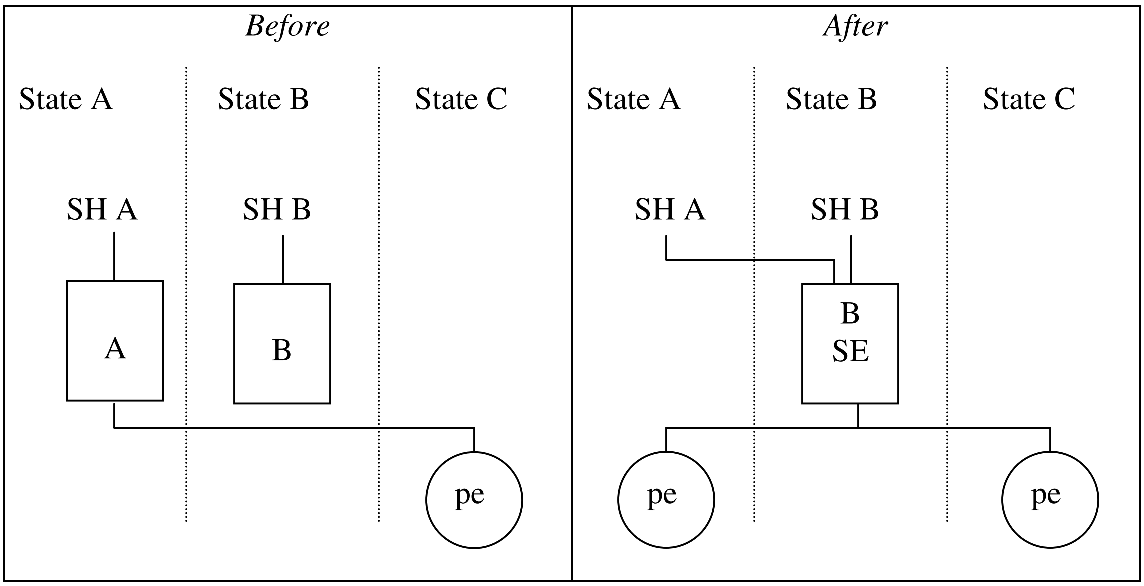
Annex 10 - Luxembourg

LUXEMBOURG

CASE 1

Merger by acquisition

(Art. 2 par. 1 jo. Art 17 par. 2(a) Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- A and B are public limited-liability companies (see Annex I to Reg. 2157/2001)
- State A, State B, and State C are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
    - has a permanent establishment in Member State C
- B:
    - formed under law of Member State B
    - registered office in Member State B
    - head office in Member State B
- B SE:
    - registered office in Member State B
    - head office in Member State B
    - will be covered by the EC Merger Directive

Transactions

- A:

- transfers all assets and liabilities to B
- in exchange for shares in B (and cash payment if any, not exceeding 10% of nominal value of shares to be issued) issued to shareholder(s) of A
- will be wound up without going into liquidation

- B / B SE:
  - as the acquiring company, B will take the form of an SE when the merger takes place (Art. 17 Reg. 2157/2001: "In the case of a merger by acquisition, the acquiring company shall take the form of an SE when the merger takes place". Consequently, there are in fact two transactions: 1) the merger and 2) a transformation of a public limited-liability company into an SE. With regard to the transformation, see also Case 9.)
  - will be regarded as public limited-liability company governed by law of Member State B

Questions

1) Assume Member State A is your country

<u>Tax effects for A in Member State A</u>

a) Will the merger give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes), or is there roll-over relief?

Roll-over relief is provided under Art. 170bis LIR (the Luxembourg Income Tax Act). According to para 2 of this provision, where a Luxembourg capital company transfers all its assets to a company resident in an EU Member State other than Luxembourg that is listed in the Annex to the EC-Merger Directive, such transfer may be carried out at book values (thus leading to a roll-over of hidden reserves) if the following conditions are fulfilled:

- *The shareholders of the Luxembourg company are exclusively remunerated by the allocation of shares in SE (a cash payment not exceeding 10% of the nominal value of the shares being tolerated); and*
- *The transfer must be carried out in a way that the latent hidden reserves remain subject to tax in Luxembourg, provided that they would have been taxable in the absence of such provision.*

As SE maintains a PE in A, the above conditions are satisfied. As a consequence, there is no taxation of capital gains at the moment of the merger. Assets transferred to SE (or its permanent establishment in A) will be considered to be held since the moment of their acquisition by A (Art. 170 (5) in connection with Art. 170bis (2) LIR)

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A, be taken over with the same roll-over relief by the permanent establishment of B SE in Member State A?

Pursuant to Art. 170bis (2) in connection with Art. 170 (4) LIR, tax-exempt reserves may be transferred to the permanent establishment of B SE in A. The law does not explicitly address the issue of the transfer of provisions. Nevertheless, provisions are considered to form part of the "actif social" of A and may, therefore, be taken over by B SE.

c) Will B SE's permanent establishment in Member State A be allowed to take over the losses of A that have not been exhausted for tax purposes? If B SE would be a company resident in Member State A, would it then be allowed to take over these losses?

For purposes of offsetting losses from previous periods against current profits, the law requires that the person that incurred the losses be identical with the person deriving the income (Art. 114 (2) 3 LIR). Therefore, B SE's permanent establishment in Member State A will not be able to make use of the losses incurred by A previously. However, this does not constitute a difference to the tax treatment in a purely domestic situation, as the requirement of identity of the person incurring the losses and the person offsetting them against income also applies in purely domestic circumstances.

d) Will Member State A renounce any right to tax the permanent establishment in Member State C?

On basis of Art. 170bis (3) LIR, the transfer of the permanent establishment situated in Member State C to B SE may be carried out at book value. This provision applies irrespective of the general conditions for the application of the roll-over relief outlined in a. However, a special provision applies in case the permanent establishment were situated in a country with which Luxembourg does not have a double tax treaty, see e) below. Luxembourg has treaties with all current Member States of the EU.

e) Or will Member State A tax profits or capital gains with respect to the permanent establishment as a result of the merger? If so, will Member State A give relief for any (notional) tax charged on these profits or capital gains by Member State C?

See d) above. Luxembourg does, however, not yet have tax treaties with all the accession countries (e.g. there are no treaties with Cyprus, Estonia, Latvia, Lithuania and Turkey). In a scenario where Member State C is one of those countries, the capital gain on the transfer of the permanent establishment would be taxable. However, the tax would be reduced by the amount of tax that would have been levied on these profits in Member State C in the absence of provisions implementing the EC-Merger Directive. Such fictitious tax credit is not granted in *so far as the results of the permanent establishment have reduced the tax base of A in Member State A.*

f) Will Member State A reinstate in the taxable profits of A such losses of the permanent establishment as have been set off against the taxable profits of A in Member State A and which have not been recovered at the time of the merger?

Only in those cases described in e) above.

Tax effects for SH A in Member State A

g) Will the issue of shares by B SE to SH A, resident in Member State A, in exchange for shares in A give rise to any taxation of the income, profits or capital gains of that shareholder?

For corporate shareholders and individual shareholders holding the shares as part of their business property, a roll-over of capital gains is available under Art. 22bis LIR. According to this provision, the shareholder of A may benefit from a roll-over relief on the exchange of shares in a resident company for shares in

- *A company resident in an EU Member State that is covered by the EC-Merger Directive;*
- *A capital company fully subject to a tax corresponding to Luxembourg corporate income tax.*

As these conditions should be met, the shareholders of A will not realize a capital gain upon the merger. The shares in B SE are considered to replace the shares in A (i.e. same book value and same acquisition date).

The analysis for individual shareholders holding the A shares within their private property is slightly different, but leads to the same result. Also in their case, the exchange does not result in the realization of taxable profits (Art. 102 (10) LIR in connection with Art. 22bis LIR).

h) Will the issue of shares by B SE to a shareholder of A, not resident in Member State A, in exchange for shares in A give rise to any taxation of the income, profits or capital gains of that shareholder?

Capital gains realized by non-resident shareholders are generally only taxable if realized on a participation of more than 10% within 6 months from their acquisition. In case the non-resident shareholder of A does not fulfill the 6-month holding requirement, the capital gains would nevertheless not be subject to tax, as a roll-over provision similar to those for resident shareholders (see g) above) applies. The conditions are the same as those for residents.

i) Will the answers to the questions 1g) and 1h) differ if SH A is:
   i) A corporate shareholder?

ii) An individual shareholder not owning a substantial interest?
iii) An individual shareholder owning a substantial interest?
iv) An individual entrepreneur?

