

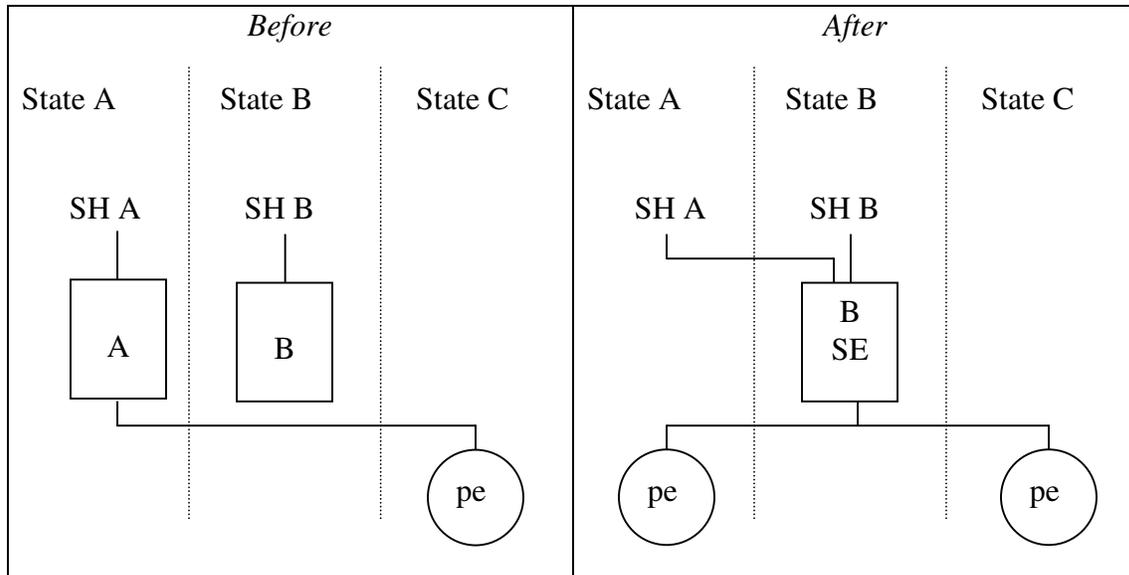
**Annex 3 - Denmark**

# DENMARK

## 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) Member State A is Denmark

#### Tax effects for A (the Danish transferring company) in A (Denmark)

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

*The tax provision for mergers in Danish domestic law is mainly found in the Merger Act (Fusionskatteloven).<sup>1</sup> Additional provisions are to be found in the Act on Taxation of Capital Gains. With respect to purely domestic mergers, it is sometimes required to apply for approval from the Central Assessment Board. In case of mergers where the acquiring company, the acquired company or both companies are non-resident, approval from the Central Assessment Board is always required.<sup>2</sup>*

*Non-resident companies are subject to the rollover relief only to the extent of their assets connected to a permanent establishment or with respect to immovable property in Denmark.<sup>3</sup>*

*Assets and liabilities in the acquired company are valued as if the acquiring company had acquired them at the same time and at the same price as in the*

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<sup>1</sup> Fusionskatteloven, as amended by Act 313, 21 May 2002 and by Act 409, 6 June 2002 (Merger Act, MA)

<sup>2</sup> MA ch 3 sec 15(1)

<sup>3</sup> MA ch 3 sec 15(2-4)

*acquired company. Depreciation made by the acquired company is treated as if the acquiring company had depreciated the assets.*<sup>4</sup>

- 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?

*There are no tax-free or partially tax-exempt provisions or reserves available in Denmark as of 1990. Any remaining contributions not yet realised are subject to rollover relief and are treated as if the acquiring company had made the contributions.*<sup>5</sup>

*In case unrealised gains on i.e. machinery or ships are considered to be tax-free reserves then the succession principle also applies and the reserves are transferred to the receiving company.*

- 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?

*Losses from previous tax years in the transferring company and also losses in the receiving company are generally not subject to the rollover relief.<sup>6</sup> This applies regardless if B in this case would be a permanent establishment or a company.*

*However, in case of a merger between a parent company and a subsidiary where both companies were subject to joint taxation, losses may be transferred, provided the losses arise during the time the companies were subject to joint taxation. This provision applies from income year 2002.<sup>7</sup> For losses arising before that date the companies must have had been subject to joint taxation for the last five years prior to the merger in order to be granted a rollover relief with respect to losses.*

- 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?

*No, Denmark will not renounce any right to tax the permanent establishment in Member State C. Denmark will grant a tax credit on any notional tax in the other*

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<sup>4</sup> MA ch 1 sec 8(1)

<sup>5</sup> MA ch 1 sec 8(1)

<sup>6</sup> MA ch 1 sec 8(6)

<sup>7</sup> MA ch 1 sec 8(6)

*Member State which would have been levied in absence of the provisions of the Merger Directive in that Member State provided that the credit method is used to relieve double taxation in that situation.*

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

*Yes, losses will be reinstated in cases where the exemption method applies in the tax treaties negotiated by Denmark (France, Germany and Spain).*

Tax effects for SH A (Danish resident shareholder of the Danish transferring company) in Member State A (Denmark)

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

*No, the issue of shares in exchange for shares in B SE will not give rise to immediate taxation. The principle of succession applies upon request to the Regional Customs and Tax Office. Taxation is postponed until shares in B SE are disposed of. Any cash consideration will, however, be taxable immediately.*

*Shares received by the shareholder in exchange for shares in the acquired company are treated as if they had been acquired at the same time and for the same price as the shares in the acquired company.<sup>8</sup>*

*The conversion of shares has to be carried out within a period of 6 months.*

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

*Only individuals and companies resident in Denmark are generally subject to tax on the disposal of shares. No tax liability in Denmark will arise in this situation.*

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

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<sup>8</sup> MA ch 1 sec 11

iv) An individual shareholder owning a substantial interest?  
*No*

v) An individual entrepreneur?  
*No*

## 2) Member State B is Denmark

### Tax effects for B (the Danish receiving company) and B SE in Member State B (Denmark)

a) According to Art. 17 par. 2 Reg. 2157/2001, the acquiring company shall take the form of an SE when the merger takes place. According to Art. 37 par. 2 Reg. 2157/2001 the conversion of a public limited-liability company into an SE shall not result in the winding up of the company or in the creation of a new legal person. However, the Regulation itself does not give guidance with regard to taxation. Will the fact that B takes the form of an SE have corporate income tax consequences in Member State B?

