



**KRZYSZTOF WOJCICECH BARAN**

Jagiellonian University in Kraków, Poland

ORCID iD: 0000-0001-5165-8265

**SPECIAL NEGOTIATIONS TEAM AS  
A TEMPORARY PARTICIPATING  
ENTITY IN THE ACT ON COMPANIES  
ESTABLISHED AS A RESULT OF CROSS-  
BORDER TRANSFORMATION,  
MERGER OR DIVISION**

## ABSTRACT

The act on the participation of employees in a company created as a result of cross-border transformation, merger or division of companies (hereinafter: the Participation Act) was adopted on May 26 2023. It establishes certain participation mechanisms with the aim to empower workers by enabling them to participate in company management. The Act foresees several types of representative bodies, including the special negotiation team that will be analysed in this paper. It plays an important role at the first stage of employee participation in a company that is undergoing transformation, merger or split, and in interested subsidiaries. Its main task is to enter into a participatory agreement with a governing body of the company. This article also discusses the legal mechanisms related to the procedure of concluding such agreements.

**KEYWORDS:** *Special negotiations team, employee participation, cross-border transformations, mergers, or divisions of companies*

## 1. INTRODUCTION

The participation principle in managing the workplace is characteristic for Member States of the European Union. It is one of the pillars of the European social model. The main regulations in this matter are provided in the Community Charter of Fundamental Social Rights for Workers. Article 17 emphasises the need to develop forms of consultation and participation of workers. Under the *acquis Communautaire*, these regulations apply both to inter-company and internal structures (J. Wratny, 2014 pp. 882-884; Z. Hajn, 2013 pp. 202 et seq.). The Polish labour law system also provides a regulation that stipulates a mechanism of employee participation in managing the enterprise. The position of Art. 18 (2) of the Labour Code demonstrates clearly that it has the rank of a fundamental principle of labour law (W. Perdeus 2022 pp.175-178; M. Gładoch 2005, pp. 31-38). However, the Code does not define *explicite* any structures or forms of participation; instead, it refers to separate legislation in that matter. The participation mechanisms adopted in the act on the participation of employees in a company created as a result of cross-border transformation, merger or division of companies (hereinafter:

the Participation Act) are aimed at empowering employees by enabling them to participate in the management of their work establishment, i.e., in this case in companies that were created as a result of cross-border transformation, merger or division of companies.

In the EU Member States, the forms of employee participation in managing the enterprise are quite diverse. Their nature may be either informational and consultative or controlling and stipulative. According to the criterion of the influence of employee representation on the situation of the employing entity, it is justified to distinguish *soft* and *hard* participation (A. Świątkowski, M. Wujczyk 2008 pp.23 ff., J. Wratny, 2014 pp 849-902; Z. Hajn, 2013 pp. 202 et seq.). While the first type is characterised by a low level of intervention of employee representation in the employer's decisions, the other grants employee representation decisive and stipulative rights. The latter legal mechanisms are dominant on the Participation Act, which, in Art. 1 (2) stipulates that the forms of participation are:

1. the right to elect or appoint a specific number of members of the Supervisory Board or the Board of Directors;
2. the right to recommend members of the Supervisory Board or the Board of Directors;
3. the right to object to the appointment of specific or all members of the Supervisory Board or the Board of Directors.

The cited provision stipulates both positive competences (items 1 and 2) and negative ones (item 3). The last one consists in the capacity to block entities designated by the company to participate in its governing bodies.

One of the participation aspects is regulated by the Directive (Eu) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law and the Directive (Eu) 2019/2121 Of The European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions. The aim of this paper is to determine the scope of implementation of the aforementioned EU regulations into Polish law regarding special negotiations teams.

