

## SCHEDULE 3

Regulation 3(3)

### MERGERS, &C.: TREATMENT OF TRANSPARENT ENTITIES

#### Modifications etc. (not altering text)

- C1** Sch. 3 modified (retrospective to 29.11.2007) by [The Corporation Tax \(Implementation of the Mergers Directive\) Regulations 2008 \(S.I. 2008/1579\)](#), regs. 1(2), 4

## PART 1

### AMENDMENT OF TCGA 1992

#### Chargeable gains

1. After section 140G of TCGA 1992 (inserted by paragraph 2 of Schedule 2) insert—

*“Transparent entities: disapplication of reliefs related to Mergers Directive*

#### 140H Share exchanges

- (1) This section applies if—

- (a) a company (“company B”) issues shares or debentures to a person in exchange for shares in or debentures of another company (“company A”),
- (b) the exchange falls within one of the cases specified in section 135(2)<sup>M1</sup>, and
- (c) either company B or company A or both is a transparent entity.

- (2) Where this section applies—

- (a) “company” in section 135 shall be treated as meaning an entity listed in the Annex to the Mergers Directive, and
- (b) section 135(3) does not apply.

(3) If, as a result of an exchange in relation to which this section applies, a gain accruing to a person holding shares in or debentures of company A on the exchange would, but for the Mergers Directive, have been chargeable to tax under the law of a member State other than the United Kingdom, Part 18 of the Taxes Act (double taxation relief), including any arrangements having effect by virtue of section 788<sup>M2</sup> of that Act (bilateral relief), shall apply as if that tax, calculated in accordance with subsection (4), had been chargeable.

- (4) Tax is calculated in accordance with this subsection if—

- (a) so far as permitted under the law of the relevant member State, losses arising on the exchange are set against gains arising on the exchange, and
- (b) any relief available to company A under that law has been claimed.

#### 140I Division of business or transfer of assets

- (1) This section applies in relation to a transfer of a business, or part of a business, where—

- (a) the transfer is of a kind to which section 140A(1)<sup>M3</sup> or 140A(1A)<sup>M4</sup> applies (or to which either of those provisions would apply if the business, or the part of the

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business, transferred were carried on by the transferor in the United Kingdom and the condition mentioned in section 140A(1)(e) were satisfied in relation to the transferee, or each of the transferees), and

- (b) either the transferor or the transferee, or one of the transferees, is a transparent entity.

(2) Where this section applies—

- (a) if the transferor is a transparent entity, sections 140A and 140DA do not apply in relation to the transfer;
- (b) if a transferee is a transparent entity, section 140DA <sup>M5</sup> does not apply in relation to the transfer to it.

(3) If, as a result of a transfer in relation to which this section applies, a transfer gain would, but for the Mergers Directive, have been chargeable to tax under the law of a member State other than the United Kingdom, 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, calculated in accordance with subsection (5), had been chargeable.

(4) In subsection (3) “transfer gain” means a gain accruing to a transparent entity (or which would be treated as accruing to that entity were it not transparent) by reason of the transfer of assets by the transparent entity to the transferee.

(5) Tax is calculated in accordance with this subsection if—

- (a) so far as permitted under the law of the relevant member State, losses arising on the transfer are set against gains arising on the transfer, and
- (b) any relief available under that law has been claimed.

#### **140J Mergers**

(1) This section applies in relation to a merger if—

- (a) the merger is of a kind to which section 140E(1) applies,
- (b) the conditions in section 140E(2) are satisfied in relation to the merger, and
- (c) one or more of the merging companies is a transparent entity.

(2) Where this section applies—

- (a) if the assets and liabilities of a transparent entity are transferred to another company by reason of the merger, sections 140E and 140G <sup>M6</sup> shall not apply;
- (b) if the assets and liabilities of one or more other companies are transferred to a transparent entity by reason of the merger section 140G shall not apply.

(3) If, as a result of a merger in relation to which this section applies, a merger gain would, but for the Mergers Directive, have been chargeable to tax under the law of a member State other than the United Kingdom, 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, calculated in accordance with subsection (5), had been chargeable.

