COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Serbia

EMPLOYEE INCENTIVES

Contributor

BDK Advokati AOD

Tomislav Popović

Counsel | tomislav.popovic@bdkadvokati.com

This country-specific Q&A provides an overview of employee incentives laws and regulations applicable in Serbia.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

SERBIA
EMPLOYEE INCENTIVES

1. What kinds of incentive plan are most commonly offered and to whom?

Because of undeveloped capital markets, equity based incentive plans have not been commonly offered by Serbian companies.

Instead, Serbian companies most commonly offer cash bonuses to employees and management. Cash bonuses are based on personal performance targets and/or on the company's success and are regulated in the employment agreement, general corporate policy or (less often) individual bargaining agreement. Cash bonuses are regarded as salary and are subject to salary tax and social security contributions ("**SSCs**") which is withheld and remitted by the employer as the tax agent of the employee (the employer also pays a portion of SSCs on its own behalf).

There are two types of equity-based incentives regulated by law:

i. As of recently, a modest number of Serbian limited liability companies ("**LLCs**") have availed themselves of the possibility introduced in 2019 by the amendments to the Companies' Act to issue options (non-transferrable dematerialised financial instruments) (in Serbian *pravo na sticanje udela*) to employees (as well as to contractors and directors engaged outside employment). The grantee may exercise the option under pre-defined conditions by paying a pre-determined strike price, and acquire equity interest in LLC from a treasury share previously created by LLC for this purpose (in Serbian *rezervisani sopstveni udeo*) ("**reserved equity interest**").
ii. joint-stock companies ("**JSCs**") can buy-back certain limited number of their shares in order to award them to its employees, employees of related entities, directors and members of supervisory boards. In public JSCs directors' and supervisory board members' remuneration, including in the form of shares, must be disclosed through publication of the remuneration policy and annual remuneration reports (for details see answer to Q14 and 18 below).

The most common share option or share award plans found in practice are global plans operated mainly by US companies who offer to Serbian individuals (mainly employees of Serbian subsidiaries, but also contractors or freelancers working in Serbia directly for foreign companies) options (e.g. Non-specified Stock Options (NSOs), Restricted Stock Units (RSUs), and similar instruments) to acquire shares in the US company. Phantom-share and stock appreciation plans are also used in this context.

2. What kinds of share option plan can be offered?

Share option plans are not regulated by law as such. Formulation of the plan is therefore left to the discretion of the employer, i.e. the company.

3. What kinds of share acquisition/share purchase plan can be offered?

Please see answer to Q1 Q2 above.

4. What other forms of long-term incentives (including cash plans) can be offered?

Please see answer to Q1 and Q2 above.

5. Are there any limits on who can participate in an incentive plan and the extent to which they can participate?

The law does not regulate plans as such. General principles of non-discrimination in employment context

 © 2023 Legalease Ltd

apply.

As regards two specific grants regulated by law:

i. reserved equity interest in LLC can be granted only to individuals and not to legal entities (see answer to Q1 and 18);
ii. share buy-back by JSC can be performed for the purpose of awarding the shares to the following categories of individuals: employees, employees of related entities, directors, and supervisory board members. For details see answers to Q1 and 18.

6. Can awards be made subject to performance criteria, vesting schedules and forfeiture?

Yes.

7. Can awards be made subject to post-vesting and/or post-employment holding periods. If so, how prevalent are these provisions both generally and by reference to specific sectors?

There are no restrictions in the law for including such provisions in an incentive plan. Incentive plans are still rare.

8. How prevalent malus and clawback provisions are and both generally and by reference to specific sectors?

Such provisions are not prevalent in local cash bonus schemes.

Local equity-based incentive plans are rare and therefore such provisions are not prevalent.