*Probably not, unless the transformation involves a liquidation no tax effect should occur.*

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?

*Denmark applies the succession principle in case of rollover relief. All assets and liabilities will be attributed the value the assets and liabilities had in the transferring company.<sup>9</sup>*

### Tax effects for SH B in Member State B

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

*The transformation will probably have no tax effect provided the transformation does not involve a liquidation of B.*

d) Will the answer to question 2c) above differ if SH B is:

i) A corporate shareholder?  
*No*

ii) An individual shareholder not owning a substantial interest?  
*No*

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<sup>9</sup> MA ch 1 sec 8

iii) An individual shareholder owning a substantial interest?  
*No*

iv) An individual entrepreneur?  
*No*

### 3) Member State C is Denmark

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

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?

*Non-resident companies are subject to the rollover relief only to the extent of their assets connected to a permanent establishment or with respect to immovable property in Denmark.<sup>10</sup> In this case rollover is available because of the permanent establishment in Denmark (Member State C).*

*Assets and liabilities in the acquired company are valued as if the acquiring company had acquired them at the same time and at the same price as in the acquired company. Depreciation made by the acquired company is treated as if the acquiring company had depreciated the assets.<sup>11</sup>*

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?

*There are no tax-free or partially tax-exempt provisions or reserves available in Denmark as of 1990. Any remaining contributions not yet realised are subject to rollover relief and are treated as if the acquiring company had made the contributions.<sup>12</sup>*

*In case unrealised gains on i.e. machinery or ships are considered to be tax-free reserves then the succession principle also applies and the reserves are transferred to the receiving company.*

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<sup>10</sup> MA ch 3 sec 15(2-4)

<sup>11</sup> MA ch 1 sec 8(1)

<sup>12</sup> MA ch 1 sec 8(1)

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

*Losses from previous tax years in the transferring company and also losses in the receiving company are generally not subject to the rollover relief.<sup>13</sup>*

*However, in case of a merger between a parent company and a subsidiary where both companies were subject to joint taxation, losses may be transferred, provided the losses arose during the time the companies were subject to joint taxation. This provision applies from income year 2002.<sup>14</sup> For losses arising before that date the companies must have had been subject to joint taxation for the last five years prior to the merger in order to be granted a rollover relief with respect to losses.*

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

*Possibly, provided the merging companies had been subject to joint taxation, see above.*

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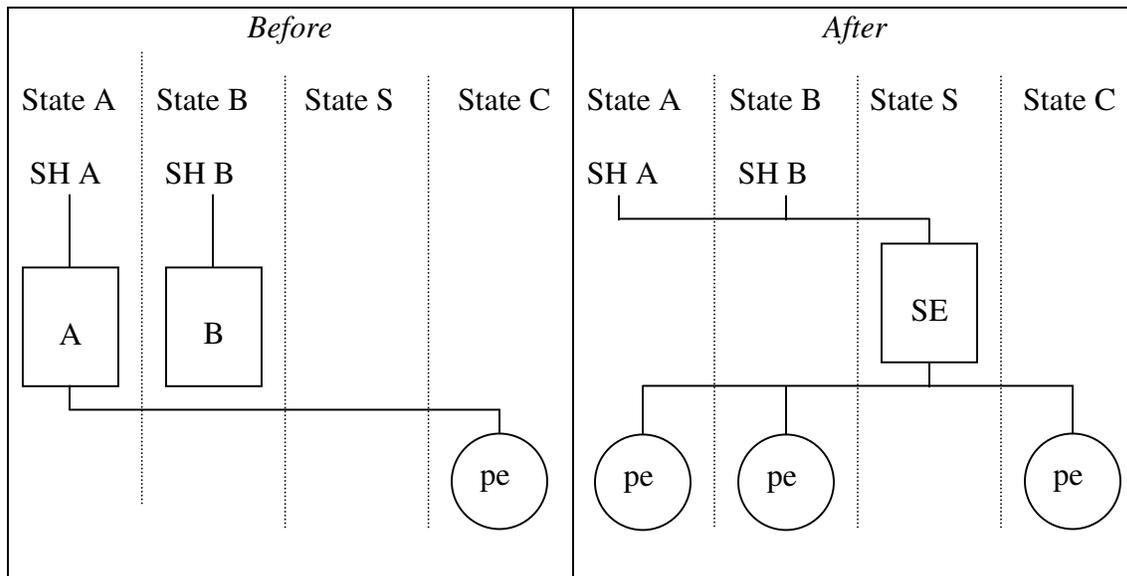
<sup>13</sup> MA ch 1 sec 8(6)

<sup>14</sup> MA ch 1 sec 8(6)

## 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 in State S
- A and B are public limited-liability companies (see Annex I to Reg. 2157/2001)
- State A, State B, State C, and State S are EU Member States
- A:
  - formed under law of Member State A
  - registered office in Member State A
  - head office in Member State A
- B:
  - formed under law of Member State B
  - registered office in Member State B
  - head office in Member State B
- SE:
  - formed under law of Member State S
  - registered office in Member State S
  - head office in Member State S
  - will be covered by the EC Merger Directive

## Transactions

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

## Questions

### 1) Assume Member State A is Denmark

#### Tax effects for A in Member State A (Denmark)

- 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?

*The tax provision for mergers in Danish domestic law is mainly found in the Merger Act (Fusionskatteloven). Additional provisions are to be found in the Act on Taxation of Capital Gains. With respect to purely domestic mergers, it is sometimes required to apply for approval from the Central Assessment Board. In case of mergers where the acquiring company, the acquired company or both companies are non-resident, approval from the Central Assessment Board is always required.<sup>15</sup>*

*Non-resident companies are subject to the rollover relief only to the extent of their assets connected to a permanent establishment or with respect to immovable property in Denmark.<sup>16</sup> In this case the permanent establishment remaining in Member State A will satisfy that requirement.*

*Assets and liabilities in the acquired company are valued as if the acquiring company had acquired them at the same time and at the same price as in the*

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<sup>15</sup> MA ch 3 sec 15(1)

<sup>16</sup> MA ch 3 sec 15(2-4)

*acquired company. Depreciation made by the acquired company is treated as if the acquiring company had depreciated the assets.*<sup>17</sup>

- 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 SE in Member State A?

