

Survey on the Societas Europaea
September 2003

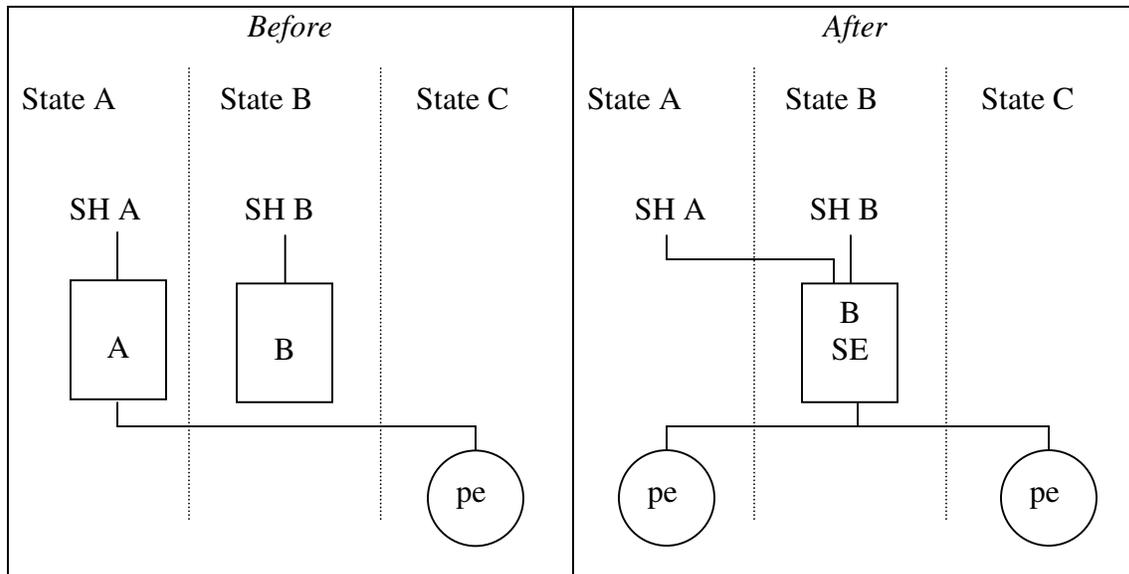
Annex 13 - Spain

SPAIN

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

Tax effects for A in Member State A

- 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?

Rollover relief may apply (art. 98.1 a) LIS)

- 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?

N/A. (A permanent establishment under Spanish law does not have reserves or provisions, but just net worth.)

- c) Will B'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 would be a company resident in Member State A, would it then be allowed to take over these losses?

Theoretically, the PE would be entitled to exhaust the remaining tax losses. However, companies are subject to Corporation tax (IS) while PEs are subject to the Non-Residents Income Tax (IRNR), thus there are reasonable doubts about if the tax authorities will allow PEs to deduct losses from another tax (even if both are taxes on profits and based on the same rules).

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

The general rule is rollover relief if the PE is in a EU Member State and the acquiring entity (i) has a legal form mentioned in the annex to the EU Merger Directive, and (ii) is subject to and not exempt from any tax mentioned in its art. 3. (art. 98.1d) LIS).

Since the acquiring entity B is a public limited liability company at the time of acquisition, Spain would waive its taxing rights on the PE.

- 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?

N/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?

Yes. The general rule for entities covered by the Annex to the Directive is the carry-back over a period of 10-years. (art. 106 LIS)

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?

No. Deferral applies (art. 102.1 LIS)

- 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?

No, if the shareholder is resident in another EU Member State. Yes, if otherwise. (art. 102.1 LIS)

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

i) A corporate shareholder?

No

ii) An individual shareholder not owning a substantial interest?

No

iii) An individual shareholder owning a substantial interest?

No

iv) An individual entrepreneur?

No

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?

No, unless it results in B SE being taxed under a special regime or not taxed at all (art. 24 LIS). See also my comments to case 9.

- 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?

The value agreed by the parties, limited up to the market value (Art. 99.2LIS).

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?

No. See above.

- d) Will the answer to question 2c) above differ if SH B is:
- i) A corporate shareholder? *No*
 - ii) An individual shareholder not owning a substantial interest? *No*
 - iii) An individual shareholder owning a substantial interest? *No*
 - iv) An individual entrepreneur? *No*

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 A of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes) or is there roll-over relief?

Rollover relief will apply (art. 98 1 c LIS).

- 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?

N/A. (A permanent establishment under Spanish law does not have reserves or provisions, but just net worth.)

- 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?

