

IMPLEMENTATION OF THE EUROPEAN COMPANY STATUTE

Technical Note and Draft Tax Clauses to implement the *EU Regulation on the European Company*

January 2005

Inland Revenue

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1. BACKGROUND: INTRODUCTION

- 1.1 In Budget 2004, the Government announced that there would be consultation on the tax changes required to accommodate the European Company Statute (ECS) that came into effect in October 2004.
- 1.2 This Technical Note meets that commitment and includes as far as possible, the necessary draft clauses setting out the legislation the government intends to bring forward in Finance Bill 2005. These clauses are set out in Appendix B
- 1.3 A partial Regulatory Impact Assessment (RIA) has been prepared and is at Appendix A.
- 1.4 This document sets out the Government's views on the main tax changes consequent on the European Company Statute. To stay in touch with developments, check the *What's New* entries on the IR web-site www.ir.gov.uk/news/index.htm. If you want to join an e-mail mailing list on this topic, please contact Will Fry as set out in 1.5 below.
- 1.5 Comments on the draft legislation are welcomed. They should be submitted as soon as possible and ideally by the end of February 2005 to:

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2. BACKGROUND: THE EUROPEAN COMPANY STATUTE

- 2.1 *Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)* is referred to in this document as the European Company Statute (ECS). Attached at Appendix C is an English version of the regulation.
- 2.2 The ECS came into effect on 8 October 2004. It set out the rules governing a new kind of corporate entity, the European Company or *Societas Europaea*, referred to throughout this document and more widely as “SE”.
- 2.3 The ECS applies directly in the United Kingdom. The DTI has issued secondary legislation to facilitate the implementation of the ECS in certain matters where the Regulation is silent, or where it provides for Member State discretion. The DTI issued a consultative document in October 2003 seeking views on the implementation of the company law changes required by the ECS. In July 2004, the DTI also published a response to the consultation, setting out proposed regulations on accommodating SEs in UK company law. Copies of the consultative document and the response are available at: <http://www.dti.gov.uk/cld/ecs-consultation-document.doc> and http://www.dti.gov.uk/cld/pdfs/annex_results.pdf.
- 2.4 The ECS concerns itself with company law provisions for SEs, not tax issues. In the absence of specific tax provisions, an SE is treated for tax purposes as a company subject to the tax law of the State in which it is based. To ensure therefore that UK corporation tax law applies to SEs based in the UK as if they were a UK company, a number of changes to our tax law are required. The Government is proposing that these changes will be included in Finance Bill 2005.
- 2.5 The adoption of the ECS Regulation coincided with the adoption of a Directive (2001/86/EC) concerning employee involvement in the administration of SEs. This Directive does not entail any changes to UK tax legislation.

Relevant articles of the ECS

- 2.6 A brief list of those articles of the ECS, which are relevant to the proposed changes in tax legislation, is set out below. Further reference is made to these articles in the detailed paragraphs on tax changes:

Article 2 sets out the ways in which an SE can be formed. There are four formation mechanisms:

- formation by merger (article 2, paragraph 1 and articles 17 to 31)
- formation of a holding SE (article 2, paragraph 2, and articles 32 to 34)
- formation of a subsidiary SE (article 2, paragraph 3, and articles 35 and 36)

- conversion of a public limited company (henceforth “PLC”) into an SE article 2, paragraph 4, and article 37)

Article 3 provides that, for the purposes of the first three paragraphs of article 2 (immediately above), an SE shall be regarded as a PLC governed by the law of the member state in which it has its registered office.

Articles 7 and 8 set out rules for the registered office of the SE, and in particular, for the transfer of the registered office of an SE between member states.

Articles 9 and 10 set out a hierarchy of the rules governing SEs.

Article 68 provides that member states should make such provision as is appropriate to ensure the effective application of the ECS.

Article 70 fixed the implementation date of the ECS as 8 October 2004.

3. FURTHER BACKGROUND: OTHER RELEVANT EU LEGISLATION: THE MERGERS DIRECTIVE

3.1 SEs themselves are a new concept, but their existence is to be factored into other EU legislation to take account of and include them in their provisions. These include *the Third Council Directive on Mergers of PLCs (78/855/EEC)* (the “Third Directive” – Appendix D) and the *Council Directive on the Common System of Taxation Applicable to Mergers etc. (the “Mergers Directive” (90/434/EEC)* Appendix E).

Third Directive on Mergers of PLCs 78/855/EEC

3.2 Article 17(2) of the ECS specifies that a merger to form an SE should be carried out in accordance with Articles 3 and 4 of the Third Directive. For convenience we will refer to the mechanism for mergers to form SEs where necessary as mergers “on the Third Directive pattern”.

The Mergers Directive 90/434/EEC

3.3 European Union Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States aims at removing taxation obstacles in business re-structuring operations.

3.4 It provides for a neutral tax regime, in order to enhance competition by allowing enterprises to participate in mergers, divisions, transfers of assets or exchanges of shares.

The EU Commission’s Proposal to include SEs within the Mergers Directive

3.5 In October 2003, the European Commission made a formal proposal to amend the Mergers Directive and to include within its scope European Companies (SEs). This proposal was ratified at the meeting of all EU Finance Ministers in December 2004 but has not yet been formally adopted into EU law.

3.6 The Government supports targeted measures aimed at making re-structuring of business easier. These measures are a valuable aid to the success of the EU internal market. The Mergers Directive helps increase the productivity of European Businesses and improve their competitive strength at the international level.

3.7 Therefore the UK Government had no objection in principle to this proposal, though the UK did, like other Member States, participate in negotiations which resulted in changes to the details of the proposal. In terms of UK tax law and this Technical Note the impact of the addition of

SEs to the Mergers Directive is the main EU legislation impacting on the taxation of SEs.

3.8 The proposal includes:

- specific provisions concerning the conversion of branches into subsidiaries;
- clarification that its benefits apply to exchange of shares where the majority of the voting rights are acquired from shareholders with tax residence outside the European Union;
- rules relating to circumstances where an entity which is regarded as a “company” in one member State is seen as fiscally transparent in another;
- the introduction of a new transaction to the scope of the Directive – “partial division”;
- it introduces rules to eliminate economic double taxation in the case of exchange of shares and transfer of assets;
- enabling the transfer, in specific circumstances, of the registered office under a tax neutral regime.
- adjustments to the shareholding limits relating to “cross-holdings”;
- clarification of article 10 to ensure that it applies where the permanent establishment and the receiving company are in the same Member State.

3.9 The Government will continue to keep relevant UK legislation under review. We expect that there will need to be some other rules relating to cross-border restructuring in Europe that may require further changes to UK legislation, and some of these are dealt with in section 7 below.

Scope of the Mergers Directive

3.10 Therefore although not specifically an SE matter, it may help appreciation of the attached clauses to include in this Technical Note a summary of the various provisions of the Mergers Directive that impact upon SEs.

3.11 Article 2 of the Mergers Directive sets out the transactions which are covered by the Directive:

- mergers (Article 2(a))
- divisions (Article 2(b))
- transfers of assets (Article 2(c)) and
- share exchanges (Article 2(d)).

- 3.12 Article 2(a) defines a “merger” by reference to three distinct mechanisms the first two of which are applicable to the formation of SEs by merger by virtue of Article 17 of the ECS.
- 3.13 Article 3(a) of the Mergers Directive links to an annex which lists the legal forms, which a “company from a member state” can take that will be within the scope of the Directive.
- 3.14 Article 3(b) specifies the residence requirement for companies covered by the Directive. Under Article 3(c), a company must be subject to one of a list of national taxes - in the UK, this is corporation tax.
- 3.15 The Directive provides for two main forms of tax deferral (plus one “special” form). Article 4 provides for deferral at asset level on merger or division while Article 9 applies the tax deferral (under Article 4) to transfers of assets.

Tax deferral: Asset level

- 3.16 At the asset level the Mergers Directive provides for a deferral of tax on assets, which are transferred as part of one of the transactions set out in Article 2 of the Directive. In current UK tax law, the transfer of such assets would be a disposal for the purposes of corporation tax on chargeable gains and would usually give rise to a capital gain or loss which might be contrary to the Mergers Directive.

Tax Deferral: Article 8: Shareholder Level

- 3.17 Article 8 allows for a slightly different form of tax deferral at shareholder level. The tax deferral at shareholder level in Article 8 covers “any taxation of the income, profits or capital gains of that shareholder”. In current UK tax law, the transfer of such shares or securities would be regarded as a “disposal” for the purposes of capital gains tax which might be contrary to the Mergers Directive.

Special Case: Transfer of a Trade or Permanent Establishment Situated in a Member State Other than the State of Residence of the Transferring Company

- 3.18 Article 10 applies a special rule to the transfer of a trade. Where a company (the “transferor”) carries on a trade through a permanent establishment in another member state and transfers that trade to a company in that or another member state, then the deferral rules will not apply to the transferor. However the transferor must be given relief for any tax that has been paid on the transfer of the assets, or would have been paid if the merger directive did not apply, in the member state in which the permanent establishment is located.

Anti-Avoidance

3.19 Article 11 allows member states to withdraw the benefit of Mergers Directive tax deferral “where it appears that the merger, division, transfer of assets or exchange of shares.....has as its principal objective or as one of its principal objectives tax evasion or tax avoidance”.

4. Mergers Directive: What Has Been Done So Far?

4.1 In Finance (No. 2) Act 1992 the UK implemented those parts of the Mergers Directive which related to share exchanges and transfers of assets. These provisions have subsequently been supplemented by new legislation in 2002 relating to intangible assets.

1992 changes: Share Exchanges and Article 8

4.2 Share exchanges for the purposes of the Directive are defined at Article 2(d). In implementing this provision only a minor change was required to the existing UK share exchange legislation at section 135 TCGA, viz.: “where the acquiring company holds, or in consequence of the exchange will hold, the greater part of the voting power in another Company”. This change can now be found at “Case 3” of section 135(2) TCGA.

4.3 The amendments to what is now section 135 TCGA in 1992 were accompanied by a similar, minor, adjustment to section 69 FA 1989 to ensure that a charge did not arise on an exchange of shares involving an Employee Share Ownership Trust.

1992 changes: Transfers of Assets: Articles 4 and 9

4.4 “Transfers of assets” for the purposes of the Directive are defined in Article 2(c). A transfer of assets means a transfer by a company of “one or more branches of its activity” to another entity. In 1992 and later, we have enacted the following legislation to give effect to the Mergers Directive for “transfers of assets”:

- Section 140A TCGA and paragraph 85 Schedule 29 Finance Act 2002 (transfer of a UK trade – chargeable gains and intangible fixed assets)
- Section 561 Capital Allowances Act 2001 (“CAA”) (deferral of certain balancing charges).

Transfers of Assets involving the Transfer of Ownership of a Permanent Establishment outside the UK

4.5 Section 140C TCGA and paragraph 87 Schedule 29 Finance Act 2002 represents our enactment of article 10 of the Mergers Directive (see paragraph 29 above) insofar as it applies to transfers of assets within article 2(c) of the Directive.

Transfers of Assets: Anti-Avoidance

- 4.6 Sections 140B and 140D TCGA and paragraph 111 Schedule 29 Finance Act 2002 support the new tax deferral sections with anti-avoidance protection, as permitted by Article 11 of the Directive.

Loan Relationships and Derivative Contracts

- 4.7 There are, in Chapter 2 Part 4 FA 1996 (loan relationships) and Schedule 26 FA 2002 (derivative contracts), no special rules based on the Mergers Directive, though there are provisions allowing an effective deferral of gains where a loan relationship or derivative contract is transferred within a group of companies.
- 4.8 The Inland Revenue's legal advice is that "capital gain" in the Mergers Directive includes a gain on the transfer of an asset representing a loan relationship or a derivative contract in the course of a transfer of assets as defined in the Directive. This Technical Note includes clauses which will apply the substance of the provisions of Schedule 29 FA 2002 to transfers of loan relationships and derivative contracts. But the legislation will not apply where fair value accounting applies to the asset or contract.

5. PROPOSED LEGISLATION IN FINANCE BILL 2005: ENACTING THE MERGERS DIRECTIVE FOR SEs

- 5.1 Current UK company law does not provide explicitly for cross-border mergers on the Third Directive pattern. Section 427 Companies Act 1985 provides for a number of possibilities, including statutory mergers, which are comparable to those on the Third Directive pattern, but this provision applies only to companies incorporated in the UK. Section 110 Insolvency Act 1986 also permits re-structuring, which may be comparable in effect to Third Directive mergers.
- 5.2 The introduction of the ECS means that, since 8 October 2004, cross-border mergers on the Third Directive pattern to form SEs will be possible in UK law. The Government's policy goal is to ensure that mergers to form SEs are governed for tax purposes by the principles of continuity reflected in the Mergers Directive.
- 5.3 The Government did consider the possibility that existing tax legislation, particularly that relating to company reconstructions, might in any case apply to mergers to form SEs. This is certainly a tenable view for many mergers to form SEs, but not for all. The unfamiliarity of the ECS is also a factor here leading to uncertainty in the minds of those contemplating the formation of SEs. The Government has therefore decided that bespoke rules, based on the Mergers Directive, for mergers to form SEs are necessary.

5.4 The main changes to tax legislation that will be introduced in Finance Bill 2005 and will be a set of rules to govern mergers to form SEs based on the “mergers” provisions of the Mergers Directive.

5.5 The changes proposed and covered in this Technical Note are set out briefly below. They cover:

- Capital gains
- Capital allowances
- Intangible assets
- Loan Relationships
- Derivative Contracts

5.6 It is also worth pointing out that current UK company law also does not provide for what the Mergers Directive calls “divisions” (cross-border or otherwise). The Mergers Directive operates to treat the “dividing” company as ceasing to exist without going into liquidation in the moment of division. Such divisions are not prescribed as one of the formation mechanisms for the creation of SEs. Therefore this element of the Mergers Directive need not be considered in relation to SEs.

5.7 This Technical Note sets out the changes to UK tax law to be implemented in 2005. They take account of the amendments to the Mergers Directive referred to above (at paragraphs 3.5 to 3.8). Because the amending Directive has not yet been formally adopted, this Technical Note does not contain all the necessary tax legislation which follows from the implementation of the ECS, though the main changes which will be required are now clear. But further clauses will be added over time and a further Technical Note may be issued if it is felt appropriate.

New draft legislation in more detail

Corporation Tax in Respect of Chargeable Gains and Capital Gains Tax

5.8 Draft legislation in Appendix B includes proposed new sections 140E to 140G Taxation of Chargeable Gains Act 1992. These new provisions relate to capital gains tax and corporation tax in respect of chargeable gains. They cover mergers to form SEs. They are intended to provide for

- Asset-level tax deferral under article 4 of the Mergers Directive
- Shareholder-level deferral under article 8 of the Directive
- The “special case” under article 10 of the Directive.

5.9 The details of how the clauses work is set out in the explanatory notes which are included in Appendix B.

Question: do respondents agree that draft sections 140E to 140G of TCGA provide satisfactory tax rules relating to capital gains for mergers to form SEs?

Capital Allowances

5.10 Draft legislation in Appendix B includes proposed new section 561A Capital Allowances Act 2001. This new provision covers mergers to form SEs. It is intended to provide for a form of asset-level tax deferral under article 4 of the Mergers Directive by preventing a capital allowances balancing charge from arising where the merger meets the necessary conditions.

5.11 The details of how the clause works is set out in the explanatory notes which are included in Appendix B.

Question: do respondents agree that draft section 561A of CAA 2001 provides satisfactory tax rules relating to capital allowances balancing charges on mergers to form SEs?

Intangible Assets

5.12 Draft legislation in Appendix B includes proposed new paragraph 85A of Schedule 29 Finance Act 2002. These new provisions relate to assets in the Intangibles regime. They cover mergers to form SEs. They are intended to provide for:

- Asset-level tax deferral under article 4 of the Mergers Directive
- The “special case” under article 10 of the Directive.

5.13 The details of how the new paragraph works is set out in the explanatory notes which are included in Appendix B.

Question: does the draft paragraph 85A of Schedule 29 FA 2002 provide satisfactory tax rules relating to intangibles on mergers to form SEs?

Loan Relationships

5.14 Draft legislation in Appendix B includes proposed new paragraph 12A of Schedule 9 to FA1996. These new provisions relate to assets in the loan relationships regime. They cover mergers to form SEs. They are intended to provide for

- Asset-level tax deferral under article 4 of the Mergers Directive
- The “special case” under article 10 of the Directive.

5.15 The details of how the new paragraph works is set out in the explanatory notes which are included in Appendix B.

Question: does draft paragraph 12A of Schedule 9 to FA1996 provide satisfactory tax rules relating to loan relationships on mergers to form SEs?

Derivative Contracts

5.16 Draft legislation in Appendix B includes proposed new paragraph 30A of Schedule 26 to FA2002. The new provisions relate to assets in the derivative contracts regime. They cover mergers to form SEs. They are intended to provide for

- Asset-level tax deferral under article 4 of the Mergers Directive
- The “special case” under article 10 of the Directive.

5.17 The details of how the new paragraph works is set out in the explanatory notes which are included in Appendix B.

Question: does draft paragraph 30A of Schedule 26 to FA2002 provide satisfactory tax rules relating to derivative contracts on mergers to form SEs?

Anti-Avoidance

5.18 It is likely that the new legislation will also be accompanied by appropriate anti-avoidance provision, as permitted by article 11 of the Directive. They will be comparable in effect to existing legislation, for example sections 137, 140B and 140D Taxation of Chargeable Gains Act 1992.

Timing: the Date from Which Legislation for Tax Deferral on Mergers to form SEs Will Come Into Effect

5.19 The ECS takes effect from 8 October 2004. However, the Mergers Directive does not apply to mergers to form SEs from that date. This is because, until the SE has been added to the annex to the Mergers Directive, an SE is not a “company” for the purposes of the Directive.

5.20 The EU Commission has suggested that the SE should be added to the annex with effect from 1 January 2006, but given that it is currently an option for UK companies to form an SE by merger, the sooner these clauses are given effect the better for UK business. However, we do not think it appropriate to have a commencement date that predates the closing of the period for discussion of this Technical Note. We are therefore proposing a uniform commencement date of 1 April 2005.

6. WHAT THE TECHNICAL NOTE DOES NOT COVER.

Transfers of registered office of SEs out of the UK

- 6.1 A key feature of an SE is that it will be able to move its Registered Office between EU Member States.
- 6.2 This aspect of the tax consequences arising from the formation of an SE by merger has been closely tied into the negotiations on the amendments to the Mergers Directive which have only just been agreed at the political level, and have not yet been formally adopted. Consequently, at time of writing it has not been possible to produce any drafts of the legislation necessary to ensure that there is tax neutrality in accordance with the Directive in the event of an SE moving registered office from one member State to another. We think in any case that UK tax legislation is compatible with the Directive and any changes required by transfers of registered office will be minimal.
- 6.3 The implementation date set out in the Mergers Directive for rules relating to the transfer of registered office of SEs is 1 January 2006, therefore we still plan to include the necessary legislation, if any, in Finance Act 2005. If before the implementation date we become aware of any inconsistency, we will provide an addendum to this Technical Note.
- 6.4 We do not think that these clauses will affect the application of the deeming of the disposal of assets on a company ceasing to be resident in the UK. We will, however, consider this to ensure that there is no compromising of the UK tax base's integrity and will ensure that the ability of an SE to move registered office does not give rise to a migration of assets from a UK tax charge to another Member State.

