

## SCHEDULES

### SCHEDULE 5

#### ENTERPRISE MANAGEMENT INCENTIVES

#### PART 3

#### QUALIFYING COMPANIES

##### *Qualifying companies: introduction*

- 8 A “qualifying company” is a company in relation to which the requirements of this Part of this Schedule as to the following are met at the appropriate time—
- independence (see paragraph 9),
  - having only qualifying subsidiaries (see paragraphs 10 and 11),
  - gross assets (see paragraph 12), and
  - trading activities (see paragraphs 13 and 14, read with paragraphs 15 to 23).

##### *The independence requirement*

- 9 (1) The independence requirement consists of two conditions.
- (2) The first condition is that the company is not—
- (a) a 51% subsidiary of another company, or
  - (b) a company which is under the control of—
    - (i) another company, or
    - (ii) another company and any other person connected with that other company,without being a 51% subsidiary of that other company.
- (3) The second condition is that no arrangements are in existence by virtue of which the company could become such a subsidiary or fall under such control.
- (4) Arrangements with a view to a qualifying exchange of shares (see paragraph 40) do not count for the purposes of the second condition.

##### *The qualifying subsidiaries requirement*

- 10 (1) A company that has one or more subsidiaries is not a qualifying company unless every subsidiary of the company is a qualifying subsidiary (see paragraph 11).
- (2) For this purpose—
- (a) “subsidiary” means any company which the company controls, either on its own or together with any person connected with it, and

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- (b) the question whether a person controls a company is to be determined in accordance with section 416(2) to (6) of ICTA (“control” in the context of close companies).

*Meaning of “qualifying subsidiary”*

- 11 (1) A company (“the subsidiary”) is a qualifying subsidiary of a company (“the holding company”) if the following conditions are met.
- (2) The conditions are—
- (a) that the holding company possesses not less than 75% of the issued share capital of, and not less than 75% of the voting power in, the subsidiary;
  - (b) that the holding company would—
    - (i) in the event of a winding up of the subsidiary, or
    - (ii) in any other circumstances,
 be beneficially entitled to receive not less than 75% of the assets of the subsidiary which would then be available for distribution to the shareholders of the subsidiary;
  - (c) that the holding company is beneficially entitled to not less than 75% of any profits of the subsidiary which are available for distribution to the shareholders of the subsidiary;
  - (d) that no person other than the holding company has control of the subsidiary; and
  - (e) that no arrangements are in existence by virtue of which the conditions in paragraphs (a) to (d) would cease to be met.
- (3) In sub-paragraph (2) any reference to the holding company is to be read as a reference to—
- (a) the holding company by itself,
  - (b) the holding company and one or more other subsidiaries of the holding company, or
  - (c) one or more other subsidiaries of the holding company.
- (4) Sub-paragraph (5) applies at a time when the subsidiary or another company is being wound up.
- (5) The subsidiary is not to be regarded as having ceased, on account of the winding up, to be a company in relation to which the conditions in sub-paragraph (2) are met if—
- (a) the conditions in that sub-paragraph would be met apart from the winding up, and
  - (b) the winding up is for commercial reasons and is not part of a scheme or arrangement the main purpose (or one of the main purposes) of which is the avoidance of tax.
- (6) Sub-paragraph (7) applies at a time when arrangements are in existence for the disposal by—
- (a) the holding company, or
  - (b) another subsidiary of the holding company,
- of all of its interest in the subsidiary.
- (7) The subsidiary is not to be regarded as having ceased, on account of those arrangements, to be a company in relation to which the conditions in sub-

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paragraph (2) are met if the disposal is to be for commercial reasons and is not to be part of a scheme or arrangement the main purpose (or one of the main purposes) of which is the avoidance of tax.

*The gross assets requirement*

- 12 (1) The gross assets requirement in the case of a single company is that the value of the company's gross assets does not exceed £30 million.
- (2) The gross assets requirement in the case of a parent company is that the value of the group assets does not exceed £30 million.
- (3) The "value of the group assets" means the aggregate of the values of the gross assets of each of the members of the group, disregarding any that consist in rights against, or shares in or securities of, another member of the group.

*The trading activities requirement: single company*

- 13 (1) The trading activities requirement in the case of a single company is that the company—
- (a) disregarding any purposes within sub-paragraph (2), exists wholly for the purpose of carrying on one or more qualifying trades, and
  - (b) is carrying on a qualifying trade or preparing to do so.
- (2) The purposes referred to in sub-paragraph (1)(a) are—
- (a) the holding and managing of property used by the company for one or more qualifying trades carried on by it, and
  - (b) any purposes having no significant effect (other than in relation to incidental matters) on the extent of the company's activities.
- (3) This paragraph is supplemented by paragraph 15 (meaning of "qualifying trade") read with paragraphs 16 to 23 (excluded activities).

