

# BELGIUM

## **COUNCIL REGULATION OF 8 OCTOBER 2001 ON THE STATUTE FOR A EUROPEAN COMPANY (SE)**

### **Introduction**

#### **Scope of the report**

The report reflects the status of Belgian law on 1 January 2003, assuming that the provisions of “the Council Regulation of 8 October 2001 on the Statute for a European Company (SE)” are applicable (hereafter “the Regulation”)<sup>1</sup>. On the basis of this Regulation and under certain conditions, an SE can be established<sup>2</sup> via:

- (i) a merger involving two or more companies;
- (ii) the formation of a holding company;
- (iii) the formation of a subsidiary; and
- (iv) the conversion of a company.

As the Regulation is adopted especially to regulate cross-border reorganisations, it also covers certain consequences of the inbound or outbound transfer of the registered office of an SE.

The scope is in particular on the Belgian tax provisions to be applied and their consequences at the time of establishment of a European Company (hereafter “SE”). The report, however, does not purport to be exhaustive nor does it try to describe the status of Belgian law in all its details. Where appropriate, nuances and specific provisions are mentioned. However, explicitly addressed is the status of the Belgian implementation of the Council Directive of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfer of assets and exchange of shares concerning companies of different Member States (hereafter “the Merger Directive”). Emphasis is put on those aspects where Belgian tax law still violates the Merger Directive<sup>3</sup>.

Finally, it should be mentioned that the report only deals with aspects of income taxation. Indirect taxes, such as capital taxes and VAT, are not addressed in this report.

#### **Status of Belgian company law**

In implementing European company law, Belgium has always been a bad example. Only after a conviction by the European Court of Justice in May 1989, it implemented in 1993

---

<sup>1</sup> O.J. 10 November 2001, L 294/1-21.

<sup>2</sup> The Regulation enters into force on 8 October 2004.

<sup>3</sup> The language of the Merger Directive (i.e. transferring and receiving company) is used in this report, unless other language is necessary in the context of Belgian law.

the third and sixth directive on domestic merger and division of public limited liability companies in its national law<sup>4</sup>.

Where this was not the case before 1993, Belgian company law currently accepts the transfer of the legal status of the assets and liabilities of a transferring company in case of a merger and division (art. 671 and 672 Company Law Act)<sup>5</sup>. A full continuity of the legal status of the person (*rechtspersoonlijkheid/personnalité civil/Rechtspersönlichkeit*) is, however, only provided for in the case of a conversion of a company into another type of company, having a separate legal status (art. 775 Belgian Company Law Act). The SE should, to that end, be included in the list of companies having a separate legal status as provided for in article 2, §2 of the Belgian Company Law Act.

In respect of a cross-border merger or the inbound or outbound transfer of the seat of a company, it was in the past argued that this was, under Belgian company law, not possible without the winding up of the company and the subsequent incorporation of a new company. Basically, the change of the nationality of a company, as a result of the transaction, would have had such effect. Currently however, based on an amendment of the Belgian Company Law Act<sup>6</sup> and Supreme case law<sup>7</sup>, Belgian scholars seem to accept, in applying Belgian company law, the principle of the continuity of the separate legal status of a company in a cross-border situation<sup>8</sup>. The above is as of 8 October 2004 - the entry into force of the Regulation - also community law in respect of an SE<sup>9</sup>.

### **Status of Belgian accounting law**

The taxable profit of a Belgian company consists out of the increase of its taxed reserves, the dividends paid out and the non-deductible expenses (art. 185 BITC). In other words, it is the increase in a company's net asset value during the taxable period, including the portion of such increase that is distributed as a dividend<sup>10</sup>. In this respect, the Belgian Supreme Court has, in the past, stated several times that Belgian accounting provisions have to be followed in determining a company's taxable profits, unless Belgian tax law explicitly or implicitly deviates from these provisions<sup>11</sup>.

---

<sup>4</sup> ECJ, 11 May 1989, *O.J.* 10 June 1989, C 144/8.

<sup>5</sup> Corporate Law on merger and divisions of 29 June 1993, *Belgian State Gazette* 21 July 1993.

<sup>6</sup> Law on the codification of the company law act of 7 May 1999, *Belgian State Gazette* 6 August 1999.

<sup>7</sup> Belgian Supreme Court, 12 April 1965, R.C.J.B., 1966, p. 408 and Administrative Supreme Court, 29 June 1987, *T.R.V.* 1988, p. 110-115, note K. Lenaerts.

<sup>8</sup> K. Geens, "Over internationale zetelverplaatsing", in *Facetten van ondernemingsrecht*, Liber Amicorum Professor Frans Bouckaert, Universitaire Pers Leuven, 2000, p. 563-577 and S. Emmerechts, "De grensoverschrijdende fusie onder de loep: vennootschapsrechtelijk en fiscaalrechtelijk", *V&F* 2000, p. 205-219; See, however, Geert Gemis, "Is de optie nog de optie? Speelt het continuïteitsgehalte bij inbreng een rol? De codificatie van het vennootschapsrecht en het jaarrekeningrecht gezien door een fiscale bril", *A.F.T.* 2002, (p. 4), p. 9.

<sup>9</sup> Article 8 and 29 of the Regulation on mergers of companies and the transfer of the registered office of an SE and article 37 of the Regulation on the conversion of a company.

<sup>10</sup> Supreme Court, 13 April 1978, *Pas.* 1978, I, 899.

<sup>11</sup> Supreme Court, 20 February 1997, *Bull. Bel.* 1997, n° 777, p. 2840.

In respect of the subject matter of this report reference needs to be made to the articles 78 to 81 of the Royal Decree to the Company Law Act, containing several accounting and balance sheet provisions. Pursuant to these provisions it seems that the accounting treatment of a merger, division or contribution of a branch of activity, basically, needs to be performed on the basis of the transfer of the book values of the assets and liabilities. The territorial scope of these provisions is, in that respect, not limited to pure Belgian transactions, entailing in principle that it would also cover cross-border situations. The Belgian Commission on Accounting Standards suggested this (“pooling of interest”) method in its opinion n° 126/16 of February 1999, which was taken over by the government upon the Belgian company law reform of 2001. The opinion stated that the shares received in the framework of a merger between two foreign companies situated in the EU should be accounted for on the basis of the same book value as the exchanged shares had<sup>12</sup>.

However, the impact and application of these rules on the tax treatment of cross-border mergers, divisions and contributions of assets and liabilities is currently still unclear<sup>13</sup>. For instance, the Belgian Commission on Accounting Standards has recently and contrary to its earlier suggestion stated that, given the international developments and the IAS recommendations on the accounting treatment of “business combinations” the continuity principle on cross-border situation should be questioned<sup>14</sup>.

### Status of Belgian tax law

Belgium is also a bad example in respect of the implementation of European direct tax law. Until today<sup>15</sup>, the Merger Directive is as such not yet implemented<sup>16</sup>. The argument of the Belgian government was that cross-border mergers and divisions were not possible under Belgian company law. This argument, as we pointed out above, cannot be upheld anymore<sup>17</sup>.

Various laws merely have brought the Belgian Income Tax Code of 1992 (hereafter “BITC”) to a certain extent in line with the Merger Directive<sup>18</sup>. As will be seen hereafter,

---

<sup>12</sup> Advice n° 126/15, *Bull. CBN* n° 45, p. 10-14.

<sup>13</sup> There is not much literature. See e.g. Geert Gemis, “Is de optie nog de optie? Speelt het continuïteitsgehalte bij inbreng een rol? De codificatie van het vennootschapsrecht en het jaarrekeningrecht gezien door een fiscale bril”, *A.F.T.* 2002, p. 4-30.

<sup>14</sup> Advice n° 166/2, *bull. CBN* n° 47, May 2002, p. 44.

<sup>15</sup> There is a draft bill pending before parliament, submitted in 2001, to bring the BITC in line with the Merger Directive (chamber doc. 1517/001). Ch. Vandermeersche, “Meerwaarden op aandelen bij fusie binnenkort vrijgesteld?”, *Fiscale actualiteit* 2001, n° 43, p. 1-3.

<sup>16</sup> G. Kleyen, “Les incohérences fiscales du nouveau régime des fusions-scissions en ce compris les scissions dites “partielles””, *J.D.F.* 2002, (p. 257), p. 259.

<sup>17</sup> J. Kirkpatrick, *La liquidation, la fusion et la scission des sociétés belges*, Edition de jeune barreau, 1990, p. 246-248 and Ch. Vandermeersche, “Meerwaarden op aandelen bij fusie binnenkort volledig vrijgesteld?”, *Fiscale Actualiteit* 2001, n° 43, p. 1-3.

<sup>18</sup> Law of 28 July 1992, containing fiscal and financial provisions, *Belgian State Gazette* 31 July 1992; Law of 6 August 1993 containing tax provisions with regard to mergers and divisions, *Belgian State*

and commentated by many Belgian tax scholars, Belgian tax law, thus, still violates the Merger Directive. The most important violations are that:

- no rollover relief will be granted if the receiving company of a merger, division or similar transaction is not a Belgian resident company;
- if the receiving company holds a participation in the transferred company, a merger (a so-called parent-subsidiary merger) will in principle lead to taxation. The cross-participation will disappear and a gain or loss is realised on the shares. If a gain is realised, part of the gain is treated as a divided distribution, giving rise to a taxation of at least 5%.
- losses of a Belgian permanent establishment cannot be taken-over by the foreign or domestic receiving company, whereas upon a purely domestic merger, a fraction of the losses incurred by the transferred company can be carried-over.

In respect of the subject matter of this report, it should, at this stage, be mentioned that the basic approach of Belgium is that for tax purposes, some of these reorganisation transactions will result in a deemed winding up of the transferring company, having in principle as a consequence that the provisions on the dissolution and liquidation of the BITC are to be applied, in principle resulting in the taxation of all unrealised capital gains and untaxed reserves.

By virtue of article 210, §1 BITC, this is the case for:

- the transferred companies in case of a mergers by acquisition, mergers by formation of a new company, division by acquisition, division by formation of a new company, by a mixed division or by a transaction equal to a merger by acquisition;
- the transferred companies in case of a transactions similar to a merger and division, without the liquidation of the transferred companies;
- a company under dissolution without a liquidation of the assets and liabilities, not those mentioned above;
- a company under conversion, except for those mentioned in the articles 774 to 778 of the Belgian company law, entailing that the provisions on the dissolution and liquidation of a company only have to be applied on those conversion where it concerns specific companies such as a non-profit organisation or an association. The conversion of a public or private limited liability company into an SE is not envisaged by this provision.

---

*Gazette* 31 August 1993; Law of 30 January 1996 to amend various provisions of the non-resident taxation, *Belgian State Gazette* 30 March 1996; Law of 22 December 1998 containing fiscal and other provisions, *Belgian State Gazette* 15 January 1999; Law of 4 May 1999 containing various fiscal provisions, *Belgian State Gazette* 12 June 1999.

- A company transferring its statutory seat, seat of management or principal establishment abroad; and
- A company recognized by the Banking and Finance Commission as a company with a fixed capital for real estate investments or investments in unlisted shares.

Basically, a merger and the transfer of the seat of a company are seen as a deemed winding up for tax purposes, whereas this is not the case for a conversion of company in another type of company. Some authors are of the opinion that a tax regime based on a deemed winding up of the company already violates the Merger Directive<sup>19</sup>.

The report hereafter describes, before addressing the hypothetical cases in part three in detail, in part two the most important Belgian tax rules relevant for solving the cases.

### **The status of the implementation of the Regulation**

Belgium has not taken any steps and measures to implement the Regulation yet.

### **Relevant Belgian tax rules**

#### **Fiscal capital of a company**

The capital of a company is, for Belgian tax purposes, that part of the authorised capital that is paid in, insofar no repayments or reductions have taken place. It includes also share premiums. Undistributed taxed profits incorporated into the capital of a company do not qualify as paid in capital (art. 184, par. 1 BITC).