*There are no tax-free or partially tax-exempt provisions or reserves available in Denmark as of 1990. Any remaining contributions not yet realised are subject to rollover relief and are treated as if the acquiring company had made the contributions.*<sup>18</sup>

*In case unrealised gains on i.e. machinery or ships are considered to be tax-free reserves then the succession principle also applies and the reserves are transferred to the receiving company.*

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

*Losses from previous tax years in the transferring company and also losses in the receiving company are generally not subject to the rollover relief.*<sup>19</sup> *This applies regardless if B in this case would be a permanent establishment or a company.*

*However, in case of a merger between a parent company and a subsidiary where both companies were subject to joint taxation, losses may be transferred, provided the losses arose during the time the companies were subject to joint taxation. This provision applies from income year 2002.*<sup>20</sup> *For losses arising before that date the companies must have had been subject to joint taxation for the last five years prior to the merger in order to be granted a rollover relief with respect to losses.*

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

*No, Denmark will not renounce any right to tax the permanent establishment in Member State C. Denmark will grant a tax credit on any notional tax in the other*

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<sup>17</sup> MA ch 1 sec 8(1)

<sup>18</sup> MA ch 1 sec 8(1)

<sup>19</sup> MA ch 1 sec 8(6)

<sup>20</sup> MA ch 1 sec 8(6)

*Member State which would have been levied in absence of the provisions of the Merger Directive in that Member State provided that the credit method is used to relieve double taxation in that situation.*

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

*Yes, in cases where the exemption method applies in the tax treaties negotiated by Denmark (France, Germany and Spain).*

Tax effects for SH A in Member State A (Denmark)

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

*No, the issue of shares in exchange for shares in B SE will not give rise to immediate taxation. The principle of succession applies upon request to the Regional Customs and Tax Office. Taxation is postponed until shares in B SE are disposed of. Any cash consideration will, however, be taxable immediately.*

*Shares received by the shareholder in exchange for shares in the acquired company are treated as if they had been acquired at the same time and for the same price as the shares in the acquired company.<sup>21</sup>*

*The conversion of shares has to be carried out within a period of 6 months.*

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

*Only individuals and companies resident in Denmark are generally subject to tax on the disposal of shares. No tax liability in Denmark will arise in this situation.*

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

- i) A corporate shareholder?

*No*

- ii) An individual shareholder not owning a substantial interest?

*No*

- iii) An individual shareholder owning a substantial interest?

*No*

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<sup>21</sup> MA ch 1 sec 11

- iv) An individual entrepreneur?  
*No*

## 2) Assume Member State S is Denmark

### Tax effects for SE in Member State S

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

*Denmark applies the succession principle in case of rollover relief. All assets and liabilities will be attributed the value the assets and liabilities had in the transferring company.<sup>22</sup>*

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

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

*Shares received in SE are to be valued according to the valuation of the shares exchanged for the new shares in SE. They are to be treated based on the acquisitions values of the shares exchanged for shares in SE.*

## 3) Assume Member State C is Denmark

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

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

*Rollover relief applies with respect to capital gains, see above.*

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

*There are no tax-free or partially tax-exempt provisions or reserves available in Denmark as of 1990. Any remaining contributions not yet realised are subject to*

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<sup>22</sup> MA ch 1 sec 8

*rollover relief and are treated as if the acquiring company had made the contributions.<sup>23</sup>*

*In case unrealised gains on i.e. machinery or ships are considered to be tax-free reserves then the succession principle also applies and the reserves are transferred to the receiving company.*

- 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?

*Losses from previous tax years in the transferring company and also losses in the receiving company are generally not subject to the rollover relief.<sup>24</sup> This applies regardless if B in this case would be a permanent establishment or a company.*

*However, in case of a merger between a parent company and a subsidiary where both companies were subject to joint taxation, losses may be transferred, provided the losses arose during the time the companies were subject to joint taxation. This provision applies from income year 2002.<sup>25</sup> For losses arising before that date the companies must have had been subject to joint taxation for the last five years prior to the merger in order to be granted a rollover relief with respect to losses.*

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<sup>23</sup> MA ch 1 sec 8(1)

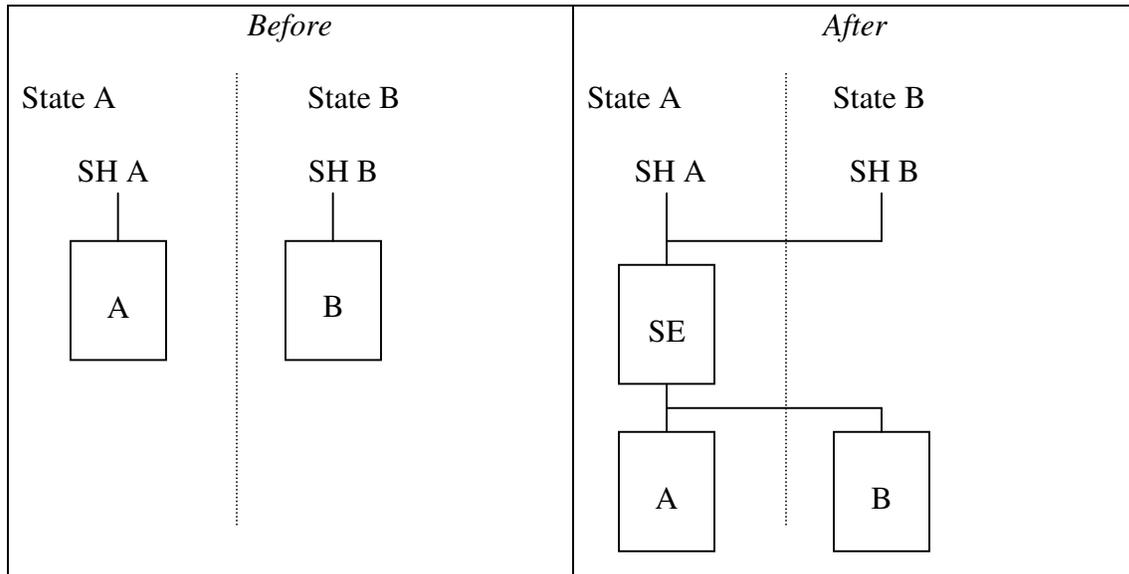
<sup>24</sup> MA ch 1 sec 8(6)

<sup>25</sup> MA ch 1 sec 8(6)

### CASE 3

#### *Formation of a Holding – SE – 1*

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



#### **Facts and assumptions**

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

## Transactions

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

## Questions

### 1) Assume Member State A is Denmark

#### Tax effects for SE in Member State A (Denmark)

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

*Shares received by SE are to be valued at market value.*

- 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?

