SCHEDULE 2 Regulation 3(2)

EUROPEAN CROSS-BORDER MERGERS

PART 1

AMENDMENTS OF TCGA 1992

1. TCGA 1992(**1**) is amended as follows.

2. For sections 140E (merger leaving assets in the UK tax charge), 140F (merger not leaving assets in the UK tax charge) and 140G (treatment of securities issued on merger)(**2**) substitute—

"Mergers within European Community

Merger leaving assets within UK tax charge

140E.—(1) This section applies on a merger which satisfies the conditions specified in subsection (2), where—

(a) an SE is formed by the merger of two or more companies in accordance with Articles 2(1) and 17(2)(a) or (b) of Council Regulation (EC) 2157/2001(**3**) on the Statute for a European Company (Societas Europaea),

(b) an SCE is formed by the merger of two or more cooperative societies, at least one of which is a society registered under the Industrial and Provident Societies Act 1965(**4**), in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/2003(**5**) on the Statute for a European Cooperative Society (SCE),

(c) the merger is effected by the transfer by one or more companies of all their assets and liabilities to a single existing company, or

(d) the merger is effected by the transfer by two or more companies of all their assets and liabilities to a single new company (other than an SE or an SCE) in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures.

(2) The conditions mentioned in subsection (1) are that —

(a) each of the merging companies is resident in a member State,

(b) the merging companies are not all resident in the same State,

(c) section 139 does not apply to any qualifying transferred assets,

(d) in the case of a merger to which subsection (1)(a), (b) or (c) applies, either—

(i) the transfer of assets and liabilities is made in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures, or

(ii) sub-paragraph (i) is not satisfied by reason only, and to the extent only, that the transferee is prevented from complying with sub-paragraph (i) by section 658 of the Companies Act 2006(**6**) (rule against limited company

(**1**) 1992 c. 12.
(**2**) Sections 140E to 140G were inserted by section 51(1) of the Finance (No. 2) Act 2005.
(**3**) OJ L 294, 10.11.2001 p1.
(**4**) 1965 c. 12.
(**5**) OJ L 207, 18.8.2003 p1.
(**6**) 2006 c. 46.

acquiring own shares) or a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself, and

(e) in the case of a merger to which subsection (1)(c) or (d) applies, in the course of the merger each transferor ceases to exist without being in liquidation (within the meaning given by section 247 of the Insolvency Act 1986(**7**)).

(3) Where this section applies, qualifying transferred assets shall be treated for the purposes of corporation tax on chargeable gains as if acquired by the transferee for a consideration resulting in neither gain nor loss for the transferor.

(4) For the purposes of subsections (2) and (3) an asset is a qualifying transferred asset if—

(a) it is transferred to the transferee as part of the process of the merger, and

(b) subsections (5) and (6) are satisfied in respect of it.

(5) This subsection is satisfied in respect of a transferred asset if—

(a) the transferor is resident in the United Kingdom at the time of the transfer, or

(b) any gain that would have accrued to the transferor, had it disposed of the asset immediately before the time of the transfer, would have been a chargeable gain forming part of the transferor's chargeable profits in accordance with section 10B.

(6) This subsection is satisfied in respect of a transferred asset if—

(a) the transferee is resident in the United Kingdom at the time of the transfer, or

(b) any gain that would accrue to the transferee were it to dispose of the asset immediately after the transfer would be a chargeable gain forming part of the transferee's chargeable profits in accordance with section 10B.

(7) If subsection (2)(d)(ii) applies in relation to a transfer of assets and liabilities on a merger (in whole or in part), sections 24 and 122 do not apply.

(8) This section does not apply in relation to a merger if—

(a) it is not effected for bona fide commercial reasons, or

(b) it forms part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoiding liability to corporation tax, capital gains tax or income tax,

and section 138 (clearance in advance) shall apply to this subsection as it applies to section 137 (with any necessary modifications).

(9) In this section—

(a) "cooperative society" means a society registered under the Industrial and Provident Societies Act 1965(**8**) or a similar society established in accordance with the law of a member State other than the United Kingdom,

(b) "transferor" means—

(i) in relation to a merger to which subsection (1)(a) applies, each company merging to form the SE,

(ii) in relation to a merger to which subsection (1)(b) applies, each cooperative society merging to form the SCE, and

(iii) in relation to a merger to which subsection (1)(c) or (d) applies, each company transferring all of its assets and liabilities,

(**7**) 1986 c. 45. Section 247 was amended by paragraph 9 of Schedule 17 to the Enterprise Act 2002 (c. 40).
(**8**) 1965 c. 55.

(c) "transferee" means—

(i) in relation to a merger to which subsection (1)(a) applies, the SE,

(ii) in relation to a merger to which subsection (1)(b) applies, the SCE, and

(iii) in relation to a merger to which subsection (1)(c) or (d) applies, the company to which assets and liabilities are transferred, and

(d) references in subsections (1)(c) and (2) to (7) to a company include references to a cooperative society.