9. What are the tax and social security consequences for participants in an incentive plan including: (i) on grant; (ii) on vesting; (iii) on exercise; (iv) on the acquisition, holding and/or disposal of any underlying shares orf securities; and (v) in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

i. on grant;

There are no tax and social security consequences for the participant on grant.

ii. on vesting;

There are no tax and social security consequences for the participant on vesting.

iii. on exercise;

There are no tax and social security consequences for the participant on exercise.

iv. on the acquisition, holding and/or disposal of any underlying shares or securities; and

On the acquisition (employee):

Taxation of participants is triggered on the acquisition of ownership title in shares. In case of the case-based incentives, taxation is triggered on the receipt of cash.

In case the participant is an employee, and the shares are received from a domestic employer (legal entity resident in Serbia) or its related party (domestic or foreign entity), the acquisition of shares is in principle regarded as the moment when the employment income is earned and therefore subject to the salary tax (due from the employee, withheld and remitted by the employer) and SSCs (due from the employee and the employer, withheld and remitted by the employer) unless a specific exemption applies (please see below).

The tax basis is the market value of the shares at the time when such shares are received by the employee less the exercise price paid by the employee (this is regarded as the net salary). The net salary is grossed up to arrive at the taxable income for the purpose of withholding salary tax and SSCs. The employer must determine the market value of the shares, but there is no guidance in the law regarding the valuation method.

In case the shares are provided by the employer’s related party which is a foreign entity, i.e. not based in Serbia, such entity is not required to withhold and remit the salary tax and SSCs. The employee must determine the market value of the shares (as the element for determination of the taxation basis), but there is no guidance in the law regarding the valuation method to be applied. The employee has an obligation to declare the income, self-assess and pay the salary tax and SSCs.

The current rates of taxation are as follows: salary tax 10%, the SSCs on behalf of the employee are 19.9%, the

 © 2023 Legalease Ltd

SSCs on behalf of the employer are 15.15%.

Apart from being taxed at source, employment income is also subject to the supplementary annual personal income tax ("**Annual PIT**") which is due on the aggregate annual income from different sources (employment, self-employment, freelance work, income from exploiting IP rights, rental income, etc.) net of tax and SSCs paid at source, exceeding the threshold of three times the average annual salary in Serbia per the official statistics (for 2021 this threshold was approx. EUR 27,900, an equivalent of RSD 3,268,224). Certain allowances and deduction apply. The first bracket is the annual income between approx. EUR 27,900 and approx. EUR 55,730 and the tax rate is 10%. The second bracket is income exceeding approx. EUR 55,730 and the tax rate is 15%.

Exemption from the salary tax and SSCs on the acquisition of shares:

Salary tax and SSCs are not due in case the employee receives shares or equity interests, which are held by the employer (or the employer's related party) as its treasury shares/equity interests, and which are granted to the employee either free of payment or against the payment of the exercise price which is below the market value of such shares at the time of acquisition.

In addition, the following conditions must be met cumulatively in order for the exemption to apply:

i. there must be a plan or other general enactment of the employer (or its related party, as the case may be) setting out the legal basis, the manner, and the conditions of the share grant (alternatively such elements could be set out in an employment agreement); and
ii. one can ascertain the date of acquisition of shares and their features such as e.g. the type and/or class of shares, their number, and the percentage in the total number of shares/in the total share capital of the employer/employer's related party.

If the above conditions are met, the exemption applies automatically, which means that there is no salary tax and SSCs on the acquisition of shares. However, the taxation will be triggered immediately in case any of the following happens:

i. the employee sells or otherwise disposes of shares prior to the expiry of two years from the acquisition date (including to the employer, or the employer's related party, as the case may be, under a share buy-back programme); or
ii. either the employee or the employer terminates the employment agreement prior to the expiry of two years from the acquisition date (except in cases of retirement due to age or disability, transfer of the employee to the employer's related party and certain cases of ex lege termination of employment without the parties' involvement).

If any of the above happens, the employer (or its related party based in Serbia, as the case may be) will have to withhold and remit the salary tax and SSCs. The tax basis is the market value of the shares at that time (when shares are sold, or when employment is terminated prior to the expiry of the two-year term) less the exercise price paid (the net salary). For the purpose of tax and SSCs withholding the net salary is grossed up to arrive at the taxable income (gross salary, which includes the net salary, the salary tax and SSCs on behalf of the employee).