The analysis may differ (see g) above). However, the result does not.

2) Assume Member State B is your country

Tax effects for B and B SE in Member State B

a) According to Art. 17 par. 2 Reg. 2157/2001, the acquiring company shall take the form of an SE when the merger takes place. According to Art. 37 par. 2 Reg. 2157/2001 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. However, the Regulation itself does not give guidance with regard to taxation. Will the fact that B takes the form of an SE have corporate income tax consequences in Member State B?

There will be no corporate income tax consequences for B SE, as the conditions for the tax-neutral transfer of assets set out in 1) a) above are fulfilled. In addition, if the transformation into an SE is to be considered as not constituting a breach of the legal personality of B on basis of Luxembourg company law it may even be argued that the transformation does not constitute an event for tax purposes. However, no clear opinion has been developed on this issue so far.

b) What is the value for tax purposes that B SE has to attribute to the assets and liabilities, which are transferred to B SE as part of the merger and that form a permanent establishment in Member States A and C?

Provided that a set of conditions are met (which should be the case in such situation), Art. 170ter (1) LIR leaves B SE the choice to value these assets and liabilities at the book value in the transferring company, at their fair market value or at a value in between these two. According to the preparatory works relating to the introduction of this article, this choice would essentially depend on the domestic law of Member State A.

Tax effects for SH B in Member State B

c) Will the fact that B will take the form of an SE result in tax consequences for SH B?

The fact that B takes the form of an SE should be considered as a transformation of B into the company form of SE. Arts. 22bis and 102 (10) LIR are to be applied accordingly (see 1) g) above). In addition, see a) above.

d) Will the answer to question 2c) above differ if SH B is:
   i) A corporate shareholder?
   ii) An individual shareholder not owning a substantial interest?
   iii) An individual shareholder owning a substantial interest?
   iv) An individual entrepreneur?

   No difference in result, but difference in analysis (see 1) g) above).

3) Assume Member State C is your country

   Tax effects for A and B SE in Member State C with respect to its permanent establishment in Member State C

   a) Will the merger give rise to any taxation in (the hands of) A of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes) or is there roll-over relief?

      Roll-over relief is provided under Art. 172 (4) LIR. Please note that this provision is broader than the corresponding provision in the Directive in so far as it does not require that the two companies involved be resident in different member states.

   b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State C, be taken over with the same roll-over relief by the permanent establishment of B SE in Member State C?

      There are no explicit rules dealing with the transfer of previously untaxed reserves and provisions. It is, however, generally accepted that provisions and reserves can be continued.

   c) Will B SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes?

      No (identity of persons required). See 1) c) above.

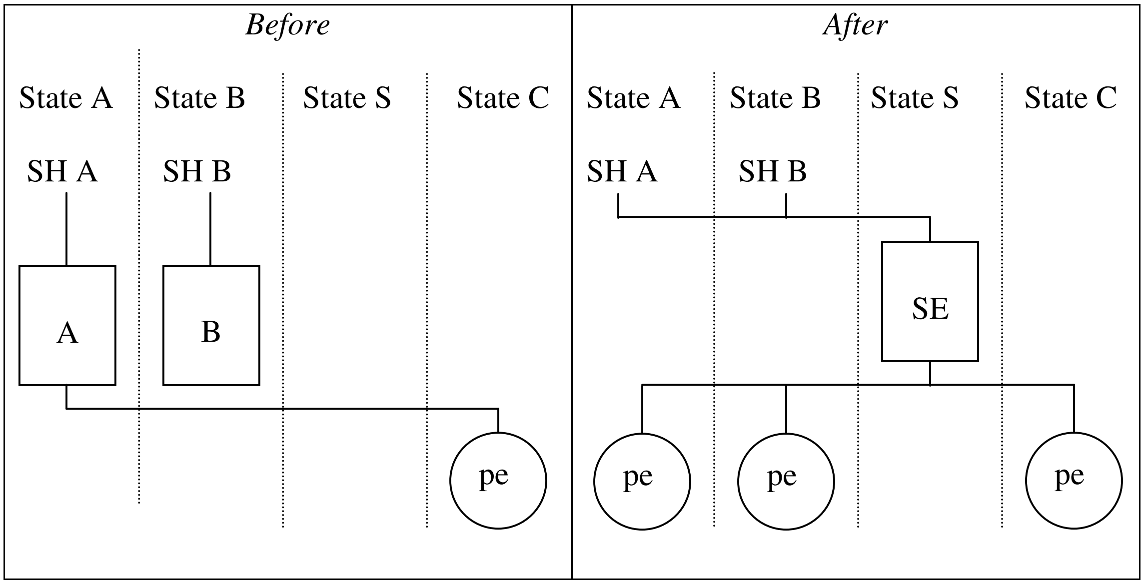
   d) If B SE would be a company resident in Member State C, would it then be allowed to take over these losses? See Merger Directive Art. 6.

      No (identity of persons required). See 1) c) and d) above.

CASE 2

Merger by formation of a new company

(Art. 2 par. 1 jo Art 17. par 2(b) Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- A has a permanent establishment in Member State C
- SE is a new company
- A and B are public limited-liability companies (see Annex I to Reg. 2157/2001)
- State A, State B, State C, and State S are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B:
    - formed under law of Member State B
    - registered office in Member State B
    - head office in Member State B
- SE:
    - formed under law of Member State S
    - registered office in Member State S
    - head office in Member State S
    - will be covered by the EC Merger Directive

Transactions

- A:
    - transfers all assets and liabilities to SE

  - o in exchange for shares of SE (and cash payment if any, not exceeding 10% of nominal value of shares to be issued) issued to shareholder(s) of A
  - o will be wound up without going into liquidation
- B:
  - o transfers all assets and liabilities to SE
  - o in exchange for shares of SE (and cash payment if any, not exceeding 10% of nominal value of shares to be issued) issued to shareholder(s) of B
  - o will be wound up without going into liquidation
- SE:
  - o will be a newly formed SE
  - o will be regarded as public limited-liability company governed by the law of Member State S

Questions

1) Assume Member State A is your country

<u>Tax effects for A in Member State A</u>

a) Will the merger give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes), or is there roll-over relief?

Roll-over relief is granted. For the conditions see 1) a) (Case 1).

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A, be taken over with the same roll-over relief by the permanent establishment of SE in Member State A?

See 1) b) (Case 1).

c) Will SE's permanent establishment in Member State A be allowed to take over the losses of A that have not been exhausted for tax purposes? If SE would be a company resident in Member State A, would it then be allowed to take over these losses?

No (identity of persons required). See 1) c) (Case 1) above.

d) Will Member State A renounce any right to tax the permanent establishment in Member State C?

See 1) d) (Case 1) above.

e) Will Member State A reinstate in the taxable profits of A such losses of the permanent establishment as have been set off against the taxable profits of A in Member State A and which have not been recovered at the time of the merger?

See 1) e) and f) (Case 1) above.

f) Or will Member State A tax profits or capital gains of the permanent establishment resulting from the merger? If so, will it give relief for any (notional) tax charged on these profits or capital gains by Member State C?

See 1) e) (Case 1) above.

Tax effects for SH A in Member State A

g) Will the issue of shares by SE to SH A, resident in Member State A, in exchange for the shares in A give rise to any taxation of the income, profits or capital gains of that shareholder or is there roll-over relief?

See 1) g) (Case 1) above.

h) Will the issue of shares by SE to a shareholder of A, not resident in Member State A, in exchange for the shares in A give rise to any taxation of the income, profits or capital gains of that shareholder or is there roll-over relief?

See 1) h) (Case 1) above.

i) Will the answers to the questions 1g) and 1h) differ if SH A is:
   i) A corporate shareholder?
   ii) An individual shareholder not owning a substantial interest?
   iii) An individual shareholder owning a substantial interest?
   iv) An individual entrepreneur?

See 1) i) (Case 1) above.

2) Assume Member State S is your country
Tax effects for SE in Member State S

a) What is the value for tax purposes that SE has to attribute to the assets and liabilities, which are transferred to SE as part of the merger and that form a permanent establishment in Member States A, B and C?

See 2) b) (Case 1) above.

Tax effects for shareholder(s) of SE in Member State S

b) Is there any provision in the legislation of Member State S that affects the shareholder of SE whether resident in Member State S or not? For example, are there provisions with regard to the valuation of the shares received in SE?

