

# United Kingdom

Mark A Ife  
Herbert Smith LLP

## Red flag issues

1. Prospectus requirements for non-EU issuers.

## 1. Securities laws

### 1.1 What prospectus and/or securities law requirements arise in connection with the grant, vesting or exercise of a long-term incentive award or on the eventual sale of the shares by the executive?

The United Kingdom is subject to the provisions of EU Prospectus Directive (2003/71/EC), which provides rules for the publication of a prospectus when securities are offered to the public. The UK provisions implementing the Prospectus Directive are contained in the Prospectus Rules issued by the UK Listing Authority of the Financial Services Authority (FSA), and also in Part VI of the Financial Services and Markets Act 2000 (as amended).

The Financial Services and Markets Act 2000 provides that a prospectus must be issued whenever transferable securities are offered to the public, or a request for the admission of securities to a regulated public market is made.

In relation to employee share plans, the FSA has provided guidance on what constitutes a “transferable security” for the purpose of the Prospectus Rules. The FSA does not consider that options granted to employees, provided that those options are non-transferable, fall within the provisions of the Prospectus Rules, either at the time of the option grant or when that option is exercised and the underlying securities are acquired. This is because the option is not a transferable security itself and, on exercise, there is no offer to the public but, rather, the fulfilment of a contractual entitlement. The Prospectus Rules will not, therefore, apply to share option grants.

The definition of an “offer to the public” is set out within the legislation as being any communication giving sufficient information to enable an investor to decide to “buy or subscribe” for securities. The FSA has confirmed that it does not consider offers of shares to employees for nil consideration (ie free shares) to fall within this definition, as there will be no purchase or subscription for those shares. The Prospectus Rules will not, therefore, apply to free share awards.

Offers to employees to subscribe to or purchase shares will, however, fall within the Prospectus Rules and will require a prospectus to be published, unless one of the relevant exemptions applies.

Where a prospectus has been produced and approved in another EU jurisdiction in respect of the offer, an application can be made to the FSA to use that prospectus in the United Kingdom for the offer being made, without the need to produce and file a separate prospectus. This procedure is referred to as “passporting”.

**1.2 Is there an exemption from securities laws requirements either because the shares are being offered only to executives or because shares are being offered to a distinct group of named individuals?**

There are a number of exemptions which may apply where an offer does not fall outside of the requirement to produce a prospectus. The exemptions which are most likely to be used in connection with employee share plans are:

- offers to fewer than 100 persons in each EU jurisdiction;
- offers where the total consideration for the securities offered is less than the equivalent of €100,000 (when taken together with similar offers in the same 12-month period);
- securities included in an offer where the total consideration of the offer is less than the equivalent of €2.5 million; and
- offers to existing or former directors and employees of transferable securities which are already admitted to trading on a recognised EU market, provided that a document is made available containing information on the number and nature of the securities offered, and the reasons for, and details of, the offer.

It is important to note, in relation to the exemption for offers to directors and employees, that this will not be available to unlisted companies or to companies which do not have a listing (whether primary or secondary) on an EU market. It is therefore important for non-EU issuers to consider whether the Prospectus Rules will apply to them and whether there are other exemptions available on which they may rely.

**1.3 If there is an exemption, will the exemption apply automatically or are there any applications/filings that need to be made?**

Where an exemption from the need to produce a prospectus applies, there will be no requirement to make any application or filing to the FSA. Generally, exemptions will apply automatically without the need for the issuer to produce any documentation.

The exception to this rule is in relation to the exemption for offers to directors and employees. For this exemption to apply, the issuer must produce a document which sets out specific information in relation to the offer. The details for the content of the document are set out both in the Prospectus Rules and also in guidance issued by the Committee of European Securities Regulators (CESR). The Prospectus Rules provide that the document must contain details of the number and nature of the securities available and the reasons for, and details of, the offer. In addition, the CESR guidance provides that the document should also set out the identification of the issuer and details of where further information can be found (generally this will be a reference to the company’s website).