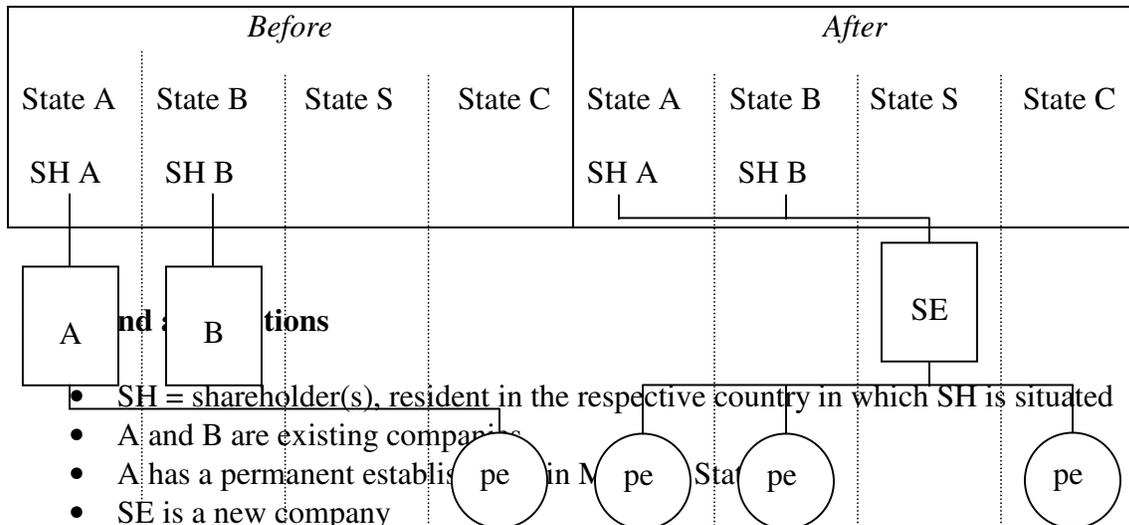
Yes. The PE legal personality will have not changed.

- 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.

In this case, the problem mentioned above (i.e. different taxes) would remain unsolved.

CASE 2

Merger by formation of a new company (Art. 2 par. 1 jo Art 17. par 2(b) Reg. 2157/2001)



- 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 A
- 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
 - 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
 - will be wound up without going into liquidation
- B:
 - transfers all assets and liabilities to SE

- 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
- will be wound up without going into liquidation
- SE:
 - will be a newly formed SE
 - 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

Tax effects for A in Member State A

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?

Rollover relief may apply (art. 98.1 a) LIS)

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?

N/A. (A permanent establishment under Spanish law does not have reserves or provisions, but just net worth.)

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?

Theoretically, the PE would be entitled to exhaust the remaining tax losses. However, companies are subject to Corporation tax (IS) while PEs are subject to Non-Residents Income Tax (IRNR), thus there are reasonable doubts about if the tax authorities will allow PEs to deduct losses from another tax (even if both are taxes on profits and are based on the same rules).

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

Yes, see Case 1; Id.

- 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?

Yes, see Case 1; If.

- 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?

N/A

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?

No. Deferral applies (art. 102.1 LIS)

- 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?

No, if: the shareholder is resident in another EU Member State. Yes, if otherwise. (art. 102.1 LIS).

- i) Will the answers to the questions 1g) and 1h) differ if SH A is:
- i) A corporate shareholder? *No*
 - ii) An individual shareholder not owning a substantial interest? *No*
 - iii) An individual shareholder owning a substantial interest? *No*
 - iv) An individual entrepreneur? *No*

- 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?

The value agreed by the parties, limited up to the market value (art. 99.2 LIS)

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?

No

- 3) Assume Member State C is your country

Tax effects for A and SE in Member State C in respect of its permanent establishment in Member State C

- 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?

No. Rollover relief will apply (art. 98 I c) LIS)

- 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?

N/A. (A permanent establishment under Spanish law does not have reserves or provisions, but just net worth.)

