive plan offered by the employer in which the terms and conditions for purchasing such shares at less than market value are set out), then the Russian employer may at least try to argue before the Russian tax authorities that the relevant costs are deductible.

5.2.2 **Social security contributions:** Social security contributions will be due if the employee purchases the shares at less than market value directly from the Russian employer or if the Russian employer absorbs the costs of the securities being sold to its employees at less than market value otherwise (e.g. if the costs are charged back to the Russian employing entity). The comments made in paragraph 4.2.2 also apply here.

5.3 Tax withholding

Individual income tax should be withheld by the employing entity if the shares acquired by employees at less than market value are in the employing company. If, however, the shares are sold to employees by the parent company or by a third party, then the duty on the part of the employer to withhold the tax is less clear (see the comments in paragraph 4.3).

6. Taxation of share disposals

6.1 If an employee is a Russian tax resident, tax is charged at a rate of 13% for the 2010 tax year on the difference between the sale proceeds and the market value

of the shares at the time when the shares were acquired (whether directly or by way of a share option), provided that the costs of acquisition (i.e. the amount paid and the tax paid, if relevant) are confirmed by supporting documents. In addition, the taxable amount can be decreased by certain other documented expenses in relation to those shares, e.g. brokerage fees etc.

6.2 In relation to non-resident individuals, the Tax Code states that they are taxed only on income arising from sources in the Russian Federation (whereas residents are taxed on their worldwide income). According to the Tax Code, income from sources in the Russian Federation includes, amongst other things, income from sales of securities in Russia. There may be a good basis for arguing that this provision primarily encompasses sales of Russian securities and that it should not apply to sales of foreign securities by non-resident employees (e.g. sale of shares in a Russian employing entity's foreign parent company), although there is a theoretical risk that the tax authorities may take a different view and claim that a non-resident making a disposal of foreign securities while staying in Russia is also liable for Russian individual income tax. If this risk ever materialises, the non-resident individual should be able to deduct their acquisition costs from the taxable proceeds, and the resulting taxable gain would be subject to 30% income tax.

7. Employee benefit trusts

7.1 Employee benefit trusts are not recognised under Russian law. Theoretically, a Russian company could attempt to claim a corporation tax deduction for a contribution made to the employee benefit trust, but as Russian law is not familiar with this concept, the likelihood of the tax authorities accepting such a deduction would appear to be fairly low.

7.2 From a strict legal perspective, an employee who is a beneficiary of a discretionary employee benefit trust should not be taxable for that reason alone. Such an employee should be taxed when he actually receives a benefit from the trust on the same principles as described in paragraph 4.1.1.

8. Data protection

8.1 Russian personal data legislation contains detailed requirements regarding the processing of an individual's personal data.[15] Russian employment legislation

[15] It should be noted that restrictions regarding transfers of an individual's personal data apply to any transfers of such data, including transfers between group companies.

also contains specific requirements with respect to the processing and transfer by an employer of an employee's personal data.[16]

8.2 Subject to certain exemptions, an individual's written consent must be obtained for the processing[17] (including collection, use and transfer) of the individual's personal data.[18] The processing of specified categories of personal data is never exempt from a requirement to obtain such written consent. In particular, written consent is always required for cross-border transfers of an individual's personal data to countries with a lower standard of personal data protection than the standard stipulated by Russian law.[19]

8.3 It is recommended that the documentation governing a particular employee share plan includes a template for each employee's consent for those transactions in relation to which personal data will be required for the purposes of implementing and administrating the plan.[20]

8.4 In certain cases, a notification to the Russian personal data authority may be required prior to commencing the processing of an individual's personal data.[21]

9. Employment law

Russian employment law does not contain any specific regulations with respect to employee share plans. As a general rule, Russian employment law is favourable to employees. However, there are no significant legal difficulties or

[16] These include, inter alia, a prohibition on the transfer of an employee's personal data to any third parties without the prior written consent of the employee.

[17] The term "processing" is defined in Federal Law No. 152-FZ ("On Personal Data" dated 27 July 2006 (the "Personal Data Law") as, among other things, the collection, accumulation, systematisation, storage, specification (updating, alteration), use, dissemination (including transfer), depersonalisation, blocking and destruction of personal data. This definition is drafted very broadly and may be interpreted as including almost any operations involving information on individuals.

[18] These exemptions include, inter alia, processing of personal data which is carried out for the purpose of the fulfilment of an agreement, to which the individual is a party. There is a view that an individual's consent to processing his/her personal data only has to be in writing in cases specified by law (e.g. in relation to the individual's biometric data). However, given that this has not been specifically confirmed by the regulator, we recommend that where the individual's consent is required, this consent be always given in writing.

[19] There is no exhaustive list of criteria for the assessment of the data protection regime standards. As a result, it is recommended that an individual's written consent is always obtained when transferring his or her personal data outside of the Russian Federation.

[20] The content of an individual's written consent is subject to certain statutory requirements.

[21] This requirement does not extend, inter alia, to the processing of: (i) personal data obtained in the course of employment relations with an individual; and (ii) personal data obtained for the purposes of fulfilment of obligations under an agreement to which the individual is a party.

obstacles from an employment law perspective in implementing an employee share plan in Russia. Due to the lack of specific regulations, it is recommended that advice is sought on a case-by-case basis.

Spain

1. Securities law

1.1 **Offer of securities[1]:** Although an offer of securities to the public generally requires the publication of a prospectus[2], there are several exemptions from that requirement, including:

- if the offer is addressed to fewer than 100 natural or legal persons per Member State, other than qualified investors;[3]
- if the total amount of the offer is below €2.5 million over 12 months;[4]
- if the securities are offered, allotted or to be allotted to existing or former directors or employees by their employer or an affiliated undertaking, provided that the securities are of the same class as securities already admitted to trading on a regulated market within the EU and a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.[5]

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[1] The implementation of the Prospectus Directive in Spain was completed in November 2005. The implementation of the Prospectus Directive was completed through a two-stage process: (i) the first stage consisted of the enactment of the Royal Decree-Law 5/2005, of March 11, which intended to implement the core principles of the Prospectus Directive (RLD 5); and (ii) the second stage, which took place after the 1 July 2005 deadline, consisted of the further development of RDL 5 by means of Royal Decree 1310/2005, approved by the Cabinet on November 4, and which came into force on November 16.

[2] The first issue to be analysed in connection with an offer of securities is whether the object of the offer is a transferable security. In this respect, stock options are not considered to be transferable securities and therefore they fall outside the scope of the Spanish law implementing the Prospectus Directive and no prospectus or registration with the Spanish Securities Market Commission (*Comisión Nacional del Mercado de Valores*) (CNMV) is required. This position is confirmed in the explanations that have been published by the CNMV on its official website. These explanations have been drafted by the Markets and Investors General Directorate (*Dirección General de Mercados e Inversore*s) with the sole purpose of providing guidance to issuers on how to comply with the new regulation on public offers and admission to trading of securities. They do not have a normative meaning and do not bind the CNMV.

[3] According to RD 1310/2005, this exception is not considered to be a public offer and therefore no prospectus is required.

[4] Please see footnote 3 above.

[5] In the guidelines published by the CNMV on their official website, it is suggested that, in order to draw up this document, issuers should follow the recommendations detailed in paragraphs 173-176 of the CESR Recommendations.

1.2 **Regulatory issues:** There are no other regulatory issues that affect the offering of securities to employees. However, the implementation of share plans by Spanish companies may be subject to certain corporate requirements.

1.3 **Disclosure:** There are no specific disclosure requirements for employee share plans. However, share plans in which directors and senior executives of Spanish listed companies can participate are subject to certain reporting requirements.

2. Exchange controls

There are no applicable exchange controls in Spain, although there are reporting requirements regarding payments abroad or collections received from abroad[6] and the holding of accounts abroad.[7] In addition, there are reporting requirements where an employee acquires shares in a non-Spanish company.[8]

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[6] Payments abroad by Spanish residents or collections from abroad received by Spanish residents are subject to various reporting requirements, the general rules of which are as follows:

- for payments or transfers abroad made by Spanish residents or collections from abroad received by a Spanish resident, in both cases through a Registered Entity (a deposit entity registered in the official registries of the Bank of Spain), that exceed €50,000, a declaration must be filed with the relevant bank; and
- for payments or collections made in cash or by bankers' draft that exceed €6,010.12, the particulars of the transaction must be declared within 30 days from the date on which the payment is made, by filing a completed B3 Official Form with the Bank of Spain, through a registered bank.

[7] Spanish residents opening foreign accounts abroad must notify the Bank of Spain of the opening (and closing) of the account outside Spain within a month from the date of the opening (or closing) by filing a DD1 Official Form. Holders of foreign accounts may be subject to annual reporting obligations if the aggregate amount of credits and debits to a foreign account exceeds €600,000 in any calendar year (although the Bank of Spain may also request information in other cases) or monthly reporting obligations if either the aggregate amount of its credits or of its debits exceeds €3,000,000.

[8] Regarding the acquisition of shares in a foreign company by a Spanish resident, the following reporting obligations must be fulfilled:

- The Spanish residents holding securities through non-resident entities must provide the Bank of Spain with certain information on transactions over such securities and balances thereof within 10 working days following the end of each month, unless (i) the total balance of negotiable securities held on 31 December of the previous calendar year does not exceed €6,000,000; or (ii) the total amount of transactions over negotiable securities carried out during the previous calendar year does not exceed €60,000,000. In any case, the Bank of Spain may require such holders to provide them with information regarding their transactions or balances within one month following the date on which such a request is made.
- Moreover, the acquisition of securities in a foreign company by Spanish employees constitutes an investment made abroad for Spanish investment control purposes, which entails reporting obligations. These obligations are normally fulfilled by the Spanish bank or stockbroker through

3. Financial assistance

3.1 **Spanish company:** A Spanish limited liability company (*sociedad anónima*) (SA) may provide financial assistance to facilitate the acquisition of its shares (or shares in another group company) by employees of that company.[9] However, a *sociedad de responsabilidad limitada* (SL)[10] may not make advance payments, grant credits or loans, give guarantees or provide financing for the acquisition of its own shares or those of companies within its group.[11] While SAs expressly benefit from the employees' exemption from the prohibition on financial assistance, this exemption does not appear to apply to SLs.[12]

3.2 **Spanish subsidiary of non-Spanish company:** See paragraph 3.1 above.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employing company or its parent company free of charge or at a discount to market value will normally be liable to pay income tax. The tax charge is on the difference

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which the employee holds the shares, but they must be done by the employee if his account is open with a non-resident entity and it constitutes a deposit abroad. Where this is the case, holders of the securities must submit, if the foreign company is listed, Form D-6 within one month following the acquisition of the shares to the Registry of Investments of the General Directorate of Commerce and Investments within the Ministry of Economy (Dirección General de Comercio e Inversiones) (DGCI) only if it (i) acquires more than 10% of the share capital of the foreign company; (ii) acquires a stake in the foreign company which allows him/her to be a member of the board of directors of the company; or (iii) invests more than €1,502,530.27. In addition, annually, during January of each year, a Form D-6 must be submitted stating, among other information, the name of the relevant participating employee, the number of his/her identity card, the number of shares and their value in relation to the previous reporting period. In the case of non-listed companies, holders of the securities must submit Form D-5A within one month following the acquisition.