Where a company produces an employee guide in connection with the offer, it

is likely that this guide will suffice as a “document” for the purposes of the Prospectus Rules.

## **2. Employee tax and social security**

### **2.1 When will the executive be liable to tax or social security (and at what rate) in respect of the long-term incentive award?**

#### **(a) Share options**

In relation to share options (including market value, discounted and nil-cost options), there is no charge to tax at the time that the option is granted provided that the employee is resident and ordinarily resident in the United Kingdom at the time of the grant (for options granted from April 6 2008, this tax treatment is also extended to employees who are resident but not ordinarily resident at grant). Neither is there a tax charge when the option becomes exercisable (ie at vesting). At the time that the option is actually exercised and the employee acquires the shares, the value of the shares acquired, less the amount of the price paid (if any), will be a taxable benefit and will be subject to income tax and national insurance (NI, ie social security) contributions.

For options granted prior to April 6 2008, if the employee was resident but not ordinarily resident in the United Kingdom at the time of grant, then there would have been no tax at grant, provided that the option was granted with an exercise price at least equal to the market value of the shares at that time. Any discount to market value would, however, have been treated as a benefit and subject to income tax and NI contributions. On the exercise of such an option, the employee will be treated as acquiring shares at an undervalue and any difference between the market value of the shares and the price paid (plus any amount which has already been subject to income tax at grant) will be treated as a notional loan until the shares are sold. Each year, or part year, that the shares are held, deemed interest on this notional loan (currently, 6.25%) is treated as a benefit and is subject to income tax for the employee, but not NI contributions (although employer NI is due – see 3.1 below). When the shares are sold, this is treated as a write-off of the notional loan, and this benefit is subject to income tax and NI contributions.

#### **(b) Free shares – conditional allocations**

There is no charge to tax at the time that the conditional allocation is granted to the employee, as the employee has only an unsecured promise to the shares. When the shares are transferred to the employee, the value of the shares received will be a taxable benefit and will be subject to income tax and NI contributions.

#### **(c) Free shares – restricted securities**

Where an employee acquires shares which are subject to a forfeiture provision which lasts for no longer than five years from the date on which the shares were acquired, the default position for an employee who is resident and ordinarily resident in the United Kingdom is that there is no charge to tax at this time (for restricted securities

acquired from April 6 2008, this tax treatment is also extended to employees who are resident but not ordinarily resident at acquisition). At the stage that the forfeiture provision is lifted (or falls away), the value of the shares received will be a taxable benefit and will be subject to income tax and NI contributions. Shares will be subject to forfeiture provisions if the terms on which they are acquired provide that they must be cancelled or transferred for less than market value if certain conditions have not been met within a specified period.

For restricted shares acquired prior to April 6 2008, if the employee was resident, but not ordinarily resident, in the United Kingdom at the time that the shares were acquired, then the value of the shares at that time would have been treated as a benefit and subject to income tax and NI contributions. There will, however, be no additional income tax or NI at the time that the forfeiture provision is lifted (or falls away).

**(d) Tax rates**

Where income tax arises, this will be due at the employee's marginal rate of income tax (for the tax year April 6 2008 to April 5 2009, the income tax rates are 20% for a basic rate taxpayer and 40% for a higher rate taxpayer).

NI contributions are due at 11% on annual earnings of up to £40,040 (for the tax year April 6 2008 to April 5 2009) and at 1% thereafter.

NI contributions will not apply in the above circumstances if the shares which are acquired are not "readily convertible assets", ie essentially where there are no trading arrangements (eg a listing on a stock market, or an employee-benefit trust willing to purchase the shares) in place which would allow the employee to realise the value of the shares at that time. Shares will, however, be deemed to be "readily convertible assets" where they do not meet the qualifying conditions for a statutory corporation tax deduction (see below).