In case the shares have been granted by the employer's related party based outside of Serbia (therefore not subject to the withholding and remitting obligation), the employee must declare income by filing a tax return with the tax authority, self-assess and pay salary tax and SSCs.

On the acquisition of shares (non-employee):

In case the participant is non-employee (e.g. a contractor, freelancer), there is no tax exemption available and taxation is triggered on the acquisition of shares in any case. The acquisition of shares should be regarded as "other", non-employment income, which is subject to the personal income tax at the rate of 20%, pension and disability insurance component of SSCs at the rate of 24%, and, in case the participant is not enrolled at the mandatory health insurance system as an employee or a self-employed person, also the health insurance component of SSCs at the rate of 10.3%.

The market price of the shares at the time of the acquisition less the exercise price paid and less an annual tax-free amount of approx. EUR 120 (RSD 14,480) is regarded as net income. This rule applies under the assumption that the share award is an extraordinary item and not part of a regular fee that the contractor earns under the service or consulting agreement. In case shares have been provided by a domestic entity, it is regarded as "payor" of the net income and a tax agent of the participant and has a withholding and remittance obligation. The net income is grossed up to account for the tax and SSC to be withheld by the domestic entity. The basis for SSCs is capped on the annual level currently at approx. EUR 45,100 (in case

 © 2023 Legalease Ltd

this cap on the basis is exceeded at some point, the participant can request from the tax authorities to be allowed to stop paying SSCs until the year end).

In case the shares have been provided by a foreign entity (therefore not subject to the withholding and remittance obligation), the participant must declare income by filing a tax return, self-assess, and pay the tax and the applicable SSCs.

In addition, “other”, non-employment income is included in the aggregate annual income for the purpose of the Annual PIT (please see 9 (iv) under the heading “On the acquisition (employee)” above).

On the holding:

There is no taxation in connection to the holding of shares, except that dividends received are taxable in the hands of the participant (shareholder). The current tax rate is 15%. In case Serbian employer or Serbian entity pays dividends, it must withhold and remit the personal income tax on dividend as a tax agent of the shareholder. Dividends are not included in the aggregate annual income for the purpose of the Annual PIT.

On the disposal:

In case the employee, who benefited from the salary tax and SSCs exemption at the time of acquisition of shares, sells shares prior to the expiry of two-year term (therefore breaching the covenant attached to the exemption), the exemption is lost and the salary tax and SSCs on salary become immediately due (see 9 (iv) under the heading “Exemption from the salary tax and SSCs on the acquisition of shares” above).

Sale of shares at gain is subject to the capital gains tax at the rate of 15%. The basis for the capital gains tax is the difference between the sale price on the one hand and the acquisition cost of the shares on the other hand. The sale price is the price stated in a contract, however, if the tax authorities perceive this as below the market price, they will increase the sale price to the level of the market price (in the opinion of the tax authority). The acquisition cost is calculated differently for employees who had to pay salary tax (either because the exemption could not apply in the first place, or the exemption initially applied but was lost due to breach of the conditions attached to the exemption) on the one hand and for other categories of participants on the other hand. For employees who paid the salary tax at the time of acquisition of shares (exemption was not available), the acquisition cost of the shares is the sum of the documented exercise price paid and the market value of the shares at the time of acquisition. For employees who were initially exempt from the salary tax, but had to pay the salary tax later due to breach of the attached conditions (e.g. sold shares prior to the expiry of the two-year period), the acquisition cost for the purpose of the capital gain calculation is the sum of the documented exercise price and the market value of the shares at the time when the salary tax became due. For other categories the acquisition cost is only the documented exercise price paid (increased only by the inflation rate).

Capital gains on the sale of shares are not included in the aggregate annual income for the purpose of the Annual PIT.

v. in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

There is no taxation of the participant upon the receipt of the loan proceeds provided that the loan is a true loan in the sense that it must be repaid. In case the lender forgives the loan receivable and releases the participant from debt, the amount of the debt so released is regarded as a taxable income of the participant. In case the lender is the employer or the employer’s related party, such income would qualify as employment income, otherwise it would qualify as “other”, non-employment income.

