

EXPLANATORY NOTE

CLAUSES 51-65: EUROPEAN COMPANY STATUTE

SUMMARY

1. Clauses 51-65 introduce provisions relating to the Societas Europaea (SE); a new European company created by Council Regulation (EC) No 2157/2001 of 8 October 2001.
2. The provisions apply to circumstances in which an SE is formed by the merger of two or more companies where not all of the merging companies are resident in the same Member State.
3. Most of the provisions have effect from 1 April 2005.

DETAILS OF THE CLAUSES

All references to numbered sections below are to those sections of the Taxation of Chargeable Gains Act (TCGA) except where otherwise indicated.

Clause 51: Chargeable gains

4. Clause 51 inserts three new sections, 140E to 140G, and provides for them to have effect in relation to SEs formed on or after 1 April 2005.

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. 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. (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 that “qualifying transferred assets” are to be treated 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 that creates the SE subject to the conditions in Section 140E (4) & (5).
8. Subsection (4) is satisfied if the transferor is resident in the UK at the time of the transfer. Alternatively, it is satisfied if the transferor is carrying on a trade in the UK through a permanent establishment (PE) and any gain, that would have arisen on a 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 if the SE is resident in the UK on its formation. Alternatively, it is satisfied if the SE is carrying on a trade in the UK through a PE and any gain that would have arisen on a 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 a company is resident in a Member State.
11. Subsection (7) provides that section 140E does not apply to the formation of an SE by merger unless the merger is undertaken for bona fide commercial reasons and does not form 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. The advance clearance provisions in section 138 apply, subject to any necessary modifications, to this subsection as they apply to section 137. (Under these provisions the Commissioners for HM Revenue and Customs 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 in section 140E(1). The fourth is that a UK-resident company transfers, in the course of a merger to form an SE, 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 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 double tax relief in circumstances where tax would have been paid in another Member State if the Mergers Directive had not applied.
15. Subsection (4) provides for section 140E (6) and (7) 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 in section 140E(1). 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 for a 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 securities, and
 - the SE,

the holdings of securities, 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 securities of company A that are treated as exchanged for the new holdings.

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 section 140E (6) and (7) to apply for the purposes of section 140G as they apply for the purposes of section 140E.

Clause 52: Intangible fixed assets

20. Subsection (1) inserts new paragraph 85A into Schedule 29 of the Finance Act 2002 (FA 2002), and Subsection (2) provides for it to have effect in relation to SEs formed on or after 1 April 2005.
21. Sub-paragraph (1) of paragraph 85A sets out the circumstances in which new paragraph applies. The first three requirements are the same as the first three in new section 140E. The fourth is that paragraph 84 of Schedule 29 FA 2002 (which applies to company reconstructions involving the transfer of a company's business) does not apply to any qualifying transferred assets.
22. Sub-paragraph (2) provides for a transfer of "qualifying transferred assets" to be treated for the purposes of Schedule 29 FA 2002, as tax neutral.
23. Sub-paragraph (3) defines a "qualifying transferred asset". The asset must be transferred as part of the process of merger. In addition, 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.
24. Sub-paragraph (4) provides that paragraph 85A does not apply unless the merger is effected for bona fide commercial reasons, and it does not form 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 FA 2002.
26. Sub-paragraph (6) determines whether a company is resident in a Member State.

Clause 53: Intangible Assets – -permanent establishment in another Member State

27. Subsection (1) inserts new paragraph 87A into Schedule 29 of the Finance Act 2002 (FA 2002), and Subsection (2) provides for it to have effect in relation to SEs formed on or after 1 April 2005.
28. Sub-paragraph (1) of paragraph 87A sets out the circumstances in which the new paragraph applies. The first three requirements are the same as new section 140E TCGA1992. The other requirements are that in the course of a merger, a UK resident company transfers the whole or part of a trade it carries on through a permanent establishment outside the UK, to a company resident in another Member State. The transfer must relate to chargeable intangible assets in the hands of the transferor, in the case of one or more of which the proceeds of the realisation exceed the cost recognised for tax purposes. No claim should have been made under paragraph 86 of Schedule 29 FA2002 in relation to those assets.
29. Sub-paragraph (2) provides that where tax would, but for the Mergers Directive, have been chargeable in the Member State in which the permanent establishment is located, double taxation relief shall have effect as if the amount of tax that would have been charged had actually been charged.
30. Sub-paragraph (3) provides that for paragraph 87A “the Mergers Directive” has the same meaning as in paragraph 87.
31. Sub-paragraph (4) provides, that for the purposes of paragraph 87A the definition of whether a company is resident in a Member State.
32. Sub-paragraph (5) provides that paragraph 87A does not apply to the formation of an SE by merger where the transaction is not affected for bona fide commercial reasons or it forms part of a scheme the main purpose of which is to avoid liability to corporation, capital gains or income tax.
33. Sub-paragraph (6) provides that sub-paragraph 5 will not affect the operation of paragraph 87A where HM Revenue and Customs have given their prior satisfaction that the merger is being affected for bona fide commercial reasons and is not part of a tax avoidance scheme.