(4) In subsection (3) “merger gain” means a gain accruing to a transparent entity (or which would be treated as accruing to that entity were it not transparent) by reason of the transfer of assets by the transparent entity to another company on the merger.

(5) Tax is calculated in accordance with this subsection if—

- (a) so far as permitted under the law of the relevant member State, losses arising on the merger are set against gains arising on the merger, and

- (b) any relief available under that law has been claimed.

#### **140K Transparent entities: taxation after merger, &c**

(1) This section applies if—

- (a) a transparent entity (“company A”) is a transferee for the purposes of section 140A(1A) or 140E,
- (b) a person (“X”) with an interest in company A was or is also a shareholder or debenture holder of a company (“company B”),
- (c) X became entitled to an interest, or an increased interest, in company A in exchange for a disposal of shares in, or debentures of, company B on a merger to which section 140E applied or on a transfer to which section 140A(1A) applied,
- (d) a chargeable gain accrued to X on the disposal of shares in or debentures of company B,
- (e) in calculating the gain on the shares or debentures account was taken of the value of an asset of company B, and
- (f) X makes a disposal of his interest in the asset.

(2) In computing the gain accruing to X on a disposal to which subsection (1)(f) applies, the sum allowable as a deduction in accordance with section 38(1)(a) in relation to the interest, or the proportion of the interest, which X acquired on the merger or transfer shall be the value taken into account in computing the gain on the disposal of his shares in, or debentures of, company B.

(3) In this section a reference to an interest in company A includes—

- (a) an interest in the assets of company A,
- (b) shares in company A, and
- (c) debentures of company A.

#### **140L Interpretation**

(1) In sections 140A to 140K, unless the contrary intention appears—

- (a) “the Mergers Directive” means Council Directive 90/434/EEC<sup>M7</sup> of 23rd July 1990 on mergers, transfers &c.,
- (b) “company” means an entity listed as a company in the Annex to the Mergers Directive, and
- (c) “transparent entity” means an entity which is resident in a member State other than the United Kingdom and is listed as a company in the Annex to the Mergers Directive, but—
  - (i) does not have an ordinary share capital (within the meaning given by section 832 of the Taxes Act), and
  - (ii) if it were resident in the United Kingdom, would not be capable of being a company within the meaning given by the Companies Act 2006.

(2) For the purposes of those sections and subsection (1) above, a company is resident in a member State if—

- (a) it is within a charge to tax under the law of the State as being resident for that purpose, and
- (b) it is not regarded, for the purpose of any double taxation relief arrangements to which the State is a party, as resident in a territory not within a member State.”.

### Marginal Citations

- M1** Section 135 was substituted by paragraph 7 of Schedule 9 to the Finance 2002.
- M2** Section 788 has been amended by paragraphs 1 and 2 of Schedule 30 to the Finance Act 2000, section 88 of the Finance Act 2002, section 198 of Finance Act 2003, section 882 of Income Tax (Trading and Other Income) Act 2005 and sections 176 and 178 of the Finance Act 2006.
- M3** Section 140A was inserted by section 44 of the Finance (No. 2) Act 1992.
- M4** Section 140A(1A) is inserted by paragraph 2 of Schedule 1 to these Regulations.
- M5** Section 140DA is inserted by paragraph 6 of Schedule 1 to these Regulations.
- M6** Section 140G is inserted by paragraph 2 of Schedule 2 to these Regulations.
- M7** OJ No L 58, 4.3.2005 p.19.

