STATUTORY INSTRUMENTS

**2007 No. 3186**

# CORPORATION TAX

## The Corporation Tax (Implementation of the Mergers Directive) Regulations 2007

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|---|---|
| *Made - - - - -* | *8th November 2007* |
| *Laid before Parliament* | *8th November 2007* |
| *Coming into force - -* | *29th November 2007* |


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The Treasury make the following Regulations in exercise of the powers conferred by section 110 of the Finance Act 2007(**a**).

The Treasury are satisfied in accordance with section 110(3) of the Finance Act 2007 that the following Regulations are necessary for the purpose of complying with the United Kingdom's obligations under the Mergers Directive.

**Citation, commencement and effect**

**1.**—(1) These Regulations may be cited as the Corporation Tax (Implementation of the Mergers Directive) Regulations 2007.

(2) These Regulations shall come into force on 29th November 2007 and shall have effect as set out in regulation 3.

**Interpretation**

**2.** In these Regulations—

"TCGA 1992" means the Taxation of Chargeable Gains Act 1992(**b**);

"ICTA" means the Income and Corporation Taxes Act 1988(**c**);

"CAA 2001" means the Capital Allowances Act 2001(**d**);

"FA 1988" means the Finance Act 1988(**e**);

"FA 1996" means the Finance Act 1996(**f**); and

"FA 2002" means the Finance Act 2002(**g**).

**Amendments of primary legislation**

**3.**—(1) Schedule 1, which contains amendments to TCGA 1992, ICTA, FA 1996, FA 2002, CAA 2001 relating to cross-border transfers of business, has effect in relation to transfers which take place on or after 1st January 2007.

(2) Schedule 2, which contains amendments to TCGA 1992, ICTA, FA 1988, FA 1996, FA 2002 and CAA 2001 relating to cross-border mergers, has effect but subject as follows—

(a) paragraphs 1 to 14 have effect—

(i) in relation to mergers relating to the formation of an SE or SCE which take place on or after 18th August 2006, and

(ii) in relation to all other mergers which take place on or after 1st January 2007;

(b) paragraph 15 has effect in relation to transfers of a registered office which take effect on or after 18th August 2006.

(3) Schedule 3, which contains amendments to TCGA 1992, FA 1996 and FA 2002 relating to mergers and treatment of transparent entities, has effect—

(a) in relation to mergers relating to the formation of an SE or SCE which take place on or after 18th August 2006, and

(b) in relation to all other mergers which take place on or after 1st January 2007.

*Dave Watts*
*Frank Roy*

8th November 2007 — Two of the Lords Commissioners of Her Majesty's Treasury

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(**a**) 2007 c. 11.
(**b**) 1992 c.12.
(**c**) 1988 c. 1.
(**d**) 2001 c. 2.
(**e**) 1988 c. 39.
(**f**) 1996 c. 8.
(**g**) 2002 c. 23.

# SCHEDULE 1

Regulation 3(1)

# CROSS-BORDER TRANSFERS OF BUSINESS

## PART 1

### AMENDMENTS OF TGCA 1992

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

**Division of UK business**

**2.**—(1) Section 140A (transfer of a UK trade)(**a**) is amended as follows.

(2) In subsection (1)—

(a) for "company A" substitute "the transferor",

(b) for "company B" substitute "the transferee",

(c) for "qualifying company" substitute "company", and

(d) for "trade" substitute "business".

(3) After subsection (1) insert—

"(1A) This section also applies where a company transfers part of its business to one or more companies if—

(a) the transferor is resident in one member State,

(b) the part of the transferor's business which is to be transferred is carried on by the transferor in the United Kingdom,

(c) at least one transferee is resident in a member State other than that in which the transferor is resident,

(d) the transferor company continues to carry on a business after the transfer,

(e) the conditions in subsection (1)(c) to (e) are satisfied (for which purpose references to the transferee shall be taken as references to each of the transferees), and

(f) either of the following conditions is satisfied.

(1B) Condition 1 is that the transfer is made in exchange for the issue of shares in or debentures of each transferee company to the persons holding shares in or debentures of the transferor.

(1C) Condition 2 is that the transfer is not made in exchange for the issue of shares in or debentures of each transferee by reason only, and to the extent only, that a transferee is prevented from complying with Condition 1 by section 658 of the Companies Act 2006(**b**) (rule against limited company acquiring own shares) or by a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(1D) If Condition 2 applies in relation to the whole or part of a transfer, sections 24 and 122 do not apply in relation to the transfer.".

(4) In subsections (2) to (4)—

(a) for "company A" substitute "the transferor", and

(b) for "company B" substitute "the transferee (or each of the transferees)".

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(**a**) Sections 140A and 140B were inserted by section 44 of the Finance (No. 2) Act 1992 (c. 48).
(**b**) 2006 c. 46.