34. Sub-paragraph (7) provides that an application under sub-paragraph 6 must be made in accordance with paragraph 88 Schedule 29 FA2002.

Clause 54: Loan Relationships

35. Clause 54 deals with the transfer in the course of a merger of assets or liabilities that represent loan relationships (a loan relationship is a money debt arising from a transaction where the company has either lent or borrowed money). Subsection (1) inserts new paragraph 12B into Schedule 9 Finance Act 1996 and Subsection (2) provides for it to have effect in relation to SEs formed on or after 1 April 2005.
36. Sub-paragraph (1) of paragraph 12B sets out the circumstances in which the new paragraph applies. The first three requirements are the same as in new section 140E(1). 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).
37. Sub-paragraph (2) provides that where the conditions above are met, the transfer of a loan relationship in the course of a merger is to be disregarded. With two exceptions. 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 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).
38. Sub-paragraph (3) provides the transferor and the transferee companies of the loan relationship shall be deemed to be the same company. The exceptions in sub-paragraph (2) apply similarly to sub-paragraph (3). The overall effect of paragraphs 12B (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.

39. Sub-paragraph (4) provides that paragraph 12(2A), Schedule 9 FA1996 shall apply to paragraph 12B. 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.
40. Sub-paragraph (5) provides that paragraph 12B does not apply unless the merger is effected for bona fide commercial reasons and does not form 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. Sub-paragraph (6) provides that the anti-avoidance provision in sub-paragraph (5) is not applied where, before the merger the HM Revenue and Customs notify the merging companies that they are satisfied that sub-paragraph (5) will not have effect.
42. Sub-paragraph (7) determines whether a company is resident in a Member State.

Clause 55: Derivative contracts

43. Clause 55 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 FA 2002 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. Subsection (1) inserts new paragraph 30B into Schedule 26 FA 2002 and Subsection (2) provides for it to have effect in relation to SEs formed on or after 1 April 2005.
44. Sub-paragraph (1) of paragraph 30B sets out the circumstances in which new paragraph 30B Schedule 26 FA2002 applies. They are the same as described in new paragraph 12B(1) Schedule 9 FA1996.
45. Sub-paragraph (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 is to 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).

46. Sub-paragraph (3) provides that 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) apply similarly to sub-paragraph (3). This rule mirrors that in paragraph 28(3)(b) Schedule 26 FA 2002.
47. Sub-paragraph (4) provides that paragraph 30, Schedule 26 FA2002 shall apply to paragraph 30B. Paragraph 30 applies to a transferor company that uses fair value accounting as respects the derivative contract. It mirrors the loan relationship's provision in new paragraph 12B(3) Schedule 9 FA 1996.
48. Sub-paragraph (5) provides that sub-paragraph (2) and (3) do not apply in relation to the formation of an SE by merger unless the merger is effected for bona fide commercial reasons and it does not form part of a scheme or arrangement 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.
49. Sub-paragraph (6) provides that the anti-avoidance provision in sub-paragraph (5) is not applied where, before the merger, the HM Revenue and Customs notify the merging companies that they are satisfied that sub-paragraph (5) will not have effect.
50. Sub-paragraph (7) determines whether a company is resident in a Member State.

Clause 56: Capital Allowances

51. Clause 56 deals with the transfer in the course of a merger of assets in respect of which capital allowances can be claimed. Subsection (1) inserts new section 561A into Capital Allowances Act 2001 (CAA 2001), and Subsection (2) provides for it to have effect in relation to SEs formed on or after 1 April 2005.
52. Subsection (1) of section 561A CAA 2001 sets out the circumstances in which the section applies, by reference to section 140E. That is 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 does not apply in relation to any qualifying asset.

53. Subsection (2) provides that 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.
54. Subsection (3) provides that a “qualifying asset” has the same meaning as “qualifying transferred asset” in new section 140E.