## PART 2

### AMENDMENT OF FA 1996

#### Loan relationships

2. After paragraph 12G of Schedule 9 to FA 1996 (European cross-border mergers) (inserted by paragraph 16 of Schedule 1) insert—

#### *“Transparent entities*

**12H.**—(1) This paragraph applies in relation to a transfer of a business, or a part of a business, where—

- (a) the transfer is of a kind to which paragraph 12D(1) or (2)<sup>M8</sup> applies (or to which either of those provisions would apply if the business, or the part of the business, transferred were carried on by the transferor in the United Kingdom and one of the conditions mentioned in paragraph 12D(1)(d) were satisfied in relation to the transferee, or each of the transferees), and
  - (b) either the transferor or the transferee, or one of the transferees, is a transparent entity.
- (2) Where this paragraph applies—
- (a) if the transferor is a transparent entity, paragraphs 12D(3) and 12G(6) do not apply in relation to the transfer;
  - (b) if a transferee is a transparent entity, paragraph 12G(6) does not apply in relation to the transfer to it.
- (3) If, as a result of a transfer to which this paragraph applies, a transfer profit would, but for the Mergers Directive, have been chargeable to tax under the law of a member State other than the United Kingdom, Part 18 of the Taxes Act 1988 (double taxation relief), including any arrangements having effect by virtue of section 788 of that Act (bilateral relief), shall apply as if that tax, calculated in accordance with sub-paragraph (5), had been chargeable.
- (4) In sub-paragraph (3) “transfer profit” means a profit accruing to a transparent entity in respect of a loan relationship (or which would be treated as accruing to that entity were it not transparent) by reason of a transfer of assets by the transparent entity to the transferee.
- (5) Tax is calculated in accordance with this subsection if—
- (a) so far as permitted under the law of the relevant member State, losses arising on the transfer are set against profits arising on the transfer, and

- (b) any relief available under that law has been claimed.

**12I.**—(1) This paragraph applies in relation to a merger if—

- (a) the merger is of a kind to which paragraph 12B(1) <sup>M9</sup> applies,
- (b) the conditions in paragraph 12B(2) are satisfied in relation to the merger, and
- (c) one or more of the merging companies is a transparent entity.

(2) Where this paragraph applies—

- (a) if the assets and liabilities of a transparent entity are transferred to another company by reason of the merger, paragraphs 12B(3) and 12G(6) shall not apply;
- (b) if the assets and liabilities of one or more other companies are transferred to a transparent entity by reason of the merger, paragraph 12G(6) shall not apply in relation to shares or debentures issued by the transparent entity.

(3) If, as a result of a merger in relation to which this paragraph applies, a merger profit would, but for the Mergers Directive, have been chargeable to tax under the law of a member State other than the United Kingdom, Part 18 of the Taxes Act 1988 (double taxation relief), including any arrangements having effect by virtue of section 788 of that Act (bilateral relief), shall apply as if that tax, calculated in accordance with sub-paragraph (5), had been chargeable.

(4) In sub-paragraph (3) “merger profit” means a profit in respect of a loan relationship accruing to a transparent entity (or which would be treated as accruing to that entity were it not transparent) by reason of the transfer of assets by the transparent entity to another company on the merger.

(5) Tax is calculated in accordance with this sub-paragraph if—

- (a) so far as is permitted under the law of the relevant member State, losses arising on the transfer are set against profits arising on the transfer, and
- (b) any relief available under that law has been claimed.

**12J.**—(1) In paragraphs 12B to 12I, unless the contrary intention appears—

- (a) “the Mergers Directive” means Council Directive 90/434/ EEC of 23rd July 1990 on mergers, transfers &c.,
- (b) “company” (except in paragraph 12B) means an entity listed as a company in the Annex to the Mergers Directive, and
- (c) “transparent entity” means an entity which is resident in a member State other than the United Kingdom and is listed as a company in the Annex to the Mergers Directive, but which does not have an ordinary share capital (within the meaning given by section 832 of the Taxes Act).

(2) For the purposes of those paragraphs and sub-paragraph (1) above, a company is resident in a member State if—

- (a) it is within a charge to tax under the law of the State as being resident for that purpose, and
- (b) it is not regarded, for the purpose of any double taxation relief arrangements to which the State is a party, as resident in a territory not within a member State.”.

