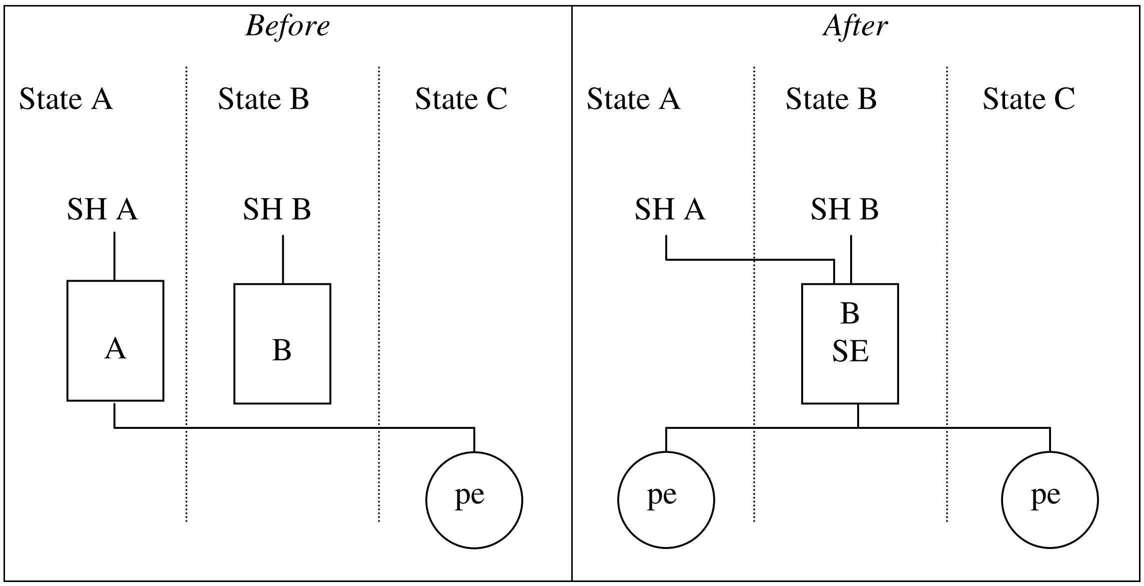
Annex 12 - Portugal

PORTUGAL

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:

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

- B / B SE:
  - o 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.)
  - o will be regarded as public limited-liability company governed by law of Member State B

Questions

1) Assume Member State A is your country

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

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

[All legal references throughout this report are made to the Portuguese Corporate Income Tax Code (CIRC) unless otherwise indicated].

Under Arts. 67(7) and 68(1), if the assets and liabilities of a Portuguese company are transferred to a receiving company in another Member State, the capital gain may be rolled over to the receiving company. See however answer to e) below.

The business transferred must however constitute a permanent establishment in Portugal of the receiving company resident in another Member State (Art. 68(1)(a)). The definition of the term "permanent establishment" contained in Art. 5 of the OECD Model Convention and used by Portugal in most of its tax treaties is incorporated into Art. 5 CIRC. However, according to the domestic definition, a permanent establishment includes a building site or construction or installation or assembly project or monitoring or supervisory activities in connection therewith, and a drilling structure, rig or ship used for the exploration for or exploitation of natural resources lasting more than 6 months (instead of 12 months).

The assets and liabilities transferred that are not included in the Portuguese permanent establishment of the receiving company are deemed to have been *transferred at market value for the purposes of taxing the capital gain. As a rule, all assets continue to be allocated to the Portuguese PE.*

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?

According to Art. 68(1) and(4)(c), provisions properly constituted by the transferring company may continue to benefit from the same tax treatment to which they were subject in the permanent establishment of the receiving company.

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

Art. 69 expressly points to the rules concerning the carry forward losses either applicable to domestic or cross-border operations.

B SE's permanent establishment in Member State A may be allowed to take over the losses of A (all or part of them; in one or more years – a ceiling can be established per year by the Minister of Finance), provided the Minister of Finance grants an express written authorization. To this end, a well grounded application for the Minister of Finance's authorization to carry forward the losses of the transferring company must be filed by the interested parties (companies A and B) with the General Directorate of Taxes (DGCI) within the month following the month of the merger's registration in the Commercial Registry. Authorization is likely to be granted if it is documentally substantiated that the operation in question are carried out both for valid economic reasons (such as the restructuring or rationalization of the activities of the companies involved) and as a result of a medium or long-term business strategy to improve the production structure. The authorization is considered to have been tacitly granted if no official notice has been served within the 6 months of filing the application. In the case of tacit authorization, the carry forward of losses must be phased over a minimum period of 3 years and the deduction over the first two years is limited to 1/3 per year. This provision clearly intends to reverse the burden of proof contained in Art. 11 of the Merger Directive, but it is also applicable to domestic mergers.

Under Art.47(1), losses can be deducted within a 6-year period from the date the relevant loss was incurred by A, but limitations can be determined by the Minister of Finance's decision as indicated above.

Equally, if B would be a company resident in Portugal, B would be also allowed to take over these losses.

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

See e) below.

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

According to Art. 68(2), the PE will be considered as if it had been disposed of at market value but a (notional) tax credit will be granted. The tax credit is equal to the tax that the State where the PE is located would have charged in the absence 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?

No, Portugal will not reinstate in A's taxable base any outstanding losses of its PE located in C because, on grounds of Art.85(1)and(3), Portugal applies the ordinary foreign tax credit for the avoidance of double taxation, allowing a 5-year carry forward for any unused credit. See e) above.

Tax effects for SH A in Member State A

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

According to Art. 70, the allotment of shares representing the capital of the receiving company to a shareholder of the transferring company in exchange for shares representing the capital of the latter company, does not give rise to any taxation in the hands of that shareholder provided, the fiscal value of the cancelled shares will constitute the tax basis of the shares received in exchange in its accounts. Any cash payment received by the shareholder is , however, taxable. The same tax treatment applies, under Art.10(10) of the Individual Income Tax Code (CIRS), to resident individual SH of Portuguese A. However, if the individual SH ceases to be a resident of Portugal (after having benefited from the tax relief on capital gains), then he would be taxed on the non-taxed capital gain (i.e. the amount by which the "real" value of the new shares received exceeds the acquisition cost of the old shares)- Art. 10 (9) and (10)CIRS.

With respect to resident corporate SH in A, worldwide capital gains derived by resident companies are regarded as ordinary income and subject to IRC at the standard rate of 30%. The gain is the amount by which the proceeds from the disposal exceed the cost of acquisition.

In order to avoid imposing tax on inflationary gains, the acquisition cost of shares or other corporate rights sold or exchanged after an ownership period of at least 2 years may be adjusted in accordance with indexation coefficients for the year of acquisition (which are published annually by the Ministry of Finance).

Under a new partial exemption scheme applicable from 1 January 2003, 50% of capital gains from the sale or exchange of shares or other corporate rights by any domestic company is exempt if (a) the total consideration received is reinvested in the acquisition of other holdings in resident or non-resident companies, in public bonds or in fixed assets allocated to the company's business activity (b) the sold or exchanged holdings represent at least either 10% of the participated company's capital or an acquisition value of EUR 20 million and both the sold/exchanged holding and the acquired holding are retained for at least 1 year, and (c) the holdings do not involve companies that are related parties (unless they are capital formation contributions) or residents of listed tax havens.