Transfer of Registered Office into the UK

- 6.5 We intend to make it clear that SEs which transfer their registered office into the UK are treated in the same way as companies incorporated in the UK for tax residence and Stamp Duty Reserve Tax purposes. Provisions to give effect to this will be added to the Technical Note as and when they are ready.

De-grouping, loss-buying, and anti-avoidance

- 6.6 These aspects need to be addressed but are not included in this Technical Note due to the short space of time that has elapsed since the Mergers Directive was ratified. These too will either be included as an addendum to this Technical Note as and when they become available, or form part of a further Note inviting comments.

Provisions to ensure that an SE within the charge to UK corporation tax is on the same footing as a UK company in relation to accounting periods and rates of tax etc.

- 6.7 To date we have concentrated on the tax consequences of formation of an SE on merger. Any provisions needed in legislation to ensure that an SE is treated for corporation tax purposes like any other company in the UK, will be added to the Technical Note as and when they are ready.

Administrative provisions

- 6.8 From an Inland Revenue administrative point of view, it is not intended that any special provisions will be made in respect of SEs. Any UK company that merges into an SE is likely to retain its permanent establishment in the UK, and this will remain within the charge to UK corporation tax which will be calculated on the same basis as a UK company.
- 6.9 Similarly, we do not see the need for any special provisions in relation to any UK SEs that are formed which will be handled as now in the tax district that it would have been dealt with if the SE had been a UK company.

Employee Representation

- 6.10 Intrinsic to the creation of an SE is the right of its employees to greater rights of representation than currently seen in UK companies (Paragraph 2.5 above). We see no tax consequences to this and therefore this Note makes no provision in relation to this aspect.

7. LOOKING TO THE FUTURE: POSSIBLE FURTHER CHANGES

A Fluid Environment: Possible Further Changes to Tax and Company Law Relating to Cross-Border Restructurings in Europe

- 7.1 The DTI issued their own consultation on a proposed company law directive on cross-border mergers (often referred to as the “Tenth Directive”) in June 2004. A summary of responses was published in October 2004. There were 10 responses and the general message was that although most respondents were in favour of the principle of the Mergers Directive; as drafted the procedure would be rarely used by British Companies and then only by the largest companies. This proposal has recently been agreed at political level by Member States and seems likely to be implemented in 2007. This proposal may require further changes to UK tax law in this area at a later date.
- 7.2 The Commission may soon come forward with a proposal on the so-called “Fourteenth Directive”. This would enable a large number of companies in Europe to transfer their registered office cross-border in a similar manner to that permitted to SEs by article 8 of the ECS. At this stage we are not in a position to predict what may emerge from the Commission but we are conscious that such a directive will have direct read across on the provisions proposed in this Technical Note.

ABOUT THE CONSULTATION PROCESS – CODE OF PRACTICE ON WRITTEN CONSULTATION

Consultation Criteria

- i) Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- ii) Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- iii) Ensure that your consultation is clear, concise and widely accessible.
- iv) Give feedback regarding the responses received and how the consultation process influenced the policy.
- v) Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
- vi) Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The Inland Revenue confirms that, where possible, these consultation criteria have and will continue to be followed.

If you have any complaints about any element of the consultation process leading from the issue of this document, please contact:

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Appendix A

PARTIAL REGULATORY IMPACT ASSESSMENT (RIA) Direct Tax Changes Resulting from the Implementation of the EU Regulation on the European Company

Purpose and intended effect of the measure

The policy objectives

1. It has been possible to form a European Company since October 2004. The Pre-Budget Report confirmed the imminent exposure of a Technical Note and draft clauses detailing changes to UK tax law that will give UK companies tax certainty if they form or operate a European company. The clauses mean the European Company will be taxed on a similar basis to a UK company.

Background

2. The European Company Statute (ECS) was adopted by the European Council of Ministers on 8 October 2001. The ECS permits the formation of a European Company (referred to in the ECS as the Societas Europaea or SE) and provides for other rules governing SEs. This partial Regulatory Impact Assessment (RIA) covers the tax measures that will be required to ensure the successful implementation of the ECS in the UK.
3. The ECS came into effect on 8 October 2004 and permits the formation of an SE by various mechanisms:
 - “transformation”, i.e. the conversion of a UK company (or similar company in another Member State) into an SE
 - formation of a subsidiary SE
 - formation of a parent SE
 - the merger between two (or more) companies in different Member States into an SE.
4. The ECS relates to company law and does not mention tax. The DTI have issued regulations enabling mergers prescribed by the ECS to form SEs to be possible in UK law.

Interaction with the Mergers Directive and formation of an SE by cross border merger

5. For most UK tax purposes, an SE based in the UK will be treated like a UK PLC and will fit within the existing corporation tax regime and other regimes relating to UK companies. The most significant issue for direct tax relates to the fourth bullet - the formation of SEs by cross-border merger. This is governed by the Mergers Directive (90/434/EEC) as the EU Commission proposed that SEs were to be added to the Mergers Directive.

6. The effect of the Mergers Directive will be, broadly, that the formation of an SE by merger should be tax-neutral. To achieve this, some changes to UK tax legislation are needed to ensure that this “fit” is as seamless as possible.
7. Formation of a SE by merger is a new option for business in the UK and the EU. The tax measures to implement the ECS will not have any impact on existing businesses unless they choose to become a SE. This can therefore be viewed as a deregulatory measure.
8. Although formation by merger is the most significant aspect of the ECS for UK tax legislation, there are other articles of the ECS which will have some effect on UK tax legislation.

Other provisions of the ECS

9. Articles 7 and 8 of the ECS set out rules for the registered office of an SE, and in particular, for the transfer of the registered office of an SE from one member states to another. This provision and the addition of SEs to the Mergers Directive mean that a tax charge should not arise on such a transfer other than those that involve the actual transfer of ownership of assets outside the jurisdiction of the transferor Member State.
10. Articles 9 and 10 of the ECS set out a hierarchy of the rules governing SEs and article 68 provides that member states should make such provision as is appropriate to ensure the effective application of the ECS.

This Regulatory Impact Assessment

11. This partial Regulatory Impact Assessment covers the provisions which are necessary to accommodate mergers to form SEs in UK tax law. Further changes may be consulted on shortly. The RIA will be updated and developed as those legislative changes become clearer.
12. The draft clauses dealt with in this RIA mainly cover a Tax Deferral. Clause 1 will ensure that assets transferred between the merging companies in the process of forming an SE will attract no charge (i.e. a deferral) for the purpose of corporation tax on chargeable gains until such assets are sold. Where the newly formed SE is non-UK resident, tax deferral still occurs as long as the foreign resident SE maintains a permanent establishment in the UK.
13. Clauses 2 to 4 cover loan relationships and financial instruments that are capital items in terms of the Mergers Directive but treated for UK tax purposes within their own bespoke but essentially income regime.
14. Clause 5 gives effect to transfers of assets on which capital allowances may be claimed.
15. Clause 6 addresses consequential amendments.

The risks being addressed

16. This is an enabling measure, allowing companies to benefit from a new form of company organisation permitted by an EU Regulation. So in terms of addressing risks, there are two elements. Firstly, if we did not provide certainty for UK business there would be a risk that UK companies and businesses might operate at a commercial competitive disadvantage to their European rivals.
17. The other risk is that in the absence of any amendments to UK legislation, the new situation created by the ECS potentially may permit some companies to use what should be a commercial decision simply to avoid a tax charge.

Options considered in drafting this legislation

18. Consideration of the risks above led us to consider three broad options when developing policy:
- *Doing nothing or the absolute minimum:* the ECS is a company law measure, not tax legislation. The Government did consider allowing existing tax legislation simply to apply to SEs as there are existing rules, which could have applied to the main transactions affecting SEs. However, there is not a perfect match between existing tax law and the company law regime introduced by the ECS. Doing nothing may have generated uncertainty and additional compliance costs for business.
 - *Wait until the ECS beds in:* the attraction of this option was to see what the take-up of the option to form SEs was in practice. It would also have enabled the Government and business to await the outcome of developments on other proposed EU legislation. The problem with this option is that if there were tax uncertainty, this would hinder use of SEs, which in turn would feed into take up.
 - *Bespoke tax rules for certain transactions affecting SEs:* This was the option chosen by the Government. Certain transactions, such as formation by cross-border *merger* and transfer of registered office, are unprecedented in UK company law. The Government's view is that the design of specific tax rules for these situations would provide certainty for business.

Business sectors affected

19. These measures will in general affect larger companies. Public limited companies and the equivalents in other EU Member States will be eligible to form SEs.

Issues of equity and fairness

20. Our initial assessment is the measure does not raise particular issues around the sectors affected or issues of equity or fairness. However, we would be interested in any views that consider this to be an overly simplistic analysis.

Benefits

21. The wider benefits of the ECS in a UK context are discussed in the RIA produced by the DTI in their consultation of October 2003. This RIA is attached as an Annex.
22. The tax changes exposed here mean that the formation of a SE by merger will be tax neutral for any company or SE wishing to take advantage of these provisions. Similarly they will provide a tax neutral environment in the case of a transfer of the registered office of a SE.
23. The changes are also designed to provide companies contemplating forming a SE or SEs themselves with certainty about the tax rules which will apply to transactions involving them. By choosing the option of bespoke legislation the Government has given business certainty which in turn reduces the cost to business of tax advice in investigating whether an SE might be for them.

Costs

Policy costs

24. There are no direct costs that the policy requires companies to incur. There are indirect costs of dealing with the company law changes brought about by the ECS and of complying with new tax rules.

Implementation (compliance) costs

25. Since the aim of the continuity provisions is to prevent additional tax costs to companies forming/becoming SEs, there should be no arising costs to companies. There may be some costs arising from the machinery provisions, but it is expected to be negligible.

Exchequer effect/distributional impacts

26. The aim of the ECS is to eliminate any tax charge arising on formation of an SE by cross border merger. Since such a mechanism has no previous comparison there is no direct methodology for making an assessment. On the basis that previously a cross border merger of the type the ECS provides for, could have given rise to a tax charge, then we anticipate a very small to negligible cost to the Exchequer.

Small Business impacts

27. Although there is nothing intrinsically precluding small businesses from making full use of the ESC, its international scope leads us to an initial assessment that the measure is unlikely to have much if any impact on small businesses. We would welcome the views of small businesses or their representatives that our understanding here is correct.

Other costs and benefits (public & private sector)

28. We do not see any particular infrastructure costs involved in the measure. It will provide a new option for business to conduct re-structuring within a European context and enable UK business to operate on a level playing field with their counterparts elsewhere in the EU.

Unintended consequences

29. We do not see any unintended consequences arising from the tax legislation in relation to ECS.

Other impacts

30. We see no impact of the ECS tax legislation for human rights, devolution, E-policy, environmental impacts or rural communities.

Competition assessment

31. The new tax legislation will affect all markets since formation of a SE is not restricted to any particular sector. In like manner to company tax provisions, in relation to the SE, this legislation will not impose additional costs - either set-up or ongoing - on any companies, nor restrict the ability of companies to choose the price, quality, range or location of their products.

32. It is anticipated that the legislation will not affect competition, either positively or negatively. However, it is possible that the legislation will have an effect on market structure since the formation of SEs by merger could lead to a smaller number of UK registered companies, although this could be off set by non-UK companies migrating into the UK.

Securing compliance

33. At present there are number of tax provisions that apply to companies that are engaged in a merger. In essence, provided the merger is undertaken for bona fide commercial reasons then, notwithstanding that otherwise there would have been a taxable disposal of the assets at the company tier, this disposal from one company to the other will not trigger a tax charge. The clauses extend those provisions to SEs created by the ECS and we see no particular need for any compliance provision over and above that provided for any other merger involving a UK company.

Consultation

34. Within government we have consulted the DTI and reviewed the responses received to their October 2003 consultation. But we would welcome any views business or their representatives have on the substance of these clauses or any administrative or regulatory costs of their implementation.

Monitoring and evaluation

35. Once we have considered the responses to this Technical Note, we intend to draw up a programme to monitor take up and use of SEs over their first year of their introduction. Our remit will be to ensure this legislation adequately provides for SEs in UK law and if it doesn't then to engage with users and potential users of SEs to see what further changes may be needed. We will also set in train work to monitor the extent to which SEs are being made use of in other EU countries and if take up is markedly different from the UK experience to look at the reasons why this is the case.

Summary and recommendation

36. We believe the ECS represents an important step in the development of a single internal market. It will enable UK business to operate on the same basis as their EU competitors and for EU businesses to structure themselves more effectively to compete on a global stage.
37. The Technical Note published today includes most of the draft tax clauses needed to provide certainty for UK companies to consider the merits of SEs as a corporate wrapper for their business. We welcome any comments on this legislation and in particular whether the clauses included here will achieve the policy purpose of enabling SEs to be formed and to operate in the UK on the same or similar basis to ordinary companies.

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Annex I to Appendix A

DRAFT REGULATORY IMPACT ASSESSMENT issued by the DTI as part of their October 2003 Consultative Document

The European Company Statute

Purpose and intended effect of the measure

Objective

The European Company Statute (ECS) creates a legal framework for a new form of company, the European Company or 'Societas Europaea' (SE). The ECS consists of a Regulation setting out the core company law framework and an accompanying Directive that specifies the employee involvement arrangements that would apply to an SE. The new form of company - which will be a European public limited liability company registered in one of the Member States with a minimum share capital of EUR 120,000 and having legal personality - will be available to commercial bodies with operations in more than one Member State. Its use will be entirely voluntary. The domestic legislation facilitating the operation of the SE (see paragraph 7 below) will apply in Great Britain.

2 Since forming an SE will be entirely voluntary only those companies which perceive that there is likely to be a real benefit will consider forming an SE. The ECS has created a framework by which GB companies will be able to engage in cross-border mergers with companies from other Member States. At present, there are no harmonised rules in the EU governing cross-border mergers. Secondly, a GB company wishing to take over a company from another Member State, or wishing to establish a joint venture with a company in another Member State, might find it easier to reach agreement with the overseas company if it decided to form a joint holding company or joint subsidiary in the form of an SE. Thirdly, a GB public company wishing to operate in several Member States simultaneously might consider that there were presentational advantages in adopting the SE name and form. The name of an SE will be preceded or followed by "SE" and only SEs will be permitted to include the abbreviation SE in their name.

Background

3 There are five methods of forming an SE set out in the Regulation, as follows:-

- i) by the merger of PLCs provided at least two of them are governed by the laws of different Member States;
- ii) by the formation of an SE as a holding company for public or private limited companies from at least two different Member States;
- iii) by the formation of an SE as a subsidiary of companies from at least two different Member States;
- iv) by the transformation of an existing PLC which has, for at least two years, had a subsidiary in another Member State;

v) by the formation of subsidiary SEs where an SE is the parent.

4 The Regulation provides that once an SE has been formed, by any method, it may transfer its registered office from one Member State to another without the winding up of the SE or the creation of a new legal person. In addition, an SE may convert to a PLC although not for at least two years (or before the first two sets of annual accounts have been produced). Conversion to a PLC would not result in the winding up of the company or the creation of a new legal person.

5 The accompanying Directive sets out requirements for the information, consultation and participation of employees (“employee involvement”) in European Companies. All SEs must have employee involvement arrangements. These will always cover information and consultation, and may cover employee participation on the board in certain circumstances (in particular, if it existed within one or more of the participating companies). Before registration of the SE is possible, provision for employee involvement in the SE must be agreed.

6 The Regulation was adopted by Member States on 8 October 2001 and comes into force on 8 October 2004. It is free-standing and will be directly applicable throughout the European Economic Area (EEA), ie Norway, Iceland and Liechtenstein and the 15 Member States of the EU (plus, by the coming into force date, the 10 accession countries). In addition, on many matters, it applies to SEs the national legislation applicable to public companies in the Member State where the SE is registered. For example, GB company law applicable to accounts and to winding up, liquidation and insolvency will be directly invoked by the Regulation. (Article 9 sets out the law and other provisions applicable to an SE, and the respective priority in which they apply.)

7 The Regulation lays down a number of Member State options and new domestic legislation will be required to set out the options adopted. This domestic legislation will also need to provide, as set out in Article 68 of the Regulation, for the effective application of the Regulation in GB such as requiring that documentation relating to the new procedures for registering an SE be filed at Companies House. It will also set out the sanctions and penalties for contraventions of the Regulation. The domestic legislation - which will also come into force on 8 October 2004 - will also implement the employee involvement Directive.

Risk assessment

8 In the context of both the existing law and the law as amended by the regulations there is no perceived hazard or situation which would lead to any harm or detriment to any individual, company or organisation.

Options

9 As noted above, the Regulation is directly applicable throughout the EEA. All Member States will need to provide for its effective application within their territory. In addition, all Member States will need to implement the accompanying employee involvement Directive. In respect of the Regulation, there are 31 Member State options. The approach of GB in deciding which options to adopt is in general to apply a light touch, ie to

impose the minimum duties and costs on companies seeking to form, or convert to, SEs. In other cases, the approach adopted has been to align the provision in the Regulation with the existing law set out in the Companies Act 1985 such as providing that SEs must have a minimum of two directors but not to prescribe a maximum number. There are also 11 requirements on Member States to legislate which relate mainly to the publicising of documents by companies intending to become SEs. The approach adopted by GB in this respect is to introduce measures which reflect the measures already implemented for domestic mergers (in GB these are also set out in the Companies Act 1985).

10 The principal option in the Regulation, as far as GB is concerned, is that set out in Article 39(5). Under this option, a Member State may adopt appropriate measures in relation to SEs where no provision for a two-tier system is made in its plc law. While the Companies Act 1985 dictates neither a one-tier or two-tier board, its provisions generally assume a unified structure. However, there is nothing in law that presently prevents PLCs incorporated in GB from adopting articles under which the powers that are granted are divided between two tiers of directors, one exercising management functions and the other exercising a supervisory role in relation to those functions. Special provision for two-tier boards might create greater certainty in respect of what the law required of SEs since less consideration would need to be given to the interaction between the Regulation, existing company law and the new domestic legislation. However, creating special provision for the board structure of SEs would be prescriptive and less flexible.

Benefits

11 Since forming an SE will be entirely voluntary, only those companies which perceive that there is likely to be a real benefit will consider forming, or converting to, an SE. Quantification of that benefit is not possible, not least because it is not possible to assess the likely take-up of the SE form by GB companies. It would be helpful if companies that are considering setting up an SE could offer an assessment of the financial advantages of the benefits summarised here. The ECS has created a framework by which GB companies will be able to engage in cross-border activities with companies from other Member States. Secondly, a GB company wishing to take over a company from another Member State, or wishing to establish a joint venture with a company in another Member State, might find it easier to reach agreement with the overseas company if it decided to form a joint holding company or joint subsidiary in the form of an SE. This might prove more acceptable to the “target” company than a straightforward takeover of it by the GB company. Thirdly, a GB public company wishing to operate in several Member States simultaneously might consider that there were presentational advantages in adopting the SE name and form. The name of an SE will be preceded or followed by “SE” and only SEs will be permitted to include the abbreviation SE in their name.