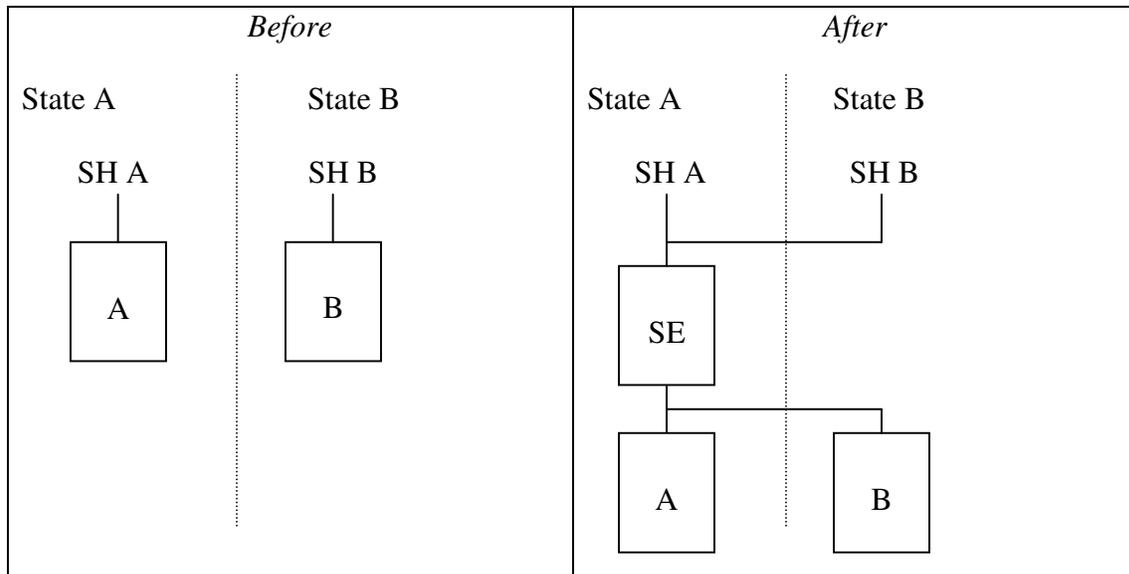
- c) Will SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes? If SE would be a company resident in Member State C, would it then be allowed to take over these losses?

Yes. The PE legal personality has not changed. If SE was a C resident company, we would face the problem mentioned above: different taxes.

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

Tax effects for SE in Member State A

- 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?

In the case of A, they must be valued at the book value of the exchanging shareholder or its market value, whichever is lower. However, where the shareholders are non-residents, the shares must be valued at the value agreed by the parties with the limit of the market value. (art. 101.2 LIS)

In the case of B, they will be valued at the value agreed by the parties, with the maximum limit of the market value (art. 101.2 in fine LIS).

- 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?

The shares must be valued at the same value of the exchanged shares, plus or less any money additionally paid (art. 101.3 LIS)

Tax effects for SH A in Member State A

- 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?

Rollover relief will apply since the acquiring entity will be resident in Spain (art. 101.1 LIS)

- d) Will the answers to the question 1c) differ if SH A is:

- i) A corporate shareholder? *No*
 - ii) An individual shareholder not owning a substantial interest? *No*
 - iii) An individual shareholder owning a substantial interest? *No*
 - iv) An individual entrepreneur? *No*
- 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?

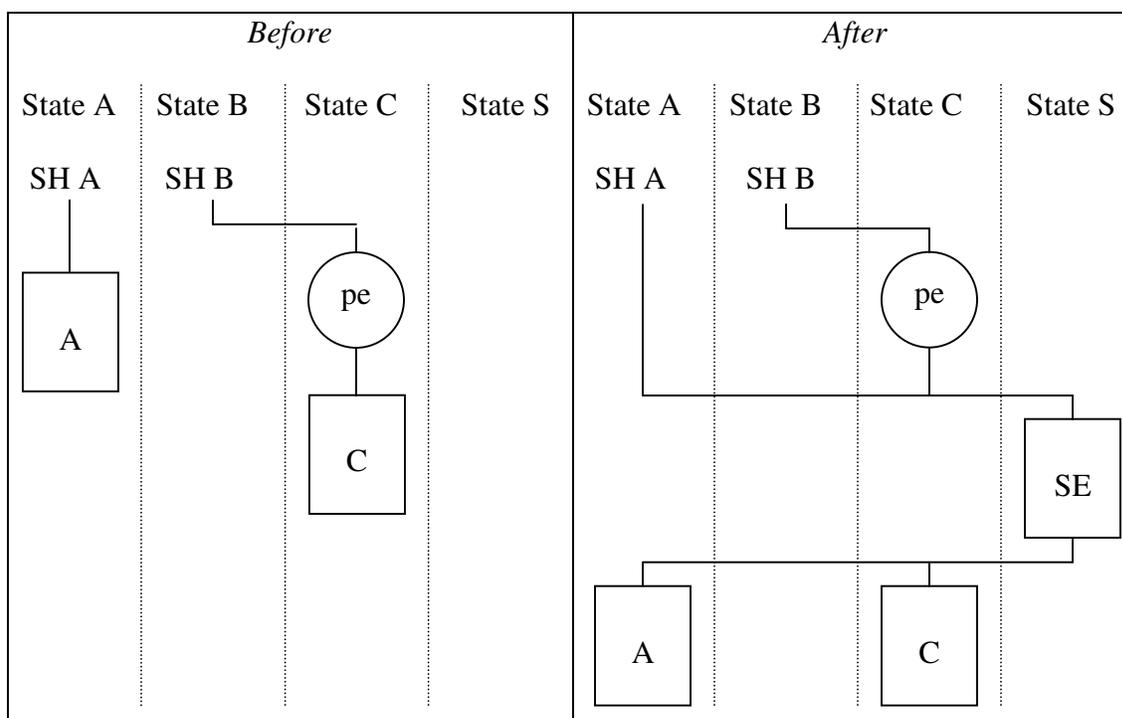
Roll-over relief (art. 101.1 LIS).

