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The European Company under French Law: Main Features

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Abstract

The Regulation and the Directive on the Statute for a European company introduce a new corporate structure under French law justifying the inclusion of new chapters in both the Commercial Code and Labour Code of France. In order to assess the merits of this new alternative, the benefits offered by the SE structure and regime need to be examined in comparison with existing corporate structures under French law, in particular the SA, which is the structure that the SE most resembles. This article reviews the main features of the SE as a legal entity under

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French law facilitating the formation of European groups. It also looks at reasons for choosing the French SE regime from the point of view of corporate and employment law. The SE is clearly most valuable in cases where the scope of business is European, in which context it can facilitate transnational mergers and joint operations, make the transfer of registered offices possible and serve as a model for streamlining the corporate governance of European groups. If, on the whole, the French legislator has *proved conservative with regard to the SE, even in implementing the Directive on labour side, he has nevertheless granted the 'French' SE plenty of freedom in the statutes regarding the definition of relationships among shareholders.*

Keywords: European Company, French law, European groups, transnational mergers, joint operations, transfer of registered office, freedom in the statutes, minority shareholders, SE holding company, SE joint subsidiary, employee involvement, special negotiating body, participation, one-person subsidiary.

1. INTRODUCTION

Formally adopted on 8 October 2001 after more than thirty years of debate, Council Regulation (EC) No. 2157/2001 on the statute for a European company (SE) (the 'Regulation') and Council Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees (the 'Directive') granted Member States until 8 October 2004 to adapt their laws. French company law was finally amended by the French Senate and the Directive implemented in 2005. It then took another year for the issuance of enforcement decrees.

In fact, a European Company or *Societas Europaea* (SE) can be established in France since 2006, following the adoption of Decree N° 2006-1360 of 9 November 2006 regarding the involvement of employees in SEs and Decree N° 1006-448 of 14 April 2006 regarding publicity requirements for SEs on registration, both enacted to complement Act N° 2005-842 of 26 July 2005 'to boost confidence and modernise the French Economy' (*Loi Breton*).[1]

The Regulation and the Directive introduce a new corporate structure under French law justifying the inclusion of new chapters in both the Commercial Code and Labour Code of France. SEs having their registered office in France are governed:[2]

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[1] Loi N° 2005-842 du 26 juillet 2005 pour la confiance et la modernisation de l'économie.

[2] Arts. 9(1), 10 and 15 of the Regulation; Art. L. 229-1 of the Commercial Code; Art. 203-3 of Decree of 23 March 1967.

(a) for aspects covered by the Regulation: by the provisions of the Regulation or, where expressly authorised by the Regulation, by the provisions of the statutes of the SE; and
(b) for matters not covered by the Regulation or, where matters are partly regulated by it, those aspects not covered by it, by:
    (i) the provisions of laws adopted in France in implementation of Community measures relating specifically to SEs;
    (ii) the provisions of laws in France that would apply to a public limited liability company (*société anonyme*, SA) formed in accordance with the laws of France, where these provisions are not expressly precluded by legislation that applies specifically to SEs;
    (iii) the statutes of the SE.

If the nature of the business carried out by the SE is regulated by specific provisions of French law, those laws also apply in full to the SE.

The decision to locate the registered office of an SE in France is therefore significant, since national laws apply to SEs set up in France, giving SEs incorporated there a particularly French bias.

There are currently more than ninety SEs in operation in Europe, many Member States having implemented EU legislation within the prescribed deadlines. According to the report on implementation of SE regulations in France prepared by Noëlle Lenoir (former Minister of European Affairs), only a single non-listed SE has been registered in France. The SCOR group is the first listed company in France to have been transformed into an SE.

In order to assess the merits of this new alternative, the benefits offered by the SE structure and regime need to be examined in comparison with existing corporate structures under French law, in particular the SA, which is the structure the SE most resembles.

This article reviews the main features of the SE as a legal entity under French law facilitating the structuring of European groups (section 2). It also looks at reasons for choosing the French SE regime from the point of view of corporate and employment law (section 3).