When a resident or non-resident taxpayer contributes a branch of activity to the capital of a Belgian company, benefiting from a rollover relief under article 46, §1, par. 1, 2° BITC or article 231, §3 BITC (*infra*), the contributed capital will be equal to the net fiscal value the branch of activity had in the hands of the contributor (art. 184, par. 2 and 3 BITC). In case of a contribution by a non-resident, the previously taxed reserves and the previously untaxed reserves, except for certain exempt capital gains and untaxed provisions (on the basis of art. 44, §1, 1° BITC and article 48 BITC) have to be deducted from the net fiscal value<sup>20</sup>. The same rule applies in case of a merger. The net fiscal value of the transferring company will constitute the new fiscal capital in the hands of the receiving company (art. 212, par. 1 BITC).

---

<sup>19</sup> G. Kleynen, “Les régime fiscal des fusion, scission et apports des branches d’activité ou d’universalité de biens au regard des directives européennes ainsi que de l’article 10 de la Constitution”, *J.D.F.* 1996, (p. 129), p. 135.

<sup>20</sup> This seems strange since these items are from the start not included in the net fiscal value of the Belgian establishment.

However, there are no specific tax provisions available for assets and liabilities located outside Belgium contributed to the capital of a Belgian company by a non-resident. It seems, according to the commentary to the BITC, that the fiscal value of those assets and liabilities will, as a rule, be equal to the value as set for company and accounting law purposes<sup>21</sup>. Taking into account the current view of the Belgian Commission on Accounting Standards it seems that the transfer of the book value is to be applied. This approach would however imply that any unrealised and booked gains become taxable again in the hands of the Belgian company.

In the past however, when for accounting purposes the discontinuity principle still applied, the Belgian Minister of Finance had, in the framework of the transfer of the seat of a foreign company to Belgium several times stated that such a transfer will not result in the incorporation of a new company in Belgium and that, therefore, the capital should be equal to the paid in capital of the company whereby the exceeding part will qualify as “taxed” reserves, in principle, upon distribution subject to dividend withholding tax<sup>22</sup>.

### **Winding up of a company**

#### *The company*

Companies entering into liquidation remain subject to corporate income tax on their annual profits between the date of their dissolution and the date of the closing of their liquidation. Such profits include any capital gains realised or established on the occasion of the distribution of the company’s assets. In the case of a distribution in kind to the shareholders, the taxable capital gain corresponds to the difference between the real value and the fiscal value (art. 208 BITC).

The distribution is treated as a repayment of capital up to the amount of the paid in capital and, to that extent such distributions are not subject to any taxation. Any amount distributed in excess of the paid-in capital is treated as a dividend distribution (art. 209 BITC). The amount distributed is deemed to originate, successively, from:

- the (re-valued) paid-in capital;
- the previously taxed but undistributed reserves (retained earnings), including capital gains that are realised or established at the time of liquidation; and
- the previously untaxed reserves.

---

<sup>21</sup> Com. BITC (old), n° 105/66.

<sup>22</sup> Questions & Answers, Chamber, 1992-93, p. 2274; P. Drijkoningen, “Zetelverplaatsing naar België : wat zijn de belaste reserves”, *Fiscoloog* 1996, n° 561, p. 4-5. See also L. Jouk, “Zetelverplaatsing”, in *Fiscaal praktijkboek '95-'96; Directe belastingen*, ced.samsom, Diegem, 1996, p. 187-209 and W. Piot, “Fiscale implicaties van zetelverplaatsing naar en vanuit België”, *A.F.T.* 1997, p. 11-17.

The distributed amount will, to the extent that it originates from previously untaxed reserves, be taxed at the normal corporate income tax rate. As mentioned in the introduction, mergers and the transfers of seat of a company abroad are seen as a deemed winding up of the transferred company, having as a consequence that the unrealised capital gains and untaxed reserves become taxable.

### *The shareholders*

The amounts distributed upon liquidation are in the hands of the shareholder, retroactive as of 1 January 2002, treated as ordinary dividend distributions, as a rule, subject to a 10% withholding tax (art. 18, 2<sup>o</sup>ter and art. 269, 2<sup>o</sup>bis BITC). There is, as to their characterisation, no difference in treatment between the liquidation distributions from a Belgian or from a foreign company. Amounts distributed upon the liquidation of a foreign company are in the hands of a Belgian shareholder also treated as a dividend distribution, as a rule, subject to the 10% dividend withholding tax. In the past, these amounts were treated as capital gains. Due to the fact that it is a fairly new rule and approach<sup>23</sup>, it is at this stage unclear to predict all the consequences of such a characterisation on domestic and cross-border reorganisations such as mergers, conversions and the in and outbound transfer of the seat of a company<sup>24</sup>.

This new approach can, in respect of the subject matter of this report, be summarised as follows:

- In respect of a merger, taxation in accordance with article 209 BITC will not take place to the extent new shares are issued and the transaction benefits from the rollover relief provided for in article 211 BITC (*infra*). Hence, there will only be a dividend distribution to the extent that the receiving company is holding shares in the transferring company (an exemption of dividend withholding tax is provided for in art. 264, 2<sup>o</sup> BITC) or the merger is a so-called taxable merger; there is no real difference in treatment between a merger by acquisition and a merger by formation of a new company. In the case of a merger by formation of a new company, all companies involved and their shareholders will, as rule, be subject to the provisions on the dissolution and liquidation (winding up) of a company.
- In respect of a conversion, there are no consequences if the SE will be listed in article 2, §2 of the Belgian Company Law Act. A conversion of a public or private limited liability company into an SE, will because of the fact that it will not be treated as a deemed winding up of the company (art. 210, §1, 3<sup>o</sup> BITC), not be subject to the application of art. 209 BITC. There will be no dividend distribution upon such a conversion.

---

<sup>23</sup> Enacted by the Law of 24 December 2002 on the amendment of the corporate income tax and the establishment of an advance ruling system in tax matters, *Belgian State Gazette* 31 December 2002.

<sup>24</sup> See e.g. S. Van Crombrugge, “Roerende voorheffing op liquidatie- en verkrijgingsuitkeringen”, in *Liber Amicorum Luc Hinnekens*, Bruylant, Brussel, 2002, p. 521-536 and W. Vandenberghe, “De roerende voorheffing op liquidatieboni. Kroniek van een « aangekondigde » heffing”, in *Hervorming van de vennootschapsbelasting*, Larcier, Brussel, 2003, p. 346.

- In respect of the transfer of the seat of a company abroad, there is no rollover relief available, having as a consequence that article 209 BITC will become fully applicable and that, thus, the deemed distribution is treated as a dividend in the hands of the shareholder.

## **Rollover relief regimes**

### *Mergers and divisions (article 211-213 BITC)*

#### **Conditions for rollover relief**

Certain transactions, such as mergers and the transfer of the seat of a company abroad, are treated as a deemed winding up of the transferring company, having as a consequence that the provisions on the dissolution and liquidation of a company become fully applicable. A mandatory deferral of taxation is, in accordance with article 211 BITC, available for the first two types of transactions mentioned in article 210, §1 BITC (mergers, divisions and similar transactions). In order to be able to benefit from this rollover relief regime, the following conditions are to be met:

- The receiving company is a Belgian company (art. 2, §2, 1° BITC). This condition clearly violates article 4 of the Directive providing for a carry over of the fiscal value and secondary tax elements of the assets and liabilities of the transferred company, wherever in the EU the receiving company is a resident<sup>25</sup>.
- The transaction is realised in accordance with the Belgian Company Law Act; and
- The transaction meets legitimate needs of a financial or economic nature. This condition is generally seen as compatible with the Merger Directive.<sup>26</sup>

If these conditions are not met, the transaction will be treated as a taxable transaction, triggering the application of article 209 BITC and characterizing the transaction, in excess of the paid in capital, into a dividend distribution.

#### **The transferring company**

The consequences for the transferring company are that it thus will be exempt from corporate income tax on any realised or unrealised capital gains mentioned in article 44, §1, 1° BITC at the time of the merger, capital subsidies mentioned in article 362 BITC, and on those gains still benefiting from the tax deferral mechanism as set forth in article 47 BITC (art. 211, §2, 1° BITC). In addition, there will be no taxation on other untaxed

---

<sup>25</sup> Article 4 of the Merger Directive reads as follows: “A merger or division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes”.

<sup>26</sup> D. Beeckman, a.o., *o.c.*, p. 477-479.

reserves insofar as the assets and liabilities are transferred in exchange for new shares (art. 211, §2, 2° BITC). Hence, such a transaction will be fully neutral when the receiving company does not hold a participation in the transferring company and there is no additional cash payment.

To the extent that the transaction is not in exchange for new shares in the receiving company, the “own funds” of the transferring company are reduced in accordance with article 209 BITC, as explained above. The order in which the several parts of the own funds are reduced depends on the reason why the transaction was not entirely in exchange for new shares:

- If the transfer of the assets and liabilities is partly in exchange for a cash payment, the reduction of the own funds is applied to the taxed reserves, the previously untaxed reserves and the paid in capital, respectively (art. 211, §2, par. 1 BITC); and
- If the receiving company has a participation in the transferring company, the reduction is proportionally applied to the capital and reserves; however, the untaxed reserves are only reduced if the taxed reserves are not sufficient (art. 211, §2, par. 2 BITC).

The reduction of the reserves is treated in the same manner as a dividend distribution of dividend, meaning that in the hands of the transferring company taxation only will occur when previously untaxed reserves are reduced. The taxation of previously untaxed reserves clearly violates article 5 of the Merger Directive, stating that the “Member shall take the necessary measures to ensure that, where provisions or reserves properly constituted by the transferring company and partly or wholly exempt from tax and are not derived from permanent establishments abroad, such provisions or reserves may be carried over, with the same tax exemption, by the permanent establishments of the receiving company ...”.

### **The receiving company**

The receiving company is not winded up for tax purposes because this company is not dissolved. However, depreciation allowance, investment deductions, capital gains and capital losses relating to the assets contributed, as well as the paid in capital, must be determined as if the reorganisation had not taken place (art. 212, par. 1 BITC). Provisions for probable losses and risks, over- and under-valuations, subsidies, receivables, capital gains and reserves can be transferred to the receiving company. If the transferring company in respect of certain assets benefits from a tax deferral under art. 47 BITC, the receiving company takes over its position. The period within which the reinvestment should take place cannot be extended because of the transaction (par. 212, par. 2 BITC).

The transferred assets and liabilities retain their initial fiscal value in the hands of the receiving company (art. 212, par. 3 BITC).

If the receiving company holds a participation in the transferring company, the positive difference between the corresponding portion of the net value of the transferring company and the book value of the shares is treated as follows:

- That part that in the hands of the transferring company is treated as a dividend distribution, is also in the hands of the receiving company treated as a dividend<sup>27</sup>, which, if the conditions are met, could benefit from a participation exemption, implying that still 5% of the dividends will be taxed at the normal corporate income tax rate (art. 202, §1, 2° BITC). This is clearly in conflict with article 7 of the Merger Directive stating that such gains “shall not be liable to tax”<sup>28</sup>.
- The excess is treated as an unrealised and thus temporarily exempt capital gain. The gain is, as rule, not to be credited to a special blocked reserve account (art. 45 and 190 BITC).

If the difference will be negative, the receiving company is free to impute the difference to the assets having a higher contribution value than their value for tax purposes, to consider it as transferred goodwill, or to book it as a cost. However, no depreciation allowances are possible on the re-valued assets or on goodwill, and a capital loss on shares is not considered as a deductible cost.

### **The shareholder**

To the extent that the shareholder of the transferring company receives new shares in exchange for his old shares, this will be treated as a realization event for tax purposes, giving rise to a gain or loss on the exchanged shares and taxable in accordance with the fiscal status of the shareholder, as explained below.