**2.2 How will the executive's tax and social security be collected? Will the executive be responsible for paying any liabilities himself or will the executive's employer be responsible for paying tax or social security liabilities on the executive's behalf?**

Where both income tax and NI arise, these amounts must be accounted for to HM Revenue & Customs by the employing company under the Pay-As-You-Earn (PAYE) system within 14 days following the end of the tax month in which the liability arises. This amount will then need to be reimbursed by the employee to his employer within 90 days of the tax liability arising. If the employee has not made this reimbursement, the outstanding amount will be treated as a benefit and will be subject to an additional charge to income tax.

Where PAYE is due, the employer is liable for this amount to HM Revenue & Customs, who may only seek direct payment from the employee in certain specified circumstances (eg where the employee is aware that PAYE has been operated incorrectly).

Where income tax arises, but NI does not (eg in respect of the notional loan charge referred to above for options exercised by employees who are not ordinarily

resident in the United Kingdom or where the shares acquired are not “readily convertible assets”) the income tax is accounted for by the individual completing a self-assessment return. Where income tax is to be accounted for under self-assessment, the return (along with the payment of the tax) must be submitted by January 31 in the year following the end of the tax year in which the liability arises.

**2.3 If the employer is responsible for the executive’s liabilities, can the employer withhold the liabilities from the executive’s salary? Are there any formalities in this respect?**

The statutory rights to deduct PAYE amounts from an employee’s salary are strictly limited. Generally, it is only possible to recover PAYE amounts from payments made to an employee in the same tax month. However, by agreement, the employee can allow deductions to be made either from salary in future months (but note the penal tax charge where reimbursement is not received within 90 days), or can make alternative arrangements for the recovery of the PAYE. Where an employer makes a payment in respect of PAYE on behalf of an employee, the employer has a legal right in restitution to such reimbursement and may bring a claim for such recovery (although in most cases this will not be necessary as the employee will have agreed to make arrangements for reimbursement).

**2.4 If the executive’s salary in the month of exercise/release is not sufficient for the employer to withhold all of the liabilities, can the employer (or the parent company, if different) arrange for the executive to authorise to sell some of the executive’s shares in the market and pass the money to the executive’s employer?**

Although not a statutory right, plan rules should provide that on the exercise of an option, or on the transfer of shares, the employer or parent company of the employer can arrange for sufficient shares to be withheld and sold on behalf of the employee in order to reimburse the employer for the PAYE amount. Alternatively, the employee can agree with the employer that this withholding is made. Generally, the employer will instruct a broker to sell sufficient shares to cover the PAYE and will retain the proceeds of such sale.

**2.5 Will the executive pay tax on the eventual sale of his shares and if so at what rate?**

On a sale of the shares acquired by the employee, capital gains tax may be due on the difference between the sale price and the purchase price paid for the shares (plus any amount on which income tax has already been paid). Any gains made may be reduced by the employee’s annual exemption. Individuals are allowed to make £9,600 of capital gains per year (for the tax year April 6 2008 to April 5 2009) before becoming subject to capital gains tax. Any gain above this amount will be subject to capital gains tax at 18%.

No NI contributions are payable on capital gains.

For shares sold up to April 5 2008, if an employee shareholder had remained employed by the company whose shares were acquired, to the date of sale, “business

asset taper relief" would have been available which would have resulted in only 50% of any gain remaining chargeable to capital gains tax if the shares had been held for one whole year from the date of acquisition. This reduction was increased to 75% where the shares had been held for two whole years or more from the date of acquisition. For former employee shareholders who had left the company whose shares had been acquired, the sale of shares qualified only for less favourable rates of "non-business asset taper relief" (where reductions of only up to 40% were available over a 10-year period).

As a result of the UK Government's reform of capital gains tax to simplify the tax system, taper relief was abolished for disposals from April 6 2008. However, employees or directors who hold at least 5% of the shares in their employer will be able to take advantage of a relief in respect of their first £1 million of lifetime chargeable gains on such shares, which will result in their paying capital gains tax at an effective rate of 10%. This relief is known as "entrepreneur's relief".

