

Abbiss Cadres

Tax Advantaged Share Plans
Enterprise Management Incentives ("EMI")

BRIEFING NOTE



What is an EMI plan?

An Enterprise Management Incentive ("EMI") plan is a tax advantaged option arrangement aimed at smaller growing companies to help them recruit and retain employees. This option plan may be operated either on a discretionary or all employee basis. EMI plans are flexible; provided companies meet the relevant qualifying conditions there are relatively few restrictions on how options can be structured. The tax benefits associated with EMI plans are significant; assuming certain conditions are satisfied, employees can enjoy a 10% tax rate on the growth in value of the shares.

Main features

To be eligible to grant options over its shares under an EMI plan, a company must:

- be independent (i.e. not under the control of another company);
- have gross assets of £30m or less (as shown on the company's or group's balance sheet);
- have only qualifying subsidiaries (which are those of which the company owns 50% or more);
- carry on only "qualifying trades" (see below); and
- have fewer than 250 full time equivalent employees (across the company's group).

In addition there is an overall "Purpose Test". In order to be a qualifying option for the purposes of the EMI legislation, an option must be granted for commercial reasons to recruit or retain an employee, and not as part of a tax avoidance arrangement.

It is possible to apply to HMRC to confirm whether the company is a qualifying company but not whether other aspects are satisfied (such as whether the plan rules are acceptable or whether employees are eligible).

What is a "qualifying trade"?

A **trade** is qualifying if:

- the company has a UK permanent establishment;
- it is conducted on a commercial basis with a view to profits; and
- it does not consist wholly or substantially in the carrying out of "excluded activities" (see below).

A **group** is qualifying if:

- the business of the group taken together does not consist wholly, or as a “substantial” part, in carrying out “excluded activities” or non-trading activities;
- at least one group company exists solely for the purpose of carrying on a qualifying trade and is either carrying on such a trade or be preparing to do so; and
- at least one group company has a UK permanent establishment (certain intra-group and incidental activities are disregarded).

A trade will not qualify if one or more “excluded activities” together amount to a “substantial” part of it (HMRC take the view that “substantial” means more than 20% of the trade).

Excluded trading activities include but are not limited to:

- dealing in land, commodities or futures, shares, securities or other financial instruments;
- dealing in goods, otherwise than in the course of an ordinary trade of wholesale or retail distribution;
- banking, insurance, money-lending, debt-factoring, hire purchase financing or other financial activities;
- leasing (including letting ships on charter, or other assets on hire); or
- receiving royalties or other licence fees.

Employee – eligibility requirements

To be eligible to be granted EMI options, an individual must satisfy the following three tests:

1. the individual must be an employee of the company whose shares are subject to the option or one of its qualifying subsidiaries;
2. the individual’s “committed time” must amount to either:
 - a. at least 25 hours a week; or if less,
 - b. 75% of his “working time”; and
3. the individual (together with connected persons) must not have a “material interest” in the company (which is, in general terms, ownership of more than 30% of the share capital).

Key requirements

Qualifying EMI options must satisfy the following conditions:

- options must be over ordinary shares that are fully paid up and non-redeemable;
- options must be capable of exercise within 10 years from grant; and
- options must not be exercisable greater than 1 year after the death of the option holder.

Limitations

There is a limit of £250,000 on the value of shares that may be subject to EMI options held by an individual at any one time, and any unexercised options under a tax qualifying Company Share Option Scheme (CSOP) are also included in the calculation of this limit.

Once an individual has been granted EMI options over shares worth £250,000 (regardless of whether options have been exercised or released), no further options may be granted to that individual within 3 years of the last qualifying EMI option grant. Companies can reduce the impact of this 3 year rule by specifying an individual limit in the EMI plan rules of £249,999 on the value of shares which may be subject to qualifying options. This allows further grants of EMI options to be made if options lapse or are exercised.

There is no limit on the number of employees who may be granted EMI options but there is a limit of £3 million on the total value of shares which may be subject to unexercised qualifying EMI options.

Valuation of shares

For companies not listed on the London Stock Exchange, the market value of shares over which EMI options may be granted are best agreed with HMRC prior to option grant to determine:

- that the £250,000 and £3 million limits are not exceeded; and
- whether there is any discount to be taxed on exercise (see "Tax Benefits" below).

The market value of any shares for the purpose of the £250,000 and £3 million limits is the price they might reasonably be expected to fetch on a sale in the open market, free from any restrictions or risk of forfeiture to which they may be subject. The market value of shares for the purpose of determining whether there is any discount to be taxed at exercise is the price taking into account any restrictions or risk of forfeiture to which they may be subject.

Tax benefits

No tax on grant

No income tax or National Insurance contributions ("NICs") are payable on the grant of an EMI option.

No tax on exercise of market value options

No income tax or NICs are payable on exercise if the option was granted with an exercise price which is not less than the market value of the shares at the date of grant.

Limited tax charge on exercise of discounted options

If a nil cost or discounted EMI option is granted, income tax will be payable when the option is exercised on the market value of the shares at the date of grant or, if lower, at the date of exercise (less the exercise price paid).