Merger: assets outside UK tax charge

140F.—(1) This section applies on a merger which satisfies the conditions specified in subsection (2), where—

(a) an SE is formed by the merger of two or more companies in accordance with Articles 2(1) and 17(2)(a) or (b) of Council Regulation (EC) 2157/2001 on the Statute for a European Company (Societas Europaea),

(b) an SCE is formed by the merger of two or more cooperative societies, at least one of which is a society registered under the Industrial and Provident Societies Act 1965, in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE),

(c) the merger is effected by the transfer by one or more companies of all their assets and liabilities to a single existing company, or

(d) the merger is effected by the transfer by two or more companies of all their assets and liabilities to a single new company (other than an SE or an SCE) in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures.

(2) The conditions mentioned in subsection (1) are that—

(a) each merging company is resident in a member State,

(b) the merging companies are not all resident in the same State,

(c) in the course of the merger a company resident in the United Kingdom ("company A") transfers to a company resident in another member State ("company B") all assets and liabilities relating to a business which company A carried on in a member State other than the United Kingdom through a permanent establishment,

(d) the aggregate of the chargeable gains accruing to company A on the transfer exceeds the aggregate of any allowable losses so accruing, and

(e) in the case of a merger to which subsection (1)(a), (b) or (c) applies, either—

(i) the transfer of assets and liabilities is made in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures, or

(ii) sub-paragraph (i) is not satisfied by reason only, and to the extent only, that the transferee is prevented from complying with sub-paragraph (i) by section 658 of the Companies Act 2006 (rule against limited company acquiring own shares) or a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(3) Where this section applies, for the purposes of this Act—

(a) the allowable losses accruing to company A on the transfer shall be set off against the chargeable gains so accruing, and

(b) the transfer shall be treated as giving rise to a single chargeable gain equal to the aggregate of those gains after deducting the aggregate of those losses.

(4) Where this section applies, section 815A(**9**) of the Taxes Act (transfer of a non-UK trade) shall also apply.

(5) Subsections (8) and (9) of section 140E apply for the purposes of this section as they apply for the purposes of that section.

Treatment of securities issued on merger

140G.—(1) This section applies on a merger which satisfies the conditions specified in subsection (2), where—

(a) an SE is formed by the merger of two or more companies in accordance with Articles 2(1) and 17(2)(a) or (b) of Council Regulation (EC) 2157/2001 on the Statute for a European Company (Societas Europaea),

(b) an SCE is formed by the merger of two or more cooperative societies, at least one of which is a society registered under the Industrial and Provident Societies Act 1965, in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE),

(c) the merger is effected by the transfer by one or more companies of all their assets and liabilities to a single existing company in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures, or

(d) the merger is effected by the transfer by two or more companies of all their assets and liabilities to a single new company (other than an SE or an SCE) in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures.

(2) The conditions mentioned in subsection (1) are that—

(a) each of the merging companies is resident in a member State,

(b) the merging companies are not all resident in the same State, and

(c) the merger does not constitute or form part of a scheme of reconstruction within the meaning of section 136(**10**).

(3) Where this section applies, the merger shall be treated for the purposes of section 136 as if it were a scheme of reconstruction.

(4) Where section 136 applies by virtue of subsection (3) above section 136(6) (and section 137) shall not apply.

(5) Subsections (8) and (9) of section 140E apply for the purposes of this section as they apply for the purposes of that section.".

3. In section 24(1) (destruction &c. of asset) for "section 144" substitute "sections 140A(1D), 140E(7) and 144".

4. After section 122(1) (capital distributions)(**11**) insert—

"(1A) Subsection (1) is subject to the provisions of section 140A(1D) and section 140E(7).".

(**9**) Section 815A was inserted by section 50 of the Finance (No. 2) Act 1992 and was amended by section 134 of the Finance Act 1996, section 153 of the Finance Act 2003 and section 59 of the Finance (No. 2) Act 2005.
(**10**) Section 136 was substituted by paragraph 2 of Schedule 9 to the Finance Act 2002.
(**11**) Section 122 was amended by section 134 of, and paragraph 52 of Schedule 20, to the Finance Act 1996.

Held over gains

5. For section 140(6B) (postponement of charge on transfer of assets to non-resident company)(**12**) substitute —

"(6B) If securities are transferred by a transferor as part of the process of a merger to which section 140E applies—

(a) the transfer shall be disregarded for the purposes of subsection (4), and

(b) the transferee shall be treated as if it were the transferor in relation to—

(i) any subsequent disposal of the securities, and

(ii) any subsequent disposal by the transferee of assets to which subsection (5) applies.

(6C) In subsection (6B) "transferor" and "transferee" have the meaning given by section 140E(9).".