*The trading activities requirement: parent company*

- 14 (1) The trading activities requirement in the case of a parent company is that—
- (a) at least one group company—
    - (i) disregarding any purposes within sub-paragraph (4), exists wholly for the purpose of carrying on one or more qualifying trades, and
    - (ii) is carrying on a qualifying trade or preparing to do so, and
  - (b) the business of the group does not consist (either wholly or as to a substantial part) in the carrying on of non-qualifying activities.
- (2) The "business of the group" means what would be the business of the group if the activities of the group companies taken together were regarded as one business.
- (3) For the purpose of determining the business of a group, activities of a group company are to be disregarded to the extent that they consist in—
- (a) the holding of shares in or securities of, or the making of loans to, another group company,
  - (b) the holding and managing of property used by a group company for the purposes of one or more qualifying trades carried on by a group company, or

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- (c) incidental activities of a company which meets the trading activities requirement for a single company (see paragraph 13).
- (4) The purposes referred to in sub-paragraph (1)(a)(i) are—
  - (a) the carrying on of any activities within sub-paragraph (3), and
  - (b) any purposes having no significant effect (other than in relation to incidental matters) on the extent of the company’s activities.
- (5) In this paragraph—
  - (a) “group company” means any member of the group;
  - (b) “incidental activities” means activities carried on in pursuance of purposes having no significant effect (other than in relation to incidental matters) on the extent of the company’s activities;
  - (c) “non-qualifying activities” means—
    - (i) excluded activities, or
    - (ii) activities carried on otherwise than in the course of a trade.
- (6) This paragraph is supplemented by paragraph 15 (meaning of “qualifying trade”) read with paragraphs 16 to 23 (excluded activities).

*Meaning of “qualifying trade”*

- 15 (1) A trade is a qualifying trade if—
- (a) it is carried on wholly or mainly in the United Kingdom,
  - (b) it is conducted on a commercial basis and with a view to the realisation of profits, and
  - (c) it does not consist (either wholly or as to a substantial part) in the carrying on of excluded activities.
- (2) The carrying on of activities of research and development from which it is intended that a connected qualifying trade will be derived or benefit counts as the carrying on of a qualifying trade.
- (3) But preparing to carry on such activities does not count as preparing to carry on a qualifying trade.
- (4) In sub-paragraph (2) “connected qualifying trade” means a qualifying trade carried on—
- (a) by the company carrying on the activities of research and development, or
  - (b) if that company is a member of a group, by any other member of the group.

*Excluded activities*

- 16 The following are excluded activities—
- (a) dealing in land, in commodities or futures or in shares, securities or other financial instruments;
  - (b) dealing in goods otherwise than in the course of an ordinary trade of wholesale or retail distribution (see also paragraph 17);
  - (c) banking, insurance, money-lending, debt-factoring, hire-purchase financing or other financial activities;
  - (d) leasing, including letting ships on charter or other assets on hire (see also paragraph 18);

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- (e) receiving royalties or licence fees (see also paragraph 19);
- (f) providing legal or accountancy services;
- (g) property development (see also paragraph 20);
- (h) farming or market gardening;
- (i) holding, managing or occupying woodlands, any other forestry activities or timber production;
- (j) operating or managing hotels or comparable establishments, or managing property used as a hotel or comparable establishment (see also paragraph 21);
- (k) operating or managing nursing homes or residential care homes, or managing property used as a nursing home or residential care home (see also paragraph 22);
- (l) any activities which are excluded activities under paragraph 23.

*Excluded activities: wholesale and retail distribution*

- 17 (1) This paragraph supplements paragraph 16(b).
- (2) A trade of wholesale distribution is one in which the goods are offered for sale and sold to persons—
- (a) for resale by them, or
  - (b) for processing and resale by them,
- to members of the general public for their use or consumption.
- (3) A trade of retail distribution is one in which the goods are offered for sale and sold to members of the general public for their use or consumption.
- (4) A trade is not an ordinary trade of wholesale or retail distribution if—
- (a) it consists, to a substantial extent—
    - (i) in dealing in goods of a kind which are collected or held as an investment, or
    - (ii) in that activity and any other excluded activity taken together, and
  - (b) a substantial proportion of those goods are held by the company for a period which is significantly longer than the period for which a vendor would reasonably be expected to hold them while endeavouring to dispose of them at their market value.
- (5) In determining whether a trade carried on by any person (“P”) is an ordinary trade of wholesale or retail distribution, consideration must be given to the extent to which it has the following features—
- (a) the goods are bought by P in quantities larger than those in which P sells them;
  - (b) the goods are bought and sold by P in different markets;
  - (c) P employs staff and incurs expenses in the trade in addition—
    - (i) to the cost of the goods, and
    - (ii) in the case of a trade carried on by a company, to any remuneration paid to any person connected with it;
  - (d) there are purchases or sales from or to persons who are connected with P;
  - (e) purchases are matched with forward sales or vice versa;