2. THE EUROPEAN COMPANY (SE): A FRAMEWORK FOR REORGANISING THE BUSINESS OF CORPORATE GROUPS ON AN EU SCALE

The aim of the SE is not to generally replace any of the existing corporate structures under French law. Nor does its appeal warrant a surge in SE entity creations. Nonetheless, the SE may prove to be the apposite choice for certain restructuring and cooperation operations as part of a European group regardless of the scale of the group's operations.

SEs can only be created by entities having their registered office and central administration in an EU Member State. Entities not meeting these requirements cannot participate in the formation of an SE but may subsequently become shareholders during the life of the new structure. Consequently, for example, a company incorporated in the United States may not directly set up an SE in France even if it has a real and continuous link with a company established in a Member State of the European Union. It can only establish the SE via a subsidiary having its registered office and central administration in an EU Member State, that is to say, via a subsidiary having its true centre of operations in Europe.

The requirement that this EU dimension exist prior to creation of the SE may appear to be unduly exacting. However, the SE is clearly most valuable in cases where the scope of business is European, in which context it can facilitate transnational mergers (section 2.1) or joint operations (section 2.2), make the transfer of registered office possible (section 2.3) and serve as a model for streamlining the corporate governance of European groups (section 2.4).

2.1 **Simplifying transnational mergers**

Companies having their registered offices in different EU Member States may be merged to form an SE. This is a particularly valuable option, since the Tenth Directive on transnational mergers of 26 October 2005 will not come into force until 15 December 2007 and until the Directive is implemented by enough Member States, mergers of this kind will continue to prove difficult. This is despite the fact that the Court of Justice of the European Communities (ECJ), in a decision dated 13 December 2005, included the merger under the EU principle of freedom of establishment prohibiting Member States from opposing registration of a company on the grounds that said company was the result of a transnational merger. In this decision, the ECJ established the principle, which had not existed previously but which can be expected to have significant effects in the future, that:

> in exercising the freedom of establishment, particular terms and conditions apply to transnational merger operations.

This principle is enshrined in Articles 43 and 48 EC, since,

> like other transformation operations, [transnational merger operations] meet cooperation and regrouping requirements among companies established in different Member States.

The first question that arises regarding the formation of an SE by transnational merger is which companies can avail themselves of this new opportunity. Under the Regulation, two or more SAs or existing SEs can now merge to form an SE

provided that at least two of them are governed by the laws of different Member States[3] and have their registered offices and central administrations within the European Union. Before an SE can be formed by merger, the corporate structures involved in the merger must be transformed into SAs.

The merger may be conducted by acquisition (with the acquiring company becoming an SE) or by the formation of a new company (with the merging companies ceasing to exist).

Where the registered office of the newly-created SE is located in France, the provisions of French law apply both to the French legal entities taking part in the merger and to certain aspects of the operation. In this respect, the regulations set down by the *Loi Breton* are applicable and their implications may be crucial.

The preliminary phase of the merger involves preparing for the opening round of negotiations on employee involvement in the SE. Negotiations with the special negotiating body (SNB) represent the potentially lengthiest part of the merger process, and it is important to plan ahead so that official negotiations can begin immediately after the announcement of the draft terms of the merger.

Also at this stage, the draft terms of the merger are drawn up by the supervisory or administrative organs of the merging companies, as set forth in the Regulation.[4] These draft terms must provide information on the merging companies and the merger transaction itself, for example the share-exchange ratio and the amount of any compensation, the date from which the transactions of the merging companies will be treated – for accounting purposes – as being those of the SE, rights conferred by the SE on the shareholders to whom special rights are attached and the holders of securities other than shares, or the measures proposed concerning them.

One or more independent experts may be appointed by a judicial or administrative authority in the Member State of one of the merging companies or the proposed SE to examine the draft terms of the merger and prepare a single report to all the shareholders. This is an alternative to separate experts operating on behalf of each of the merging companies. These experts may be the same for all the merging companies.

Pursuant to Book IV of the French Labour Code, which applies to all merger transactions, the body representative of the employees must be provided with information and consulted on the draft terms of the merger.

Once all the pre-merger acts and formalities have been completed, the supervisory or administrative organs may take a decision on the draft terms of the merger, which must then be published for information purposes. Where nothing is

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[3] CJCE, 13 December 2005, aff. C-411/03 *SEVIC Systems AG*, *Revue critique de droit international privé* (2006), p. 662, note by Heymann; *Recueil Dalloz* (2006), p. 451, note by Luby; *JCP* (2006), II, 10077, note by Dammann.