#### *Conversion (article 214 BITC)*

Although a conversion is in principle not treated as a deemed winding up of the converted company nor as discontinuation of the legal status of the company, still a rollover relief is provided for in article 214 BITC for those conversions that are treated as a deemed winding up of the company. In addition, article 45, §1 BITC provides for a rollover of the fiscal value of the shares received in exchange in these cases.

A conversion of a public or private limited liability company into an SE will have no tax consequences if the SE will be listed in article 2, §2 of the Belgian Company Law Act. Such a transaction will not be treated as a realization of the shares.

---

<sup>27</sup> More accurately and based on article 202, §1, 2° BITC, if it concerns a dividend on which the article 186, 187 or 209 or similar provisions in foreign laws were applied, the positive difference between the net fiscal value of the transferring company, eligible for the reduction, and the fiscal value of the share in the hands of the receiving company, as the case may increased with previously expressed and taxed gains (capital gain *sensu stricto*).

<sup>28</sup> Article 7 of the Merger Directive reads as follows: “Where the receiving company has a holding in the capital of the transferring company, any gains accruing to the receiving company on the cancellation of its holding shall not be liable to any taxation”.

*Branch of activity (article 46 BITC)*

**The conditions**

Profits arising out of the termination of a business activity are taxable as ordinary business income (Art. 28, par. 1, 1° and par. 2 BITC). However, such profit may benefit from a full but temporary tax exemption when the termination is the result of, amongst others, the contribution of one or more branches of activity or the universality of goods in a company, in exchange for shares representing the capital of the company (art. 46, §1, 2° BITC). This temporary exemption is optional.

Four basic conditions have to be fulfilled:

- A “branch of activity” needs to be contributed. Some discussion has arisen in respect of this condition. The interpretation of the Belgian Tax Authorities is, although according to some authors broader, in conformity with what is meant in article 2, c) of the Merger Directive<sup>29</sup>; More specific, however, it is determined that financial fixed assets and other securities are not a branch of activity. They are part of a branch of activity if they normally belong to the business of the branch of activity, not making out the substance of the business (art. 46, §2 BITC). According to some authors this does not violate the Merger Directive<sup>30</sup>.
- The statutory seat, the principal establishment or the seat of management of the company<sup>31</sup> receiving the contribution must be located in an EU Member State; It has been argued that this condition is not in line with the Merger Directive, stating in article 3 (b), that ‘company from a Member State’ shall mean “any company which according to the tax laws of a Member State is considered to be a resident in that State for tax purposes and, ...”<sup>32</sup>.
- The receiving company has to issue shares in exchange for the contribution of shares;

---

<sup>29</sup> Caroline Docclo, “L ’intrusion des conventions dans les mecanismes belges de transposition de la directive fusion”, in *Liber Amicorum Luc Hinnekens*, Bruylant, Brussel, 2002, p. 173-184; See also M. Van keirsbilck, “Het begrip “bedrijfstuk”; Kan men nog spreken van een eenduidig begrip in de inkomstenbelasting, de registratierechten en de B.T.W.?”, *T.F.R.* 2003, p.70-101 and K. Moser, “De fiscale aspecten verbonden aan de inbreng van een bedrijfstak na de wet van 13 april 1995 – Afdeling VIII<sup>quater</sup> van de Gecoördineerde Wetten op de Handelsvennootschappen: een *status questionis*”, *T.F.R.* 1998, p. 257-288.

<sup>30</sup> P. Vanhaute, “Grensoverschrijdende herstructurerings van ondernemingsgroepen”, in *Het Belgisch internationaal belastingrecht in ontwikkeling ; Nieuwe wegen voor het Belgisch internationaal belastingrecht?*, G. Joseph, L. Hinnekens, J. Malherbe and J. Van Hoorn Jr. (ed.), Kluwer Rechtswetenschappen, Diegem, 1993, (p. 491), p. 520.

<sup>31</sup> The scope of article 46 BITC is also broader than the Merger Directive in respect of the type of companies that may benefit from this rollover relief. All companies subject to corporate income tax may invoke this provision, whereas the Merger Directive is only applicable for the companies listed in the annex.

<sup>32</sup> D. Beeckman, a.o., *o.c.*, 194-195 and *De Fiscale Koerier*, “Jaaroverzicht 1992”, p. 46.

- The transaction meets legitimate needs of a financial or economic nature. This condition is seen as in conformity with the Merger Directive.<sup>33</sup>

Note that a contribution of a branch of activity does not have to comply with Belgian company law, as is the case for a merger and division.

### **The receiving company**

The receiving company must compute any new depreciations, investment deductions, write-downs and over- or under valuations in respect of the assets and liabilities transferred, in accordance with the rules that would have been applied by the contributor as if the contribution had not taken place (art. 46, §2 par. 1 BITC). As a consequence, the specific rules applicable to capital gains, write-downs, provisions, under or over valuation, subsidies and receivables remain applicable, in so far the elements are to be found by the new taxpayer (art. 46, §2, par. 2 BITC). If the contributor benefits from a tax deferral under article 47 BITC, the receiving company takes over its position. The period within which the reinvestment should take place is not extended because of the transaction (Art. 46, §2, par.3 BITC).

It is, for purpose of the rollover relief, also assumed that the contributed goods will form a Belgian establishment (art. 229, §1 BITC). However, goods that do not remain part (in Dutch “aangewend worden door”) of the Belgian establishment will be treated as realised for tax purposes. This is in conformity with the Merger Directive, as it does not result in taxation in the hands of the transferring company.

### **The contributor**

The tax exemption is, as a rule, of a temporary nature only. The fiscal value of the shares obtained in exchange for the contribution is not their book or market value, but a value that corresponds to the fiscal value of the underlying assets (after deduction of the liabilities comprised in the contribution). The latter fiscal value will serve as a basis for determining any future write-downs, capital gains or capital losses on the shares obtained in exchange for the contribution (art. 46, §3 BITC).

The final tax treatment of the gain or loss will depend on the fiscal status of the shareholder (individual or company) as explained below. If the gain is expressed in the account of the contributor then it must be booked in a separate blocked account on the liabilities side of the balance sheet (the intangible condition) (art. 190 par. 3 BITC).

---

<sup>33</sup> Ibidem.

*Non-residents (article 231, §2 and 3 BITC)*

Similar provisions exist for non-resident taxpayers<sup>34</sup>. Article 231, §2 BITC determines that any capital gain established as a result of the contribution of a Belgian establishment are exempt if the Belgian establishment is part of a merger, division or a contribution by a company located in an EU Member State benefiting from a rollover relief in its home country and the goods forming part of the Belgian establishment are retained in Belgium. The depreciations, investments deductions, under or over valuations of assets will in the hands of the receiving company retain their initial value as if the transaction had not taken place. This is also the case for any build up reserves or provisions, under- and overvaluations, subsidies, gains and reserves. And, the period within which the reinvestment should take place in accordance with article 47 BITC cannot be extended because of the transaction (art. 231, §2 par. 3°, 4°, 5° BITC).

The same rules apply if a non-resident taxpayer contributes its Belgian establishment to a Belgian company insofar as the elements are part of the capital of the Belgian company (art. 231, §3 BITC). However, as mentioned above, in determining the fiscal capital of the company, the net fiscal value of the Belgian establishment is taken (art. 184, par. 3 BITC).

Note that there are several differences between these rollover relief provisions and the rollover of article 46, §1, 2° BITC. However, where it was obligatory in the past and rendering these rollover provisions obsolete, for the shares received in exchange were to remain invested in a business activity of the non-resident in Belgium, this is, as of 30 March 1996, not the case anymore<sup>35</sup>.

## **Gains and losses on shares**

### *Individuals holding shares as a private investment*

Capital gains on shares realised by a private person are taxable as miscellaneous income if: (i) derived from a substantial interest (taxed at a rate of 16,5%) or (ii) derived from speculative transactions (taxed at a rate of 33 %)(art. 90, 1° and 9° BITC).

Taxation of speculative transactions will occur rarely but still it could, at first sight, violate article 8.1. of the Merger Directive stating that gains derived in the framework of a merger, division or exchange of shares “shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder”. This is also the case when capital gains derived from a substantial interest are taxed at a separate rate of 16,5%. To this end, the following conditions have to be met:

---

<sup>34</sup> These provisions were implemented in 1992 order to bring the BITC in line with article 9 of the Merger Directive dealing with permanent establishments. D. Beeckman, a.o., *o.c.*, p. 190.

<sup>35</sup> Article 236 BITC was abolished by law of 30 January 1996 on some changes of several provisions of the taxation of non-residents, *Belgian State Gazette* 30 March 1996; E. Schoonvliet, “B.N.I.-wetgeving: commentaar op de Wet van 30 januari 1996 en actuele situatieschets”, *A.F.T.* 1997, p. 426-448.

- The gain is derived from shares in a Belgian resident company;
- the individual was holding a participation of at least 25%<sup>36</sup>; and
- the shareholding is transferred to a non-resident entity in the sense of article 227, 2° and 3° BITC.

A non-resident, not using the shares for business purposes in Belgium, is subject to the same rules (art. 228, §2, 9°, g BITC and Com. BITC, n° 228/106). However, this rule is in practice not applied if the non-resident is at least a resident of a EU Member State. All Belgian double tax conventions allocate the taxing power to the other contracting state, insofar as the shares are not attributable to a Belgian permanent establishment.

Article 96 provides for a rollover provision if the shares of a substantial interest are exchanged for other shares in the framework of a merger, division or conversion; The in exchange received shares will have the fiscal value of the exchanged shares (art. 96). There is no, however, rollover relief provided for gains derived from an exchange of shares in the framework of the formation of a holding company or, in general the exchange of shares meant in article 2. (d) of the Merger Directive. The realised gains become, as a rule, fully taxable, clearly implying a violation of article 8.1 and 2. of the Merger Directive.

Losses on shares are not deductible unless incurred in the framework of a speculative transaction.

#### *Individual entrepreneur*

Established or realised capital gains on shares, used for a business purpose, are in the hands of an individual entrepreneur taxable as ordinary business income, subject to the progressive income tax rates (art. 24 BITC). Gains derived from the exchange of shares in the framework of a merger and similar transactions or conversion are, however, temporarily exempt (art. 45, §1, par. 1 BITC). This exemption is only applicable for gains derived from shares of which the company is located in one of the EU Member States, when the transaction benefits from a rollover relief under article 211, §1 or 214, §1 BITC or a similar foreign rollover relief regime.

The shares received in exchange will have the fiscal value and receiving date of the exchanged shares (art. 45, §1, par. 2 BITC). A separate tax rate of 16,5% is available for gains derived from the shares held as fixed business assets for more than 5 years or upon the termination of the business.

---

<sup>36</sup> A substantial interest is deemed to exist if the shareholder or his spouse, ascendants or descendants, his family to the second degree or his spouse's family to the second degree, held at the time of transfer or in one of the five preceding years directly or indirectly more than 25 % of the shares in the company (art. 90, 9° *in fine* BITC).

There is no rollover relief provided for an exchange of shares in the framework of the formation of a holding company by way of an exchange of shares. The realised gains become, as a rule, fully taxable, which is clearly a violation of article 8 of the Merger Directive.

Losses on shares are, as a rule, fully deductible.

### *Company*

Capital gains on shares are also in the hands of a corporate taxpayer treated as ordinary profits and, in accordance with article 45, §1, par. 1 BITC, temporarily exempt upon a merger or similar transaction benefiting from a rollover relief. Noteworthy in this respect is that for accounting purposes, a transfer of the book value of the old shares is provided for, as explained above, rendering this provision obsolete and entailing several problems that go beyond the scope of this report. In addition, article 192 BITC provides for a full exemption for gains, other than those of article 45, §1, par. 1 BITC, if the dividends derived from the shares: (i) are eligible for the participation exemption regime and (ii) insofar the taxable amount is higher than previous write-downs lowered with gains taxed in accordance with article 24, 3° BITC.