Tax charge following disqualifying event

If an option is exercised within 90 days of a disqualifying event, it has no effect on the tax treatment. If an option is exercised more than 90 days after a disqualifying event income tax is charged on the amount (if any) by which the market value of the shares when the option is exercised exceeds their market value immediately before the disqualifying event (the gain made before the disqualifying event escapes income tax and NICs).

The EMI legislation contains a wide range of “disqualifying events”, and they are broadly when either the company or the participant cease to satisfy the EMI requirements.

PAYE withholding

Whether or not any income tax liability is collected through Pay As You Earn withholding, and if any NIC liability arises for the employer and the employee, depends upon whether the shares subject to the option are readily convertible assets as at the date of exercise (very broadly, that will be the case if they are tradable or arrangements are likely to come into existence under which they will become so). If agreed to by the employee, any employer NICs liability may be transferred to the employee.

Beneficial CGT treatment

On the disposal of the shares acquired under an EMI option, capital gains tax (CGT) is payable on any gain at 10% or 20% depending on whether the seller is a higher rate tax payer (these are the reduced CGT rates in effect from 6 April 2016). However, if at the time of disposal more than 12 months has passed since the option was granted and other conditions are satisfied, the disposal will attract entrepreneur’s relief (a CGT rate of 10%).

Administration

Written agreement

EMI options must be granted by way of a written agreement with the employee including specific information such as the option grant date, the number of shares subject to the EMI option, the exercise price, the exercise conditions, any restrictions on the shares and any performance conditions.

Notifying HMRC

The employer company (or an agent) must notify HMRC within 92 days of the grant of an EMI option. This notification must be made online and include details of the option, the company over whose shares the option is granted and the employing company.

Inspection

The option agreement must also be available for inspection by HMRC, who has the right to raise enquiries on the notification for 12 months after the end of the 92 day period.

Why EMI?

EMI options are the most popular choice of share incentive for smaller companies, as they offer the greatest potential tax benefits of any of the tax advantaged plans.

How can we help?

If you are considering implementing an EMI plan, we can assist with the following:

- confirming whether your company is eligible to grant EMI options;
- drafting the plan rules and associated documentation;
- drafting participant communications, including tax advice;
- agreeing share valuations with HMRC; and
- complying with HMRC filing requirements.

Our compensation and benefits services

We are independently recognised as leading experts in the design and implementation of share, phantom equity and other cash-based incentive plans for employees, executives and consultants in the UK and internationally.

A practical, multi-disciplinary approach ensures our clients receive a complete service providing fully thought through arrangements which are appropriate to their market and support the achievement of their commercial goals.

Our services range from design consulting, technical feasibility analysis, drafting and implementation to providing ongoing operational support, including advising on the impact of corporate transactions.

Our financial modelling service allows clients valuable transparency on the cash, tax and share dilution impact of proposed and adopted arrangements. We also offer share valuation services.

Client testimonials

"The team at Abbiss Cadres possess expertise that is second to none in relation to complex remuneration structures and share-based incentives that has proven invaluable to us in the execution of both IPO's and corporate transactions."

Corporate Partner, AM Law 100 firm

"Abbiss Cadres assisted Abbott Risk Consulting (ARC) Ltd in the design and implementation of an employee share scheme based on Enterprise Management Incentives (EMI). Their support was invaluable and went beyond the simple mechanics of EMI schemes. They helped us focus on our business needs and ensure the scheme we put in place would help us attract and retain staff. The scheme did just that and we have just enjoyed one of our best year's performance ever with low staff turnover and a motivated workforce. Guy Abbiss is an expert in his field and is a pleasure to deal with. I have no hesitation in recommending him and Abbiss Cadres LLP."

John Abbott, Managing Director, ARC

Abbott Risk Consulting (ARC) Ltd is an independent consultancy leading the field in the provision of consulting services and technical recruitment to the defence, transportation, marine and energy sectors.

Contact us

For more information on how we can help you, visit our website at www.abbisscadres.com or contact our team.

Abbiss Cadres LLP

4 St Paul's Churchyard

London

EC4M 8AY

T: + 44 (0) 203 051 5711

F: + 44 (0) 203 051 5712

E: info@abbisscadres.com

Keep up to date with the latest people, law & tax updates

Twitter: [@Abbiss_Cadres](https://twitter.com/Abbiss_Cadres)

LinkedIn: www.linkedin.com/company/abbiss-cadres-llp

Content is for general information purposes only. The information provided is not intended to be comprehensive and it does not constitute or contain legal or other advice. If you require assistance in relation to any issue please seek specific advice relevant to your particular circumstances. In particular, no responsibility shall be accepted by the authors or by Abbiss Cadres LLP for any losses occasioned by reliance on any content appearing on or accessible from this article. For further legal information click [here](#).

London office and meeting rooms:

4 St. Paul's Churchyard, London, EC4M 8AY T: + 44 (0) 203 051 5711 F: + 44 (0) 203 051 5712

www.abbisscadres.com

www.celiaalliance.com

Abbiss Cadres LLP, registered number OC339497, is authorised and regulated by the Solicitors Regulation Authority in respect of carrying on any legal activities which fall within section 12 of the Legal Services Act 2007. Our general HR consulting, communications and business support services not involving legal or tax services are unlikely to be regulated. If and when we are retained to carry out work we will inform our client of whether and how the services we are to provide are regulated and how this affects the protections available to that client.