[4] Art. 20.

stipulated regarding the terms of the publication in Decree N° 1006-448 of 14 April 2006, the terms that apply are those in force for French internal mergers. These stipulate that a notice must appear in the BODACC (Official Bulletin of Civil and Commercial Notices) and in the appropriate legal bulletin for the place of registration of the SE.

The independent expert may file his report once the draft terms of the merger have been agreed and must do so at least one month before the General Meeting convened to decide on the merger. This represents the next stage in the merger process.

When the draft terms have been published, the SNB can be set up and negotiations on employee involvement may commence.

Publication of the notice in the BODACC is also the beginning of the period that allows the creditors, the Public Prosecutor (*Procureur de la République*) and some French administrative authorities like the Financial Markets Authority to oppose the merger. The French legislator did not exercise the option offered by the Regulation to adopt provisions designed to ensure appropriate protection for minority shareholders opposed to the merger. This negative option, designed to make mergers easier by avoiding the cost involved in buying back shares from shareholders opposed to the merger, could in practice prove penalising as it may be in a group's interest to buy out minority shareholders rather than keep a group of opposing shareholders who represent a potential source of conflict. Creditors, bondholders and holders of securities other than shares, which carry special rights, are protected under the provisions of French law.[5]

The draft terms of the merger and the statutes of the SE must be approved by the general meeting of shareholders of each of the merging companies.

However, it is at the time of registration, and more particularly the universal transmission of holdings, that the merger takes effect,[6] and before the SE can be registered in France it must successfully undergo a certain number of controls.

The Regulation includes the provision that Member States must designate the competent authorities to examine the legality of the merger on their territory. In France, the competent authorities to examine the legality of the merger are defined by Article L. 229-3 of the French Commercial Code, which grants control, on the one hand, to the clerk of the commercial court in the jurisdiction of the registered office of all the merging companies for that part of the procedure that concerns them and, on the other hand, to a notary (*notaire*) who examines the legality of the merger, in particular whether the draft terms of the merger are adopted by all the merging companies and whether employee involvement is in compliance with the provisions of the French Labour Code. This task may prove to be a particularly sensitive matter for the notary.

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[5] Art. 24.
[6] Art. 29.

The Regulation states that the laws of a Member State may provide that a company governed by the law of that Member State may not take part in the formation of an SE by merger if any of that Member State's competent authorities opposes the merger on the grounds of public interest. In France, this option is enshrined in Article L. 229-4 of the French Commercial Code which grants these rights to the Public Prosecutor. Other institutions are also granted objection rights: the CECEI (Committee of Credit Institutions and Investment Companies),[7] the CEA (Committee of Insurance Companies)[8] and the AMF (Financial Markets Regulator)[9] can oppose a merger involving a credit institution, insurance company or fund manager in France. French law regulations on foreign investments also apply in cases where the transaction would give a French company control in a sector considered to be sensitive within the meaning of Article L. 151-3 et seq. of the Financial and Monetary Code.

Following registration, a notice is published in the *Official Journal of the European Communities*,[10] and this marks the end of the formation process.

2.2 Transnational cooperation via an SE

Although forming an SE by means of a merger is the most profitable use of the SE for transnational mergers, there are two other forms of SEs that can be formed by merger: the SE holding company and SE joint subsidiary.

Public and private limited liability companies – *sociétés anonymes* (SA) and *sociétés à responsabilité limitée* (SARL) – with registered offices and head offices within the Community may promote the formation of a holding SE provided that each of at least two of them is governed by the law of a different Member State or has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.[11]

Creating a subsidiary SE is a more flexible option, since companies and firms formed under the law of a Member State and having their registered office and central administration in the Community may form a subsidiary SE by subscribing for its shares, subject to the same terms in respect of location as for the SE holding company.