A roll-over provision applies to resident and non-resident shareholders in so far as the capital gains on the exchange of shares is taxable. In contrast to resident shareholders, non-resident shareholders are only subject to tax on capital gains realized on substantial participations within 6 months of their acquisition. Special rules apply to formerly resident shareholders that have transferred their residence out of Luxembourg within the last 5 years.

3) Assume Member State C is your country

<u>Tax effects for A and SE in Member State C in respect of its permanent establishment in Member State C</u>

a) Will the merger give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes) or is there roll-over relief?

See 3) a) (Case 1) above.

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State C, be taken over with the same roll-over relief by the permanent establishment of SE in Member State C?

See 3) b) (Case 1) above.

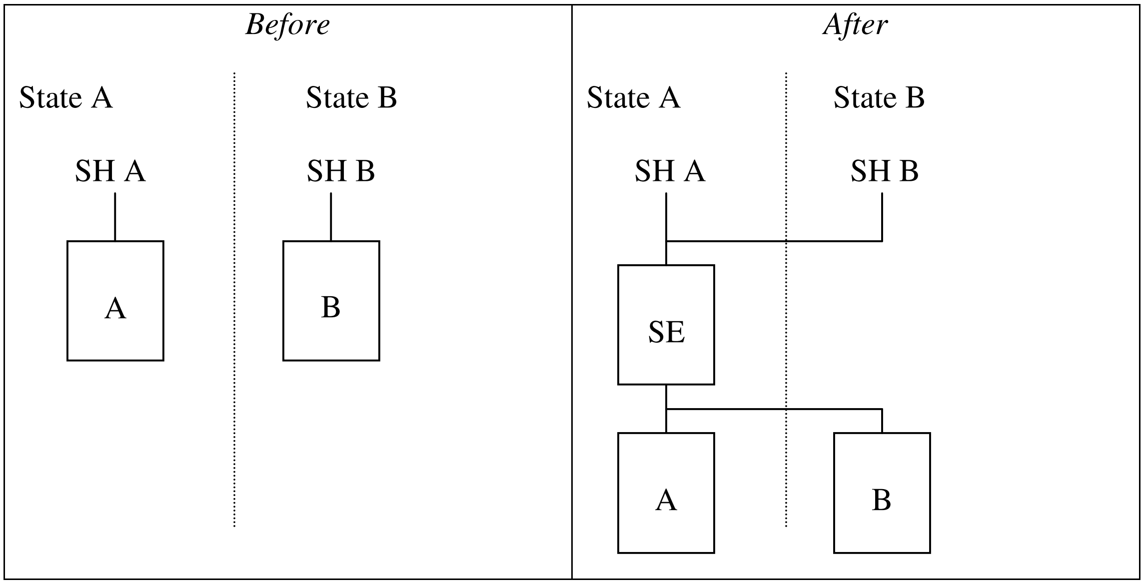
c) Will SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes? If SE would be a company resident in Member State C, would it then be allowed to take over these losses?

See 3) c) and d) (Case 1) above.

CASE 3

Formation of a Holding – SE – 1

(Art. 2 par. 2(a) jo. Art. 32, Art. 33 and Art. 34 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- SE is a new company
- A and B are public or private limited-liability companies (see Annex II Reg. 2157/2001)
- State A and State B are EU Member States
- A:
  - formed under law of Member State A
  - registered office in Member State A
  - head office in Member State A
- B:
  - formed under law of Member State B
  - registered office in Member State B
  - head office in Member State B
- SE:
  - formed under law of Member State A
  - registered office in Member State A
  - head office in Member State A
  - will be covered by the EC Merger Directive

Transactions

- SE:
  - will be regarded as public limited-liability company governed by the law of Member State A
  - acquires holding in A and B

- such that it obtains more than 50% of the permanent voting rights in A and B
- in exchange for shares in SE
- issued to the shareholders of A and B

Questions

1) Assume Member State A is your country

<u>Tax effects for SE in Member State A</u>

a) Are there any provisions for the valuation for tax purposes of the shares in A and B acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

There are no provisions dealing explicitly with such situation. The general rule according to which assets are to be valued at their historic acquisition cost or at their lower going concern value (optional) applies (Art. 23 (3) LIR).

b) Are there any provisions for the valuation for tax purposes of the shares issued to SH A and SH B? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

In order to benefit from the roll-over relief available under Art. 22bis LIR (in connection with Art. 102 (10) LIR in case of individual shareholders holding their shares in their private property), the shares in SE have to be valued at the book value of the shares in A and B given in exchange.

<u>Tax effects for SH A in Member State A</u>

c) Will the issue of shares by SE to SH A in exchange for shares in A give rise to any taxation of the income, profits or capital gains of SH A or is there roll-over relief?

Roll-over relief is available under the conditions of Art. 22bis LIR (in connection with Art. 102 (10) LIR in case of an individual shareholder holding the shares in his private property). See 1) g) (Case 1) above.

d) Will the answers to the question 1c) differ if SH A is:
   i) A corporate shareholder?
   ii) An individual shareholder not owning a substantial interest?
   iii) An individual shareholder owning a substantial interest?
   iv) An individual entrepreneur?

No difference in result. Slight difference in analysis (see 1) i) (Case 1) above).

2) Assume Member State B is your country

   Tax effects for SH B in Member State B

   a) Will the issue of shares by SE to SH B in exchange for shares in B give rise to any taxation of the income, profits or capital gains of SH B or is there roll-over relief?

      Roll-over relief is available. See 1) g) (Case 1) above for the conditions.

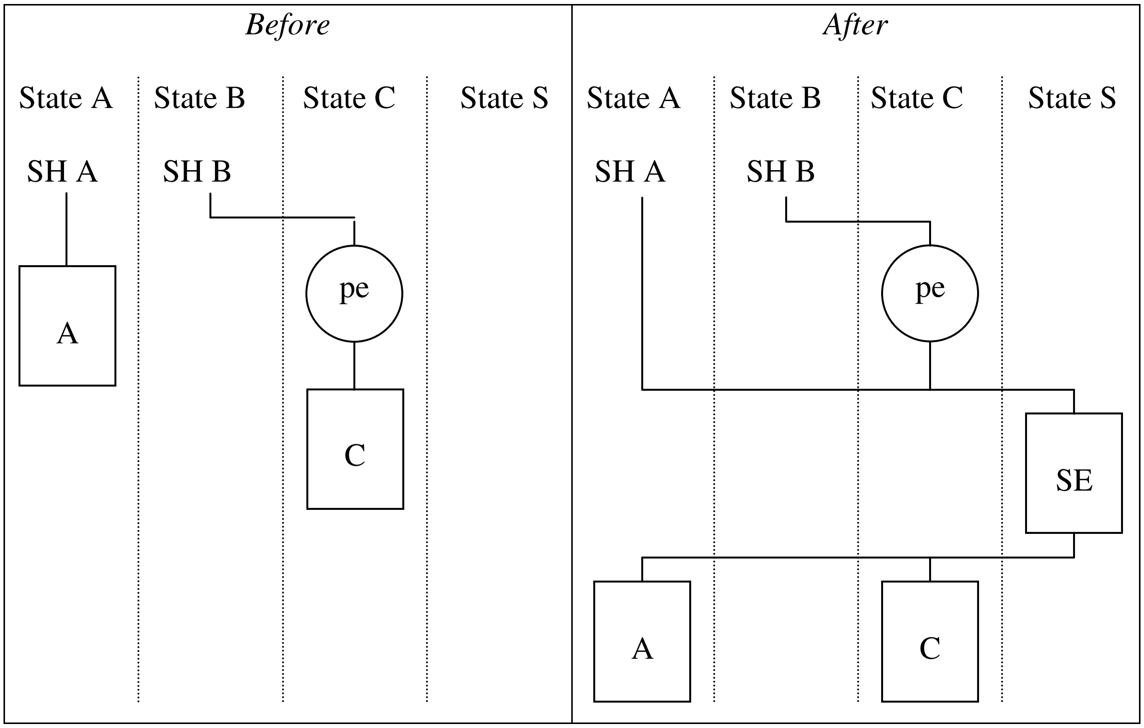
   b) Will the answers to the question 1a) differ if SH B is:
      i) A corporate shareholder?
      ii) An individual shareholder not owning a substantial interest?
      iii) An individual shareholder owning a substantial interest?
      iv) An individual entrepreneur?

      No difference in result. Slight difference as to the analysis (see 1) i) (Case 1) above).