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- (f) the goods are held by P for longer than is normal for goods of the kind in question;
  - (g) the trade is carried on otherwise than at a place or places commonly used for wholesale or retail trade;
  - (h) P does not take physical possession of the goods.
- (6) The features in sub-paragraph (5)(a) to (c) are indications that the trade is such an ordinary trade.
- (7) Those in sub-paragraph (5)(d) to (h) are indications to the contrary.

*Excluded activities: leasing of certain ships*

- 18 (1) This paragraph supplements paragraph 16(d) so far as it relates to the leasing of ships other than oil rigs or pleasure craft.
- (2) In the following provisions “ship” accordingly means a ship other than an oil rig or a pleasure craft.
- (3) If the requirements of sub-paragraph (4) are met, a trade is not to be regarded as consisting in the carrying on of excluded activities within paragraph 16(d) as a result only of its consisting in the letting of ships on charter.
- (4) The requirements of this sub-paragraph are that—
- (a) every ship let on charter by the company carrying on the trade is beneficially owned by the company;
  - (b) every ship beneficially owned by the company is registered in the United Kingdom;
  - (c) the company is solely responsible for arranging the marketing of the services of its ships; and
  - (d) the conditions mentioned in sub-paragraph (5) are satisfied in relation to every letting of a ship on charter by the company.
- (5) The conditions are that—
- (a) the letting is for a period not exceeding 12 months and no provision is made at any time (in the charterparty or otherwise) for extending it beyond that period otherwise than at the option of the charterer;
  - (b) during the period of the letting there is no provision in force (as a result of being contained in the charterparty or otherwise) for the grant of a new letting to end, otherwise than at the option of the charterer, more than 12 months after that provision is made;
  - (c) the letting is by way of a bargain made at arm’s length between the company and a person who is not connected with it;
  - (d) under the terms of the charter the company is responsible as principal—
    - (i) for taking, throughout the period of the charter, management decisions in relation to the ship, other than those of a kind generally regarded by persons engaged in trade of the kind in question as matters of husbandry, and
    - (ii) for defraying all expenses in connection with the ship throughout that period, or substantially all such expenses, other than those directly incidental to a particular voyage or to the employment of the ship during that period; and

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- (e) no arrangements exist as a result of which a person other than the company may be appointed to be responsible for the matters mentioned in paragraph (d) on behalf of the company.
- (6) If in the case of a letting by the company carrying on the trade (“the letting company”) the charterer is also a company and—
  - (a) the charterer is a qualifying subsidiary of the letting company, or
  - (b) the letting company is a qualifying subsidiary of the charterer, or
  - (c) both companies are qualifying subsidiaries of a third company,sub-paragraph (5) has effect with the omission of paragraph (c).
- (7) Where any of the requirements in sub-paragraph (4) is not met in relation to any lettings, the trade is not, as a result, to be treated as consisting in the carrying on of excluded activities if those lettings and any other excluded activities do not, taken together, amount to a substantial part of the trade.
- (8) In this paragraph—
  - “oil rig” means any ship which is an offshore installation for the purposes of the Mineral Workings (Offshore Installations) Act 1971 (c. 61); and
  - “pleasure craft” means any ship of a kind primarily used for sport or recreation.

*Excluded activities: receipt of royalties or licence fees*

- 19 (1) This paragraph supplements paragraph 16(e) (receipt of royalties or licence fees).
- (2) If the requirement of sub-paragraph (3) is met, a trade is not to be regarded as consisting in the carrying of excluded activities within paragraph 16(e) as a result only of its consisting to a substantial extent in the receiving of royalties or licence fees.
  - (3) The requirement of this sub-paragraph is that the royalties or licence fees (or all of them except for a part that is not substantial in terms of value) are attributable to the exploitation of relevant intangible assets.
  - (4) For this purpose a “relevant intangible asset” is an intangible asset the whole or greater part of which (in terms of value) has been created—
    - (a) by the company carrying on the trade, or
    - (b) by a company which, for the whole of the period during which it created the asset, was—
      - (i) the parent company of the company carrying on the trade, or
      - (ii) a qualifying subsidiary of that parent company.
  - (5) In the case of an intangible asset which is intellectual property, any reference in sub-paragraph (4) to the creation of the asset by a company is to its creation in circumstances in which the right to exploit it vests in the company (either alone or jointly with others).
  - (6) In sub-paragraph (5) “intellectual property” means—
    - (a) any patent, trade mark, registered design, copyright, design right, performer’s right or plant breeder’s right; or
    - (b) any rights under the law of a country or territory outside the United Kingdom which correspond or are similar to those falling within paragraph (a).