12 Companies adopting the SE vehicle will, under the Directive, have to embrace employee involvement. Economists have argued that

information and consultation, together with other types of employment relations practices, acts to align better the interests of companies and workers, thus improving a company's performance, through lower employee turnover and higher productivity . By being consulted, employees may feel more committed to the organisation and may feel more secure in their jobs. As the benefits of information and consultation will depend very much on the circumstances of the company, the flexibility of options is likely to mean a greater chance of realising benefits. Companies and employees will be able to agree their employee involvement arrangements, taking into account their unique requirements and existing set of arrangements.

Business sectors affected

13 All business sectors are affected since any company may form or convert to an SE if it fits the criteria set out in Article 2 of the Regulation (referred to in paragraph 3 above). Any two GB companies, public or private, may promote the formation of a holding or subsidiary SE as long as each company has its registered and head offices within the Community and both have had a branch or subsidiary in another Member State for at least two years. In addition, public companies which fit this criteria may convert to an SE. The resulting SE must have a minimum share capital of EUR 120,000. It is estimated that there are less than 5,000 companies registered in GB which fit this criteria . A public company which has its registered and head office within the Community may form an SE by merger as long as the other company involved is governed by the law of a different Member State and the resulting SE has a minimum share capital of EUR 120,000. There are almost 12,000 public companies registered in GB and given that the minimum share capital of a public company in GB is £50,000 all such companies could, potentially, merge with another company in the Community to form an SE.

Equity and fairness

14 The ECS is voluntary and only those companies which perceive that there is an advantage to them will consider forming, or converting to, an SE. In the light of this, the principal issue of equity and fairness, in theory at least, is whether the restriction of some of methods of forming SEs to public companies, together with the requirement to have a minimum share capital of 120,000 euros might be seen as a barrier to small companies operating across EU borders. It is important to note that private companies can form SEs under the Regulation – it is merely that not all the possible methods are available to them. Moreover, companies with operations large enough to warrant the special form of an SE to carry out cross-border activities are likely to be able to meet the minimum share capital requirement. That minimum requirement reflects a general distinction in EU law between the treatment of public and private companies. Nevertheless, comments on whether the requirements of the Regulation might disadvantage small companies would be welcome. In this context, it is worth noting that the European Commission is considering whether there is justification for the creation of a new form of

European Private Company, along the lines of the European Company Statute.

Costs

15 Since adoption of the SE form is voluntary, no costs will be imposed on any company. It is reasonable to assume that, in the event that a company chooses, voluntarily, to become an SE, the resulting benefits to it will outweigh the costs. Such costs would include, where necessary, the setting up of employment involvement structures.

16 The principal costs incurred by a company where there would not be any benefits would be in the case where a company investigated the possibility of, but ultimately decided against, becoming an SE. In respect of those companies that could convert to an SE, there would appear to be three stages in this process. Firstly, it would seem likely that a senior employee would consider whether there was a case for conversion to an SE. If this was thought to be a viable proposition then the issue is likely to be put to the company's board. If the company's board were to be persuaded of the viability of the SE form then it is likely that legal advice would be sought. The cost of such legal advice would clearly vary on a case by case basis and be determined, at least initially, on the type and extent of the advice sought by the company.

17 Any attempt to cost the above exercise is fraught with difficulties. However, in respect of the first stage, the cost of a manager spending two days (sixteen hours) considering whether there was a case for conversion to an SE is estimated to be around £400 . If it is assumed that 20% of the 5,000 companies referred to in paragraph 13 above undertook this exercise the cost to GB business would be £400,000. In respect of the second stage, a company board of 12 members considering the issue for two hours would represent a further 24 hours of costs with an estimated total cost of £600 . If it is assumed that 10% of those 5,000 companies undertook this exercise the cost to GB business would be £300,000. Trying to assess legal costs is even more difficult since, as noted above, they would clearly vary on a case by case basis. However, the cost of a solicitor spending one day (eight hours) considering whether a company might benefit from adopting the SE form is estimated to be £2,400 . If it is assumed that 5% of the 5,000 companies undertook this exercise the cost to GB business would be £600,000.

18 Companies will not merge with others simply to become an SE. What may happen is that where, say, a GB registered company intended to merge with a German company both companies would consider whether the resulting company should be an SE. In other words, the possibility of forming an SE would be considered as part of the merger process and if this additional option was considered to be the cheapest option, or would result in greater flexibility, it is likely that it would be adopted. The only costs incurred by the companies concerned would be similar to those identified in paragraph 17 above, ie where adoption of the SE form was considered (in this case by a minimum of two companies) but ultimately rejected.

Employee involvement

19 In the event that companies decided to use an SE as the vehicle for a merger it is likely that the principal additional costs would come from the employee involvement arrangements. However, the voluntary nature of becoming an SE, as well as the many different circumstances of the companies involved make it very difficult to come up with an estimate of the overall costs. Some illustrative costs are set out below which are based on the merger of two companies of a similar size, one in GB and the other in another EU country, intending to register as an SE in GB. Costs may be higher if there are more than two companies involved. The examples used below assume that there are no subsidiaries and all the employees of each company are located in each of their two respective Member States.

20 For the purpose of agreeing arrangements for employee involvement, a Special Negotiating Body (SNB), made up of employee representatives from the participating companies and any “concerned” subsidiaries, must be established. Any expenses relating to the functioning of the SNB, and to the negotiations in general, must be borne by the participating companies (this may include the cost of up to one “expert” to assist the SNB). The SNB and management have 6 months, extendable to 12 months, in which to reach a voluntary agreement on employee involvement under Article 4 of the Directive. There are three possible outcomes:-

- i) the SNB and the management draw up a voluntary agreement for employee involvement under Article 4; or
- ii) the SNB takes the two-thirds majority decision under Article 3.6 of the Directive to rely on the national Information and Consultation rules already in force in the Member State in which the SE has employees (this option is not available where the SE is to be formed by transformation or the company previously had employee participation); or
- iii) no voluntary agreement is reached by the end of the negotiating period and the Article 3.6 decision is not taken but the participating companies still wish to go ahead and register the SE. In such a case, the standard “fallback” rules of the Member State in which the SE wishes to register will apply.

Ballots to elect SNB members and number of SNB representatives

21 A ballot must be conducted to elect SNB representatives for the GB employees. Separate ballots may need to be conducted in each Member State where the participating companies or subsidiaries have employees although this will not always be the case. In some Member States (such as Germany), existing works council members may simply be appointed as SNB members and no ballots would be held.

22 The cost of conducting a ballot to elect the GB SNB members is estimated to be around £13,650 . There would be no additional balloting cost in the other Member States where the works council is used to nominate its SNB members.

23 The rules for the composition of the Special Negotiating Body (SNB) depend on a variety of factors including the number of participating companies or “concerned” subsidiaries and in how many Member States the employees are located and in what proportion etc. The method of determining the number of SNB members in the Directive implies that there will always be a minimum of 10 SNB members and currently, with the 18 countries of the EEA covered by the Directive, an absolute maximum of 27 .

Costs of a special negotiating body meeting

24 Assuming that the participating companies have a total of 50,000 employees, an SNB might have 10 employee representatives and 6 management representatives. The costs of this meeting would include the opportunity cost of the workers’ and employers’ time, travel costs, the cost of the venue and interpreter costs. It is estimated that the costs for one meeting would be about £24,000 .

Illustrative costs:

25 Three cases, where both companies have information and consultation processes in place, are set out below:-

- i) case 1 - the two merging companies are satisfied with their respective information and consultation arrangements and do not choose to have a transnational body (in effect, an European Works Council (EWC)) in addition to their existing national information and consultation structures;
- ii) case 2 - the two merging companies want a transnational body in addition to their existing national information and consultation structures and they can reach a voluntary agreement to this effect;
- iii) case 3 - the two merging companies want a transnational body in addition to their existing national information and consultation structures but they cannot reach a voluntary agreement and so go down the fallback route.

26 Case 1. It is assumed that it takes two SNB meetings for the representatives to take the decision under Article 3.6 of the Directive to rely on the national information and consultation rules already in place in their own countries (ie to agree not to supplement their existing agreements). This would cost about £48,000.

27 Case 2. It is assumed that it takes 4 SNB meetings to come to a voluntary agreement, at a cost of £88,000. The voluntary agreement is such that each company in the merger has to make some changes to its existing information and consultation agreements, equivalent to having one or more meetings of a transnational consultative committee a year. This will cost about £64,000 each year.

28 Case 3. It is assumed that failure to reach a voluntary agreement is time consuming and could take 6 to 8 SNB meetings, with a cost of about £143,000 to £190,000. The information and consultation structure set up under the fallback arrangements is likely to be quite similar to that in case 2.

Participation at board level

29 If one of the merging companies already has worker participation on the company board, there will need to be at least the same level of participation on the SE board (unless the SNB take a two-thirds majority decision to reduce, or even abolish, employee participation in the new SE). Since there is no tradition of employee participation in GB, the possible costs involved have been estimated using the German model as an example.

30 The maximum percentage of representatives is likely to be 50% of the board as this is the maximum that applies in Germany; it is doubtful that this percentage would be exceeded. In this example it is assumed that there are two worker representatives on the board of the company in the non-GB company and that the SNB decides that there should be four – two from each country. This would mean an extra two worker representatives attending maybe 12 meetings per year, which take up one day of each representative's time. The cost of travel has been included, but not interpreter and venue costs (since these costs will already have been included). It is estimated that this will cost about £15,000 per year.

31 In Germany, a proportion of the employee representatives on the boards of companies may be full time union representatives who are paid by the company for this purpose. If this model were followed for SE boards, there would be no opportunity costs to companies of employee time for these representatives.

32 It is sometimes argued that worker participation on boards can slow down decision-making and hence reduce companies' competitive edge. However, evidence from Japanese companies with works councils in Germany does not show this to be the case. Accordingly, no costs have been factored in for longer decision-making processes.

33 Once the employee involvement arrangements have been put into place, compliance is likely to follow similar rules and procedures to those set out in the Transnational Information and Consultation of Employees (TICE) Regulations, which implement the European Works Council Directive. There will therefore be costs to employers if a complaint is brought before the Central Arbitration Committee (CAC) or an Employment Tribunal.

34 The costs of appearing at the CAC is estimated to be £11,900 and consists of the average cost of a CAC case together with the cost of 2 days of management time and 1 day of employee representative time. The costs of appearing at an Employment Tribunal are £2,540 and consist of £2,000 for the employer and £540 for the Employment Tribunal Service.

Small firms' impact test

35 The key point is that adoption of the SE form will be voluntary and no costs will be imposed on small firms. Although the minimum share capital of an SE will be EUR 120,000, it will nevertheless be open to smaller companies to form an SE if the other companies involved have sufficient share capital.

Competition assessment

36 The new domestic legislation will affect all markets since formation of an SE is not restricted to any particular sector. This legislation will not impose additional costs - either set-up or ongoing - on any companies nor restrict the ability of companies to choose the price, quality, range or location of their products. It is anticipated that the legislation will not affect competition, either positively or negatively. However, it is possible that the legislation will have an effect on market structure since the formation of SEs by merger could (but not necessarily would) lead to a smaller number of GB registered companies although this could be off set by the creation of subsidiary or holding SEs registered in GB. The number of companies registered in GB would not, of course, be affected by the ability of public companies to convert to SEs.

Enforcement and sanctions

37 Enforcement of existing company law and legislation dealing with the involvement of employees (such as European Works Councils) - which are both subject to criminal penalties for non-compliance - is the responsibility of the Department of Trade and Industry. The Department will be responsible for enforcing the ECS other than certain provisions in the Regulation that fall to the Court. The principal role for the Court will be to issue a certificate certifying that the pre-merger acts and formalities have been properly completed where an SE is being formed by merger and, subsequently, for it to scrutinise that the merger has been properly completed and the SE correctly formed.

Consultation

38 The consultation document will be placed on the Department's website and will also be sent to all organisations that have responded to the Department's previous consultations on this issue (both the Regulation and the Directive) and other organisations known to have an interest in the ECS. The Department has consulted the Department for Constitutional Affairs, the Office of the Lord President, the Inland Revenue and, in Northern Ireland, the Department of Employment and Learning and the Department for Enterprise, Trade and Investment. It also held meetings prior to the publication of the consultative document with the Law Society, Confederation of British Industry, Trades Union Congress and Takeover Panel.

Monitoring and review

39 The Department will keep the ECS under review. If, in the light of experience, it proves necessary to amend the domestic legislation this could be done by making further regulations under section 2(2) of the European Communities Act 1972. However, the consultation exercise will give interested parties the opportunity to comment on the draft legislation.

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Appendix B Draft Legislation and Explanatory Notes

- 1 Chargeable gains [j320.01]
- 2 Intangible fixed assets [j320.05]
- 3 Loan relationships [j320.08]
- 4 Derivative contracts [j320.09]
- 5 Capital allowances [j320.02]
- 6 Consequential amendments [j320.04]

1 Chargeable gains [j320.01]

(1) After section 140D of TCGA 1992 (transfer of non-UK trade) insert—

“Formation of SE by merger

140E Merger leaving assets within UK tax charge

- (1) This section applies 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) each merging company is resident in a member State,
 - (c) the merging companies are not all resident in the same State, and
 - (d) section 139 does not apply to any qualifying transferred assets.
- (2) Where this section applies, qualifying transferred assets shall be treated for the purposes of corporation tax on chargeable gains as if acquired by the SE for a consideration resulting in neither gain nor loss for the transferor.
- (3) For the purposes of subsections (1) and (2) an asset is a qualifying transferred asset if—
 - (a) it is transferred to the SE as part of the process of the merger forming it, and
 - (b) subsections (4) and (5) are satisfied in respect of it.
- (4) 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.
- (5) This subsection is satisfied in respect of a transferred asset if—
 - (a) the transferee SE is resident in the United Kingdom on formation, or
 - (b) any gain that would accrue to the transferee SE were it to dispose of the asset immediately after the transfer would be a chargeable gain forming part of the SE's chargeable profits in accordance with section 10B.
- (6) For the purposes of this section 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 purposes of any double taxation relief arrangements to which the State is a party, as resident in a territory not within a member State.
- (7) This section does not apply to the formation of an SE by 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).

140F Merger not leaving assets within UK tax charge

- (1) This section applies 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) each merging company is resident in a member State,
 - (c) the merging companies are not all resident in the same State,
 - (d) 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, and
(e) the aggregate of the chargeable gains accruing to company A on the transfer exceeds the aggregate of any allowable losses so accruing.

- (2) 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.
- (3) Where this section applies, section 815A of the Taxes Act shall also apply.
- (4) Subsections (6) and (7) of section 140E apply for the purposes of this section as they apply for the purposes of that section.

140G Treatment of securities issued on merger

- (1) This section applies 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) each merging company is resident in a member State,
 - (c) the merging companies are not all resident in the same State, and
 - (d) the merger does not constitute or form part of a scheme of reconstruction within the meaning of section 136.
- (2) Where this section applies, the merger 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.
- (4) Subsections (6) and (7) of section 140E apply for the purposes of this section as they apply for the purposes of that section.”
- (2) Subsection (1) shall have effect in relation to the formation of an SE which occurs on or after 1st April 2005.

2 Intangible fixed assets [j320.05]

- (1) After paragraph 85 of Schedule 29 to FA 2002 (intangible fixed assets: gains and losses: transfer of trade) insert—

“Formation of SE by merger

85A (1) This paragraph applies 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) each merging company is resident in a member State,
- (c) the merging companies are not all resident in the same State, and
- (d) paragraph 84 above does not apply to any qualifying transferred assets.

(2) Where this paragraph applies a transfer of qualifying transferred assets is treated for the purposes of this Schedule as tax-neutral (see paragraph 140).

(3) For the purposes of sub-paragraphs (1) and (2) 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.

(4) Sub-paragraph (2) shall apply in relation to the formation of an SE by 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.

(5) Paragraph 84(6) (and therefore paragraph 88) shall apply, with any necessary modifications, in relation to sub-paragraph (4) above as in relation to paragraph 84(5).

(6) For the purposes of this paragraph 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 purposes of any double taxation relief arrangements to which the State is a party, as resident in a territory not within a member State.”

(2) Subsection (1) shall have effect in relation to the formation of an SE which occurs on or after 1st April 2005.

3 Loan relationships [j320.08]

(1) After paragraph 12 of Schedule 9 to FA 1996 (loan relationships: gains and losses: continuity of treatment for groups) insert—

“Formation of SE by merger

12A (1) This paragraph applies 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) each merging company is resident in a member State,
- (c) the merging companies are not all resident in the same State, and
- (d) either—
 - (i) immediately after formation the SE is resident in the United Kingdom and within the charge to corporation tax in accordance with section 6 of the Taxes Act, or
 - (ii) immediately after formation the SE is not resident in the United Kingdom but is within the charge to corporation tax in accordance with section 11 of the Taxes Act.

(2) Where this paragraph applies, the transfer in the course of the merger of an asset or liability which represents a loan relationship shall be disregarded except—

- (a) for the purpose of determining the debits or credits to be brought into account in respect of exchange gains or losses and identifying the company which is to bring them into account, and
- (b) for the purpose of identifying the company in whose case a debit or credit which does not relate to the transfer is to be brought into account.

- (3) Where this paragraph applies, the transferor and the transferee companies of an asset or liability which represents a loan relationship shall be deemed, except for the purposes specified in sub-paragraph (2)(a) and (b), to be the same company.
 - (4) Paragraph 12(2A) shall have effect (with any necessary modifications) in relation to this paragraph as in relation to paragraph 12.
 - (5) Sub-paragraphs (2) and (3) shall apply in relation to the formation of an SE by 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.
 - (6) But sub-paragraph (5) shall not have the effect of preventing subparagraphs (2) and (3) from applying if before the merger the Inland Revenue have on the application of the merging companies notified them that the Inland Revenue are satisfied that sub-paragraph (5) will not have that effect.
 - (7) For the purposes of this paragraph 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 purposes of any double taxation relief arrangements to which the State is a party, as resident in a territory not within a member State.”
- (2) Subsection (1) shall have effect in relation to the formation of an SE which occurs on or after 1st April 2005.