Equally, only 50% of the net capital loss incurred in the tax year on the sale or exchange of shares or other corporate rights is deductible. No deduction is, however, allowed if the shares or corporate rights (a) have been held for less than 3 years and were acquired from a related party or a resident of a listed tax haven or the free-trade zones of the Azores and Madeira or (b) are sold to or exchanged with a related party or a resident of a listed tax haven or the free-trade zones of the Azores and Madeira.

<u>With respect to resident individual SH in A</u>, under the general rule of Art. 10(2)(a) CIRS, gains from the sale or exchange of shares in a corporation (SA) owned by such SH for more than a 12-month period are not subject to IRS; (this period starts on the date on which he acquired his shares in Portuguese A and continues through his holding period in B's SE).

Gains from the sale or exchange of shares held for 12 months or less and of any other corporate rights are taxable. The taxable amount is the net gain realized during the year, i.e. the total gains less total losses on such assets. However, in computing the annual net gain, capital losses are disregarded if the other party to the underlying transaction is a resident in a listed tax haven. The annual net gains are subject to a final tax at a rate of 10%, unless the resident taxpayer elects for the aggregation of the net gains, in which case the 10% tax is an advance levy.

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?

Under the general rule set out in Arts. 20(1)(h) and 43 CIRC and Arts. 10(1)(b) and 18(1)(i) CIRS, capital gains realized on the sale/exchange of holdings of a Portuguese A are treated as Portuguese-source income and are, in principle, taxable in Portugal. However, according to Arts.68 (1)(a) and 70(1), if at least *the holding exchanged is effectively connected with a permanent establishment in Portugal, rollover relief is available. It may be arguable whether a shareholder of A, not resident in Portugal (and not being a PE in Portugal), would not be taxable because the law requires that the shares received in exchange are registered in its tax accounts with the same value. Non-residents without PE's in Portugal do not present tax accounts in Portugal. This means that they could not benefit from the tax neutrality regime. After the merger, Portugal will lose its tax claim since the non-resident shareholder of the non-resident receiving company is not taxed in Portugal for the sale of such shares. A different interpretation would accept such result. There is no administrative or judicial interpretation on this matter.*

The relevance of the problem is, however, limited since specific exemption are already established in Portuguese domestic law for non-resident shareholders alienating participations in Portuguese companies, as indicated below.

<u>With respect to non-resident corporate SH in A</u>, capital gains derived by non-resident corporate SH directly from the sale/exchange of shares or other corporate rights of resident companies are, in principle, exempt from tax (see, however i)i) below).

<u>With respect to non-resident individual SH in A</u>, under the general rule of Art. 10(2)(a) CIRS, gains from the sale or exchange of shares in a corporation (SA) owned by a non-resident shareholder for more than a 12-month period are not subject to IRS. According to Art. 43(4)(f) CIRS, this period starts on the date on which he acquired the old shares in A and continues through his holding period in B's SE).

Gains from the sale or exchange of shares held for 12 months or less and of any other corporate rights (irrespective of the holding period) are subject to IRS at a final rate of 10%, unless qualifying for exemption (see i)ii)).

<u>With respect to the taxation of gains under current tax treaty network</u>, Portugal has effective tax treaties with all EU Member States except Sweden (which is not yet in force). Exceptions to the general rule of exclusive taxation of capital gains from the sale/exchange of shares or other corporate rights in the alienator's state of residence are contained in the Portuguese treaties with <u>France</u> (Art. 14(1):capital gains on shares or other rights in real estate companies); <u>Ireland</u> (Art. 13(2): capital gains on shares or other rights in real estate companies); <u>Netherlands</u> (Art. 13(5): capital gains on shares in an SA realized by an individual who (a) holds directly or indirectly, alone or through his next of kin, at least 5% of the SA's share capital, (b) has been a Portuguese resident within the 10-year period prior to the year of the sale/exchange, and (c) at the time he became a resident of the Netherlands the conditions in (a) and (b) regarding share ownership in the SA were satisfied); and <u>Spain</u> (Art. 13(2): capital gains on shares or other rights in a real estate company, and 13(3): in another company in

which 25% or more of its capital was held, directly or indirectly by a resident of Spain during the 12-month period prior to the sale/exchange).

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

i) A corporate shareholder?

As regards question 1h), the exemption does not, however, apply (such gains being taxed at a rate of 25% by assessment) if:
(1) the non-resident corporate SH (a) is owned, directly or indirectly, for more than 25% by any Portuguese resident company or (b) is a resident of a listed tax haven; and/or
(2) the sold/exchanged shares or corporate rights are holdings in a domestic real estate company (i.e. a company in which more than 50% of its assets consists of Portuguese-situs immovable property) or holding company (SGPS) that controls such a real estate company.

ii) An individual shareholder not owning a substantial interest?

As regards question 1h), an exemption from IRS applies to capital gains derived directly by a non-resident individual SH from the sale/ exchange of shares held for 12 months or less and of other corporate rights (irrespective of the holding period) in any resident company, provided that (a) such SH is not a resident of a listed tax haven and/or (b) the sold/exchanged shares or corporate rights are not holdings in a domestic real estate company (i.e. a company in which more than 50% of its assets consists of Portuguese-situs immovable property) or SGPS that controls such a real estate company.

iii) An individual shareholder owning a substantial interest?

It is irrelevant (see ii) above).

iv) An individual entrepreneur?

It is irrelevant (see ii) above).

2) Assume Member State B is your country

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

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?

   In accordance with Art. 66(1), the transformation of B-SA (even if being dissolved) into B-SE will not trigger by itself any IRC consequences. Thus the tax regime which was being applied to B-SA will remain unchanged in its application to B-SE, taking only into account that the date of acquisition of the new shares in B-SE is the date of acquisition of the old shares in B-SA.

   The CIRC does not remit to the Commercial Companies' Code (CSC) in order to define what a transformation of companies is. Under Art. 130 CSC, civil or commercial companies formed in accordance with the Civil Code or the CSC may be "transformed", i.e., may adopt different forms within those established in the law. Art. 1(2) CSC lists in a "numerus clausus" 5 "commercial company" types: the general partnerships, the limited partnership, the partnership limited by shares, the private limited liability company (Lda) and the public limited liability company (SA). It is possible that the CSC and Commercial Registry Code be amended in the near future to include the SE as a 6th type of commercial companies. This, in principle, would mean that the Merger Directive and the CIRC would also to be amended in order to include an express reference to the SE. A different approach is to consider the SE as a special type of SA already regulated under our law. This paper is prepared under this view.

   Nevertheless, even if those Codes are not amended, Reg. 2157/2001 becomes effective and, therefore, allows the possibility to transform an SA into an SE, which continues having its capital divided into shares.

   Taking into consideration that the merger would occur before the transformation and that it would respect the Merger Directive rules (assuming that B SE will be covered by the EC Merger Directive – e.g. Annex), one could expect that such transformation would not trigger taxes. The CIRC expressly refers to the companies qualifying for the Merger Directive regime as those mentioned in Directive 90/434/EEC of 23 July. One should consider these companies (SE) as Commercial companies formed in accordance with Portuguese law – see Annex K). Taking into consideration that this information would imply the exchange of shares (SE shares from B shares) it is crucial that the same value and "rights" are attributed to those shares.

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

Provided B SE is considered to be included in the Annex of the Merger Directive, the rules of Arts 67 and 68 CIRC apply to this case. Accordingly, the value that for tax purposes the resident receiving company has to attribute to the assets and liabilities of the transferring company is the last tax value the assets and liabilities had in the hands of the transferring company.