9 Article 81.2 of *Ley de Sociedades Anónimas* (LSA). The employee share plan exemption from the prohibition on financial assistance does not apply to a *sociedad de responsabilidad limitada* (SL).

10 Article 40.5 of the *Ley de Sociedades de Responsabilidad Limitada* of 1995.

11 By contrast, although, a SA may not advance funds, grant loans, extend real or personal guarantees, or provide any type of financial assistance to a third party for the purchase of its shares or those of its controlling company, such a prohibition will not apply to transactions aimed at facilitating the acquisition of shares in the company or shares in a group company by employees of the company.

12 This may create a conflict between the rules applicable to SAs and SLs where the parent company of the SL is an SA and the shares of the parent company are the object of the financial assistance. In this regard, we believe that in the case of an acquisition of shares in the parent company, the rules of the parent company should apply and not the rules applicable to the subsidiary (if different). This interpretation is supported by the leading commentary in this area. However, it is important to note that a case based on similar facts has yet to be heard, therefore, it is impossible to predict the final outcome of litigation on this point.

between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the 2010 tax year income tax rates range from 24% to 43%.

4.1.2 **Social security contributions:** An employee will be subject to social security contributions on the amount subject to income tax at a standard rate of 6.35% for indefinite employment contracts and 6.40% for fixed-term employment contracts for the 2010 tax year. The maximum earnings threshold for the 2010 tax year is €3,198 per month.[13]

4.1.3 **Tax exemption:** The first €12,000 of taxable benefit received in the form of shares by an employee from his employer or a group company may be exempt from tax if certain conditions are met.[14] The main conditions are that the offer is made to current employees who must then hold the shares for at least 3 years. If the shares are disposed of within 3 years, the previously tax free amount must be declared by the employee as personal taxable income.[15] The employee will be taxed at the relevant rates applicable at the time of the share acquisition (plus interest for late payment).

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** The costs involved in the administration of a share plan and employer social security contributions are deductible.[16] When shares are purchased or a cost is incurred under a recharge arrangement with a foreign parent, the costs are also deductible.[17]

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[13] Therefore, in principle, no contribution is paid on earnings over this amount. Earnings must nevertheless be apportioned in the fiscal year in which they are received and separate additional contributions must be produced for any previous months.

[14] The detailed conditions are:

- the offer is made to current employees;
- the award of shares is made pursuant to the general remuneration policy of the company or group;
- no employee, alone or jointly with his spouse or immediate relatives, holds a beneficial interest of 5% or more in the share capital of any group company; and
- the shares must be held for a minimum of 3 years.

[15] By submitting an income tax return for the tax year in which the shares were acquired.

[16] Invoices should support these costs.

[17] Provided documents to evidence the cost supports the claim (this cost will be categorised as a salary cost).

4.2.2 **Social security contributions:** Employer social security contributions will be payable in respect of shares provided to employees for free or at a discount on the amount subject to income tax at a standard rate (for the 2010 tax year) of 29.90% for indefinite employment contracts, 31.10% for full-time fixed-term employment contracts and 32.10% for part-time fixed-term employment contracts, plus contributions for occupational accidents and illnesses (which range from 0.90% to 8.15%, depending on the type of activity carried out). The maximum earnings threshold for the 2010 tax year is €3,198 per month.[18]

4.3 Tax withholding

The employer must withhold any income tax and social security contributions arising from the acquisition of shares.[19]

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no tax charge on the grant of a share option provided that it is not transferable.[20]

5.1.2 **Exercise:** There is an income tax charge on the exercise of a share option on the difference between the market value of the shares at the date of exercise and the option exercise price. For the 2010 tax year income tax rates range from 24% to 43%.

5.1.3 **Social security contributions:** Social security contributions arise on the exercise of an option on the amount subject to income tax at a standard rate of 6.35% for indefinite employment contracts and 6.40% for fixed-term employment contracts for the 2010 tax year. The maximum earnings threshold for the 2010 tax year is €3,198 per month.[21]

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[18] Therefore, in principle, no contribution is paid on earnings over this amount. Earnings must nevertheless be apportioned in the fiscal year in which they are received and separate additional contributions must be produced for any previous months.

[19] Provided that it exceeds or is not included in the tax exemption referred to above.

[20] Nor assignable.

[21] Therefore, in principle, no contribution is paid on earnings over this amount. Earnings must nevertheless be apportioned in the fiscal year in which they are received and separate additional contributions must be produced for any previous months.

5.1.4 **Tax exemption:** The tax exemption referred to in paragraph 4.1.3 applies if the relevant conditions are met at the time of exercise of the option.[22]

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** The costs involved in the administration of a share plan and employer social security contributions are deductible.[23] When shares are purchased or a cost is incurred under a recharge arrangement with a foreign parent, the costs are also deductible.[24]

5.2.2 **Social security contributions:** Social security contributions arise on the exercise of an option on the amount subject to income tax at a standard rate (for the 2010 tax year) of 29.90% for indefinite employment contracts, 31.10% for full-time fixed-term employment contracts and 32.10% for part-time fixed-term employment contracts, plus contributions for occupational accidents and illnesses (which range from 0.90% to 8.15%, depending on the type of activity carried out). The maximum earnings threshold for 2010 is €3,198 per month.[25]

5.3 Tax withholding

The employer must withhold any income tax and social security contributions arising from the exercise of the option.[26]

6. Taxation of share disposals

The difference between the sale proceeds of the shares and (if lower) the market value of the shares on the date of acquisition is taxed at a fixed rate of 19% on

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[22] In cases where the exemption is not applicable because the requirements are not met or because the benefit obtained by the employee exceeds the exempted €12,000, the taxable income in both cases can be reduced by up to 40%, provided that the taxable benefit is classed as "irregular income". The amount of taxable income which may be exempted cannot exceed 40% of the average annual salary (the average annual salary for 2010 is €22,100) multiplied by the number of years from grant to vesting. This limit may be doubled if the shares are held for at least 3 years and the offer of options was made to all employees (of the company or group company) on the same terms.

[23] Invoices should support these costs.

[24] Provided documents to evidence the cost support the claim (this cost will be categorised as a salary cost).

[25] Therefore, in principle, no contribution is paid on earnings over this amount. Earnings must nevertheless be apportioned in the fiscal year in which they are received and separate additional contributions must be produced for any previous months.

[26] Provided that it exceeds or is not included in the tax exemption referred to above.

the first €6,000 and at 21% on any excess,[27] regardless of how long the shares have been held.[28]

7. Employee benefit trusts

Trusts are not recognised by Spanish law. If a Spanish resident is a potential beneficiary of a discretionary employee benefit trust he will not be subject to tax unless he actually receives benefits. A Spanish company cannot claim a tax deduction for payments made to such a trust.

8. Data protection

In addition to certain other formalities that are required, unambiguous employee consent must be obtained for the collection, processing, assignment and worldwide transfer of personal data in connection with an employee share plan.[29]

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[27] The increased rate of 21% applies to any amount exceeding €6,000 taking into account the entire "savings income" (which includes dividends, interest, capital gains etc) obtained by the employee in the same year.

[28] If the employee was entitled to utilise the tax exemption referred to above, and he/she sells the shares within a period of three years following receipt, then the employee must reassess his/her tax situation by submitting a tax return relating to the tax year in which the shares were acquired.

[29] According to the Spanish law on Data Protection (Organic Law 15/1999, dated 13 December 1999, on Data Protection), the employees involved in a share plan, as data subjects, must first be provided with certain information as regards the personal data processing, such as (i) the purpose of the data processing and the recipients of the data; or (ii) their ability to exercise their rights of access, rectification, deletion and objection.

Moreover, the processing of personal data (including the data transfer) carried out in connection with the share plan will require the prior consent from the employees (being an express written consent necessary in the event that sensitive data is processed).

Finally, as regards the eventual international transfer of employees personal data involved in the share plan, it should be noted that, most of the time, their prior consent will be required and the procedure to carry out the international data transfer will depend on the nature of the personal data processed and the country of destination (e.g. transfers to countries outside the EEA will require prior authorisation from the Director of the Spanish Data Protection Agency).

Although under Spanish regulations, the general rule is that employee's prior consent is required before transferring, communicating or processing any personal data, under Spanish Data Protection law there are also several exceptions to this requirement. One such exception is the existence of a labour relationship. Under a labour relationship:

- No employee consent is required for the processing of personal data provided that such data is required for the maintenance of the relevant labour relationship.
- No employee consent is required for the communication of personal data provided that such communication is for the purposes of furthering the legitimate interests of the employer.

9. Employment law

9.1 Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable. In addition to these general employment law issues, specific issues arising in Spain are mentioned below.

9.2 On termination of employment in certain circumstances, options and similar rights granted under employee share plans can be taken into account in determining the compensation due to the former employee.[30]

9.3 In relation to the treatment of outstanding stock option rights where the employees had been unfairly dismissed, the Labour Courts have decided in certain cases that employees were entitled to keep their existing option rights (including unvested rights) and that these should retain their normal vesting/exercise terms. The reasoning was that the employer could not evade its contractual obligations to the employees by acting unilaterally in an unfair matter. However, the decisions in termination cases which involve share options are issued on a case-by-case basis and are not long-established.[31]

9.4 Unfortunately, the usual exclusion clause found in option contracts and the reference to the contract being governed by the laws of a foreign jurisdiction

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- No employee consent is required for the transfer of personal data provided that there is an agreement between the transferor and the transferee (excluding, therefore, the employee).

Where the transfer does not have a legitimate interest and/or does not have justified purposes or in the case of sensitive personal data, such as religion, race or sexual orientation, the exemptions stated above do not apply.

[30] In this regard, some Regional Labour Courts have limited the classification of salary for severance pay calculation purposes to the income obtained by the employee through the exercise of accrued options in the 12 months preceding the termination. On the other hand, the Supreme Court has established in a recent ruling that, for severance pay calculation purposes, the income obtained by the employee in the exercise should be proportionally distributed along the vesting period (assuming the vesting period is over one year).

[31] In certain cases where the stock option plan did not specifically explain the rules or consequences in the event of unfair dismissals, the Supreme Court applied in their place the regulations contained in the plan for cases of death, retirement or long-term disability. Even if the option contract states otherwise for the events of dismissals, this may not prevent the Courts from disregarding such provision if there is evidence of fraud of law or abuse of law by the employer (e.g. if the dismissal is carried out immediately before the maturity date so as to prevent the employee receiving benefits under the plan).

have generally been disregarded by the Spanish courts. However, these clauses are present in most incentive plans and do no harm.

