

Draft Corporation Tax Bill

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PART 8

DERIVATIVE CONTRACTS

CHAPTER 1

EUROPEAN CROSS-BORDER TRANSFERS OF BUSINESS

Introduction

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1 Introduction to Chapter [\[j72630Dc\]](#)

- (1) This Chapter applies if—
- (a) condition A or B is met, and
 - (b) each of the companies mentioned in subsection (2)(a) or (3)(a) makes a claim under this subsection,
- but see section 4 (tax avoidance etc) and section 5 (disapplication of Chapter where transparent entities involved).

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[Origin: FA 2002 Sch.26 paras.30D\(1\), \(2\), 30G\(1\).](#)

- (2) Condition A is that—
- (a) a company resident in one member State transfers to a company resident in another member State the whole or part of a business carried on in the United Kingdom,
 - (b) the transfer is wholly in exchange for shares or debentures issued by the transferee to the transferor, and
 - (c) immediately after the transfer the transferee is within the charge to corporation tax.

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[Origin: FA 2002 Sch.26 para.30D\(1\).](#)

- (3) Condition B is that—
- (a) a company transfers part of its business to one or more companies,
 - (b) the transferor is resident in one member State,
 - (c) the part of the transferor's business which is transferred is carried on by the transferor in the United Kingdom,
 - (d) at least one transferee is resident in a member State other than that in which the transferor is resident (and each transferee is resident in a member State, but not necessarily the same one),
 - (e) the transferor continues to carry on a business after the transfer,
 - (f) immediately after the transfer each transferee is within the charge to corporation tax, and
 - (g) the transfer—

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- (i) is made in exchange for the issue of shares in or debentures of each transferee to the persons holding shares in or debentures of the transferor, or
- (ii) is not so made only because, and only so far as, a transferee is prevented from so issuing such shares or debentures by section 658 of the Companies Act 2006 (c. 46) (general rule against limited company acquiring own shares) or by a corresponding provision of the law of another member State preventing such an issue. 5
- Origin: FA 2002 Sch.26 para.30D(2), (3), (4). 10
- (4) In this Chapter –
“the transfer of business” means the transfer of business mentioned in subsection (2)(a) or (3)(a),
“transferee” has the same meaning as in subsection (2) or (3), and
“the transferor” has the same meaning as in subsection (2) or (3). 15
- Origin: FA 2002 Sch.26 para.30I(1); drafting.
- (5) For the meaning of “company” and “resident in a member State”, see section 6.
Origin: Drafting.

Transfers of derivative contracts at notional carrying value

- 2 Transfer of derivative contract at notional carrying value [j72630D]** 20
- (1) This section applies if in the course of the transfer of business the transferor transfers rights and liabilities under a derivative contract to a transferee.
Origin: FA 2002 Sch.26 para.30D(1), (2), (6).
- (2) For the purpose of determining the credits and debits to be brought into account in respect of the derivative contract in accordance with this Part, the transferor and the transferee are treated as having entered into the transfer of those rights and liabilities for a consideration of an amount equal to the notional carrying value of the contract. 25
Origin: FA 2002 Sch.26 para.30D(6).
- (3) For the purposes of this section, the notional carrying value of a contract is the amount that would have been its carrying value in the accounts of the transferor if a period of account had ended immediately before the date when the transferor ceased to be party to the contract. 30
Origin: FA 2002 Sch.26 para.30D(6).
- (4) This section is subject to section 3 (transferor using fair value accounting). 35
Origin: Drafting.
- 3 Transferor using fair value accounting [j72630Da]**
- (1) This section applies instead of section 2 if, in a case where that section would otherwise apply, the transferor uses fair value accounting as respects the derivative contract. 40

Origin: FA 2002 Sch.26 para.30D(7).

- (2) The amount that is to be brought into account by the transferor in respect of the transfer of the rights and liabilities mentioned in section 2(1) is the fair value of the derivative contract as at the date of transfer to the transferee.

Origin: FA 2002 Sch.26 para.30D(7).

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- (3) For any accounting period in which the transferee is party to the derivative contract, for the purpose of determining the credits and debits to be brought into account in respect of the contract in accordance with this Part, the transferee is treated as if it had acquired the contract for a consideration of an amount equal to the fair value of the contract as at the date of transfer to it.

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Origin: FA 2002 Sch.26 para.30D(7).

Exception for tax avoidance cases

4 Tax avoidance etc [j72630Db]

- (1) This Chapter does not apply in relation to the transfer of business if –
- (a) the transfer of business is not effected for genuine commercial reasons, or
 - (b) the transfer of business 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.

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Origin: FA 2002 Sch.26 para.30F(1).

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- (2) But subsection (1) does not prevent this Chapter from applying if before the transfer of business –
- (a) the companies mentioned in section 1(2)(a) or (3)(a) have applied to the Commissioners for Her Majesty’s Revenue and Customs, and
 - (b) the Commissioners have notified them that they are satisfied this section will not have that effect.