4 Derivative contracts [j320.09]

- (1) After paragraph 30 of Schedule 26 to FA 2002 (derivative contracts: profits: groups) insert—

“Formation of SE by merger

- 30A (1) This paragraph applies 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) each merging company is resident in a member State,
 - (c) the merging companies are not all resident in the same State, and
 - (d) either—
 - (i) immediately after formation the SE is resident in the United Kingdom and within the charge to corporation tax in accordance with section 6 of the Taxes Act, or
 - (ii) immediately after formation the SE is not resident in the United Kingdom but is within the charge to corporation tax in accordance with section 11 of the Taxes Act.
- (2) Where this paragraph applies, the transfer in the course of the merger of rights or liabilities under a derivative contract shall be disregarded except—
- (a) for the purpose of determining the debits or credits to be brought into account in respect of exchange gains or losses and identifying the company which is to bring them into account, and
 - (b) for the purpose of identifying the company in whose case a debit or credit which does not relate to the transfer is to be brought into account.
- (3) Where this paragraph applies, the transferor and the transferee companies of a right or liability under a derivative contract shall be deemed, except for the purposes specified in sub-paragraph (2)(a) and (b), to be the same company.
- (4) Paragraph 30 shall apply, with any necessary modifications, in relation to this paragraph as in relation to paragraph 28.
- (5) Sub-paragraphs (2) and (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.
- (6) But sub-paragraph (5) shall not have the effect of preventing subparagraphs (2) and (3) from applying if before the merger the Inland Revenue have on the application of the merging

companies notified them that the Inland Revenue are satisfied that sub-paragraph (5) will not have that effect.

- (7) For the purposes of this paragraph 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 purposes of any double taxation relief arrangements to which the State is a party, as resident in a territory not within a member State.”

(2) Subsection (1) shall have effect in relation to the formation of an SE which occurs on or after 1st April 2005.

5 Capital allowances [j320.02]

(1) After section 561 of CAA 2001 (transfer of UK trade to company in another member State) insert—

“561A Transfer during formation of SE by merger

- (1) This section applies to the transfer of a qualifying asset as part of the process of a merger to which section 140E of TCGA 1992 (formation of SE by merger) applies.
- (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 1988 (company reconstruction without change of ownership) shall not apply.

(3) In subsection (1) “qualifying asset” has the same meaning as “qualifying transferred asset” in section 140E of TCGA 1992.”

(2) Subsection (1) shall have effect in relation to a transfer made on or after 1st April 2005.

6 Consequential amendments [j320.04]

- (1) In section 815A(1) of ICTA 1988 (transfer of a non-UK trade) after “section 140C” insert “or 140F”.
- (2) In section 35(3)(d)(i) of TCGA 1992 (re-basing to 1982, &c.) after “140A,” insert “140E,”.
- (3) In section 140A of TCGA 1992 (transfer of UK trade)—
 - (a) in subsection (1)(b) for “securities” substitute “shares or debentures”, and
 - (b) in subsection (7) omit the definition of “securities”.
- (4) In section 140C of TCGA 1992 (transfer of non-UK trade)—
 - (a) in subsection (1)(c) for “securities” substitute “shares or debentures”, and
 - (b) in subsection (9) omit the definition of “securities”.
- (5) In paragraph 88(1) and (5) of Schedule 29 to FA 2002 (intangible fixed assets: gains and losses: transferred assets: application for clearance) after “85(5),” insert “85A(5),”.
- (6) In paragraph 127 of that Schedule (acquired assets to be treated as existing assets) after sub-paragraph (1)(b)(ii) insert—
 - “, or
 - (iii) section 140E of that Act (transfer on formation of SE by merger),”.
- (7) Subsections (3) and (4) shall have effect in relation to an issue effected on or after 1st April 2005.

Annex I to Appendix B

EXPLANATORY NOTES ON CLAUSES 1 TO 6: THE EUROPEAN COMPANY STATUTE AND MERGERS DIRECTIVE

Summary

1. These clauses introduce provisions relating to the Societas Europaea (SE), which is a new European company brought into being by the European Company Statute (ECS) that came into effect on 8th October 2004.
2. The provisions apply in relation only to cases in which an SE is formed by the merger of two or more companies where not all the merging companies are resident in the same member State.
3. Most of the provisions in Clauses 1 to 6 will have effect from 1st April 2005.

Details of the Clauses

4. Clause 1 inserts three new sections, sections 140E to 140G, into the Taxation of Chargeable Gains Act 1992 (TCGA), and provides for them to have effect in relation to formations of SEs which occur on or after 1st April 2005. (All references to numbered sections in paragraphs 5 to 19 below are to those sections of the TCGA except where otherwise indicated.)

Section 140E: Merger leaving assets within UK tax charge

5. Subsection (1) sets out the circumstances in which section 140E applies. First, an SE is formed by the merger of two or more companies in accordance with the relevant articles of the Council Regulation on the Statute for a European Company. Second, each merging company is resident in a member State (see paragraph 10 below). Third, the merging companies are not all resident in the same member State. Fourth, section 139 does not apply in relation to any "qualifying transferred assets" (see paragraph 7 below). (Section 139 makes provision corresponding to that made by section 140E in the case of a scheme of reconstruction involving the transfer of the whole or part of a company's business where certain requirements are met.)
6. Subsection (2) provides, where section 140E applies, for "qualifying transferred assets" to be treated for the purposes of corporation tax on chargeable gains as if acquired by the SE for a consideration resulting in neither gain nor loss for the transferor.

7. Subsection (3) provides that an asset is a “qualifying transferred asset” for the purposes of subsections (1) and (2) if it is transferred to the SE as part of the process of the merger forming it and subsections (4) and (5) (see paragraphs 8 and 9 below) are satisfied in respect of the asset.
8. Subsection (4) is satisfied in respect of a transferred asset if the transferor is resident in the UK at the time of the transfer. It is satisfied in other cases if the transferor is carrying on a trade in the UK through a permanent establishment (PE) and any gain arising on a hypothetical disposal of the asset immediately before the transfer would have formed part of the transferor’s chargeable profits for corporation tax purposes.
9. Subsection (5) is satisfied in respect of a transferred asset if the SE is resident in the UK on its formation. It is satisfied in other cases if the SE is carrying on a trade in the UK through a PE and any gain arising on a hypothetical disposal of the asset immediately after the transfer would form part of the SE’s chargeable profits for corporation tax purposes.
10. Subsection (6) determines whether, for the purposes of section 140E, a company is resident in a member State.
11. Subsection (7) provides that section 140E does not apply in relation to the formation of an SE by merger if the merger is not effected for bona fide commercial reasons, or if it forms part of a scheme or arrangements of which the main purpose, or one of the main purposes, is the avoidance of liability to corporation tax, capital gains tax or income tax. But this is subject to the advance clearance provisions in section 138, which are applied, subject to any necessary modifications, to this subsection as they apply to section 137. (Under these advance clearance provisions the Board of Inland Revenue will, in effect, say whether they are satisfied that a proposed formation of an SE by merger is one to which the anti-avoidance provision in subsection (7) will not apply.)

Section 140F: Merger not leaving assets within UK tax charge

12. Subsection (1) sets out the circumstances in which section 140F applies. The first three requirements are the same as the first three described in paragraph 5 above. The fourth is that a UK-resident company transfers in the course of the merger all assets and liabilities relating to a business which it carried on through a PE in a member State other than the UK to a company resident in a member State other than the UK. The fifth is that the aggregate of the chargeable

gains arising to the UK-resident company on the transfer exceeds the aggregate of any allowable losses so arising.

13. Subsection (2) provides, where section 140F applies, for the allowable losses arising to the UK-resident company on the transfer to be deducted from the chargeable gains so arising. The transfer is treated for the purposes of the TCGA as giving rise to a single chargeable gain equal to the difference between the aggregates of those gains and losses.
14. Subsection (3) provides for section 815A of the Income and Corporation Taxes Act 1988 (ICTA) to apply in any case where section 140F TCGA applies. (Section 815A ICTA makes provision in relation to cases where UK-resident companies transfer trades, which they had carried on outside the UK through Pes, in circumstances where the Mergers Directive has effect to prevent gains arising on the transfer being chargeable to tax under the law of the relevant member State.) The broad effect of subsection (3) is to reduce the liability to UK corporation tax in respect of chargeable gains of a company to which section 140F applies by reference to the amount of foreign tax which the company would have incurred if the Mergers Directive had not had effect in relation to the merger in question.
15. Subsection (4) provides for subsections (6) and (7) of section 140E (see paragraphs 10 and 11 above) to apply for the purposes of section 140F as they apply for the purposes of section 140E.

Section 140G: Treatment of securities issued on merger

16. Subsection (1) sets out the circumstances in which section 140G applies. The first three requirements are the same as the first three described in paragraph 5 above. The fourth is that the merger does not constitute or form part of a scheme of reconstruction to which section 136 applies.
17. Subsection (2) provides, where section 140G applies, for the merger to be treated for the purposes of section 136 as if it were a scheme of reconstruction. This means that, in any case where the requirements of section 136(1) are met in relation to—
 - a company (“company A”) involved in the merger,
 - persons holding its shares or debentures, and
 - the SE,

the holdings of shares in, or debentures of, the SE which are issued to those persons on its formation are treated as being the same

assets for TCGA purposes as the holdings of shares in, or debentures of, company A that are treated as exchanged for the new holdings. This is subject to the provision described in paragraph 11 above as it is applied as mentioned in paragraph 19 below.

18. Subsection (3) provides that where section 136 applies by virtue of section 140G(2) the provisions in section 136(6) and 137 do not apply. The effect of section 136(6) is to make section 136 subject to the anti-avoidance provision in section 137(1).
19. Subsection (4) provides for subsections (6) and (7) of section 140E (see paragraphs 10 and 11 above) to apply for the purposes of section 140G as they apply for the purposes of section 140E.

Intangible fixed assets

20. Clause 2 (1) inserts new paragraph 85A into Schedule 29 of the Finance Act 2002 (FA02), and Clause 2 (2) provides for it to have effect in relation to formations of SEs which occur on or after 1st April 2005.
21. Paragraph 85A (1) sets out the circumstances in which new paragraph 85A applies. The first three requirements are the same as the first three described in paragraph 5 above. The fourth is that paragraph 84 of FA02 (which applies to company reconstruction involving the transfer of business) does not apply to any qualifying transferred assets.
22. Sub paragraph (2) provides, where paragraph 85A applies, for “qualifying transferred assets” to be treated for the purposes of Schedule 29 FA02 (Gains and losses of a company from intangible fixed assets) as tax neutral. What is meant by tax neutral is spelt out in paragraph 140, Schedule 29 FA02. A tax-neutral transfer means the transfer is not treated as the realisation of the asset by the transferor or its acquisition by the transferee. Furthermore, the history of the asset in the hands of the transferor is taken over, so that anything done in relation to the asset by the transferor is treated as done by the transferee”.
23. Sub paragraph (3) sets out what is meant by qualifying transferred assets in sub-paragraphs (1) and (2). The asset must be transferred as part of the process of merger. Additionally, it must be an intangible fixed asset, which is a ‘chargeable intangible asset’ in the hands of the transferor immediately before the transfer, and in the hands of the transferee immediately after the transfer. The term ‘chargeable intangible asset’ is defined in paragraph 137 Schedule 29 and in broad terms is an asset within the computational rules of Schedule 29.

24. Sub paragraph (4) sets out that sub-paragraph (2) above does not apply in relation to the formation of an SE by merger if the merger is not effected for bona fide commercial reasons, or if it forms part of a scheme or arrangements of which the main purpose, or one of the main purposes, is the avoidance of liability to corporation tax, capital gains tax or income tax.
25. Sub paragraph (5) provides for pre-transaction clearance in accordance with the procedure at paragraph 88 of Schedule 29. Under these advance clearance provisions the Board of Inland Revenue will, in effect, say whether they are satisfied that a proposed formation of an SE by merger is one to which the anti-avoidance provision in sub-paragraph (4) will not apply.
26. Sub-paragraph (6) determines, for the purposes of paragraph 85A, Schedule 29, whether a company is resident in a member State.

Loan Relationships

27. Clause 3 deals with the transfer in the course of a merger of assets or liabilities, which represent loan relationships (a loan relationship is a money debt arising from a transaction where the company has either lent or borrowed money). Clause 3 (1) inserts new paragraph 12A into Schedule 9 Finance Act 1996 (FA96) and Clause 3 (2) provides for it to have effect in relation to formations of SEs which occur on or after 1st April 2005.
28. New paragraph 12A (1) sets out the circumstances in which new paragraph 12A applies. The first three requirements are the same as the first three described in paragraph 5 above. The fourth is that:
 - either immediately after formation the SE is resident in the UK and within the charge to corporation tax; or
 - immediately after formation the SE is not resident in the UK and within the charge to corporation tax but is within the charge to corporation tax in accordance with section 11 of ICTA 1988 (company not resident in the UK but carrying on a trade in the UK through a permanent establishment).
29. Paragraph 12A (2) provides that where the conditions above are met, the transfer in the course of the merger of a loan relationship (see paragraph 27 above) shall be disregarded. There are two exceptions to this. The first is for the purpose of determining the debits or credits that are brought into account for exchange gains and losses and identifying the company which is to bring them into account. The second is for the purpose of identifying which company is to bring into account a any debit or credit that does not relate to the transfer, such

as interest. This rule mirrors that in paragraph 12(2)(a) Schedule 9 FA 1996 (transactions between members of groups).

30. Paragraph 12A (3) sets out that where this paragraph applies the transferor and the transferee companies of the loan relationship shall be deemed to be the same company. The exceptions outlined in sub-paragraph (2) above apply similarly to sub-paragraph (3). The overall effect of paragraphs 12A (2) and (3) is to treat a transfer of a loan asset or liability in the course of a merger in the same way as it would be were the transfer to occur between two companies in the same group. This rule mirrors that in paragraph 12(2)(b) Schedule 9 FA 1996.
31. Paragraph 12A (4) provides that paragraph 12(2A), Schedule 9 FA96 shall apply to new paragraph 12A. Paragraph 12(2A) applies where a transferor company uses fair value accounting for the loan relationship. The transfer is not disregarded, but both the transferor and transferee company must treat the transfer as being at fair value.
32. Paragraph 12A (5) sets out that sub-paragraph (2) and (3) do not apply in relation to the formation of an SE by merger if the merger is not effected for bona fide commercial reasons, or if it forms part of a scheme or arrangements of which the main purpose, or one of the main purposes, is the avoidance of liability to corporation tax, capital gains tax or income tax.
33. Paragraph 12A (6) provides that the anti-avoidance provision in sub-paragraph (5) is not applied where, before the merger the Inland Revenue notify the merging companies that they are satisfied that sub-paragraph (5) will not have effect.
34. Paragraph 12A (7) determines, for the purposes of paragraph 12A, Schedule 9 FA96, whether a company is resident in a member State. A company is resident in an member State as being when it is within a charge to tax under the law of that member State (as for that purpose is being resident) and it is not regarded as resident in a territory that is not within a member State for the purposes of any double taxation agreement.

Derivative contracts

35. Clause 4 deals with the transfer in the course of a merger of rights or liabilities under a derivative contract. A derivative contract for the purposes of Schedule 26 is an option, future or contract for differences which is accounted for as a derivative financial instrument and whose underlying subject matter falls within the scope of the Schedule for example a future, option or swap. Clause 4 (1) inserts new paragraph 30A into Schedule 26 Finance Act 2002 (FA02) and

Clause 4 (2) provides for it to have effect in relation to formations of SEs which occur on or after 1st April 2005.

36. New paragraph 30A (1) sets out the circumstances in which new paragraph 30A Schedule 26 FA02 applies. They are the same as described in paragraph 29 above.
37. Paragraph 30A (2) provides that where the conditions above are met, the transfer in the course of the merger of rights or liabilities under a derivative contract (see paragraph 35 above) shall be disregarded. The exception to this is the determining of the debits or credits that are brought into account for exchange gains and losses and identifying the company which is to bring them into account and also for identifying which company is to bring into account any debit or credit that does not relate to the transfer (for example, periodic payments under a swap). This rule mirrors that in paragraph 28(3)(a) Schedule 26 FA 2002 (transactions between members of groups).
38. Paragraph 30A (3) sets out that where this paragraph applies the transferor and the transferee companies of a derivative contract shall be deemed to be the same company. The exceptions outlined in sub-paragraph (2) above apply similarly to sub-paragraph (3). This rule mirrors that in paragraph 28(3)(b) Schedule 26 FA 2002.
39. Paragraph 30A (4) provides that paragraph 30, Schedule 26 FA02 shall apply to [new] paragraph 30A. Paragraph 30 applies to a transferor company that uses fair value accounting as respects the derivative contract. It mirrors the loan relationships provision described in paragraph 31 above.
40. Paragraph 30A (5) sets out that sub-paragraph (2) and (3) above do not apply, in relation to the formation of an SE by merger, if the merger is not effected for bona fide commercial reasons or if it forms part of a scheme or arrangements of which the main purpose or one of the main purposes is the avoidance of liability to corporation tax, capital gains tax or income tax.
41. Paragraph 30A (6) provides that the anti-avoidance provision in sub-paragraph (5) is not applied where, before the merger the Inland Revenue notify the merging companies that they are satisfied that sub-paragraph (5) will not have effect.
42. Paragraph 30A (7) determines, for the purposes of paragraph 30A, Schedule 26 FA02, whether a company is resident in a member State. A company is resident in an member State as being when it is within a charge to tax under the law of that member State (as for that purpose is being resident) and it is not regarded as resident in a

territory that is not within a member State for the purposes of any double taxation agreement.

Capital Allowances

43. Clause 5 deals with the transfer in the course of a merger of assets upon which capital allowances can be claimed. Clause 5 (1) inserts new section 561A into Capital Allowances Act2001 (CAA 2001), and Clause 5 (2) provides for it to have effect in relation to formations of SEs which occur on or after 1st April 2005.
44. Section 561A (1) sets out the circumstances in which section 561A applies by reference to section 140E TCGA (see paragraph 5). Briefly these are where an SE is formed by the merger of two or more companies, each merging company is resident in a member State, while not all the merging companies are resident in the same member State and section 139 TCGA does not apply in relation to any qualifying asset (see paragraph 46 below).
45. Subsection (2) provides, where section 561A applies to the transfer of a “qualifying asset”,
 - it is to be treated as not giving rise to any allowance or charge under the CAA 2001;
 - that anything done to or by the transferor to the assets transferred is treated after the transfer as having been by the transferee; and
 - the company reconstructions without change of ownership provisions of section 343 ICTA 1988 shall not apply.
46. Subsection (3) provides that a “qualifying asset” has the same meaning as “qualifying transferred asset” in new section 140E TCGA (see paragraph 7 above).

Consequential amendments

47. Clause 6 makes a number of consequential amendments necessary.

Appendix C

European Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the Economic and Social Committee³,

Whereas:

- (1) The completion of the internal market and the improvement it brings about in the economic and social situation throughout the Community mean not only that barriers to trade must be removed, but also that the structures of production must be adapted to the Community dimension. For that purpose it is essential that companies the business of which is not limited to satisfying purely local needs should be able to plan and carry out the reorganisation of their business on a Community scale.
- (2) Such reorganisation presupposes that existing companies from different Member States are given the option of combining their potential by means of mergers. Such operations can be carried out only with due regard to the rules of competition laid down in the Treaty.
- (3) Restructuring and cooperation operations involving companies from different Member States give rise to legal and psychological difficulties and tax problems. The approximation of Member States' company law by means of Directives based on Article 44 of the Treaty can overcome some of those difficulties. Such approximation does not, however, release companies governed by different legal systems from the obligation to choose a form of company governed by a particular national law.
- (4) The legal framework within which business must be carried on in the Community is still based largely on national laws and therefore no longer corresponds to the economic framework within which it must develop if the objectives set out in Article 18 of the Treaty are to be achieved. That situation forms a considerable obstacle to the creation of groups of companies from different Member States.

