

18 September 2012

Enterprise Management Incentives (EMI): Extending access for academic employees - Response to Consultation Document published on 27 June 2012

About PraxisUnico

PraxisUnico makes this submission as a key representative body of the UK's research and development and technology transfer profession. PraxisUnico was formed in 2009 from two separate organisations - Praxis (committed to training for technology transfer officers in universities and research centres) and Unico which was a membership organisation including universities and PSREs (Public Sector Research Establishments). PraxisUnico has over 2600 members from 112 universities and research organisations and 42 commercial concerns, patent agents and intellectual property lawyers are associate members. PraxisUnico holds an annual conference and has delivered professional training to over 2500 individuals from 40 countries. PraxisUnico makes this submission having consulted its board and members.

Although originally focused solely on "technology transfer" (commercial deals involving intellectual property generated by universities), PraxisUnico members are engaged across the whole range of knowledge exchange activities, promoting the transfer of knowledge in all its forms across the boundaries of universities and into society.

Response overview

The policy objective of providing enhanced incentives to academic staff engaged in creating economic benefits from their research activity through the creation and growth of spin out companies and the objective to place such academics on a more level tax playing field with the non-academic management of the spin out is welcomed by PraxisUnico.

Whilst we support the principles behind the changes there are a number of aspects which, in our view, make the proposal impractical as currently set out and therefore PraxisUnico would wish to see changes before implementation. The reasons for this are set out below in the responses to the specific consultation questions.

Question 1: Can you provide details and evidence on the typical working patterns and arrangements of academic employees engaged by EMI qualifying companies – for example, whether this involves a regular and permanent weekly commitment of time, or whether working time is concentrated at particular times of the academic year?

The relationship between the academic and the EMI Company will rarely be one of employment. In most instances the academic will remain a full-time employee of the university.

Many academic employment contracts with their Research Institution allow for a number of days of consultancy carried out either in a private capacity, through the university or through a consultancy organization run for that purpose by the Research Institution. It is rare for it to be an employment arrangement between the spin-out company and the member of staff. In some instances universities will be given paid leave of absence or unpaid leave of absence to engage with the business.

There are a number of reasons why dual employment is generally not used including the problems it creates with pensions, continuous employment provisions, IP ownership, the Working Time Directive compliance, conflicts of commitment with academic research and teaching obligations and a university's Research Excellence Framework return. In addition an early stage EMI Company will typically have highly variable demands on the time of the academic that are most easily and cost effectively met through a variable hours consultancy arrangement and not by fixed hours employment. Many early stage companies with their cash constraints will also strongly prefer the fully variable costs of consultancy against the fixed costs of employment for part time workers. In a number of instances the academic will receive no remuneration from the company, particularly in the early days of the company's development.

There would be great concern that the proposed changes would have the unintended consequence of incentivising academic staff to want to change the current consultancy arrangements to part time employment ones with all the attendant significant problems for both the Company and Research Institution noted above.

Question 2: Would the proposed definition of an academic employee be effective in meeting the policy objective? If not, what alternatives could be used?

The definition would not be effective in meeting the policy objective primarily because of the issues set out in response to Question 1. To be effective the definition would need to be extended to include academic consultancy and paid or unpaid leave of absence with the EMI Company both directly or through a Research Institution or their consultancy company. We note however that consultancy would not qualify under 2.12 and 2.13 of the consultation and the matter is outside the remit of the consultation under 1.15. We therefore conclude that the proposed definition would not be effective in meeting the policy objective and further would have adverse unintended consequences for the relationship between the universities and their academic staff.

Further it is not clear how the academic would normally qualify for EMI options under paragraph 8 of Schedule 5 ITEPA 2003 which requires that the company is not under the control of an unlisted company. In the early stages of a spin out, the Research Institution or its subsidiary company may hold sufficient equity in the spin out company to disqualify any EMI options under Paragraph 8, which would need to be relaxed. Only Imperial College, which operates through its listed vehicle, Imperial Innovations plc, would appear to escape this issue.

Question 3: Are there any cases where this proposed definition might exclude academic employees that ought to be covered by any relaxation of the working time requirement?

Please provide specific examples.

See Question 1 and 2.

Question 4: Is a modified working time requirement for academic employees a suitable approach? If not, what alternatives could be used?

The approach is not a suitable approach for the reasons set out in the response to Question 1 namely that the relationship is overwhelmingly a consultancy or unpaid one and not one of employment. The time dedicated to the business is usually highly variable from week to week and month to month to the benefit of the Company and the Research Institution.

Question 5: If a modified working time requirement for academic employees was adopted, what would be a reasonable average working time to be spent on the business of the EMI company, based on current practice; and over what period of time should this be applied? For example, it could be a set number of hours over a week, or over a longer period of time.

As noted in the responses to Questions 1 and 4, the week to week and month to month working hours can be highly variable depending on the needs of the Company and the demands of the research and teaching commitments of the academic which vary on a termly basis. In order to make a significant contribution to the company it is likely that they will have to contribute, on average, two days a month. An appropriate minimum might therefore be the equivalent of 24 days per annum commitment to the company for a full time academic employee.

Question 6: Are there any cases where the proposed modified working time requirement for academic employees would be too restrictive? Please provide specific examples.

See the responses to Questions 4 and 5

Question 7: Would the proposed condition that the academic employee's work for the EMI company must be relevant to the academic discipline for which they are engaged by the research institution be a suitable approach? If not, what alternatives could be used?

While the restriction that the work is relevant to the academic's discipline appears superficially attractive it may also overly restrictive. Many academics have a wide range of interests beyond their immediate discipline and this is becoming more common with the increase in cross-disciplinary working and thematic research funding. The simplest route would be to state that the individual would have to provide evidence that the work for the company is considered to be related to their experience and sanctioned by their academic employer. This could be recorded through a consultancy agreement or a letter confirming paid or unpaid leave of absence from their academic employer.

Question 8: Do you have any views on the relative merits, including potential scope, impact, costs and benefits, of the two proposed alternative approaches to defining the type of work the academic employee must be carrying out for the EMI company in order to benefit from the new relaxation?

Neither option is appropriate in general because, as set out in, the response to Question 1, part-time employment is both unusual and inappropriate for these circumstances. For the rare exceptions, and subject to the issues raised in response to Question 7, there is no particular merit of one option over the other and it would seem most appropriate to include both options.

Question 9: Overall, do these proposals represent an appropriate and workable basis for relaxing the EMI working time requirement for academic employees?

Overall PraxisUnico does not consider these proposals appropriate because they are only applicable in a small number of cases where dual employment arrangements exist and in many of those the control conditions in Paragraph 8 of Schedule 5 ITEPA 2003 will disqualify them from EMI. For the majority of academics it will have no relevance but it may well disrupt the current model of academic consultancy that is well developed and works well. The new proposal may incentivize academics to press for an employment arrangement which could complicate matters for both the spin-out company and the university.

Question 10: What impact would these proposals have for the number of academics eligible to receive EMI share options?

It would have very little impact for the reasons already set out.

Question 11: Would these proposals present any difficulties of implementation for businesses?

The proposals would present a number of difficulties of implementation including the pressure to convert the academic relationship from one of very variable as needed consultancy input on a wide range of topics to employment for specific minimum qualifying hours and only on qualifying topics. The cost and complexity of monitoring the arrangement for HMRC would be significant.

Question 12: What impact would these proposals have for businesses in terms of one-off or continuing costs / savings?

The proposals will have both one off and continuing costs for the business and reduce the efficiency and flexibility of their academic employees/consultants.