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Origin: FA 2002 Sch.26 para.30F(2).

- (3) Sections {j6ml12B7} and {j6ml12B8} have effect in relation to subsection (2) as in relation to section {j6ml12F1}(2), taking the reference in section {j6ml12B8}(2)(a) to being satisfied as mentioned in section {j6ml12F1}(2)(b) as a reference to being satisfied as mentioned in subsection (2)(b) of this section.

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Origin: FA 2002 Sch.26 para.30F(3); drafting.

Transparent entities

5 Disapplication of Chapter where transparent entities involved [j72630G]

- (1) This Chapter does not apply in relation to the transfer of business if the transferor is a transparent entity.

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Origin: FA 2002 Sch.26 para.30G(1), (2).

- (2) In this section “transparent entity” means an entity which is resident in a member State other than the United Kingdom and is listed as a company in the

Annex to the Mergers Directive, but which does not have an ordinary share capital.

Origin: FA 2002 Sch.26 para.30I(1); drafting.

- (3) For the meaning of “resident in a member State”, see section 6.

Origin: Drafting.

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Interpretation

6 Interpretation [j72630Ia]

- (1) In this Chapter “company” means any entity listed as a company in the Annex to the Mergers Directive.

Origin: FA 2002 Sch.26 para.30I(1).

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

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Origin: FA 2002 Sch.26 para.30I(2).

CHAPTER 2

EUROPEAN CROSS-BORDER MERGERS

Introduction

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7 Introduction to Chapter [j72630Bnew]

- (1) This Chapter applies if the following conditions are met –
- (a) conditions A to D,
 - (b) in the case of a merger within subsection (2)(a), (b) or (c), condition E, and
 - (c) in the case of a merger within subsection (2)(c) or (d), condition F, but see section 11 (tax avoidance etc) and section 12 (disapplication of Chapter where transparent entities involved).

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Origin: FA 2002 Sch.26 paras.30B(1), (2), 30H(1).

- (2) Condition A is that –
- (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) No. 2157/2001 on the Statute for a European Company (Societas Europaea),
 - (b) an SCE is formed by the merger of two or more co-operative societies, at least one of which is a society registered under the Industrial and Provident Societies Act 1965 (c. 12), in accordance with Articles 2(1) and 19 of Council Regulation (EC) No. 1435/2003 on the Statute for a European Cooperative Society (SCE),

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- (c) a merger is effected by the transfer by one or more companies of all their assets and liabilities to a single existing company, or
- (d) a merger is effected by the transfer by two or more companies of all their assets and liabilities to a single new company (other than an SE or an SCE) in exchange for the issue by the transferee, to each person holding shares in or debentures of a transferor, of shares or debentures. 5
- [Origin: FA 2002 Sch.26 paras.30B\(1\), \(2\).](#)
- (3) Condition B is that each merging company is resident in a member State.
- [Origin: FA 2002 Sch.26 paras.30B\(1\), \(2\).](#)
- (4) Condition C is that the merging companies are not all resident in the same State. 10
- [Origin: FA 2002 Sch.26 paras.30B\(1\), \(2\).](#)
- (5) Condition D is that immediately after the merger the transferee is within the charge to corporation tax.
- [Origin: FA 2002 Sch.26 paras.30B\(1\), \(2\).](#) 15
- (6) Condition E is that—
- (a) the transfer of assets and liabilities to the transferee in the course of the merger is made in exchange for the issue of shares or debentures by the transferee to each person holding shares in or debentures of a transferor, or 20
- (b) that transfer is not so made only because, and only so far as, the transferee is prevented from so issuing such shares or debentures to any person mentioned in that paragraph by section 658 of the Companies Act 2006 (c. 46) (general rule against limited company acquiring own shares) or by a corresponding provision of the law of another member State preventing such an issue. 25
- [Origin: FA 2002 Sch.26 paras.30B\(1\), \(2\).](#)
- (7) Condition F is that in the course of the merger each transferor ceases to exist without being in liquidation (within the meaning given by section 247 of the Insolvency Act 1986 (c. 45)). 30
- [Origin: FA 2002 Sch.26 paras.30B\(1\), \(2\).](#)
- (8) In this Chapter, “the merger” and “the merging companies” have the same meaning as in this section.
- [Origin: Drafting.](#)
- (9) See— 35
- (a) section 13 for the meaning of “company”, “co-operative society” and “resident in a member State”, and
- (b) section 8 for the meaning of “the transferee” and “transferor”.
- [Origin: Drafting.](#)
- 8 Meaning of “the transferee” and “transferor” [j72630Bnew1] 40**
- (1) In this Chapter, “the transferee” means—
- (a) in relation to a merger within section 7(2)(a), the SE,

- (b) in relation to a merger within section 7(2)(b), the SCE, and
- (c) in relation to a merger within section 7(2)(c) or (d), the company to which assets and liabilities are transferred.