Clause 57: Stamp Duty Reserve Tax

55. Clause 57 inserts a new paragraph into sub-section 99(4) of Finance Act 1986 and new subsection (94A) into the same Act (the definition of chargeable securities for the purpose of stamp duty reserve tax section) in relation to agreements to transfer securities on or after 1 April 2005.
56. New paragraph (4)(d) section 99 FA 1986 provides that securities are chargeable securities, if they are issued or raised by an SE that has its registered office in the UK, irrespective of whether the SE was originally incorporated in the UK or whether at the time of the issue or raising of the securities the SE had its registered office in the UK.
57. New subsection (4A) provides that the definition of “chargeable securities” does not include securities falling within (a), (b) or (c) of section 99, subsection (3) Finance Act 1986, where:
- The securities are issued or raised by an SE; and
 - At the point of determining if the securities are chargeable securities, the SE has its registered office outside the UK.

Clause 58: Bearer Instruments: stamp duty & stamp duty reserve tax

58. Clause 58 amends Schedule 15 Finance Act 1999 and section 90(3) Finance Act 1986 to clarify how these provisions apply to SE’s on or after 1 April 2005.

59. Subsection (1) provides that an SE that has transferred its registered office outside the UK does not constitute “a body corporate incorporated in the UK” for the purposes of section 90(3C)(a) Finance Act 1986.
60. Subsection (2) provides that an SE that has transferred its registered office outside the UK does not constitute “a body corporate incorporated in the UK” for the purposes of section 90(3E)(a) Finance Act 1986.
61. Subsection (3) provides a new definition of “UK company” for the purposes of Schedule 15 Finance Act 1999. The definition excludes SEs, which have transferred their registered office outside the UK in accordance with Article 8 of the ECS. SE’s who have transferred their registered offices into the UK in accordance with Article 8 are, however, within the definition.

Clause 59: Consequential amendments

62. Clause 59 makes a number of consequential amendments.

Clause 60: Residence

63. Clause 60 deals with an SE that transfers its registered office to the United Kingdom in accordance with Article 8 of the Council Regulation on the Statute for the European Company.
64. Subsection (1) inserts a new section 66A into Finance Act 1988.
65. Subsection (2) extends section 249(3) Finance Act 1994 to include SEs, treated as UK resident by virtue of new section 66A FA1988.
66. Subsection (3) provides for section 66A FA 1988 to have effect in relation to transfers of registered office, occurring on or after 1 April 2005.
67. New section 66A(1) FA1988 sets out the circumstances in which section 66A FA1988 applies. Those being where an SE transfers its registered office to the UK in accordance with the relevant articles of the Council Regulation on the Statute for the European Company.
68. New section 66A(2) provides, where section 66A(1) FA1988 applies, for the SE, upon registration in the UK, to be regarded, for the purposes of the Taxes Acts, to be resident in the UK. Additionally if a different place of residence is given by any rule of

law that place shall be ignored for the purposes of the Taxes Act definition of residence.

69. New section 66A(3) FA1988 provides, where section 66A(1) FA1988 applies, that the SE shall not cease to be regarded as resident in the UK by reason only of a subsequent transfer from the UK of its registered office.
70. New section 66A(4) FA 1988 sets out that within section 66A FA1988 “the Taxes Acts” should have the same meaning as in the Taxes Management Act 1970.

Clause 61: Continuity for transitional -purposes

71. Clause 61 provides continuity in the arrangements for imposing a charge to tax on a UK resident company for the period up to its ceasing to be resident as a result of either:
- participating in a merger to form an SE outside the UK; or
 - (after transforming into an SE) transferring its registered office to another Member State under Article 8 of the ECS.
72. Subsection (1) provides that, if a company ceases to be UK resident in the course of the formation of an SE by merger, the provisions in new clause 61(3) will continue to apply in relation to liabilities accruing and matters arising before that time. The provisions will apply as if the company was still UK resident or where the company has ceased to exist, as if the SE were the company.
73. Subsection (2) provides that, if an SE transfers its registered office from the UK and ceases to be UK resident, the provisions specified in new clause 61(3) will apply in the same manner as outlined in Clause 61(1) above.
74. Subsection (3) specifies the provision mentioned in subsections (1) and (2).

Clause 62: Groups

75. Clause 62 inserts new section 170(10A) and provides for it to have effect in relation to SEs formed on or after 1 April 2005.
76. New section 170(10A) provides that where the principal company of a group (Group 1) becomes
- an SE by being the acquiring company in the formation of an SE by merger by acquisition, or

- a subsidiary of a holding SE or
- an SE via transformation

then any group of which the SE is a member of on formation, shall be regarded as the same for the purposes of sections 170-181.