### **3. Employer's social security**

#### **3.1 Is the employer liable to pay (on its own account) any employer's social security in connection with the long-term incentive award?**

The rate of employer's NI is currently 12.8% and applies generally whenever income tax and NI is collected via PAYE.

In relation to the notional loan which arises on the exercise of an option, by employees who were not ordinarily resident in the United Kingdom at the time of the option grant, although NI is not payable by the employee, employer's NI is due on this amount.

#### **3.2 Can the liability of the employer be put onto the employee? What steps are required?**

In certain circumstances a transfer of employer's NI to the employee is possible. In the context of options and free shares, these circumstances are limited to the exercise of a share option and the award of restricted (forfeitable) securities. Where the liability is passed to the employee, the employee will receive a deduction against income tax for the amount of the liability for employer's NI.

The Social Security Contributions and Benefits Act 1992 provides for two methods of passing the liability for employer's NI to the employee. The first method is for the employee to agree with his employer that the liability is to be transferred. In this case, the liability to HM Revenue & Customs for the employer's NI remains with the employer, although the employer has a contractual right to recover this amount from the employee. The second method is a more formal approach and requires the employee and employer to enter into an "election" in a form which has been approved by HM Revenue & Customs. By entering into the election, the liability to HM Revenue & Customs for the employer's NI is formally transferred from the employer to the employee. The benefit of this is that the employer is no longer required to accrue for this liability in its accounts and the employer's NI is treated in the same manner as the employee's.

#### **4. Tax deduction for the employer**

##### **4.1 Is it possible for the employer to receive a tax deduction in respect of the long-term incentive award? Would the employer need to be subject to recharge arrangements (eg if the employer is a subsidiary and provides funds to the parent company as part of a recharge arrangement in respect of the long-term incentive award)?**

Where employees exercise share options or acquire shares in their employer (or in the parent company of their employer) a corporation tax deduction for the UK employer will be available at the time that the shares are acquired, provided that certain statutory conditions are met. First, the shares must either be listed on a recognised stock exchange or must be shares in a company which is either not controlled by another company, or is controlled by a company with shares listed on a recognised stock exchange. Secondly, the business for which the employee's work must be carried on by the employing company and must be within a charge to UK corporation tax. Finally, the option exercise or share award must constitute earnings from employment.

Where the statutory conditions are met, the employing company will be able to claim a deduction against the profits of the business for which the employee works equal to the amount of the gain made by the employee. The deduction will, therefore, be equal to the value of the shares acquired, less the amount of the price paid (if any).

This statutory corporation tax deduction is available irrespective of whether recharge arrangements are in place. If recharge arrangements are in place, there will be no corporation tax deduction for such arrangements where the statutory deduction is available, as the legislation provides for the statutory deduction to take precedence.

The rate of UK corporation tax, effective from April 6 2008, is 28%.

#### **5. Tax beneficial arrangements**

##### **5.1 Are there any ways of making the long-term incentive award tax-efficient in the United Kingdom?**

There are four types of share-based incentive arrangement available in the United Kingdom which may receive tax-beneficial treatment following approval by HM Revenue & Customs. Two of these – the Sharesave Scheme and the Share Incentive Plan – are all-employee arrangements (ie they must be offered on similar terms to all UK employees). The remaining two, however, may be offered on a discretionary basis.

Both of the discretionary tax-approved share plans are option schemes. It is not, therefore, possible to provide for discretionary free share allocations or restricted shares on a tax-approved basis.

The first of the approved share option plans is the Company Share Option Plan. Under this plan, an employer may grant up to £30,000 worth of market value options to each participating employee and, provided that the option is exercised more than

three years after grant (but not more than 10 years after grant), the gain on exercise will not be subject to income tax. In addition, where the option is exercised in certain specified circumstances (death, injury, disability, retirement or redundancy), exercise may be effected without an income tax charge even if exercise is within the first three years of grant. Where shares are later sold, the full difference between the sale price and the exercise price paid will be subject to the more beneficial rates of capital gains tax (see above), and also allows the employee to use the capital gains tax annual exemption. To qualify for this beneficial tax treatment, the shares acquired must satisfy the statutory conditions (ie the shares must be fully paid up and not redeemable, and they must either be listed on a recognised stock exchange or be shares in a company which is either not controlled by another company, or is controlled by a company with shares listed on a recognised stock exchange), there must be no restrictions on the shares which do not apply generally to all shareholders, and the employee must not already hold 25% or more of the company's shares.

