SCHEDULE 2

EUROPEAN CROSS-BORDER MERGERS

PART 3

AMENDMENTS OF FA 2002

9. FA 2002(**1**) is amended as follows.

Derivative contracts

10. For paragraph 30B of Schedule 26 (formation of SE by merger)(**2**) 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,

(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

(**1**) 2002 c. 23.
(**2**) Paragraph 30B was inserted by section 55 of the Finance (No. 2) Act 2005.

(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)(**3**),

(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 on the Statute for a European Cooperative Society (SCE)(**5**),

(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 with that sub-paragraph by section 658 of the Companies Act 2006(**6**) (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

(**3**) OJ L 294, 10.11.2001 p1.
(**4**) 1965 c. 12.
(**5**) OJ L 207, 18.8.2003 p1.
(**6**) 2006 c. 46.

(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)(**7**) 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(**8**), 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—

(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(**9**)).

(**7**) Paragraph 85A was inserted by section 52 of the Finance (No. 2) Act 2005.
(**8**) 1986 c.46.
(**9**) 1986 c. 46.

(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

(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)(**10**) 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,

(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

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

(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)(**11**) for "85A(5), 87A(6)" substitute "85A(7), 87A(7)".

(**11**) Paragraph 88 was amended by section 59(5) of the Finance (No. 2) Act 2005.