10. What are the tax and social security consequences for companies operating an incentive plan? (i) on grant; (ii) on vesting; (iii) on exercise; (iv) on the acquisition, holding and/or disposal of any underlying shares orf securities; (v) in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

i. on grant;

There are no tax and social security consequences for the company operating an incentive plan on grant.

ii. on vesting;

There are tax and social security consequences for the company operating an incentive plan on vesting.

iii. on exercise;

There are tax and social security consequences for the

 © 2023 Legalease Ltd

company operating an incentive plan on exercise.

iv. on the acquisition, holding and/or disposal of any underlying shares or securities;

On the acquisition:

In case the participant is an employee, and the shares are provided by the employer or the employer's related party based in Serbia, the employer (or its related party as the case may be) has an obligation to withhold and remit the salary tax on behalf of the employee and the SSCs both on behalf of the employee and the employer, unless the exemption apply (see 9 (iv) under the heading "On the acquisition (employee)" above). In case the employer's related party that provided the shares is an entity based outside of Serbia, it has no withholding obligation, and taxation is levied by the self-assessment of the participant (see 9 (iv) under the heading "On the acquisition (employee)" above).

In case the participant is a non-employee, the company (based in Serbia) providing shares is regarded as payor of non-employment income and has an obligation to withhold personal income tax on "other", non-employment income and the applicable SSCs on behalf of the participant (see 9 (iv) under the heading "On the acquisition of shares (non-employee)" above). In case the company providing shares is an entity based outside of Serbia, it has no withholding obligation, and the participant is required to self-assess personal income tax on "other", non-employment income and the applicable SSCs.

On the holding:

There are no tax and social security consequences for the company operating the plan on the holding, except in case when the company (Serbian entity) pays dividends (in such case the company must withhold and remit personal income tax on dividend income as a tax agent of the shareholder at the rate of 15%). In case the company operating the plan is a foreign company, the participant receiving dividend must declare dividend income, self-assess and pay tax.

On the disposal:

In case the acquisition of shares was exempt from the salary tax and SSCs, and the attached conditions were breached before the expiry of two years from the acquisition date (e.g. the shares were sold or employment terminated by either the employee or the employer), the employer (or the employer's related party which is an entity based in Serbia, as the case may be) are required to withhold salary tax and the SSCs (see 9 (iv) under the heading "Exemption from salary tax and SSCs on the acquisition of shares" above).

Other than this specific case, there are no consequences for the company operating the plan in case of the disposal of shares by the participant.

v. in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

Please see 9 (v) above. Also, in case a loan is with interest, such interest is subject to the corporate income tax ("**CIT**") of the employer or other lender based in Serbia. In case the loan is written off by the Serbian based lender, a corresponding expense will not be recognised as a deductible expense for CIT purposes, unless the lender is able to demonstrate that it has sued the debtor (certain exceptions apply).

11. What are the reporting/notification/filing requirements applicable to an incentive plan?

There are no reporting/notification/filing requirements specific to incentive plans.

If the company operating the plan is the employer or the employer's related party and is based in Serbia, it has an obligation to withhold and pay to the tax authority the salary tax and SSCs on behalf of the employee (and also the portion of SSCs on behalf of the employer) and thus to report to the tax authorities by submitting the relevant tax return. If the employer's related party that issues equity interests is an entity organised outside of Serbia, the employee has an obligation to declare income to the tax authority, self-assess and pay the salary tax and SSCs. In addition, the employee has an obligation, provided that he meets the relevant threshold, to declare employment income in the Annual PIT return.

Similarly, in case shares are provided to a participant who is a non-employee, the company based in Serbia is required to report to the tax authority by submitting the relevant tax return to account for the withholding and remittance of tax and SSCs. In case the shares are provided by a foreign company, the participant has an obligation to declare income by submitting tax return, self-assess and pay tax on "other", non-employment income. In addition, provided that the relevant threshold is exceeded, the participant must declare and self-assess tax in the Annual PIT return.