(5) In subsection (4) for "the two companies" substitute "the transferor and the transferee (or each of the transferees)".

(6) Omit subsections (5), (6) and (7).

(7) The heading accordingly becomes "Transfer or division of UK business".

**3.** In section 140B (section 140A: anti-avoidance)—

(a) for "company A" substitute "the transferor",

(b) for "company B" substitute "the transferee (or each of the transferees)", and

(c) for "trade" substitute "business".

**Division of non-UK business**

**4.**—(1) Section 140C (transfer of non-UK trade)(**a**) is amended as follows.

(2) In subsection (1)—

(a) for "company A" substitute "the transferor",

(b) for "company B" substitute "the transferee",

(c) for "qualifying company" substitute "company", and

(d) for "trade" substitute "business".

(3) After subsection (1) insert—

"(1A) This section also applies where a company resident in the United Kingdom transfers part of its business to one or more companies if—

(a) the part of the transferor's business which is to be transferred is carried on, immediately before the time of the transfer, by the transferor in a member State other than the United Kingdom through a permanent establishment,

(b) at least one transferee is resident in a member State other than the United Kingdom,

(c) the transferor company continues to carry on a business after the transfer,

(d) the conditions in subsection (1)(b), (d), (e) and (f) are satisfied, and

(e) either of the following conditions is satisfied.

(1B) Condition 1 is that the transfer is made in exchange for the issue of shares in or debentures of each transferee company to the persons holding shares in or debentures of the transferor.

(1C) Condition 2 is that the transfer is not made in exchange for the issue of shares in or debentures of each transferee by reason only, and to the extent only, that a transferee is prevented from complying with Condition 1 by section 658 of the Companies Act 2006 (rule against limited company acquiring own shares) or by a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.".

(4) In subsections (3) and (8) for "company A" substitute "the transferor".

(5) Omit subsections (6), (7) and (9).

(6) The heading accordingly becomes "Transfer or division of non-UK business".

**5.** In section 140D (section 140C: anti-avoidance)—

(a) for "company A" substitute "the transferor", and

(b) for "trade" substitute "business".

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(**a**) Sections 140C and 140D were inserted by section 45 of the Finance (No. 2) Act 1992.

**Treatment of securities issued on transfer of assets**

**6.** After section 140D insert—

"**Securities issued on division of business**

**140DA.**—(1) This section applies where—

(a) a transfer of assets to which section 140A(1A) or 140C(1A)(**a**) applies has taken place,

(b) the transferor and the transferee (or each of the transferees) are each resident in a member State,

(c) they are not all resident in the same State, and

(e) the transfer does not constitute or form part of a scheme of reconstruction within the meaning of section 136.

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

(3) Where section 136 applies by virtue of subsection (2) above section 136(6) (and section 137) shall not apply.".

**Held over gains**

**7.** After section 140(6A) (postponement of a charge on transfer of assets to non-resident company)(**b**) insert—

"(6AA) If securities are transferred by a transferor company as part of the process of the transfer of a business to which section 140A or 140C applies—

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

(b) the transferee company shall be treated as if it were the transferor company 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.".

**8.** After section 154(2C) (new assets which are depreciating assets) (inserted by paragraph 6 of Schedule 2) insert—

"(2D) Subsections (2A) and (2B) shall apply in relation to the transfer of an asset in circumstances where section 140A applies as they apply in relation to the transfer of an asset on a merger to which section 140E(**c**) applies, and for that purpose—

(a) references to the merger shall be treated as references to the transfer,

(b) references to section 140E shall be treated as references to section 140A, and

(c) references to the transferor and the transferee shall be treated as references to the transferor and the transferee in relation to the asset.".

**9.** After section 179(1A) (company ceasing to be member of group: post appointment day cases)(**d**) insert—

"(1AA) If shares in a company are transferred as part of the process of the transfer of a business to which section 140A or 140C applies and in consequence of the transfer the company ceases to be a member of a group ("Group 1")—

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(**a**) Sections 140A(1A) and 140C(1A) are inserted by paragraph 2 of Schedule 2 to these Regulations.
(**b**) Section 140(6A) was inserted by section 46(1) of the Finance (No. 2) Act 1992.
(**c**) Section 140E is inserted by paragraph 2 of Schedule 2 to these Regulations.
(**d**) Subsections (1) and (1A) of section 179 were substituted by paragraph 4(2) of Schedule 29 to the Finance Act 2000 (c. 17).

(a) the company shall not be treated for the purposes of this section as having left Group 1, and

(b) if the transferee is a member of a group ("Group 2") and in consequence of the transfer the company becomes a member of Group 2 it shall be treated, for the purposes of this section, as if Group 1 and Group 2 were the same.".