Some tax scholars argue that, given the conditions and the fact that it is a full exemption regime, article 8 of the Merger Directive is violated. The provisions of article 8 contain a full but temporary exemption not subject to any condition. However, due to the changes to article 45, §1 BITC in 1998, this might only be the case for an exchange of shares transaction (formation of a holding by way of the contribution of shares). In that case, the conditions set forth in article 192 still apply. An argument against this line of reasoning is that the exclusions from the participation exemption are aimed at tax avoidance and can be seen as anti-abuse provisions in the sense of the Merger Directive.

Losses on shares are only deductible to the extent the loss relates to the paid in capital (art. 198, 7° BITC).

## **Previously incurred losses**

### *General rules*

A corporate taxpayer or individual entrepreneur can, in accordance with article 23, §2, 3° and 206, §1 BITC, deduct any previously incurred but not-exhausted loss from its taxable base. There is no limit in amount or time set on the carry forward of a loss. However, there is no carry back available.

The general unwritten rule in this respect seems to be that a (resident or non-resident) taxpayer cannot transfer its losses to another taxpayer, because it concerns another person. This implies also that when there is, in the framework of a certain transaction, a continuity of the legal status of the same person (such as a conversion or a transfer of the

seat) the losses should not be lost<sup>37</sup>. The fact that a deemed liquidation took place should in principle not alter this. A deemed liquidation should (or can)not result in the constitution of a new taxpayer. However, there are no specific provisions governing this situation.

Noteworthy is also that the BITC contains a provision upon which corporate taxpayers lose the right to use their previously non-exhausted losses if they are acquired or there is a change in control not meeting legitimate needs of a financial or economic nature (art. 207, par. 3 BITC). For the purpose of this report, it is assumed that all cases discussed in part three meet legitimate needs of a financial or economic nature.

Finally, Belgium does not know the concept of group taxation, as this is, for instance, the case in Austria or Germany.

#### *Branch of activity*

A special limitation applies when a company receives, as a contribution, a branch of activity or a universality of goods in the framework of the rollover relief provided for in article 46, §1, 2° BITC. The receiving company can, after the contribution, only deduct a fraction of the previously incurred non-exhausted losses. The numeration of this fraction is determined by reference to the net fiscal value of the transferred elements and the denominator by reference to the net fiscal value of the receiving company plus the net fiscal value of the elements received, all as determined before the transaction (art. 206, §2, par. 1 BITC).

In accordance with the general rule, a receiving non-resident company cannot take over the previously non-exhausted losses of a non-resident taxpayer transferring his Belgian branch of activity in the framework of a foreign merger. In this respect it is argued by the Belgian Minister of Finance that on the basis of the non-discrimination provisions of the applicable double tax conventions a non-resident company still could transfer the losses in the same way as a domestic company<sup>38</sup>. This situation clearly violates the Merger Directive. Article 6 in conjunction with article 10, 1. last sentence of the Merger Directive provides that the transfer of losses in the case of domestic mergers, discussed hereafter, should also be available for a Belgian permanent establishment<sup>39</sup>.

#### *Merger*

In respect of the losses of the receiving company, the same rule applies as when a branch of activity or universality is contributed (art. 206, §2, par. 1 BITC). The future use of losses incurred by the receiving company is limited.

---

<sup>37</sup> Question, n° 28, 17 March 1988, *Bull. Bel.* 1988, n° 676, p. 1756; W. Piot, "Fiscale implicaties van zetelverplaatsing naar en vanuit België", *A.F.T.* 1997, p. 11-17.

<sup>38</sup> Questions & Answers, Chamber, 1998-1999, n° 160, p. 21624. See also D. Beeckman, a.o., *o.c.*, p. 612-613.

<sup>39</sup> Article 6 *in fine* reads as follows: "it shall extend those provisions to cover the take-over of such losses by the receiving company's permanent establishments situated within its territory".

It may be assumed that upon a merger the transferring company disappears and is – as a taxpayer - not continued in the hands of the receiving company. However, as opposed to the contribution of a branch of activity, the losses incurred by the transferring company are still eligible for a fractional transfer to the receiving company. The numerator of the fraction is determined by reference to the net fiscal value of the receiving company and the denominator by reference to the net fiscal value of the receiving company plus the fiscal value of the transferring company, all as determined before the transaction (art. 206, §2, par. 2 BITC).

## **Double tax conventions**

### *Treaty network*

Belgium has concluded double tax conventions with all EU Member States. Of the accession countries, Belgium has concluded double tax conventions with Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia and Turkey.

Hence, the Belgian treaty network covers the present territory of the European Union and that after the accession of several candidate countries.

### *Dividend distributions*

Based on a brief analysis of the provision dealing with dividends, it can be concluded that the characterisation of what a dividend is for treaty purposes will depend on the law of the country of which the company distributing the dividend is a resident<sup>40</sup>. Only the treaty with France explicitly excludes new shares received as a result of a merger of companies resident in only one contracting state from the scope of the provision dealing with dividends. Cross-border mergers however seem, on the basis of the same provision, to fall under the dividend article<sup>41</sup>.

Hence, real and deemed liquidation distributions by Belgian resident companies will, as rule, fall under the distributive rule of article 10 OECD Model tax Convention, giving Belgium the competence to withhold a dividend withholding tax. In that respect, Belgium has agreed in some treaties with a reduction of dividend withholding tax to 5% for companies owning, in most cases, a participation of at least 25%. The treaties with Estonia, Finland, Latvia, Lithuania, Slovakia, Slovenia, Sweden and United Kingdom contain for example such a provision. Within Europe, this is however of minor

---

<sup>40</sup> Note that the double tax conventions have not been analysed in detail and that there could be exceptions to this rule.

<sup>41</sup> Art. 15, 6° of the 1964 Belgium-France Income tax Convention as amended by the Protocol of 8 February 1999. The provision reads as follows: “In the case of a merger of companies resident in only one Contracting State, the free distribution of shares of the surviving or new company shall not, if the said company is a resident of the same State, be regarded in the other Contracting State as constituting a distribution of income”.

importance. The Parent-Subsidiary Directive will, in most cases, fully exempt any dividend from a withholding tax if the receiving company owns a participation of at least 25%.

### *Capital gains*

All double tax conventions contain a provision similar to article 13 OECD Model Tax Convention, allocating the competence to tax capital gains on moveable property forming part of the business property of a permanent establishment to the country where the permanent establishment is located and those on other moveable property such as shares, as a rule, to the country of residence.

In respect of the Merger Directive and its notion of “permanent establishment”, and the notion of “Belgian establishment” in article 228, §2, 3° BITC, it should be noted that differences in interpretation and application exist between all three concepts. The Belgian notion is according to some authors much broader than the one used in the Merger Directive and those used in the Belgian double tax conventions, having as a result that for certain capital gains the exemption will be final and not a temporarily one<sup>42</sup>.

### *Relief method*

In respect of capital gains derived from the transfer of a permanent establishment, Belgium, a country taxing worldwide profits, applies the exemption method situated at the level of the determination of the taxable base.<sup>43</sup>

### **Corporate taxpayers**

For companies, the actual relief is achieved via the division of the taxable base (profits and losses) in three segments: the Belgian profit or loss, the profits and losses derived in treaty countries and the profits and losses derived in non-treaty countries, whereby a negative balance in the treaty country segment and non-treaty country segment will be set-off before an imputation on the Belgian profits, if any. Finally, Belgian losses are set-off, first, against the non-treaty country profits and, second, the treaty country profits (art. 75 Royal decree on the BITC). To the extent there remains a positive balance of the taxable base, first the exempted treaty country profits have to be deducted from it and second some other items mentioned in article 76 of the Royal decree on the BITC.

At first sight, this system does not violate article 10.2. of the Merger Directive since relief will be granted before any tax is actually levied<sup>44</sup>. In other words, the taxable amount is,

---

<sup>42</sup> See e.g. C. Docclo, “L ’intrusion des conventions dans les mecanismes belges de transposition de la directive fusion”, in *Liber Amicorum Luc Hinnekens*, Bruylant, Brussel, 2002, p. 173-184.

<sup>43</sup> E. Schoonvliet, *Handboek Internationaal Fiscaal Recht*, Biblo, Kalmthout, 1996, p. 43.

<sup>44</sup> Article 10.2. of the Merger Directive reads as follows: “... on the condition that it gives relief for the tax that, but for the provisions of this Directive, would have been charged on those profits or capital gains in the Member State in which that permanent establishment is situated, in the same way and in the same amount as it would have done iof that tax had actually been charged and paid”.

to the extent already not absorbed by losses, reduced with the gains derived from the permanent establishment<sup>45</sup>.

### **Individual entrepreneurs**

For an individual entrepreneur, the method of calculating and applying the exemption is however not the same. An individual taxpayer is subject to progressive rates and the exemption is applied at the level of the initial tax due, calculated on an average basis<sup>46</sup>. Basically, the amount of tax for which relief is granted is the average amount of tax due on the exempt income taking into account the progression of the income tax rate scales.<sup>47</sup>

One could argue that this approach violates article 10, par. 2 of the Merger Directive - if it also applies for the exemption method<sup>48</sup> - stating that Belgium will have the right to tax any profits or capital gains of a permanent establishment but that it should provide for a relief taking into account the progressive scales of the personal income tax. On the other hand, one could also argue that the words “but for the provision of this Directive” would render the whole provision obsolete because Belgium still had to exempt the income on the basis of the applicable double tax convention.

---

<sup>45</sup> It seems that the arguments invoked in the framework of the Velasquez doctrine and double tax conventions are not relevant in this respect. See e.g. E. Schoonvliet, *Handboek Internationaal Fiscaal Recht*, Biblo, Kalmthout, 1996, p. 43.

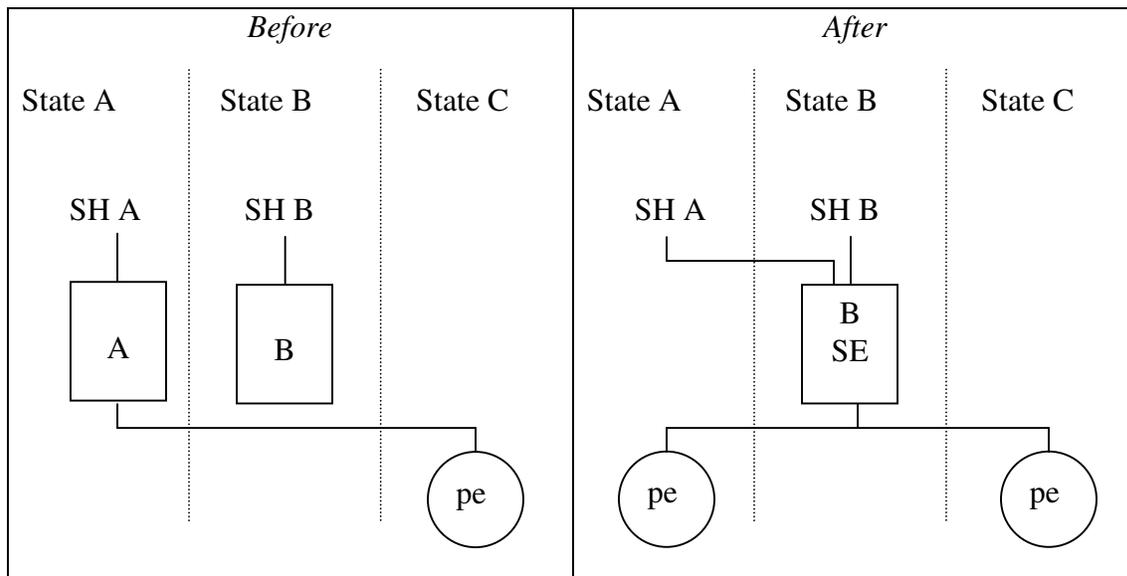
<sup>46</sup> Com. BITC, n° 155/30.