For potential notification to the Securities Commission of Serbia, please see answer to Question 15 below.

 © 2023 Legalease Ltd

For requirements on public JSCs to publish remuneration policy and the annual remuneration report, including information about awarded shares to directors and board members, please see answer to Q14 below.

12. Do participants in incentive plans have a right to compensation for loss of their awards when their employment terminates? Does the reason for the termination matter?

This is not regulated by the law but is left to the terms of the plan or a contract regulating the incentive, the civil law agreement entered into with the participant, or the employment agreement.

13. Do any data protection requirements apply to the operation of an incentive plan?

There are no data protection requirements that would be specific to the operation of an incentive plan. General data protection requirements in the employment context would apply to the operation of an incentive plan. Serbian Personal Data Protection Act ("**DP Act**") for the most part transposes the provisions of the GDPR.

14. Are there any corporate governance guidelines that apply to the operation of incentive plans?

The Companies' Act provides for some rules on disclosure of directors' and board members' variable remuneration including in the form of shares and/or warrants. General meeting of shareholders (or supervisory board in two-tier management structure) approves directors' remuneration or principles for determination of such remuneration. Alternatively, this can be regulated by articles of association of the company. The directors' remuneration may include awards in the form of shares and/or warrants, in addition to the salary under the employment agreement, or cash remuneration under the management agreement. The same applies to supervisory board members (the difference is only that, unlike directors, they cannot have a status of an employee and may not enter into an employment agreement). The shares and/or warrants may be provided by the company or its related entity and the awards may be based on the achievement of a performance targets.

Companies organised as private JSCs and LLCs are required to disclose to their shareholders (one or more shareholders holding in aggregate at least 5% of the share capital), upon their request, details on directors' and supervisory board members' total remuneration, including shares and/or warrants awarded to them. Shareholders may be required to sign a non-disclosure statement or agreement in case the remuneration information is proclaimed by the company to be a business secret.

Companies organised as public JSCs must have a policy regarding directors' and supervisory board members' remuneration. The remuneration policy is adopted, as a rule, for a 4-year period. In case any remuneration to directors and/or board members is paid in the form of shares, such policy must set out, at minimum, vesting and exercise periods, any lock-up holding periods, and an explanation how awarding shares contribute to the strategy, long-term development goals and sustainability of the company. More generally, with respect to any variable parts of the remuneration, the policy should also disclose all such variable parts, related financial and non-financial key performance indicators, deferred payment periods and the conditions under which the company would be entitled to the clawback claim. The remuneration policy must be published on the company's website.

Public JSCs must prepare and publish an annual remuneration report, which must set out, among many other mandatory details, information on shares and warrants granted or committed to be granted to directors/supervisory board members by the company or any other group company, and the main terms of the relevant awards, including exercise prices, maturity dates and any amendments to the main terms. More generally, with respect to any variable part of remuneration, the annual remuneration report must set out, inter alia, whether the company has requested clawback on any variable part paid to the director/board member. The auditor entrusted with the audit of financial statements of the company is also required to conduct an audit on whether the annual remuneration policy complies with the statutory requirements. The annual remuneration report is prepared by the board of directors (or supervisory board in two-tier governance structure) or the remuneration committee if formed, and must be put on the agenda of the annual general meeting of shareholders and published on the company's website.

The Corporate Governance Code, published by the Serbian Chamber of Commerce in 2012, sets out non-binding principles and recommendations some of which relate to remuneration of directors and supervisory board members, and thus indirectly to equity-based incentive plans. Those include the following:

 © 2023 Legalease Ltd

- Executive directors' remuneration should include a variable part based on achievement of performance goals;
- Variable remuneration targets should include both financial and non-financial performance indicators. A significant portion of variable remuneration should depend on the successful performance of the company over the period of 3-5 years and should be capped;
- If the company's condition deteriorates after the remuneration is set, the company should decrease remuneration to what is appropriate if the payment of the initially determined remuneration would be manifestly unjust;
- Companies should include a clawback provision in the agreements with executive directors, according to which the company is entitled to request repayment of any bonus or other incentive, or the gain received from sale of shares, received within the period of one year from the date of publication of manifestly erroneous or incorrect information for which the executive director is responsible;
- Executive directors who are awarded equity should be subject to a 3-year lock-up period and should in any event keep the fixed amount of shares until the end of their term in office;
- In public JSC that have a supervisory board, general meeting of shareholders should approve remuneration policy and equity-based incentives provided to supervisory board members, whereas the supervisory board should approve remuneration and equity-based incentives to executive board members, in each case unless the same incentives are provided to other employees as well;
- In public JSC that do not have a supervisory board, general meeting of shareholders should approve remuneration policy and equity-based incentives provided to executive directors, unless the same incentives are provided to other employees as well;
- A public JSC should publish on its webpage a comprehensive information on directors' and supervisory board members' remuneration.

15. Are there any prospectus or securities law requirements that apply to the operation of incentive plans?

The Capital Markets Act ("**CMA**"), enacted in 2021 and in force from 6 January 2023, regulates, *inter alia*, public offer of transferable securities, including shares and equivalent securities, depository notes and some other types of securities, all of which have a common characteristic that they may be traded on the capital markets ("**transferable securities**").

Public offer is defined as any communication in any form or by any means setting out sufficient information about those securities offered and the terms of the offer that enables an investor to decide on whether or not to invest in them. A public offer is in principle subject to the requirement to prepare, obtain approval for and publish a prospectus.

There is a specific exemption from the prospectus requirement applicable in cases when an employer or its related party offers its transferable securities for purchase to the current or former employees and/or directors. The exemption applies provided that there is a document available to the grantees setting out the number and characteristics of the offered transferable securities and the reasons and details of the offer. If these conditions are fulfilled, the employer or its related party are only required to notify the Securities Commission of Serbia ("**Commission**") in writing about the intention to rely on the exemption from the prospectus requirement.

Similarly, there is a specific exemption from the prospectus requirement in case the transferable securities offer is addressed to not more than 150 individuals. Invoking this specific exemption also requires a notification to the Commission.

The above exemptions should, in our view, apply in case a foreign issuer of transferable securities offers such securities for sale to Serbian participants through an equity incentive plan. However, the Commission has not yet confirmed this interpretation of the new law due to its novelty (it entered into force on 6 January 2023).

In any event, the prospectus and notification requirements of the CMA do not apply to incentive plans offering participants to acquire securities for free (i.e. without making investment to purchase them). Moreover, neither the prospectus nor the notification requirement applies if the total value of the public offer of securities is below EUR 1 million.

16. Do any specialist regulatory regimes apply to incentive plans?

No.

17. Are there any exchange control

 © 2023 Legalease Ltd

restrictions that affect the operation of incentive plans?

When a foreign company operates a share option or share award plan that requires a resident of Serbia to open a bank account overseas in order to pay the exercise price and receive dividends and/or proceeds of sale, the participant must seek prior approval of the National Bank of Serbia ("**NBS**") to do that. The particular purpose for which such approval can be granted is purchasing shares or other securities and/or collecting sale proceeds from their sale as well as collecting dividends. In case the NBS does not give its approval, the participant may not open and use foreign bank account. If prior approval is obtained, the participant is required to notify NBS of the details of any such bank account opened abroad and to report to the NBS, on a quarterly basis, on the balance on any such bank account, on a pre-printed form RN set out in the Guidelines for Implementation of Decision on Duty to Report Foreign Transactions (*Uputstvo za sprovođenje Odluke o obavezi izveštavanja u poslovanju sa inostranstvom*, published in the Official Gazette of the Republic of Serbia No. 40/2015).

The participant who is regarded as a Serbian resident is also required to repatriate to Serbia the proceeds of the sale of the shares or dividends within 30 days from the date of the collection (unless there is another permissible basis to keep such proceeds outside Serbia), and to report to the NBS on such repatriation.