- b) Will the answers to the question 1a) differ if SH B is:
- i) A corporate shareholder?
No
 - ii) An individual shareholder not owning a substantial interest?
No
 - iii) An individual shareholder owning a substantial interest?
No
 - iv) An individual entrepreneur?
No

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 (art. 101.I LIS).

- 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? *No*
 - ii) SH A being an individual shareholder owning a substantial interest?
No
 - iii) SH A being an individual entrepreneur?
No
 - iv) SH A being a corporate shareholder?
No

- 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?*

Roll-over relief (art. 101.I LIS).

- b) Will the answer to the above question be different in the case of:
- i) SH B being an individual entrepreneur?
No
 - ii) SH B being a corporate shareholder?
No

3) Assume Member State C is your country

Tax effects for SH B in Member State C

- 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 (art. 101.1 LIS).

- b) Will the answer to the above question be different in the case of:
- i) SH B being an individual entrepreneur?
No
 - ii) SH B being a corporate shareholder?
No

4) 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 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?

Where the shareholders are non-residents, as it is the case, the shares must be valued at the value agreed by the parties with the limit of the market value. (art. 101.2 LIS in fine)

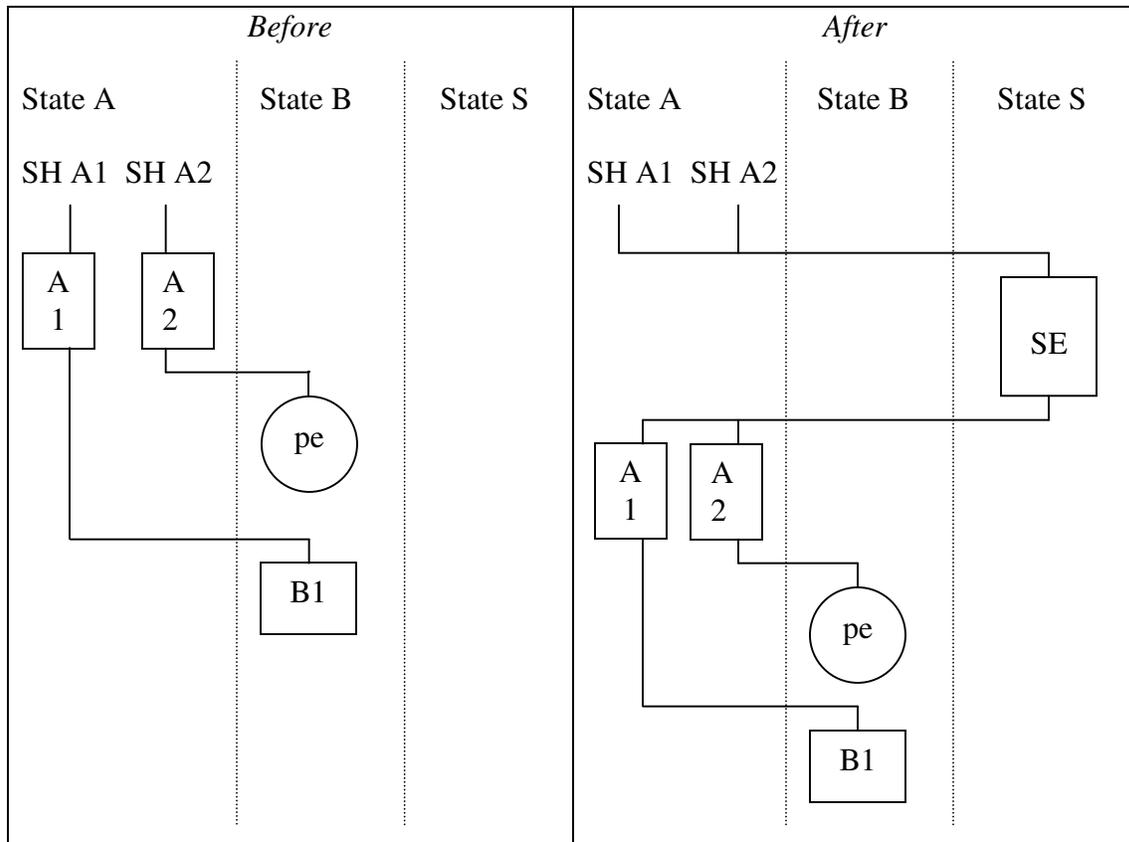
- b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to SH A and SH B? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

The shares have to be valued at the book value of the shares exchanged by the shareholder plus or less any money additionally paid (art. 101.3. LIS).

