

# Setting up a special negotiating body in the context of a SE

Flichy Grangé Avocats' partners explain to Leaders League the technicalities of creating a SE, which countries can get involved, and how members are appointed.



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**Joël Grangé**  
Partner



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**Florence Aubonnet**  
Partner

## ABOUT THE AUTHORS

Joël Grangé, founding partner at Flichy Grangé Avocats, leads the employment law practice in France with over 80 labor law specialists, including partner Florence Aubonnet. They focus on French and international clients in regard to mergers, restructuring, and human resources.

The years after the EU directive 2001/86/CE of October 8, 2001 (the “EU Directive”), in relation to the involvement of employees in a European Company (so-called “SE”), was transposed in France on July 26, 2005, very few French companies showed interest. In the past couple of years, however, major companies such as Total, Dassault Systèmes, LVMH, Vivendi, etc... have chosen to transform into a SE.

The constitution of a SE by means of a merger is less frequent, maybe due to the existence of another mechanism, the “cross-border merger”, regulated by a distinct EU Directive (Directive 2005/56/EC). One of the reasons is the legal duty to set up a special negotiating body (SNB), which cannot be avoided in case of a SE created further to a merger, whereas the SNB may be avoided in case of a cross-border merger. Indeed, the law allows the merging entities’ management to decide whether or not to negotiate as it relates to the involvement of employees provided that the statutory works council is also implemented. This assumes that the merged entity provides the same level of participation rights as those existing within the participating companies (participation rights being “the influence the

body representative of the employees and/or the employees’ representatives can have in the affairs of a company by way of : (i) the right to elect or appoint some of the members of the company’s supervisory or administrative organ, or (ii) the right to recommend and/or oppose the appointment of some or all of the members of the company’s supervisory or administrative organ”).

The administrative burden of the SNB

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and the time involved in the negotiation which can last up to 6 months and may be extended up to one year, is then often seen as the main inconvenience.

What is at stake is the determination of the SE employees’ involvement. Involvement is defined as “any mechanism including information, consultation, and

participation, through which employees’ representatives may exercise an influence on decisions to be taken within the company”. The purpose of the SNB shall then be to discuss the composition of the representative body, the functions, and procedure for its information and consultation, the frequency of its meetings, the financial and material resources to be allocated, as the case may be the arrangements for participation. A SE in France would generally enter into agreements to set up a SE works council to have consultation prerogatives on transnational matters.

## Scope of the SE employees’ involvement: can non-EU countries be included?

Unlike provisions in relation to the European works council, which allows non-EU countries to be in scope (articles 1 and 6 of Council Directive 94/45/CE of September 22, 1994), provisions in relation to the SE SNB or SE works council do not expressly deal with this question. In practice, we have seen that some SE may have included non-EU countries, such as Switzerland, in the past. Since Brexit, some others have included the UK. Total made the same choice, which transformed into a SE in 2020, and has

granted the UK to sit as a guest within the Council of the SE during its transitional period, agreeing to convene again at the expiry of such period.

### How to assess the workforce size?

Further to the EU directive, the seats are allocated in proportion to the workforce in each country. For “French” SE, the labor code provides that each country representing less than 10% of the workforce shall be granted one seat, the number of seats then increasing based on 10% brackets. Properly determining the “weight” of each country is then the first step. Since there are no specific rules implemented by the Directive regarding the assessment of the workforce, such computation shall in our view be made in the application of local legislation, which may have different methodologies, increasing complexity when it comes to consolidating the data. Another question is when (which date) to assess the workforce’s size. Under French law, this information must be communicated by the management “within a month from the publication of the project of creation of the SE”. Assessment of the workforce should therefore be made sufficiently in advance, but also not too early to avoid any major changes in the workforce’s size between the assessment and the designation of the SNB members.

### How are SNB members appointed and how much time does it take?

In reference to section 3 of the EU Directive, the way the SNB members are appointed or elected is determined by the member States’ regulation. Setting up the SNB obviously requires assistance in each country involved and coordination by the head of the company transforming into a SE, as those rules may be quite different and may vary based on the workforce size, the existence of unions, works councils, or similar bodies. The duration of the process and its complexity to manage is then variable. In France, SNB members shall

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be appointed by Unions amongst their works council members; when there are no unions or no works councils, a direct election by the French workforce is to be conducted. This would generally require a 2-month process on average,

and many legal steps. As there would rarely be a maximum timeframe provided in the local legislation to achieve this election/designation process, one should try to set up a date where all members are expected to be duly designated, 3 months being a cautious approach if a great number of countries are involved, and when direct elections by the workforce are to be conducted.

### What happens if no agreement is reached with the SNB?

Failure to reach an agreement with the SNB does not preclude the creation of the SE Works Council. Indeed, when no agreement has been reached at the expiry of the negotiation period, the SE WC is instituted and must benefit from the attributions and rights granted by specific local provisions which must at least be equal to the “standard rules” provided in the Appendix of the EU Directive. In a nutshell, the standard rules applicable in the absence of an agreement provide (i) the implementation of the Council of the SE benefiting from information-consultation rights comparable to that of the European Works Council and (ii) the implementation of a system of employees’ participation to the SE’s administrative or supervisory body corresponding to the provisions applicable to the transformed Company. ♦

