

## Your team



**Ann Casey**  
Partner

+44 20 7300 4750  
a.casey@taylorwessing.com



**Claire Matthews**  
Partner

+44 20 7300 7023  
cm.matthews@taylorwessing.com



**Katie Lewis**  
Senior Counsel

+44 20 7300 4704  
k.lewis@taylorwessing.com



**Karen Bail**  
Senior Associate

+44 20 7300 4076  
k.bail@taylorwessing.com



**Elliot Michaelson Taylor**  
Senior Associate

+44 20 3077 7343  
e.michaelsontaylor@taylorwessing.com



**Megan Geiser**  
Associate

+44 20 7300 7077  
m.geiser@taylorwessing.com



**Marianna Vlas**  
Associate

+44 20 3077 7252  
m.vlas@taylorwessing.com

**Claire Hawley**  
Senior Counsel -  
Knowledge

+44 20 7300 4891  
c.hawley@taylorwessing.com

**Michelle Williamson**  
Senior Counsel -  
Knowledge

+44 20 7300 4686  
m.williamson@taylorwessing.com

# EMI options – 10 traps to avoid!

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## What are the key requirements

The quid pro quo of the tax advantages of an EMI option plan is that it is subject to complex requirements relating to the company, individual employees, option terms and ongoing requirements.

If an option does not meet the requirements, it will not qualify as an EMI option and will become a non tax-favoured option (and will be taxed as such).

It is, therefore, important to ensure the requirements are complied with at all relevant times. In addition to checking the requirements are met every time an EMI option is granted, several requirements also need to be monitored throughout the life of the option. There is no advance clearance or approval procedure, although HMRC may be asked to comment in advance on whether the company is a qualifying company.

Following grant, failure to meet certain requirements may constitute a 'disqualifying event'. If the option is exercised within 90 days of a disqualifying event, the full tax advantages are preserved. If it is exercised after the end of the 90-day window, the EMI tax treatment is only preserved in respect of the increase in market value of the underlying shares to the date of the disqualifying event.

In addition, if an amendment is made to an option or discretion is exercised which impacts on a fundamental term of the option, HMRC may view this as a deemed cancellation and regrant of the option, which could similarly lead to loss of EMI tax favourable treatment.

Note that this is a summary of the current requirements only and does not include the full details, which are contained in the relevant legislation, as well as case law and associated HMRC guidance.

## 10 traps to avoid

1. The company failing the independence test by being controlled by another entity, or having arrangements in place including an imminent acquisition.
2. The company failing to meet the trading activities requirement, for example due to undertaking excluded activities such as certain financial services.
3. Not seeking a valuation from HMRC or not granting within the valuation window.
4. Breach of the EMI limits – usually the individual limit but sometimes also the company limit.
5. Option holders failing to meet the working time commitment – although it is no longer a requirement to sign a working time declaration.
6. Option terms on grant not complying with the EMI legislation.
7. Failing to register the plan or notify option grants on time – although note that the grant notification deadline extended from April 2024.
8. Altering the underlying share capital such that it is a disqualifying event – although details of share restrictions no longer need to be provided on grant.
9. Amending option terms so as to cause the option not to qualify as an EMI option and/or amendment of terms or use of discretion affecting a fundamental term.
10. Failing to comply with annual reporting requirements.

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