

**Summary of the law-expertise of Prof. Dr. Thomas Blanke (Germany)
about “Reserve-SE`s” without worker involvement (Longform in German,
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1. **Registration of an SE** [Societas Europaea] is the final step of the founding process. It is **constitutive** for the creation of the SE.
2. Under § 3 of the SEAG [*SE-Ausführungsgesetz*: German law on implementation of the SE], the SE shall be registered in the company register according to the laws applying to **joint stock companies**. The Registry Court must determine, according to § 38, Para. 1 of the AktG [*Aktiengesetz*: German stock corporation act], if the company has been duly set up and filed, and otherwise to refuse registration. Its duty is limited to determining the fulfilment of the legal requirements regarding proper filing and the setting-up process including the elements to be examined under AktG § 38, Para. 2 – **special founding regulations** in the SE Council Regulation and the SEAG (see e.g. Art. 17ff, 32ff,) **being reserved**.
3. In accordance with Art. 38, Para. 3 of the AktG, the registry court shall examine the legality of **the company statutes also**. Under Art. 12, Para. 4 of the SE Council Regulation, the statutes of an SE must at no time **conflict** with a **negotiated agreement on involvement**.
4. Art. 2, Paras. 1 to 4 of the SE Council Regulation contains a **limited catalogue of admissible founding forms**. It provides for **4 formation methods**. A further, **“secondary“ formation method** is derived from Art. 3, Para. 2 of the SE Council Regulation.
5. With regard to the individual SE founding forms, the SE Council Regulation emphasises **with varying degrees of intensity** the need to regulate employee involvement under the SE Council Directive as a key element of the founding requirements. Regulation is most emphatic concerning the founding requirements in the event of a **merger** (SE Council Regulation Art. 27ff) and only insignificantly less so in the founding of a **holding SE** (SE Council Regulation Art. 32f). In case of a **conversion** the SE Council Regulation contains only a succinct reference to employee involvement as a prerequisite for registration (SE Council Regulation Art. 37, Para. 2); in the event of a **subsidiary SE** any further emphasis on this requirement (aside from the general provision in SE Council Regulation Art. 12, Para. 2 & 3, and SE Council Directive Art. 3, Para. 1) is lacking.
6. The varying **extent of detailed provisions** in the individual formation requirements results not from differences relating to the significance of employee involvement for the various SE start-up forms but from varying legal **protective requirements** in connection with the **relevant conversion processes**.

7. **Registration of an SE always** presupposes, under SE Council Regulation Art. 2 & 3, that **employee involvement in the SE** is given. Otherwise, **according to the explicit terms of SE Council Regulation Art. 12, Paras. 2 & 3, an SE cannot be registered.**
8. This does not imply that an SE can be registered only when an **agreement on employee involvement** according to SE Council Directive Art. 4 (SEBG § 21 [*SE-Beteiligungsgesetz*: German law on involvement in the SE]) between a special negotiating body and the relevant bodies of the companies concerned has been concluded. Rather, registration of an SE according to SE Council Regulation Art. 12, Para. 2 is also always admissible when the **alternatives to employee involvement** indicated in the SE Council Directive are deployed according to the procedures determined by the SE Council Directive.
9. Registration of an SE presupposes that **establishment of a special negotiating body** following the provisions of the SE Council Directive (or of the relevant national implementation regulations) has been implemented. Otherwise, that body can neither have made a **negative decision** according to SE Council Directive Art. 3, Para. 3, nor can **negotiations** – whether successful or fruitless – have been **conducted**.
10. The principal grounds for an affirmative response to the question whether providing for employee involvement is an indispensable requirement, without exception, for registration of an SE are:
 - **Provision for employee involvement** is a constitutive element of the corporate governance of an SE and, as such, has been explicitly elevated to the level of an **indispensable requirement for registration**. This results from SE Council Regulation Art. 12, Paras. 2 & 3, as well as from the founding regulations for the individual SE founding forms.
 - **According to the intentions of the European lawmaker`s, the provisions** of the SE Council Regulation and of the SE Council Directive **constitute a single** indivisible entity.
 - The SE Council Directive presupposes **mandatorily** that in the course of founding an SE, **without exception** a special negotiating body shall be formed (SE Council Directive Art. 3, Para. 2), whose purpose is the negotiation of a participation agreement with the organs of the companies taking part in the founding process.
 - This **also applies to the founding method** involving a **transformative conversion** of a public limited liability company to an SE. In this case the SE Council Directive prescribes that the continuation of “all components” of previous employee involvement in the plc shall also be mandatory for the SE (Art. 4, Para. 4), so that the **admissible “downwards” negotiating margin of the special negotiating body** is thus limited.
 - The requirement to establish a special negotiating body and to commence negotiations about a participation agreement derives from the **legislative dovetailing** of employee involvement with the founding and setting up of an SE. The attainment of **legal**

personality (SE Council Regulation Art. 1, Para. 3 in conjunction with Art. 16, Para. 1) is tied in with the **registration of the SE**. The European legislator has picked up the self-interest of the founding companies and has phrased the provisions on forming a special negotiating body and on the course of negotiations over a participation agreement in such a manner that those companies must themselves seize the initiative to create a special negotiating body.