Note that, regarding the PE in a third EU State (i.e. State C) of the transferring company (i.e. company A), if the State of the transferring company taxes the capital gain arising from the alienation of the foreign PE, then the tax value of the PE will be equal to its market value.

Tax effects for SH B in Member State B

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

No, at least expressly. It seems that Art. 70 may apply to this case. Accordingly, the fiscal value of the cancelled shares will constitute the tax basis of the shares received in exchange.
Under Art. 66(4), the acquisition date of SE shares, for future capital gains purposes, is the date in which B shareholders acquired shares from B.

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

No, it will not be different.

2) Assume Member State C is your country

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

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

The transfer does not result in any taxation in Portugal. According to Art. 68(1)(b) and (3), the assets and liabilities of the PE maintain their pre-merger value for Portuguese tax purposes.

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?

According to Art. 68(1) and (4)(c), provisions properly constituted by the former PE of company A may continue to benefit from the same tax treatment as provisions of the B SE's permanent establishment in Member State C (Portugal).

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?

B SE's permanent establishment in Member State C may be authorized by the Minister of Finance to carry forward the losses that have not been exhausted by A's permanent establishment in accordance with Art. 69(3)(c). Note once more that the Portuguese legal provision only allows this possibility for companies qualifying under the Merger Directive and that respect all the mandatory requirements applicable to tax neutral mergers.

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.

The same regime would apply.

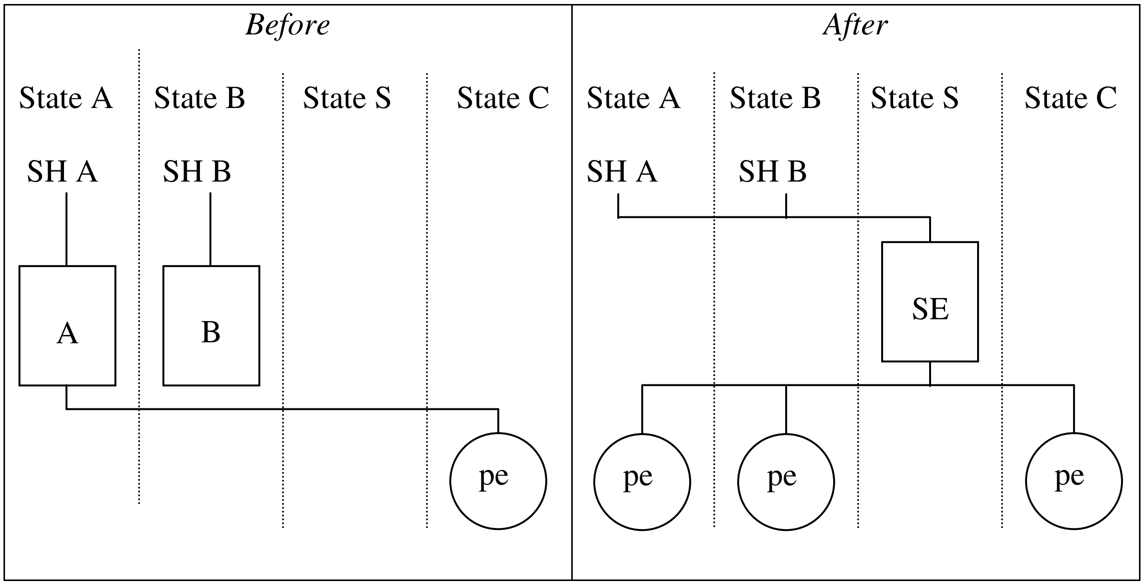
Other problems envisaged

After the merger BSE will have a pe in Portugal. Currently a pe is not entitled to benefit from the exemption method to avoid economic double taxation in case it receives dividends from a domestic or foreign company/subsidiary. This regime discriminates against non resident (foreign) companies and contravenes EC Law. However, before the law is amended this situation prevents that mergers take place in case the acquired company (owning stock) is resident in Portugal.

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) Assume Member State A is your country

Tax effects for A in Member State A

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

The same answer to question 1(a) of Case 1 applies here. See however answer to e) below.

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?

The same answer to question 1(b) of Case 1 applies here.

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?

The same answer to question 1(c) of Case 1 applies here.

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

See f) below.

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?

The same answer to question 1(f) of Case 1 applies here. See f) below.

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

The same answer to question 1(e) of Case 1 applies here.

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

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?

The same answer to question 1(g) of Case 1 applies here.

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?

The same answer to question 1(h) of Case 1 applies here.

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

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

The same answers to question 1(i) of Case 1 apply here.

3) Assume Member State S is your country

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

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

Provided that the SE is considered to be included in the Annex of the Merger Directive, Arts 67 and 68 apply to this case. Accordingly, the value that for tax purposes the resident receiving company has to attribute to the assets and liabilities of the transferring company is the last tax value the assets and liabilities had in the hands of the transferring company.

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?

The same answer to question 2(c) of Case 1 applies here.

4) Assume Member State C is your country

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

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

The transfer does not result in any taxation in Portugal. According to Art. 68(1)(b) and (3), the assets and liabilities of the PE maintain their pre-merger value for Portuguese tax purposes.

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?

According to Art. 68(1) and (4)(c), provisions properly constituted by the former PE of company A may continue to benefit from the same tax treatment as provisions of the B SE's permanent establishment in Member State C (Portugal).

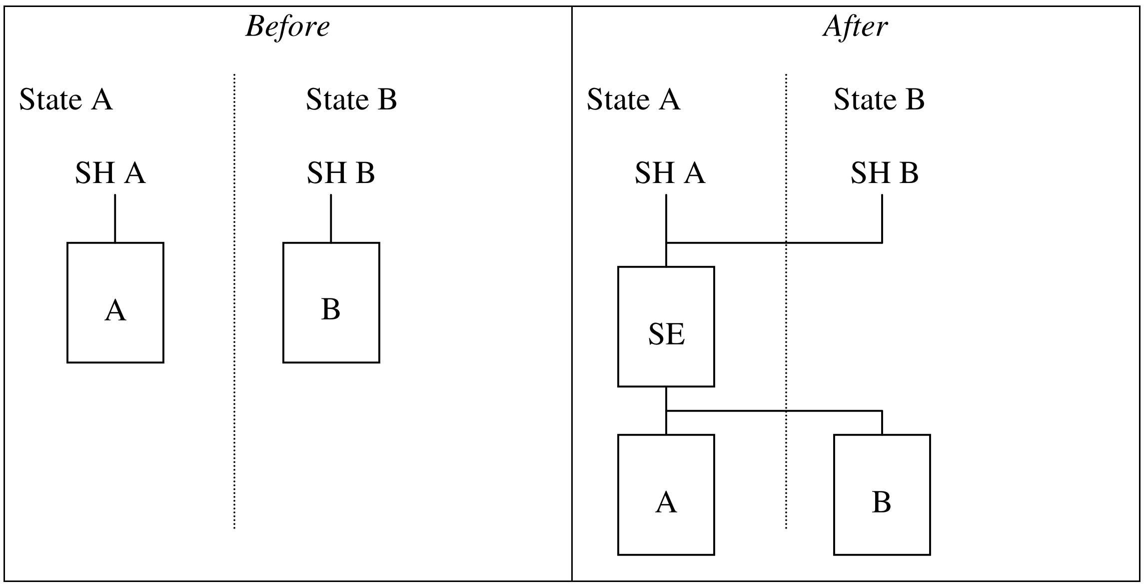
c) Will SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes? If SE would be a company resident in Member State C, would it then be allowed to take over these losses?