¹ OJ C 263, 16.10.1989, p. 41 and OJ C 176, 8.7.1991, p. 1.

² Opinion of 4 September 2001 (not yet published in the Official Journal).

³ OJ C 124, 21.5.1990, p. 34.

- (5) Member States are obliged to ensure that the provisions applicable to European companies under this Regulation do not result either in discrimination arising out of unjustified different treatment of European companies compared with public limited-liability companies or in disproportionate restrictions on the formation of a European company or on the transfer of its registered office.
- (6) It is essential to ensure as far as possible that the economic unit and the legal unit of business in the Community coincide. For that purpose, provision should be made for the creation, side by side with companies governed by a particular national law, of companies formed and carrying on business under the law created by a Community Regulation directly applicable in all Member States.
- (7) The provisions of such a Regulation will permit the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law.
- (8) The Statute for a European public limited-liability company (hereafter referred to as "SE") is among the measures to be adopted by the Council before 1992 listed in the Commission's White Paper on completing the internal market, approved by the European Council that met in Milan in June 1985. The European Council that met in Brussels in 1987 expressed the wish to see such a Statute created swiftly.
- (9) Since the Commission's submission in 1970 of a proposal for a Regulation on the Statute for a European public limited-liability company, amended in 1975, work on the approximation of national company law has made substantial progress, so that on those points where the functioning of an SE does not need uniform Community rules reference may be made to the law governing public limited-liability companies in the Member State where it has its registered office.
- (10) Without prejudice to any economic needs that may arise in the future, if the essential objective of legal rules governing SEs is to be attained, it must be possible at least to create such a company as a means both of enabling companies from different Member States to merge or to create a holding company and of enabling companies and other legal persons carrying on economic activities and governed by the laws of different Member States to form joint subsidiaries.
- (11) In the same context it should be possible for a public limited-liability company with a registered office and head office within the Community to transform itself into an SE without going into liquidation, provided it has a subsidiary in a Member State other than that of its registered office.
- (12) National provisions applying to public limited-liability companies that offer their securities to the public and to securities transactions should

also apply where an SE is formed by means of an offer of securities to the public and to SEs wishing to utilise such financial instruments.

- (13) The SE itself must take the form of a company with share capital, that being the form most suited, in terms of both financing and management, to the needs of a company carrying on business on a European scale. In order to ensure that such companies are of reasonable size, a minimum amount of capital should be set so that they have sufficient assets without making it difficult for small and medium-sized undertakings to form SEs.
- (14) An SE must be efficiently managed and properly supervised. It must be borne in mind that there are at present in the Community two different systems for the administration of public limited-liability companies. Although an SE should be allowed to choose between the two systems, the respective responsibilities of those responsible for management and those responsible for supervision should be clearly defined.
- (15) Under the rules and general principles of private international law, where one undertaking controls another governed by a different legal system, its ensuing rights and obligations as regards the protection of minority shareholders and third parties are governed by the law governing the controlled undertaking, without prejudice to the obligations imposed on the controlling undertaking by its own law, for example the requirement to prepare consolidated accounts.
- (16) Without prejudice to the consequences of any subsequent co-ordination of the laws of the Member States, specific rules for SEs are not at present required in this field. The rules and general principles of private international law should therefore be applied both where an SE exercises control and where it is the controlled company.
- (17) The rule thus applicable where an SE is controlled by another undertaking should be specified, and for this purpose reference should be made to the law governing public limited-liability companies in the Member State in which the SE has its registered office.
- (18) Each Member State must be required to apply the sanctions applicable to public limited-liability companies governed by its law in respect of infringements of this Regulation.
- (19) The rules on the involvement of employees in the European company are laid down in Directive 2001/86/EC⁴, and those provisions thus form an indissociable complement to this Regulation and must be applied concomitantly.
- (20) This Regulation does not cover other areas of law such as taxation, competition, intellectual property or insolvency. The provisions of the

⁴ See p. 22 of this Official Journal.

Member States' law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation.

- (21) Directive 2001/86/EC is designed to ensure that employees have a right of involvement in issues and decisions affecting the life of their SE. Other social and labour legislation questions, in particular the right of employees to information and consultation as regulated in the Member States, are governed by the national provisions applicable, under the same conditions, to public limited-liability companies.
- (22) The entry into force of this Regulation must be deferred so that each Member State may incorporate into its national law the provisions of Directive 2001/86/EC and set up in advance the necessary machinery for the formation and operation of SEs with registered offices within its territory, so that the Regulation and the Directive may be applied concomitantly.
- (23) A company the head office of which is not in the Community should be allowed to participate in the formation of an SE provided that company is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy according to the principles established in the 1962 General Programme for the abolition of restrictions on freedom of establishment. Such a link exists in particular if a company has an establishment in that Member State and conducts operations therefrom.
- (24) The SE should be enabled to transfer its registered office to another Member State. Adequate protection of the interests of minority shareholders who oppose the transfer, of creditors and of holders of other rights should be proportionate. Such transfer should not affect the rights originating before the transfer.
- (25) This Regulation is without prejudice to any provision which may be inserted in the 1968 Brussels Convention or in any text adopted by Member States or by the Council to replace such Convention, relating to the rules of jurisdiction applicable in the case of transfer of the registered offices of a public limited-liability company from one Member State to another.
- (26) Activities by financial institutions are regulated by specific directives and the national law implementing those directives and additional national rules regulating those activities apply in full to an SE.
- (27) In view of the specific Community character of an SE, the "real seat" arrangement adopted by this Regulation in respect of SEs is without prejudice to Member States' laws and does not pre-empt any choices to be made for other Community texts on company law.
- (28) The Treaty does not provide, for the adoption of this Regulation, powers of action other than those of Article 308 thereof.

- (29) Since the objectives of the intended action, as outlined above, cannot be adequately attained by the Member States in as much as a European public limited-liability company is being established at European level and can therefore, because of the scale and impact of such company, be better attained at Community level, the Community may take measures in accordance with the principle of subsidiarity enshrined in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in the said Article, this Regulation does not go beyond what is necessary to attain these objectives,

HAS ADOPTED THIS REGULATION:

TITLE I

GENERAL PROVISIONS

Article 1

1. A company may be set up within the territory of the Community in the form of a European public limited-liability company (*Societas Europaea* or SE) on the conditions and in the manner laid down in this Regulation.
2. The capital of an SE shall be divided into shares. No shareholder shall be liable for more than the amount he has subscribed.
3. An SE shall have legal personality.
4. Employee involvement in an SE shall be governed by the provisions of Directive 2001/86/EC.

Article 2

1. Public limited-liability companies such as referred to in Annex I, formed under the law of a Member State, with registered offices and head offices within the Community may form an SE by means of a merger provided that at least two of them are governed by the law of different Member States.
2. Public and private limited-liability companies such as referred to in Annex II, formed under the law of a Member State, with registered offices and head offices within the Community may promote the formation of a holding SE provided that each of at least two of them:
 - (a) is governed by the law of a different Member State, or
 - (b) has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.
3. Companies and firms within the meaning of the second paragraph of Article 48 of the Treaty and other legal bodies governed by public or private law, formed under the law of a Member State, with registered offices and head offices within the Community may form a subsidiary SE by subscribing for its shares, provided that each of at least two of them:
 - (a) is governed by the law of a different Member State, or
 - (b) has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.

4. A public limited-liability company, formed under the law of a Member State, which has its registered office and head office within the Community may be transformed into an SE if for at least two years it has had a subsidiary company governed by the law of another Member State.
5. A Member State may provide that a company the head office of which is not in the Community may participate in the formation of an SE provided that company is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy.

Article 3

1. For the purposes of Article 2(1), (2) and (3), an SE shall be regarded as a public limited-liability company governed by the law of the Member State in which it has its registered office.
2. An SE may itself set up one or more subsidiaries in the form of SEs. The provisions of the law of the Member State in which a subsidiary SE has its registered office that require a public limited-liability company to have more than one shareholder shall not apply in the case of the subsidiary SE. The provisions of national law implementing the twelfth Council Company Law Directive (89/667/EEC) of 21 December 1989 on single-member private limited-liability companies⁵ shall apply to SEs *mutatis mutandis*.

Article 4

1. The capital of an SE shall be expressed in euro.
2. The subscribed capital shall not be less than EUR 120000.
3. The laws of a Member State requiring a greater subscribed capital for companies carrying on certain types of activity shall apply to SEs with registered offices in that Member State.

Article 5

Subject to Article 4(1) and (2), the capital of an SE, its maintenance and changes thereto, together with its shares, bonds and other similar securities shall be governed by the provisions which would apply to a public limited-liability company with a registered office in the Member State in which the SE is registered.

Article 6

For the purposes of this Regulation, "the statutes of the SE" shall mean both the instrument of incorporation and, where they are the subject of a separate document, the statutes of the SE.

Article 7

The registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place.

⁵ OJ L 395, 30.12.1989, p. 40. Directive as last amended by the 1994 Act of Accession.

Article 8

1. The registered office of an SE may be transferred to another Member State in accordance with paragraphs 2 to 13. Such a transfer shall not result in the winding up of the SE or in the creation of a new legal person.
2. The management or administrative organ shall draw up a transfer proposal and publicise it in accordance with Article 13, without prejudice to any additional forms of publication provided for by the Member State of the registered office. That proposal shall state the current name, registered office and number of the SE and shall cover:
 - (a) the proposed registered office of the SE;
 - (b) the proposed statutes of the SE including, where appropriate, its new name;
 - (c) any implication the transfer may have on employees' involvement;
 - (d) the proposed transfer timetable;
 - (e) any rights provided for the protection of shareholders and/or creditors.
3. The management or administrative organ shall draw up a report explaining and justifying the legal and economic aspects of the transfer and explaining the implications of the transfer for shareholders, creditors and employees.
4. An SE's shareholders and creditors shall be entitled, at least one month before the general meeting called upon to decide on the transfer, to examine at the SE's registered office the transfer proposal and the report drawn up pursuant to paragraph 3 and, on request, to obtain copies of those documents free of charge.
5. A Member State may, in the case of SEs registered within its territory, adopt provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer.
6. No decision to transfer may be taken for two months after publication of the proposal. Such a decision shall be taken as laid down in Article 59.
7. Before the competent authority issues the certificate mentioned in paragraph 8, the SE shall satisfy it that, in respect of any liabilities arising prior to the publication of the transfer proposal, the interests of creditors and holders of other rights in respect of the SE (including those of public bodies) have been adequately protected in accordance with requirements laid down by the Member State where the SE has its registered office prior to the transfer.

A Member State may extend the application of the first subparagraph to liabilities that arise (or may arise) prior to the transfer.

The first and second subparagraphs shall be without prejudice to the application to SEs of the national legislation of Member States concerning the satisfaction or securing of payments to public bodies.

8. In the Member State in which an SE has its registered office the court, notary or other competent authority shall issue a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer.

9. The new registration may not be effected until the certificate referred to in paragraph 8 has been submitted, and evidence produced that the formalities required for registration in the country of the new registered office have been completed.
10. The transfer of an SE's registered office and the consequent amendment of its statutes shall take effect on the date on which the SE is registered, in accordance with Article 12, in the register for its new registered office.
11. When the SE's new registration has been effected, the registry for its new registration shall notify the registry for its old registration. Deletion of the old registration shall be effected on receipt of that notification, but not before.
12. The new registration and the deletion of the old registration shall be publicised in the Member States concerned in accordance with Article 13.
13. On publication of an SE's new registration, the new registered office may be relied on as against third parties. However, as long as the deletion of the SE's registration from the register for its previous registered office has not been publicised, third parties may continue to rely on the previous registered office unless the SE proves that such third parties were aware of the new registered office.
14. The laws of a Member State may provide that, as regards SEs registered in that Member State, the transfer of a registered office which would result in a change of the law applicable shall not take effect if any of that Member State's competent authorities opposes it within the two-month period referred to in paragraph 6. Such opposition may be based only on grounds of public interest.

Where an SE is supervised by a national financial supervisory authority according to Community directives the right to oppose the change of registered office applies to this authority as well.

Review by a judicial authority shall be possible.

15. An SE may not transfer its registered office if proceedings for winding up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against it.
16. An SE which has transferred its registered office to another Member State shall be considered, in respect of any cause of action arising prior to the transfer as determined in paragraph 10, as having its registered office in the Member States where the SE was registered prior to the transfer, even if the SE is sued after the transfer.

Article 9

1. An SE shall be governed:
 - (a) by this Regulation,
 - (b) where expressly authorised by this Regulation, by the provisions of its statutesor
 - (c) in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:

- (i) the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs;
 - (ii) the provisions of Member States' laws which would apply to a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office;
 - (iii) the provisions of its statutes, in the same way as for a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office.
2. The provisions of laws adopted by Member States specifically for the SE must be in accordance with Directives applicable to public limited-liability companies referred to in Annex I.
3. If the nature of the business carried out by an SE is regulated by specific provisions of national laws, those laws shall apply in full to the SE.

Article 10

Subject to this Regulation, an SE shall be treated in every Member State as if it were a public limited-liability company formed in accordance with the law of the Member State in which it has its registered office.

Article 11

1. The name of an SE shall be preceded or followed by the abbreviation SE.
2. Only SEs may include the abbreviation SE in their name.
3. Nevertheless, companies, firms and other legal entities registered in a Member State before the date of entry into force of this Regulation in the names of which the abbreviation SE appears shall not be required to alter their names.

Article 12

1. Every SE shall be registered in the Member State in which it has its registered office in a register designated by the law of that Member State in accordance with Article 3 of the first Council Directive (68/151/EEC) of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community⁶.
2. An SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded.
3. In order for an SE to be registered in a Member State which has made use of the option referred to in Article 7(3) of Directive 2001/86/EC, either an agreement pursuant to Article 4 of the Directive must have been concluded on the arrangements for employee involvement, including

⁶ OJ L 65, 14.3.1968, p. 8. Directive as last amended by the 1994 Act of Accession.

participation, or none of the participating companies must have been governed by participation rules prior to the registration of the SE.

4. The statutes of the SE must not conflict at any time with the arrangements for employee involvement which have been so determined. Where new such arrangements determined pursuant to the Directive conflict with the existing statutes, the statutes shall to the extent necessary be amended.

In this case, a Member State may provide that the management organ or the administrative organ of the SE shall be entitled to proceed to amend the statutes without any further decision from the general shareholders meeting.

Article 13

Publication of the documents and particulars concerning an SE which must be publicised under this Regulation shall be effected in the manner laid down in the laws of the Member State in which the SE has its registered office in accordance with Directive 68/151/EEC.

Article 14

1. Notice of an SE's registration and of the deletion of such a registration shall be published for information purposes in the Official Journal of the European Communities after publication in accordance with Article 13. That notice shall state the name, number, date and place of registration of the SE, the date and place of publication and the title of publication, the registered office of the SE and its sector of activity.
2. Where the registered office of an SE is transferred in accordance with Article 8, notice shall be published giving the information provided for in paragraph 1, together with that relating to the new registration.
3. The particulars referred to in paragraph 1 shall be forwarded to the Office for Official Publications of the European Communities within one month of the publication referred to in Article 13.

TITLE II

FORMATION

Section 1

General

Article 15

1. Subject to this Regulation, the formation of an SE shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE establishes its registered office.
2. The registration of an SE shall be publicised in accordance with Article 13.

Article 16

1. An SE shall acquire legal personality on the date on which it is registered in the register referred to in Article 12.

2. If acts have been performed in an SE's name before its registration in accordance with Article 12 and the SE does not assume the obligations arising out of such acts after its registration, the natural persons, companies, firms or other legal entities which performed those acts shall be jointly and severally liable therefor, without limit, in the absence of agreement to the contrary.

Section 2

Formation by merger

Article 17

1. An SE may be formed by means of a merger in accordance with Article 2(1).
2. Such a merger may be carried out in accordance with:
 - (a) the procedure for merger by acquisition laid down in Article 3(1) of the third Council Directive (78/855/EEC) of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited-liability companies⁷ or
 - (b) the procedure for merger by the formation of a new company laid down in Article 4(1) of the said Directive.

In the case of a merger by acquisition, the acquiring company shall take the form of an SE when the merger takes place. In the case of a merger by the formation of a new company, the SE shall be the newly formed company.

Article 18

For matters not covered by this section or, where a matter is partly covered by it, for aspects not covered by it, each company involved in the formation of an SE by merger shall be governed by the provisions of the law of the Member State to which it is subject that apply to mergers of public limited-liability companies in accordance with Directive 78/855/EEC.

Article 19

The laws of a Member State may provide that a company governed by the law of that Member State may not take part in the formation of an SE by merger if any of that Member State's competent authorities opposes it before the issue of the certificate referred to in Article 25(2).

Such opposition may be based only on grounds of public interest. Review by a judicial authority shall be possible.

Article 20

1. The management or administrative organs of merging companies shall draw up draft terms of merger. The draft terms of merger shall include the following particulars:
 - (a) the name and registered office of each of the merging companies together with those proposed for the SE;

⁷ OJ L 295, 20.10.1978, p. 36. Directive as last amended by the 1994 Act of Accession.

- (b) the share-exchange ratio and the amount of any compensation;
- (c) the terms for the allotment of shares in the SE;
- (d) the date from which the holding of shares in the SE will entitle the holders to share in profits and any special conditions affecting that entitlement;
- (e) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the SE;
- (f) the rights conferred by the SE on the holders of shares to which special rights are attached and on the holders of securities other than shares, or the measures proposed concerning them;
- (g) any special advantage granted to the experts who examine the draft terms of merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;
- (h) the statutes of the SE;
- (i) information on the procedures by which arrangements for employee involvement are determined pursuant to Directive 2001/86/EC.

2. The merging companies may include further items in the draft terms of merger.

Article 21

For each of the merging companies and subject to the additional requirements imposed by the Member State to which the company concerned is subject, the following particulars shall be published in the national gazette of that Member State:

- (a) the type, name and registered office of every merging company;
- (b) the register in which the documents referred to in Article 3(2) of Directive 68/151/EEC are filed in respect of each merging company, and the number of the entry in that register;
- (c) an indication of the arrangements made in accordance with Article 24 for the exercise of the rights of the creditors of the company in question and the address at which complete information on those arrangements may be obtained free of charge;
- (d) an indication of the arrangements made in accordance with Article 24 for the exercise of the rights of minority shareholders of the company in question and the address at which complete information on those arrangements may be obtained free of charge;
- (e) the name and registered office proposed for the SE.

Article 22

As an alternative to experts operating on behalf of each of the merging companies, one or more independent experts as defined in Article 10 of Directive 78/855/EEC, appointed for those purposes at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the proposed SE, may examine the draft terms of merger and draw up a single report to all the shareholders.

The experts shall have the right to request from each of the merging

companies any information they consider necessary to enable them to complete their function.