The SE is designed primarily with transnational mergers in mind. Three of the four forms of SE are intended specifically for this type of merger. The fourth type of SE, added later, is designed for the transformation of a public limited liability company (SA) into an SE.[12] An SA that is incorporated under the laws of a

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7 Art. L. 511-13, subpara. 1 of the French Monetary and Financial Code.
8 Art. L. 322-29 of the French Insurance Code.
9 Art. L. 532-9, subpara. 2 of the French Monetary and Financial Code.
10 Art. 13.
11 Art. 12(2).
12 Art. 2(4).

Member State and has its registered office and head office within the Community may be transformed into an SE if, for a period of at least two years, it has had a subsidiary company governed by the law of another Member State. In practice, however, although transformation is the type of formation most regulated from the point of view of employment law, transformation and merger are likely to be the most popular forms of SE registration for companies wishing to benefit from the other advantages that the SE offers.

2.3 SE transfer of registration from one Member State to another

One of the principle contributions of the Regulation is that it permits the transfer of SE registered offices and defines various provisions[13] to ease the resolution of the major difficulties encountered in changing the location of an SE registered office. Nonetheless, the French legislator has sought to establish a number of hurdles.

Article L. 229-2 of the French Commercial Code stipulates that the plan to transfer registration must be filed with the court registry in the jurisdiction in which the company is registered and that the decision to transfer registration must be taken by the extraordinary general meeting and ratified by special meetings of the shareholders. It furthermore stipulates that the proposed transfer of registration must be put to the special meetings of the holders of preference shares and the meetings of bondholders of the company, unless the company purchases these shares or offers to redeem the bonds.

As it does in the case of transnational mergers, Article L. 229-2 gives creditors of the company who are not bondholders the right to object, without this objection being able to prohibit the pursuit of transfer operations. The Public Prosecutor, CECEI, CEA and AMF are also granted objection rights. In contrast to mergers, however, minority shareholders may have their shares purchased back in the case of a transfer.

If these hurdles are overcome, a notary public issues a certificate to the SE confirming that the requisite documents and formalities have been completed. The company may then obtain a new registration in another Member State of the European Union and registration in France will be stricken.

This operation, although complex, is one of the essential contributions of the SE facilitating mobility within the Community. Until such time as the Fourteenth Directive regarding the transnational transfer of registered offices becomes enforceable – and Internal Market Commissioner Charlie McCreevy recently (3 October 2007) stated that this Directive had been abandoned – the SE has a competitive advantage over national corporate structures. Under such structures, transfer of registration, even within the European Union, is difficult despite the recent withdrawal of tax obstacles relating to French registered offices.

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[13] Art. 8.

2.4 Streamlining corporate legal structures

SE incorporation facilitates the streamlining of structures within a given group. Indeed, although SEs are not the same from one Member State to another due to national legislation, by adopting the SE structure for all or part of a group, managers can use the legislation common to Member States in order to standardise SE rules of governance and use a 'scoreboard' to enhance group management.

For example, SEs may operate under either a one-tier or two-tier system of administration, regardless of the Member States in which they have their registered offices. Similarly, the Regulation sets standard rules for the appointment of the chairman of the administrative organ[14] and the chairman of the management or supervisory organ,[15] as well as the maximum term of the mandate of representatives on SE bodies, which is six years.[16] A group may therefore use a single structure for all or some of its companies, with variations from one Member State to another but applying the same structure. This standardisation is made easier by the fact that the national provisions to which the Regulation refers are themselves, for the most part, the result of EU directives that have made mergers possible.

By authorising the incorporation of one-person subsidiaries, the SE creates further opportunities for streamlining the legal organisation of European corporate groups.

Article 3(2) of the Regulation stipulates that an SE may itself comprise one or several subsidiaries in the form of SEs. Legislation requiring that SAs have more than one shareholder do not apply to SE subsidiaries. For this reason, although a one-person SA does not exist under French law, Article L. 229-6 of the French Commercial Code authorises the incorporation of an SE subsidiary as a one-person SE (*SE unipersonnelle* or SEU). In this case, the SE parent company, the sole shareholder, exercises all powers devolved in principle to the general meeting. Moreover, the requirement that directors and members of the governing board of the limited company (SA) own shares does not apply. Article L. 229-6 furthermore states that the SEU is subject to the legislation that applies to SEs as well as to legislation that applies to EURLs (*Entreprises unipersonnelle à responsabilité limitée*).