6. For section 154(2A) and (2B) (new assets which are depreciating assets)(**13**) substitute—

"(2A) If asset No 2 or shares in a company which holds asset No 2 are transferred as part of the process of a merger to which section 140E applies, the transfer shall be disregarded for the purpose of subsection (2), and for that purpose—

(a) if the transferee holds asset No 2, it shall be treated for the purpose of subsection (2), in relation to asset No 2, as if it were the claimant, or

(b) if the transferee holds shares in the company which holds asset No 2, section 175(**14**) shall apply in relation to the group of which the transferee is a member as if it were the same group as any group of which the claimant was a member before the merger.

(2B) If, as part of the process of a merger to which section 140E applies, the transferee becomes a member (whether or not as the principal company) of a group of which the claimant is also a member, for the purposes of subsection (2) section 175 shall apply in relation to the trade carried on by the claimant as if the group of which the transferee is a member were the same group as the group of which the claimant was a member before the merger.

(2C) In subsections (2A) and (2B)(**15**), "transferor" and "transferee" have the meaning given by section 140E(9).".

7. For section 179(1B) and (1C) (de-grouping charge) substitute—

"(1B) Where, as part of the process of a merger to which section 140E applies, a company which is a member of a group ("Group 1") ceases to exist and in consequence of that cessation—

(a) assets are transferred to the transferee, or

(b) shares in one or more companies which were also members of the group are transferred to the transferee,

a company which has ceased to exist, or the shares in which have been transferred to the transferee, shall not be treated for the purposes of this section as having left Group 1.

(1C) If subsection (1B) applies in relation to a company then for the purposes of this section—

(**12**) Section 140(6B) was inserted by section 64(2) of the Finance (No. 2) Act 2005.
(**13**) Subsections (2A) and (2B) of section 154 were inserted by section 64(3) of the Finance (No. 2) Act 2005.
(**14**) Section 175 was amended by section 251 of the Finance Act 1994, and section 48 of the Finance Act 1995.
(**15**) Subsections (1B) and (1C) of section 179 were inserted by section 51(1) of the Finance (No. 2) Act 2005.

(a) the transferee and a company which has ceased to exist in consequence of the merger shall be treated as the same entity, and

(b) if the transferee is a member of a group ("Group 2") following the merger (whether or not as the principal company of the group) a company which was a member of Group 1 and became a member of Group 2 in consequence of the merger shall be treated, for the purposes of this section, as if Group 1 and Group 2 were the same.

(1D) In subsections (1B) and (1C), "transferor" and "transferee" have the meaning given by section 140E(9).".

PART 2

AMENDMENTS OF FA 1996

Loan relationships

8. For paragraph 12B of Schedule 9 to FA 1996 (formation of SE by merger)(**16**) substitute—

"European cross-border merger

12B.—(1) This paragraph applies on a merger which satisfies the conditions specified in sub-paragraph (2), where—

(a) an SE is formed by the merger of two or more companies in accordance with Articles 2(1) and 17(2)(a) or (b) of Council Regulation (EC) 2157/2001 on the Statute for a European Company (Societas Europaea)(**17**),

(b) an SCE is formed by the merger of two or more cooperative societies, at least one of which is a society registered under the Industrial and Provident Societies Act 1965(**18**), in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/ 2003 on the Statute for a European Cooperative Society (SCE)(**19**),

(c) the merger is effected by the transfer by one or more companies of all their assets and liabilities to a single existing company, or

(d) the merger is effected by the transfer by two or more companies of all their assets and liabilities to a single new company (other than an SE or an SCE) in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures.

(2) The conditions mentioned in sub-paragraph (1) are that—

(a) each of the merging companies is resident in a member State,

(b) the merging companies are not all resident in the same State,

(c) either—

(i) immediately after the merger the transferee is resident in the United Kingdom and within the charge to corporation tax in accordance with section 6 of the Taxes Act 1988, or

(**16**) 1996 c. 8; paragraph 12B was inserted by section 85(1) of the Finance (No. 2) Act 2005.
(**17**) OJ L 294, 10.11.2001 p1.
(**18**) 1965 c. 12.
(**19**) OJ L 207, 18.8.2003 p 1.

(ii) immediately after the merger the transferee is not resident in the United Kingdom but is within the charge to corporation tax in accordance with section 11 of the Taxes Act 1988(**20**), and

(d) in the case of a merger to which sub-paragraph (1)(a), (b) or (c) applies, either—

(i) the transfer of assets and liabilities is made in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures, or

(ii) sub-paragraph (i) is not satisfied in relation to the transfer by reason only, and to the extent only, that the transferee is prevented from complying with that sub-paragraph by section 658 of the Companies Act 2006(**21**) (rule against limited company acquiring own shares) or a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(3) Where this paragraph applies, in determining credits and debits to be brought into account for the purposes of this Chapter in respect of a loan relationship, if an asset or liability representing the loan relationship is transferred in the course of the merger, the transferor and transferee companies shall be treated as having entered into the transfer for a consideration equal to the notional carrying value (within the meaning given by paragraph 12(2)) of the asset or liability.