CASE 4

Formation of a Holding – SE

(Art. 2 par. 2(a) and (b) jo. Art. 32, Art. 33, and Art. 34 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and C are existing companies
- The shares in C are attributable to pe in State C
- SE is a new company
- A and C are public or private limited-liability companies (see Annex II)
- State A, State B, State C and State S are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- C:
    - formed under law of Member State C
    - registered office in Member State C
    - head office in Member State C
- SE:
    - formed under law of Member State S

  - registered office in Member State S
  - head office in Member State S
  - will be covered by the EC Merger Directive

Transactions

- SE:
  - will be regarded as public limited-liability company governed by the law of Member State S
  - acquires holding in A and C
  - such that it obtains more than 50% of the permanent voting rights in A and C
  - in exchange for shares in SE
  - issued to the shareholders of A and C

Questions

1) Assume Member State A is your country

   Tax effects for SH A in Member State A

   a) Will the issue of shares by SE to SH A in exchange for shares in A give rise to any taxation of the income, profits or capital gains of SH A or is there roll-over relief?

      Roll-over relief is available under the conditions of Art. 22bis (in connection with Art. 102 (10) LIR if the shareholder is an individual that holds the shares in his private property). See 1) g) (Case 1) above for details.

   b) Will the answer to the above question be different in the case of:
      i) SH A being an individual shareholder not owning a substantial interest?
      ii) SH A being an individual shareholder owning a substantial interest?
      iii) SH A being an individual entrepreneur?
      iv) SH A being a corporate shareholder?

      No difference as to the result. Slight difference as regards analysis (see 1) i) (Case 1) above).

2) Assume Member State B is your country

   Tax effects for SH B in Member State B

   a) Will the issue of shares by SE to SH B in exchange for shares in C give rise to any taxation of the income, profits or capital gains of SH B or is there roll-over relief?

Any profits realized on the exchange should be attributable to the permanent establishment of SH B in Member State C and should, therefore, on basis of the provisions of the Luxembourg tax treaties concluded with all current Member States of the EU be exempt from tax in Luxembourg. If this is not the case, roll-over relief should be available under Art. 22bis LIR (see 1) g) (Case 1) for the conditions).

b) Will the answer to the above question be different in the case of:
   i) SH B being an individual entrepreneur?
   ii) SH B being a corporate shareholder?

   No.

3) Assume Member State C is your country

<u>Tax effects for SH B in Member State C</u>

a) Will the issue of shares by SE to SH B in exchange for shares in C give rise to any taxation of the income, profits or capital gains of SH B or is there roll-over relief?

   Roll-over relief is available under Art. 22bis LIR. See 1) g) (Case 1) for the conditions).

b) Will the answer to the above question be different in the case of:
   i) SH B being an individual entrepreneur?
   ii) SH B being a corporate shareholder?

   No.

4) Assume Member State S is your country

<u>Tax effects for SE in Member State S</u>

a) Are there any provisions for the valuation for tax purposes in Member State S of the shares of A and C acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

   There are no explicit provisions dealing with the valuation of the shares in A and C in such situations. The general rule according to which assets are to be valued at their historic acquisition cost or at their lower going concern value (optional) applies (Art. 23 (3) LIR).

b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to SH A and SH B? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

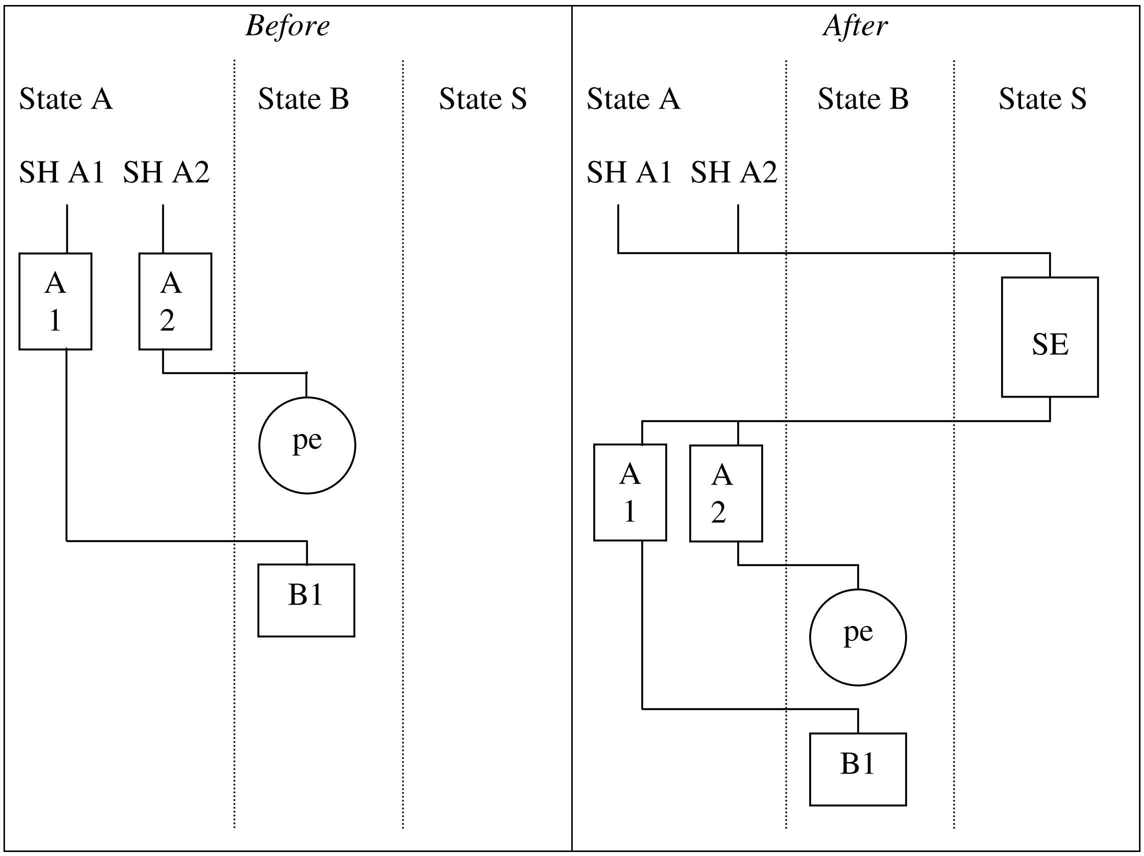
The SE shares have to be valued at their book value for Luxembourg tax purposes.

As both, SH A and SH B, are non-residents, they would only be subject to tax on future capital gains realized on the SE shares if they have a substantial participation and if capital gains are realized within 6 months from the acquisition of such participation. The holding period will be computed as from the acquisition of the A and B shares, respectively. Similarly, the basis for computing the capital gain is the book value of the A and B shares (Art. 156 (8) in connection with Arts. 100 (1), 102 (10) and 22bis (4) LIR). The application of Art. 22bis constitutes an option and, therefore, taxpayers could opt for accounting for SE shares at a value higher than book value.

CASE 5

Formation of a Holding – SE

(Art. 2 par. 2(b) jo. Art. 32, Art. 33, and Art. 34 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A1, A2, and B1are existing companies
- pe is an existing permanent establishment of A2 in Member State B
- SE is a new company
- A1, A2, and B1 are public or private limited-liability companies (see Annex II to Reg. 2157/2001)
- State A, State B, and State S are EU Member States
- A1 and A2:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B1:
    - formed under law of Member State B

    - registered office in Member State B
    - head office in Member State B
- SE:
    - formed under law of Member State S
    - registered office in Member State S
    - head office in Member State S
    - will be covered by the EC Merger Directive

Transactions

- SE:
    - will be regarded as public limited-liability company governed by the law of Member State S
    - acquires holding in A1 and A2
    - such that it obtains more than 50% of the permanent voting rights in A1 and A2
    - in exchange for shares in SE
    - issued to the shareholders of A1 and A2

Questions

1) Assume Member State A is your country

   <u>Tax effects for SH A2 in Member State A</u>

   a) Will the issue of shares by SE to SH A2 in exchange for shares in A2 give rise to any taxation of the income, profits or capital gains of SH A2 or is there roll-over relief?

      Roll-over relief is available under Art. 22bis LIR (in connection with Art. 102 (10) LIR in case of SH A2 being an individual holding the shares in his private property). See 1) g) (Case 1) for the conditions.

   b) Will the answer to the above question be different in the case of:
      i) SH A2 being an individual shareholder not owning a substantial interest?
      ii) SH A2 being an individual shareholder owning a substantial interest?
      iii) SH A2 being an individual entrepreneur?
      iv) SH A2 being a corporate shareholder?

      No difference in result. Slight difference in analysis. See 1) i) (Case 1) above.