Therefore, regardless of the legislation that applies to each of the companies in the Member States in which they are established, a European group may be organised as a lead SE and several one-person SE subsidiaries. Extra-European groups, for example American or Japanese groups, should find the potential for streamlining the administration of their activities in Europe that is possible via the SE to be of particular interest. From the perspective of an American registered

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14 Art. 45.
15 Art. 42.
16 Art. 46.

office, being able to apply a standard legal model to administer ten subsidiaries in Europe is more reassuring by far than managing an SA in France, a *società per azioni* in Italy, a *naamloze vennootschap* in the Netherlands and/or a *publikt Aktiebolag* in Sweden.

Overall it would appear that, while it may not be a panacea, the SE has very clear benefits to offer. Another important consideration in choosing an SE – although not a legal consideration – is image. The Regulation stipulates that the corporate name of an SE must be preceded or followed by the abbreviation 'SE',[17] which is reserved solely for European Companies.[18] This European Company designator may prove attractive to some groups, particularly groups like Allianz.

The decision to form an SE should therefore be driven by the desire to restructure and streamline a group with business in Europe. The size of the group is not a key consideration. There are no secure gains at the time the SE is incorporated.

The following section discusses the regime that applies to SEs registered in France.

3. THE SE REGIME UNDER FRENCH LAW

The Regulation and the Directive grant Member States limited freedom to adapt their legislation to the SE by choosing to exercise certain options. On the whole, the French legislator has proved conservative in choosing to use the French-law public limited liability company (SA) as a model for the SE (section 3.1). However, the French legislator introduced exceptions to the SA model by allowing plenty of freedom in the statutes regarding the definition of relationships among shareholders (section 3.2). On the labour side, the French legislator has also proved conservative in implementing the Directive and aiming to guarantee employee involvement rights as much as possible. However, when entering into a collective bargaining agreement, some freedom was given to redefine the scope of the existing employee representative bodies in France (section 3.3).

3.1 A French SE regime based on the French SA regime

There is nothing original in the structure of the SE under French law. The structure is based on the SA model without all of the flexibility offered by the EU Regulation having been applied. No significant amendments were required under French law, since the monist and dualist systems of administration and management already existed for the SA. For matters relating to management and administration and general meetings, SEs are subject to SA legislation, subject to a limited number of provisions.

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[17] Art. 11(1).
[18] Art. 11(2).

3.1.1 *Management of the SE*

Pursuant to Article L. 229-7 of the French Commercial Code, the administrative and management organs of SEs registered in France are subject to legislation governing the management and administration of SAs, except in respect of the rules of quorum for management and supervisory boards and the rules governing board of directors' meetings. Article L. 229-7, subparagraph 3 of the French Commercial Code stipulates that legislation governing the maximum number of directors or directors on the payroll and the maximum number of members of the management or supervisory board, on the payroll or otherwise, cannot be used to block employees from taking part in the organs of the SE.

It is to be regretted that the French legislator chose not to exercise several of the options offered by the Regulation. Unlike French law regulations governing SAs regarding the control of regulated agreements, the Regulation[19] stipulates that the statutes must list the categories of operations subject to authorisation by the supervisory or management organ or approval by the administration body, but leaves it to Member States to decide on the relevant categories. The French legislator exercised the option offered by the Regulation and stipulated in Article L. 229-7 that the statutes of an SE having its registered office in France must define rules similar to those governing regulated agreements under French law.

With regard to the control of the SE by the supervisory organ in the dualist system, the Regulation specifies that the supervisory organ may ask the executive body for whatever information it requires and that Member States may stipulate that individual members of the supervisory body may also be granted the right to request such information. Like the directors of an SA, the members of the governing body of a French-law SE may – in cases where they consider this to be necessary to fulfil their mission – obtain information and documents from the chairman of the board of directors.[20] The legislator also amended Article L. 225-68 of the French Commercial Code and extended the right to information granted to directors of French SAs to members of the governing board of dualist French SAs.