(4) Paragraph 12(2A)(**22**) shall have effect (with any necessary modifications) in relation to this paragraph as in relation to paragraph 12.

(5) If sub-paragraph (2)(d)(ii) applies in relation to a transfer of assets and liabilities on a merger (in whole or in part) sections 24 and 122 of the Taxation of Chargeable Gains Act 1992 do not apply.

(6) Sub-paragraph (3) shall apply in relation to a merger only if—

(a) it is effected for bona fide commercial reasons, and

(b) it does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoiding liability to corporation tax, capital gains tax or income tax.

(7) But sub-paragraph (6) shall not have the effect of preventing sub-paragraph (3) from applying if before the merger the Commissioners for Her Majesty's Revenue and Customs have on the application of any of the merging companies notified them that the Commissioners are satisfied that sub-paragraph (6) will not have that effect.

(8) Section 138(2) to (5) of the Taxation of Chargeable Gains Act 1992 shall have the same effect in relation to sub-paragraph (7) above as in relation to section 138(1).

(9) For the purposes of this paragraph—

(a) "cooperative society" means a society registered under the Industrial and Provident Societies Act 1965 or a similar society governed by the law of a member State other than the United Kingdom,

(b) "transferor" means—

(i) in relation to a merger to which sub-paragraph (1)(a) applies, each company merging to form the SE,

(**20**) Section 11 was amended by section 98 of the Finance Act 1990 (c. 29), Schedule 23 to the Finance Act 1993 (c. 34), section 165 of the Finance Act 1998 (c. 36) and section 149 to the Finance Act 2003 (c. 14).
(**21**) 2006 c. 46.
(**22**) Paragraph (2A) was inserted by section 82 of the Finance Act 2002.

(ii) in relation to a merger to which sub-paragraph (1)(b) applies, each cooperative society merging to form the SCE, and

(iii) in relation to a merger to which sub-paragraph (1)(c) or (d) applies, each company transferring all of its assets and liabilities,

(c) "transferee" means—

(i) in relation to a merger to which sub-paragraph (1)(a) applies, the SE,

(ii) in relation to a merger to which sub-paragraph (1)(b) applies, the SCE, and

(iii) in relation to a merger to which sub-paragraph (1)(c) or (d) applies, the company to which assets and liabilities are transferred, and

(d) references, other than references in sub-paragraph (1)(a), (b) or (d), to a company include references to a cooperative society.

12C.—(1) This paragraph applies on a merger which satisfies the conditions specified in sub-paragraph (2), where—

(a) an SE is formed by the merger of two or more companies in accordance with Articles 2(1) and 17(2)(a) or (b) of Council Regulation (EC) 2157/2001 on the Statute for a European Company (Societas Europaea),

(b) an SCE is formed by the merger of two or more cooperative societies, at least one of which is a society registered under the Industrial and Provident Societies Act 1965, in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE),

(c) the merger is effected by the transfer by one or more companies of all their assets and liabilities to a single existing company, or

(d) the merger is effected by the transfer by two or more companies of all their assets and liabilities to a single new company (other than an SE or an SCE) in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures.

(2) The conditions mentioned in sub-paragraph (1) are that—

(a) each merging company is resident in a member State,

(b) the merging companies are not all resident in the same State,

(c) in the course of the merger a company resident in the United Kingdom ("company A") transfers to a company resident in another member State ("company B") all assets and liabilities relating to a business which company A carried on in a member State other than the United Kingdom through a permanent establishment,

(d) the transfer mentioned in paragraph (c) includes the transfer of an asset or liability representing a loan relationship, and

(e) in the case of a merger to which sub-paragraph (1)(a), (b) or (c) applies, either—

(i) the transfer of assets and liabilities is made in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures, or

(ii) sub-paragraph (i) is not satisfied in relation to the transfer by reason only, and to the extent only, that the transferee is prevented from complying with that sub-paragraph by section 658 of the Companies Act 2006 (rule against limited company acquiring own shares) or a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(3) If tax would have been chargeable under the law of one or more other member States in respect of the transfer of an asset or liability representing a loan relationship but for the Mergers Directive, Part 18 of the Taxes Act (double taxation relief) including any arrangements having effect by virtue of section 788(**23**) of that Act (bilateral relief) shall apply as if that tax had been chargeable.

(4) In calculating tax notionally chargeable under sub-paragraph (3) it shall be assumed—

(a) that to the extent permitted by the law of the other member State losses arising on the transfer are set against gains arising on the transfer, and

(b) that any relief due to company A under that law is claimed.

(5) Sub-paragraphs (6) to (9) of paragraph 12B apply for the purposes of this paragraph as they apply for the purposes of that paragraph.".