Sweden

1. Securities law

1.1 **Offer of securities[1]:** Although the offer of securities to the public generally requires the publication of a prospectus, there is an exemption from that requirement where securities are offered only to existing or former directors or employees (of the company or a group company) where the securities are of the same type as securities already admitted to trading on a regulated market within the EEA or related to such instruments,[2] provided a document including information on the instruments and the reasons for and details of the offer is made available. In addition to the CESR Recommendations for such a document, the document must, in accordance with Swedish stock market practice, also include such information as is necessary to enable the investor to make a well-founded assessment of the offer and its consequences, including e.g. information relating to the offeror's financial position and the employee's tax position.[3] There is also an exemption for an offer to fewer than 100 individuals (other than qualified investors) per state within the EEA. The grant and exercise of non-transferable options generally falls outside the Prospectus Directive on the basis referred to in paragraph 2.1 of the first chapter of this guide.

1.2 **Regulatory issues:** There are no other regulatory issues which affect the offer of securities to employees. The company and employees must, however, comply with Swedish insider rules. In addition, the company must comply with good stock market practice when offering securities to its employees.[4]

1.3 **Disclosure:** Managing directors, directors and other senior executives participating in employee share plans must notify their holdings to the Swedish Financial Supervisory Authority.[5]

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[1] The Prospectus Directive was implemented into Swedish law on 1 January 2006.

[2] The Government Bill preceding the amendments to Swedish law implementing the Prospectus Directive gave examples of what may constitute related securities, including convertibles or warrants with respect to the securities already admitted to trading.

[3] In addition, other relevant rules should be taken into consideration, such as statements and guidelines from the Swedish Securities Council (*SW Aktiemarknadsnämnden*) and the other actors on the financial markets.

[4] The Swedish Corporate Governance Code contains certain provisions regarding share and share price-related incentive programmes. Certain regulated businesses, such as credit institutions, investment funds and fund management companies, are subject to specific regulations and guidelines governing remuneration policies issued by the Swedish Financial Supervisory Authority.

[5] Holdings of non-transferable options are normally not subject to a notification obligation.

2. Exchange controls

When a payment exceeding SEK150,000 is remitted abroad, the bank making the remittance must notify the tax authorities.

3. Financial assistance

3.1 **Swedish company:** Under Swedish company law, a Swedish limited liability company may not provide loans or security to a shareholder, managing director or director of the company or a group company, or to a person related to such a shareholder, managing director or director. Furthermore, a Swedish limited liability company may not grant an advance, provide loans or security for the purpose of financing the acquisition of its shares or shares in a parent company or a fellow subsidiary in the same group of companies, although there is an exemption for advances, loans and security to employees if certain conditions are met.[6]

3.2 **Swedish subsidiary of non-Swedish company:** It appears that a Swedish company is not prohibited from providing financial assistance (by way of loan or otherwise) for the purpose of financing the acquisition of shares in a non-Swedish parent company. However, the position is not certain and has never been tested in a Swedish court.

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6 The prohibition against granting advances, providing loans or security for the purposes of financing the acquisition of shares in the company or in a parent company or a fellow subsidiary in the same group does not apply where the borrower is an employee of the company or a group company, provided that:

- the value of the offered advance, the loan amount or the security, when added to other advances, loans and security from the company or another company in the same group of companies made for the purpose of the acquisition of shares, does not exceed SEK 84,800 (2010); and
- the offer is addressed to at least half of the employees of the company and, with respect to advances or loans, entails that the offered amount is to be repaid within five years by regular repayments.

In addition, advances, loans or security may only be granted if there will still be full coverage for restricted equity and if it is justifiable taking a number of parameters into account.

The prohibition against provision of loans or security to a shareholder, managing director or director of the company or a group company, or to a person related to such a shareholder, managing director or director, described above, would still apply.

If a Swedish company makes a loan in SEK with no or low interest to its employees, the employees will be taxed on the difference between the interest rate for Government borrowing (measured in accordance with certain provisions) plus 1% and the agreed interest rate. Similar rules apply to loans in other currencies. If the employee receives a cash gift, the gift is taxed as income from employment.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares in his employing company or its parent company free of charge or at a discount to market value will normally be liable to pay income tax. The tax charge is on the difference between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the 2010 income year income tax rates range from approximately 31% to 57%. An exemption may apply if shares are offered at the same time to persons other than employees.[7]

4.1.2 **Social security contributions:** An employee will be subject to social security contributions on the amount subject to income tax at a rate of 7% on income up to SEK 412,377 for the 2010 income year. The social security contributions reduce the income tax by a corresponding amount and are included in the marginal tax rates stated in paragraph 4.1.1.

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** A Swedish subsidiary may be entitled to deduct any costs incurred or charged by the parent company. However, the position is complex and specific advice should be sought in each case.[8]

4.2.2 **Social security contributions:** Employer social security contributions will be payable in respect of shares provided to employees for free or at a discount on the value of taxable benefits received by the employees at a rate of, generally, 31.42% for the 2010 income year.[9] Employer social security contributions are not subject to any earnings caps.

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[7] An employee is not taxed on the acquisition of shares in a limited liability company or in a company belonging to the same group, even if the consideration payable is less than market value, provided that:

- shares have been acquired pursuant to a simultaneous offer by persons other than employees and shareholders (including Board Members and Deputies) of the company (or group companies), on the same terms as those applying to the employees;
- employees' and existing shareholders' acquisitions of shares have not, in total, exceeded 20% of the total number of offered shares; and
- the employee has not acquired shares for an amount exceeding SEK 30,000.

[8] In a case involving a plan which delivered free shares, The Supreme Administrative Court permitted an employing company to claim a corporation tax deduction equal to the value of the shares delivered to its employees.

[9] The cost of employers' social security contributions is tax deductible for the employer.

4.3 Tax withholding

The employer is only liable to withhold tax from the employee's cash salary (and cash benefits) in the month in which the benefit is received. Where there is insufficient cash salary to cover the necessary withholding then the employee is required to pay the shortfall to the Swedish Tax Agency.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no tax charge on the grant of a share option if the option is deemed to be an employee share option and, as such, is not treated as a security. This will, generally, be the case if the option is not transferable and will lapse on cessation of employment.[10] If the share option is deemed to be a security, and is deemed to have been fully acquired at grant, then taxation occurs at grant.

5.1.2 **Exercise:** There is an income tax charge on the exercise of an employee share option (which is not a security) on the difference between the market value of the shares at the date of exercise and the option exercise price. For the 2010 income year income tax rates range from approximately 31% to 57%.[11]

5.1.3 **Social security contributions:** Social security contributions arise on the exercise of employee share options at a rate of 7% for the 2010 income year on income up to SEK 412,377[12]. The social security contributions reduce the income tax by a corresponding amount and are included in the marginal tax rates stated in paragraph 5.1.2. If the share option is a security, social security contributions arise at grant (see paragraph 5.1.1).

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[10] The acquisition of securities (for example share options) below market value is a taxable benefit. This is generally true even if the securities are subject to some sale or transfer restrictions. If, on the grant of a share option, an employee is deemed to have acquired a security, he will be taxed on that grant. However, not all options are deemed to be securities. Employee share options which lapse on cessation of employment and which are not transferable are generally not regarded as securities. In these circumstances, an employee who is granted an employee share option is deemed to have received a taxable benefit only when the option is exercised. The value of the benefit is the difference between the market value of the shares on the day the option is exercised and the exercise price paid for the shares. Any premium paid for the option may be deducted when the taxable benefit is calculated.

[11] In certain cases a flat rate tax of 25% may instead be imposed if the employee share option holder becomes non-resident for tax purposes in Sweden before the time of exercise.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** A Swedish subsidiary may be entitled to deduct any costs incurred or charged by the parent company. However, the position is complex and specific advice should be sought in each case.[13]

5.2.2 **Social security contributions:** Social security contributions arise on the exercise of an employee share option in circumstances where an employee has been covered by Swedish social security during the vesting period[14]. The rate for employer social security contributions is, generally, 31.42% for the 2010 income year.[15] Employer social security contributions are not subject to any earnings caps. If the share option is a security, employer social security contributions arise at grant (see paragraph 5.1.1.).

5.3 Tax withholding

The employer is only liable to withhold tax from the employee's cash salary (and cash benefits) in the month in which the benefit is received. Where there is insufficient cash salary to cover the necessary withholding then the employee is required to pay the deficit to the Swedish Tax Agency.

6. Taxation of share disposals

6.1 Any gain realised on a sale of shares is taxed as capital income at a rate of 30% for the 2010 income year. Capital gains on unlisted shares are, under certain circumstances, taxed at a rate of only 25%. The gain is the difference between the sale price and the acquisition cost of the shares (calculated according to the "average method").[16] The acquisition cost is the total of the price paid by the employee and the value of the taxable benefit at the time of acquisition.

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[12] Unless taxed under the special flat rate tax rules described in footnote 11.

[13] In a case involving an employee share option plan, The Supreme Administrative Court permitted an employing company to claim a corporation tax deduction equal to the value of the shares acquired by its employees, less the exercise price paid by the employees.

[14] To be paid by the employer for which the employee performed the work that entitled him/her to be granted the options.

[15] The cost of employers' social security contributions is tax deductible for the employer.

[16] This means that the acquisition cost is calculated by using the average acquisition cost for all shares of the same type and class.

6.2 Alternatively, if the shares are quoted, the tax payer may choose to calculate the acquisition cost as 20% of the net sale proceeds. Special tax rules apply to holders of shares in close companies.

7. Employee benefit trusts

7.1 Generally, a Swedish resident who is a potential beneficiary of a discretionary trust (but has no immediate right to any benefits and may not demand that shares are distributed), will not be subject to any tax on property held by the trust. This is the case provided that the trust is not deemed to be transparent for Swedish tax purposes. An employee will be subject to income tax when he receives a benefit or when he becomes entitled to receive a benefit.

7.2 It may be possible for an employer to obtain a corporation tax deduction if an employee benefit trust can be structured as a foundation under Swedish law.[17] A Swedish subsidiary may be entitled to deduct any payments it makes to establish and/or fund the trust. However, the position is complex and specific advice should be sought in each case.

[17] Foundations formed under Swedish law for the benefit of employees (“profit-sharing foundations”) are sometimes used by companies in Sweden. Such foundations are established by the employees of a company and are funded by contributions, in shares or cash, made by the company. Although profit-sharing foundations and employee benefit trusts are not synonymous, some conclusions may be drawn from the tax treatment of profit-sharing foundations which may be applicable to employee benefit trusts.

Contributions by employers to profit-sharing foundations can be tax deductible provided that:

- the object of the contribution is to reward the employees of the contributing company;
- the foundation is administered in such a way that the employees' entitlement to allocations from the fund is secured; and
- in the event of a liquidation of the foundation, any proceeds would be distributed among the employees as beneficiaries of the fund.

Arguably, if an employee benefit trust is structured to fulfil the above requirements, the employer may claim a tax deduction on payments to such a trust.