The second approved share option plan is the Enterprise Management Incentive (EMI) Plan. This plan is more flexible in that options do not need to be market value options, but may be discounted or nil-cost options (ie free shares). However, there are additional restrictions as to which companies are eligible to operate an EMI plan. Essentially, the company whose shares are acquired pursuant to the option must be an independent trading company that has gross assets of no more than £30 million and has fewer than 250 employees. In addition, certain businesses are excluded from participating, such as banking, shipbuilding, coal and steel production, insurance, certain property businesses, farming and legal or accountancy businesses. The limit for individuals is that no employee may hold unexercised qualifying EMI options over shares with a market value at grant of more than £120,000 (from April 6 2008; the previous limit being £100,000). Any number of employees may hold EMI options in a company or group, subject to a maximum of £3 million as the total value of shares under EMI options. As with the Company Share Option Plan, the gain over the market value at grant on the exercise of an EMI option will not be subject to income tax (although any upfront discount will be subject to income tax and National Insurance at exercise). Where shares are later sold, the full difference between the sale price and the exercise price paid (taking into account any amounts on which income tax has already been paid) will be subject to the more beneficial rates of capital gains tax (see above), and also allows the employee to use the capital gains tax annual exemption.

## **6. Internationally mobile executives**

### **6.1 What are the income tax consequences for an employee who is resident in the United Kingdom when the long-term incentive award is made but who is no longer resident at the time of exercise/vesting?**

#### **(a) Share options**

In relation to share options, for an employee who was resident and ordinarily resident at the date of grant of the option, but who is no longer resident in the

United Kingdom at exercise, the UK legislation continues to apply to tax the full gain on exercise (and, from April 6 2008, this tax treatment is also extended to employees who are resident but not ordinarily resident at grant). However, as a result of double taxation treaties (or, in certain cases, unilateral relief from UK tax allowed by HM Revenue & Customs), the gain on exercise is generally apportioned for tax purposes between the United Kingdom and the country of residence at exercise based on the residence of the employee during the vesting period (ie up to the time that the option became exercisable). Under the UK-US double taxation treaty, however, the apportionment is based on the time that the option has been held to the date of exercise. This will only be the case, however, where the employee would suffer double taxation without the relief from the UK tax.

For options granted prior to April 6 2008, in respect of employees who were not ordinarily resident at the date of grant of the option and who are not resident at the time of exercise, provided that the employee has no taxable UK earnings at that time, there will be no tax when the option is exercised.

**(b) Free shares – conditional allocations**

As a conditional allocation of free shares is taxed only as a benefit when the shares are received, there will only be a charge to UK tax if the employee is resident in the United Kingdom when he receives the shares. If the employee is no longer resident in the United Kingdom at this time, the acquisition of the shares will only be taxable in the employee's country of residence at that time.

**(c) Free shares – restricted securities**

The same provisions as apply to share options will apply to an employee who was resident and ordinarily resident at the date on which restricted securities were acquired if, as a result of the forfeiture provisions lasting for less than five years, he was not subject to income tax on acquisition and is no longer resident in the United Kingdom when the forfeiture provision falls away (although, for apportionment purposes, the view of HM Revenue & Customs is that the earnings period in relation to restricted securities will generally fall prior to the award rather than being based on the forfeiture period). For restricted securities acquired from April 6 2008, this tax treatment is also extended to employees who are resident but not ordinarily resident at acquisition.