SE's permanent establishment in Member State C may be authorized by the Minister of Finance to carry forward the losses that have not been exhausted by A's permanent establishment in accordance with Art. 69(3)(c). Note once more that the Portuguese legal provision only allows this possibility for companies qualifying under the Merger Directive and that respect all the mandatory requirements applicable to neutral mergers.

CASE 3

Formation of a Holding – SE – 1

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



Facts and assumptions

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

Transactions

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

Questions

1) Assume Member State A is your country

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

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

The formation of a holding SE involves the acquisition of shares by the SE and the contribution of shares by the shareholders of A and B in a way that is similar (but not identical) to the exchange of shares operation.

There are no provisions for the valuation for tax purposes of the shares in A and B acquired by SE.

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?

According to Arts. 8 of the Merger Directive, 71 (1) CIRC and 10(8) CIRS, the exchange of shares receives a tax neutral treatment provided the shareholders of A and B register (for tax purposes) the new shares received from SE at the book value of the shares given to SE.

Portuguese law also recognizes this treatment for domestic exchange of shares.

Arts. 71(3) CIRC and 10(8) CIRS provide that cash payments are subject to tax but no specific rules have been formulated with respect to how the assessment is to be made. Therefore it is not clear whether all payments will be considered *capital gains, or whether the taxable portion will be determined in relation to proportion of shares and cash payment received.*

Tax effects for SH A in Member State A

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

Under Arts. 71(1) CIRC and 10(8) CIRS, domestic exchange of shares also benefit from a rollover relief provided the shareholders of A continue registering the new shares with the same value of the old shares.

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

No. It should also be borne in mind that the acquisition date of the shares of the acquiring company (SE) received by shareholders A and B is the date when they acquired shares in A and B. This is relevant because future gains obtained with the sale of SE shares may be exempt in view of this holding period.

2) Assume Member State B is your country

Tax effects for SH B in Member State B

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

The shareholder of the acquired company (B), who receives shares in SE, can be a corporate entity, an individual or a partnership and, more important, can be a resident or a non-resident in Portugal.

If SHB is a non-resident company, which held shares in the acquired company through a Portuguese permanent establishment relief may be granted so long as the shares in the acquiring company (SE) are also held through as Portuguese permanent establishment. The non-resident EU company is considered the shareholder of SE through the Portuguese PE.

Relieve is available to shareholders who reside in non-EC Member States only if the acquiring company is resident in Portugal. In the current case SE is located abroad (in State A) .

Problems may arise because both the acquiring company (SE) and shareholders are not resident in Portugal. How would future gains be taxed in Portugal in such a case?

Eventual future gains obtained by non-resident shareholders from the sale of SE shares would not be taxable in Portugal.

Although not expressly mentioned, one may interpret that when it is not possible to verify if the shareholder of B registers the value of SE shares with the same value of its former shares (namely, because it is a non-resident without a PE in Portugal) it should be taxed in Portugal at the time the exchange of shares occurs.

b) Will the answers to the question 1a) differ if SH B is:

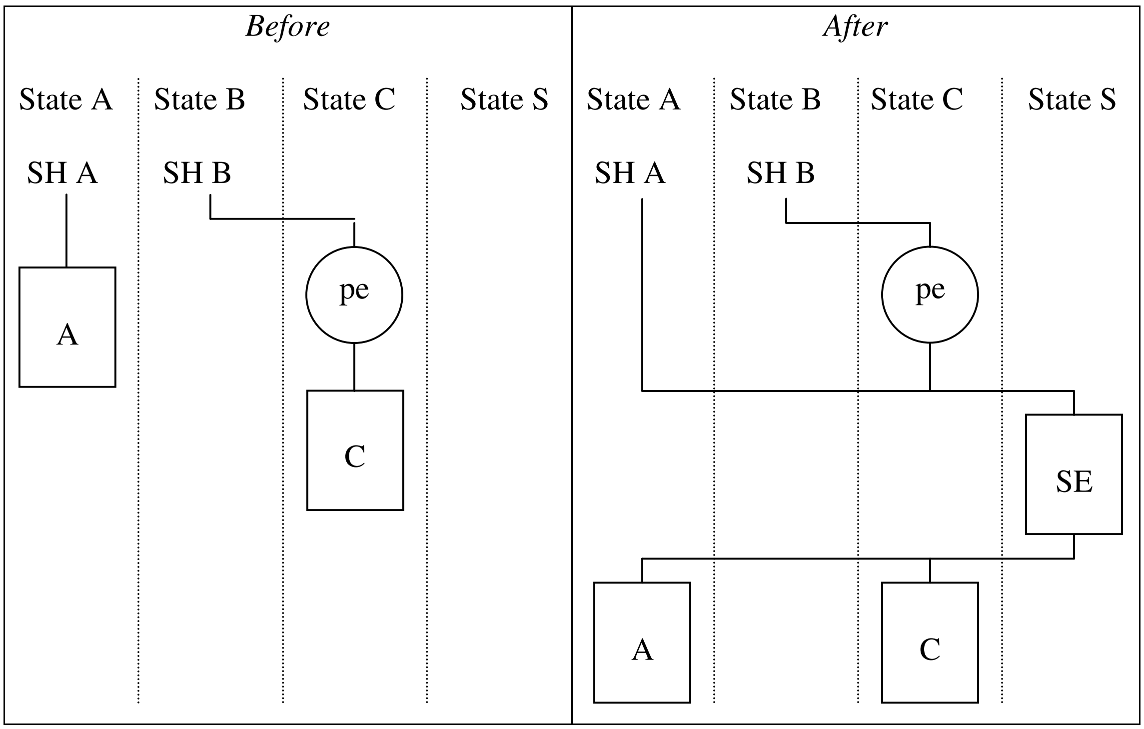
i) A corporate shareholder?
ii) An individual shareholder not owning a substantial interest?
iii) An individual shareholder owning a substantial interest?
iv) An individual entrepreneur?

No, it will not make any difference. Note however that a different tax treatment may be applied as regard the cash payment, if any.

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:
    - o formed under law of Member State A
    - o registered office in Member State A
    - o head office in Member State A
  - C:
    - o formed under law of Member State C
    - o registered office in Member State C
    - o head office in Member State C
- SE:

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

Transactions

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

Questions

1) Assume Member State A is your country

   Tax effects for SH A in Member State A

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

      According to Arts. 71(1) and 10(8) CIRS, the allotment of shares representing the capital of acquiring company to a shareholder of the acquired company in exchange for shares representing the capital of the latter company, does not give rise to any taxation in the hands of that shareholder. The tax value of the transferred shares will constitute the tax basis of the shares received in exchange. Any cash payment received by the shareholder is taxable. Eventual problems may arise if SH A is a non-resident without a PE in Portugal to whom those shares are allocated. In fact, in this case, Portugal cannot verify whether the transferred shares will constitute or not the tax basis of SE shares. At the end of the day the problem is the eventual loss of the right to tax future gains.

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

      No, it will not.

2) Assume Member State B is your country

Tax effects for SH B in Member State B

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

According to Arts. 71 CIRC and 10(8) CIRS, the allotment of shares representing the capital of acquiring company to a shareholder of the acquired company in exchange for shares representing the capital of the latter company, does not give rise to any taxation in the hands of that shareholder. The tax value of the transferred shares will constitute the tax basis of the shares received in exchange. Any cash payment received by the shareholder is taxable.

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

No, it will not.