*Shares transferred by SE to shareholders are to be valued at market value.*

#### Tax effects for SH A in Member State A (Denmark)

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

*The issue of shares in SE in exchange for shares in A will not give rise to any taxation of capital gains with SH A. The principle of succession applies upon request to the Regional Customs and Tax Office. Any cash consideration in connection to the exchange of shares is taxable immediately.*

*Shares received by the shareholder in exchange for shares in the acquired company are treated as if they had been acquired at the same time and for the same price as the shares in the acquired company.<sup>26</sup>*

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<sup>26</sup> MA ch 1 sec 11

*The conversion of shares has to be carried out within a period of 6 months.*

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

## **2) Assume Member State B is Denmark**

### Tax effects for SH B in Member State B

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

*The issue of shares in SE in exchange for shares in A will not give rise to any taxation of capital gains with SH A. The principle of succession applies upon request to the Regional Customs and Tax Office. Any cash consideration in connection to the exchange of shares is taxable immediately.*

*Shares received by the shareholder in exchange for shares in the acquired company are treated as if they had been acquired at the same time and for the same price as the shares in the acquired company.<sup>27</sup>*

*The conversion of shares has to be carried out within a period of 6 months.*

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

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<sup>27</sup> MA ch 1 sec 11

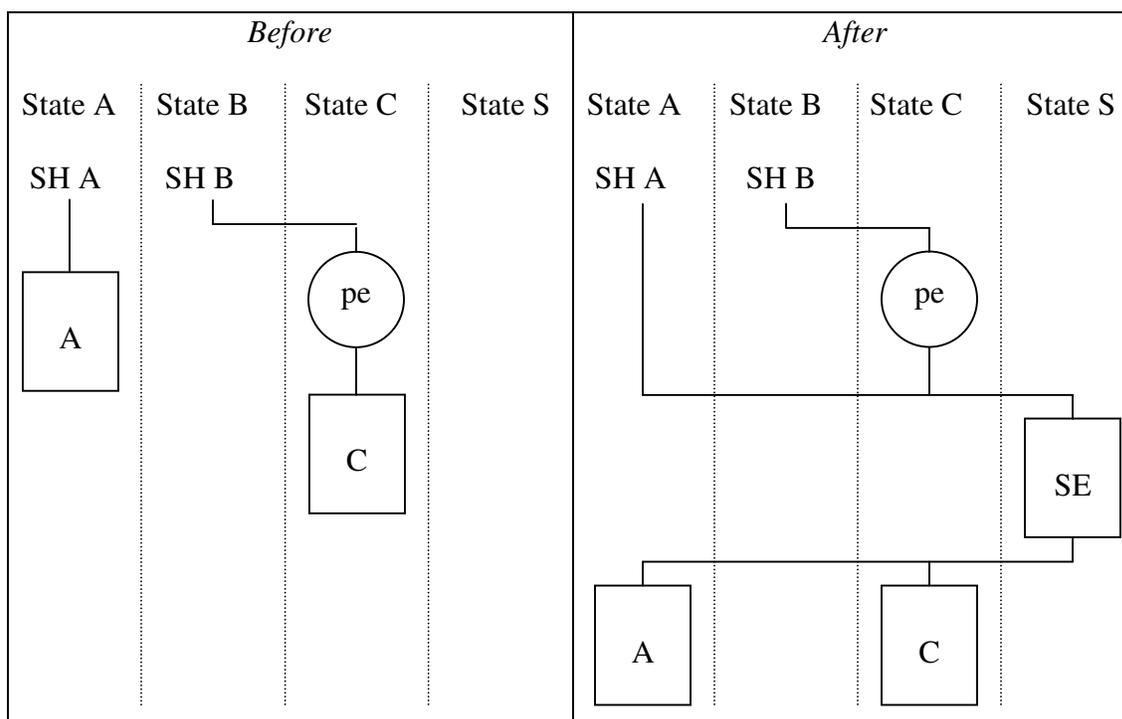
iii) An individual shareholder owning a substantial interest?  
*No*

iv) An individual entrepreneur?  
*No*

## CASE 4

### *Formation of a Holding – SE*

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



#### Facts and assumptions

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

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

### Transactions

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

### Questions

#### 1) Assume Member State A is Denmark

##### Tax effects for SH A in Member State A

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

*The issue of shares in SE in exchange for shares in A will not give rise to any taxation of capital gains with SH A. The principle of succession applies upon request to the Regional Customs and Tax Office. Any cash consideration in connection to the exchange of shares is taxable immediately.*

*Shares received by the shareholder in exchange for shares in the acquired company are treated as if they had been acquired at the same time and for the same price as the shares in the acquired company.<sup>28</sup>*

*The conversion of shares has to be carried out within a period of 6 months.*

- b) Will the answer to the above question be different in the case of:
- i) SH A being an individual shareholder not owning a substantial interest?  
*No*
  - ii) SH A being an individual shareholder owning a substantial interest?  
*No*

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<sup>28</sup> MA ch 1 sec 11

iii) SH A being an individual entrepreneur?

*No*

iv) SH A being a corporate shareholder?

*No*

## 2) Assume Member State B is Denmark

### Tax effects for SH B in Member State B

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

*The issue of shares in SE in exchange for shares in C will not give rise to any taxation of capital gains with SH B. The principle of succession applies upon request to the Regional Customs and Tax Office. Any cash consideration in connection to the exchange of shares is taxable immediately.*

*Shares received by the shareholder in exchange for shares in the acquired company are treated as if they had been acquired at the same time and for the same price as the shares in the acquired company.<sup>29</sup>*

*The conversion of shares has to be carried out within a period of 6 months.*

b) Will the answer to the above question be different in the case of:

i) SH B being an individual entrepreneur?

*No*

ii) SH B being a corporate shareholder?

