

SCHEDULE 2

EUROPEAN CROSS-BORDER MERGERS

PART 2

AMENDMENTS OF FA 1996

Loan relationships

8. For paragraph 12B of Schedule 9 to FA 1996 (formation of SE by merger) ^{M1} 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) ^{M2},
 - (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 ^{M3}, in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE) ^{M4},
 - (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 ^{M5}, 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 ^{M6} (rule against limited

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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) ^{M7} 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,
 - (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 ^{M8} 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.”.

Marginal Citations

M1 1996 c. 8; paragraph 12B was inserted by section 85(1) of the Finance (No. 2) Act 2005.

M2 OJ L 294, 10.11.2001 p1.

Changes to legislation: There are currently no known outstanding effects for the The Corporation Tax (Implementation of the Mergers Directive) Regulations 2007, Paragraph 8. (See end of Document for details)

- M3** 1965 c. 12.
- M4** OJ L 207, 18.8.2003 p 1.
- M5** 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).
- M6** 2006 c. 46.
- M7** Paragraph (2A) was inserted by section 82 of the Finance Act 2002.
- M8** 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.

Changes to legislation:

There are currently no known outstanding effects for the The Corporation Tax (Implementation of the Mergers Directive) Regulations 2007, Paragraph 8.