**Loan relationships**

**10.** Section 116(8A) and (8B) (reorganisations, conversions and reconstructions)(**a**) shall cease to have effect.

# PART 2

## AMENDMENTS OF ICTA

**11.** ICTA(**b**) is amended as follows.

**Exempt distributions**

**12.** After section 209(1) (meaning of "distribution")(**c**) insert—

"(1A) If a company making a distribution as part of a merger to which section 140E or section 140F(**d**) of the 1992 Act (cross-border mergers) applies ceases to exist in the course of the merger (without being wound up), the distribution shall be treated for the purposes of subsection (1) as a distribution in respect of share capital in a winding up.".

**13.** After section 213 (exempt distributions) insert—

"**Exempt distributions: division of business**

**213A.**—(1) A reference in the Corporation Tax Acts to distributions of a company shall not apply to a distribution if—

(a) it is a distribution consisting of—

(i) the transfer of part of a business by a company ("the distributing company") to one or more other companies ("the transferee company or companies"), and

(ii) the issue of shares by the transferee company or companies to the members of the distributing company, and

(b) the requirements of either section 140A(1A) of the 1992 Act (division of UK business) or section 140C(1A) of that Act (division of non-UK business) are satisfied in relation to the distribution.

(2) A distribution to which this section applies is an "exempt distribution" for the purposes of sections 214 to 217.

(3) The expression "relevant company" in sections 214 to 217 includes the distributing company and the transferee company or companies.".

**14.** In section 218(1) (interpretation of sections 213 to 217)—

(a) for the definitions of "distributing company" and "exempt distribution" substitute—

""distributing company" means a company to which section 213(3)(b) or 213A(1)(a) applies;

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(**a**) Section 116(8A) was inserted by paragraph 60(3) of Schedule 14 to the Finance Act 1996. The subsection was amended, and section 116(8B) was inserted, by paragraph 8 of Schedule 6 to the Finance (No. 2) Act 2005 (c. 22).
(**b**) 1988 c. 1.
(**c**) Section 209(1) was amended by section 40 of the Finance Act 2000.
(**d**) Section 140F is inserted by paragraph 2 of Schedule 2 to these Regulations.

"exempt distribution" means a distribution falling within section 213(2) or 213A;", and

(b) for the definition of "relevant company" substitute—

""relevant company" means a company falling within section 213(3) or 213A(3);".

# PART 3

## AMENDMENTS OF FA 1996

**15.** Schedule 9 to FA 1996 (loan relationships: special computational provisions)(**a**) is amended as follows.

**Loan relationships**

**16.** After paragraph 12C (European cross-border mergers) (inserted by paragraph 9 of Schedule 2) insert—

*"Cross-border transfer of business within European Community*

**12D.**—(1) This paragraph applies where—

(a) a company resident in one member State transfers to a company resident in another member State the whole or part of a business carried on in the United Kingdom,

(b) the transfer is wholly in exchange for shares or debentures issued by the transferee to the transferor,

(c) the transferor and the transferee each make a claim under this paragraph, and

(d) either—

(i) the transferee is resident in the United Kingdom immediately after the transfer, or

(ii) the transferee is within the charge to corporation tax immediately after the transfer in accordance with section 11 of the Taxes Act 1988(**b**).

(2) This paragraph also applies where a company transfers part of its business to one or more companies if—

(a) the transferor is resident in one member State,

(b) the part of the transferor's business which is to be transferred is carried on by the transferor in the United Kingdom,

(c) at least one transferee is resident in a member State other than that in which the transferor is resident (and each transferee is resident in a member State, but not necessarily the same one),

(d) the transferor continues to carry on a business,

(e) the conditions in sub-paragraph (1)(c) and (d) are satisfied (for which purpose references to the transferee shall be treated as references to each of the transferees), and

(f) either of the following conditions is satisfied.

(3) Condition 1 is that the transfer is made in exchange for shares in or debentures of each transferee company to the persons holding shares in or debentures of the transferor.

(4) Condition 2 is that the transfer is not made in exchange for the issue of shares in or debentures of each transferee by reason only, and to the extent only, that a transferee is prevented from complying with Condition 1 by section 658 of the Companies Act 2006

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(**a**) 1996 c. 8.

(**b**) 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 of the Finance Act 2003 (c. 14).

(rule against limited company acquiring own shares) or by a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(5) If Condition 2 applies in relation to the whole or part of a transfer, sections 24 and 122 of the Taxation of Chargeable Gains Act 1992 do not apply in relation to the transfer.

(6) 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 which represents the loan relationship is transferred in the course of the transfer of the business or part mentioned in sub-paragraph (1) or (2), 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 12(2)) of the asset or liability.

(7) Paragraph 12(2A)(**a**) shall have effect (with any necessary modifications) in relation to this paragraph as it has effect in relation to paragraph 12.

**12E.**—(1) This paragraph applies to a transaction if—

(a) a company resident in the United Kingdom transfers to a company resident in another member State the whole or part of a business which immediately before the transfer the transferor carried on in a member State other than the United Kingdom through a permanent establishment, and

(b) the transfer is wholly or partly in exchange for shares or debentures issued by the transferee to the transferor.