3.1.2 *SE shareholders' meetings*

Pursuant to Article L. 229-8 of the French Commercial Code, SE general shareholders' meetings are subject to the rules that govern SA general shareholders' meetings to the extent that these are compatible with the Regulation. Decisions taken by the general meeting that do not amend the statutes are taken by a majority of votes excluding blank or spoilt votes.[21] The Regulation[22] stipulates

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19 Art. 48(1).
20 Art. L. 229-7, subpara. 4 of the French Commercial Code.
21 Art. 58.
22 Art. 59.

that decisions that amend the statutes must be taken by at least a two-thirds majority.

3.2 The freedom to define relationships among shareholders in the statutes of the French SE

Pursuant to Articles L. 229-11 and L. 229-15 of the French Commercial Code, SEs that are registered in France and do not make public offerings enjoy much freedom regarding the definition of their statutes. Based on the SAS (*Société par actions simplifiée*) model, SE shareholders may freely organise their relationships by including provisions in the statutes of the SE restricting the free sale of shares. This freedom to organise relationships among shareholders is a feature of the 'French' SE.

Article L. 229-11, subparagraph 1 concerns non-assignability clauses that are valid as long as the term of non-assignability is not greater than ten years. Also authorised are acceptance clauses, right of first refusal clauses (*clauses de préemption*), tag-along clauses (*clauses de sortie*) and so forth. Article L. 229-11, subparagraph 2 stipulates that any transfer in breach of these statutory articles is null and void and that this nullity may be enforced upon the transferee or its assignees/parties in interest or settled by a unanimous decision by shareholders not party to the agreement or the transaction assigning the shares. Exclusion and suspension of non-pecuniary rights clauses[23] may also be written into the statutes of the SE, including further to a change of control within the meaning of Article L. 233-16 of an SE shareholder,[24] in particular following a merger or de-merger.[25] Moreover, pursuant to Article L. 229-14, if the statutes do not stipulate how the purchase price of the shares is to be calculated, and if the parties do not reach agreement on this, the price must be set in accordance with Article 1843-4 of the French Civil Code. In cases where the SE purchases the shares, it has six months to assign or cancel them.

The clauses governed by Articles L. 229-11 to L. 229-14 can only be adopted or amended following a unanimous decision by the shareholders.[26]

This contractual freedom is the result of an innovative interpretation of Article 9 of the Regulation, which grants each Member State the power to adopt national legislation for SEs that would have primacy over national legislation applicable to SAs. Therefore, in cases where they comply with SA-related directives, exceptions can be created for SEs otherwise subject to SA-applicable local legislation. The Regulation, however, does not deal with relationships among shareholders and does not set down provisions governing SE internal organs. This area was

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[23] Art. L. 229-12 of the French Commercial Code.
[24] Art. L. 229-13, subpara. 1 of the French Commercial Code.
[25] Art. L. 229-13, subpara. 2 of the French Commercial Code.
[26] Art. L. 229-15 of the French Commercial Code.

therefore open ground for separate measures to be taken in accordance with EU principles governing the standardisation of company law.

3.3 A conservative implementation under French law of the Directive regarding the involvement of employees

Both French Act N° 2005-842 (*Loi Breton*) and Decree N° 2006-1360 of 9 November 2006 implement the Directive on employee involvement under French law. These labour aspects are crucial, as, according to the Directive, an SE cannot be registered if the terms and conditions governing employee involvement have not been set down. The model retained by the Directive to set up employee involvement within the SE is similar to that of European Works Councils,[27] that is to say, (i) a negotiation between employers' and employees' representatives to reach an agreement and (ii) the application of subsidiary rules, should no agreement be reached.

3.3.1 *The definition of the employee involvement under French law*

Article L. 439-25 of the French Labour Code uses the tripartite definition of employee involvement set down by the Directive:

> 'Involvement of employees' means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company.

This definition of employee involvement is wider than the definitions set down by earlier EU legislation.

Information means:

> the informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE on questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State.

The first part of this definition is taken directly from Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council. The second part of the definition of information, however, contains a new definition of transnationality. The scope of information to be provided is

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[27] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

wider than set down in previous EU regulations. This is because, according to the Directive, questions concerning a single Member State have to be considered transnational once the decision is taken outside that Member State. For example, in cases where a restructuring affects a single Member State only, the European Works Council does not need to be informed, whereas if the decision is taken in a Member State other than the State in which the effects of the decision apply, the SE employee representative body must be informed.