The employer must pay social security contributions at a rate of 24.26% (income year 2010) on the value of contributions to a profit sharing foundation. No social security contributions (employees' or employer's) are due when the foundation makes distributions to the employees, provided that the contributions have been held on trust for not less than three years and that at least one third of the employees are beneficiaries of the foundation (this does not apply for distributions to certain executives, partners or those related to such persons in close companies).

8. Data protection

Employee consent should be obtained for the collection, processing and worldwide transfer of personal data in connection with an employee share plan.[18]

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[18] According to the Swedish Personal Data Act (the PDA), processing of personal data is lawful provided that the data is processed in accordance with the fundamental requirements (derived from the applicable EU Directives) set out in the PDA and that:

- the data subject consents to this processing; or
- a statutory exemption to the consent requirement applies.

A number of issues arise in Sweden regarding whether or not employee consent has been provided voluntarily, and can therefore be said to be valid. However, these issues are outside the scope of this guide.

Personal data may be processed without consent if the processing is necessary for certain purposes listed in the PDA, for example the performance of a contract with the data subject (the Contract Exemption), compliance with legal obligations, protecting vital interests of the data subject and for public interest reasons. Also, personal data may be processed without consent provided that a legitimate interest of the processor is more important than the data subject's interest in being protected against a violation of his/her personal integrity (the Legitimate Interest Exemption).

If consent has not been obtained from the employee and the employee share scheme is included in a contract (e.g. the employment contract or in a separate employee share scheme contract) then the processing necessary for the performance of the contract will be lawful under the PDA pursuant to the Contract Exemption. However, if the employee share scheme is not expressly governed by a contract then the Contract Exemption is unlikely to apply and express employee consent, or the fulfilling of another exception stated in the PDA, will be required.

In cases of the employee share scheme not being expressly governed by a contract, the Legitimate Interest Exemption, which covers all data processing except for worldwide transfer, is likely to be applicable to all processing necessary for the administration of the employee share scheme, provided that the data processing only relates to employees who have previously expressed interest in participating in the employee share scheme.

Under the PDA, personal data may not be transferred to a country outside the EU and EEA. However, there are several exceptions to the prohibition.

In order to avoid any uncertainties (especially if the share scheme involves transfer of personal data to a third country), it is recommended that the consent of employees to the processing of personal data is obtained.

If the employee share scheme is not expressly governed by a contract, then an employee should, in general, be informed that the administration of the employee share scheme will require the processing of personal data and what the processing entails.

It should be noted that the PDA strictly regulates the processing of personal identity numbers and certain sensitive data such as health records. It should also be noted that the processing of personal data may necessitate the appointment of a personal data representative and/or notifying the supervisory authority.

9. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable.[19]

[19] According to Swedish employment and labour law, an employer may, in the case of a failure to consult with the trade union(s), be liable for damages to the trade union(s) with which the employer is bound by a collective bargaining agreement.

The United Kingdom

1. Securities law

1.1 **Offer of securities:** As noted in the first chapter of this guide, the offer of securities to the public generally requires the publication of a prospectus. There are certain exemptions from that requirement that may be relevant to employee share plans. Details of these exemptions are set out in the first chapter of this guide.[1]

1.2 **Regulatory issues:** The operation of an employee share plan and the distribution of explanatory material normally falls within exemptions from the need for approval under the UK financial services legislation. The exemptions do not extend to the giving of investment advice and the wording of employee communications should be carefully reviewed to exclude investment advice.

1.3 **Disclosure:** Extensive disclosure obligations exist under UK financial services and markets law, in particular in relation to dealings in shares by directors and other persons discharging managerial responsibilities.

2. Exchange controls

There are no exchange controls in the UK.

3. Financial assistance

3.1 **UK company:**

3.1.1 *Public limited companies:* Financial assistance is permitted in relation to the acquisition of shares in a UK company, provided that it is given for

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[1] Under the Prospectus Directive, where a company offers securities to the public in the EU, or its shares are admitted to trading on a regulated market in the EU, it needs to issue a prospectus which must contain extensive information about the company, including financial statements prepared in accordance with International Accounting Standards (or equivalent). However, as noted in the first chapter of this guide, CESR has issued "short-form" prospectus rules in connection with share offers to employees. There are a number of useful exclusions and exemptions from the obligation to provide a prospectus, in particular where the total consideration of the offer (measured over a 12 month period) is less than €2.5 million, or where the offer is made to fewer than 100 persons per member state. Furthermore, a company which has securities listed on a regulated market in the EU does not need to issue a prospectus when it makes an offer to its employees or former employees provided that it makes available a short information document setting out certain details of the offer. The information requirements for the information document follow those set out in CESR's Paper of February 2005. The UK regulatory authority, the FSA, has expressed the view that the grant and exercise of employee share options would not normally require a prospectus.

the purposes of an employee share plan subject to certain requirements relating to the company's net assets.

3.1.2 *Private limited companies*: As from 1 October 2008 the financial assistance provisions for private limited companies were, subject to some exceptions (e.g. where the financial assistance is given by a private subsidiary for the acquisition of shares in a public holding company), abolished in the UK. Financial assistance is now permitted in relation to the acquisition of shares in a private limited company, whether for the purposes of an employee share plan or otherwise.

3.2 **UK subsidiary of non-UK company:** A UK company is permitted to give financial assistance to its UK employees to enable them to acquire shares in a non-UK parent company.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 **Tax:** An employee who acquires shares (which are not subject to restrictions) by reason of employment at a discount to market value or free of charge, will normally be liable to pay income tax. The tax charge is on the difference between the market value of the shares at the time of acquisition and the amount, if any, paid for the shares. For the tax year 2010-2011 (6 April - 5 April), tax rates range from 20% to 50%.[2]

If an employee acquires shares by reason of employment and the shares are subject to a risk of forfeiture which will be lifted within 5 years of acquisition, there will be no tax charge on acquisition, unless the employee elects to pay tax at that point. There may be a later charge to income tax when the shares cease to be subject to the risk of forfeiture or cease to be subject to other restrictions (e.g. restrictions on dividend rights) or are disposed of by the employee. Additional tax charges may arise if share values are artificially reduced or increased.[3]

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[2] The 50% tax rate is a new highest marginal tax rate which was introduced from the 2010-2011 tax year. The 50% tax rate applies to income over £150,000.

[3] Tax charges may apply to shares which have a value which has either been artificially depressed by at least 10% within 7 years before the date on which the employee acquires them or artificially enhanced by at least 10% in any tax year (6 April - 5 April) after the employee acquires them. Income tax may also arise where shares are disposed of for more than market value, if the employee receives post-acquisition benefits in connection with the shares or where partly paid shares are purchased.

4.1.2 **Social security contributions:** An employee will be subject to social security contributions[4] on, broadly, the amount subject to income tax if the shares are "readily convertible assets" (RCAs). Shares will be RCAs if they are quoted on a stock exchange, are subject to trading arrangements (for example, if there is an internal market for the shares), or do not satisfy the conditions permitting the relevant employer to obtain a UK corporation tax deduction (see paragraph 4.2.1 below). The normal rate of employee social security contributions is 11% for the tax year 2010-2011. Employee social security contributions are capped at this rate at £844 per week, and arise at a rate of 1% for income in excess of this amount.[5]

4.2 Employer tax and social security contributions

4.2.1 **Corporation tax deduction:** An employer is entitled to a statutory corporation tax deduction in relation to benefits received by its employees under its (or its parent company's) employee share plans, subject to certain conditions.[6] Generally, the deduction equates to the amount on which the employee is subject to income tax in respect of the acquisition of the shares.[7]

If a statutory tax deduction is not available, it may still be possible to obtain a deduction in respect of contributions made to an employee trust which acquires shares pending transfer to employees. Even where a deduction is available in these circumstances, the deduction will be delayed until the employee incurs an income tax and social security contributions charge and careful structuring is needed to ensure that a deduction is obtained.

4.2.2 **Social security contributions:** Employer social security contributions will be payable in respect of shares provided to employees for free or at a discount if the employee is subject to social security contributions (see paragraph 4.1.2). Employer social security contributions are charged at

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[4] Known as National Insurance Contributions in the UK.

[5] Note that as from the 2011-2012 tax year, employee NIC rates are to be increased by 1% i.e. the employee rates will be 12% up to the salary cap and 2% in excess of the salary cap.

[6] The statutory corporation deduction applies to accounting periods beginning on or after 1 January 2003.

[7] The statutory corporation tax deduction is also available where there is no UK tax liability because the shares have been acquired under a tax-favoured share plan.

a rate of 12.8% for the tax year 2010-2011[8]. No earnings cap applies in the case of employer contributions.

4.3 Favourable tax regime

Employees may acquire shares free from income tax and social security contributions under a tax approved Share Incentive Plan (SIP).[9] A SIP can be

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[8] Note that as from the 2011-2012 tax year, employer NIC rates are to be increased by 1% i.e. the employer NIC rate will be 13.8% (uncapped).

[9] The approved share incentive plan (SIP) operates in conjunction with a UK based trust. The main features are the following:

- all UK tax-ordinarily resident employees (both full-time and part-time) must be invited to participate in the SIP although employees can be required to have completed a minimum qualifying period of employment before they can participate (being not more than 18 months). The SIP permits the award of "free", "partnership", "matching" and "dividend" shares. A company may offer all or part of this combination of shares, although matching shares may only be offered to employees who have bought partnership shares and dividend shares can only be awarded in conjunction with one of the other types of shares;
- free shares may be awarded up to the statutory limit (currently £3,000 per employee each tax year 6 April - 5 April). The award of free shares must be made on "similar terms" although free shares may be awarded by reference to criteria such as remuneration or length of service. Free shares must normally be held in the SIP trust for between 3 and 5 years (the holding period is set by the company);
- free shares will be exempt from income tax and social security contributions if they are held in the SIP for 5 years. Employees who take their free shares out of the SIP between 3 and 5 years will normally pay tax and social security contributions on the lower of their market value at the time they were awarded and the value at the date of withdrawal (unless the employee leaves employment for certain "good leaver" reasons e.g. death, injury, redundancy or retirement, in which case the employee will also receive favourable tax treatment). Free shares may be made subject to forfeiture if the employee leaves within 3 years except for one of the "good leaver" reasons mentioned above;
- partnership shares are bought out of employees' pre-tax salary up to the statutory limit (currently £1,500 of shares in any one tax year or 10% of salary, if less). The contributions may be used to buy partnership shares monthly or be accumulated over a period of up to 12 months (in which case the number of shares acquired is based on the lower of the value of the shares at the start and end of the period);
- partnership shares may be withdrawn from the SIP at any time, but will be subject to income tax and social security contributions on their market value at the time of withdrawal if employees take them out of the SIP within 3 years (unless the employee is leaving employment for one of the "good leaver" reasons mentioned above). Employees who take their partnership shares out of the SIP after 3 years will normally pay income tax and social security contributions on the lower of the amount of partnership share money used to buy the partnership shares and their value at the date of withdrawal, unless the employee is leaving for one of the "good leaver" reasons. Partnership shares kept in the SIP for 5 years will be free of income tax and social security contributions;
- employees who buy partnership shares may also be awarded additional shares for no cost (matching shares) to a maximum of two matching shares for each partnership share. Matching

operated in several ways. First, employees can be awarded free shares in the employer or its parent company (free shares). Secondly, employees may use pre-tax salary to buy shares (partnership shares). The employer can provide an incentive to the employee to buy partnership shares by providing additional free shares on a matching basis (matching shares). Finally, employees can reinvest dividends received on shares held in the SIP to buy additional shares (dividend shares). A company may offer all or some of these types of share.