PART 3

AMENDMENTS OF FA 2002

9. FA 2002(**24**) is amended as follows.

Derivative contracts

10. For paragraph 30B of Schedule 26 (formation of SE by merger)(**25**) substitute—

"European cross-border merger

30B.—(1) This paragraph applies on a merger which satisfies the conditions specified in sub-paragraph (2), where—

(a) an SE is formed by the merger of two or more companies in accordance with Articles 2(1) and 17(2)(a) or (b) of Council Regulation (EC) 2157/2001 on the Statute for a European Company (Societas Europaea),

(b) an SCE is formed by the merger of two or more cooperative societies, at least one of which is a society registered under the Industrial and Provident Societies Act 1965, in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE),

(c) the merger is effected by the transfer by one or more companies of all their assets and liabilities to a single existing company, or

(d) the merger is effected by the transfer by two or more companies of all their assets and liabilities to a single new company (other than an SE or an SCE) in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures.

(2) The conditions mentioned in sub-paragraph (1) are that—

(a) each of the merging companies is resident in a member State,

(b) the merging companies are not all resident in the same State,

(**23**) Section 788 was amended by paragraphs 1 and 2 of Schedule 30 to the Finance Act 2000, section 88 of the Finance Act 2002, section 198 of the Finance Act 2003, section 882 of the Income Tax (Trading and Other Income) Act 2005 and sections 176 and 178 of the Finance Act 2006.

(**24**) 2002 c. 23.

(**25**) Paragraph 30B was inserted by section 55 of the Finance (No. 2) Act 2005.

(c) either—

(i) immediately after the merger the transferee is resident in the United Kingdom and within the charge to corporation tax in accordance with section 6 of the Taxes Act 1988, or

(ii) immediately after the merger the transferee is not resident in the United Kingdom but is within the charge to corporation tax in accordance with section 11 of the Taxes Act 1988, and

(d) in the case of a merger to which sub-paragraph (1)(a), (b) or (c) applies, either—

(i) the transfer of assets and liabilities is made in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures, or

(ii) sub-paragraph (i) is not satisfied in relation to the transfer by reason only, and to the extent only, that the transferee is prevented from complying with that sub-paragraph by section 658 of the Companies Act 2006 (rule against limited company acquiring own shares) or a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(3) Where this paragraph applies, in determining credits and debits to be brought into account for the purposes of this Chapter in respect of a derivative contract, if the rights and liabilities under the derivative contract are transferred in the course of the merger, the transferor and the transferee companies shall be treated as having entered into the transfer for a consideration equal to the notional carrying value (within the meaning given by paragraph 28(3)) of the derivative contract.

(4) Paragraph 30 shall apply, with any necessary modifications, in relation to this paragraph as in relation to paragraph 28.

(5) If sub-paragraph (2)(d)(ii) applies in relation to a transfer of assets and liabilities on a merger (in whole or in part) sections 24 and 122 of the Taxation of Chargeable Gains Act 1992 do not apply.

(6) Sub-paragraph (3) shall apply in relation to a merger only if—

(a) it is effected for bona fide commercial reasons, and

(b) it does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoiding liability to corporation tax, capital gains tax or income tax.

(7) But sub-paragraph (6) shall not have the effect of preventing sub-paragraph (3) from applying if before the merger the Commissioners for Her Majesty's Revenue and Customs have on the application of any of the merging companies notified them that the Commissioners are satisfied that sub-paragraph (6) will not have that effect.

(8) Section 138(2) to (5) of the Taxation of Chargeable Gains Act 1992 shall have the same effect in relation to sub-paragraph (6) above as in relation to section 138(1).

(9) For the purposes of this paragraph—

(a) "cooperative society" means a society registered under the Industrial and Provident Societies Act 1965 or a similar society governed by the law of a member State other than the United Kingdom,

(b) "transferor" means—

(i) in relation to a merger to which sub-paragraph (1)(a) applies, each company merging to form the SE,

(ii) in relation to a merger to which sub-paragraph (1)(b) applies, each cooperative society merging to form the SCE, and

(iii) in relation to a merger to which sub-paragraph (1)(c) or (d) applies, each company transferring all of its assets and liabilities,

(c) "transferee" means—

(i) in relation to a merger to which sub-paragraph (1)(a) applies, the SE,

(ii) in relation to a merger to which sub-paragraph (1)(b) applies, the SCE, and

(iii) in relation to a merger to which sub-paragraph (1)(c) or (d) applies, the company to which assets and liabilities are transferred, and

(d) references, other than references in sub-paragraph (1)(a), (b) or (d), to a company include references to a cooperative society.