Consultation means:

> Establishment of dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SE.

The definition of consultation applied by the Directive is similar to the definition used by the Directive on European Works Councils. However, the former goes further than the latter, as it defines the purpose of the consultation that must take place:

> At a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE.

Such a detailed definition of consultation should make it possible to avoid the sort of difficulties encountered in the well-known *Renault Vilvoorde* case regarding whether consultation of the European Works Council should take place before or after the restructuring.[28]

Article L. 439-25 of the French Labour Code defines participation as:

> The influence of the body representative of the employees and/or the employees' representatives in the affairs of a company,

by way of the right to elect or appoint or to recommend, and/or oppose the appointment, of some of the members of the company's supervisory or administrative organ.

Under French law, participation does not cover a field as wide as under German law, for example. Participation covers, in particular, the works council appointing some of its members to take part in board of directors' or supervisory board meetings of the public limited liability companies (SA) and to have voting rights at these meetings;[29] taking part in shareholders' general meetings;[30] and, if

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[28] Versailles Court of Appeal, 7 April 1997.

[29] Art. L. 432-6 of the French Labour Code.

[30] Art. L. 432-6-1 of the French Labour Code.

the statutes make provision for this, the election by employees of representatives to sit on these boards.[31]

3.3.2 *Negotiating the involvement of employees*

The negotiating parties to the involvement of employees within the SE are, on the side of the employer, the competent organs of the participating companies and, on the side of the employees, a special negotiating body (SNB) created,

> as soon as possible after publishing the draft terms of merger or creating a holding company or after agreeing a plan to form a subsidiary or to transform into an SE.[32]

The French legislator grants French trade unions a monopoly on the election or appointment of the members of the SNB, whereas the Directive leaves each Member State free to decide on national regulations in this respect. Where there are no trade unions, the French members of the SNB have to be elected directly by employees.[33]

Decree N° 2006-1360 of 9 November 2006[34] sets at one month from the publication of the draft plan for the establishment of the French SE the period within which the management of the participating companies must provide the trade unions with information on the companies, subsidiaries and establishments, existing employee involvement schemes and the number of their employees in each Member State and the number of seats on the SNB. These seats are allocated among Member States *pro rata* the number of employees in each country[35] and are then distributed among colleges and finally among trade unions.[36]

In electing or appointing members of the SNB, it must be ensured that members are elected or appointed in proportion to the number of employees employed by the participating companies and the concerned subsidiaries or establishments in each Member State.[37]

Negotiations regarding arrangements for the involvement of employees within the SE cannot last more than six months, except where the parties decide to extend these negotiations, in which case they cannot exceed twelve months in total. During this period, the SNB is kept regularly informed of progress made on the incorporation of the SE.

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31 Arts. L. 225-23 and 225-27 of the French Commercial Code.
32 Art. L. 439-26, subpara. 2 of the French Labour Code.
33 Arts. L. 439-30 and R. 439-8 of the French Labour Code.
34 Art. R. 439-5 of the French Labour Code.
35 Art. L. 439-27 of the French Labour Code.
36 Arts. L. 439-29 and R. 439-6 of the French Labour Code.
37 Arts. L. 439-27, L. 439-29 and R. 439-6 of the French Labour Code.

Although the Directive refers only to the information to be provided by the competent organs of the participating companies regarding

> the plan and the actual process of establishing the SE, up to its registration,[38]

Decree N° 2006-1360 of 9 November 2006 goes further by stipulating that the SNB must be informed (i) of the way of creation chosen for the SE as well as any effects this choice may have on the participating companies; (ii) the arrangement chosen for the information, consultation and participation process in these participating companies; and (iii) the arrangements governing the transfer of rights and obligations of the participating companies regarding working conditions pursuant to legislation, relationships in the workplace and individual employment contracts.[39]

The SNB may be assisted by experts. The French Act implementing the Directive retained the option offered by the Directive that Member States limit funding to cover one expert only.