## **2. GENERAL REMARKS ON THE STATUS OF A SPECIAL NEGOTIATIONS TEAM**

The Participation Act foresees several types of participatory bodies, including the special negotiations teams, whose legal status will be discussed here. The teams play an important role at the first stage of employee participation in a company that is undergoing transformation, merger or division, and in interested subsidiaries (Art. 3 item 2 of the Participation Act). Pursuant to the provisions of Art. 5 of the Participation Act, special negotiation teams are appointed immediately after the competent body of a company has announced the planned: 1) transformation – a plan for cross-border transformation; 2) merger – a plan for cross-border merger; 3) division – a plan for cross-border division. The existing regulations do not provide a precise definition of the immediate appointment of a special negotiation team, so it should be assumed that the team should be appointed as soon as possible in the normal course of work.

The Act imposes special obligations in this matter on the governing bodies of the company that is transforming, merging or dividing. These bodies should specify the date of commencement of the procedure aimed at establishing a special negotiations team. For companies undergoing cross-border mergers, the date of commencement of this procedure is the same for all merging companies. (Art. 6 of the Participation Act). Apart from that, the governing body has a statutory obligation to notify the employees in a manner typically used at the company. This may include either electronic or conventional notifications, depending on the existing internal regulations of the given company.

The Participation Act introduces two modes of appointing a special negotiations team. It grants the priority to trade unions, which may determine the composition of the team. On the other hand, it contains a subsidiary reference to the staff, if the authorised trade union organisations fail to specify members of the team. As a result, we are dealing with a specific model of trade union dominance. The hegemony of trade unions adopted in the newly introduced Act is contrary to the idea of equal treatment of employees and directly violates the universal principle of negative freedom of trade unions. Thus, it also violates the democratic standards in industrial relationships.

As far as the appointment of special negotiation teams by trade unions is concerned, the nature of this mode is varied and depends on whether there is only one or more representative trade union organisations at the employer. If there is only one active trade union organisation at the employer, as defined in Art. 25 (3) of the Act on Trade Unions (M. Lekston, 2019 pp.147-158) then it has statutory exclusive rights to designate the members of a special negotiations team. The designating authority is the management or another managing and executive body of the organisation that has statutory powers, regardless of the name given to such body in the trade union's statute. The only important condition is that its competences should include managing the ongoing operations of the union. Members of the special negotiations team are designated in an autonomous manner, so the employer does not have the right to interfere with the process. This means that team members should be appointed based on an independent resolution of the competent body of the trade union. This leads to the question what will happen if the trade union organisation violates the regulations on designating members of special negotiations teams, e.g., if it designates a person without the necessary powers. In such situation, the employer or other trade unions may notify the prosecutor's office about the violation of law pursuant to Art. 36 of the Act on Trade Unions (Baran K. W., 2019 pp.254 – 258).

If there are more than one active trade union organisations at the employer, they should designate a common representation in order to appoint the members of the special negotiations team. The provisions of Art. 30 items 4 and 5 of the Act on Trade Unions apply here *ab exemplo*. (Książek D. 2019 pp. 195-198). This means that the trade unions conduct independent negotiations in order to designate members of the special negotiations team.

The members of the team should be designated within 14 days from the date of commencing the procedure aimed at establishing the special negotiations team. Failure to meet this deadline means that the right to designate members of the team is transferred to the staff.

Members of special negotiations teams are designated from among employees of companies that will become part of the transformed, merged or divided company and of the interested subsidiary or work establishment. The *lege non distinguente* argument leads to the conclusion that the basis of employment

of the given worker is irrelevant. Hence, a member of the team may be even a person who is employed based on an employment contract for a definite period. However, *de lege lata*, employees who are in sole charge of the establishment, their deputies, and deputies of persons not being employees but being in sole charge of the establishment, employees who are members of collective governing bodies (e.g., the Management Board), the Chief Accountant and the Legal Counsel cannot become members of the team. (Art. 12 *in fine* of the Participation Act). Persons who are self-employed or perform work based on civil law contract cannot be designated as members of the special negotiations team, either. However, I personally disapprove of this solution, as in the Polish legal system such persons have the full rights to associate in trade unions. hence, we are dealing with discrimination based on the manner of employment here.