Origin: FA 2002 Sch.26 para.30B(9).

- (2) In this Chapter “transferor” means – 5
- (a) in relation to a merger within section 7(2)(a), a company merging to form the SE,
 - (b) in relation to a merger within section 7(2)(b), a co-operative society merging to form the SCE, and
 - (c) in relation to a merger within section 7(2)(c) or (d), a company transferring all of its assets and liabilities. 10

Origin: FA 2002 Sch.26 para.30B(9).

Transfers of derivative contracts at notional carrying value

9 Transfer of derivative contract at notional carrying value [j72630Bnew3]

- (1) This section applies if rights and liabilities under a derivative contract are transferred in the course of the merger. 15

Origin: FA 2002 Sch.26 para.30B(3).

- (2) For the purpose of determining the credits and debits to be brought into account in respect of the derivative contract in accordance with this Part, the transferor and the transferee are treated as having entered into the transfer of those rights and liabilities for a consideration of an amount equal to the notional carrying value of the contract. 20

Origin: FA 2002 Sch.26 para.30B(3).

- (3) For the purposes of this section, the notional carrying value of a contract is the amount that would have been its carrying value in the accounts of the transferor if a period of account had ended immediately before the date when the transferor ceased to be party to the contract. 25

Origin: FA 2002 Sch.26 para.30B(3).

- (4) This section is subject to section 10 (transferor using fair value accounting).

Origin: Drafting. 30

10 Transferor using fair value accounting [j72630ba]

- (1) This section applies instead of section 9 if, in a case where that section would otherwise apply, the transferor uses fair value accounting as respects the derivative contract.

Origin: FA 2002 Sch.26 para.30B(4). 35

- (2) The amount that is to be brought into account by the transferor in respect of the transfer of the rights and liabilities mentioned in section 9(1) is the fair value of the derivative contract as at the date of transfer to the transferee.

Origin: FA 2002 Sch.26 para.30B(4).

- (3) For any accounting period in which the transferee is party to the derivative contract, for the purpose of determining the credits and debits to be brought into account in respect of the contract in accordance with this Part, the transferee is treated as if it had acquired the contract for a consideration of an amount equal to the fair value of the contract as at the date of transfer to it. 5

Origin: FA 2002 Sch.26 para.30B(4).

Exception for tax avoidance cases

11 Tax avoidance etc [j72630bb]

- (1) This Chapter does not apply in relation to the merger if – 10
- (a) the merger is not effected for genuine commercial reasons, or
 - (b) the merger 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.

Origin: FA 2002 Sch.26 para.30B(6).

- (2) But subsection (1) does not prevent this Chapter from applying if before the merger – 15
- (a) any of the merging companies have applied to the Commissioners for Her Majesty’s Revenue and Customs, and
 - (b) the Commissioners have notified them that they are satisfied this section will not have that effect. 20

Origin: FA 2002 Sch.26 para.30B(7).

- (3) Sections {j6ml12B7} and {j6ml12B8} have effect in relation to subsection (2) as in relation to section {j6ml12F1}(2), taking the reference in section {j6ml12B8}(2)(a) to being satisfied as mentioned in section {j6ml12F1}(2)(b) as a reference to being satisfied as mentioned in subsection (2)(b) of this section. 25

Origin: FA 2002 Sch.26 para.30B(8); drafting.

Transparent entities

12 Disapplication of Chapter where transparent entities involved [j72630H]

- (1) This section applies if one or more of the merging companies is a transparent entity. 30

Origin: FA 2002 Sch.26 para.30H(1), (2).

- (2) If as a result of the merger the assets and liabilities of a transparent entity are transferred to another company, this Chapter does not apply in relation to the transfer.

Origin: FA 2002 Sch.26 para.30H(2). 35

- (3) In this section “transparent entity” means an entity which is resident in a member State other than the United Kingdom and is listed as a company in the Annex to the Mergers Directive, but which does not have an ordinary share capital.

Origin: FA 2002 Sch.26 para.30I(1); drafting. 40

Interpretation

13 Interpretation [j72630I]

- (1) In this Chapter –
- “company” means any entity which is listed as a company in the Annex to the Mergers Directive, and 5
 - “co-operative society” means a society registered under the Industrial and Provident Societies Act 1965 (c. 12) or a similar society governed by the law of a member State other than the United Kingdom.
- [Origin: FA 2002 Sch.26 para.30I\(1\).](#)
- (2) For the purposes of this Chapter, a company is resident in a member State if – 10
- (a) it is within a charge to tax under the law of the State as being resident for that purpose, and
 - (b) it is not regarded, for the purpose of any double taxation relief arrangements to which the State is a party, as resident in a territory not within a member State. 15

[Origin: FA 2002 Sch.26 para.30I\(2\).](#)