3) Assume Member State C is your country

Tax effects for SH B in Member State C

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

In case of exchange of shares, Arts. 71 CIRC and 10(8) CIRS Arts. provide for rollover relief in case the value of the old registered capital participations (as shown in the accounts) is maintained in relation to SE shares. One may interpret that this situation just occurs provided the shares are held through a Portuguese permanent establishment of a company listed in the Annex to the Directive. Accordingly, if SH B is a company listed in the annex of the Directive, then it will carry the value of the shares in company C over the value of the shares in SE. On the other hand, if SH B is not a company listed in the annex, then the capital gain will be taxable in Portugal. In this respect, Portugal's right to tax the capital gain in the hands of the non-resident shareholder is not restricted by the treaty concluded with the country of residence of the shareholder because the holding is effectively connected with a permanent establishment in Portugal.

It seems that the Merger Directive and Art. 71 do not contain any specific provision concerning the qualification of the shareholder or requiring that the latter is resident in the same State of the acquiring company. However, Art. 71 may be interpreted as requiring that the shareholder of the acquired company be a resident or have a PE in the latter Member State, namely because it requires that he/she/it registers the SE shares with the same value of its former shares. But, strictly speaking, the wording of the law does not require their residence in

Portugal. At the end of the day this interpretation would just serve to protect the Portuguese right to tax. However, it would make sense taking into consideration the provision that stipulate the right to tax provided a resident shareholder emigrates after the operation (see the answer to question 1 g) of Case 1).

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

   No.

4) Assume Member State S is your country

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

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

   There are no provisions for the valuation for tax purposes of the shares in A and C acquired by SE. Therefore, it seems that the tax basis of the acquired shares for SE do not need to be the same as the one that was recognized by the shareholders of A and C.

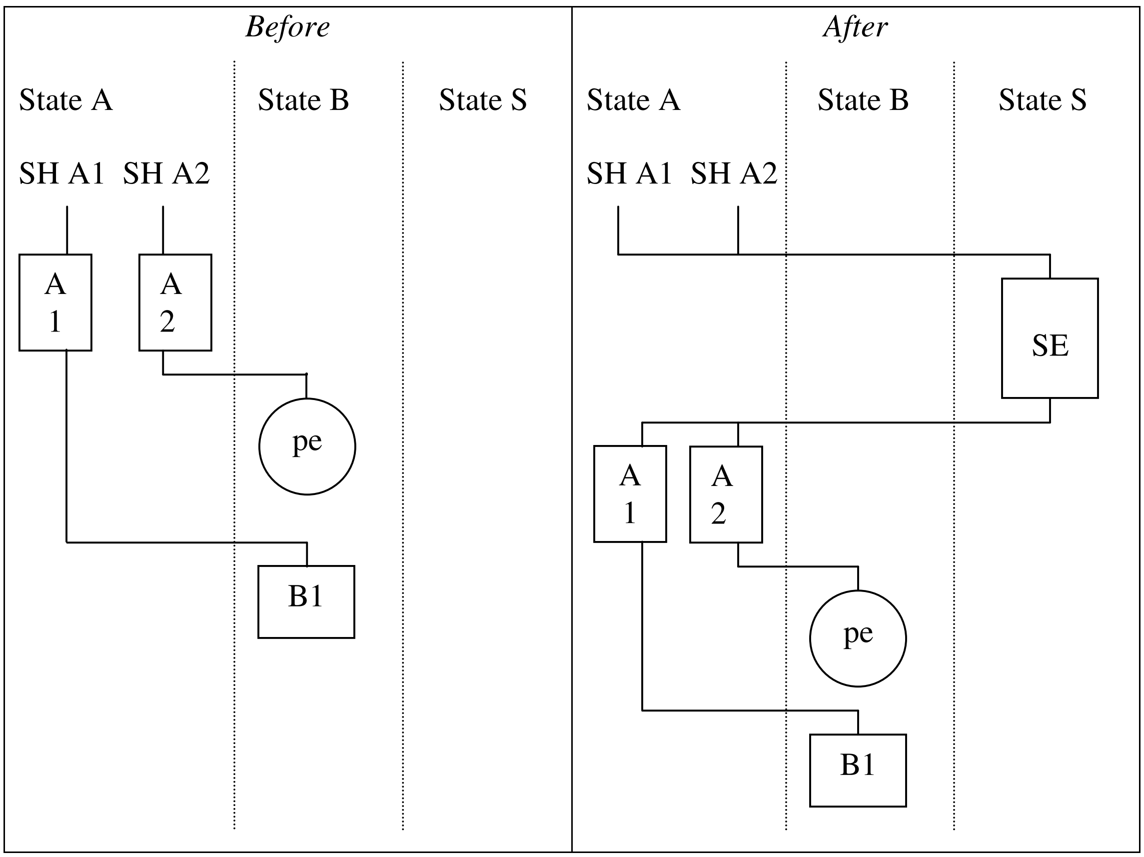
b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to SH A and SH B? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

   Art. 71(1) of the CIRC just states that the exchange of shares receives a tax neutral treatment provided the shareholders of the acquired company register, for tax purposes, the new shares received from the acquiring company (SE) by the book value of the shares exchanged. The sole way to preserve the rationale of this spirit (from a strictly Portuguese's point of view) is to say that SH A and SH B would maintain a PE in State S to whom those shares would be allocated. Different interpretations may lead Portugal to loose its right of tax.

CASE 5

Formation of a Holding – SE

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



Facts and assumptions

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

    - o head office in Member State A
  - B1:
    - o formed under law of Member State B
    - o registered office in Member State B
    - o head office in Member State B
- SE:
    - o formed under law of Member State S
    - o registered office in Member State S
    - o head office in Member State S
    - o will be covered by the EC Merger Directive

Transactions

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

Questions

1) Assume Member State A is your country

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

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

      According to Arts. 71 CIRC and 10(8) CIRS, the allotment of shares representing the capital of acquiring company to a shareholder of the acquired company in exchange for shares representing the capital of the latter company, does not give rise to any taxation in the hands of that shareholder. The fiscal value of the transferred shares will constitute the tax basis of the shares received in exchange. Any cash payment received by the shareholder is taxable. Eventual problems may arise if SH A2 is a non-resident without a PE in Portugal to whom those shares are allocated. In fact, in this case, Portugal cannot verify whether the transferred shares will constitute or not the tax basis of SE shares. At the end of the day the problem is the eventual loss of the right to tax future gains.
      Individuals that emigrate are subject to tax as indicated above (answer to the question 1 g) of Case 1.

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

i) SH A2 being an individual shareholder not owning a substantial interest?
ii) SH A2 being an individual shareholder owning a substantial interest?
iii) SH A2 being an individual entrepreneur?
iv) SH A2 being a corporate shareholder?

No, it will not.

2) Assume Member State S is your country

Tax effects for SE in Member State S

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

There are no provisions for the valuation for tax purposes of the shares in A1 and A2 acquired by SE. Therefore, it seems that the tax basis of the acquired shares for SE do not need to be the same as the one that was recognized by the shareholders of A1 and A2.