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 B1 are 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

Tax effects for SH A2 in Member State A

- 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 (art. 101.ILIS).

- 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? *No*
 - ii) SH A2 being an individual shareholder owning a substantial interest?
No
 - iii) SH A2 being an individual entrepreneur?
No
 - iv) SH A2 being a corporate shareholder?
No

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 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?

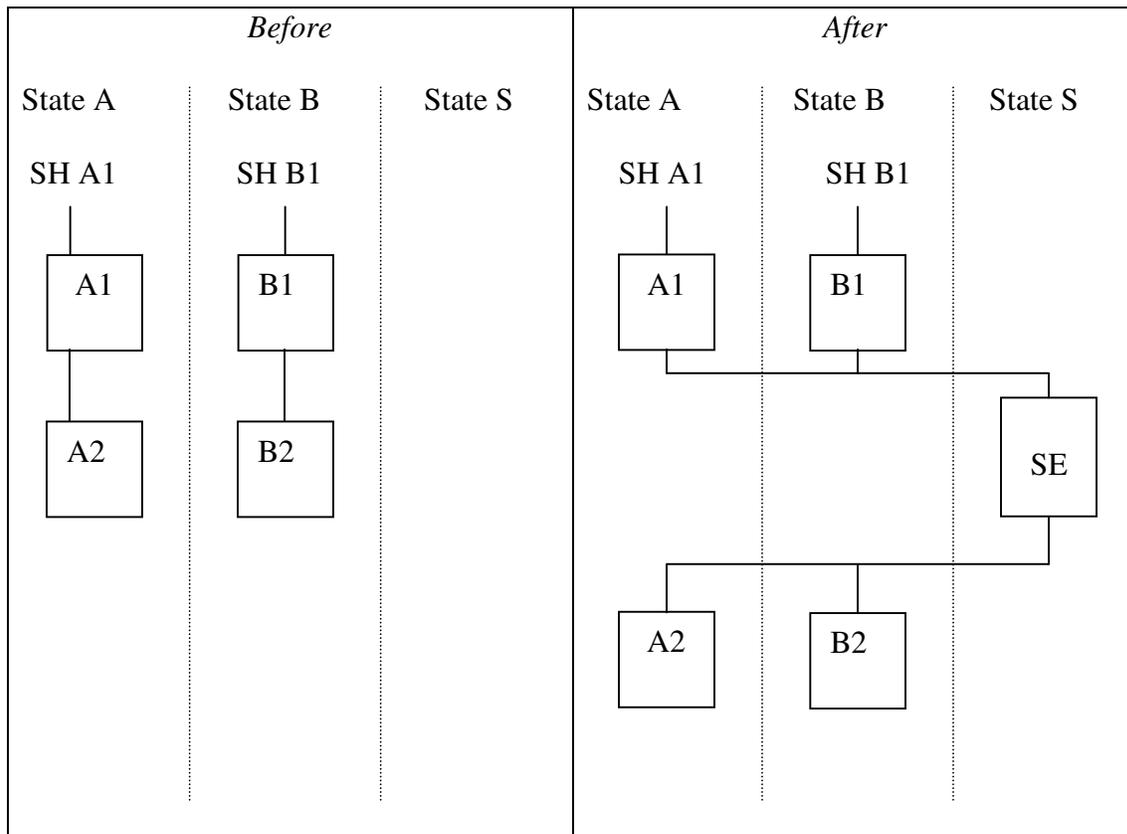
The shares have to be valued at the book value of the exchanging shareholder or its market value, whichever is lower. However, where the shareholders are non-residents, the shares must be valued at the value agreed by the parties with the limit of the market value. (art. 101.2 in fine LIS)

- 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 shares have to be valued at the same value of the shares exchanged by the shareholder plus or less any money additionally paid (art. 101.3. LIS).

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 (art. 101.1 LIS).

- 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?

The shares must be valued at the lowest of: i) the book value of the exchanging shareholder, or ii) its market value.

