SCHEDULE 2

EUROPEAN CROSS-BORDER MERGERS

PART 1

AMENDMENTS OF TCGA 1992

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

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

"Mergers within European Community

Merger leaving assets within UK tax charge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) In this section—

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

(b) "transferor" means—

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

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

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

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

(c) "transferee" means—

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

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

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

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

Merger: assets outside UK tax charge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Treatment of securities issued on merger

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Held over gains

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

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

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

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

(i) any subsequent disposal of the securities, and

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

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

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

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

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

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

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

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

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

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

(a) assets are transferred to the transferee, or

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

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

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

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

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

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

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