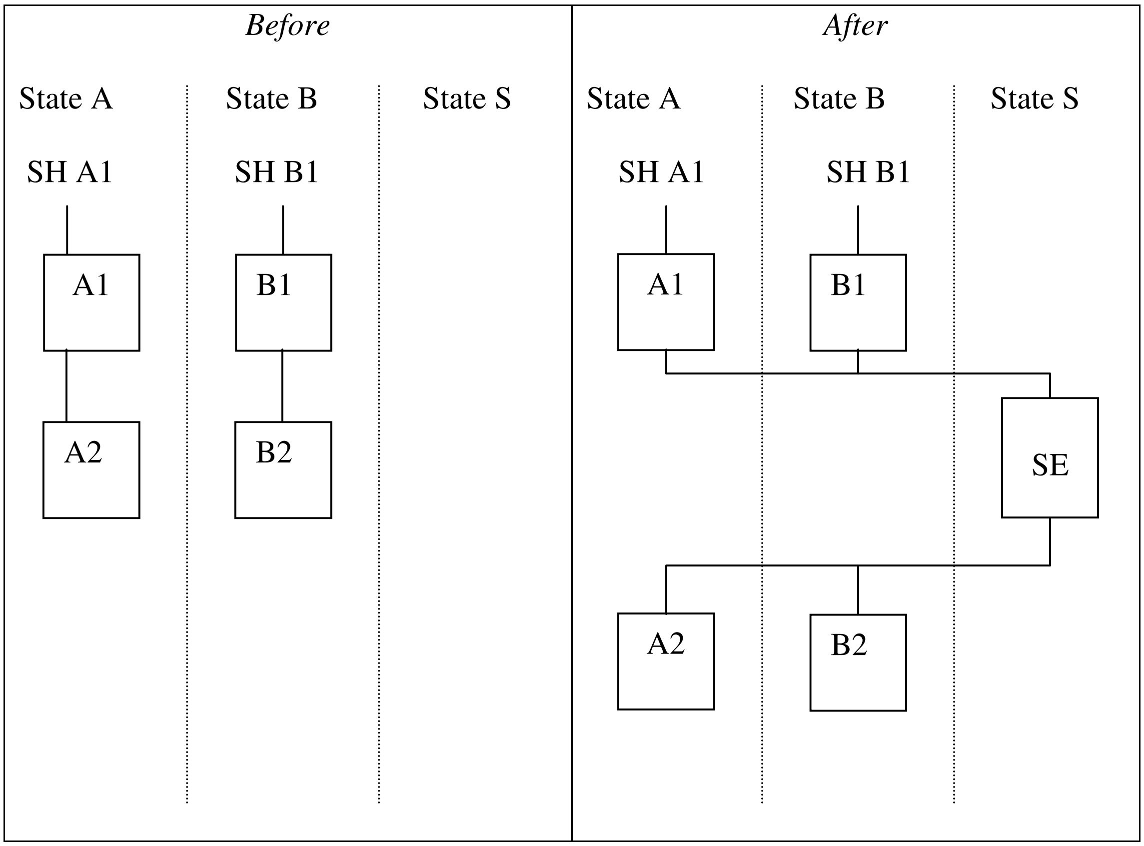
b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to SH A1 and SH A2? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

Arts. 71(1) CIRC and 10(8) CIRS just state that the exchange of shares receives a tax neutral treatment provided the shareholders of the acquired company register, for tax purposes, the new shares received from the acquiring company (SE) by the book value of the shares exchanged.

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:
    - o formed under law of Member State A
    - o registered office in Member State A
    - o head office in Member State A
    - B1 and B2:

  - o formed under law of Member State B
  - o registered office in Member State B
  - o head office in Member State B

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

Transactions

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

Questions

1) Assume Member State A is your country

   Tax effects for A1 in Member State A

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

      According to Arts. 71(1) CIRC and 10(8) CIRS, the allotment of shares representing the capital of receiving company (SE) to a shareholder of the transferring company (A2), in exchange for shares representing the capital of the latter company, does not give rise to any taxation in the hands of that shareholder (A1). The fiscal value of the cancelled shares will constitute the tax basis of the shares received in exchange. Any cash payment received by the shareholder is taxable.

2) Assume Member State S is your country

   Tax effects for SE in Member State S

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

There are no provisions for the valuation for tax purposes of the shares in A2 and B2 acquired by SE. Therefore, it seems that the tax basis of the acquired shares for SE do not need to be the same as the one that was recognized by the shareholders of A2 and B2.

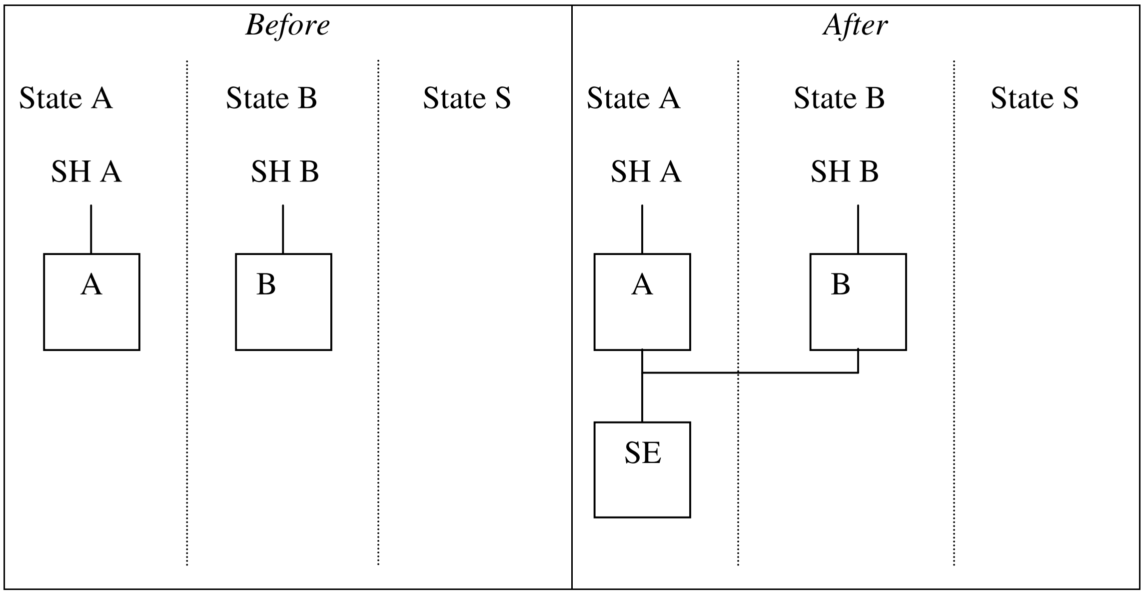
b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to A1 and B1? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

Arts. 71(1) CIRC and 10(8) CIRS just state that the exchange of shares receives a tax neutral treatment provided the shareholders of the acquired company register, for tax purposes, the new shares received from the acquiring company (SE) by the book value of the shares exchanged.
It could be said that the sole way for Portugal to verify if A1 and B1 would register the shares with the same value would require their allocation to a Portuguese PE of A1 and B1. However, this would be pure interpretation and would certainly lead to further discussions.

CASE 7

Formation of a Subsidiary–SE by contribution of cash

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



Facts and assumptions

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

Transactions

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

Questions

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

1) Assume Member State A is your country

   Tax effects for A in Member State A

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

   No, there will not be any relevant tax effect as a consequence of the formation of a subsidiary.

2) Assume Member State B is your country

   Tax effects for B in Member State B

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

   No, in principle there will not be any relevant tax effect as a consequence of the formation of a subsidiary.