<sup>47</sup> E. Schoonvliet, *o.c.*, p. 174-176.

<sup>48</sup> Based on the wordings of the provision this could be the case.

## 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) A Belgian plc, having a PE situated in the EU, is transferred to a foreign SE*

#### Tax consequences for the Belgian company

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 rollover relief?

*A cross-border merger is treated as a deemed winding up of the transferred public limited liability company, having as a consequence that unrealised capital gains and untaxed reserves become taxable at the time of liquidation. A rollover relief on the basis of article 211, §1 BITC is not possible. The receiving company is not a Belgian company.*

*In addition, it should be mentioned that, on the basis of the accounting treatment, it seems that there will be a transfer of the book value of the assets and liabilities of the transferring company, entailing that upon a future realization by the receiving company, under the current rules, again a taxable profit will arise (double taxation).*

*This violates article 4 of the Merger Directive. There is a draft bill pending, providing for a rollover relief.*

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 rollover relief by the permanent establishment of B SE in Member State A?

*No.*

*This violates article 5 of the Merger Directive. There is a draft bill pending, providing for a rollover relief.*

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?

*No unless the non-discrimination provision of the applicable double tax convention could be invoked.*

*This violates article 6 of the Merger Directive. There is a draft bill pending, providing for a rollover relief.*

*If the receiving public limited liability company would be a resident of Belgium, it would be a purely domestic merger allowing the SE to use a fraction of the losses of the transferring company (art. 206, §2, par. 2 BITC). The previously incurred non-exhausted losses of the SE will also be limited by a fraction as set out above.*

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

*In principle, any unrealised capital gains on assets and liabilities forming part of a foreign permanent establishment will, as a result of the merger, be taxed in the hands of the Belgian public limited liability company. Belgium adheres to the worldwide taxation principle and will treat the cross-border merger as a deemed winding up of the company for tax purposes.*

*However, such gains will be exempt from taxation on the basis of the applicable double tax convention. As Belgium applies the exemption method in respect of gains derived from assets belonging to permanent establishments, it does not grant relief on the basis of the tax charged by the other EU Member State. This system of relief does not seem to violate article 10, par. 2 of the Merger Directive.*

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?

*Belgium has not implemented any provision prescribing a reinstatement of losses of a foreign permanent establishment, which were previously deducted from domestic profits and which are not recaptured at the time of the merger.*

Tax consequences for the Belgian shareholder

g and h) 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? Will the answer 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, or iv) An individual entrepreneur?

*The cross-border merger will be treated as a deemed winding up of the public limited liability company, entailing the distribution to the shareholders of the liquidation proceeds (the shares in SE B). Article 18, 2<sup>o</sup>ter BITC explicitly qualifies these liquidation distributions as dividends. These distributions are, in the hands of the shareholders, treated as ordinary dividend distributions, in principle, subject to a 10% dividend withholding tax.*

- *For a corporate shareholder, the dividend will constitute ordinary business profit, which could benefit from a 95% exemption if certain conditions are met (minimal holding of 5% or 1,2 million Euro and the “subject to tax” requirement). A corporate shareholder can, under the Parent-Subsidiary Directive, benefit from a dividend withholding tax exemption if it holds at least a participation of 25% for more than one year; If no exemption is available, it can credit the withholding tax against its corporate income tax due.*

*It should be noted that the shares received in exchange for the old shares will have the book value of the old shares, entailing that upon a future realisation an, although tax exempt, taxable gain will arise.*

- *For an individual shareholder not owning a substantial interest, the dividend withholding tax will, as a rule, constitute the final tax. The individual shareholder does not have to report the dividend income its income tax return.*
- *An individual owning a substantial interest is, in respect of a dividend distribution, treated in the same way as any other individual shareholder.*
- *For an individual entrepreneur, the dividends constitute ordinary business income. The dividend withholding tax may be credited against the personal income tax due.*

*If the merger would have fallen under the application of the rollover relief provisions provided for in article 211 BITC, the exchange gain will, for corporate*

*shareholders and individual entrepreneurs, as a rule be treated as a temporary exempt capital gain (under the application of article 45, §1 BITC).*

f) 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?

*In the hands of a non-resident shareholder, the merger will also result in a dividend distribution by the transferred Belgian public limited liability company, as a rule, subject to a 10% dividend withholding tax. The withholding tax will, in the hands of an individual (entrepreneur) or corporate shareholder, in principle, constitute the final tax. An exemption is available for corporate shareholders falling under the Parent-Subsidiary Directive (article 106, § 5 BITC). Some double tax conventions provide for a reduced withholding tax (5%). This is, for instance, the case in the new Belgian-Netherlands treaty, providing for a reduction to 5% if the beneficiary is a company holding at least a participation of 10%.*

**2) A Belgian SE receives an EU company, having a PE in another EU Member State**

Tax consequences for the Belgian company

a) According to Art. 17 par. 2 Reg. 2157/2001, the receiving 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?

*Article 210, §1 BITC only envisages specific conversions such as does involving a non-profit organisation, which is subject to the corporate income tax. A conversion of a Belgian public limited liability company into an SE should after amending article 2, §2 of the Belgian Company Law Act, in principle, not have any corporate income tax consequences.*

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 are no provisions in Belgian tax law dealing with this issue and one could conclude that the value as set for company and accounting law purposes should be taken, even if in the other EU Member State a rollover relief is available. Based on the accounting treatment, still under discussion, a transfer of the book values has to be applied, entailing that any unrealised gains and untaxed reserves are, as a rule, again taxable in Belgium (double taxation).*

*The fiscal capital will, in accordance with article 184 BITC, be equal to the paid in capital.*

Tax consequences for the Belgian shareholder of the receiving company

c and d) Will the fact that B will take the form of an SE result in tax consequences for SH B? Will the answer 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, and iv) an individual entrepreneur?

*The receiving public limited liability company is not dissolved. Also, its conversion into an SE will not lead to a realization or deemed winding up of the company. Hence, there are no immediate tax consequences for a Belgian shareholder of a Belgian public limited liability company converted into an SE subsequent a cross-border merger.*

**3) A Belgian PE of an EU company is transferred to a foreign SE**

Tax consequences for the non-resident companies

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 rollover relief?

*The transfer will be treated as a (deemed) realisation event, having as a consequence that all unrealised gains and untaxed reserves and provisions in the Belgian permanent establishment become taxable. The non-resident companies may, in accordance with article 231, §2 BITC and 46, §1, 2° BITC, benefit from a rollover relief to the extent that the establishment or assets and liabilities remain in Belgium.*

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 rollover relief by the permanent establishment of B SE in Member State C?

*Provisions and reserves are transferable.*

c and d) 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? 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 Belgium, a taxpayer cannot use losses incurred by another taxpayer. Hence, the receiving company cannot use the previously non-exhausted losses incurred by the transferring company in Belgium. Some scholars argue, on the basis of a statement made by the Belgian Minister of Finance, that this should be possible*

*on the basis of the non-discrimination provision of the applicable double tax convention.*

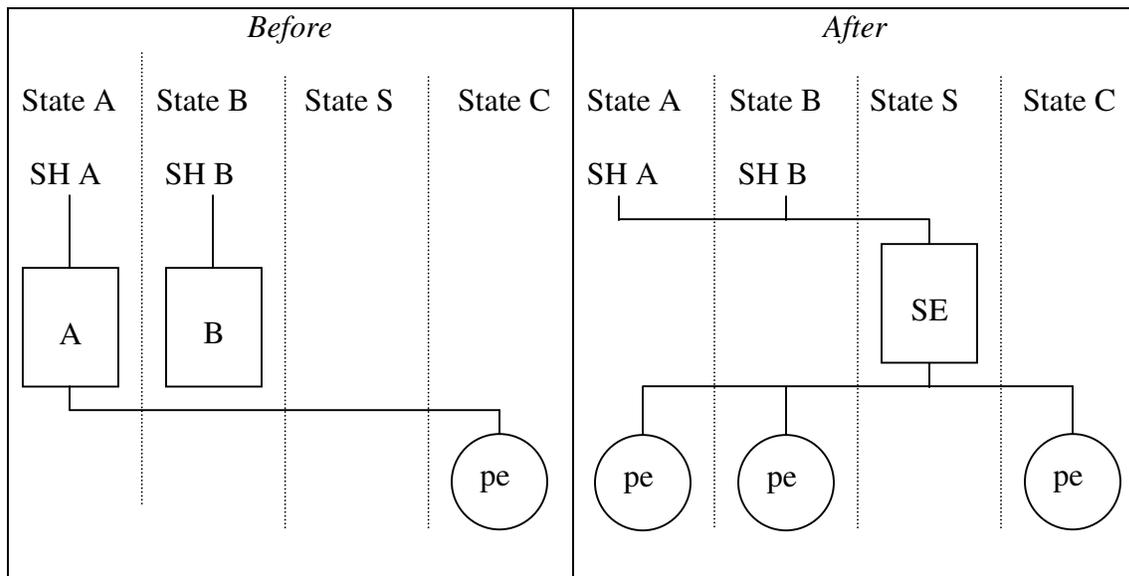
*If the receiving public limited liability company of the Belgian establishment would be situated in Belgium, a rollover relief under the application of article 231, §3 BITC will be available. However, the receiving company can as a rule, not use the previously non-exhausted losses of the transferring company. Article 206, §2 BITC does not cover this situation unless it can be argued that the merger also is covered by article 211, §1 BITC. It may be assumed that this is not the case.*

*This clearly violates article 6 and 10, 1. last sentence of the Merger Directive.*

## 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
  - 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) A Belgian plc is transferred to a foreign SE

There is, in the hands of the Belgian public limited liability company, no difference in treatment between a merger by formation and a merger by acquisition. The same answers as in Case 1 Q 1 apply.