However, where the shareholders are non-residents, the shares must be valued at the value agreed by the parties with the limit of the market value. (art. 101.2 in fine LIS)

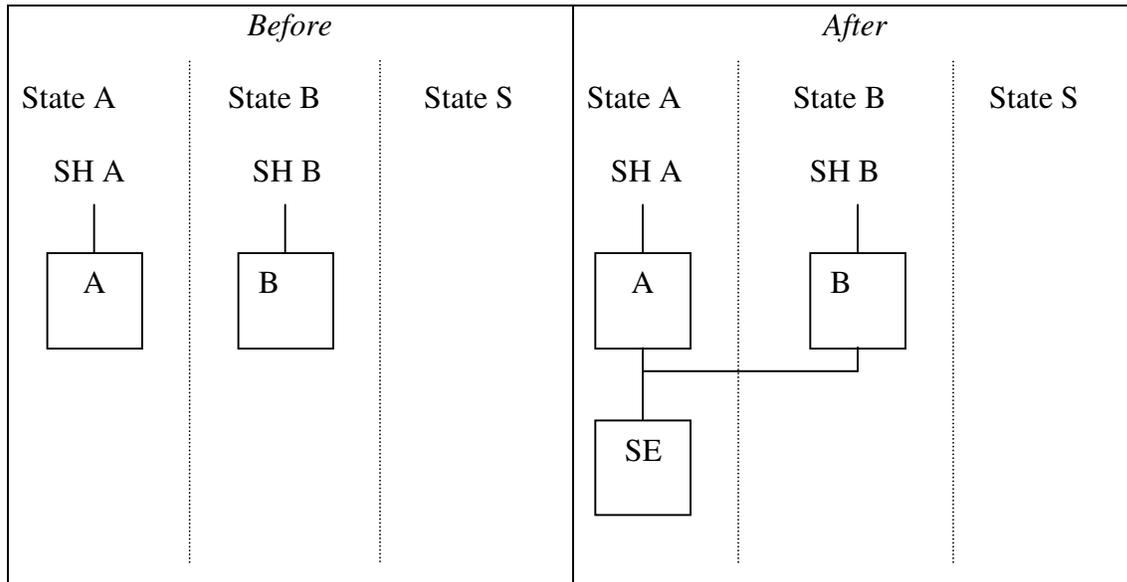
- b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to A1 and B1? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

The shares have to be valued at the book value of the shares exchanged plus any money additionally paid (art. 101.3 LIS).

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

Tax effects for A in Member State A

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?

There will be no negative effects with respect to the domestic participation exemption. However, A will not be able to apply for tax consolidation with the SE subsidiary, since the current rules do not include this legal form among the qualifying companies. No other drawbacks.

- 2) Assume Member State B is your country

Tax effects for B in Member State B

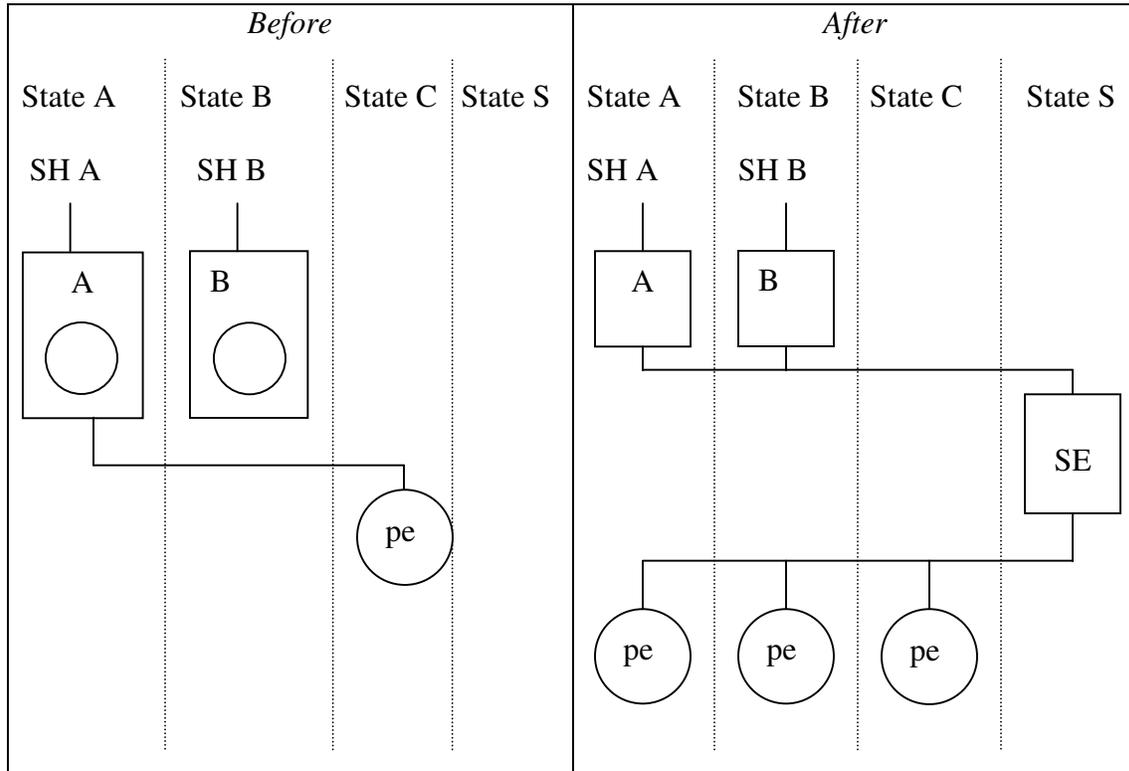
Will there be any tax effect for B in Member State B as a consequence of the formation of the subsidiary SE in Member State A?