18. What is the formal process for granting awards under an incentive plan?

LLCs:

The process for granting awards is regulated only in case when an LLC issues options (non-transferrable, dematerialised financial instruments) to its employees and/or other individuals enabling them to purchase, at the pre-defined exercise price and under certain conditions, a pre-defined portion of the reserved equity interest. Please also see answers to Questions 1 and 2 above.

As a precondition for issuing options, the LLC must acquire and register with the corporate register the reserved equity interest. The creation of the reserved equity interest is approved by the general meeting of shareholders' resolution (adopted with a qualified majority of two-thirds of all votes). On the basis of the resolution, one or more shareholders donate to the LLC portions of their respective equity interests (the LLC must not pay anything to the shareholders), which form the reserved equity interest. The LLC applies with the corporate register to get this registered as a treasury equity interest. All reserved equity interests combined may not at any time exceed 40% of the total share capital of the LLC.

After the LLC has created at least one reserved equity interest, a general meeting of shareholders passes a resolution on the issuance of options to the named individuals (usually employees but can be other individuals too). The resolution on the issuance of options must set out at least the following information:

1. the number of options to be issued;
2. the description of the underlying reserved equity interest;
3. names, citizen's numbers (or passport numbers in case of foreigners) and addresses of the grantees;
4. percentage of the reserved equity interest that the option holder is entitled to purchase;
5. the exercise price and the payment term (which must between 15 and 30 days from the exercise due date);
6. the issuance date;
7. the exercise due date;
8. conditions under which the issued options may be cancelled prior to the maturity.

The law is silent on what could be the conditions attached for options to mature and the conditions for cancellation prior to the maturity, so the LLC is free to set out any conditions it wants. Performance criteria and vesting periods may be defined as conditions for maturity of the option. Termination of employment can be an event that results in the cancellation of the option prior to the maturity.

The company files an application with the Central Registry, Depository and Clearing House of Securities of Serbia ("**CDS**") for registration of the issued options in the CDS system. The CDS opens financial instruments' accounts in the name of each option holder and records the issued options (dematerialised financial instruments) on their respective accounts held within the CDS.

Options are strictly personal and non-transferable and may not even be inherited. However, if the option holder paid the exercise price when due but died before acquiring a portion of the reserved equity interest, heirs have a claim against the company for receiving a compensation equal to the market value of the equity interest that the deceased option holder was entitled to acquire.

On exercise, the option holder pays the exercise price to the company within the set deadline. Failure to pay the

 © 2023 Legalease Ltd

full amount of the exercise price within the deadline results in the cancellation of the option. The company must, within 30 days from the expiry of the payment term, request from the CDS the deletion of all issued options (both exercised and cancelled). Upon the company's request the CDS issues a written confirmation on the exercised options stating, *inter alia*, the names of the option holders who are entitled to acquire portions of the reserved equity interest and the respective percentages that they acquire. The company must submit this confirmation to the corporate register for the purpose of registration of the option holders as new shareholders of the company. Registration is the moment when the option holder becomes shareholder of the company. The existing shareholders do not have a pre-emption right with respect to the reserved equity interest. The unused portion of the reserved equity interest may be kept by the company for new option issues or may be cancelled and in such case the company must carry out a formal process of the share capital reduction.

JSCs:

JSCs may not issue options as recognised financial instruments, but may award its shares and warrants to employees, employees of related entities, directors and supervisory board members. The formal process of share awards is not regulated by law, but it can be regulated in an award plan and by concluding individual award agreements with the participants.

In order to fund the award JSCs may buy back its own shares and keep them as treasury shares under certain conditions. The buy-back of shares is based on the resolutions of the general meeting of shareholders (or the board of directors if this is provided for in the articles of association and the company has adequate reserves for the buy-back). The beneficiaries of the buy-back are named in the resolution. However, the total number of shares bought back for this purpose may not, on an annual basis, exceed 5% of any class of shares that the company has issued. Once bought back, the shares must be distributed to the named beneficiaries within one-year period from the acquisition. No such restrictions apply in case treasury shares are acquired for free.