In order for a SIP to qualify for tax benefits, a number of conditions must be met. The most important conditions are that all UK employees of the company and its subsidiaries must be allowed to participate (although the company may impose a qualifying period of service subject to certain limits), no more than £3,000 worth of free shares can be given to any one employee each tax year (6 April - 5 April) and employees cannot authorise a deduction of more than £1,500 in each tax year (or 10% of annual salary, if lower) from their pre-tax salary to buy partnership shares. Shares awarded under the SIP must be held in a special SIP trust.

If a SIP is approved by HM Revenue & Customs, no income tax or social security contributions arise at the time shares are awarded to participants. Employees who keep their shares in the SIP for 5 years (or who are "good leavers" within that period) pay no income tax or social security contributions on

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shares must also be subject to a holding period of between 3 and 5 years. The income tax and social security contributions position in relation to the matching shares is the same as for free shares;

- matching shares may also be subject to forfeiture (i) if the employee leaves within 3 years unless the employee leaves employment for one of the "good leaver" reasons (in which case the employee will also receive favourable tax treatment), or (ii) if the employee withdraws his partnership shares out of the SIP within 3 years;
- employees may be permitted to reinvest dividends paid on any shares held in the SIP up to the statutory limit which is currently £1,500 per employee each tax year. Dividend shares must also be subject to a holding period of 3 years unless the employee leaves. If this happens, the dividend shares are transferred out of the SIP and the original dividends are subject to income tax (unless the employee leaves for one of the "good leaver" reasons). However, social security contributions are not payable in any circumstances. After 3 years, dividend shares may be withdrawn from the SIP free of income tax;
- if the employee is liable to pay social security contributions on his free, matching or partnership shares under the SIP, the employer will also have a liability to social security contributions. However, social security contributions (employee's and employer's) will only be payable if the shares are RCAs (see 4.1.2 above); and
- employees who keep their shares in the SIP until they sell them will not have any capital gains tax to pay. If shares are withdrawn from the SIP and sold later, the employee will only be liable to capital gains tax on any increase in value of those shares after they come out of the SIP.

those shares. The employee will only be liable to capital gains tax on any increase in the value of the shares after they have come out of the SIP.

An employer has a statutory right to deduct from its taxable profits contributions made to a SIP, provided the statutory requirements are met. There is also a statutory right to deduct the costs of setting up a SIP from taxable profits.

4.4 Tax withholding

The employer must withhold within strict time limits any income tax and social security contributions due if the shares are RCAs.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** There is no tax charge on the grant of a share option.[10]

5.1.2 **Exercise:** There is an income tax charge on the exercise of a share option on the difference between the market value of the shares at the date of exercise and the option exercise price (plus the amount, if any, paid for the option). For the tax year 2010-2011, tax rates range from 20% to 50%.

5.1.3 **Social security contributions:** Social security contributions are charged on the exercise of options if the shares are RCAs at the time of exercise. The amount on which social security contributions are chargeable is broadly the same as for income tax. The normal rate of employee social security contributions is 11% for the tax year 2010-2011. Employee social security contributions are capped at this rate at £844 per week, and arise at a rate of 1% for income in excess of this amount.

5.2 Employer tax and social security contributions

5.2.1 **Corporation tax deduction:** A company will be entitled to a statutory corporation tax deduction in relation to the exercise of options in the circumstances described in paragraph 4.2.1 above. The deduction will be the amount on which the employee is subject to income tax on the exercise of the option.

[10] The treatment outlined in paragraph 5.1 will only apply where the arrangements under which the share options are granted do not have as their main purpose or one of their main purposes the avoidance of tax or social security contributions. There are special provisions that apply where there is such an avoidance purpose and these operate to remove the exemption from tax on the grant of the option.

5.2.2 **Social security contributions:** There is a charge to employer's social security contributions if social security contributions are charged on exercise of an option (as set out in paragraph 5.1.3 above). Employer social security contributions are charged at a rate of 12.8% for the tax year 2010-2011 and no earnings caps apply.

5.3 Favourable tax regimes

5.3.1 **CSOP[11]:** The tax approved company share option plan (CSOP) offers tax benefits if a number of conditions are met. The most important conditions are that the plan must only be open to employees and full-time directors, the option exercise price cannot be less than the market value of the shares at the time the option is granted and no individual employee may hold options under the plan with a total option exercise price of more than £30,000.

No tax or social security contributions will be chargeable on exercise of an option granted under a tax approved CSOP, provided that the option is exercised between 3 and 10 years from its grant date (or earlier in the case of specified "good leavers").

The CSOP is flexible as the company has discretion to select which directors and employees will be granted options under the plan and to decide the number of shares to which the option relates. As a result of the £30,000 individual limit, it is common for companies to use a separate plan to permit the grant of "unapproved" options in excess of

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[11] The main features of the CSOP, sometimes known as an approved executive share option plan, are as follows:

- a CSOP is open only to employees and full-time directors. "Full-time" is defined as working 25 hours a week;
- unlike sharesave plans and SIPs, the CSOP is a discretionary plan. The board of the company which establishes the CSOP has discretion to choose which employees may participate and the number of shares to be made available to each of them;
- employees are granted options to acquire shares at an option exercise price which must not be less than the market value of the shares at the time the option is granted. No individual employee can hold options with a total option exercise price of more than £30,000; and
- no tax is charged on the grant of the option nor on its exercise, provided it is exercised between 3 and 10 years after the grant date. If the option is exercised at any other time, the employee is subject to an income tax charge (and social security contributions if the shares are RCAs) as if the option were not granted under an "approved" plan (see 5.1.2 above). Exceptionally, certain "good leavers" (e.g. employees made redundant) may be able to exercise their options within 3 years of grant without triggering a tax or social security contributions liability.

the £30,000 limit. Unapproved options are taxed as described in paragraphs 5.1 and 5.2.

The statutory corporation tax deduction referred to at paragraph 5.2.1 is available even if the employee does not in fact pay income tax on the exercise of an option because the option is granted under an approved plan and is exercised in circumstances where the employee is not subject to income tax on exercise.

5.3.2 **Sharesave plan:**[12] The tax approved sharesave plan is an all-employee share option plan under which employees are granted options to acquire shares on condition that they agree to make savings into a special savings account, with the savings being used to pay the exercise price at the end of the savings period. The most important conditions for approval of a sharesave plan are that all UK employees and full time directors must be offered the opportunity to participate in the plan (although the company may impose a qualifying period of service of up to 5 years), the option exercise price must not be less than 80% of the market value of the shares and the savings contract must last either 3 or 5 years.

No tax will usually be chargeable on the exercise of an option granted under a tax approved sharesave plan. Social security contributions are

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[12] The main features of the sharesave plan are the following:

- all UK tax-ordinarily resident employees (full-time or part-time) with 5 or more years service must be invited to take part in the plan. In practice, most companies choose a much shorter eligibility period (e.g. 6 to 12 months);
- employees who wish to participate must enter into a 3 or 5 year savings contract with a bank or building society. The employee must agree to save between £10 and £250 a month for 3 or 5 years. After 3 or 5 years the savings contract comes to an end and the employee becomes entitled to receive his savings plus interest, where applicable (currently no interest is payable in respect of 3 year contracts entered into from 14 May 2010). The amount of interest is fixed at the start of the savings contract so the amount due at the end of the savings contract is already known;
- when the savings contract is entered into, the company grants the employee an option to acquire shares. The option exercise price cannot be less than 80% of the market value of the shares at the time the option is granted. The number of shares comprised in the option is calculated by reference to the savings and interest due at the end of the savings contract, divided by the exercise price. When the savings contract ends, the employee will be entitled to the savings and interest which he can use to exercise the option if he wishes. Alternatively, he may retain the savings and interest; and
- there is no tax charge on the grant of the option, nor (except in limited circumstances) on its exercise, nor is there any tax charge on the interest acquired under the savings contract. The only tax liability arises when the employee later sells the shares.

not payable in any circumstances in connection with the grant or exercise of an approved sharesave option.

The statutory corporation tax deduction referred to at paragraph 5.2.1 is available even if the employee does not in fact pay income tax on the exercise of an option because the option is exercised in circumstances where the employee is not subject to income tax on exercise of the option.

5.3.3 **EMI plan:**[13] The enterprise management incentive plan (EMI) is an option arrangement which allows a company to grant options over up to £3 million worth of shares to employees. It is designed for smaller companies, particularly those in the high technology sector.

Options will only qualify for EMI treatment if a number of conditions are met, the most important of which are that only companies which are independent (i.e. not controlled by another company), have gross assets of no more than £30 million and operate in certain business sectors can grant EMI options. In addition, from 21 July 2008[14] EMI is only available to a company which (together with any subsidiaries) has fewer than 250 employees in aggregate.

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[13] Under the EMI plan, options over up to £3 million worth of shares may be granted to employees although no individual employee may be granted more than £120,000 (increased from £100,000 from 6 April 2008) worth of shares (by reference to market value at the time of grant). No income tax or social security contributions are chargeable on either the grant or exercise of EMI options provided the exercise takes place within 10 years of grant and the exercise price is not less than the market value of the shares at the date the options were granted. To be eligible to operate an EMI, a company must be independent (i.e. not under the control of another company) and its gross assets must not exceed £30 million. Therefore, it would not be possible for a UK subsidiary of a foreign parent company to operate an EMI as it would not be "independent". In addition, from 21 July 2008, EMI is only available to companies which (together with its subsidiaries) has fewer than 250 employees in aggregate. Previously, there was no limit on the number of employees which a company may have in order to qualify.

Companies established outside the UK can establish EMI for their UK employees, so long as those companies are carrying on a "qualifying trade" in the UK and they can generally meet the EMI requirements. Currently, a "qualifying trade" is one which is, amongst other things, carried on "wholly or mainly" in the UK. During 2010, in order to comply with EU state aid guidelines, legislation is to be introduced to relax this requirement so that the company need only have a "permanent establishment" in the UK. The revised requirements are expected to apply to options granted on or after the relevant legislation is given Royal Assent.

Part-time employees count towards the 249 limit on the basis of "a just and reasonable fraction for each part-time employee". This change does not affect EMI options granted by companies prior to 21 July 2008 that have more than 249 employees.

[14] The date on which the UK's Finance Act 2008 was enacted.