*No*

## 3) Assume Member State C is Denmark

### Tax effects for SH B in Member State C

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

*Non-residents are not subject to tax on capital gains on shares in Denmark. The issue of rollover relief is therefore not relevant in this case.*

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<sup>29</sup> MA ch 1 sec 11

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

**4) Assume Member State S is Denmark**

Tax effects for SE in Member State S

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

*Shares received by SE are to be valued at market value.*

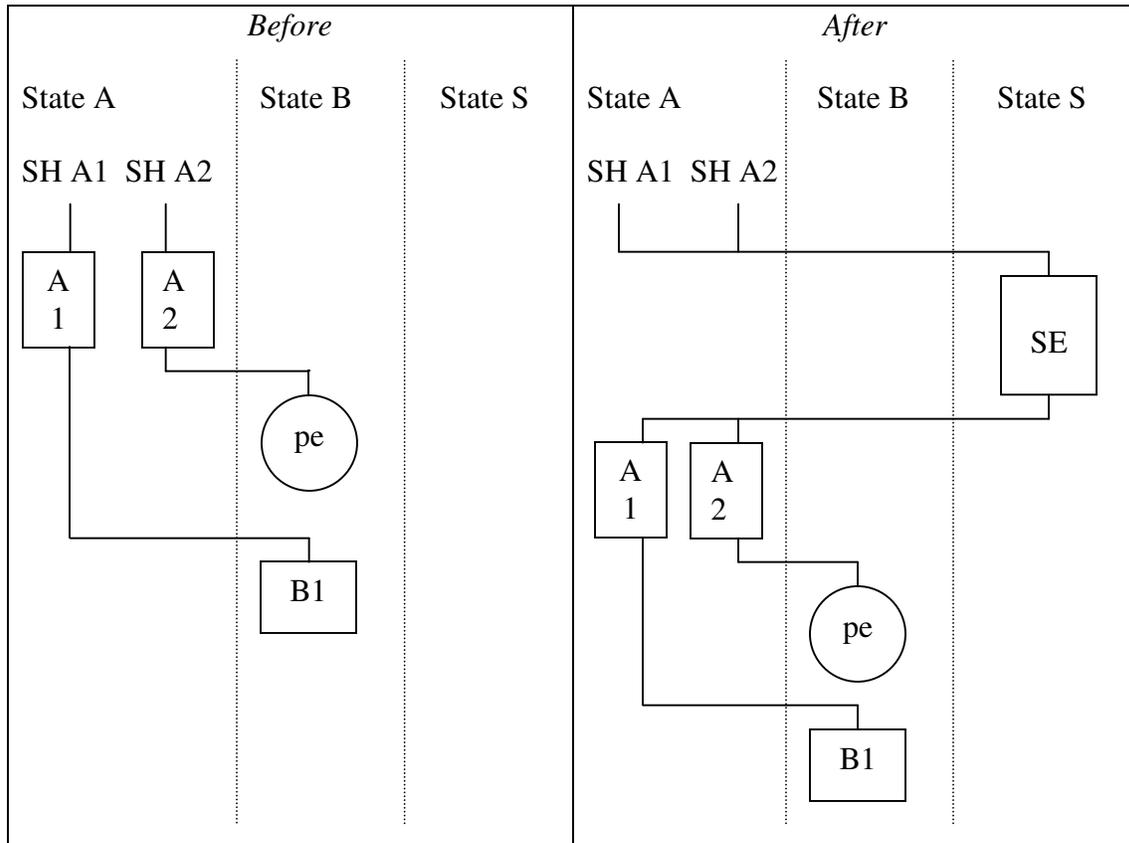
- b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to SH A and SH B? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

*Shares transferred by SE to shareholders are to be valued at market value.*

## CASE 5

### *Formation of a Holding – SE*

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



#### Facts and assumptions

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

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

### Transactions

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

### Questions

#### 1) Assume Member State A is Denmark

##### Tax effects for SH A2 in Member State A

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

*The issue of shares in SE in exchange for shares in A2 will not give rise to any taxation of capital gains with SH A2. The principle of succession applies upon request to the Regional Customs and Tax Office. Any cash consideration in connection to the exchange of shares is taxable immediately.*

*Shares received by the shareholder in exchange for shares in the acquired company are treated as if they had been acquired at the same time and for the same price as the shares in the acquired company.<sup>30</sup>*

*The conversion of shares has to be carried out within a period of 6 months.*

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<sup>30</sup> MA ch 1 sec 11

- b) Will the answer to the above question be different in the case of:
- i) SH A2 being an individual shareholder not owning a substantial interest?  
*No*
  - ii) SH A2 being an individual shareholder owning a substantial interest?  
*No*
  - iii) SH A2 being an individual entrepreneur?  
*No*
  - iv) SH A2 being a corporate shareholder?  
*No*

**2) Assume Member State S is Denmark**

Tax effects for SE in Member State S

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

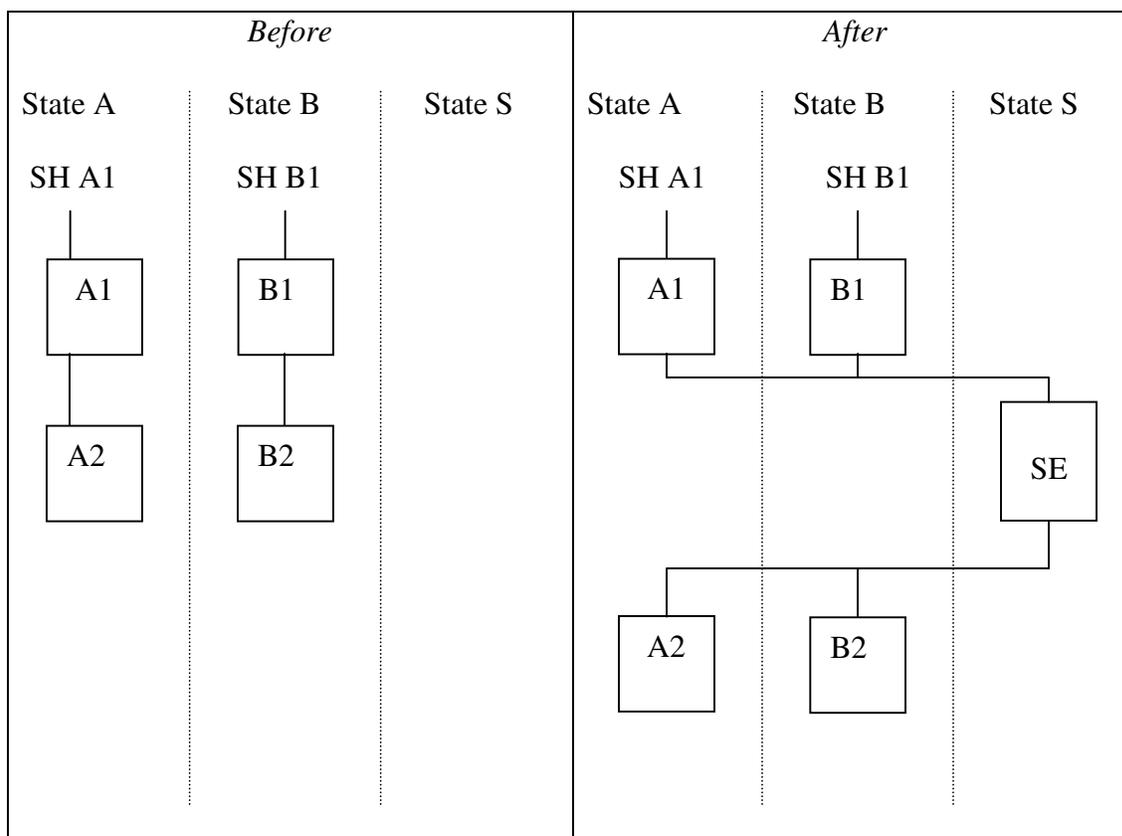
*Shares received by SE are to be valued at market value.*