Clause 63: Groups: Intangible fixed assets

77. Clause 63 inserts a new paragraph, 51A, into Schedule 29 Finance Act 2002 defining the continuity of group identity for SEs formed on or after 1 April 2005. This provides that where the principal company of a group (Group 1) becomes
- an SE by being the acquiring company in the formation of an SE by merger by acquisition, or
 - a subsidiary of a holding SE or
 - an SE via transformation

then any group of which the SE is a member of on formation, shall be regarded as the same.

Clause 64: Held over gains

78. Clause 64 deals with continuity for group membership purposes in the event of an SE being formed.
79. Subsection (1) extends the scope of section 116(11) to exclude section 116(10)(b) and (c) from applying to disposals falling within section 140E.
80. Subsection (2) inserts new section 140(6B). The section deals with the transfer of securities as part of a merger, forming an SE, to which 140E applies. Where securities are transferred to the SE by a transferor company, that transfer shall be disregarded for the purpose of section 140 (4). It also provides for the SE to be treated as if it were the transferor company in the event of any subsequent disposal of the securities and any subsequent disposal by the transferee company of assets to which subsection (5) applies.
81. Subsection (3) inserts new subsections 154(2A) and (2B) into TCGA1992 and provides for them to have effect in relation to the formation of an SE on or after 1 April 2005.
82. New subsection 154(2A) deals with the transfer of assets as part of a merger, forming an SE, to which 140E applies. It provides that where asset No 2 (see 154(1)(a)), or shares in a company which

holds asset No 2, is transferred to the SE then the transfer will be disregarded for the purposes of 154(2). Additionally, if the SE holds asset No 2 it will be treated as if it were the claimant or if the SE holds shares in the company which holds asset No 2 section 175 will apply to the group of which the SE is a member as if it were the same group as any group of which the claimant were a member before the SE's formation.

83. New subsection 154(2B) provides that if, as part of a merger, forming an SE, to which 140E applies, the SE becomes a member (whether or not as principal member) of a group of which the claimant is also a member then section 175 will apply. It will apply in relation to the trade carried on by the claimant as if the group of which the SE is a member were the same group as the group of which the claimant was a member before the SE's formation.
84. Subsection (4) inserts new subsections 179(1B) & (1C) into TCGA 1992.
85. New subsection 179(1B) applies where, as part of an SE's formation, in circumstances to which section 140E apply, a company, which is a member of a group (Group 1), ceases to exist and as a consequence of that cessation assets are transferred to the SE or shares in any company which were also members of the group are transferred to the SE. In such circumstances a company that has ceased to exist or the shares in which have been transferred to the SE are not treated for the purposes of this section as having left Group 1.
86. New subsection 179(1C) provides that where section 179(1B) applies to a company then the SE and the company, that has ceased to exist by virtue of the merger to form the SE, are treated as the same entity. Additionally if the SE is a member of a group (Group 2) following its formation (whether or not as principal company) then a company that was a member of Group 1 and became a member of Group 2 as a consequence of the SE's formation will be treated as if Group 1 and Group 2 were the same.

Clause 65: Restrictions on set-off of pre-entry losses

87. Clause 65 extends the scope of Schedule 7A of TCGA 1992 (restrictions on set-off of pre-entry losses) to cover formations of SEs which occur on or after 1 April 2005. It inserts new paragraph 1(3A)(aa) which specifies the relevant event for calculating losses on pre-entry assets.

88. Subsection (2) sets out that paragraph 1(3A)(aa) applies in circumstances where the company in question is an UK resident SE and the asset in question was transferred to the SE as part of its formation by the merger by acquisition of two or more companies in accordance with Articles 2(1) and 17(2)(a) or (b) of Council Regulation (EC) 2157/2001 Statute for a European Company.

BACKGROUND NOTES

89. The European Company Statute (ECS) Regulation was adopted by the EU Council of Ministers on 8 October 2001. The Regulation brought into existence the European Company (Societas Europaea or SE) and provides rules governing SEs.
90. Tax is not explicitly covered within the regulation so the tax law of the member state in which the SE is based applies to SEs. The addition of SEs to other EU legislation (the Mergers Directive) means that UK tax measures are needed to ensure that a UK company's decision to merge with a company in another member State to form an SE is not disadvantaged (or driven) by tax considerations.
91. The implementation date of SEs was 8 October 2004. Implementation of the legislation has been held back by agreement on the Mergers Directive. This was agreed in mid December 2004.
92. These clauses will amend legislation to give certainty regarding the tax treatment of certain transactions involving European Companies (SEs), particularly formation by merger. It will enable UK businesses to take advantage of the new corporate vehicle if they so wish.