2) Assume Member State S is your country

   <u>Tax effects for SE in Member State S</u>

a) Are there any provisions for the valuation for tax purposes in Member State S of the shares of A1 and A2 acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

There are no explicit provisions dealing with the valuation of the shares in A and C in such situations. The general rule according to which assets are to be valued at their historic acquisition cost or at their lower going concern value (optional) applies (Art. 23 (3) LIR).

b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to SH A1 and SH A2? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

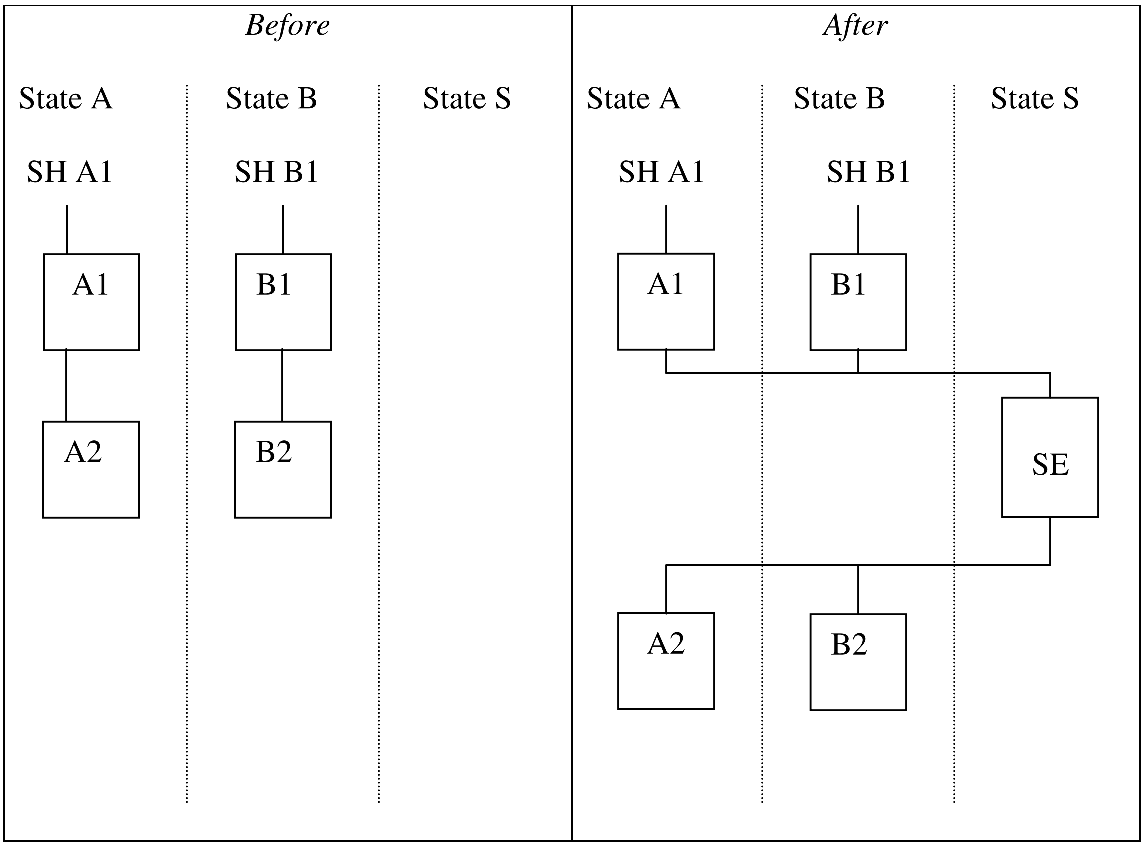
The SE shares have to be valued at their book value for Luxembourg tax purposes.

As both, SH A1 and SH A2, are non-residents, they would only be subject to tax on future capital gains realized on the SE shares if they have a substantial participation and if capital gains are realized within 6 months from the acquisition of such participation. The holding period will be computed as from the acquisition of the A1 and A2 shares, respectively. Similarly, the basis for computing the capital gain is the book value of the A1 and A2 shares (Art. 156 (8) in connection with Arts. 100 (1), 102 (10) and 22bis (4) LIR). The application of Art. 22bis constitutes an option and, therefore, taxpayers could opt for accounting for SE shares at a value higher than book value.

CASE 6

Formation of a Subsidiary–SE by exchange of shares

(Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A1, A2, B1, and B2 are existing companies
- SE is a new company
- A1 and B1 are companies or firms within the meaning of Art. 48 par. 2 of the Treaty establishing the European Community or other legal bodies governed by public or private law (Art. 2 par. 3 Reg. 2157/2001)
- State A, State B, and State S are EU Member States
- A1 and A2:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B1 and B2:
    - formed under law of Member State B

    - registered office in Member State B
    - head office in Member State B

- SE:
    - formed under law of Member State S
    - registered office in Member State S
    - head office in Member State S
    - will be covered by the EC Merger Directive

Transactions

- A1 and B1:
    - *form a subsidiary SE by way of contributing their subsidiaries A2 and B2 respectively to SE*
- *SE:*
    - will be regarded a public limited-liability company governed by the law of Member State S
    - will acquire the shares in A2 and B2 in exchange for shares issued to A1 and B1

Questions

1) Assume Member State A is your country

   Tax effects for A1 in Member State A

   a) Will the issue of shares by SE to A1 in exchange for shares in A2 give rise to any taxation of the income, profits or capital gains of A1 or is there roll-over relief?

      Roll-over relief is available under Art. 22bis LIR (see 1) g) (Case 1) for the conditions).

2) Assume Member State S is your country

   Tax effects for SE in Member State S

   a) Are there any provisions for the valuation for tax purposes in Member State S of the shares of A2 and B2 acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

      There are no explicit provisions dealing with the valuation of the shares in A2 and B2 in such situations. The general rule according to which assets are to be valued at their historic acquisition cost or at their lower going concern value (optional) applies (Art. 23 (3) LIR).

b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to A1 and B1? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

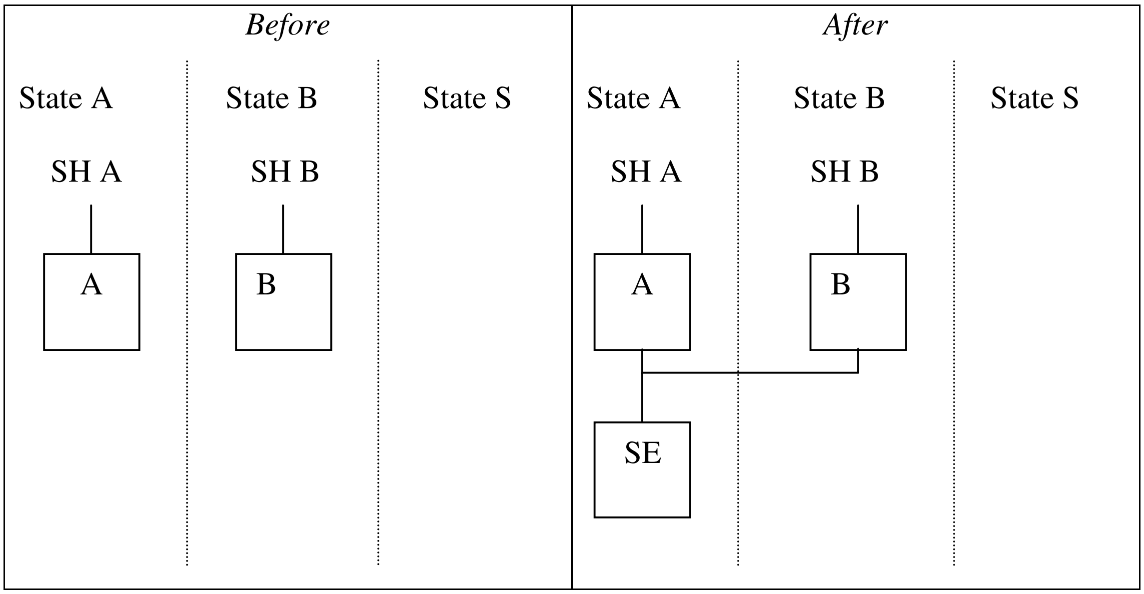
The SE shares have to be valued at their book value for Luxembourg tax purposes.