(2) This paragraph also applies where a company resident in the United Kingdom transfers part of its business to one or more companies if—

(a) the part of the transferor's business which is to be transferred was carried on immediately before the transfer in a member State other than the United Kingdom through a permanent establishment,

(b) at least one transferee is resident in a member State other than the United Kingdom (and each transferee is resident in a member State, but not necessarily the same one),

(c) the transferor continues to carry on a business after the transfer, and

(d) either of the following conditions is satisfied.

(3) Condition 1 is that the transfer is made in exchange for the issue of shares in or debentures of each transferee company to the persons holding shares in or debentures of the transferor.

(4) Condition 2 is that the transfer is not made in exchange for the issue of shares in or debentures of each transferee by reason only, and to the extent only, that a transferee is prevented from complying with Condition 1 by section 658 of the Companies Act 2006 (rule against limited company acquiring own shares) or by a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(5) If, as a result of a transaction to which this paragraph applies, tax would have been chargeable under the law of one or more other member States in respect of the transfer of the loan relationship but for the Mergers Directive, 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)(**b**) shall apply as if that tax had been chargeable.

(6) 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

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(**a**) Paragraph 12(2A) was inserted by paragraph 29 of Schedule 25 to the Finance Act 2002.

(**b**) 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, and Schedule 1 to, the Income Tax (Trading and Other Income) Act 2005 (c. 5) and section 178 of the Finance Act 2006.

(b) that any relief due to the transferor under that law is claimed.

**12F.**—(1) Paragraph 12D or 12E shall apply in relation to the transfer of the whole or part of a business 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 income tax, corporation tax or capital gains tax.

(2) But sub-paragraph (1) shall not prevent paragraph 12D or 12E from applying in relation to a transfer if before the transfer the Commissioners for Her Majesty's Revenue and Customs have on the application of the transferor and transferee or transferees notified them that the Commissioners are satisfied that sub-paragraph (1) will not prevent paragraph 12D or 12E from applying in relation to the transfer.

(3) Section 138(2) to (5) of the TCGA 1992(**a**) shall have the same effect in relation to sub-paragraph (2) above as in relation to section 138(1).

*Exchanges, &c.: treatment of loan relationships*

**12G.**—(1) This paragraph applies if sections 127 to 130 of TCGA 1992 (equation of original shares and new holding) apply in relation to a reorganisation.

(2) In this paragraph "the original shares" has the meaning given by section 126(1) of TCGA 1992.

(3) Where this paragraph applies and the original shares consist of or include an asset representing a loan relationship, then unless sub-paragraph (4), (5) or (6) applies such debits and credits shall be brought into account for the purposes of this Chapter as would have been brought into account if the transaction had been a disposal of the old asset at fair value.

(4) This sub-paragraph applies if the transaction is a conversion of securities (within the meaning given by section 132(3)(**b**) of TCGA 1992) occurring in consequence of the operation of the terms of a security or a debenture which is not a security.

(5) This sub-paragraph applies if paragraph 12B, 12C, 12D(2) or 12E(2) above applies in relation to the transaction.

(6) This sub-paragraph applies if—

(a) section 135(**c**) of TCGA 1992 applies in relation to the transaction, and

(b) company A is resident in one member State and company B is resident in another member State.

(7) If sub-paragraph (4), (5) or (6) applies, such debits and credits shall be brought into account for the purposes of this Chapter as would have been brought into account if the transaction had been a disposal of the old asset at a consideration equal to its notional carrying value (within the meaning given by paragraph 12(2)).

(8) Paragraph 12(2A)(**d**) shall have effect (with any necessary modifications) in relation to sub-paragraphs (4) to (7) as it has effect in relation to paragraph 12.".

**17.** In paragraph 12A (transferee leaving group)(**e**)—

(a) after sub-paragraph (5) insert—

"(5A) Where an asset or liability which represents a loan relationship is transferred as part of the process of a transfer to which paragraph 12B(**f**) or 12D applies, and in

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(**a**) 1992 c. 12.
(**b**) Section 132(3) was inserted by section 88 of the Finance Act 1997.
(**c**) Section 135 was substituted by paragraph 7 of Schedule 9 to the Finance Act 2002.
(**d**) Paragraph 12(2A) was inserted by paragraph 29 of Schedule 25 to the Finance Act 2002.
(**e**) Paragraph 12A of Schedule 9 was inserted by paragraph 18(1) of Schedule 7 to the Finance (No. 2) Act 2005.
(**f**) Paragraph 12B was inserted by section 54 of the Finance (No. 2) Act 2005.

consequence of the transfer the transferee company ceases to be a member of a group ("Group 1")—

(a) the transferee shall not be treated for the purposes of this paragraph as having left Group 1, and

(b) if in consequence of the transfer the transferee becomes a member of another group ("Group 2") it shall be treated, for the purposes of this paragraph, as if Group 1 and Group 2 were the same.", and

(b) in sub-paragraph (8), in the definition of "exempt distribution" after "section 213(2)" insert "or 213A(**a**)".