30C.—(1) This paragraph applies on a merger which satisfies the conditions specified in sub-paragraph (2), where—

(a) an SE is formed by the merger of two or more companies in accordance with Articles 2(1) and 17(2)(a) or (b) of Council Regulation (EC) 2157/2001 on the Statute for a European Company (Societas Europaea)(**26**),

(b) an SCE is formed by the merger of two or more cooperative societies, at least one of which is a society registered under the Industrial and Provident Societies Act 1965(**27**), in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/ 2003 on the Statute for a European Cooperative Society (SCE)(**28**),

(c) the merger is effected by the transfer by one or more companies of all their assets and liabilities to a single existing company, or

(d) the merger is effected by the transfer by two or more companies of all their assets and liabilities to a single new company (other than an SE or an SCE) in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures.

(2) The conditions mentioned in sub-paragraph (1) are that—

(a) each merging company is resident in a member State,

(b) the merging companies are not all resident in the same State,

(c) in the course of the merger a company resident in the United Kingdom ("company A") transfers to a company resident in another member State ("company B") all assets and liabilities relating to a business which company A carried on in a member State other than the United Kingdom through a permanent establishment,

(d) the transfer mentioned in paragraph (c) includes the transfer of rights and liabilities under a derivative contract, and

(e) in the case of a merger to which sub-paragraph (1)(a), (b) or (c) applies, either—

(i) the transfer of assets and liabilities is made in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures, or

(ii) sub-paragraph (i) is not satisfied in relation to the transfer by reason only, and to the extent only, that the transferee is prevented from complying

(**26**) OJ L 294, 10.11.2001 p1.
(**27**) 1965 c. 12.
(**28**) OJ L 207, 18.8.2003 p1.

with that sub-paragraph by section 658 of the Companies Act 2006(**29**) (rule against limited company acquiring own shares) or a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(3) Where tax would have been chargeable under the law of one or more other member States in respect of the transfer of rights and liabilities under the derivative contract but for the Mergers Directive, Part 18 of the Taxes Act (double taxation relief) including any arrangements having effect by virtue of section 788 of that Act (bilateral relief) shall apply as if that tax had been chargeable.

(4) In calculating tax notionally chargeable under sub-paragraph (3) it shall be assumed—

(a) that to the extent permitted by the law of the other member State losses arising on the transfer are set against gains arising on the transfer, and

(b) that any relief due to Company A under that law is claimed.

(5) Sub-paragraphs (6) to (9) of paragraph 30B apply for the purposes of this paragraph as they apply for the purposes of that paragraph.".

Intangible assets

11. For paragraph 85A of Schedule 29 (formation of SE by merger)(**30**) substitute—

"European cross-border merger: transfer of UK business

85A.—(1) This paragraph applies on a merger which satisfies the conditions specified in sub-paragraph (2), where—

(a) an SE is formed by the merger of two or more companies in accordance with Articles 2(1) and 17(2)(a) or (b) of Council Regulation (EC) 2157/2001 on the Statute for a European Company (Societas Europaea),

(b) an SCE is formed by the merger of two or more cooperative societies, at least one of which is a society registered under the Industrial and Provident Societies Act 1965(**31**), in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/ 2003 on the Statute for a European Cooperative Society (SCE),

(c) the merger is effected by the transfer by one or more companies of all their assets and liabilities to a single existing company, or

(d) the merger is effected by the transfer by two or more companies of all their assets and liabilities to a single new company (other than an SE or an SCE) in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures.

(2) The conditions mentioned in sub-paragraph (1) are that—

(a) each of the merging companies is resident in a member State,

(b) the merging companies are not all resident in the same State,

(c) paragraph 84 does not apply to any qualifying transferred assets,

(d) in the case of a merger to which sub-paragraph (1)(a), (b) or (c) applies, either—

(**29**) 2006 c. 46.
(**30**) Paragraph 85A was inserted by section 52 of the Finance (No. 2) Act 2005.
(**31**) 1986 c.46.

(i) the transfer of assets and liabilities is made in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures, or

(ii) sub-paragraph (i) is not satisfied in relation to the transfer by reason only, and to the extent only, that the transferee is prevented from complying with that sub-paragraph by section 658 of the Companies Act 2006 (rule against limited company acquiring own shares) or a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself, and

(e) in the case of a merger to which sub-paragraph (1)(c) or (d) applies, in the course of the merger each of the companies transferring assets and liabilities ceases to exist without being in liquidation (within the meaning given by section 247 of the Insolvency Act 1986(**32**)).

(3) Where this paragraph applies, a transfer of qualifying transferred assets is treated for the purposes of this Schedule as tax-neutral (see paragraph 140).

(4) For the purposes of sub-paragraphs (2) and (3) an asset is a qualifying transferred asset if—

(a) it is transferred as part of the process of the merger,

(b) it is a chargeable intangible asset in relation to the transferor immediately before the transfer, and

(c) it is a chargeable intangible asset in relation to the transferee immediately after the transfer.