Although options are usually granted under plan rules, the rules do not need to be approved by HM Revenue & Customs. The option grant must be structured as an agreement between the grantor company and the employee. The employer must notify HM Revenue & Customs after a grant has been made.

No income tax or social security contributions will usually be chargeable on the grant or exercise of an EMI option provided that the exercise takes place within 10 years of grant and the option was granted at no less than market value at the date the options were granted. The disposal of shares is subject to capital gains tax. The tax advantages of EMI will be lost if an employee holds unexercised options under a CSOP and unexercised EMI options which together have an aggregate market value at the date of grant of the relevant options of more than £120,000.

5.4 Tax withholding

The employer must withhold within strict time limits any income tax and social security contributions due if the shares are RCAs.

6. Taxation of share disposals

6.1 On the sale of shares acquired free or at a discount to their market value, or on the exercise of an option which gives rise to an income tax charge on exercise, the employee will be subject to capital gains tax, based on the sale proceeds less the market value of the shares at the date they were acquired.

6.2 Where the employee was not subject to income tax on exercise of an option under the tax approved CSOP, sharesave plan or EMI, the employee will be subject to capital gains tax on the sale proceeds less the price paid for the shares under the option.[15] Special rules apply to shares acquired under an approved SIP (see paragraph 4.3).

[15] For capital gains tax purposes all of the employee's shares which are of the same class in the same company, are "pooled" together and special "identification" rules apply which determine which shares the employee is deemed to be selling and therefore what price paid is to be used in calculating the liability to capital gains tax.

6.3 For disposals of shares made on or after 6 April 2008 and on or before 22 June 2010 a single CGT flat rate of 18% applied.[16] For disposals of shares made from 23 June 2010 onwards, a new CGT rate of 28% applies, in addition to the existing rate of 18%. For individuals, the rate of CGT remains at 18% where their total taxable gains and income are less than the upper limit of the income tax basic rate band (£37,400 for 2010-2011). The 28% CGT rate applies to gains (or any part of gains) above that limit.[17]

6.4 A UK tax resident is not subject to capital gains tax on the first £10,100 (2010-2011 tax year) of gains each tax year.[18]

7. Employee benefit trusts

7.1 An employee who is a discretionary beneficiary of an employee benefit trust[19] will not be taxable for that reason alone, unless and until he actually receives any benefits. At that point he may be taxed on the receipt of those benefits. In general, an employee who receives benefits from an employee benefit trust is taxed as if he had received the benefit directly from his employer.

7.2 A company may receive any statutory corporation tax deduction in relation to shares received by employees from an employee benefit trust (see paragraph 4.2.1 above). If this is not available, it may still be possible to obtain a deduction in respect of contributions made by the company to the employee benefit trust, although careful structuring will be needed to ensure that a deduction is obtained.

[16] For disposals of shares prior to 6 April 2008, taper relief reduced any taxable gain according to the time elapsed between the date of acquisition and the disposal of shares. Where shares were held by an employee for 2 or more years, taper relief would reduce the taxable gain on the shareholding by 75%, giving an effective rate of tax for a (then) top rate (40%) taxpayer of 10% (2007-2008 tax year). However, as from 6 April 2008, taper relief was abolished.

[17] Gains which arose prior to 23 June 2010 will not be taken into account in determining the rate (or rates) at which the gains of individuals arising on or after 23 June 2010 should be charged. In addition, taxpayers are able to off-set losses and the annual exempt amount (£10,100 for 2010/2011) (see further below) against gains in the way that is most beneficial to them.

[18] A married couple/civil partners may combine their tax free allowances so that in practice capital gains tax is not due on the first £20,200 of gains for the 2010-2011 tax year.

[19] An employee benefit trust is often referred to as employee share ownership plan (ESOP) in the UK. Employee benefit trusts are normally operated with other employee share plans operated by the company, for example a share option plan. ESOPs provide a way of holding existing shares for use with employee share plans.

8. Data protection

8.1 Employees should be fully informed, in advance, of the collection, processing and disclosure of their personal information in connection with an employee share plan.[20]

8.2 The processing should be covered by a registration with the office of the UK Information Commissioner and a series of general "data protection principles" set out in the Data Protection Act 1998 (DPA), should be followed. These include, for example, a requirement that all processing should meet one of a series of specific justifying conditions and requirements in relation to general fair processing, security and destruction when information is no longer needed. Further restrictions will apply if employee information is to be transferred outside the European Economic Area.

8.3 In many cases, companies have taken the approach of obtaining employees' consent to the data processing in relation to an employee share plan as a means of meeting the specific justifying conditions. Some doubt has been expressed as to whether, strictly, such an approach is valid and a possible alternative approach may be for the data processing to be justified on the basis that it is necessary for the purposes of the legitimate interests of the company.

9. Employment law

Please refer to paragraph 4 on pages 5-6 of this guide. This explains the employment law issues which are generally applicable to a greater or lesser degree in all the countries covered by this guide. There is a risk that employees may claim a right to continued participation in an employee share plan or that rights under a plan may be included in compensation on termination. Companies should seek specific advice on these issues and other employment law issues which may be applicable.

10. Further information

A more detailed analysis of employee share plans in the UK can be found in Clifford Chance's publication "Employee Share Plans in the United Kingdom".

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[20] The EU Directive on Data Protection has been incorporated into UK law by virtue of the Data Protection Act 1998.

The United States of America

1. Securities law

1.1 **Offer of securities:** The sale of securities is regulated by both federal and state securities laws. The Securities Act of 1933, as amended (the "Securities Act") provides that all securities offered in the U.S. must either be (i) registered with, the Security and Exchange Commission (the "SEC"), or (ii) exempt from registration. Both the sale or grant and exercise of an option are considered to constitute the offer or sale of the underlying securities.

State securities laws (which also generally require that offers of securities must be registered or exempt) vary from state to state. Some states require certain filings or approvals before offers or grants can be made.

1.2 **Regulatory issues:** Generally, if the issuer is subject to, and is in compliance with the U.S. securities law reporting requirements (i.e. its securities are registered with the SEC), it can then register the securities on Form S-8, which is a short registration statement that applies to employee benefit plans[1]. In addition, a prospectus is required to be distributed to plan participants, and summary information about the plan and the shares being offered to employees is required to be published.

At the federal level, there are various exemptions[2] from the requirement to register the shares which might be available (although compliance with state law registration requirements would still be required). One of the most often used exemptions is Rule 701[3] under the Securities Act, for "Offers and Sales of Securities Pursuant to Certain Compensatory Benefit Plans". To rely on this exemption, the issuer must not be an SEC-reporting company[4]. Sales made in

[1] Generally speaking, registration on Form S-8 (the appropriate form for offers to employees) is only feasible for companies that are already registered with the SEC, and in compliance with the SEC's periodic reporting requirements. Such general registration is only undertaken in connection with capital-raising or listing in the United States, and is not practicable purely for employee offers.

[2] These exemptions are subject to certain limitations on the number or value of securities offered, and/or the number or type of participants.

[3] Rule 701 provides an exemption from the general registration requirement for compensatory arrangements maintained by privately held employers, provided that certain conditions are met.

[4] Offers and sales may be made pursuant to a written compensatory benefit plan established by the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent, for the participation of their employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors and their family members acquiring the securities by gift or domestic relations orders.

reliance on Rule 701 during any consecutive 12-month period may not exceed the greater of (i) $1 million (ii) 15% of the issuer's total assets or (iii) 15% of the class of securities offered.[5] Additional disclosure requirements, discussed below, apply when $5 million of assets have been sold under the plan in a 12-month period.

Offerings to employees may also be made without registration in reliance on Rule 506 of Regulation D. Under Rule 506, an offering only to persons who are "accredited investors" is exempted under the Securities Act and no disclosure is required[6].

It is possible to combine reliance on these two exemptions, and, for example, rely on Rule 506 for offers and sales to employees who are accredited, and Rule 701 for other employees, in order to avoid additional disclosure requirements, although state-level regulation may dictate which exemption is used at the federal level.

Securities sold in the United States pursuant to an exemption from registration are "restricted" under U.S. securities laws and cannot be easily resold in the United States for 12 months.

1.3 Disclosure:

1.3.1 **Federal:** Under Rule 701, an employer must disclose a copy of the compensatory benefit plan or contract to investors. In addition, if the aggregate sales price of the amount of securities sold during any 12 month period exceeds $5 million, the employer must also disclose certain additional information[7]. Further disclosure obligations under anti-

[5] Calculations for (ii) and (iii) are measured at the issuer's most recent annual balance sheet date (if not older than its last fiscal year end).

[6] In order to be "accredited", offerees must: be directors, executive officers or general partners of the issuer; have had incomes of $200,000 (or joint income with spouse of $300,000) for the two most recent years and a reasonable expectation of reaching that level again in the current year; or have net assets (with spouse) of $1 million. In addition, up to 35 non-accredited investors may be included in a Rule 506 offering, but disclosure requirements apply when any non-accredited investors are involved. Nothing needs to be supplied to the SEC (although there is a Form D, it is not a condition of Regulation D that it be filed).

[7] These additional disclosures include the following: (i) if the plan is subject to ERISA, a copy of the summary plan description; (ii) if the plan is not subject to ERISA, a summary of the material terms of the plan; (iii) information about risks associated with investment in securities sold pursuant to the plan; and (iv) financial statements required by Part F/S of Form 1-A under Regulation A. The financial statements must be prepared in accordance with either U.S. generally accepted accounting principles (U.S. GAAP) or International Financial Reporting Standards (IFRS) as issued by the IASB. The financial statements must be no more than 180 days old.

fraud, civil liability or other provisions of federal securities law may also apply.

Rule 506 only requires disclosure in the event that offers or sales are made to non-accredited persons[8].

1.3.2 **State:** Most states do not impose significant disclosure requirements on Rule 701 offerings. In addition, states are pre-empted from imposing disclosure requirements on Rule 506 offerings.

2. Exchange controls

There are no exchange controls in the U.S.A.

3. Financial assistance

3.1 **US company:** Generally, a US company is permitted to give financial assistance to its US employees to enable them to acquire shares in that company. However, a loan which is made to a director or executive officer of a publicly traded US company (or any transaction which could be deemed to be such a loan) may be prohibited under the Sarbanes-Oxley Act 2002. Otherwise, generally, employers can make loans to employees for the purpose of purchasing securities[9].

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[8] That disclosure, however, in most cases is significant, on a level with the disclosure required of SEC registrants, including financial statements prepared in accordance with U.S. GAAP or IFRS as issued by the IASB.