# PART 4

## AMENDMENTS OF FA 2002

**18.** FA 2002(**b**) is amended as follows.

**Derivative contracts**

**19.** After paragraph 30C of Schedule 26 (European cross-border mergers) (inserted by paragraph 11 of Schedule 2) insert—

*"Cross-border transfer of business within European Community*

**30D.**—(1) This paragraph applies where—

(a) a company resident in one member State transfers to a company resident in another member State the whole or part of a business carried on in the United Kingdom,

(b) the transfer is wholly in exchange for shares or debentures issued by the transferee to the transferor,

(c) the transferor and the transferee each make a claim under this paragraph, and

(d) either—

(i) the transferee is resident in the United Kingdom immediately after the transfer, or

(ii) the transferee is within the charge to corporation tax immediately after the transfer in accordance with section 11 of the Taxes Act 1988.

(2) This paragraph also applies where a company transfers part of its business to one or more companies if—

(a) the transferor is resident in one member State,

(b) the part of the transferor's business which is to be transferred is carried on by the transferor in the United Kingdom,

(c) at least one transferee is resident in a member State other than that in which the transferor is resident (and each transferee is resident in a member State, but not necessarily the same one),

(d) the transferor continues to carry on a business after the transfer,

(e) the conditions in sub-paragraph (1)(c) and (d) are satisfied (for which purpose references to the transferee shall be treated as references to each of the transferees), and

(f) either of the following conditions is satisfied.

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(**a**) Section 213A is inserted by paragraph 13 of Schedule 1 to these Regulations.
(**b**) 2002 c. 23.

(3) Condition 1 is that the transfer is made in exchange for the issue of shares in or debentures of each transferee company to the persons holding shares in or debentures of the transferor.

(4) Condition 2 is that the transfer is not made in exchange for the issue of shares in or debentures of each transferee by reason only, and to the extent only, that a transferee is prevented from complying with Condition 1 by section 658 of the Companies Act 2006(**a**) (rule against limited company acquiring own shares) or by a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(5) If Condition 2 applies in relation to the whole or part of a transfer, sections 24 and 122 of the Taxation of Chargeable Gains Act 1992 do not apply in relation to the transfer.

(6) 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 transfer of the business or part mentioned in sub-paragraph (1) or (2), 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)(**b**)) of the derivative contract.

(7) Paragraph 30(**c**) shall have effect (with any necessary modifications) in relation to this paragraph as it has effect in relation to paragraph 28.

**30E.**—(1) This paragraph applies where—

(a) a company resident in the United Kingdom transfers to a company resident in another member State the whole or part of a business which immediately before the transfer the transferor carried on in a member State other than the United Kingdom through a permanent establishment,

(b) the transfer is wholly or partly in exchange for shares or debentures issued by the transferee to the transferor or to the persons holding shares in or debentures of the transferor,

(c) the transfer includes the transfer of rights or liabilities under a derivative contract, and

(d) the transferor makes a claim under this paragraph.

(2) This paragraph also applies where a company resident in the United Kingdom transfers part of its business to one or more companies if—

(a) the part of the transferor's business which is to be transferred was carried on immediately before the transfer in a member State other than the United Kingdom through a permanent establishment,

(b) at least one transferee is resident in a member State other than the United Kingdom (and each transferee is resident in a member State, but not necessarily the same one),

(c) the transferor continues to carry on a business,

(d) the conditions in sub-paragraph (1)(c) and (d) are satisfied, and

(e) either of the following conditions is satisfied.

(3) Condition 1 is that the transfer is made in exchange for the issue of shares in or debentures of each transferee company to the persons holding shares in or debentures of the transferor.

(4) Condition 2 is that the transfer is not made in exchange for the issue of shares in or debentures of each transferee by reason only, and to the extent only, that a transferee is

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(**a**) 2006 c. 46.
(**b**) Paragraph 28(3) was inserted by paragraph 22 of Schedule 7 to the Finance (No. 2) Act 2005.
(**c**) Paragraph 30 was substituted by section 179(4) of the Finance Act 2003 and was amended by paragraph 23 of Schedule 6 to the Finance Act 2006.

prevented from complying with Condition 1 by section 658 of the Companies Act 2006 (rule against limited company acquiring own shares) or by a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(5) 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 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 had been chargeable.

(6) In calculating tax notionally chargeable under sub-paragraph (5) 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 the transferor under that law is claimed.

**30F.**—(1) Paragraph 30D or 30E shall apply in relation to the transfer of the whole or part of a business 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 income tax, corporation tax or capital gains tax.