### 2) A Belgian SE is formed by two EU companies not having a PE in Belgium

#### Tax consequences for the Belgian SE

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 are no provisions in Belgian tax law dealing with this issue and one could conclude that the value as set for company and accounting law purposes should be taken, even if in the other EU Member State a rollover relief is available. Based on the accounting treatment, it seems that a transfer of the book value is also applied on cross-border situation, entailing that any unrealised gains and untaxed reserves are, as a rule, again taxable in Belgium (double taxation).*

*The fiscal capital will, in accordance with article 184 BITC, be equal to the paid-in capital.*

Tax consequences for the (non) resident shareholder(s) of the Belgian SE

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 resident and non-resident individual shareholder will be taxed on any capital gain derived from a substantial interest in a Belgian company. Article 96 BITC states in that respect that the fiscal value of the shares received in the framework of a merger, division or conversion will have the fiscal value of the exchanged shares. For a non-resident shareholder, avoidance of taxation will be possible on the basis of the applicable double tax convention.*

*For a corporate shareholder or an individual entrepreneur, holding the shares for business purposes in Belgium, article 45, §1 explicitly provides that the fiscal value of the shares received in the framework of a merger, a division will be equal to the fiscal value of exchanged shares.*

*Based on the wordings of the dividend withholding tax exemption in article 106, §5 of the Royal Decree to the BITC, a non-resident corporate shareholder will not be able to claim the parent-subsidiary withholding tax exemption. In this provision, explicit reference is made to the companies as described in the annex to the Parent-subsidiary Directive. The SE is not mentioned in the annex.*

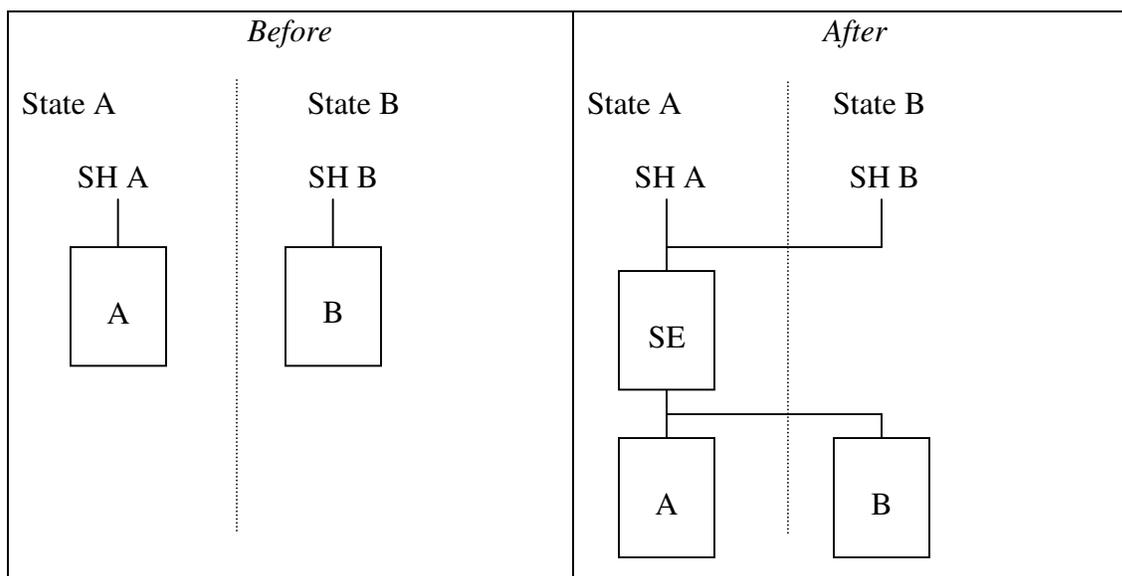
**3) A Belgian PE of an EU company is transferred to a foreign SE**

Tax consequences for the transferring EU company

*There is, in respect of the Belgian permanent establishment, no difference in treatment between a merger by formation and a merger by acquisition. The same answers as in Case 1 Q 3 apply.*

## 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) A Belgian plc and EU company incorporate a Belgian holding SE*

#### The valuation of the shares for tax purposes

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

*The contributed shares will have the value as set for company and accounting law purposes, which in general will be the conventional value or the higher market value.*

*Belgian tax law does not provide for a rollover provision, entailing the transfer of the fiscal value the shares had in the hands of the contributor. The fiscal capital of the SE will, in accordance with article 184 BITC, be equal to the paid-in capital.*

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 received in exchange will have the value as set for company and accounting law purposes, which in general will be the conventional value or the higher market value.*

*Belgian tax law does not provide for a rollover provision in the framework of an exchange of shares.*

*This violates article 8.2. of the Merger Directive where it states that “Member States shall make the application of paragraph 1 (no taxation of the shareholder) conditional upon the shareholder’s not attributing to the securities received a value for tax purposes higher than the securities exchanged had immediately before the merger, division or exchange”.*

#### Tax consequences for a Belgian shareholder

c and d) 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 rollover relief? 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, or iv) an individual entrepreneur?

*The exchange of shares will be treated as a realization of the gain, taxable in accordance with the fiscal status of the shareholder.*

- *For a corporate shareholder, gains on shares will only be exempt if the dividends of the exchanged shares are eligible for the participation exemption regime; It is argued that this violates article 8.1. of the Merger Directive, merely providing for a rollover relief without any conditions.*
- *For an individual shareholder not owning a substantial interest, the gain does not constitute taxable income unless the transaction is seen as speculative (art. 90, 1° BITC); Although this will occur seldom, it violates article 8.1. of the Merger Directive entailing a rollover relief.*
- *An individual owning a substantial interest will be treated in the same manner as any other individual shareholder.*
- *For an individual entrepreneur, the gain will constitute ordinary business income. No exemption is available. This also violates article 8.1. of the Merger Directive entailing a rollover relief.*

#### **2) A Belgian plc is contributed to a foreign holding SE**

#### Tax consequences for a Belgian shareholder

a and b) 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 rollover relief? Will the answer 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, or iv) an individual entrepreneur?

*The difference with the previous hypothesis is that the Belgian shareholder is exchanging his shares for shares in a foreign company. The exchange of shares*

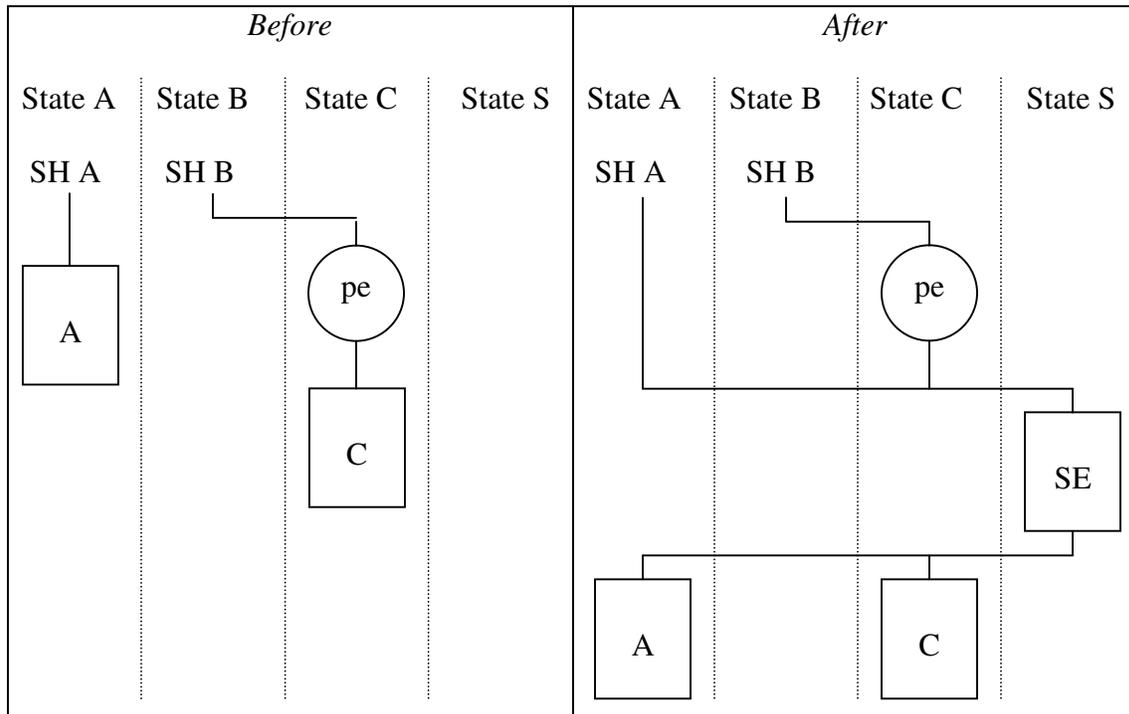
*will also be treated as a realization and subject to taxation in accordance with the fiscal status of the shareholder.*

- *For a corporate shareholder, there is no difference. The gain will be exempt if the dividends of the exchanged shares are eligible for a participation exemption (art. 192 BITC).*
- *For an individual shareholder not owning a substantial interest, the gain does also not constitute taxable income, unless the transaction is seen as speculative (art. 90, 1° BITC).*
- *An individual holding owning a substantial interest is treated differently. The gain would be subject to a separate 16,5% tax if the conditions of article 90, 9° BITC are met. There is no rollover provision available. This violates article 8.1 of the Merger Directive.*
- *For an individual entrepreneur, there is no difference. The gain will constitute ordinary business income. No exemption is available. This violates article 8.1 of the Merger Directive.*

## 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) A Belgian plc is contributed to a foreign holding SE

##### Tax consequences for the Belgian shareholder of the Belgian company

a and b) 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 rollover relief? 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, or SH A being a corporate shareholder?

*The same answer as in Case 3 Q 1c and d applies.*

#### 2) An EU company, held via a PE by a Belgian shareholder, is contributed to an foreign holding SE

##### Tax consequences for the Belgian shareholder

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

*The exchange of shares will be treated as a realization event and any gain subject to taxation in accordance with the fiscal status of the shareholder.*

- *For a corporate shareholder, there is no difference. The gains will be exempt if the dividends of the exchanged shares are eligible for the participation exemption regime (192 BITC).*
- *For an individual entrepreneur, there is no difference. The gain will in principle constitute ordinary business income. No exemption is available.*

*Although more relevant for the individual entrepreneur, both types of taxpayers may, as a rule, invoke the applicable double tax convention. Belgium will apply the exemption method to provide for relief of double taxation.*

### **3) An EU company held in a Belgian PE is contributed to an foreign holding SE**

#### Tax consequences for the non-resident contributor

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

*The same answer as under Q 2 a and b of this case applies. However, the applicable double tax convention will not protect an individual entrepreneur from taxation in Belgium.*

### **4) Shares of EU companies are contributed to a Belgian holding SE**

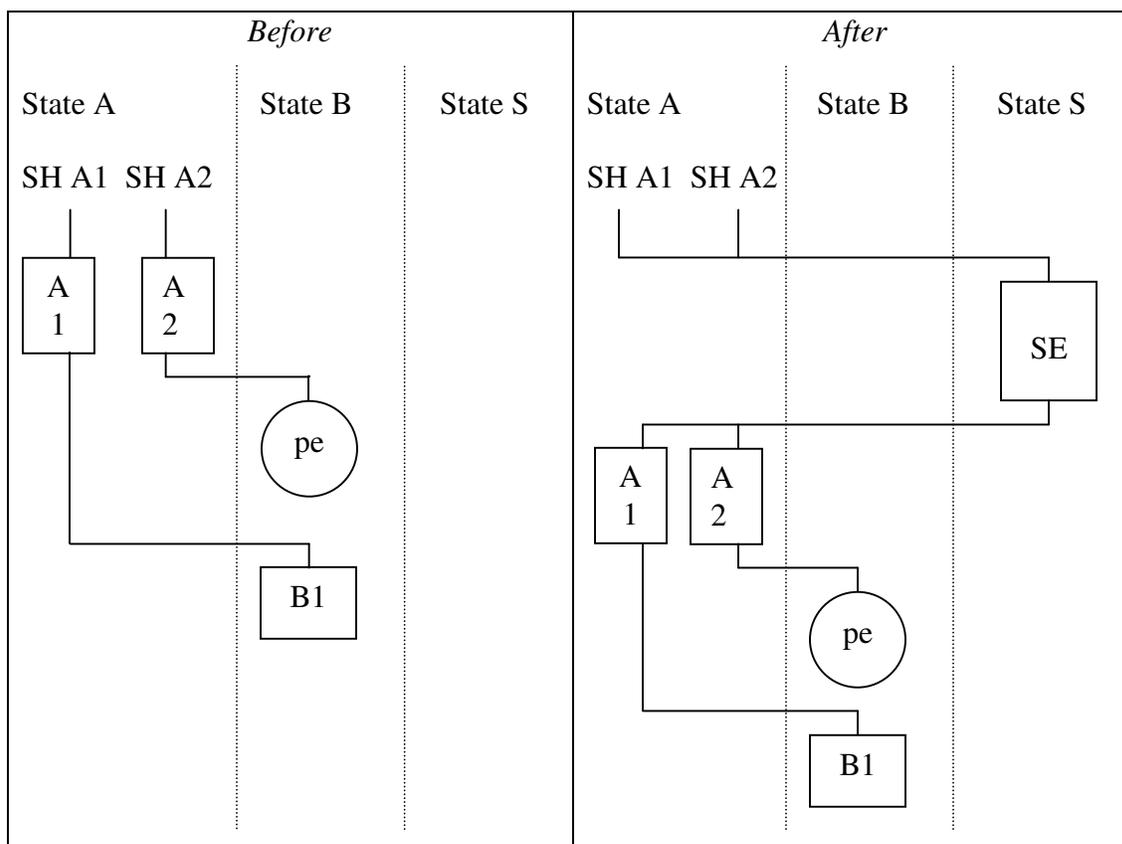
#### The valuation of the shares for tax purposes

*The same answers as in Case 3 Q 1a apply.*

## 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) Two Belgian plc's are contributed to a foreign holding SE**

##### Tax consequences for a Belgian shareholder

a and b) 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 rollover relief? 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, or SH A2 being a corporate shareholder?