In case the articles of association provide for such possibility, the JSC can increase its share capital by issuing new shares up to the maximum of 3% of the issued share capital for the purpose of offering subscription of such shares to employees, directors and/or board members of the company or a related entity. The issue of new shares is based on a resolution of the general meeting of shareholders setting out the relevant details such as e.g. the number and class of new shares to be offered for subscription, categories of investors offered to subscribe the shares, the subscription terms, the minimum subscription threshold, the subscription price or methods for determination of such price (which may not be lower than the current market value of such shares). The shares may be issued only against the full payment of the subscription price. The priority subscription rights of the existing shareholders may be excluded only by way of a resolution of the general meeting of shareholders adopted with a super majority of at least 75% of votes present or represented at the meeting.

19. Can an overseas corporation operate an incentive plan?

Yes, an overseas corporation can operate an incentive plan and offer its shares to Serbian residents. See answer to Q15 for securities law regulation of such offer.

20. Can an overseas employee participate in an incentive plan?

Yes. There are no restrictions that would prevent or limit the right of foreign nationals to participate in an incentive plan operated by a Serbia-based company.

21. How are share options or awards held by an internationally mobile employee taxed?

An internationally mobile employee will become subject to Serbian personal income tax with respect to his worldwide income (i.e. income earned from any source anywhere in the world) once when he becomes tax resident of Serbia. Otherwise, as long as the internationally mobile employee is regarded as a non-resident, he will be subject to Serbian personal income tax only with respect to income that has its source in Serbia (e.g. employment income earned through performing work on the Serbian territory or income or gains from using or disposing of assets situated in Serbia).

An individual becomes tax resident of Serbia once any of the following conditions are met:

1. an individual acquires domicile in Serbia; or
2. an individual has a centre of business and vital interests in Serbia; or
3. an individual spends more than 183 days in Serbia, continuously or with interruptions, within any 12 months' period.

 © 2023 Legalease Ltd

Coming to Serbia does not trigger taxation with respect to the share options or awards that the internationally mobile employee already holds at that time. In case he becomes tax resident of Serbia, and exercises share option and acquires shares as a result of such exercise, he should arguably become subject to the personal income tax on the acquisition of shares. His income in the form of shares should arguably be qualified as "other", non-employment income and he should be taxed as explained in 9 (iv) under the heading "On the acquisition of shares (non-employee)" above (by way of self-assessment, assuming that his employer or company offering shares is not based in Serbia, but overseas).

In case he sells shares at gain, being a tax resident of Serbia, he will be subject to the capital gains tax in Serbia regardless of where the shares were issued, are registered or where they were sold. The tax basis is the capital gain, which is a difference between the sale price (or market price as determined by the tax authority in case the actual sale price is perceived as below the market value) on the one hand and the acquisition cost of the shares on the other hand. The acquisition cost is generally what the participant paid for the acquisition of shares (increased by the inflation rate). However, there is a special rule for determining the acquisition cost in a scenario involving relocation to Serbia after shares are awarded. If an individual acquired shares of a foreign issuer (non-resident entity), and at that time and at least 6 months after that such individual has been a non-resident of Serbia, and eventually became a Serbian tax resident after that, the acquisition costs of such shares (for the purpose of the capital gain calculation) is their market value at the time the individual became a Serbian tax resident.

22. How are cash-based incentives held by an internationally mobile employee taxed?

In case an internationally mobile employee holds a cash-based incentive, his arrival to Serbia will not trigger taxation. If he becomes tax resident of Serbia, he will become subject to Serbian personal income tax once the cash is paid to him. His income should arguably be qualified as "other", non-employment income and he will be taxed as explained in 9 (iv) under the heading "On the acquisition of shares (non-employee)" above.

23. What trends in incentive plan design have you observed over the last 12 months?

In the last 12 months, the new Capital Markets Act became applicable. See answer to Q15.

24. What are the current developments and proposals for reform that will affect the operation of incentive plans over the next 12 months?

At present there are not such developments and proposals.

Contributors

Tomislav Popović
Counsel

tomislav.popovic@bdkadvokati.com

 © 2023 Legalease Ltd