(2) But sub-paragraph (1) shall not prevent paragraph 30D or 30E from applying in relation to a transfer if before the transfer the Commissioners for Her Majesty's Revenue and Customs have on the application of the transferor and transferee or transferees notified them that the Commissioners are satisfied that sub-paragraph (1) will not prevent paragraph 30D or 30E from applying in relation to the transfer.

(3) Section 138(2) to (5) of the TCGA 1992 shall have the same effect in relation to sub-paragraph (2) above as in relation to section 138(1).".

**20.**—(1) Paragraph 30A(**a**) of Schedule 26 (transferee leaving group) is amended as follows.

(2) After sub-paragraph (5) insert—

"(5A) Where rights and liabilities under a derivative contract are transferred as part of the process of a transfer to which paragraph 30B or 30D applies, and in consequence of the transfer the transferee company ceases to be a member of a group ("Group 1")—

(a) the transferee shall not be treated for the purposes of this paragraph as having left Group 1, and

(b) if in consequence of the transfer the transferee becomes a member of another group ("Group 2") it shall be treated, for the purposes of this paragraph, as if Group 1 and Group 2 were the same.".

(3) In sub-paragraph (8), in the definition of "exempt distribution" after "section 213(2)" insert "or 213A".

**Intangible fixed assets**

**21.**—(1) Paragraph 85 of Schedule 29 (transfer of UK trade between companies resident in different EU member states) is amended as follows.

(2) For sub-paragraph (1) substitute—

"(1) This paragraph applies where—

(a) an EU company resident in one member State ("the transferor") transfers the whole or part of the business carried on by it in the United Kingdom to an EU company resident in another member State ("the transferee"),

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(**a**) Paragraph 30A was inserted by paragraph 24(1) of Schedule 7 to the Finance (No. 2) Act 2005.

(b) the transfer is wholly in exchange for securities issued by the transferee to the transferor, and

(c) a claim is made under this paragraph by the transferor and the transferee.

(1A) This paragraph also applies where an EU company transfers part of its business to one or more EU companies if—

(a) the transferor is resident in one member State,

(b) the part of the transferor's business which is to be transferred is carried on by the transferor in the United Kingdom,

(c) at least one transferee is resident in a member State other than that in which the transferor is resident,

(d) the transferor continues to carry on a business after the transfer,

(e) a claim is made under this paragraph by the transferor and the transferee (or each of the transferees), and

(f) either of the following conditions is satisfied.

(1B) Condition 1 is that the transfer is made in exchange for the issue of shares in or debentures of each transferee company to the persons holding shares in or debentures of the transferor.

(1C) Condition 2 is that the transfer is not made in exchange for the issue of shares in or debentures of each transferee by reason only, and to the extent only, that a transferee is prevented from complying with Condition 1 by section 658 of the Companies Act 2006 (rule against limited company acquiring own shares) or by a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself.

(1D) If Condition 2 applies in relation to the whole or part of a transfer, sections 24 and 122 of the Taxation of Chargeable Gains Act 1992 do not apply in relation to the transfer. ".

(3) In sub-paragraph (4) for "trade" substitute "business".

(4) In sub-paragraph (5) after "transferee" insert "(or each of the transferees)".

(5) The heading above paragraph 85 accordingly becomes "Transfer of UK business between companies resident in different EU member States".

**22.**—(1) Paragraph 87 of Schedule 29 (transfer of non-UK trade) is amended as follows,

(2) For sub-paragraph (1)(**a**) substitute—

"(1) This paragraph applies where—

(a) an EU company resident in the United Kingdom ("the transferor") transfers to an EU company resident in another member State ("the transferee") the whole or part of a business that, immediately before the time of the transfer, the transferor carried on in a member state other than the United Kingdom ("the other member State") through a permanent establishment,

(b) the transfer—

(i) includes the whole of the assets of the transferor used for the purposes of the business or part (or the whole of those assets other than cash), and

(ii) is wholly or partly in exchange for securities issued by the transferee to the transferor,

(c) the transfer includes intangible fixed assets—

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

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

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(**a**) Paragraph 87(1) was amended by section 153 of the Finance Act 1993.

(d) the transferor makes a claim under this paragraph.

(1A) This paragraph also applies where an EU company resident in the United Kingdom transfers part of its business to one or more EU companies—

(a) immediately before the time of the transfer, the transferor was carrying on the part of its business to be transferred in the other member State through a permanent establishment,

(b) at least one transferee is resident in a member State other than the United Kingdom,

(c) the transferor continues to carry on a business,

(d) the conditions in sub-paragraph (1)(b)(i), (c) and (d) are satisfied, and

(e) either of the following conditions is satisfied.

(1B) Condition 1 is that the transfer is made in exchange for the issue of shares in or debentures of each transferee company to the persons holding shares in or debentures of the transferor.