[9] If the loan is "below market" interest and the employee is personally obligated to repay the loan, and if the amount of the loan (and any other below market loan) exceeds $10,000 at any time, then the employee may be treated as receiving taxable income at that time equal to the amount of the foregone interest on the loan under Code Section 7872. In that event, the income, if any, would be spread over the term of the loan if the loan is a demand loan, or treated as received when the loan is made if the loan is a term loan. (A demand loan is generally one that is payable on demand or that is conditioned on the employee's continued performance of services. A term loan is generally any other type of loan.) If the employee is subject to tax under Code Section 7872, he or she will be treated as paying the foregone interest over the term of the loan. The employee may be able to deduct those interest payments under Code Section 163(d) (thereby reducing the amount of foregone interest subject to tax) to the extent that the payments do not exceed his or her net investment income for the year. Any income that the employee is treated as receiving under Code Section 7872 will be subject to income tax at ordinary income rates (as well as social security/Medicare and other employment taxes). Notwithstanding the foregoing, there may be arguments that no imputed interest arises if the loans are of sufficiently short duration.

Loans secured only by underlying shares purchased (i.e. non-recourse) may be viewed as options for U.S. tax purposes.

3.2 **US subsidiary of non-US company:** In general, a US company is permitted to give financial assistance to its US employees to enable them to acquire shares in a non US-parent company.

4. Taxation of share acquisitions

4.1 Employee tax and social security contributions

4.1.1 Tax:

- **Shares:** An employee who acquires shares (which are not subject to any restrictions, as discussed below) would generally recognise ordinary compensation income equal to the fair market value of the shares received (less any amount paid for the shares). The rate of the employee's tax on the ordinary federal income recognised will be based on the individual employee's ordinary income tax rate (currently, in general, from 15% to 35%, depending on the individual's level of income). State and local tax rates vary by location.

- **Restricted stock:** Restricted stock is stock issued to employees that is subject to a "substantial risk of forfeiture" and is subject to transfer restrictions.[10]

  The tax consequences of restricted stock are determined under Section 83 of the Internal Revenue Code of 1986, as amended (the "Code"). Generally, if stock is transferred to an employee in exchange for services, the employee is taxed when the stock is either transferable (free of transfer restrictions and transferable other than to the employer) or is no longer subject to a substantial risk of forfeiture ("substantially vested"). The amount of taxable income is the fair market value of the stock at the time that it becomes substantially vested less any amount that the employee pays for the stock[11]. The rate of the employee's tax on the ordinary federal income recognised will be based on the

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In addition, if the loans are viewed as a margin loan, they will be subject to the Federal Reserve's margin regulations, in which case a number of restrictions may apply. A loan will qualify as a margin loan if it is secured directly or indirectly by margin stock.

[10] Some common restrictions include a prohibition on sale for a specified number of years, forfeiture if the employee terminates employment before completing a specified length of service, and a requirement that the employee sell the stock back to the company at the lesser of cost and the then current fair market value.

[11] Any appreciation (or depreciation) in the stock after it becomes substantially vested is characterised as capital gain (or loss) when the employee sells the stock (long-term or short-term depending on the holding period).

individual employee's ordinary income tax rate (currently, in general, from 15% to 35%, depending on the individual's level of income). State and local tax rates vary by location.

The employee may make an election under Code Section 83(b) to include in income the fair market value of the stock, less any amount paid for the stock, within 30 days of the issue of the granted stock, regardless of applicable restrictions.[12] If such an election is made, the employee does not recognise income when the forfeiture and/or transfer restrictions lapse.[13]

Any dividends paid during the period of restriction are taxed to the employee as compensation income, and the employer will be entitled to a corresponding corporation tax deduction. If the employee makes an election under Code Section 83(b), dividends paid after the date of the election are taxed to the employee as dividend income, rather than compensation income.

4.1.2 **Social security contributions:** At the time the employee recognises compensation income on restricted stock (i.e. when the stock becomes substantially vested, or when the employee makes an election under Code Section 83(b)), the compensation income will be subject to Medicare taxes and social security taxes. Currently, the employee's share of (i) the Medicare tax is at a rate of 1.45% and (ii) the social security tax is at a rate of 6.2%. Social security taxes are not due on compensation income that exceeds the taxable wage base (currently $106,800 for 2010). (The actual full rates (including both employee and employer portions) for Medicare taxes and social security taxes are 2.9% and 12.4% respectively. However, these rates are divided equally between the employer and the employee).

4.2 Employer tax and social security contributions

4.2.1 Corporation tax deduction:

- **Shares:** The employer is generally entitled to a corporation tax deduction equal to the fair market value of the shares (less any amount

[12] The election would be made only if the stock is subject to a substantial risk of forfeiture and is not transferable (i.e. not otherwise taxable).

[13] Subsequent appreciation (or depreciation) after the date of the election is taxed as capital gain (or loss) when the employee sells the stock.

paid by the employee to acquire the shares) when the employee recognises ordinary compensation income with respect to such shares.

- **Restricted stock:** If the employee does not make a Code Section 83(b) election (see paragraph 4.1.1) the employer is generally entitled to a corporation tax deduction when the employee's rights to the stock become substantially vested (e.g. when no longer subject to a substantial risk of forfeiture and/or become transferable). If the employee does enter into a Code Section 83(b) election the employer is generally entitled to a corporation tax deduction at the time the election is made. In either case, the amount of deduction is equal to the amount of ordinary income recognised by the employee.

4.2.2 **Social security contributions:** At the time the employee recognises compensation income (i.e. when the stock becomes substantially vested, or when the employee makes an election under Code Section 83(b)) on restricted stock, the compensation income will be subject to Medicare and social security taxes. Currently, the employer's share of (i) Medicare tax is at a rate of 1.45% and (ii) social security tax is at a rate of 6.2%. Social security taxes are not due on compensation income that exceeds the taxable wage base (currently $106,800 for 2010). (The actual full rates (including both the employee and employer portions) for Medicare and social security taxes are 2.9% and 12.4% respectively. However, these rates are divided equally between the employer and the employee).

4.3 Tax withholding

The employer is required to withhold federal (and, generally, state and local) income and employment taxes when compensation income is recognised by the employee.

5. Taxation of share options

5.1 Employee tax and social security contributions

5.1.1 **Grant:** In general, at the time of grant of a share option, (unless the option is traded on the open market) no taxes will be owed or payable by the employer or employee.

5.1.2 **Exercise:**

- **Non-qualified stock options:** The employee would generally have ordinary compensation income upon exercise equal to the excess (if any) of (i) the fair market value of the stock received upon exercise over (ii) the aggregate exercise price. In addition, compensation income is generally subject to applicable state and local income taxes.

The rate of federal income tax on the income from the exercise of the option will be based on the individual employee's ordinary income tax rate (currently, in general, from 15% to 35%, depending on the individual's level of income). State and local tax rates vary by location.

As noted in paragraphs 5.5 and 5.6 below, options over employer shares with an exercise price that is no less than the fair market value of a share on the date of grant should generally not raise any issues under Code Sections 409A and 457A (provided that the option has no other deferral features).

- **Incentive stock options:** Incentive stock options (ISOs) may only be awarded to employees of a corporation (as well as employees of certain subsidiary and parent entities). The exercise of an ISO generally will not result in any federal income tax consequences, except to the extent it results in an alternative minimum tax for certain taxpayers.[14]

5.1.3 **Social security contributions:** The exercise of an ISO generally will not result in any federal Medicare or social security tax consequences, except in the event of a disqualifying disposition (e.g. where the ISO Holding Period, as described under paragraph 6.2 below, is not satisfied).

On the exercise of a non-qualified stock option, the compensation income arising on exercise (being equal to the excess of (i) the fair market value of the stock received on exercise over (ii) the aggregate exercise price) will generally be subject to Medicare taxes and social security taxes. Currently, the employee's share of (i) the Medicare tax is at a rate of 1.45% and (ii) the social security is at a rate of 6.2%. Social security taxes are not due on compensation income that exceeds the taxable wage base (currently $106,800 for 2010). (The actual full rates (including both the employee and employer portions) for Medicare and social security taxes are 2.9% and 12.4% respectively. However, these rates are divided equally between the employer and the employee).

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[14] In general, upon the exercise of an ISO, the amount by which the fair market value of the shares on the date of exercise exceeds the exercise price will be an adjustment in computing income for purposes of the AMT. The AMT is an alternate tax calculation on income of certain taxpayers, who must pay the greater of ordinary tax or the AMT. This could result in such excess being subject to tax at a rate up to 28% in the year of exercise. In addition, special AMT rules may apply if the shares are disposed of in the same taxable year in which they were acquired.

5.2 Employer tax and social security contributions

5.2.1 Corporation tax deduction:

- **Non-qualified stock options:** An employer is entitled to a corporation tax deduction upon the exercise by an employee of a nonqualified stock option. The amount of the deduction is equal to the ordinary income recognised by the employee.

- **Incentive stock options:** The exercise and qualifying disposition of stock acquired under an ISO will not provide any corporation tax deduction for the employer. However, the employer is entitled to a deduction for the amount the employee recognises as compensation on a disqualifying disposition e.g. where the ISO Holding Period, as described under paragraph 6.2 below, is not satisfied.

5.2.2 **Social security contributions:** At the time the employee recognises compensation income (i.e. when the employee exercises the stock options) the compensation income will be subject to Medicare and social security taxes. Currently the employer's share of (i) Medicare tax is at a rate of 1.45% and (ii) social security tax is at a rate of 6.2%. Social security taxes are not due on compensation income that exceeds the taxable wage base (currently $106,800 for 2010). (The actual full rates (including both employee and employer portions) for Medicare and social security taxes are 2.9% and 12.4% respectively. However, these rates are divided equally between the employer and the employee.)

5.3 Tax withholding

- **Non-qualified stock options:** At the time of exercise of a non-qualified stock option by an employee, an employer is required to withhold federal income and employment (e.g. social security, Medicare and unemployment insurance) taxes on the difference between the fair market value of the stock at the time of exercise and the exercise price.[15]

- **Incentive stock options:** An employer is not required to withhold federal income and employment taxes in connection with the exercise of an ISO or a disqualifying disposition of the stock acquired by an employee pursuant to the exercise of an ISO.

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[15] The income recognised on exercise of a stock option is treated as supplemental wages subject to withholding at the applicable supplemental wages withholding rate.

5.4 **Favourable tax regimes**

5.4.1 **Incentive stock options:** ISOs may only be awarded to employees of a corporation (as well as employees of certain subsidiary and parent entities). An option will qualify for favourable tax treatment, if certain requirements are satisfied.[16] These requirements include that, generally, the exercise price of the ISO must not be less than the fair market value of the underlying stock at the grant date. In addition, the fair market value of the underlying stock (determined at the date of grant) that are first exercisable by the employee in any one calendar year cannot exceed $100,000.

As noted below, grants that qualify as ISOs should generally not raise issues under Code Sections 409A and 457A.

5.4.2 **Employee stock purchase plan:** The purpose of an employee stock purchase plan is to provide eligible employees with the opportunity to acquire company stock through periodic after-tax payroll deductions. Such payroll deductions are applied during designated offering periods and are used to purchase shares of the company's common stock at the conclusion of the applicable offer period (often at a discount to the current fair market value). Under an employee stock purchase plan that meets the qualifications set out in Code Section 423, no taxable income is recognised by the employee either upon receipt of the purchase right, at the time of entry into the offering period or upon actual purchase of shares on the purchase date.