(5) For the purposes of this paragraph—

(a) "cooperative society" means a society registered under the Industrial and Provident Societies Act 1965 or a similar society governed by the law of a member State other than the United Kingdom,

(b) "transferor" means—

(i) in relation to a merger to which sub-paragraph (1)(a) applies, each company merging to form the SE,

(ii) in relation to a merger to which sub-paragraph (1)(b) applies, each cooperative society merging to form the SCE, and

(iii) in relation to a merger to which sub-paragraph (1)(c) or (d) applies, each company transferring all of its assets and liabilities,

(c) "transferee" means—

(i) in relation to a merger to which sub-paragraph (1)(a) applies, the SE,

(ii) in relation to a merger to which sub-paragraph (1)(b) applies, the SCE, and

(iii) in relation to a merger to which sub-paragraph (1)(c) or (d) applies, the company to which assets and liabilities are transferred,

(d) references, other than references in sub-paragraph (1)(a), (b) or (d), to a company include references to a cooperative society, and

(e) a company is resident in a member State if—

(i) it is within a charge to tax under the law of the State as being resident for that purpose, and

(**32**) 1986 c. 46.

(ii) it is not regarded, for the purposes of any double taxation relief arrangements to which the State is a party, as resident in a territory not within a member State.

(6) If sub-paragraph (2)(d)(ii) applies in relation to a transfer of assets and liabilities on a merger (in whole or in part), sections 24 and 122 of the Taxation of Chargeable Gains Act 1992 do not apply.

(7) This paragraph applies only if the merger—

(a) is effected for bona fide commercial reasons, and

(b) does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoiding liability to corporation tax, capital gains tax or income tax.

(8) The requirements of sub-paragraph (7) are treated as met where, before the transfer, the Commissioners for Her Majesty's Revenue and Customs have, on the application of the transferor, notified the transferor that they are satisfied that the merger will be effected for bona fide commercial reasons and will not form part of any such scheme or arrangements as are mentioned in sub-paragraph (7)(b).

(9) An application under sub-paragraph (8) must be made in accordance with paragraph 88.".

12. For paragraph 87A of Schedule 29 (SEs: transfer of non-UK trade)(**33**) substitute—

"European cross-border merger: transfer of non-UK business

87A.—(1) This paragraph applies on a merger which satisfies the conditions specified in sub-paragraph (2), where—

(a) an SE is formed by the merger of two or more companies in accordance with Articles 2(1) and 17(2)(a) or (b) of Council Regulation (EC) 2157/2001 on the Statute for a European Company (Societas Europaea),

(b) an SCE is formed by the merger of two or more cooperative societies, at least one of which is a society registered under the Industrial and Provident Societies Act 1965, in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE),

(c) the merger is effected by the transfer by one or more companies of all their assets and liabilities to a single existing company, or

(d) the merger is effected by the transfer by two or more companies of all their assets and liabilities to a single new company (other than an SE or an SCE) in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures.

(2) The conditions mentioned in sub-paragraph (1) are that—

(a) each merging company is resident in a member State,

(b) the merging companies are not all resident in the same State,

(c) in the course of the merger a company resident in the United Kingdom ("company A") transfers to a company resident in another member State ("company B") the whole or part of a business that, immediately before the transfer, company A carried on in a member State other than the United Kingdom through a permanent establishment,

(**33**) Paragraph 87A was inserted by section 53 of the Finance (No. 2) Act 2005.

(d) the transfer includes the whole of the assets of company A used for the purposes of the business or part,

(e) the transfer includes intangible fixed assets—

(i) that are chargeable intangible assets in relation to company A immediately before the transfer, and

(ii) in the case of one or more of which the proceeds of realisation exceed the cost recognised for tax purposes,

(f) no claim is made under paragraph 86 in relation to those assets, and

(g) in the case of a merger to which sub-paragraph (1)(a), (b) or (c) applies, either—

(i) the transfer of assets and liabilities is made in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures, or

(ii) sub-paragraph (i) is not satisfied in relation to the transfer by reason only, and to the extent only, that the transferee is prevented from complying with that sub-paragraph by section 658 of the Companies Act 2006 (rule against limited company acquiring own shares) or a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(3) Where tax would, but for the Mergers Directive, have been chargeable in the member State in which the permanent establishment is located, Part 18 of the Taxes Act 1988 (double taxation relief), including any arrangements having effect by virtue of section 788 (double taxation agreements), shall have effect as if the amount of tax that would, but for the Mergers Directive, have been charged in respect of the transfer of the chargeable intangible assets, had actually been charged.

(4) In this paragraph "the Mergers Directive" has the same meaning as in paragraph 87.