#### Marginal Citations

**M8** Paragraphs 12D to 12G are inserted by paragraph 16 of Schedule 1 to these Regulations.

**M9** Paragraph 12B was inserted by section 54 of the Finance (No. 2) Act 2005.

## PART 3

### AMENDMENTS OF FA 2002

#### Derivative contracts

3. FA 2002 <sup>M10</sup> is amended as follows.

#### Marginal Citations

**M10** 2002 c 23.

4. After paragraph 30F of Schedule 26 (European cross-border mergers) (inserted by paragraph 19 of Schedule 1) insert—

#### *“Transparent entities*

**30G.**—(1) This paragraph applies in relation to a transfer of a business, or a part of a business, where—

- (a) the transfer is of a kind to which paragraph 30D(1) or (2) <sup>M11</sup> applies (or to which either of those provisions would apply if the business, or the part of the business, transferred were carried on by the transferor in the United Kingdom and one of the conditions mentioned in paragraph 30D(1)d) were satisfied in relation to the transferee, or each of the transferees), and
- (b) the transferor is a transparent entity.

(2) Where this paragraph applies paragraph 30D(3) does not apply in relation to the transfer.

(3) If, as a result of a transfer to which this paragraph applies, a transfer profit would, but for the Mergers Directive, have been chargeable to tax under the law of a member State other than the United Kingdom, Part 18 of the Taxes Act 1988 (double taxation relief), including any arrangements having effect by virtue of section 788 of that Act (bilateral relief), shall apply as if that tax, calculated in accordance with sub-paragraph (5), had been chargeable.

(4) In sub-paragraph (3) “transfer profit” means a profit accruing to a transparent entity in respect of a derivative contract (or which would be treated as accruing to that entity were it not transparent) by reason of the transfer of assets by the transparent entity to the transferee.

(5) Tax is calculated in accordance with this sub-paragraph if—

- (a) so far as permitted under the law of the relevant member State, losses arising on the transfer are set against profits arising on the transfer, and
- (b) any relief available under that law has been claimed.

**30H.**—(1) This paragraph applies in relation to a merger if—

- (a) the merger is of a kind to which paragraph 30B(1) applies,
- (b) the conditions in paragraph 30B(2) are satisfied in relation to the merger, and
- (c) one or more of the merging companies is a transparent entity.

(2) Where this paragraph applies, if the assets and liabilities of a transparent entity are transferred to another company by reason of the merger, paragraph 30B(3) shall not apply.

(3) If, as a result of a merger in relation to which this paragraph applies, a merger profit would, but for the Mergers Directive, have been chargeable to tax under the law of a member State other

than the United Kingdom, Part 18 of the Taxes Act 1988 (double taxation relief), including any arrangements having effect by virtue of section 788 of that Act (bilateral relief), shall apply as if that tax, calculated in accordance with sub-paragraph (5), had been chargeable.

(4) In sub-paragraph (3) “merger profit” means a profit in respect of a derivative contract accruing to a transparent entity (or which would be treated as accruing to that entity were it not transparent) by reason of the transfer of assets by the transparent entity to another company on the merger.

(5) Tax is calculated in accordance with this sub-paragraph if—

- (a) so far as is permitted under the law of the relevant member State, losses arising on the transfer are set against profits arising on the transfer, and
- (b) any relief available under that law has been claimed.

**30I.**—(1) In paragraphs 30A<sup>M12</sup> to 30H, unless the contrary intention appears—

- (a) “the Mergers Directive” means Council Directive 90/434/ EEC of 23rd July 1990 on mergers, transfers &c.,
- (b) “company” (except in paragraph 30B) means an entity listed as a company in the Annex to the Mergers Directive, and
- (c) “transparent entity” means an entity which is resident in a member State other than the United Kingdom and is listed as a company in the Annex to the Mergers Directive, but which does not have an ordinary share capital (within the meaning given by section 832 of the Taxes Act).

(2) For the purposes of those paragraphs and sub-paragraph (1) above, a company is resident in a member State if—

- (a) it is within a charge to tax under the law of the State as being resident for that purpose, and
- (b) it is not regarded, for the purpose of any double taxation relief arrangements to which the State is a party, as resident in a territory not within a member State.”.