The competent organs of the participating companies and the SNB must negotiate in a spirit of cooperation with a view to reaching an agreement on arrangements for the involvement of employees within the SE. The parties may (i) decide to create a representative body that will be the discussion partner of the competent organ of the SE regarding information and consultation of the employees of the SE and its subsidiaries and establishments; (ii) agree on a procedure using the existing body representative of the employees and/or the employees' representatives; or (iii) create an 'SE Works Council' (*Comité de la SE*), that is to say, the representative body for which provision is made in the standard rules of the French Labour Code. The agreement may also define arrangements governing participation.

Whatever solutions are agreed, they must provide for at least the same level of all aspects of employee involvement as the ones existing prior to formation of the SE ('before and after' principle). Thus, the French legislator opted for the guarantee of employee rights offered by the Directive.

The SNB, as a collegial body, decides by absolute majority of its members representing the absolute majority of employees of the participating companies.[40] A qualified majority is required for the SNB to decide to diminish participation rights, that is to say, to bring participation rights below the highest level reported by any of the participating companies. The qualified majority required is two-thirds of members from at least two Member States representing at least two-thirds of employees in these States.

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[38] Art. 3(3), second para.

[39] Art. R. 439-12 of the French Labour Code.

[40] Arts. L. 439-33 and R. 439-13 of the French Labour Code.

Although the regulations advocate agreement, neither the Directive nor its implementation in the French Labour Code contain any obligation to reach agreement, nor even to enter into negotiations, the SNB having powers to not commence negotiations or to end negotiations once commenced and to rely on the rules on information and consultation in force in the Member States in which the SE has employees. In cases where this last option is chosen, the implementation of an SE Works Council is not an obligation. However, the decision not to set up an SE Works Council must be taken by a qualified majority of two-thirds of the members of the SNB from at least two Member States representing at least two-thirds of employees in these Member States. The decision not to set up an SE Works Council is not an option for an SE formed by transformation of a company with participation.

3.3.3 *Standard rules regarding the involvement of employees in the French SE*

The standard provisions may apply in cases where the parties agree so. They must apply in cases where no agreement has been reached following six to twelve months of negotiations and where the SNB has not chosen to end negotiations. In this situation, the SE becomes subject to the 'default' regime defined in Articles L. 439-34 to L. 439-50 of the French Labour Code, which stipulate that a new body representative of the employees must be created – the SE Works Council – and, if appropriate, new arrangements governing participation must be agreed.

The SE Works Council comprises, on the one hand, the SE manager or his representative and, on the other hand, employee representatives of participating companies, concerned subsidiaries or establishments. SE Works Council members are appointed in the same way as special negotiating body members,[41] that is to say, by trade unions via their elected representatives to the local Works Council.

The SE Works Council meets at least once annually. Its powers are limited to questions concerning the SE itself or any subsidiary or establishment located in another Member State.

The powers of the SE Works Council are wider than those of the European Works Council on several counts. First, the SE Works Council must be informed of issues concerning a single Member State only in cases where these issues are 'transnational'. Second, the legal representatives of the SE must provide the SE Works Council with management or supervisory organ meeting agendas and copies of all documents submitted to the general shareholders' meeting. Finally, the SE Works Council is endowed with considerable powers in the event of exceptional circumstances affecting the employees' interests, in particular in the

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[41] Art. R. 439-18 of the French Labour Code.

event of relocations, transfers, the closure of establishments or undertakings or collective redundancies. In these situations, if it so requests, the SE Works Council is duly convened by the SE manager for the purposes of information and consultation.

The SE Works Council is not intended as an additional tier to the European Works Council. Indeed, an SE with a registered office in France and that already has a European Works Council or is subject to the Directive on European Works Councils is now no longer required to comply with French Labour Code provisions on European Works Councils.[42]

Finally, the French Act implementing the Directive in the French Labour Code[43] also stipulates that the agreement on employee involvement – or a collective agreement entered into at the appropriate level – may abolish or modify the French employee representative bodies that are likely to disappear in the event that the participating companies located in France lose their legal autonomy because of the establishment of the SE. The French Labour Code provides that these agreements may redefine the national scope of action of the French employee representative bodies. Thus, the French Labour Code leaves to the parties negotiating the agreement a margin of freedom to redefine the scope of the existing employee representative bodies in France.

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[42] Art. L. 439-43, subpara. 1 of the French Labour Code.
[43] Art. L. 439-43, subpara. 2 of the French Labour Code.