(5) For the purposes of this paragraph—

(a) "cooperative society" means a society registered under the Industrial and Provident Societies Act 1965 or a similar society governed by the law of a member State other than the United Kingdom,

(b) "transferor" means—

(i) in relation to a merger to which sub-paragraph (1)(a) applies, each company merging to form the SE,

(ii) in relation to a merger to which sub-paragraph (1)(b) applies, each cooperative society merging to form the SCE, and

(iii) in relation to a merger to which sub-paragraph (1)(c) or (d) applies, each company transferring all of its assets and liabilities,

(c) "transferee" means—

(i) in relation to a merger to which sub-paragraph (1)(a) applies, the SE,

(ii) in relation to a merger to which sub-paragraph (1)(b) applies, the SCE, and

(iii) in relation to a merger to which sub-paragraph (1)(c) or (d) applies, the company to which assets and liabilities are transferred,

(d) references, other than references in sub-paragraph (1), to a company include references to a cooperative society, and

(e) a company is resident in a member State if—

(i) it is within a charge to tax under the law of the State as being resident for that purpose, and

(ii) it is not regarded, for the purposes of any double taxation relief arrangements to which the State is a party, as resident in a territory not within a member State.

(6) This paragraph applies only if a merger—

(a) is effected for bona fide commercial reasons, and

(b) does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoiding liability to corporation tax, capital gains tax or income tax.

(7) The requirements of sub-paragraph (6) are treated as met where, before the transfer, the Commissioners for Her Majesty's Revenue and Customs have, on the application of the transferor, notified the transferor that they are satisfied that the merger will be effected for bona fide commercial reasons and will not form part of any such scheme or arrangements as are mentioned in sub-paragraph (6)(b).

(8) An application under sub-paragraph (7) must be made in accordance with paragraph 88.".

13. In paragraph 88(1) and (5) of Schedule 29 (procedure on application for clearance)(**34**) for "85A(5), 87A(6)" substitute "85A(7), 87A(7)".

PART 4

AMENDMENTS OF CAA 2001, FA 1988 AND ICTA

Capital allowances

14. For section 561A of CAA 2001 (transfer during formation of SE by merger)(**35**) substitute—

"**561A Transfer of asset by reason of cross-border merger**

(1) This section applies to the transfer of a qualifying asset as part of the process of a merger to which section 140E(**36**) of TCGA 1992 (mergers: assets within UK tax charge) applies (or would apply but for section 140E(2)(c)).

(2) Where this section applies to a transfer—

(a) the transfer does not give rise to any allowance or charge under this Act,

(b) anything done to or by the transferor in relation to assets transferred is to be treated after the transfer as having been done to or by the transferee (with any necessary apportionment of expenditure being made in a reasonable manner), and

(c) section 343 of ICTA(**37**) (company reconstruction without change of ownership) shall not apply.

(3) For the purposes of subsection (1) an asset is a "qualifying asset" if—

(a) it is transferred to the transferee as part of the process of the merger, and

(b) subsections (4) and (5) are satisfied in respect of it.

(**34**) Paragraph 88 was amended by section 59(5) of the Finance (No. 2) Act 2005.
(**35**) Section 516A was inserted by section 56 of the Finance (No. 2) Act 2005.
(**36**) Section 140E is inserted by paragraph 2 of Schedule 2 to these Regulations.
(**37**) 1988 c. 1.

(4) This subsection is satisfied in respect of an asset if—

(a) the transferor is resident in the United Kingdom at the time of the transfer, or

(b) the asset is an asset of a permanent establishment in the United Kingdom of the transferor.

(5) This subsection is satisfied in respect of an asset if—

(a) the transferee is resident in the United Kingdom at the time of the transfer, or

(b) the asset is an asset of a permanent establishment of the transferee in the United Kingdom immediately following the transfer.".

Residence of SCE

15.—(1) Section 66A of FA 1988 (residence of SE)(**38**) is amended as follows.

(2) For subsection (1) substitute—

"(1) This section applies in relation to—

(a) an SE which transfers its registered office to the United Kingdom (in accordance with Article 8 of Council Regulation (EC) 2157/2001 on the Statute for a European Company (Societas Europaea)), and

(b) an SCE which transfers its registered office to the United Kingdom (in accordance with Article 7 of Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE)).".

(3) In subsections (2) and (3) after "SE" insert "or SCE".

(4) The heading accordingly becomes "Residence of SE or SCE".

Tax treatment of SCE

16. In section 486(12) (industrial and provident societies and co-operative associations) of ICTA for the definition of "registered industrial and provident society" substitute—

""registered industrial and provident society" means—

(a) a society registered or deemed to be registered under the Industrial and Provident Societies Act 1965(**39**) or under the Industrial and Provident Societies Act (Northern Ireland) 1969(**40**), or

(b) an SCE formed in accordance with Council Regulation (EC) 1435/2003 on the Statute for a European Co-Operative Society(**41**);".

(**38**) Section 66A was inserted by section 60(1) of the Finance (No. 2) Act 2005.
(**39**) 1965 c. 12.
(**40**) 1969 c. 24.
(**41**) OJ L 207, 18.8.2003. p1.