**(d) Capital gains tax**

If an individual makes capital gains from selling shares during a period of temporary residence (ie five or fewer years) outside the United Kingdom, he may still be subject to UK capital gains tax under the temporary non-residence rules.

**6.2 What are the social security consequences for an employee who is resident in the United Kingdom when the long-term incentive award is made but who is no longer resident at the time of exercise/vesting?**

An employee's social security position will depend on the terms of applicable EC Regulations and also any bilateral social security agreement between the United Kingdom and the jurisdictions in which the employee is then resident.

(a) **Share options**

In relation to share options, for an employee who was resident and ordinarily resident at the date of grant of the option (and for options granted from April 6 2008, where the employee is resident but not ordinarily resident at grant), but who is no longer resident in the United Kingdom at exercise, HM Revenue & Customs considers that, as the option was granted for UK employment, the whole of any gain should be subject to UK NI. Where, however, a bilateral social security agreement exists, this will set out the provisions which will apply to NI charges.

In respect of options granted prior to April 6 2008, for employees who were not ordinarily resident at the date of grant of the option and who are not resident at the time of exercise, HM Revenue & Customs will not seek to apply UK NI contributions provided that exercise takes place in a new tax year following departure from the United Kingdom.

(b) **Free shares – conditional allocations**

A conditional allocation of free shares is treated as a benefit when the shares are received. The general position is that employees will remain liable for UK National Insurance for 52 weeks following leaving the United Kingdom. This, however, is subject to EC Regulations, which require social security to be paid in the member state in which the individual is then working, and the terms of any bilateral social security agreement.

(c) **Free shares – restricted securities**

The same provisions as apply to share options will apply to an employee who was resident and ordinarily resident at the date on which restricted securities were acquired if, as a result of the forfeiture provisions lasting for less than five years, he was not subject to NI on acquisition and is no longer resident in the United Kingdom when the forfeiture provision falls away. For restricted securities acquired from April 6 2008, this treatment is also extended to employees who are resident but not ordinarily resident at acquisition.

**6.3 What are the tax and social security/withholding/reporting consequences for the employer in respect of an employee who is resident in the United Kingdom when the long-term incentive award is made, but who is no longer resident at the time of exercise/vesting?**

Where income tax and NI contributions arise for share awards made to individuals who are no longer UK tax resident, the employer continues to be liable to account to HM Revenue & Customs under the PAYE system in respect of these amounts. In the case of non-resident employees, however, PAYE is operated at the basic rate of tax (20% for the tax year April 6 2008 to April 5 2009) and NI is operated based on weekly rates (11% on an amount between £105 and £770, and 1% thereafter). Employer's NI remains at 12.8% on the full amount which is subject to UK income tax. Any additional amount of income tax due (ie for higher rate tax payers) must be accounted for to HM Revenue & Customs by the individual under self-assessment.

## **7. Reporting requirements**

### **7.1 Will the employer (or parent company, if different) have any reporting requirements as a result of the long-term incentive award?**

No formal approval is required from HM Revenue & Customs or from the FSA for employee share plans. Should the employer wish to adopt an approved Company Share Option Plan, this must have received prior approval from HM Revenue & Customs before options may be granted. Although not requiring formal approval before grant, EMI options must be notified to HM Revenue & Customs within 92 days of grant.

HM Revenue & Customs requires employers to comply with detailed reporting requirements where employees acquire shares or an interest in shares. Annual returns must be submitted to HM Revenue & Customs (using prescribed forms) by July 7 in each year and penalties may apply if this deadline is not adhered to. In addition, HM Revenue & Customs requires disclosure of any unapproved share plan which provides significant tax advantages to participants.

### **7.2 Are there any tax rulings required in relation to the long-term incentive awards?**

No tax ruling will be required for shares that are listed on the London or New York stock exchanges. For unlisted shares or shares listed on other markets, Shares and Assets Valuation at HM Revenue & Customs will generally need to be consulted to agree the value of the relevant shares for tax purposes.