No. The international participation exemption will apply (the law does not specifies any kind of legal forms), provided that all other conditions are met. Tax consolidation is not applicable to foreign subsidiaries of any kind. No other drawbacks.

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

The answers are given assuming that the reference to transfers of “branches” means that we are focusing on transfers of a BRANCH of activity (art. 97.3 LIS), and not on transfers of other assets (art. 108 LIS).

Questions

1) Assume Member State A is your country

Tax effects for A and SE in Member State A

- 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?

Rollover relief may apply, since the branch will remain in Spain as a PE (art. 98.1 a) LIS).

- 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?

N/A. (A permanent establishment under Spanish law does not have reserves or provisions, but just net worth.)

- 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?

The shares have to be valued at the book value of the branch of activity exchanged by the shareholder increased by any capital gain and reduced by any capital loss which the transferring entity has chosen to include in its taxable income (art. 100 LIS).

- 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?)

Theoretically, yes, but the problem already mentioned would arise (different taxes).

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

Yes, see Case 1; Id.

- 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)?

Yes, see Case 1; If.

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

N/A

- 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)?

N/A

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 of the permanent establishments in Member States A, B and C that is transferred to SE as part of the merger?

The value agreed by the parties, with the maximum limit of the market value (art. 99.2 LIS)

Tax effects for A as shareholder of SE in Member State S

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

The shares received after the transfer of assets are to be valued at the book value of the assets exchanged, as modified by any related gains or losses included in the taxable base. (art. 100 LIS)

3) Assume Member State C is your country

Tax effects for A and SE in Member State C in respect of its permanent establishment in Member State C

- 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?

Rollover relief will apply (art. 98.1 c) LIS).

- 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?

N/A. (A permanent establishment under Spanish law does not have reserves or provisions, but just net worth.)

- 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

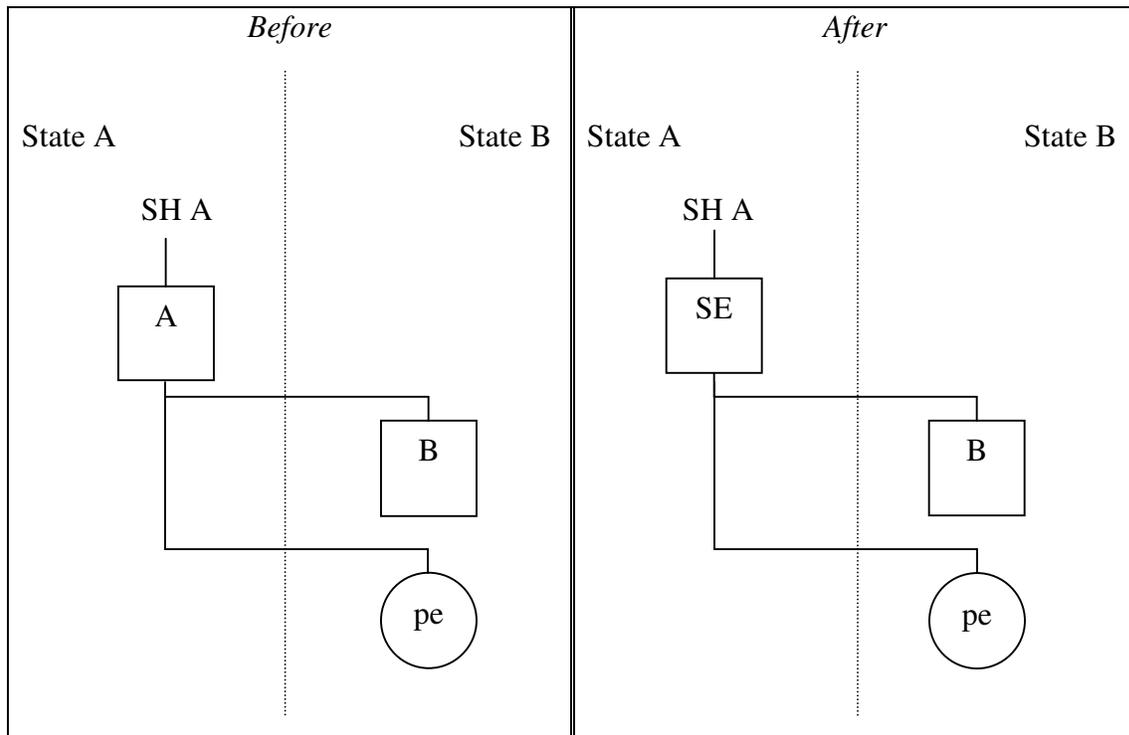
purposes? If SE would be a company resident in Member State C, would it then be allowed to take over these losses?