As both, A1 and B1, are non-residents, they would only be subject to tax on future capital gains realized on the SE shares if they have a substantial participation and if capital gains are realized within 6 months from the acquisition of such participation. The holding period will be computed as from the acquisition of the A2 and B2 shares by A1 and B1, respectively. Similarly, the basis for computing the capital gain is the book value of the A2 and B2 shares (Art. 156 (8) in connection with Arts. 100 (1), 102 (10) and 22bis (4) LIR). The application of Art. 22bis constitutes an option and, therefore, taxpayers could opt for accounting for SE shares at a value higher than book value.

CASE 7

Formation of a Subsidiary–SE by contribution of cash

(Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A, and B are existing companies
- SE is a new company
- A and B are companies or firms within the meaning of Art. 48 par. 2 of the Treaty establishing the European Community or other legal bodies governed by public or private law (Art. 2 par. 3 Reg. 2157/2001)
- State A, State B, and State S are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B:
    - formed under law of Member State B
    - registered office in Member State B
    - head office in Member State B
- SE:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
    - will be covered by the EC Merger Directive

Transactions

- *SE:*
    - will take the form of an SE
    - will be regarded a public limited-liability company governed by the law of Member State A
- A and B:
    - *form a subsidiary SE*

Questions

It is generally assumed that an SE will for domestic corporate income tax purposes be treated as a corporate entity. However, there may be differences between the treatment of an SE and other legal entities, if certain possibilities, e.g. participation exemption or fiscal unity etc. are only allowed between certain types of legal entities and the SE is not yet included. If relevant, please mention some of these situations in your answers to the following questions.

1) Assume Member State A is your country

   <u>Tax effects for A in Member State A</u>

   Will there be any tax effect for A in Member State A as a consequence of the formation of the subsidiary SE in Member State A?

   The participation exemption for dividends and capital gains apply to resident fully taxable capital companies. The definition of capital companies currently only includes the SA, Sàrl and SCA, but not yet the SE. Similarly, only resident capital companies (and permanent establishments of certain companies) may form a fiscal unity. However, it is not yet entirely clear whether the SE would indeed constitute a separate company form under Luxembourg company law or whether it could be considered as a particular type of SA.

2) Assume Member State B is your country

   <u>Tax effects for B in Member State B</u>

   Will there be any tax effect for B in Member State B as a consequence of the formation of the subsidiary SE in Member State A?

   Currently, for the participation exemption for dividends and capital gains to apply it is required that the subsidiary is:
   - *either resident in the EU and has a form that is listed in the Annex to the EC-Parent-Subsidiary Directive; or*

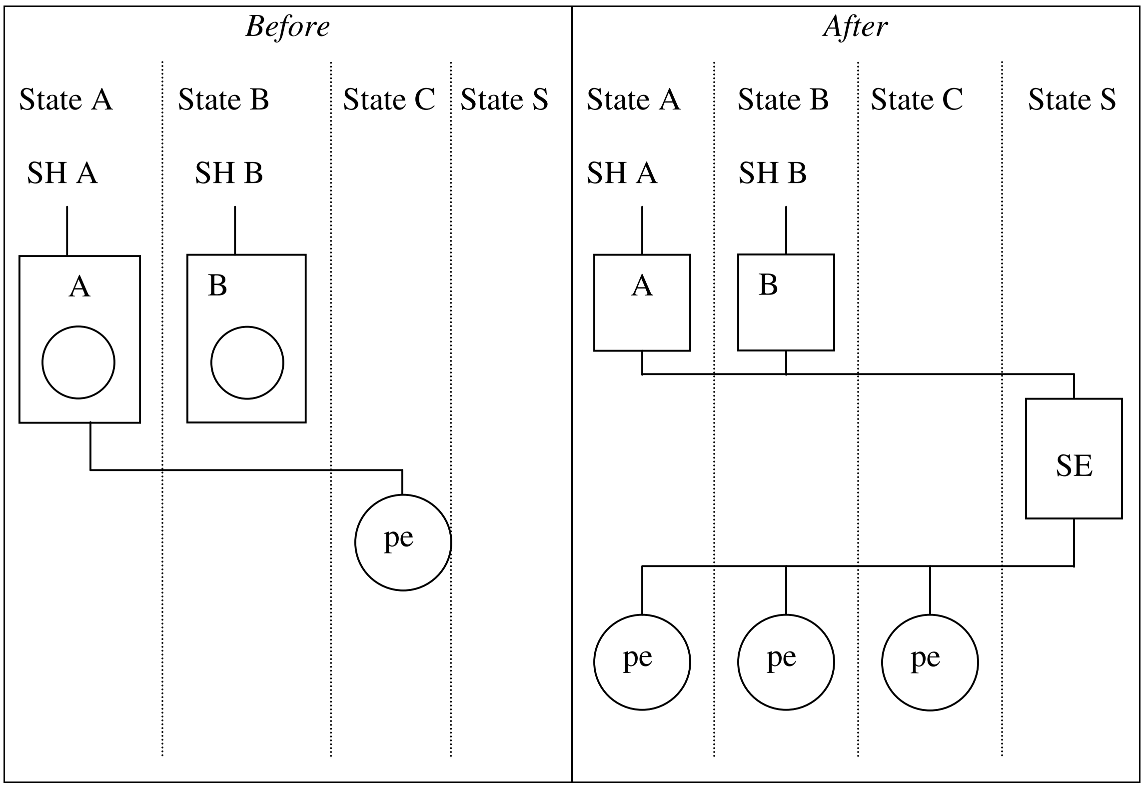
- *a non-resident capital company fully subject to a tax corresponding to Luxembourg corporate income tax.*

Although dividends from and capital gains realized on the participation in SE should ultimately benefit from the exemption as they will fall under the second indent, the conditions that need to be fulfilled are nevertheless harsher than those required for subsidiaries listed in the EC-Parent-Subsidiary Directive. For instance, subsidiaries listed in the EC-Parent-Subsidiary Directive do not have to prove that they are subject to a tax that is comparable to Luxembourg corporate income tax. However, it might also be argued that the SE only constitutes a particular type of SA and should, therefore, be included in the notion of SA (or equivalent) as listed in the Directive.

CASE 8

Formation of a Subsidiary–SE by transfer of assets

(Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A, and B are existing companies
- SE is a new company
- A and B are public or private limited-liability companies (see Annex II)
- A and B are companies or firms within the meaning of Art. 48 par. 2 of the Treaty establishing the European Community or other legal bodies governed by public or private law
- A has a permanent establishment in State C
- State A, State B, State C and State S are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A

- B:
  - formed under law of Member State B
  - registered office in Member State B
  - head office in Member State B
- SE:
  - formed under law of Member State S
  - registered office in Member State S
  - head office in Member State S
  - will be covered by the EC Merger Directive

Transactions

- *SE:*
  - will take the form of an SE
  - will be regarded a public limited-liability company governed by the law of Member State S
- A (and B):
  - *form a subsidiary by way of contributing their branches in Member State A (and B respectively) to SE in exchange for the issue of shares by SE to A (and B respectively)*
- A:
  - will transfer its permanent establishment in Member State C to SE in exchange for the issue of shares by SE to A

Questions

1) Assume Member State A is your country

   <u>Tax effects for A and SE in Member State A</u>

   a) Will the transfer of assets give rise to any taxation of capital gains (= real value of the assets and liabilities minus their value for tax purposes) or is there roll-over relief?

      Roll-over relief is available under Art. 59bis (1) 1 LIR, which stipulates that contributions of an enterprise or an autonomous branch of an enterprise to a Luxembourg permanent establishment of a company resident in the EU (i.e. companies listed in the EC Merger Directive) qualify for the roll-over relief available under Art. 59 (3) and (3a) LIR. As a consequence, the new permanent establishment of SE in A continues the assets and liabilities at the same book values as were contained in the books of A prior to the contribution. The application of Art. 59bis is an option.

   b) May provisions or reserves which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A be taken over with the same roll-over relief by the permanent establishment of SE in Member State A?

If the taxpayer does not opt for the application of Art. 59bis (see a) above), untaxed reserves may not be continued by the permanent establishment of SE in Member State A. However, if the taxpayer opts for the transfer to be carried out at book values, it is generally accepted that provisions and reserves can be continued. Nevertheless, there is no explicit provision in the law.

c) Are there any provisions in the legislation of Member State A for the valuation for tax purposes of the shares in SE acquired by A?

Pursuant to Arts. 59 (3) and 59bis (1) 1 LIR, if the taxpayer opts for the tax-neutral regime, the shares in SE are to be valued at the sum of the book value of the assets and liabilities transferred.

d) Will SE's permanent establishment in Member State A be allowed to take over the losses of A which have not been exhausted for tax purposes? (If SE would be a company resident in Member State A, would it then be allowed to take over these losses?)