## **8. Exchange control issues**

### **8.1 Are there any exchange control issues that would prevent an employee from (a) remitting monies abroad to purchase shares or (b) repatriating monies from the sale of shares?**

There are no exchange control laws in the United Kingdom.

## **9. Employment law**

### **9.1 Are there any employment or local labour law issues which may arise as a result of the long-term incentive award? Are any consultations or authorisations required by law?**

There are generally no requirements to consult with employee representatives before share awards are made to employees. Consultation may, however, be required if the employer has entered into a collective agreement with a union which requires such consultation (eg in respect of changes to remuneration arrangements).

The Information and Consultation of Employees Regulations 2004 include an obligation for certain employers (currently, those employing more than 100 individuals) to inform and/or consult employees in relation to the economic situation of the business, their employment prospects and decisions likely to lead to substantial changes in work organisation or contractual relations, including redundancies and transfers. Whilst these obligations will not generally extend to the making of share awards, they may be relevant in certain situations.

## **10. Translation**

### **10.1 Are there any language restrictions in the United Kingdom? Does any of the documentation provided to the employee in relation to the long-term incentive award need to be translated into English?**

There are generally no requirements for documents sent to individuals to be translated into English.

Where a prospectus is submitted to the FSA for approval it must be in English. If a prospectus has been “passported” into the United Kingdom in a language other than English, the FSA requires that the summary is translated into English in cases where the prospectus is solely being used for public offers (rather than admission to trading). Similarly, if the company is relying on the exemption from producing a prospectus for offers to directors and employees and a document setting out specific information in relation to the offer is being produced, this document should be translated into English.

## **11. Data protection**

### **11.1 Are there any data protection issues which may arise should the employer wish to outsource the administration of the long-term incentive award to a third party?**

The Data Protection Act 1998 governs the processing of personal data in the United Kingdom. The most relevant obligations imposed in respect of the transfer of the personal data of individuals are the obligation to maintain a notification (ie registration) with the UK Office of the Information Commissioner and to ensure that the transfer is “fair and lawful”.

Fairness and lawfulness require at least one of the conditions contained in the legislation to be met. These include the individual having given his consent to the processing, or the processing being necessary for the performance of a contract to which the individual is a party or for the taking of steps at the request of the individual with a view to entering into a contract. It will also be lawful to transfer personal data if the processing is necessary for the purposes of “legitimate interests” pursued by the data controller or by a third party or parties to whom the data is disclosed. The controller of the data must ensure that the rights and freedoms or legitimate interests of the individual are protected.

There are also additional requirements to be met if sensitive personal data is being transferred (eg information as to a person’s health, sexual life, political opinions, racial or ethnic origin, trade union membership or criminal record).

In order to carry out any processing of personal data, organisations are required to file a suitable notification with the UK Information Commissioner’s Office and to keep this up-to-date. The notification requires a generic description of the kinds of personal data processed by an organisation and the purposes for which they are processed. There are only very narrow exemptions from the requirement to notify. Failure to maintain an up-to-date data protection notification (unless exempt) is a criminal offence punishable by way of potentially unlimited fine.

Employees affected by the proposed processing will need to be made aware of the identity of the entity processing their personal data, the purposes for which the data is being processed and any further information which is necessary, having regard to the specific circumstances, to enable processing in respect of the employees to be “fair”.

## **12. Source of shares**

### **12.1 Does it matter if shares are newly issued to an employee, provided out of treasury or delivered from an employee-benefit trust?**

It is possible for options and share awards to be satisfied by an issue of shares or transfer of shares from treasury or from an employee-benefit trust without affecting the tax position for the individual, save that stamp duty tax is payable where shares are transferred from an employee-benefit trust for consideration. This stamp duty will usually be paid by the employing company.

Where the issuing company has a listing in the United Kingdom on the main market of the London Stock Exchange, shareholder approval is required for share awards which may make use of new issue shares or treasury shares. In addition, where share awards are made to directors of a company which has a main market UK listing, shareholder approval will generally be required.

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