If the PE was liquidated and then set up again, as a consequence of these operations, then the losses would be lost. If the PE has not gone through liquidation, no problem would arise.

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

Tax effects for A in Member State A

- 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?

Transformations of legal forms do not entail winding ups.

- 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?

Yes. The entity is the same one. Only the legal form changed.

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

Yes. The entity is the same one. Only the legal form changed.

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

- e) Will the answer to question d) be different in the following situations:

- i) SH is a corporate shareholder?

No

- ii) SH is an individual shareholder not owning a substantial interest?

No

- iii) SH is an individual shareholder owning a substantial interest?

No

- iv) SH is an individual entrepreneur?
No

2) Assume Member State B is your country

Tax effects for the shareholder of B in Member State B

- a) Will there be any effect for the shareholder of B because of the transformation of its parent company A into an SE?

No

Tax effects for A and SE in Member State B

- b) 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?

Transformation of the legal form of the parent company does not affect its Spanish subsidiaries.

- c) 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?

The same one it had on A books

- d) 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?

N/A. (A permanent establishment under Spanish law does not have reserves or provisions, but just net worth.)

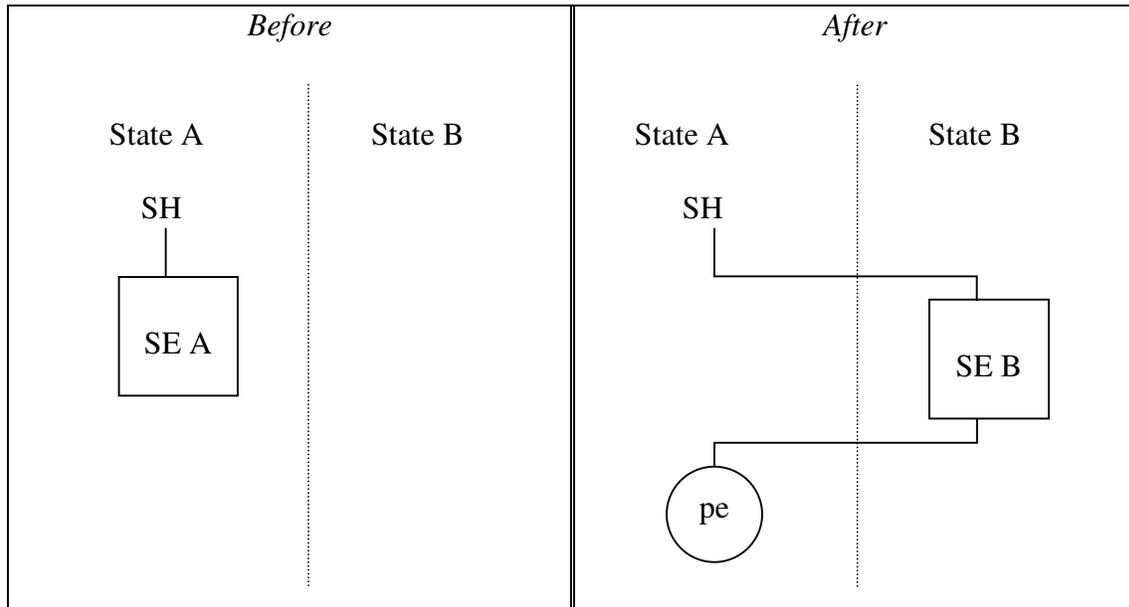
- e) Will SE's permanent establishment in Member State B be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes?

Yes

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

Tax effects of the transfer for SE

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

Yes (art. 17.1 a) LIS)

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

SE will be taxed on the difference between the book and market value of its assets transferred abroad (art. 17.1 a) LIS)

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

Yes. If they remain affected to a Spanish-situs PE, no taxation arises (art. 17.1 a) LIS)

- 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?

The law does not rule on this.

- 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?

Theoretically yes, but the "different taxes" problem will arise.

Tax effects of the transfer for SH

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

SH will be taxed on the difference between the market value and the book value of the assets. (Art. 15.6 LIS)

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

- i) SH is a corporate shareholder?

No

- ii) SH is an individual shareholder?

No

- iii) SH is an individual not owning a substantial interest?
No
 - iv) SH is an individual owning a substantial interest?
No
 - v) SH is an individual entrepreneur?
No
- 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?

N/A

Is the answer to 1h) different if: *N/A*

- 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?
- 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?

Not clear.

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?

Not clear.