Article 23

1. The general meeting of each of the merging companies shall approve the draft terms of merger.
2. Employee involvement in the SE shall be decided pursuant to Directive 2001/86/EC. The general meetings of each of the merging companies may reserve the right to make registration of the SE conditional upon its express ratification of the arrangements so decided.

Article 24

1. The law of the Member State governing each merging company shall apply as in the case of a merger of public limited-liability companies, taking into account the cross-border nature of the merger, with regard to the protection of the interests of:
 - (a) creditors of the merging companies;
 - (b) holders of bonds of the merging companies;
 - (c) holders of securities, other than shares, which carry special rights in the merging companies.
2. A Member State may, in the case of the merging companies governed by its law, adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger.

Article 25

1. The legality of a merger shall be scrutinised, as regards the part of the procedure concerning each merging company, in accordance with the law on mergers of public limited-liability companies of the Member State to which the merging company is subject.
2. In each Member State concerned the court, notary or other competent authority shall issue a certificate conclusively attesting to the completion of the pre-merger acts and formalities.
3. If the law of a Member State to which a merging company is subject provides for a procedure to scrutinise and amend the share-exchange ratio, or a procedure to compensate minority shareholders, without preventing the registration of the merger, such procedures shall only apply if the other merging companies situated in Member States which do not provide for such procedure explicitly accept, when approving the draft terms of the merger in accordance with Article 23(1), the possibility for the shareholders of that merging company to have recourse to such procedure. In such cases, the court, notary or other competent authorities may issue the certificate referred to in paragraph 2 even if such a procedure has been commenced. The certificate must, however, indicate that the procedure is pending. The decision in the procedure shall be binding on the acquiring company and all its shareholders.

Article 26

1. The legality of a merger shall be scrutinised, as regards the part of the procedure concerning the completion of the merger and the formation of

the SE, by the court, notary or other authority competent in the Member State of the proposed registered office of the SE to scrutinise that aspect of the legality of mergers of public limited-liability companies.

2. To that end each merging company shall submit to the competent authority the certificate referred to in Article 25(2) within six months of its issue together with a copy of the draft terms of merger approved by that company.
3. The authority referred to in paragraph 1 shall in particular ensure that the merging companies have approved draft terms of merger in the same terms and that arrangements for employee involvement have been determined pursuant to Directive 2001/86/EC.
4. That authority shall also satisfy itself that the SE has been formed in accordance with the requirements of the law of the Member State in which it has its registered office in accordance with Article 15.

Article 27

1. A merger and the simultaneous formation of an SE shall take effect on the date on which the SE is registered in accordance with Article 12.
2. The SE may not be registered until the formalities provided for in Articles 25 and 26 have been completed.

Article 28

For each of the merging companies the completion of the merger shall be publicised as laid down by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC.

Article 29

1. A merger carried out as laid down in Article 17(2)(a) shall have the following consequences ipso jure and simultaneously:
 - (a) all the assets and liabilities of each company being acquired are transferred to the acquiring company;
 - (b) the shareholders of the company being acquired become shareholders of the acquiring company;
 - (c) the company being acquired ceases to exist;
 - (d) the acquiring company adopts the form of an SE.
2. A merger carried out as laid down in Article 17(2)(b) shall have the following consequences ipso jure and simultaneously:
 - (a) all the assets and liabilities of the merging companies are transferred to the SE;
 - (b) the shareholders of the merging companies become shareholders of the SE;
 - (c) the merging companies cease to exist.
3. Where, in the case of a merger of public limited-liability companies, the law of a Member State requires the completion of any special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities shall apply and shall be carried out either by the merging companies or by the SE following its registration.
4. The rights and obligations of the participating companies on terms and conditions of employment arising from national law, practice and individual

employment contracts or employment relationships and existing at the date of the registration shall, by reason of such registration be transferred to the SE upon its registration.

Article 30

A merger as provided for in Article 2(1) may not be declared null and void once the SE has been registered.

The absence of scrutiny of the legality of the merger pursuant to Articles 25 and 26 may be included among the grounds for the winding-up of the SE.

Article 31

1. Where a merger within the meaning of Article 17(2)(a) is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of another company, neither Article 20(1)(b), (c) and (d), Article 29(1)(b) nor Article 22 shall apply. National law governing each merging company and mergers of public limited-liability companies in accordance with Article 24 of Directive 78/855/EEC shall nevertheless apply.
2. Where a merger by acquisition is carried out by a company which holds 90 % or more but not all of the shares and other securities conferring the right to vote at general meetings of another company, reports by the management or administrative body, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company being acquired so requires. Member States may, however, provide that this paragraph may apply where a company holds shares conferring 90 % or more but not all of the voting rights.

Section 3

Formation of a holding SE

Article 32

1. A holding SE may be formed in accordance with Article 2(2). A company promoting the formation of a holding SE in accordance with Article 2(2) shall continue to exist.
2. The management or administrative organs of the companies which promote such an operation shall draw up, in the same terms, draft terms for the formation of the holding SE. The draft terms shall include a report explaining and justifying the legal and economic aspects of the formation and indicating the implications for the shareholders and for the employees of the adoption of the form of a holding SE. The draft terms shall also set out the particulars provided for in Article 20(1)(a), (b), (c), (f), (g), (h) and (i) and shall fix the minimum proportion of the shares in each of the companies promoting the operation which the shareholders

- must contribute to the formation of the holding SE. That proportion shall be shares conferring more than 50 % of the permanent voting rights.
3. For each of the companies promoting the operation, the draft terms for the formation of the holding SE shall be publicised in the manner laid down in each Member State's national law in accordance with Article 3 of Directive 68/151/EEC at least one month before the date of the general meeting called to decide thereon.
 4. One or more experts independent of the companies promoting the operation, appointed or approved by a judicial or administrative authority in the Member State to which each company is subject in accordance with national provisions adopted in implementation of Directive 78/855/EEC, shall examine the draft terms of formation drawn up in accordance with paragraph 2 and draw up a written report for the shareholders of each company. By agreement between the companies promoting the operation, a single written report may be drawn up for the shareholders of all the companies by one or more independent experts, appointed or approved by a judicial or administrative authority in the Member State to which one of the companies promoting the operation or the proposed SE is subject in accordance with national provisions adopted in implementation of Directive 78/855/EEC.
 5. The report shall indicate any particular difficulties of valuation and state whether the proposed share-exchange ratio is fair and reasonable, indicating the methods used to arrive at it and whether such methods are adequate in the case in question.
 6. The general meeting of each company promoting the operation shall approve the draft terms of formation of the holding SE.

Employee involvement in the holding SE shall be decided pursuant to Directive 2001/86/EC. The general meetings of each company promoting the operation may reserve the right to make registration of the holding SE conditional upon its express ratification of the arrangements so decided.

7. These provisions shall apply *mutatis mutandis* to private limited-liability companies.

Article 33

1. The shareholders of the companies promoting such an operation shall have a period of three months in which to inform the promoting companies whether they intend to contribute their shares to the formation of the holding SE. That period shall begin on the date upon which the terms for the formation of the holding SE have been finally determined in accordance with Article 32.
2. The holding SE shall be formed only if, within the period referred to in paragraph 1, the shareholders of the companies promoting the operation have assigned the minimum proportion of shares in each company in accordance with the draft terms of formation and if all the other conditions are fulfilled.
3. If the conditions for the formation of the holding SE are all fulfilled in accordance with paragraph 2, that fact shall, in respect of each of the promoting companies, be publicised in the manner laid down in the

national law governing each of those companies adopted in implementation of Article 3 of Directive 68/151/EEC.

Shareholders of the companies promoting the operation who have not indicated whether they intend to make their shares available to the promoting companies for the purpose of forming the holding SE within the period referred to in paragraph 1 shall have a further month in which to do so.

4. Shareholders who have contributed their securities to the formation of the SE shall receive shares in the holding SE.
5. The holding SE may not be registered until it is shown that the formalities referred to in Article 32 have been completed and that the conditions referred to in paragraph 2 have been fulfilled.

Article 34

A Member State may, in the case of companies promoting such an operation, adopt provisions designed to ensure protection for minority shareholders who oppose the operation, creditors and employees.

Section 4

Formation of a subsidiary SE

Article 35

An SE may be formed in accordance with Article 2(3).

Article 36

Companies, firms and other legal entities participating in such an operation shall be subject to the provisions governing their participation in the formation of a subsidiary in the form of a public limited-liability company under national law.

Section 5

Conversion of an existing public limited-liability company into an SE

Article 37

1. An SE may be formed in accordance with Article 2(4).
2. Without prejudice to Article 12 the conversion of a public limited-liability company into an SE shall not result in the winding up of the company or in the creation of a new legal person.
3. The registered office may not be transferred from one Member State to another pursuant to Article 8 at the same time as the conversion is effected.
4. The management or administrative organ of the company in question shall draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications for the shareholders and for the employees of the adoption of the form of an SE.

5. The draft terms of conversion shall be publicised in the manner laid down in each Member State's law in accordance with Article 3 of Directive 68/151/EEC at least one month before the general meeting called upon to decide thereon.
6. Before the general meeting referred to in paragraph 7 one or more independent experts appointed or approved, in accordance with the national provisions adopted in implementation of Article 10 of Directive 78/855/EEC, by a judicial or administrative authority in the Member State to which the company being converted into an SE is subject shall certify in compliance with Directive 77/91/EEC⁸ mutatis mutandis that the company has net assets at least equivalent to its capital plus those reserves which must not be distributed under the law or the Statutes.
7. The general meeting of the company in question shall approve the draft terms of conversion together with the statutes of the SE. The decision of the general meeting shall be passed as laid down in the provisions of national law adopted in implementation of Article 7 of Directive 78/855/EEC.
8. Member States may condition a conversion to a favourable vote of a qualified majority or unanimity in the organ of the company to be converted within which employee participation is organised.
9. The rights and obligations of the company to be converted on terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships and existing at the date of the registration shall, by reason of such registration be transferred to the SE.

TITLE III

STRUCTURE OF THE SE

Article 38

Under the conditions laid down by this Regulation an SE shall comprise:

- (a) a general meeting of shareholders and
- (b) either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the form adopted in the statutes.

Section 1

Two-tier system

Article 39

⁸ Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 26, 31.1.1977, p. 1). Directive as last amended by the 1994 Act of Accession.

1. The management organ shall be responsible for managing the SE. A Member State may provide that a managing director or managing directors shall be responsible for the current management under the same conditions as for public limited-liability companies that have registered offices within that Member State's territory.
2. The member or members of the management organ shall be appointed and removed by the supervisory organ.
A Member State may, however, require or permit the statutes to provide that the member or members of the management organ shall be appointed and removed by the general meeting under the same conditions as for public limited-liability companies that have registered offices within its territory.
3. No person may at the same time be a member of both the management organ and the supervisory organ of the same SE. The supervisory organ may, however, nominate one of its members to act as a member of the management organ in the event of a vacancy. During such a period the functions of the person concerned as a member of the supervisory organ shall be suspended. A Member State may impose a time limit on such a period.
4. The number of members of the management organ or the rules for determining it shall be laid down in the SE's statutes. A Member State may, however, fix a minimum and/or a maximum number.
5. Where no provision is made for a two-tier system in relation to public limited-liability companies with registered offices within its territory, a Member State may adopt the appropriate measures in relation to SEs.

Article 40

1. The supervisory organ shall supervise the work of the management organ. It may not itself exercise the power to manage the SE.
2. The members of the supervisory organ shall be appointed by the general meeting. The members of the first supervisory organ may, however, be appointed by the statutes. This shall apply without prejudice to Article 47(4) or to any employee participation arrangements determined pursuant to Directive 2001/86/EC.
3. The number of members of the supervisory organ or the rules for determining it shall be laid down in the statutes. A Member State may, however, stipulate the number of members of the supervisory organ for SEs registered within its territory or a minimum and/or a maximum number.

Article 41

1. The management organ shall report to the supervisory organ at least once every three months on the progress and foreseeable development of the SE's business.
2. In addition to the regular information referred to in paragraph 1, the management organ shall promptly pass the supervisory organ any information on events likely to have an appreciable effect on the SE.
3. The supervisory organ may require the management organ to provide information of any kind, which it needs to exercise supervision in

accordance with Article 40(1). A Member State may provide that each member of the supervisory organ also be entitled to this facility.

4. The supervisory organ may undertake or arrange for any investigations necessary for the performance of its duties.
5. Each member of the supervisory organ shall be entitled to examine all information submitted to it.

Article 42

The supervisory organ shall elect a chairman from among its members. If half of the members are appointed by employees, only a member appointed by the general meeting of shareholders may be elected chairman.

Section 2

The one-tier system

Article 43

1. The administrative organ shall manage the SE. A Member State may provide that a managing director or managing directors shall be responsible for the day-to-day management under the same conditions as for public limited-liability companies that have registered offices within that Member State's territory.
2. The number of members of the administrative organ or the rules for determining it shall be laid down in the SE's statutes. A Member State may, however, set a minimum and, where necessary, a maximum number of members.
The administrative organ shall, however, consist of at least three members where employee participation is regulated in accordance with Directive 2001/86/EC.
3. The member or members of the administrative organ shall be appointed by the general meeting. The members of the first administrative organ may, however, be appointed by the statutes. This shall apply without prejudice to Article 47(4) or to any employee participation arrangements determined pursuant to Directive 2001/86/EC.
4. Where no provision is made for a one-tier system in relation to public limited-liability companies with registered offices within its territory, a Member State may adopt the appropriate measures in relation to SEs.

Article 44

1. The administrative organ shall meet at least once every three months at intervals laid down by the statutes to discuss the progress and foreseeable development of the SE's business.
2. Each member of the administrative organ shall be entitled to examine all information submitted to it.

Article 45

The administrative organ shall elect a chairman from among its members. If half of the members are appointed by employees, only a member appointed by the general meeting of shareholders may be elected chairman.

Section 3

Rules common to the one-tier and two-tier systems

Article 46

1. Members of company organs shall be appointed for a period laid down in the statutes not exceeding six years.
2. Subject to any restrictions laid down in the statutes, members may be reappointed once or more than once for the period determined in accordance with paragraph 1.

Article 47

1. An SE's statutes may permit a company or other legal entity to be a member of one of its organs, provided that the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated does not provide otherwise. That company or other legal entity shall designate a natural person to exercise its functions on the organ in question.
2. No person may be a member of any SE organ or a representative of a member within the meaning of paragraph 1 who:
 - (a) is disqualified, under the law of the Member State in which the SE's registered office is situated, from serving on the corresponding organ of a public limited-liability company governed by the law of that Member State, or
 - (b) is disqualified from serving on the corresponding organ of a public limited-liability company governed by the law of a Member State owing to a judicial or administrative decision delivered in a Member State.
3. An SE's statutes may, in accordance with the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated, lay down special conditions of eligibility for members representing the shareholders.
4. This Regulation shall not affect national law permitting a minority of shareholders or other persons or authorities to appoint some of the members of a company organ.

Article 48

1. An SE's statutes shall list the categories of transactions which require authorisation of the management organ by the supervisory organ in the two-tier system or an express decision by the administrative organ in the one-tier system. A Member State may, however, provide that in the two-tier system the supervisory organ may itself make certain categories of transactions subject to authorisation.
2. A Member State may determine the categories of transactions which must at least be indicated in the statutes of SEs registered within its territory.

Article 49

The members of an SE's organs shall be under a duty, even after they have ceased to hold office, not to divulge any information which they have

concerning the SE the disclosure of which might be prejudicial to the company's interests, except where such disclosure is required or permitted under national law provisions applicable to public limited-liability companies or is in the public interest.

Article 50

1. Unless otherwise provided by this Regulation or the statutes, the internal rules relating to quorums and decision-taking in SE organs shall be as follows:
 - (a) quorum: at least half of the members must be present or represented;
 - (b) decision-taking: a majority of the members present or represented.
2. Where there is no relevant provision in the statutes, the chairman of each organ shall have a casting vote in the event of a tie. There shall be no provision to the contrary in the statutes, however, where half of the supervisory organ consists of employees' representatives.
3. Where employee participation is provided for in accordance with Directive 2001/86/EC, a Member State may provide that the supervisory organ's quorum and decision-making shall, by way of derogation from the provisions referred to in paragraphs 1 and 2, be subject to the rules applicable, under the same conditions, to public limited-liability companies governed by the law of the Member State concerned.

Article 51

Members of an SE's management, supervisory and administrative organs shall be liable, in accordance with the provisions applicable to public limited-liability companies in the Member State in which the SE's registered office is situated, for loss or damage sustained by the SE following any breach on their part of the legal, statutory or other obligations inherent in their duties.

Section 4

General meeting

Article 52

The general meeting shall decide on matters for which it is given sole responsibility by:

- (a) this Regulation or
- (b) the legislation of the Member State in which the SE's registered office is situated adopted in implementation of Directive 2001/86/EC.

Furthermore, the general meeting shall decide on matters for which responsibility is given to the general meeting of a public limited-liability company governed by the law of the Member State in which the SE's registered office is situated, either by the law of that Member State or by the SE's statutes in accordance with that law.

Article 53

Without prejudice to the rules laid down in this section, the organisation and conduct of general meetings together with voting procedures shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated.

Article 54

1. An SE shall hold a general meeting at least once each calendar year, within six months of the end of its financial year, unless the law of the Member State in which the SE's registered office is situated applicable to public limited-liability companies carrying on the same type of activity as the SE provides for more frequent meetings. A Member State may, however, provide that the first general meeting may be held at any time in the 18 months following an SE's incorporation.
2. General meetings may be convened at any time by the management organ, the administrative organ, the supervisory organ or any other organ or competent authority in accordance with the national law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated.

Article 55

1. One or more shareholders who together hold at least 10 % of an SE's subscribed capital may request the SE to convene a general meeting and draw up the agenda therefor; the SE's statutes or national legislation may provide for a smaller proportion under the same conditions as those applicable to public limited-liability companies.
2. The request that a general meeting be convened shall state the items to be put on the agenda.
3. If, following a request made under paragraph 1, a general meeting is not held in due time and, in any event, within two months, the competent judicial or administrative authority within the jurisdiction of which the SE's registered office is situated may order that a general meeting be convened within a given period or authorise either the shareholders who have requested it or their representatives to convene a general meeting. This shall be without prejudice to any national provisions which allow the shareholders themselves to convene general meetings.

Article 56

One or more shareholders who together hold at least 10 % of an SE's subscribed capital may request that one or more additional items be put on the agenda of any general meeting. The procedures and time limits applicable to such requests shall be laid down by the national law of the Member State in which the SE's registered office is situated or, failing that, by the SE's statutes. The above proportion may be reduced by the statutes or by the law of the Member State in which the SE's registered office is situated under the same conditions as are applicable to public limited-liability companies.

Article 57

Save where this Regulation or, failing that, the law applicable to public limited-liability companies in the Member State in which an SE's registered office is situated requires a larger majority, the general meeting's decisions shall be taken by a majority of the votes validly cast.