No. Article 114 (3) LIR requires the identity of the person that incurred the losses with the person offsetting them against profits. The same rule applies for purely domestic situations.

e) Will Member State A renounce any right to tax the permanent establishment in Member State C?

The contribution of a permanent establishment of a Luxembourg company situated in another EU Member State to a company resident in an EU Member State that is covered by the EC-Merger Directive qualifies for roll-over relief of capital gains (Art. 59bis (1) 2 LIR). As a consequence, the shares attributed to A as a consequence of the contribution of the permanent establishment in Member State C are valued at the book value of the assets and liabilities pertaining to the permanent establishment in Member State C.

f) Will Member State A reinstate in the taxable profits of A such losses of the permanent establishment in Member State C as have been set off against the taxable profits of A in Member State A and which have not be recovered (see art. 10 par. 2 of the EC Merger Directive)?

No.

g) Or will Member State A tax profits or capital gains of the permanent establishment resulting from the transfer of assets?

Only in the case where Luxembourg does not have a tax treaty with Member State C.

h) If question g) is answered affirmatively, will Member State A give relief for the notional tax charged on these profits or capital gains by Member State C, assuming that Member State C would have levied tax (see art 10 par. 2 of the EC Merger Directive)?

In the case where Luxembourg did not have a tax treaty with Member State C, the roll-over relief described in e) above would not be applicable. However, Luxembourg would grant a fictitious tax credit for the tax that would have been paid in the other Member State in the absence of provisions implementing the EC-Merger Directive. In that case, no such credit would be granted to the extent of tax loss carry forwards utilized to reduce the amount of tax payable in Luxembourg (Art. 59bis (4) LIR).

2) Assume Member State S is your country

<u>Tax effects for SE in Member State S</u>

a) What is the value for tax purposes that SE has to attribute to the assets and liabilities of the permanent establishments in Member States A, B and C that is transferred to SE as part of the merger?

Pursuant to Art. 59bis (5) LIR , SE may value the assets and liabilities contributed by A and B at the book value in the books of A and B prior to the transfer. SE may, however, also opt to value them at a value between the book value and their going concern value. Furthermore, SE may choose not to apply Art. 59bis LIR, in which case the valuation would have to be made at acquisition cost.

<u>Tax effects for A as shareholder of SE in Member State S</u>

b) Is there any provision in the tax legislation of Member State S that affects A as shareholder of SE?

No particular provisions. A holds shares in SE as from the moment of the contribution and will be subject to tax on capital gains realized within six months from that date. After this date, capital gains will not be subject to tax.

3) Assume Member State C is your country

<u>Tax effects for A and SE in Member State C in respect of its permanent establishment in Member State C</u>

a) Will the transfer of assets give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes) or is there roll-over relief?

(Optional) roll-over relief is available under Art. 172 (4) LIR.

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State C, be taken over with the same roll-over relief by the permanent establishment of SE in Member State C?

There are no explicit rules as to the transfer of provisions and reserves. However, in practice, it is generally accepted that provisions and reserves may be continued.

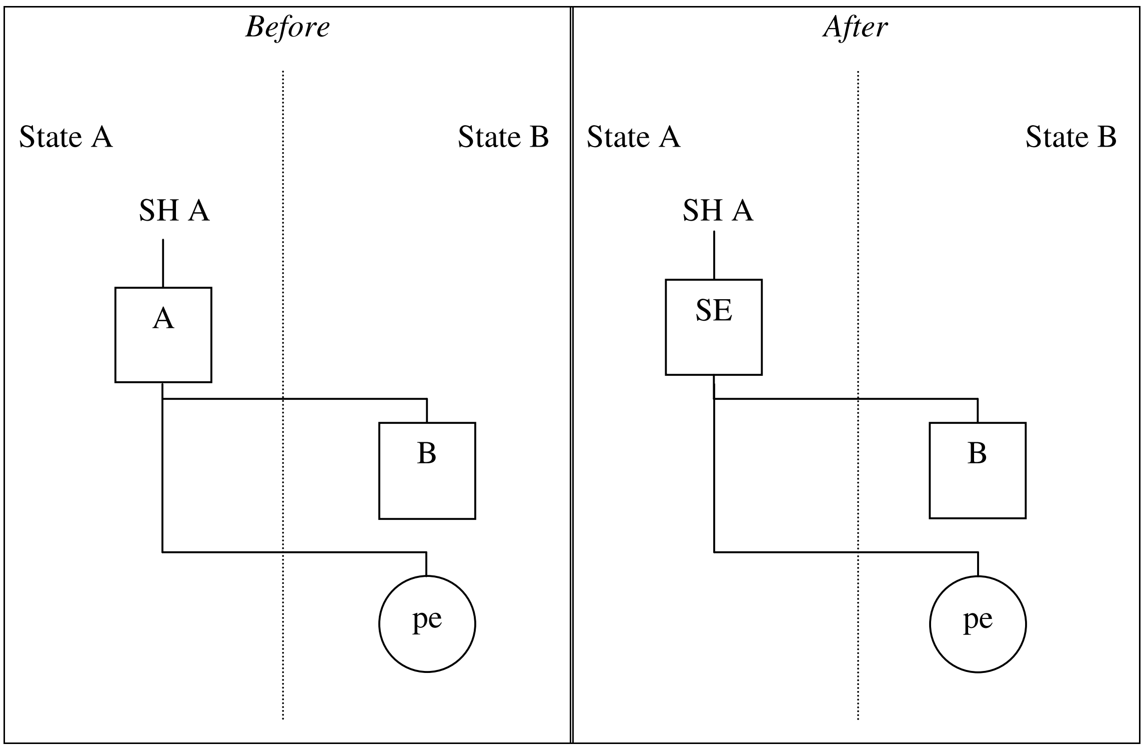
c) Will SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes? If SE would be a company resident in Member State C, would it then be allowed to take over these losses?

No. Art. 114 (2) 3 LIR requires the identity of persons.

CASE 9

Transformation of public limited-liability company into an SE

(Art. 2 par. 4 jo. Art. 37 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- pe is an existing permanent establishment
- A and B public limited-liability companies (see Annex I of Reg. 2157/2001)
- State A and State B are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B:
    - formed under law of Member State B
    - registered office in Member State B
    - head office in Member State B

Transactions

- A will be transformed into an SE, governed by the law of Member State A (Pursuant to Art. 37 par. 2 Reg., the transformation shall not result in the winding up of A or in the creation of a new legal person. However, the Regulation itself does not give guidance with regard to taxation.)

Questions

1) Assume Member State A is your country

<u>Tax effects for A in Member State A</u>

a) Will the transformation of A into an SE give rise to any taxation of capital gains (= real value of assets and liabilities transferred minus their value for tax purposes) or is there roll-over relief for the business carried on in Member State A, or in Member State B through a permanent establishment?

It is not yet entirely clear under Luxembourg company law whether a change of A into SE will indeed be considered to constitute a breach of the legal personality. If this is not the case, the change may not be considered as a transformation and may, therefore, not be considered as a taxable event. However, even if the change of form is considered as a transformation, it will not have any tax consequences, as the conditions for a tax-neutral transfer of assets and liabilities as required by Art. 170 (2) LIR (see 1) a) (Case 1) above) are fulfilled. For purposes of the below analysis, it is assumed that the change of A into SE constitutes a breach of legal personality and is, thus, considered as a transformation.

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A, be carried over to SE in Member State A?

Reserves are transferred to A SE on basis of Art. 170 (4) LIR. The law does not explicitly address the issue of the transfer of provisions. Nevertheless, provisions are considered to form part of the "actif social" of A and may, therefore, be taken over by A SE.

c) Will SE be allowed to take over the losses of A that have not been exhausted for tax purposes?

Although the Luxembourg corporate income tax law generally requires the identity of the person that incurred the losses with the person offsetting them against profits, there is an exception provided for situations of transformations: According to Art. 172bis (1) LIR, losses are transferred to A SE and may be utilized by A SE under the same conditions that applied to A.

Tax effects for SH A in Member State A

d) Will there be any effect for SH A because of the transformation of its subsidiary company A into an SE?

No, as the roll-over of Art. 22bis LIR (in connection with Art. 102 (10) LIR for individual shareholders holding the A shares in their private property) will apply (see 1) g) (Case 1) for the conditions).

e) Will the answer to question d) be different in the following situations:
i) SH is a corporate shareholder?
ii) SH is an individual shareholder not owning a substantial interest?
iii) SH is an individual shareholder owning a substantial interest?
iv) SH is an individual entrepreneur?