- As befits its position as negotiating body and party to agreements on behalf of the employees, the **special negotiating body** has the “**ability to affect the statutes**” (SE Council Regulation Art. 12, Para. 4) and, as a result of the establishment of lasting employee representation, at least indirect power to influence corporate governance.

Supplementary Report I:

Exceptionally: Admissibility of Registration of a “Reserve” SE Without Employees?

11. The object of this examination is the question whether **registration** of a “**reserve**” SE **without employees, without provision for employee involvement** may exceptionally be viewed as admissible.
12. Using instruments of the SE under company or corporate law that have the specific advantages of this legal form in comparison to national company forms may, when in doubt, **not be viewed as an abuse of that legal form** to the detriment of employee rights.
13. The following must be considered, however: already under national law, **co-determination laws constitute part of the company statutes**, because they bolster corporate governance. **This is all the more true at the level of Community law**. Here, corporate law and labour law fuse into organisational governance. The SE Council Regulation and the SE Council Directive are inseparably bound together.
14. In literature, myriad possibilities of form have been discussed through which the **founding and registration restrictions** imposed by the SE Council Regulation and Directive may be circumvented. The proposed approaches to circumvention focus mainly on the circle of participants in formation; the requirement of multi-nationalism of the companies participating in formation; and the registration requirement constituted by the provision for employee involvement. It is mainly for the last case that the founding and registration of “reserve” SEs is proposed.
15. Due to the absence of operating business activity a “**reserve**”-SE has, when in doubt, **no employees**.
16. The registration of an SE without employees could, in the course of a “**teleological reduction**” of the founding and registration provisions of the SE Council Regulation, in

conjunction with the stipulations of the SE Council Directive, exceptionally be admissible.

17. The teleological reduction of a regulation comes into consideration when its literal application in a specific, exceptional situation would not achieve the purpose intended thereby under both historical as well as systematic interpretations.
18. The requirement to provide for employee involvement may, with regard to the moment of registration of an SE without employees, appear inappropriate.
19. However, in view of future economic activities of the SE, as intended with a “reserve”-SE, that is not the case. In fact, the participation agreement shall provide for occasions and procedures for the future renegotiation of an agreement.
20. Furthermore, teleological reduction involves a **principle of interpretation**. It does not permit the explicit wording of a regulation to be dismissed.
21. Since the provision for employee involvement according to the **express wording** of SE Council Regulation Art. 12, Paras. 2 & 3 and the stipulations of the Council Directive constitute a **mandatory prerequisite for registration**, it is unacceptable to disregard that requirement when interpreting the terms.
22. There are **also good material reasons** that speak in favour of a provision for employee involvement at the moment of registration for an SE without employees too: the European legislator has shown clearly that he has reserved the legal form of the SE for companies that have, in the general case, laid down stipulations governing employee involvement based on a negotiated participation agreement.

<p>Supplementary Report II: Legal Consequences of the Subsequent Use of a “Reserve” SE Initially Registered Without Employees</p>
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23. The starting point for examination is the assumption – rejected in Supplementary Report I – that an SE without employees can be acceptably registered.
24. In the event that it **subsequently enters into active operation**, this will raise a plethora of unsolved **attendant problems**. These relate largely to the following points: the threshold value upon subsequent engaging of employees for, or inclusion of employees in, the SE, respectively: the definition of the feature of inclusion of other companies; the extent of a possible, renewed examination of the circumstances of its formation; the striking off the register of the company; and/or the reopening of negotiations on employee involvement.
25. Subsequent engagement of employees, respectively the inclusion of employees in the SE within a corporation shall be viewed as a **“structural change”** according to the terms of SE Council Directive Art. 18 and of SEBG §§ 1, Para. 4 and § 18, Para. 3, 43, which

trigger the obligation to renew negotiations on employee involvement if otherwise participation rights would be denied or withdrawn from the employees.

26. Plausible **threshold values** for determining the number of employees that a “reserve” SE must have (respectively, that must be taken for its account within a corporation) for an obligation to renegotiate as a consequence of a structural change of the SE to be asserted **cannot be given**. They cannot be deduced from the **minimum size** of the SE works council under law or of the special negotiating body; nor can they be drawn from Community or national stipulations regarding the **ratio** of employee representatives to represented employees.
27. In the event of subsequent structural changes the management of the company is obliged, under SEBG § 18, Para. 3, to initiate **negotiation procedures** on a participation agreement **of its own accord without delay**.
28. If this does not ensue upon application by the employees, where applicable, or upon demand by the registry court, the latter is bound to commence the **procedure for deleting** the registration of the SE according to § 142 of the FGG [*Freiwillige Gerichtsbarkeitsgesetz*: German law on voluntary choice of jurisdiction]. An annulment and the dissolution of the SE under the terms of FGG § 144a are out of the question.
29. The SE management has, according to SEBG § 11, Para. 2 5.1, a **maximum of ten weeks plus 6 or, where applicable, plus twelve months** (according to SEBG § 20) to forestall the deletion procedure by submitting a participation agreement.