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

*Shares transferred by SE to shareholders are to be valued at market value.*

## CASE 6

### *Formation of a Subsidiary–SE by exchange of shares* (Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



#### **Facts and assumptions**

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

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

### Transactions

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

### Questions

#### 1) Assume Member State A is Denmark

##### Tax effects for A1 in Member State A

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

*The issue of shares in SE in exchange for shares in A2 will not give rise to any taxation of capital gains with SH A1. The principle of succession applies upon request to the Regional Customs and Tax Office. Any cash consideration in connection to the exchange of shares is taxable immediately.*

*Shares received by the shareholder in exchange for shares in the acquired company are treated as if they had been acquired at the same time and for the same price as the shares in the acquired company.<sup>31</sup>*

*The conversion of shares has to be carried out within a period of 6 months.*

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<sup>31</sup> MA ch 1 sec 11

**2) Assume Member State S is Denmark**

Tax effects for SE in Member State S

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

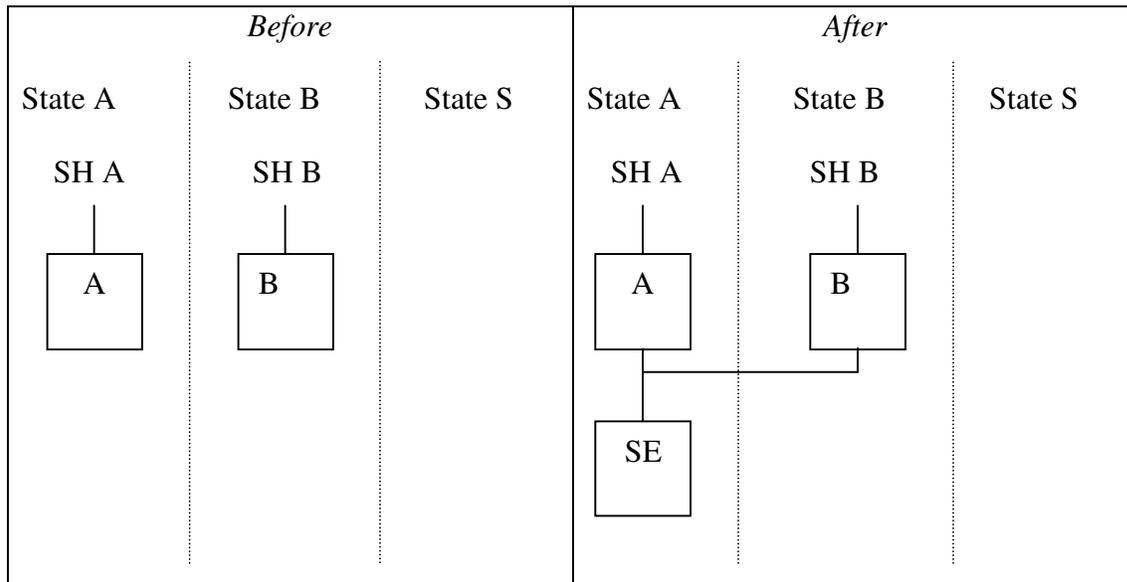
*Shares received by SE are to be valued at market value.*

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

*Shares transferred by SE to shareholders are to be valued at market value.*

## CASE 7

### *Formation of a Subsidiary–SE by contribution of cash* (Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



#### **Facts and assumptions**

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

## Transactions

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

## Questions

### 1) Assume Member State A is Denmark

#### Tax effects for A in Member State A

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

*No*

### 2) Assume Member State B is Denmark

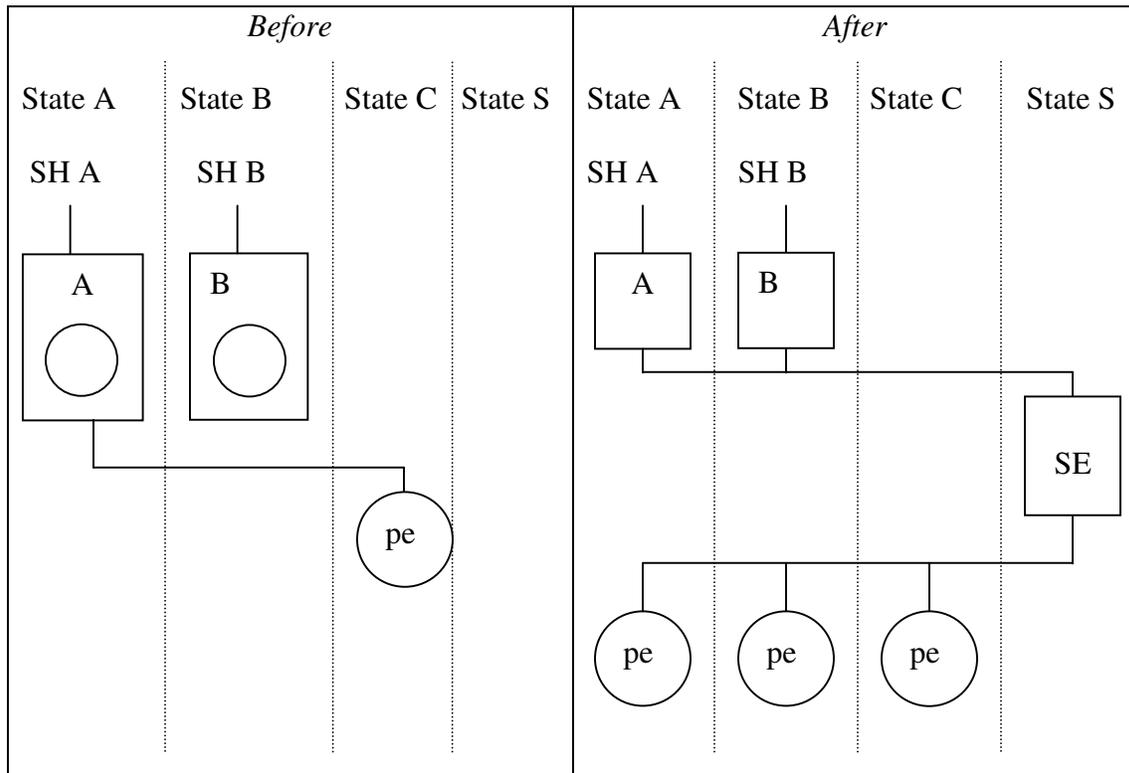
#### Tax effects for B in Member State B