(1D) Condition 2 is that the transfer is not made in exchange for the issue of shares in or debentures of each transferee by reason only, and to the extent only, that a transferee is prevented from complying with Condition 1 by section 658 of the Companies Act 2006 (rule against limited company acquiring own shares) or by a corresponding provision of the law of another member State preventing the issue of shares or debentures to itself."

(3) In sub-paragraph (7) for "trade" substitute "business".

(4) The heading accordingly becomes "Transfer of non-UK business".

**23.** After paragraph 58(5) of Schedule 29 insert—

"(6) Where a relevant asset is transferred as part of the process of a transfer to which paragraph 85 or 87 applies, and in consequence of the transfer the transferee ceases to be a member of a group ("Group 1")—

(a) the transferee shall not be treated for the purposes of this paragraph as having left Group 1, and

(b) if in consequence of the transfer the transferee becomes a member of another group ("Group 2") it shall be treated, for the purposes of this section, as if Group 1 and Group 2 were the same.".

**24.** In paragraph 127 (certain assets to be treated as existing assets)—

(a) in sub-paragraph (1)(b)(ii) for "trade" substitute "business", and

(b) in sub-paragraph (1)(b)(iii)(**a**) for "(transfer on formation of SE by merger)" substitute "(merger leaving assets within UK tax charge)".

# PART 5

## AMENDMENT OF CAA 2001

### Capital allowances

**25.**—(1) Section 561 of CAA 2001 (transfer of UK trade to a company in another member state)(**b**) is amended as follows.

(2) For subsection (1) substitute—

"(1) This section applies if and in so far as—

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(**a**) Paragraph 127(1)(b)(iii) was inserted by section 59(6) of the Finance (No. 2) Act 2005.
(**b**) 2001 c. 2.

(a) a qualifying company resident in one member State ("the transferor") transfers the whole or part of a business carried on by it in the United Kingdom to one or more qualifying companies resident in one or more other member States ("the transferee" or "the transferees"),

(b) section 140A(**a**) of TCGA 1992 (transfer of assets treated as no-gain no-loss disposal) applies in relation to the transfer, and

(c) immediately after the transfer the transferee (or one or more of the transferees)—

(i) is resident in the United Kingdom, or

(ii) carries on in the United Kingdom through a permanent establishment a business which consists of, or includes, the business or part of the business transferred.".

(3) In subsection (2)(b)—

(a) for "company A" substitute "the transferor", and

(b) for "company B" substitute "the transferee (or each transferee)".

(4) The heading accordingly becomes "Transfer or division of UK business".

(**a**) Section 140A was inserted by section 44 of the Finance (No. 2) Act 1992.

# SCHEDULE 2

Regulation 3(2)

# EUROPEAN CROSS-BORDER MERGERS

## PART 1

### AMENDMENTS OF TCGA 1992

**1.** TCGA 1992(**a**) 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)(**b**) 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(**c**) 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(**d**), in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/2003(**e**) 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(**f**) (rule against limited company acquiring

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

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(**a**)).

(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(**b**) 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,

(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

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

(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(**a**) of the Taxes Act (transfer of a non-UK trade) shall also apply.

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(**a**) 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.

(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(**a**).

(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)(**b**) insert—

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

**Held over gains**

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

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(**a**) Section 136 was substituted by paragraph 2 of Schedule 9 to the Finance Act 2002.
(**b**) Section 122 was amended by section 134 of, and paragraph 52 of Schedule 20, to the Finance Act 1996.
(**c**) Section 140(6B) was inserted by section 64(2) of the Finance (No. 2) Act 2005.

(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)(**a**) 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(**b**) 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)(**c**), "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—

(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).".

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(**a**) Subsections (2A) and (2B) of section 154 were inserted by section 64(3) of the Finance (No. 2) Act 2005.
(**b**) Section 175 was amended by section 251 of the Finance Act 1994, and section 48 of the Finance Act 1995.
(**c**) Subsections (1B) and (1C) of section 179 were inserted by section 51(1) of the Finance (No. 2) Act 2005.

# PART 2

## AMENDMENTS OF FA 1996

**Loan relationships**

**8.** For paragraph 12B of Schedule 9 to FA 1996 (formation of SE by merger)(**a**) 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)(**b**),

(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(**c**), in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE)(**d**),

(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(**e**), 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(**f**) (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.

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(**a**) 1996 c. 8; paragraph 12B was inserted by section 85(1) of the Finance (No. 2) Act 2005.
(**b**) OJ L 294, 10.11.2001 p1.
(**c**) 1965 c. 12.
(**d**) OJ L 207, 18.8.2003 p 1.
(**e**) 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).
(**f**) 2006 c. 46.

(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)(**a**) 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

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(**a**) Paragraph (2A) was inserted by section 82 of the Finance Act 2002.

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(**a**) 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(**b**) is amended as follows.

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(**a**) 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.

(**b**) 2002 c. 23.

**Derivative contracts**

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

(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.