Article 58

The votes cast shall not include votes attaching to shares in respect of which the shareholder has not taken part in the vote or has abstained or has returned a blank or spoilt ballot paper.

Article 59

1. Amendment of an SE's statutes shall require a decision by the general meeting taken by a majority which may not be less than two thirds of the votes cast, unless the law applicable to public limited-liability companies in the Member State in which an SE's registered office is situated requires or permits a larger majority.
2. A Member State may, however, provide that where at least half of an SE's subscribed capital is represented, a simple majority of the votes referred to in paragraph 1 shall suffice.
3. Amendments to an SE's statutes shall be publicised in accordance with Article 13.

Article 60

1. Where an SE has two or more classes of shares, every decision by the general meeting shall be subject to a separate vote by each class of shareholders whose class rights are affected thereby.
2. Where a decision by the general meeting requires the majority of votes specified in Article 59(1) or (2), that majority shall also be required for the separate vote by each class of shareholders whose class rights are affected by the decision.

TITLE IV

ANNUAL ACCOUNTS AND CONSOLIDATED ACCOUNTS

Article 61

Subject to Article 62 an SE shall be governed by the rules applicable to public limited-liability companies under the law of the Member State in which its registered office is situated as regards the preparation of its annual and, where appropriate, consolidated accounts including the accompanying annual report and the auditing and publication of those accounts.

Article 62

1. An SE which is a credit or financial institution shall be governed by the rules laid down in the national law of the Member State in which its registered office is situated in implementation of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to

the taking up and pursuit of the business of credit institutions⁹ as regards the preparation of its annual and, where appropriate, consolidated accounts, including the accompanying annual report and the auditing and publication of those accounts.

2. An SE which is an insurance undertaking shall be governed by the rules laid down in the national law of the Member State in which its registered office is situated in implementation of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings¹⁰ as regards the preparation of its annual and, where appropriate, consolidated accounts including the accompanying annual report and the auditing and publication of those accounts.

TITLE V

WINDING UP, LIQUIDATION, INSOLVENCY AND CESSATION OF PAYMENTS

Article 63

As regards winding up, liquidation, insolvency, cessation of payments and similar procedures, an SE shall be governed by the legal provisions which would apply to a public limited-liability company formed in accordance with the law of the Member State in which its registered office is situated, including provisions relating to decision-making by the general meeting.

Article 64

1. When an SE no longer complies with the requirement laid down in Article 7, the Member State in which the SE's registered office is situated shall take appropriate measures to oblige the SE to regularise its position within a specified period either:
 - (a) by re-establishing its head office in the Member State in which its registered office is situated or
 - (b) by transferring the registered office by means of the procedure laid down in Article 8.
2. The Member State in which the SE's registered office is situated shall put in place the measures necessary to ensure that an SE which fails to regularise its position in accordance with paragraph 1 is liquidated.
3. The Member State in which the SE's registered office is situated shall set up a judicial remedy with regard to any established infringement of Article 7. That remedy shall have a suspensory effect on the procedures laid down in paragraphs 1 and 2.
4. Where it is established on the initiative of either the authorities or any interested party that an SE has its head office within the territory of a Member State in breach of Article 7, the authorities of that Member State shall immediately inform the Member State in which the SE's registered office is situated.

⁹ OJ L 126, 26.5.2000, p. 1.

¹⁰ OJ L 374, 31.12.1991, p. 7.

Article 65

Without prejudice to provisions of national law requiring additional publication, the initiation and termination of winding up, liquidation, insolvency or cessation of payment procedures and any decision to continue operating shall be publicised in accordance with Article 13.

Article 66

1. An SE may be converted into a public limited-liability company governed by the law of the Member State in which its registered office is situated. No decision on conversion may be taken before two years have elapsed since its registration or before the first two sets of annual accounts have been approved.
2. The conversion of an SE into a public limited-liability company shall not result in the winding up of the company or in the creation of a new legal person.
3. The management or administrative organ of the SE shall draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications of the adoption of the public limited-liability company for the shareholders and for the employees.
4. The draft terms of conversion shall be publicised in the manner laid down in each Member State's law in accordance with Article 3 of Directive 68/151/EEC at least one month before the general meeting called to decide thereon.
5. Before the general meeting referred to in paragraph 6, one or more independent experts appointed or approved, in accordance with the national provisions adopted in implementation of Article 10 of Directive 78/855/EEC, by a judicial or administrative authority in the Member State to which the SE being converted into a public limited-liability company is subject shall certify that the company has assets at least equivalent to its capital.
6. The general meeting of the SE shall approve the draft terms of conversion together with the statutes of the public limited-liability company. The decision of the general meeting shall be passed as laid down in the provisions of national law adopted in implementation of Article 7 of Directive 78/855/EEC.

TITLE VI

ADDITIONAL AND TRANSITIONAL PROVISIONS

Article 67

1. If and so long as the third phase of economic and monetary union (EMU) does not apply to it each Member State may make SEs with registered offices within its territory subject to the same provisions as apply to public limited-liability companies covered by its legislation as regards the expression of their capital. An SE may, in any case, express its capital in euro as well. In that event the national currency/euro conversion rate shall be that for the last day of the month preceding that of the formation of the SE.

2. If and so long as the third phase of EMU does not apply to the Member State in which an SE has its registered office, the SE may, however, prepare and publish its annual and, where appropriate, consolidated accounts in euro. The Member State may require that the SE's annual and, where appropriate, consolidated accounts be prepared and published in the national currency under the same conditions as those laid down for public limited-liability companies governed by the law of that Member State. This shall not prejudice the additional possibility for an SE of publishing its annual and, where appropriate, consolidated accounts in euro in accordance with Council Directive 90/604/EEC of 8 November 1990 amending Directive 78/60/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as concerns the exemptions for small and medium-sized companies and the publication of accounts in ecu¹¹.

TITLE VII

FINAL PROVISIONS

Article 68

1. The Member States shall make such provision as is appropriate to ensure the effective application of this Regulation.
2. Each Member State shall designate the competent authorities within the meaning of Articles 8, 25, 26, 54, 55 and 64. It shall inform the Commission and the other Member States accordingly.

Article 69

Five years at the latest after the entry into force of this Regulation, the Commission shall forward to the Council and the European Parliament a report on the application of the Regulation and proposals for amendments, where appropriate. The report shall, in particular, analyse the appropriateness of:

- (a) allowing the location of an SE's head office and registered office in different Member States;
- (b) broadening the concept of merger in Article 17(2) in order to admit also other types of merger than those defined in Articles 3(1) and 4(1) of Directive 78/855/EEC;
- (c) revising the jurisdiction clause in Article 8(16) in the light of any provision which may have been inserted in the 1968 Brussels Convention or in any text adopted by Member States or by the Council to replace such Convention;
- (d) allowing provisions in the statutes of an SE adopted by a Member State in execution of authorisations given to the Member States by this Regulation or laws adopted to ensure the effective application of this Regulation in respect to the SE which deviate from or are complementary to these laws, even when such provisions would not be authorised in the statutes of a public limited-liability company having its registered office in the Member State.

¹¹ OJ L 317, 16.11.1990, p. 57.

Article 70

This Regulation shall enter into force on 8 October 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 8 October 2001.

For the Council
The President
L. Onkelinx

ANNEX I to Appendix C

PUBLIC LIMITED-LIABILITY COMPANIES REFERRED TO IN ARTICLE 2(1)

BELGIUM: la société anonyme//de naamloze vennootschap
DENMARK: aktieselskaber
GERMANY: die Aktiengesellschaft
GREECE: anonymi etaireia
SPAIN: la sociedad anónima
FRANCE: la société anonyme
IRELAND: public companies limited by shares
public companies limited by guarantee having a share capital
ITALY: società per azioni
LUXEMBOURG: la société anonyme
NETHERLANDS: de naamloze vennootschap
AUSTRIA: die Aktiengesellschaft
PORTUGAL: a sociedade anónima de responsabilidade limitada
FINLAND: julkinen osakeyhtiö//publikt aktiebolag
SWEDEN: publikt aktiebolag
UNITED KINGDOM: public companies limited by shares
public companies limited by guarantee having a share capital

ANNEX II to Appendix C

**PUBLIC AND PRIVATE LIMITED-LIABILITY COMPANIES REFERRED TO
IN ARTICLE 2(2)**

BELGIUM:
la société anonyme//de naamloze vennootschap,
la société privée à responsabilité limitée//besloten vennootschap met
beperkte aansprakelijkheid
DENMARK:
aktieselskaber,

anpartselskaber

GERMANY:

die Aktiengesellschaft,
die Gesellschaft mit beschränkter Haftung

GREECE:

anonymi etaireia
etaireia periosmenes euthynes

SPAIN:

la sociedad anónima,
la sociedad de responsabilidad limitada

FRANCE:

la société anonyme,
la société à responsabilité limitée

IRELAND:

public companies limited by shares,
public companies limited by guarantee having a share capital,
private companies limited by shares,
private companies limited by guarantee having a share capital

ITALY:

società per azioni,
società a responsabilità limitata

LUXEMBOURG:

la société anonyme,
la société à responsabilité limitée

NETHERLANDS:

de naamloze vennootschap,
de besloten vennootschap met beperkte aansprakelijkheid

AUSTRIA:

die Aktiengesellschaft,
die Gesellschaft mit beschränkter Haftung

PORTUGAL:

a sociedade anónima de responsabilidade limitada,
a sociedade por quotas de responsabilidade limitada

FINLAND:

Osaakeyhtiö

Aktiebolag

SWEDEN:

Aktiebolag

UNITED KINGDOM:

public companies limited by shares,
public companies limited by guarantee having a share capital,
private companies limited by shares,
private companies limited by guarantee having a share capital

Appendix D

Third Council Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited liability companies (The “Third Directive”)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 (3) (g) thereof,

Having regard to the proposal from the Commission¹²,

Having regard to the opinion of the European Parliament¹³,

Having regard to the opinion of the Economic and Social Committee¹⁴,

Whereas the coordination provided for in Article 54 (3) (g) and in the general programme for the abolition of restrictions on freedom of establishment¹⁵ was begun with Directive 68/151/EEC¹⁶;

Whereas this coordination was continued as regards the formation of public limited liability companies and the maintenance and alteration of their capital with Directive 77/91/EEC¹⁷, and as regards the annual accounts of certain types of companies with Directive 78/660/EEC¹⁸;

Whereas the protection of the interests of members and third parties requires that the laws of the Member States relating to mergers of public limited liability companies be coordinated and that provision for mergers should be made in the laws of all the Member States;

Whereas in the context of such coordination it is particularly important that the shareholders of merging companies be kept adequately informed in as objective a manner as possible and that their rights be suitably protected;

Whereas the protection of employees' rights in the event of transfers of undertakings, businesses or parts of businesses is at present regulated by Directive 77/187/EEC¹⁹;

Whereas creditors, including debenture holders, and persons having other claims on the merging companies must be protected so that the merger does not adversely affect their interests;

¹² (1) OJ No C 89, 14.7.1970, p. 20.

¹³ OJ No C 129, 11.12.1972, p. 50 ; OJ No C 95, 28.4. 1975, p. 12.

¹⁴ OJ No C 88, 6.9.1971, p. 18.

¹⁵ OJ No 2, 15.1.1962, p. 36/62.

¹⁶ OJ No L 65, 14.3.1968, p. 8.

¹⁷ OJ No L 26, 31.1.1977, p. 1.

¹⁸ OJ No L 222, 14.8.1978, p. 11.

¹⁹ OJ No L 61, 5.3.1977, p. 26.

Whereas the disclosure requirements of Directive 68/151/EEC must be extended to include mergers so that third parties are kept adequately informed;

Whereas the safeguards afforded to members and third parties in connection with mergers must be extended to cover certain legal practices which in important respects are similar to merger, so that the obligation to provide such protection cannot be evaded;

Whereas to ensure certainty in the law as regards relations between the companies concerned, between them and third parties, and between the members, the cases in which nullity can arise must be limited by providing that defects be remedied wherever that is possible and by restricting the period within which nullification proceedings may be commenced,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Scope

1. The coordination measures laid down by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the following types of company:
 - Germany : die Aktiengesellschaft,
 - Belgium : la société anonyme / de naamloze vennootschap,
 - Denmark : aktieselskaber,
 - France : la société anonyme,
 - Ireland : public companies limited by shares, and public companies limited by guarantee having a share capital,
 - Italy : la società per azioni,
 - Luxembourg : la société anonyme,
 - the Netherlands : de naamloze vennootschap,
 - the United Kingdom : public companies limited by shares, and public companies limited by guarantee having a share capital.
2. The Member States need not apply this Directive to cooperatives incorporated as one of the types of company listed in paragraph 1. In so far as the laws of the Member States make use of this option, they shall require such companies to include the word "cooperative" in all the documents referred to in Article 4 of Directive 68/151/EEC.
3. The Member States need not apply this Directive in cases where the company or companies which are being acquired or will cease to exist are the subject of bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies, judicial arrangements, compositions and analogous proceedings.

CHAPTER I

Regulation of merger by the acquisition of one or more companies by another and of merger by the formation of a new company

Article 2

The Member States shall, as regards companies governed by their national laws, make provision for rules governing merger by the acquisition of one or more companies by another and merger by the formation of a new company.

Article 3

1. For the purposes of this Directive, "merger by acquisition" shall mean the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.
2. A Member State's laws may provide that merger by acquisition may also be effected where one or more of the companies being acquired is in liquidation, provided that this option is restricted to companies which have not yet begun to distribute their assets to their shareholders.

Article 4

1. For the purposes of this Directive, "merger by the formation of a new company" shall mean the operation whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.
2. A Member State's laws may provide that merger by the formation of a new company may also be effected where one or more of the companies which are ceasing to exist is in liquidation, provided that this option is restricted to companies which have not yet begun to distribute their assets to their shareholders.

CHAPTER II Merger by acquisition

Article 5

1. The administrative or management bodies of the merging companies shall draw up draft terms of merger in writing.
2. Draft terms of merger shall specify at least:
 - (a) the type, name and registered office of each of the merging companies;
 - (b) the share exchange ratio and the amount of any cash payment;
 - (c) the terms relating to the allotment of shares in the acquiring company;

- (d) the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement;
- (e) the date from which the transactions of the company being acquired shall be treated for accounting purposes as being those of the acquiring company;
- (f) the rights conferred by the acquiring company on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them;
- (g) any special advantage granted to the experts referred to in Article 10 (1) and members of the merging companies' administrative, management, supervisory or controlling bodies.

Article 6

Draft terms of merger must be published in the manner prescribed by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC, for each of the merging companies, at least one month before the date fixed for the general meeting which is to decide thereon.

Article 7

1. A merger shall require at least the approval of the general meeting of each of the merging companies. The laws of the Member States shall provide that this decision shall require a majority of not less than two thirds of the votes attaching either to the shares or to the subscribed capital represented.
The laws of a Member State may, however, provide that a simple majority of the votes specified in the first subparagraph shall be sufficient when at least half of the subscribed capital is represented. Moreover, where appropriate, the rules governing alterations to the memorandum and articles of association shall apply.
2. Where there is more than one class of shares, the decision concerning a merger shall be subject to a separate vote by at least each class of shareholders whose rights are affected by the transaction.
3. The decision shall cover both the approval of the draft terms of merger and any alterations to the memorandum and articles of association necessitated by the merger.

Article 8

The laws of a Member State need not require approval of the merger by the general meeting of the acquiring company if the following conditions are fulfilled:

- (a) the publication provided for in Article 6 must be effected, for the acquiring company, at least one month before the date fixed for the general meeting of the company or companies being acquired which are to decide on the draft terms of merger;
- (b) at least one month before the date specified in (a), all shareholders of the acquiring company must be entitled to inspect the documents specified in Article 11 (1) at the registered office of the acquiring company;

- (c) one or more shareholders of the acquiring company holding a minimum percentage of the subscribed capital must be entitled to require that a general meeting of the acquiring company be called to decide whether to approve the merger. This minimum percentage may not be fixed at more than 5 %. The Member States may, however, provide for the exclusion of non-voting shares from this calculation.

Article 9

The administration or management bodies of each of the merging companies shall draw up a detailed written report explaining the draft terms of merger and setting out the legal and economic grounds for them, in particular the share exchange ratio.

The report shall also describe any special valuation difficulties, which have arisen.

Article 10

1. One or more experts, acting on behalf of each of the merging companies but independent of them, appointed or approved by a judicial or administrative authority, shall examine the draft terms of merger and draw up a written report to the shareholders. However, the laws of a Member State may provide for the appointment of one or more independent experts for all the merging companies, if such appointment is made by a judicial or administrative authority at the joint request of those companies. Such experts may, depending on the laws of each Member State, be natural or legal persons or companies or firms.
2. In the report mentioned in paragraph 1 the experts must in any case state whether in their opinion the share exchange ratio is fair and reasonable. Their statement must at least:
 - (a) indicate the method or methods used to arrive at the share exchange ratio proposed;
 - (b) state whether such method or methods are adequate in the case in question, indicate the values arrived at using each such method and give an opinion on the relative importance attributed to such methods in arriving at the value decided on.

The report shall also describe any special valuation difficulties, which have arisen.

3. Each expert shall be entitled to obtain from the merging companies all relevant information and documents and to carry out all necessary investigations.

Article 11

1. All shareholders shall be entitled to inspect at least the following documents at the registered office at least one month before the date fixed for the general meeting which is to decide on the draft terms of merger:
 - (a) the draft terms of merger;
 - (b) the annual accounts and annual reports of the merging companies for the preceding three financial years;

- (c) an accounting statement drawn up as at a date which must not be earlier than the first day of the third month preceding the date of the draft terms of merger, if the latest annual accounts relate to a financial year which ended more than six months before that date;
 - (d) the reports of the administrative or management bodies of the merging companies provided for in Article 9;
 - (e) the reports provided for in Article 10.
2. The accounting statement provided for in paragraph 1 (c) shall be drawn up using the same methods and the same layout as the last annual balance sheet.

However, the laws of a Member State may provide that:

- (a) it shall not be necessary to take a fresh physical inventory;
 - (b) the valuations shown in the last balance sheet shall be altered only to reflect entries in the books of account ; the following shall nevertheless be taken into account:
 - interim depreciation and provisions,
 - material changes in actual value not shown in the books.
3. Every shareholder shall be entitled to obtain, on request and free of charge, full or, if so desired, partial copies of the documents referred to in paragraph 1.

Article 12

Protection of the rights of the employees of each of the merging companies shall be regulated in accordance with Directive 77/187/EEC.

Article 13

1. The laws of the Member States must provide for an adequate system of protection of the interests of creditors of the merging companies whose claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication.
2. To this end, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards.
3. Such protection may be different for the creditors of the acquiring company and for those of the company being acquired.

Article 14

Without prejudice to the rules governing the collective exercise of their rights, Article 13 shall apply to the debenture holders of the merging companies, except where the merger has been approved by a meeting of the debenture holders, if such a meeting is provided for under national laws, or by the debenture holders individually.