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

*No*

## CASE 8

### *Formation of a Subsidiary–SE by transfer of assets* (Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



#### Facts and assumptions

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

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

### Transactions

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

### Questions

#### 1) Assume Member State A is Denmark

##### Tax effects for A and SE in Member State A

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

*Upon request to the Central Assessment Board, a transfer of assets may qualify for relief in Denmark under the provisions in the Merger Act section 15d, provided both the transferring and the receiving companies are covered by the Merger Directive.<sup>32</sup>*

*The consideration for the transferred assets must consist entirely of shares in the receiving company.*

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<sup>32</sup> MA ch 5 sec 15c(1)

*Transferred assets in the situation described in case 8 are deemed to have been acquired at the same time and for the same price in the receiving company as in the transferring company.<sup>33</sup> The succession principle applies.*

*Only assets effectively connected to a permanent establishment in Member State A are subject to the rollover relief.<sup>34</sup>*

- 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?

*There are no tax-free or partially tax-exempt provisions or reserves available in Denmark as of 1990. Any remaining contributions not yet realised are subject to rollover relief and are treated as if the acquiring company had made the contributions.<sup>35</sup>*

*In case unrealized gains on i.e. machinery or ships are considered to be tax-free reserves then the succession principle also applies and the reserves are transferred to the receiving company.*

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

*The shares in SE received by A as consideration for the transferred assets are to be valued at the taxable value the transferred assets had on the date of the transfer of assets.<sup>36</sup>*

- 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?)

*Losses are generally not subject to the rollover relief. In case of a transfer between a parent company and a subsidiary where both companies were subject to joint taxation losses may be transferred subject to restrictions.<sup>37</sup>*

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<sup>33</sup> MA ch 5 sec 15d with reference to MA ch 1 sec 8

<sup>34</sup> MA ch 5 sec 15d(2)

<sup>35</sup> MA ch 5 sec 15d(2)

<sup>36</sup> MA ch 5 sec 15d(4)

<sup>37</sup> MA ch 5 secs 15d (2-3) with reference to MA ch 1 sec 8

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

*No, Denmark will not renounce any right to tax the permanent establishment in Member State C.*

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

*Yes, in case the exemption method is used to relieve double taxation. Exemption method is used to relieve double taxation with France, Germany and Spain.*

- g) and h) Or will Member State A tax profits or capital gains of the permanent establishment in State C 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)?

*Denmark will tax the permanent establishment but will also grant a tax credit on any notional tax in the other Member State which would have been levied in absence of the provisions of the Merger Directive in that Member State provided that the credit method is used to relieve double taxation in that situation.*

## **2) Assume Member State S is Denmark**

### Tax effects for SE in Member State S

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

*SE will take over the assets at the transfer value or the market value in certain cases if the market value is different from the transfer value.*

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

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

*No*

**3) Assume Member State C is Denmark**

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

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

*Yes, rollover relief applies, see above.*

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

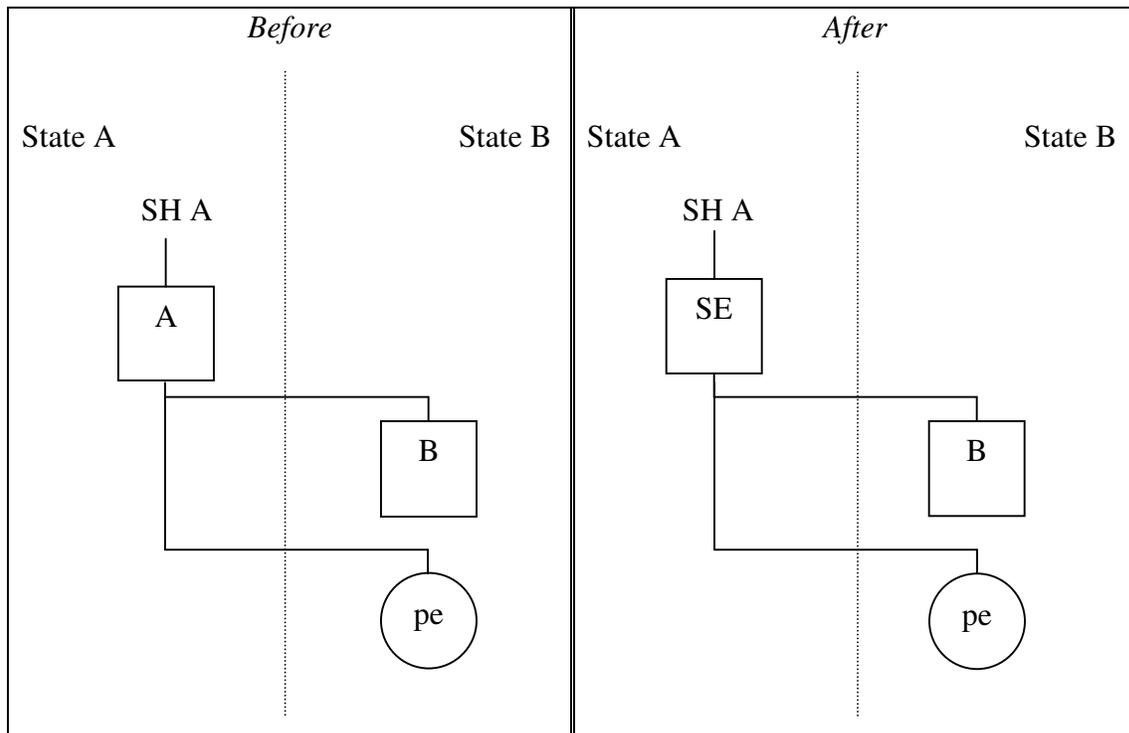
*Yes, see above.*

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

*Generally not. In case both transferring and receiving company has been subject to joint taxation losses may be taken over subject to restrictions, see above.*

## CASE 9

### *Transformation of public limited-liability company into an SE* (Art. 2 par. 4 jo. Art. 37 Reg. 2157/2001)



#### Facts and assumptions

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

## Transactions

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

## Questions

### 1) Assume Member State A is Denmark

#### Tax effects for A in Member State A

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

*Most likely a rollover relief will be granted. Please note that there are no provisions covering this situation so it is impossible to answer accurately but in this situation there seems to be no reason why a rollover relief should not be granted.*

- 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?