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

(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)(**a**),

(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(**b**), in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/ 2003 on the Statute for a European Cooperative Society (SCE)(**c**),

(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

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(**a**) OJ L 294, 10.11.2001 p1.
(**b**) 1965 c. 12.
(**c**) OJ L 207, 18.8.2003 p1.

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(**a**) (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)(**b**) 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(**c**), in accordance with Articles 2(1) and 19 of Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE),

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

(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(**a**)).

(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

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(**a**) 1986 c. 46.

(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)(**a**) 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

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

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

(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)(**a**) 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)(**b**) 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(**c**) 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(**d**) (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.

(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—

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

(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)(**a**) 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(**b**) or under the Industrial and Provident Societies Act (Northern Ireland) 1969(**c**), or

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

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

# SCHEDULE 3

Regulation 3(3)

# MERGERS, &C.: TREATMENT OF TRANSPARENT ENTITIES

## 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*

**Share exchanges**

**140H.**—(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)(**a**), 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(**b**) 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.

**Division of business or transfer of assets**

**140I.**—(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)(**c**) or 140A(1A)(**d**) 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

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(**a**) Section 135 was substituted by paragraph 7 of Schedule 9 to the Finance 2002.
(**b**) 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.
(**c**) Section 140A was inserted by section 44 of the Finance (No. 2) Act 1992.
(**d**) Section 140A(1A) is inserted by paragraph 2 of Schedule 1 to these Regulations.

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(**a**) 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.

**Mergers**

**140J.**—(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(**b**) 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.

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(**a**) Section 140DA is inserted by paragraph 6 of Schedule 1 to these Regulations.
(**b**) Section 140G is inserted by paragraph 2 of Schedule 2 to these Regulations.

**Transparent entities: taxation after merger, &c**

**140K.**—(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.

**Interpretation**

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

(a) "the Mergers Directive" means Council Directive 90/434/EEC(**a**) 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.".

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(**a**) 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)(**a**) 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)(**b**) 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.

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(**a**) Paragraphs 12D to 12G are inserted by paragraph 16 of Schedule 1 to these Regulations.
(**b**) Paragraph 12B was inserted by section 54 of the Finance (No. 2) Act 2005.

(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.".

# PART 3

## AMENDMENTS OF FA 2002

### Derivative contracts

**3.** FA 2002(**a**) is amended as follows.

**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)(**b**) 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

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(**a**) 2002 c 23.
(**b**) Paragraphs 30D to 30F were inserted by paragraph 19 of Schedule 1 to these Regulations.

(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(**a**) 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).

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(**a**) 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.

(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.".

**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)(**a**) 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.

(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.

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

(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

(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.".

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations amend primary legislation to make provision to ensure that United Kingdom direct tax legislation is compliant with its obligations under: Directive 90/434/EEC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 58, 4.3.2005. p.19), as amended by Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfer of assets and exchanges of shares concerning companies of different Member States (OJ L 310, 25.11.2005. p1) ("The Mergers Directive").

Regulation 1 provides for the citation, commencement and effect, and regulation 2 provides definitions for expressions used in the instrument.

Regulation 3 provides for Schedules 1 to 3 to have effect. They contain amendments to primary legislation. It also provides that a number of the amendments will have retrospective effect in relation to specified types of merger and transfers.

Schedule 1 makes amendments to the Taxation of Chargeable Gains Act 1992, ("TCGA 1992"), the Income and Corporation Taxes Act 1988 (c. 1: "ICTA"), the Finance Acts 1996 and 2002 ("FA 1996" and "FA 2002" respectively) and the Capital Allowances Act 2001 (c. 1: "CAA 2001") in consequence of the Mergers Directive in its application to cross-border transfers of business. The amendments implement in part Articles 4, 8 and 10 of the Mergers Directive, and provide the anti-avoidance protection allowed by Article 11 of that Directive.

Schedule 2 amends ICTA, TCGA 1992, FA 1996, CAA 2001 and the Finance Act 1988 in relation to European cross-border mergers, implementing in part Articles 4, 8 and 10 of the Mergers Directive.

Schedule 3 amends TCGA 1992, FA 1996 and FA 2002 in relation to the treatment of transparent entities. A transparent entity is an entity resident in a Member State outside the United Kingdom and which is listed as company in the Annex to the Mergers Directive, but which does not have a share capital and, were it resident in the United Kingdom would not be capable of being a company within the meaning of the Companies Act 2006 (c. 46).

A transposition note has been prepared which sets out how the main elements of the Mergers Directive will be transposed in to UK law. A Regulatory Impact Assessment of the effect of this instrument on the costs to business has been prepared. Both may be obtained from CT and VAT team, HMRC, 100 Parliament Street, London, SW1A 2HQ. They are also available on the HMRC website (www.hmrc.gov.uk). Copies of both documents have been placed in the Library of the House of Commons.



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