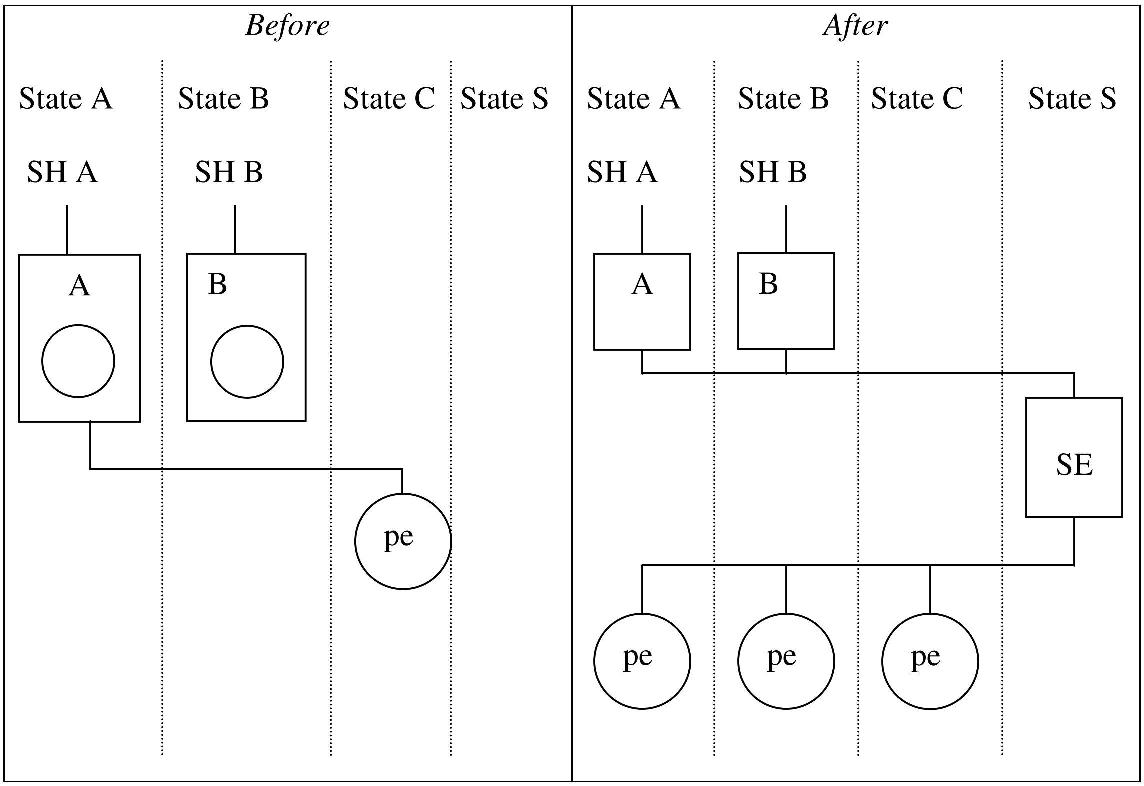
   It should be, however, noted that, in accordance with Art. 46(5), the participation exemption regime requires that the subsidiaries are commercial companies included in the Annex of the Merger Directive and that the entire requirements are met. One should interpret that the SE is a qualifying company.

   Under Art. 63 et seq. (dealing with a "special regime for determining the taxable base of a group of companies" which superseded the former tax consolidation regime), the *fiscal unity regime is only applicable between resident companies. Therefore, it would not apply.*

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:
    - o formed under law of Member State A
    - o registered office in Member State A

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

Transactions

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

Questions

1) Assume Member State A is your country

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

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

   According to Art. 68, the transfer of assets does not give rise to any taxable gain and the value for tax purposes of the business transferred is carried over to the shares received in exchange.

   If the assets transferred constitute a permanent establishment in another Member State (in this case in State C), according to Art. 68(2), the PE will be considered as if it had been disposed of at market value but a (notional) tax credit equal to the tax that the State where the PE is located would have charged in the absence of the Merger Directive will be granted.

   Accordingly, the value that for tax purposes the non-resident receiving company *has to attribute to the assets and liabilities of the transferring company is the last tax value the assets and liabilities had before the transfer in the hands of the transferring company.*

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?

The same answer to question 1(b) of Case 1 applies in here. Note that the above-mentioned provision applies to cases of merger, division and transfer of assets.

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 must be valued by company A at the net book value of the transferred assets and liabilities of the assets transferred to SE in accordance with Art. 68(5).

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?)

The same answer to question 1(c) of Case 1 applies in here.

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)?

No.

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

Yes.

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

Yes. According to Art. 68(2), the PE will be considered as if it had been disposed of at market value but a (notional) tax credit will be granted. The tax credit is equal to the tax that the State where the PE is located would have charged in the absence of the Merger Directive.

2) Assume Member State S is your country

Tax effects for SE in Member State S

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

   There are no specific rules concerning this situation. However, it is expected that the resident receiving company should enter the branches abroad at the book 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?

   In principle, the shares of SE received by A should also be valued in Member State S at the net book value of the assets and liabilities transferred to SE (this would be the same value registered in Member State A).

3) Assume Member State C is your country

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

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

   The transfer does not result in any taxation in Portugal. According to Art. 68(1)(b), the assets and liabilities of the PE maintain their pre-merger value for Italian tax purposes.

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?

   According to Art. 68(1) and (4)(c), provisions properly constituted by the *transferring company continue to benefit from the same tax treatment to which they were subject in the PE of the receiving company.*

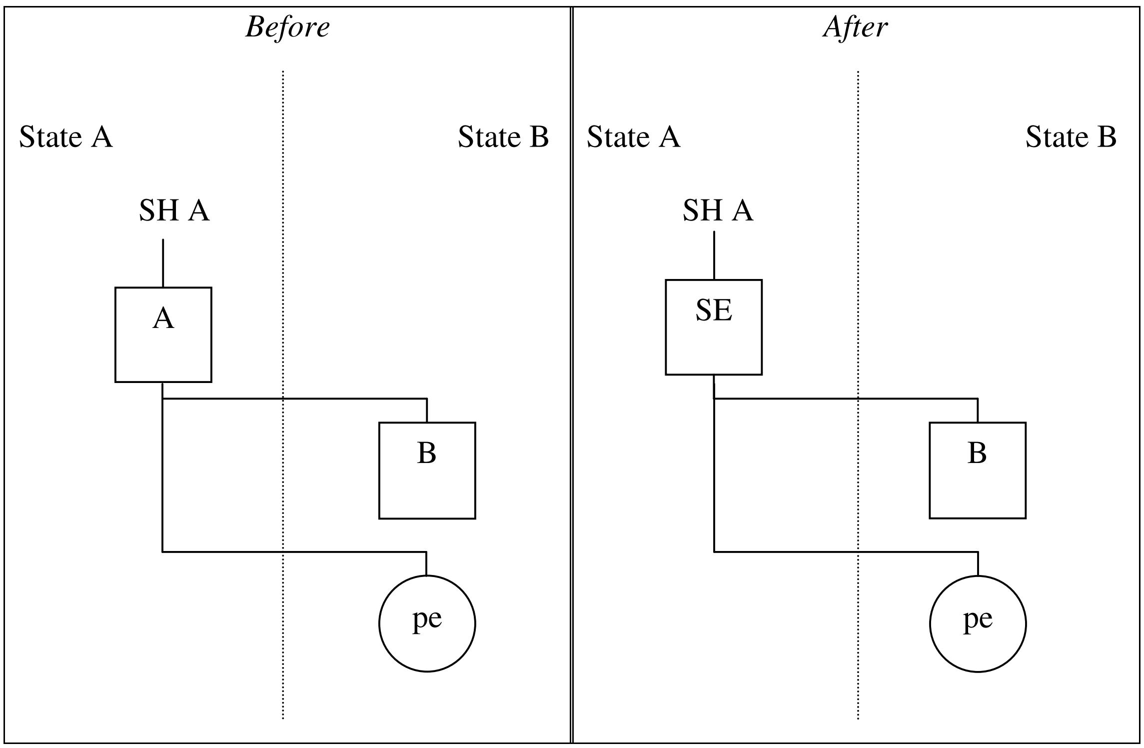
c) Will SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes? If SE would be a company resident in Member State C, would it then be allowed to take over these losses?