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[16] The requirements that must be satisfied are as follows: An option must be a stock option granted under a written or electronic plan that (i) specifies the aggregate number of shares of company stock (as an ascertainable number (e.g. not as a percentage of shares outstanding from time to time)) that can be issued under the plan (or specifies the total number of shares that may be subject to ISOs), (ii) specifies the employees or class of employees eligible to receive ISOs and (iii) is approved by the shareholders of the adopting corporation within 12 months before or after the adoption. ISOs cannot be granted more than 10 years after the adoption of the plan (or shareholder approval, if earlier), and any plan amendments affecting the number of shares issuable or the eligibility requirements must be approved by the shareholders. In addition, an ISO, by its terms, cannot be exercisable more than 10 years after the date of grant (or five years after grant in the case of a grantee who owns at least 10% of the voting stock of the employer corporation or any parent or subsidiary). The exercise price of the ISO must be no less than the fair market value of the underlying stock at the time of grant (or 110% in the case of an option granted to a 10% owner), and the option generally must expressly be non-transferable. The fair market value of the underlying stock (determined at the date of grant) that are first exercisable by the employee in any one year cannot exceed $100,000. If the plan does not provide for such $100,000 limitation, any excess options will not receive ISO treatment.

To qualify as an employee stock purchase plan under Code Section 423, certain requirements must be met.[17] These requirements include that the exercise price must be at least 85% of the market price of the shares on the date the option is granted or, if so designed, may be the lower of such price and 85% of the market price on the date the shares are purchased. In addition, the maximum fair market value of stock that an employee may accrue the right to purchase under the plan and all similar plans in any calendar year cannot exceed $25,000.

As noted below, plans that qualify under Code Section 423 should generally not raise issues under Code Sections 409A and 457A.

5.5 Application of Code Section 409A

Code Section 409A generally provides that amounts deferred under a non-qualified deferred compensation plan are currently includible in a service provider's gross income to the extent such compensation is not subject to a substantial risk of forfeiture and was not previously included in the service provider's gross income, unless certain requirements are met. Further, non-complying deferrals are subject to an additional 20% tax and additional interest on any underpayment of taxes. As noted above:

5.5.1 **Restricted stock:** Restricted stock is generally not subject to Code Section 409A.

5.5.2 **Stock options:** Stock options are generally not subject to Code Section 409A if (i) granted at fair market value (ii) with respect to "service recipient stock" and (iii) do not have any additional deferral features.

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[17] An employee stock purchase plan under Code Section 423 must meet the following requirements: (i) options are granted only to eligible employees of the employer corporation or its parent or subsidiary corporation; (ii) the plan must be approved by the shareholders of the corporation within 12 months before or after the date the plan is adopted; (iii) 5% owners must be excluded from participation in the plan; (iv) all employees of the designated participating companies must be eligible to participate, with some exceptions; (v) all eligible employees must be given the same rights and privileges under the plan; (vi) the exercise price must be at least 85% of the market price on the date the option is granted or, if so designed, may be the lower of such price or 85% of the market price on the date the shares are purchased; (vii) the term of the option may generally not exceed 5 years (if the purchase price is not less than 85% of the market price on the grant date) or 27 months (if the purchase price is determined in any other manner); and (viii) the maximum fair market value of stock that an employee may accrue the right to purchase under the plan and all similar plans in any calendar year cannot exceed $25,000; and (ix) purchase rights must be non-transferable, other than by will or the laws of descent and distribution and exercisable only by the participant during the participant's lifetime.

During 2010 the Internal Revenue Service ("IRS") issued guidance intended to provide relief to employers who inadvertently or unintentionally fail to comply with the written document requirements under Code Section 409A. The relief generally only applies (i) to inadvertent and unintentional failures to comply with the documentary requirements under Code Section 409A and (ii) if the service recipient (e.g. the employer) takes commercially reasonable steps to (A) identify all other non-qualified deferred compensation plans that have a document failure that is substantially similar to the document failure initially identified and corrected, and (B) corrects all such failures in a method consistent with the issued guidance. The relief is generally not available (i) if the service provider or service recipient's federal income tax return is under examination with respect to non-qualified deferred compensation for any taxable year in which the document failure existed, (ii) if the failure is directly or indirectly related to participation in a "reportable transaction" under Treasury Regulation Section 1.6011-4(b)(2), (iii) if the non-qualified deferred compensation plan is linked to certain other non-qualified deferred compensation or qualified plans, or (iv) with respect to the issuance of a stock right.

Under a special rule, if the non-qualified deferred compensation plan is corrected in accordance with the guidance on or before December 31, 2010, the plan may be treated as having been corrected on January 1, 2009 for purposes of applying such relief and would be treated as if the plan complied with Code Section 409A from the time documentary compliance was required.

5.6 Application of Code Section 457A

Code Section 457A (added under the USA "bailout" legislation in Autumn 2008) generally provides that amounts deferred under a non-qualified deferred compensation plan of a "non-qualified entity" are currently includible in a service provider's gross income to the extent such compensation is not subject to a substantial risk of forfeiture. However, if the deferred compensation is subject to Section 457A but is not readily determinable at the time it is otherwise includible in gross income (e.g. generally at the time of vesting), such amount will be subject to an additional tax of 20%, plus interest on any related underpayment of taxes when such amount becomes determinable. For these purposes, a "non-qualified entity" is generally (i) any non-US corporation unless substantially all of its income is (a) "effectively connected with the conduct of a trade or business in the US", or (b) subject to a "comprehensive foreign income tax", and (ii) any

partnership unless substantially all of its income is allocated to "eligible persons".[18]

Similar to the provisions of Code Section 409A, restricted stock and stock options granted at fair market value are generally not subject to Code Section 457A. However, (unlike Code Section 409A) plans that provide for a right to compensation based on the appreciation in value of an equity unit (such as a stock appreciation right) of the service recipient will generally be subject to Code Section 457A unless they are, among other things, certain partnership interests or stock appreciation rights that are settled in shares.

In general, compensation will not be subject to Code Section 457A if the compensation is paid within 12 months following the end of the service recipient's taxable year in which the right to such amount is no longer subject to a "substantial risk of forfeiture" (the "short-term deferral" exception under Code Section 457A). However, for the purposes of Section 457A, a substantial risk of forfeiture means only that a person's right to compensation is conditional upon the future performance of substantial services by such person (e.g. generally a time-based forfeiture restriction).

6. Taxation of share disposals

6.1 **Non-qualified stock options:** The employee will pay tax at capital rates on any subsequent sale of the stock. If the shares are held for more than one year, the capital gains tax rate on any gain from the sale will be taxed at a maximum rate of 15% (2010 tax year). If the shares are held for one year or less, then the employee will have to pay taxes on any gain from the sale at the employee's personal tax rate. The tax is based on the difference between the employee's basis in the stock (i.e. the market value of the stock on exercise) and the amount received from the sale of the stock.

[18] "Substantially all" income is deemed to be "effectively connected with the conduct of a trade or business in the US" if at least 80% of the corporation's gross income is effectively connected with the conduct of a trade or business in the US, and it is not exempt from US federal income tax pursuant to a treaty. In general, substantially all of the income of a non-US corporation will be considered subject to a "comprehensive foreign income tax" if, for the foreign corporation's taxable year ending with or within the service provider's relevant taxable year (i) either (A) it is eligible for the benefits of an income tax treaty between such country (excluding Bermuda and Netherlands Antilles) and the US, or (B) it demonstrates to the satisfaction of the Secretary of the Treasury that such country has a comprehensive income tax, and (ii) such corporation is not taxed by the country under any regime or arrangement that is materially more favourable than the taxes otherwise generally imposed by such country. In general, substantially all of a partnership's income for a taxable year will be allocated to eligible persons if at least 80% of the gross income of the partnership for such taxable year is allocated

6.2 **Incentive stock options:** If the employee holds the shares received upon the exercise of the ISO for one year from the date he or she exercised such ISO and for two years from the date he or she was granted such ISO (collectively, the "ISO Holding Period"), then the employee will not have any compensation income upon exercise, but will recognise long-term capital gain (or long-term capital loss) upon a subsequent sale of the shares. The amount of long-term capital gain (or loss) recognised is equal to the difference between the amount realised upon the sale of the shares and the purchase price for such shares (i.e. the exercise price of the ISO). The employer would not be entitled to a related corporation tax deduction. (Special rules may apply in the case of non-cash exercises).

If, however, the employee makes a disposition of the shares prior to the expiration of the ISO Holding Period (a "disqualifying disposition"), the employee generally will recognise ordinary income, and the employer generally will be entitled to a corporation tax deduction, in each case equal to the excess of the fair market value of the shares on the date of exercise over the exercise price. Any excess of the amount realised upon such disposition over the fair market value on the date the ISO Holding Period began will be long-term or short-term capital gain depending on the holding period (as determined for purposes of the capital gains rules) involved.

7. Employee benefit trusts

Employee benefit trusts are not generally used for share-based schemes in the USA. Any employee benefit trust for executives would generally need to be a "rabbi trust" and therefore subject to claims of general creditors of the employer. Non-U.S. trusts relating to arrangements not exempt from Section 409A could cause immediate taxation (and penalties) upon vesting of an employee's interest pursuant to Section 409A.

8. Data protection

8.1 With respect to share plans and incentive compensation, there is no comprehensive data protection law that covers all personal data. Instead, there is a collection of various sector-specific federal and state laws that regulate only certain classes of data.[19]

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to persons other than (A) a person with respect to whom such income is not subject to a comprehensive non-US income tax, and (B) a tax-exempt organisation.

[19] Excluding the health care and background-check contexts, most employee information is not covered under these sector-specific laws.

8.2 Notwithstanding the lack of specific data laws, it is recommended that plan enrolment forms should include a written consent, whereby plan participants should expressly authorise the use and disclosure of their data for all purposes of the plan. In addition, plan administrators should comply with (i) any privacy policy of a sponsor employer and (ii) document-retention laws that require retaining tax-related information to be retained for certain periods.

9. Employment law

9.1 When an equity plan is amended or discontinued, a claim for breach of contract may arise. Plan provisions should be drafted so as to (i) prevent leased and/or temporary employees, and/or independent contractors from claiming rights under the plan, and (ii) allow for unilateral termination or amendment of the plan, which should include an acknowledgment of such by the employee. Typically, such termination and amendment is subject to the caveat that the changes cannot negatively affect a grant already made without the grantee's agreement.

9.2 Employers may not prohibit employees, either directly or indirectly, from participating in the plan based on any prohibited grounds of discrimination.[20]

9.3 Although not required by law, plan documents should be available in English unless the participant speaks the language in which the documents are written. Otherwise, the effectiveness of the terms or an obligation of employees that are a matter of contract law may be in question.

[20] Prohibited grounds of discrimination include race, colour, religion, sex, national origin, citizenship, age, disability, uniformed service or any other status protected by federal, state or local law.

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