*Since any old reserves may generally be carried over in case of a merger or a transfer of assets, there seems to be no reason why the same should not apply to the situation described above in case the transformation is subject to a rollover relief.*

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

*There are currently restrictions applicable to losses from previous tax years in case of mergers and transfer of assets. In this case however, there seems to be no obstacle in the way for SE to take over the losses of A that have not been exhausted for tax purposes.*

Tax effects for SH A in Member State A

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

*There will probably not be any tax consequences for SH A as a result of the transformation until he disposes of his shares in SE.*

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

- i) SH is a corporate shareholder?

*No*

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

*No*

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

*No*

- iv) SH is an individual entrepreneur?

*No*

**2) Assume Member State B is Denmark**

Tax effects for the shareholder of B in Member State B

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

*There will probably not be any tax effect to the shareholders of B.*

Tax effects for A and SE in Member State B

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

*Most likely a rollover relief for A will be granted in case of the transformation.*

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

*Most likely the current value of the assets will be the attributable value for SE.*

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

*Since any old reserves may generally be carried over in case of a merger or a transfer of assets, there seems to be no reason why the same should not apply to the situation described above in case the transformation is subject to a rollover relief.*

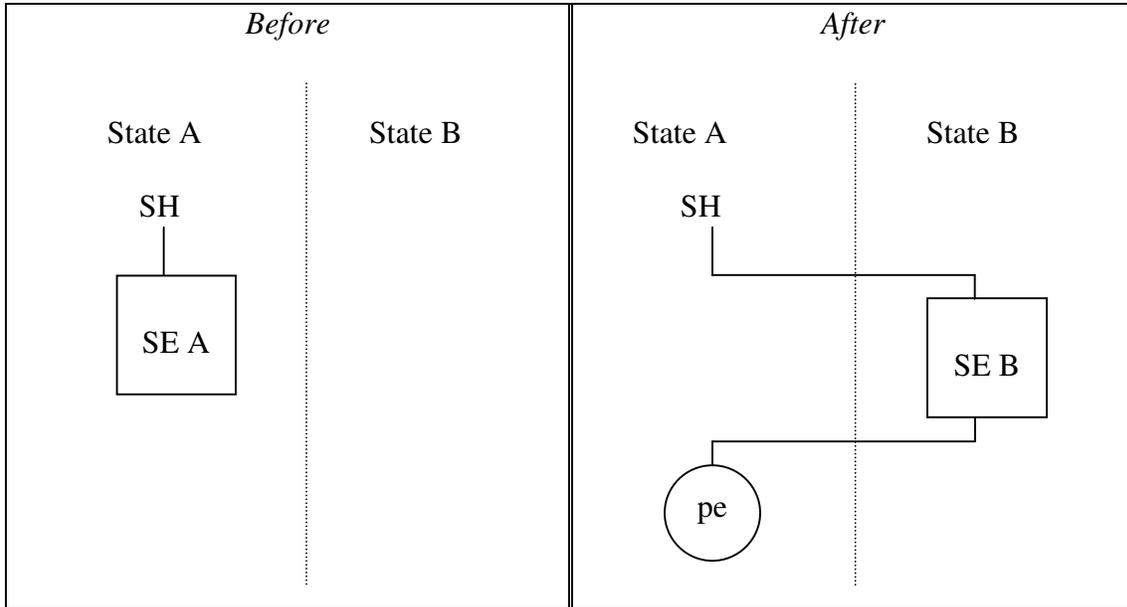
- e) Will SE's permanent establishment in Member State B be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes?

*There are currently restrictions applicable to losses from previous tax years in case of mergers and transfer of assets. In this case however, there seems to be no obstacle in the way for SE to take over the losses of A that have not been exhausted for tax purposes.*

## CASE 10

### *Transfer of registered office of an SE*

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



#### **Facts and assumptions**

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

#### **Transactions**

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

## Questions

### 1) Assume Member State A is Denmark

#### Tax effects of the transfer for SE

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

*Probably, since the current legislation in Denmark does not allow for a transfer of seat to another State.*

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

*All assets will be subject to tax at the company level as if the assets had been disposed of at market value.*

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

*No*

- 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?

*Only if SE A has not been liquidated. In case a transfer of seat would be possible then it is very likely that it would have been possible for SE B to take over reserves and provisions of the permanent establishment in Member State A.*

- 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?

*If SE A has not been liquidated it may be possible to transfer the losses but there would be restrictions such as a requirement for joint taxation attached to that transfer as in the case of a merger or a transfer of assets.*

Tax effects of the transfer for SH

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

*Liquidation proceeds received in the year when company is liquidated are treated as if the shares were sold. Proceeds received prior to liquidation year are treated as dividend distributions and are subject to withholding tax.*

- g) Is the answer to 1f) different if:
- i) SH is a corporate shareholder?  
*No*
  - ii) SH is an individual shareholder?  
*No*
  - iii) SH is an individual not owning a substantial interest?  
*No*
  - iv) SH is an individual owning a substantial interest?  
*No*
  - v) SH is an individual entrepreneur?  
*No*

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

*If the transfer would not be considered as winding up of SE A for Danish tax purposes, there would be no direct tax consequences for the shareholder. However, the fact that the transfer would mean that the company would become a foreign company instead of a Danish company would have effect for example on the tax treatment of the future dividend distributions.*

- i) Is the answer to 1h) different if:
- i) SH is a corporate shareholder?  
*No*
  - ii) SH is an individual shareholder?  
*No*
  - iii) SH is an individual not owning a substantial interest?  
*No*

iv) SH is an individual owning a substantial interest?  
*No*

v) SH is an individual entrepreneur?  
*No*

## 2) Assume Member State B is Denmark

### Tax effects of the transfer for SE

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

*Assets would probably be valued at the current value.*

### Tax effects of the transfer for SH

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

*Shares would probably be valued at the current value.*