#### Marginal Citations

**M11** Paragraphs 30D to 30F were inserted by paragraph 19 of Schedule 1 to these Regulations.

**M12** Paragraph 30A was inserted by paragraph 24 of Schedule 7 to the Finance (No. 2) Act 2005. Paragraphs 30B and 30C are inserted by paragraph 11 of Schedule 2 to these Regulations.

#### Intangible assets

**5.** After paragraph 85A of Schedule 29 (European cross-border mergers) (inserted by paragraph 12 Schedule 2) insert—

#### *“Transparent entities*

**85B.**—(1) This paragraph applies in relation to a transfer of a business, or a part of a business, where—

- (a) the transfer is of a kind to which paragraph 85(1) or (1A)<sup>M13</sup> applies (or to which either of those provisions would apply if the business, or the part of the business, transferred were carried on by the transferor in the United Kingdom), and
- (b) the transferor is a transparent entity.

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(2) Where this paragraph applies paragraph 85(2) does not apply in relation to the transfer.

(3) If, as a result of a transfer to which this paragraph applies, a transfer profit would, but for the Mergers Directive, have been chargeable to tax under the law of a member State other than the United Kingdom, Part 18 of the Taxes Act 1988 (double taxation relief), including any arrangements having effect by virtue of section 788 of that Act (bilateral relief), shall apply as if that tax, calculated in accordance with sub-paragraph (5), had been chargeable.

(4) In sub-paragraph (3) “transfer profit” means a profit which would be treated as accruing to a transparent entity in respect of an intangible fixed asset were it not transparent, by reason of the transfer of assets by the transparent entity.

(5) Tax is calculated in accordance with this sub-paragraph if—

- (a) so far as permitted under the law of the relevant member State, losses arising on the transfer are set against profits arising on the transfer, and
- (b) any relief available under that law has been claimed.

**85C.**—(1) This paragraph applies in relation to a merger if—

- (a) the merger is of a kind to which paragraph 85A(1) applies,
- (b) the conditions in paragraph 85A(2) are satisfied in relation to it,
- (c) one or more of the merging companies is a transparent entity.

(2) Where this paragraph applies, if the assets and liabilities of a transparent entity are transferred to another company by reason of the merger, paragraph 85A(3) shall not apply.

(3) If, as a result of a merger in relation to which this paragraph applies, a merger profit would, but for the Mergers Directive, have been chargeable to tax under the law of a member State other than the United Kingdom, Part 18 of the Taxes Act 1988 (double taxation relief), including any arrangements having effect by virtue of section 788 of that Act (bilateral relief), shall apply as if that tax, calculated in accordance with sub-paragraph (5), had been chargeable.

(4) In sub-paragraph (3) “merger profit” means a profit which would be treated as accruing to a transparent entity in respect of an intangible fixed asset were it not transparent, by reason of the transfer of assets by the transparent entity on the merger.

(5) Tax is calculated in accordance with this sub-paragraph if—

- (a) so far as is permitted under the law of the relevant member State, losses arising on the transfer are set against profits arising on the transfer, and
- (b) any relief available under that law has been claimed.

**85D.**—(1) In paragraphs 85B and 85C—

- (a) “the Mergers Directive” means Council Directive 90/434/ EEC of 23rd July 1990 on mergers, transfers &c.,
- (b) “company” means an entity listed as a company in the Annex to the Mergers Directive, and
- (c) “transparent entity” means an entity which is resident in a member State other than the United Kingdom and is listed as a company in the Annex to the Mergers Directive, but which does not have an ordinary share capital (within the meaning given by section 832 of the Taxes Act).

(2) For the purposes of those paragraphs and sub-paragraph (1) above, a company is resident in a member State if—

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



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

**Marginal Citations**

**M13** Paragraph 85(1A) was inserted by paragraph 21 of Schedule 1 to these Regulations.

**Changes to legislation:**

There are currently no known outstanding effects for the The Corporation Tax (Implementation of the Mergers Directive) Regulations 2007, SCHEDULE 3.