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- (7) In this paragraph “intangible asset” means any asset which falls to be treated as an intangible asset in accordance with generally accepted accounting practice.

*Excluded activities: property development*

- 20 (1) This paragraph supplements paragraph 16(g).
- (2) “Property development” means the development of land—
- (a) by a company which has, or at any time has had, an interest in the land, and
  - (b) with the sole or main object of realising a gain from the disposal of an interest in the land when it is developed.
- (3) For this purpose “interest in land” means—
- (a) any estate, interest or right in or over land, including any right affecting the use or disposition of land, or
  - (b) any right to obtain such an estate, interest or right from another which is conditional on the other’s ability to grant it.
- (4) References in this paragraph to an interest in land do not, however, include—
- (a) the interest of a creditor (other than a creditor in respect of a rentcharge) whose debt is secured by way of mortgage, an agreement for a mortgage or a charge of any kind over land, or
  - (b) in the case of land in Scotland, the interest of a creditor in a charge or security of any kind over land.

*Excluded activities: hotels and comparable establishments*

- 21 (1) This paragraph supplements paragraph 16(j).
- (2) A “comparable establishment” means a guest house, hostel or other establishment offering overnight accommodation.
- (3) An establishment offers overnight accommodation if the main purpose of maintaining it is the provision of facilities for such accommodation (with or without catering services).
- (4) The activities of a person are not to be taken to fall within paragraph 16(j) unless that person has an estate or interest in, or is in occupation of, the hotel or comparable establishment in question.

*Excluded activities: nursing homes and residential care homes*

- 22 (1) This paragraph supplements paragraph 16(k).
- (2) “Nursing home” means an establishment that exists wholly or mainly for the provision of nursing care—
- (a) for persons suffering from sickness, injury or infirmity, or
  - (b) for women who are pregnant or have given birth to children.
- (3) “Residential care home” means an establishment that exists wholly or mainly for the provision of residential accommodation, together with board and personal care, for persons in need of personal care by reason of—
- (a) old age,



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- (b) mental or physical disability,
  - (c) past or present dependence on alcohol or drugs,
  - (d) any past illness, or
  - (e) past or present mental disorder.
- (4) The activities of a person are not to be taken to fall within paragraph 16(k) unless that person has an estate or interest in, or is in occupation of, the nursing home or residential care home in question.

*Excluded activities: provision of facilities for another business*

- 23 (1) This paragraph applies where a company (“the service provider”) provides services or facilities for a business carried on by another person.
- (2) Providing those services or facilities is an excluded activity if—
- (a) the business consists to a substantial extent in carrying on excluded activities within any of sub-paragraphs (a) to (k) of paragraph 16, and
  - (b) a controlling interest in the business is held by a person (other than a company of which the service provider is a subsidiary) who also has a controlling interest in the business carried on by the service provider.
- (3) Sub-paragraphs (4) to (6) explain what is meant by a controlling interest in a business for the purposes of sub-paragraph (2)(b).
- (4) In the case of a business carried on by a company, a person (“P”) has a controlling interest in the business if—
- (a) P controls the company,
  - (b) the company is a close company and P, or an associate of P's, is a director of the company and either—
    - (i) is the beneficial owner of more than 30% of the ordinary share capital of the company, or
    - (ii) is able (directly or through the medium of other companies or by any other indirect means) to control more than 30% of that share capital, or
  - (c) not less than half of the business could, in accordance with section 344(2) of ICTA (company reconstructions: supplemental), be regarded as belonging to him for the purposes of section 343 of that Act (company reconstructions without a change of ownership).
- (5) In any other case, a person has a controlling interest in a business if that person is entitled to not less than half—
- (a) of the assets used for the business, or
  - (b) of the income arising from it.
- (6) For the purposes of sub-paragraph (4)(a) the question whether a person controls a company is to be determined in accordance with section 416(2) to (6) of ICTA (“control” in the context of close companies).
- (7) For the purposes of this paragraph any rights or powers of a person who is an associate of another person are to be attributed to that other person.
- (8) In this paragraph—

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“associate” has the meaning given in section 417(3) and (4) of ICTA (expressions relating to close companies), except that in those subsections as they apply for the purposes of this paragraph “relative” does not include a brother or sister;

“business” includes any trade, profession or vocation;

“director” is to be construed in accordance with section 417(5) of ICTA (expressions relating to close companies).