*The same answer as in Case 3 Q 2 a and b applies.*

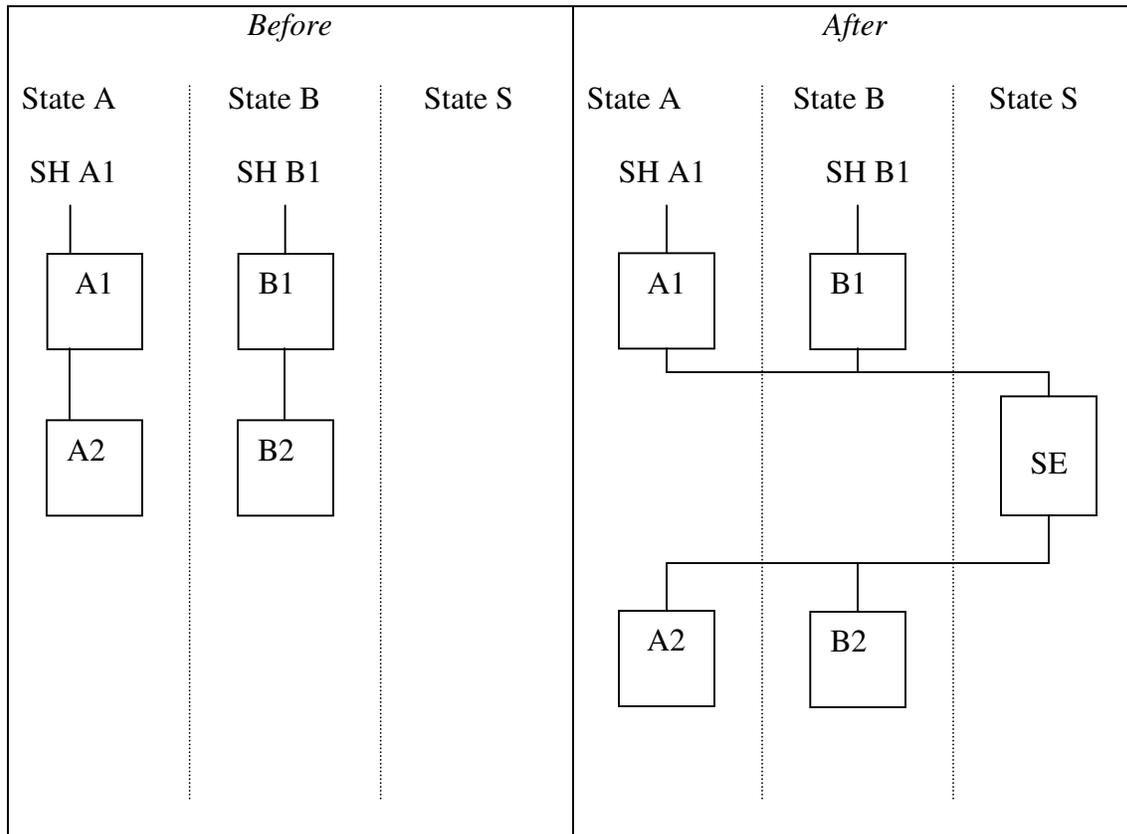
#### **2) EU companies are contributed to a Belgian holding SE**

##### The valuation of the shares for tax purposes

*The same answer as in Case 3 Q 1 a and b applies.*

## 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) A Belgian subsidiary is contributed to a foreign subsidiary SE

##### Tax consequences for the Belgian parent company

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 rollover relief?

*The exchange of shares will be treated as a realization of the gain or loss, subject to taxation in accordance with the fiscal status of the shareholder. For a corporate shareholder, the gains will be exempt if the dividends of the exchanged shares are eligible for the participation exemption (art. 192 BITC).*

#### 2) An EU subsidiary is contributed to a Belgian subsidiary SE

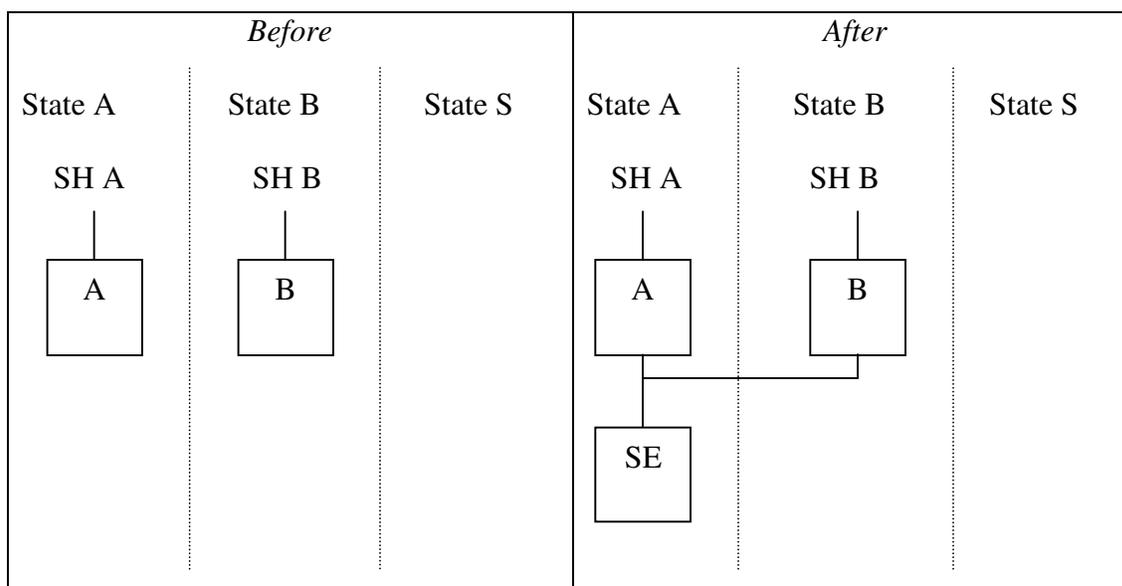
##### Tax valuation of the shares for tax purposes

*The same answer as in Case 3 Q 1 a and b applies.*

## 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) A Belgian company incorporates a Belgian subsidiary SE**

##### Tax consequences for the Belgian company

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 only income tax consequences of the incorporation of the Belgian subsidiary SE will, at that time be that, in the balance sheet of the Belgian subsidiary, cash will be replaced by shares, having the same fiscal value as the cash. The going concern tax treatment should, in principle, be the same as for any other public or private limited liability company.*

#### **2) A Belgian company incorporates a foreign subsidiary SE**

##### Tax consequences for the Belgian company

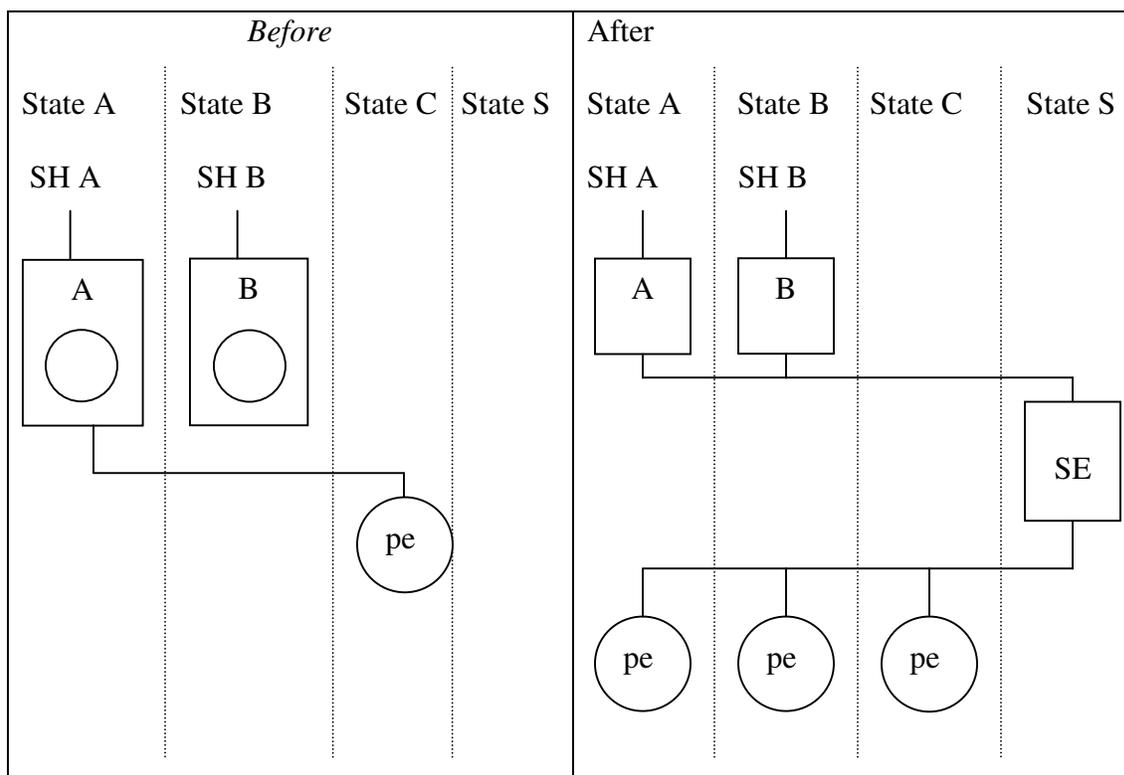
Will there be any tax effect for B in Member State B as a consequence of the formation of the subsidiary SE in Member State A?

*The same answer as in Q 1 of this case applies.*

## 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) A Belgian company contributes a PE and a Belgian branch to a foreign subsidiary SE

##### Tax consequences for the Belgian company and the SE

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 rollover relief?

*The transfer of assets has, in accordance with article 26 BITC, to take place at market value and any capital gain or loss on the assets that are part of the permanent establishment and branch of activity needs to be treated in accordance with its fiscal status. The gains will, as a rule, become taxable in the hands of the Belgian company.*

*As for the assets and liabilities that are part of the permanent establishment, the Belgian company can, in principle, invoke the exemption provided for in the applicable double tax convention. There is no domestic rollover relief available for foreign permanent establishments. The PE is not situated in Belgium.*

*As for the assets and liabilities belonging to the Belgian branch of activity, the rollover relief provided for in article 46, §1, 2° BITC may be invoked. The conditions of the rollover relief – and their possible violation of the Merger Directive - are explained above. The exemption is, as a rule, of a temporary nature only.*

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 rollover relief by the permanent establishment of SE in Member State A?

*Provisions and reserves belonging to the Belgian branch of activity are transferable.*

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

*The fiscal value of the shares obtained in exchange for the contribution will correspond to the fiscal value of the underlying assets (after deduction of the liabilities comprised in the contribution). The latter fiscal value will serve as a basis for determining any future write-downs, capital gains or capital losses on the shares obtained in exchange for the contribution (art. 46, §3 BITC).*

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.*

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

*No.*

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)?

*The same answer as in Case 1 Q 1 f applies.*

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

*The same answer as in Case 1 Q 1 d and e applies.*

## **2) A PE is contributed to a Belgian subsidiary SE**

### Tax consequences for the Belgian subsidiary SE

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?