   The same answer to question 1(c) of Case 1 applies in here.

CASE 9

Transformation of public limited-liability company into an SE

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



Facts and assumptions

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

Transactions

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

Questions

1) Assume Member State A is your country

Tax effects for A in Member State A

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

According to the general rule of Art. 66(1) and (4), the transformation of companies does not have any tax consequences. It is only a change in the Statute of the company, there is neither winding up of the company nor creation of a new company; the company continues to exist but with a different legal form.

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?

See answer to a) above.

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

See answer to a) above.

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?

Since the transformation does not entail winding up of the company and creation of a new company, there will be no significant effects for the shareholders because of the transformation.

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

i) SH is a corporate shareholder?
ii) SH is an individual shareholder not owning a substantial interest?
iii) SH is an individual shareholder owning a substantial interest?
iv) SH is an individual entrepreneur?

No.

2) Assume Member State B is your country

Tax effects for the shareholder of B in Member State B

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

There are no rules covering this situation. Since the transformation does not entail winding up of the company and creation of a new company, it might be concluded that there will be no effects because of the transformation. In any case, one need to verify whether the SE will be or not recognized as a qualifying type of company under the Annex of Directive 90/435/EEC in order to benefit from the Parent Subsidiary Directive regime (exemption method foreseen by Art. 46(5) CIRC).

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?

No.

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

The same they had as assets from a permanent establishment of A.

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?

Yes. See answer to e) below.

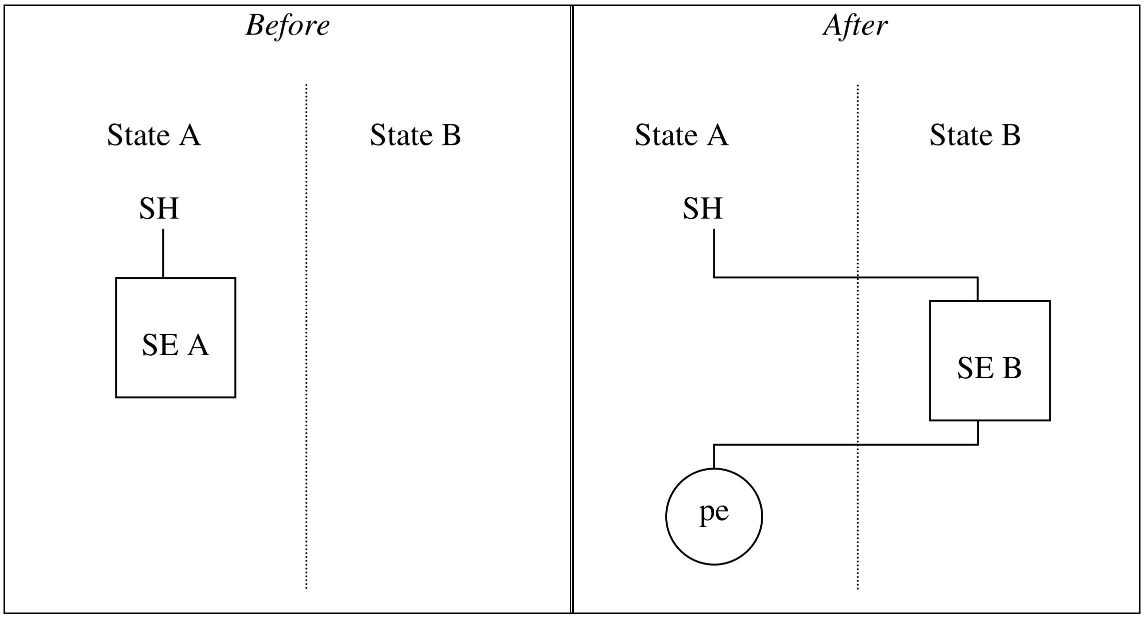
e) Will SE's permanent establishment in Member State B be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes?

Since the transformation does not entail winding up of the company and creation of a new company, I conclude that there will be no effects because of the *transformation.*

CASE 10

Transfer of registered office of an SE

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



Facts and assumptions

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

Transactions

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

Questions

1) Assume Member State A is your country

   Tax effects of the transfer for SE

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

      It should not. The CSC expressly foresees the possibility for a commercial company to transfer the head office (without a winding up) to another country maintaining its legal personality provided the legislation of the latter country accepts it.

      Due to the fact the Art. 8 of Regulation 2157 of 2001 explicitly states that the transfer shall not result in the winding up of the SE or in the creation of a new legal person, then it may be concluded that the transfer of the residence to another Country does not involve a winding up of the company for Portuguese tax purposes.

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

      This fact would mean that taxation of capital gains or losses could occur. However, as mentioned above, this should not be the case.

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

      No. The transfer of the registered seat or of the civil law residence, which determine the loss of the Portuguese fiscal residence, does not involve the realization at market value of the business. There is no exit tax in Portugal. Probably, it would make sense to prevent this tax treatment, unless the companies it constitutes a permanent establishment in Portugal.

   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?

      In principle yes, considering domestic rules applicable to transformation. However, please note that there are no legal references to this situation.

   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?

      In principle yes, considering domestic rules. This matter is not expressly regulated by the CIRC.

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?

This fact would mean that taxation of capital gains or losses could occur. However, as mentioned above, this should not be the case.

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

i) SH is a corporate shareholder?
ii) SH is an individual shareholder?
iii) SH is an individual not owning a substantial interest?
iv) SH is an individual owning a substantial interest?
v) SH is an individual entrepreneur?

In principle, no. However, if taxation would occur, one would need to distinguish the situation of each shareholder because some (e.g. individual and non-residents) could benefit from tax exemptions (see answers to questions 1(h) and (i) of Case 1).

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?

In principle, no.

i) Is the answer to 1h) different if:

i) SH is a corporate shareholder?
ii) SH is an individual shareholder?
iii) SH is an individual not owning a substantial interest?
iv) SH is an individual owning a substantial interest?
v) SH is an individual entrepreneur?

No.

2) Assume Member State B is your country

Tax effects of the transfer for SE

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

The problem arises even if the SE is not deemed to be a new company. Portugal already recognized the immigration of several companies to its territory.

There are no specific rules dealing with this issue. However, in accordance with the principle of continuity the tax value to be attributed to assets used for business purposes, is the historical cost, i.e. it would be possible to keep the value the *assets and liabilities had before the transfer. This means that if there is taxation of the capital gain in State A upon transfer of the seat, the tax value of the assets should be their market value. If there is no taxation in State A, the tax value of the assets should be their cost. This avoids double tax problems but it would require the proof that the value of the assets and liabilities would be their market value.*

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

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

There are no rules regarding this issue. Due to the fact that Art. 8 of the Regulation explicitly states that the transfer shall not result in the winding up of the SE or in the creation of a new legal person, then it may be concluded that the shareholder will maintain the same situation (the company's equity will not change and the acquisition value of the shares of SE A will be maintained when the charge for SE B shares occurs.