No difference in result. Slight difference in analysis (see 1) i) (Case 1) above).

2) Assume Member State B is your country

Tax effects for A and SE in Member State B

a) Will A be subject to any taxation of capital gains (=real value of assets and liabilities minus their value for tax purposes) or is there roll-over relief?

A as a non-resident would only be subject to tax on possible capital gains on B if the transformation of A occurred less than 6 months after the acquisition of B. However, even if this is the case, roll-over will be available under Arts. 100 (2) in connection with Arts. 102 (10) and 22bis LIR.

b) If not, what is the value for tax purposes that SE has to attribute to the assets and liabilities of the permanent establishment in Member State B?

Book value (Art. 172 (5) LIR).

c) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State B, be taken over with the same roll-over relief by the permanent establishment of SE in Member State B?

Yes (Art. 172 (5) LIR).

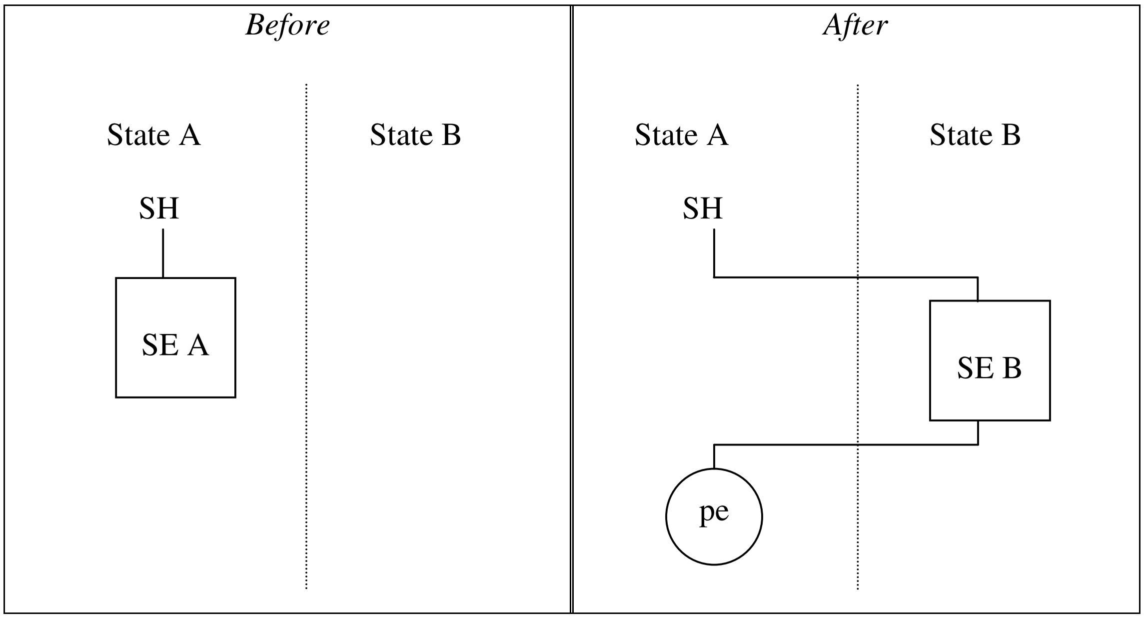
d) Will SE's permanent establishment in Member State B be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes?

Article 172bis (2) LIR explicitly provides that the transfer of losses (as an exception to the general rule) also applies to cases where a domestic permanent establishment is transferred by a non-resident capital company listed in the EC-Merger Directive to another non-resident company that is also listed in the EC-Merger Directive within the framework of a transformation.

CASE 10

Transfer of registered office of an SE

(Art. 8 par. 1 jo. Art. 37 Reg. 2157/2001)



Facts and assumptions

- SE is an existing SE
- State A and State B are EU Member States
- SE A:
    - formed under the law of Member State A
    - registered office in Member State A
    - head office in Member State A
- SE B:
    - statutes are amended to conform to the law of Member State B
    - registered office in Member State B
    - head office in Member State B

Transactions

- registered office and head office of SE are transferred to Member State B (pursuant to Art. 8 Reg. 2157/2001 such a transfer shall not result in the winding up of SE or in the creation of a new legal person)

Questions

1) Assume Member State A is your country

<u>Tax effects of the transfer for SE</u>

a) Does the transfer entail a winding up of SE for tax purposes?

In general, the transfer by a resident company of its statutory seat and its principal place of management abroad is treated like the liquidation of the company for tax purposes. However, provided that a permanent establishment is maintained in Luxembourg to which the net assets (i.e. the assets and liabilities) of A remain attached, the transfer may be carried out at book values (Arts. 172 (1) and (2) LIR). As this is the case in the present scenario, there would be no tax liability arising upon the transfer.

b) What are the tax consequences in case of a winding up of SE?

All assets and liabilities would be considered realized at their market value. The resulting profit would be subject to tax at the standard rate of 30.38%.

c) Does it make a difference whether or not a permanent establishments of SE B remains in Member State A?

Yes. As described in 1) a) above, the exception from the treatment of the transfer of seat and principal establishment as liquidation only applies in case the assets and liabilities of the company remain attached to a Luxembourg permanent establishment..

d) If after the transfer of the registered office, SE B will have a permanent establishment in Member State A, can SE B take over the provisions and reserves which are partly or wholly exempt from tax with the same roll-over relief?

There are no explicit rules. See 3) b) (Case 1).

e) If after the transfer of the registered office, SE B will have a permanent establishment in Member State A, can SE B's permanent establishment in Member State A take over the losses of SE A that have not been exhausted for tax purposes?

This should be the case as legally there has been no change in the identity of the taxpayer.

<u>Tax effects of the transfer for SH</u>

f) What are the tax effects for SH in case the transfer results in a winding up of SE for tax purposes?

SE would be taxed on its liquidation profits (i.e. roughly the difference between the fair market value of the assets/liabilities and their book value). The resulting remaining profit will be considered distributed to the shareholders. The tax treatment of liquidation bonuses depends on the residence and identity of the shareholder (see g) below).

g) Is the answer to 1f) different if:

i) SH is a corporate shareholder?

If SH is a resident capital company that is fully subject to tax, a liquidation bonus derived from A would be exempt from tax provided that the conditions for the participation exemption for dividends are met (Art. 166 (4) LIR). The conditions are as follows (Art. 166 (2) LIR):

- *A is resident capital; and*
- *SH has held a direct participation of at least 10% in the capital of A or of acquisition cost of at least EUR 1.2m for at least 12 months.*

ii) SH is an individual shareholder?

For individuals, liquidation bonuses are assimilated to capital gains. There are differences between resident and non-resident shareholders and depending on the size of the shareholding.

iii) SH is an individual not owning a substantial interest?

For resident shareholders not holding a substantial interest, a liquidation bonus is only subject to tax if realized within 6 months from the acquisition. For non-resident shareholders, such liquidation bonus is not taxable.

iv) SH is an individual owning a substantial interest?

For resident shareholders, a liquidation bonus is subject to tax even if realized after 6 months from the acquisition. The capital gain is determined with reference to an indexed acquisition price. For non-resident shareholders (that have not been resident in Luxembourg in the past), such liquidation bonus is only taxable if realized within 6 months from the acquisition.

v) SH is an individual entrepreneur?

For a resident shareholder that holds the shares in his business property, a liquidation bonus is included in business income and taxed accordingly. For a non-resident individual entrepreneur, the same rules apply as outlined in iii) and iv) above, unless a permanent establishment exists in Luxembourg.

h) Are there any effects for tax purposes if the transfer of the registered office is not considered as a winding up for tax purposes?

   Provided there is a continuation of the same legal person, there should be no tax consequences at the level of the shareholders.

i) Is the answer to 1h) different if:
   i) SH is a corporate shareholder?
   ii) SH is an individual shareholder?
   iii) SH is an individual not owning a substantial interest?
   iv) SH is an individual owning a substantial interest?
   v) SH is an individual entrepreneur?

   No.

2) Assume Member State B is your country

   Tax effects of the transfer for SE

   a) If SE is considered to be a new company, how should the assets and liabilities of SE be valued?

   Upon the migration, an opening balance sheet will have to be drawn up. In this balance sheet, assets and liabilities are valued at fair market value.

   Tax effects of the transfer for SH

   b) Are there any tax effects for SH in case the transfer results in a formation of a new SE in your country? For example, with regard to the valuation of the shares in SEB?

   SH would be considered to hold shares in a Luxembourg-resident company as from the moment of SE becoming a Luxembourg-resident company.