*Same answers as in Case 1 Q 2 b apply.*

### Tax consequences for the EU company, shareholder of the Belgian subsidiary SE

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

*Based on the wordings of the provision dealing with the dividend withholding tax exemption in article 106, §5 of the Royal Decree on the BITC, a non-resident corporate shareholder will not be able to claim the Parent-Subsidiary withholding tax exemption. In this provision explicit reference is made to the companies as described in the annex to the Parent-subsubsidiary Directive. The SE is not mentioned in this annex.*

*A corporate non-resident taxpayer will not be taxed on gains derived from the shares of the Belgian Subsidiary SE.*

## **3) A Belgian PE is contributed to a foreign subsidiary SE**

### Tax consequences for the EU company and the foreign subsidiary SE

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 rollover relief?

*For Belgian tax purposes, the transfer will be treated as a realisation of the assets and liabilities of the permanent establishment, having as a consequence that all unrealised gains and untaxed reserves and provisions become taxable. However, the non-resident company can, in accordance with article 231, §2*

*BITC, benefit from a rollover relief to the extent that the assets and liabilities remain situated in the Belgian permanent establishment.*

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 rollover relief by the permanent establishment of SE in Member State C?

*Provisions and reserves are transferable.*

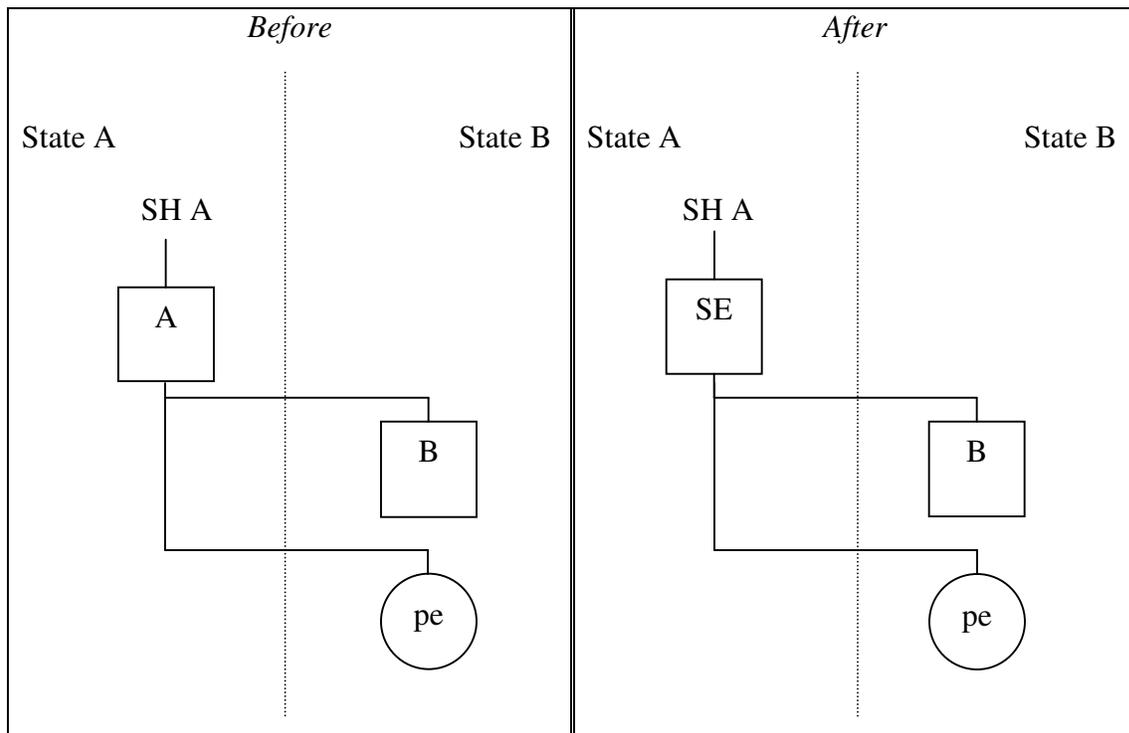
c) Will SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes? If SE would be a company resident in Member State C, would it then be allowed to take over these losses?

*In Belgium, a taxpayer cannot use losses incurred by another taxpayer. Hence, the receiving company cannot use the previously non-exhausted losses incurred by the transferring company in Belgium. Some scholars argue, on the basis of a statement made by the Belgian Minister of Finance, that this should be possible on the basis of the non-discrimination provision of the applicable double tax convention.*

*If the receiving public limited liability company of the Belgian establishment would be situated in Belgium, a rollover relief under the application of article 231, §3 BITC will be available. However, the receiving company can as a rule, not use the previously non-exhausted losses of the transferring company. Article 206, §2 BITC does not cover this situation.*

## 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) A Belgian company is converted into an SE

#### Tax consequences for the SE

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 rollover relief for the business carried on in Member State A, or in Member State B through a permanent establishment?

*A conversion of a public limited liability company into an SE will – after amending and listing of the SE in article 2, §2 of the Belgian Company Law Act not result in a realization of the assets and liabilities of the company, nor in dissolution and liquidation or even a deemed liquidation (art. 210, §1, 3° BITC and art. 775 Belgian company law).*

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?

*Provisions and reserves should be transferable. There are however no provisions dealing with this issue.*

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

*As the SE after the conversion will still be the same taxpayer, it should be able to use its previously incurred non-exhausted losses. There are no provisions dealing with this issue.*

#### Tax consequences for the Belgian shareholder of SE

d and e) Will there be any effect for SH A because of the transformation of its subsidiary company A into an SE? Will the answer 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, or iv) SH is an individual entrepreneur?

*A conversion of a Belgian public limited liability company into a SE will, in the hands of the Belgian shareholder, not result in a realization of the shares and will therefore not have any tax consequences.*

**2) A foreign company, owning a Belgian subsidiary and PE is converted into an SE**

Tax consequences for the SE in Belgium

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

*The SE, or the shareholder of the Belgian subsidiary, is still the same non-resident taxpayer. The conversion should not have any tax consequences at the time of the conversion. There are no provisions dealing with this issue.*

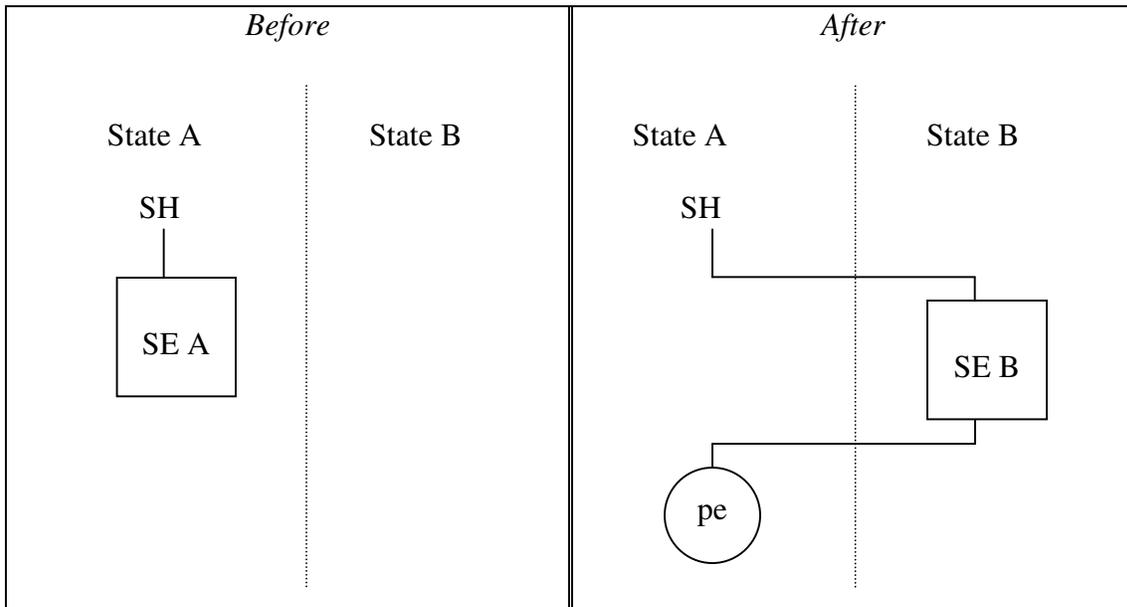
*The SE will upon a dividend distribution by its Belgian subsidiary not be able to benefit from the Parent-Subsidiary withholding tax exemption. The SE is not listed in the annex of the Parent-Subsidiary Directive. Article 106, §5 of the Royal Decree on the BITC explicitly refers to the annex of the Directive, containing the types of companies that may benefit from the Parent-subsubsidiary Directive.*

Tax consequences for the SE and the shareholder of the Belgian subsidiary and permanent establishment in Belgium

*The same answers as in Q 1 of this case apply.*

## 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) A Belgian SE transfers its registered office abroad

#### Tax consequences for the SE

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

*If a Belgian company transfers its statutory seat, seat of management or principal establishment abroad, it will become subject to the rules on the dissolution and liquidation of a company at the time of the transfer (art. 210, §1, 4° BITC). The transfer will thus result in a deemed winding up of the SE.*

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

*See “Relevant Belgian tax rules”.*

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

*Belgian tax law does not explicitly provide for a rollover relief of the net fiscal value of a Belgian branch of activity. Until recently, said transaction always resulted in the incorporation of a new company abroad whereby the rollover relief of article 46, §1, par. 2° became applicable.*

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 rollover relief?

*No specific rules, case law or doctrine seems to exist. However, since it still concerns the same taxpayer, this should be possible.*

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?

*No specific rules, case law or doctrine seems to exist. However, since it still concerns the same taxpayer, this should be possible.*

Tax consequences for the Belgian shareholder

f and g) What are the tax effects for SH in case the transfer results in a winding up of SE for tax purposes? Will the answer differ if SH is: i) a corporate shareholder, ii) an individual shareholder not owning a substantial interest, iii) an individual shareholder owning a substantial interest, and iv) an individual entrepreneur?

*The same answers as in Case 1 Q 1 g and h apply.*

h and i) Are there any effects for tax purposes if the transfer of the registered office is not considered as a winding up for tax purposes? Will the answer differ if SH is: i) a corporate shareholder, ii) an individual shareholder not owning a substantial interest, iii) an individual shareholder owning a substantial interest, and iv) an individual entrepreneur?

*A transfer of the registered office of an SE in accordance with the Regulation will always be seen as a winding up of the SE for tax purposes.*

**2) An SE of another EU Member State transfers its registered office to Belgium**

Belgian tax consequences of the transfer for the SE

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

*The SE will, according to the Belgian Minister of Finance, not be considered a new company.*

*It is currently unclear whether the assets and liabilities will be valued at their market value or will continue to be valued at their book value for tax purposes. The latter seems obvious for assets and liabilities that are part of a Belgian permanent establishment but not for those located outside Belgium.*

*Although debated in tax literature, the fiscal capital of SE will, in accordance with article 184 BITC, be the paid in capital. Hence, previously untaxed reserves will not be incorporated in the fiscal capital of the company and will, as a rule, be subject to a dividend withholding tax upon distribution.*

Tax consequences for the non resident shareholder

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 SE B?

*No specific rules, case law or doctrine seems to exist.*

*Article 45, §1 and 96 of the BITC do not cover this situation. As the transfer does not result in the incorporation of a new company, it might be argued by the Belgian Tax Authorities that upon a subsequent sale, the initial fiscal value immediately before the transfer is relevant for Belgian tax purposes.*

In addition, a corporate shareholder will upon a dividend distribution by its Belgian subsidiary not be able to benefit from the Parent-Subsidiary withholding tax exemption. The SE is not listed in the annex of the Parent-Subsidiary Directive. Article 106, §5 of the Royal Decree on the BITC explicitly refers to the annex of the Directive, containing the types of companies that may benefit from the Parent-subsubsidiary Directive.