Article 15

Holders of securities, other than shares, to which special rights are attached, must be given rights in the acquiring company at least equivalent to those they possessed in the company being acquired, unless the alteration of those

rights has been approved by a meeting of the holders of such securities, if such a meeting is provided for under national laws, or by the holders of those securities individually, or unless the holders are entitled to have their securities repurchased by the acquiring company.

Article 16

1. Where the laws of a Member State do not provide for judicial or administrative preventive supervision of the legality of mergers, or where such supervision does not extend to all the legal acts required for a merger, the minutes of the general meetings which decide on the merger and, where appropriate, the merger contract subsequent to such general meetings shall be drawn up and certified in due legal form. In cases where the merger need not be approved by the general meetings of all the merging companies, the draft terms of merger must be drawn up and certified in due legal form.
2. The notary or the authority competent to draw up and certify the document in due legal form must check and certify the existence and validity of the legal acts and formalities required of the company for which he or it is acting and of the draft terms of merger.

Article 17

The laws of the Member States shall determine the date on which a merger takes effect.

Article 18

1. A merger must be publicized in the manner prescribed by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC, in respect of each of the merging companies.
2. The acquiring company may itself carry out the publication formalities relating to the company or companies being acquired.

Article 19

1. A merger shall have the following consequences ipso jure and simultaneously:
 - (a) the transfer, both as between the company being acquired and the acquiring company and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired;
 - (b) the shareholders of the company being acquired become shareholders of the acquiring company;
 - (c) the company being acquired ceases to exist.
2. No shares in the acquiring company shall be exchanged for shares in the company being acquired held either:
 - (a) by the acquiring company itself or through a person acting in his own name but on its behalf;or
 - (b) by the company being acquired itself or through a person acting in his own name but on its behalf.
3. The foregoing shall not affect the laws of Member States which require the completion of special formalities for the transfer of certain assets, rights

and obligations by the acquired company to be effective as against third parties. The acquiring company may carry out these formalities itself ; however, the laws of the Member States may permit the company being acquired to continue to carry out these formalities for a limited period which cannot, save in exceptional cases, be fixed at more than six months from the date on which the merger takes effect.

Article 20

The laws of the Member States shall at least lay down rules governing the civil liability towards the shareholders of the company being acquired of the members of the administrative or management bodies of that company in respect of misconduct on the part of members of those bodies in preparing and implementing the merger.

Article 21

The laws of the Member States shall at least lay down rules governing the civil liability towards the shareholders of the company being acquired of the experts responsible for drawing up on behalf of that company the report referred to in Article 10 (1) in respect of misconduct on the part of those experts in the performance of their duties.

Article 22

1. The laws of the Member States may lay down nullity rules for mergers in accordance with the following conditions only:
 - (a) nullity must be ordered in a court judgment;
 - (b) mergers which have taken effect pursuant to Article 17 may be declared void only if there has been no judicial or administrative preventive supervision of their legality, or if they have not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under national law;
 - (c) nullification proceedings may not be initiated more than six months after the date on which the merger becomes effective as against the person alleging nullity or if the situation has been rectified;
 - (d) where it is possible to remedy a defect liable to render a merger void, the competent court shall grant the companies involved a period of time within which to rectify the situation;
 - (e) a judgment declaring a merger void shall be published in the manner prescribed by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC;
 - (f) where the laws of a Member State permit a third party to challenge such a judgment, he may do so only within six months of publication of the judgment in the manner prescribed by Directive 68/151/EEC;
 - (g) a judgment declaring a merger void shall not of itself affect the validity of obligations owed by or in relation to the acquiring company which arose before the judgment was published and after the date referred to in Article 17;
 - (h) companies which have been parties to a merger shall be jointly and severally liable in respect of the obligations of the acquiring company referred to in (g).

2. By way of derogation from paragraph 1 (a), the laws of a Member State may also provide for the nullity of a merger to be ordered by an administrative authority if an appeal against such a decision lies to a court. Subparagraphs (b), (d), (e), (f), (g) and (h) shall apply by analogy to the administrative authority. Such nullification proceedings may not be initiated more than six months after the date referred to in Article 17.
3. The foregoing shall not affect the laws of the Member States on the nullity of a merger pronounced following any supervision other than judicial or administrative preventive supervision of legality.

CHAPTER III

Merger by formation of a new company

Article 23

1. Articles 5, 6, 7 and 9 to 22 shall apply, without prejudice to Articles 11 and 12 of Directive 68/151/EEC, to merger by formation of a new company. For this purpose, "merging companies" and "company being acquired" shall mean the companies which will cease to exist, and "acquiring company" shall mean the new company.
2. Article 5 (2) (a) shall also apply to the new company.
3. The draft terms of merger and, if they are contained in a separate document, the memorandum or draft memorandum of association and the articles or draft articles of association of the new company shall be approved at a general meeting of each of the companies that will cease to exist.
4. The Member States need not apply to the formation of a new company the rules governing the verification of any consideration other than cash which are laid down in Article 10 of Directive 77/91/EEC.

CHAPTER IV

Acquisition of one company by another which holds 90 % or more of its shares

Article 24

The Member States shall make provision, in respect of companies governed by their laws, for the operation whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company which is the holder of all their shares and other securities conferring the right to vote at general meetings. Such operations shall be regulated by the provisions of Chapter II, with the exception of Articles 5 (2) (b), (c) and (d), 9, 10, 11 (1) (d) and (e), 19 (1) (b), 20 and 21.

Article 25

The Member States need not apply Article 7 to the operations specified in Article 24 if the following conditions at least are fulfilled:

- (a) the publication provided for in Article 6 must be effected, as regards each company involved in the operation, at least one month before the operation takes effect;

- (b) at least one month before the operation takes effect, all shareholders of the acquiring company must be entitled to inspect the documents specified in Article 11 (1) (a), (b) and (c) at the company's registered office. Article 11 (2) and (3) must apply;
- (c) Article 8 (c) must apply.

Article 26

The Member States may apply Articles 24 and 25 to operations whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company, if all the shares and other securities specified in Article 24 of the company or companies being acquired are held by the acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company.

Article 27

In cases of merger where one or more companies are acquired by another company which holds 90 % or more, but not all, of the shares and other securities of each of those companies the holding of which confers the right to vote at general meetings, the Member States need not require approval of the merger by the general meeting of the acquiring company, provided that the following conditions at least are fulfilled:

- (a) the publication provided for in Article 6 must be effected, as regards the acquiring company, at least one month before the date fixed for the general meeting of the company or companies being acquired which is to decide on the draft terms of merger;
- (b) at least one month before the date specified in (a), all shareholders of the acquiring company must be entitled to inspect the documents specified in Article 11 (1) (a), (b) and (c) at the company's registered office. Article 11 (2) and (3) must apply;
- (c) Article 8 (c) must apply.

Article 28

The Member States need not apply Articles 9 to 11 to a merger within the meaning of Article 27 if the following conditions at least are fulfilled:

- (a) the minority shareholders of the company being acquired must be entitled to have their shares acquired by the acquiring company;
- (b) if they exercise that right, they must be entitled to receive consideration corresponding to the value of their shares;
- (c) in the event of disagreement regarding such consideration, it must be possible for the value of the consideration to be determined by a court.

Article 29

The Member States may apply Articles 27 and 28 to operations whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company if 90 % or more, but not all, of the shares and other securities referred to in Article 27 of the company or companies being acquired are held by that acquiring company and/or by

persons holding those shares and securities in their own names but on behalf of that company.

CHAPTER V

Other operations treated as mergers

Article 30

Where in the case of one of the operations referred to in Article 2 the laws of a Member State permit a cash payment to exceed 10 %, Chapters II and III and Articles 27, 28 and 29 shall apply.

Article 31

Where the laws of a Member State permit one of the operations referred to in Articles 2, 24 and 30, without all of the transferring companies thereby ceasing to exist, Chapter II, except for Article 19 (1) (c), Chapter III or Chapter IV shall apply as appropriate.

CHAPTER VI

Final provisions

Article 32

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive within three years of its notification. They shall forthwith inform the Commission thereof.
2. However, provision may be made for a delay of five years from the entry into force of the provisions referred to in paragraph 1 for the application of those provisions to unregistered companies in the United Kingdom and Ireland.
3. The Member States need not apply Articles 13, 14 and 15 as regards the holders of convertible debentures and other convertible securities if, at the time when the laws, regulations and administrative provisions referred to in paragraph 1 come into force, the position of these holders in the event of a merger has previously been determined by the conditions of issue.
4. The Member States need not apply this Directive to mergers or to operations treated as mergers for the preparation or execution of which an act or formality required by national law has already been completed when the provisions referred to in paragraph 1 enter into force.

Article 33

This Directive is addressed to the Member States.

Done at Luxembourg, 9 October 1978.

For the Council

The President

H.-J. VOGEL

Appendix E

COUNCIL DIRECTIVE of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (90/434/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal of the Commission²⁰,

Having regard to the opinion of the European Parliament²¹,

Having regard to the opinion of the Economic and Social Committee²²,

Whereas mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market;

whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas to that end it is necessary to introduce with respect to such operations tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;

Whereas tax provisions disadvantage such operations, in comparison with those concerning companies of the same Member State; whereas it is necessary to remove such disadvantages;

Whereas it is not possible to attain this objective by an extension at the Community level of the systems presently in force in the Member States, since differences between these systems tend to produce distortions; whereas only a common tax system is able to provide a satisfactory solution in this respect;

Whereas the common tax system ought to avoid the imposition of tax in connection with mergers, divisions, transfers of assets or exchanges of shares, while at the same time safeguarding the financial interests of the State of the transferring or acquired company;

²⁰ OJ No C 39, 22. 3. 1969, p. 1.

²¹ OJ No C 51, 29. 4. 1970, p. 12.

²² OJ No C 100, 1. 8. 1969, p. 4.

Whereas in respect of mergers, divisions or transfers of assets, such operations normally result either in the transformation of the transferring company into a permanent establishment of the company receiving the assets or in the assets becoming connected with a permanent establishment of the latter company;

Whereas the system of deferral of the taxation of the capital gains relating to the assets transferred until their actual disposal, applied to such of those assets as are transferred to that permanent establishment, permits exemption from taxation of the corresponding capital gains, while at the same time ensuring their ultimate taxation by the State of the transferring company at the date of their disposal;

Whereas it is also necessary to define the tax regime applicable to certain provisions, reserves or losses of the transferring company and to solve the tax problems occurring where one of the two companies has a holding in the capital of the other;

Whereas the allotment to the shareholders of the transferring company of securities of the receiving or acquiring company would not in itself give rise to any taxation in the hands of such shareholders;

Whereas it is necessary to allow Member States the possibility of refusing to apply this Directive where the merger, division, transfer of assets or exchange of shares operation has as its objective tax evasion or avoidance or results in a company, whether or not it participates in the operation, no longer fulfilling the conditions required for the representation of employees in company organs,

HAS ADOPTED THIS DIRECTIVE:

TITLE I

General provisions

Article 1

Each Member State shall apply this Directive to mergers, divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved.

Article 2

For the purposes of this Directive:

(a) 'merger' shall mean an operation whereby:

- one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company in exchange for the issue to their

shareholders of securities representing the capital of that other company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities,

- two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, in exchange for the issue to their shareholders of securities representing the capital of that new company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities,
 - a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities representing its capital;
- (b) 'division' shall mean an operation whereby a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more existing or new companies, in exchange for the pro rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities;
- (c) 'transfer of assets' shall mean an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer;
- (d) 'exchange of shares' shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange;
- (e) 'transferring company' shall mean the company transferring its assets and liabilities or transferring all or one or more branches of its activity;
- (f) 'receiving company' shall mean the company receiving the assets and liabilities or all or one or more branches of the activity of the transferring company;
- (g) 'acquired company' shall mean the company in which a holding is acquired by another company by means of an exchange of securities;
- (h) 'acquiring company' shall mean the company which acquires a holding by means of an exchange of securities;
- (i) 'branch of activity' shall mean all the assets and liabilities of a division of a company which from an organizational point of view

constitute an independent business, that is to say an entity capable of functioning by its own means.

Article 3

For the purposes of this Directive, 'company from a Member State' shall mean any company which:

- (a) takes one of the forms listed in the Annex hereto;
- (b) according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;
- (c) moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:
 - impôt des sociétés/vennootschapsbelasting in Belgium,
 - selskabsskat in Denmark,
 - Koerperschaftsteuer in the Federal Republic of Germany,
 - foros eisodimatos nomikon prosopon kerdokopikoy charaktira, in Greece,
 - impuesto sobre sociedades in Spain,
 - impôt sur les sociétés in France,
 - corporation tax in Ireland,
 - imposta sul reddito delle persone giuridiche in Italy,
 - impôt sur le revenu des collectivités in Luxembourg,
 - vennootschapsbelasting in the Netherlands,
 - imposto sobre o rendimento das pessoas colectivas in Portugal,
 - corporation tax in the United Kingdom,
 - or to any other tax which may be substituted for any of the above taxes.

TITLE II

Rules applicable to mergers, divisions and exchanges of shares

Article 4

1. A merger or division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes. The following expressions shall have the meanings assigned to them:
 - value for tax purposes: the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the merger or division but independently of it,
 - transferred assets and liabilities: those assets and liabilities of the transferring company which, in consequence of the merger or division, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company and play a part in

generating the profits or losses taken into account for tax purposes.

2. The Member States shall make the application of paragraph 1 conditional upon the receiving company's computing any new depreciation and any gains or losses in respect of the assets and liabilities transferred according to the rules that would have applied to the transferring company or companies if the merger or division had not taken place.
3. Where, under the laws of the Member State of the transferring company, the receiving company is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities transferred computed on a basis different from that set out in paragraph 2, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised.

Article 5

The Member States shall take the necessary measures to ensure that, where provisions or reserves properly constituted by the transferring company are partly or wholly exempt from tax and are not derived from permanent establishments abroad, such provisions or reserves may be carried over, with the same tax exemption, by the permanent establishments of the receiving company which are situated in the Member State of the transferring company, the receiving company thereby assuming the rights and obligations of the transferring company.

Article 6

To the extent that, if the operations referred to in Article 1 were effected between companies from the Member State of the transferring company, the Member State would apply provisions allowing the receiving company to take over the losses of the transferring company which had not yet been exhausted for tax purposes, it shall extend those provisions to cover the take-over of such losses by the receiving company's permanent establishments situated within its territory.

Article 7

1. Where the receiving company has a holding in the capital of the transferring company, any gains accruing to the receiving company on the cancellation of its holding shall not be liable to any taxation.
2. The Member States may derogate from paragraph 1 where the receiving company's holding in the capital of the transferring company does not exceed 25 %.

Article 8

1. On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.
2. The Member States shall make the application of paragraph 1 conditional upon the shareholder's not attributing to the securities received a value for

tax purposes higher than the securities exchanged had immediately before the merger, division or exchange.

The application of paragraph 1 shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of securities received in the same way as the gain arising out of the transfer of securities existing before the acquisition.

In this paragraph the expression 'value for tax purposes' means the amount on the basis of which any gain or loss would be computed for the purposes of tax upon the income, profits or capital gains of a shareholder of the company.

3. Where, under the law of the Member State in which he is resident, a shareholder may opt for tax treatment different from that set out in paragraph 2, paragraph 1 shall not apply to the securities in respect of which such an option is exercised.
4. Paragraphs 1, 2 and 3 shall not prevent a Member State from taking into account when taxing shareholders any cash payment that may be made on the merger, division or exchange.

TITLE III

Rules applicable to transfers of assets

Article 9

The provisions of Articles 4, 5 and 6 shall apply to transfers of assets.

TITLE IV

Special case of the transfer of a permanent establishment

Article 10

1. Where the assets transferred in a merger, a division or a transfer of assets include a permanent establishment of the transferring company which is situated in a Member State other than that of the transferring company, the latter State shall renounce any right to tax that permanent establishment. However, the State of the transferring company may reinstate in the taxable profits of that company such losses of the permanent establishment as may previously have been set off against the taxable profits of the company in that State and which have not been recovered. The State in which the permanent establishment is situated and the State of the receiving company shall apply the provisions of this Directive to such a transfer as if the former State were the State of the transferring company.
2. By way of derogation from paragraph 1, where the Member State of the transferring company applies a system of taxing world-wide profits, that Member State shall have the right to tax any profits or capital gains of the permanent establishment resulting from the merger, division or transfer of assets, on condition that it gives relief for the tax that, but for the provisions of this Directive, would have been charged on those profits or capital gains in the Member State in which that permanent establishment

is situated, in the same way and in the same amount as it would have done if that tax had actually been charged and paid.

TITLE V

Final provisions

Article 11

1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III and IV where it appears that the merger, division, transfer of assets or exchange of shares:
 - (a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons such as the restructuring or rationalization of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives;
 - (b) results in a company, whether participating in the operation or not, no longer fulfilling the necessary conditions for the representation of employees on company organs according to the arrangements which were in force prior to that operation.
2. Paragraph 1 (b) shall apply as long as and to the extent that no Community law provisions containing equivalent rules on representation of employees on company organs are applicable to the companies covered by this Directive.

Article 12

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 1992 and shall forthwith inform the Commission thereof.
2. By way of derogation from paragraph 1, the Portuguese Republic may delay the application of the provisions concerning transfers of assets and exchanges of shares until 1 January 1993.
3. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

Article 13

This Directive is addressed to the Member States.

Done at Brussels, 23 July 1990.

For the Council

The President

G. CARLI

ANNEX I to Appendix E

List of companies referred to in Article 3 (a)

- (a) companies under Belgian law known as 'société anonyme' / 'naamloze vennootschap', 'société en commandite par actions' / 'commanditaire vennootschap op aandelen', 'société privée à responsabilité limitée' / 'besloten vennootschap met beperkte aansprakelijkheid' and those public law bodies that operate under private law;
- (b) companies under Danish law known as: 'aktieselskab', 'anpartsselskab';
- (c) companies under German law known as: 'Aktiengesellschaft', 'Kommanditgesellschaft auf Aktien', 'Gesellschaft mit beschränkter Haftung', 'bergrechtliche Gewerkschaft';
- (d) companies under Greek law known as: 'anonymi etaireia';
- (e) companies under Spanish law known as: 'sociedad anónima', 'sociedad comanditaria por acciones', 'sociedad de responsabilidad limitada' and those public law bodies which operate under private law;
- (f) companies under French law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée' and industrial and commercial public establishments and undertakings;
- (g) the companies in Irish law known as public companies limited by shares or by guarantee, private companies limited by shares or by guarantee, bodies registered under the Industrial and Provident Societies Acts or building societies registered under the Building Societies Acts;
- (h) companies under Italian law known as 'società per azioni', 'società in accomandita per azioni', 'società a responsabilità limitata', and public and private entities carrying on industrial and commercial activities;
- (i) companies under Luxembourg law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée';
- (j) companies under Dutch law known as: 'naamloze vennootschap', 'besloten vennootschap met beperkte aansprakelijkheid';
- (k) commercial companies or civil law companies having a commercial form as well as other legal persons carrying on commercial or industrial activities, which are incorporated in accordance with Portuguese law;
- (l) companies incorporated under the law of the United Kingdom.