The representative trade union organisation at the company or the common trade union representation should notify the competent governing body of the company about establishing the composition of the special negotiations team. Along with designating three members of the special negotiations team, three substitute members may be appointed. Although this is not obligatory, it seems reasonable from the functional point of view (e.g., in the event of one of the members resigning from their mandate).

### **3. ELECTING PROCEDURE OF THE SPECIAL NEGOTIATIONS TEAM MEMBERS'**

Pursuant to Art. 12 item 6 of the Participation Act, if, in a company that will become part of a company created as a result of trans-border transformation, merger or division of companies:

1. there is no active representative trade union organisation,
2. the representative trade union organisation fails to designate the members of the special negotiations team within the specified period,
3. the common trade union representation fails to designate the members of the special negotiations team within the specified period,
4. no common trade union representation has been established,

then the competences related to designating members of the special negotiations team are transferred to the staff, and, in specific terms, to employees (K.W. Baran, M. Lekston, 2019 pp 545-553). The date of the election is arranged by the competent bodies of the company undergoing the transformation, merger or division, not later than 60 days after the date of commencement of the procedure with the aim to establish a special negotiations team. The composition, principles of appointment and the manner of operating of the election committee as well as the manner of conducting the election are specified in the regulations established by the competent bodies of the company and agreed with employee representatives who are designated in the manner adopted by the company. The regulations may foresee a voting procedure with use of means of electronic communication as defined in Art. 2 item 5 of the Act of July 18 2002 on Providing Services by Electronic Means (Journal of Laws of 2022, item 344), provided that the principles of personal data protection are complied with. As for the employees with whom the employer should consult the content of these regulations, as the Participation Act uses the plural form in Art. 13 item 4, it should be assumed that there should be at least two such employees. The competent body of the company shall present the draft of the regulations to employee representatives within 5 days from the date of notification. The analysed provision does not specify what the *reconciliation* of the regulations should consist in. Referring to the standards developed in collective employment law, it seems justified to assume that it consists in agreeing on the content and the literal wording of the regulations. If the parties fail to reach agreement on the regulations within 7 days from presenting the draft, the regulations are established by the competent body of the company, taking into consideration the arrangements made in the negotiating process (Art. 13 item 5 of the Participation Act). This provision leaves the employer ample room for manoeuvre. Here, it is worth noting that the regulations do not have a status of a source of labour law as defined in Art. 9 para. 1 of the Labour Code, as its provisions are mainly of an organisational and collective nature.

The regulations should comprehensively regulate the organisation and procedure of the election. In particular, it should address the following issues:

- the status of the election committee and its internal structure,

- the principles of electing or designating members of the election committee,
- the status of members of the election committee,
- the rights and obligations of the election committee,
- the rules for convening meetings and adopting resolutions,
- the detailed manner of voting,
- the principles of counting the votes in a transparent manner,
- the dates for announcing the election dates,
- the principles that justify cancelling the elections,
- and the circumstances in which re-elections are held.

The provisions of the regulations must comply with the provisions of the Participation Act. The provisions of the Act are imperative and they cannot be modified by acts of lower rank, even if the regulations have been agreed with employee representatives. In the event of discrepancies between the regulations and the Act, the Act should thus prevail.

The works of the election committee are governed by the regulations. Therefore, the question arises whether the employer may delegate its representative to the committee to control the attendance and the methods of counting votes. Personally, I am of the opinion that it is acceptable, if the election regulations foresee such possibility.

The principles of conducting the election are specified in Art. 13 of the Participation Act. The election takes place on one or more working days, during working hours, with employees retaining their right to remuneration. Voting should be secret and direct. Due to the axiological properties of a democratic state under the rule of law, the secrecy of the election should be treated as a priority in employment relationships. The secrecy of voting should be ensured for every voting employee. Therefore, voting *in gremio* is unacceptable. In the event of violating the principle of secrecy, the election should be deemed as invalid and conducted once again. The Participation Act does not foresee any legal mechanisms for the judicial authorities to control the election, which is doubtlessly a serious disadvantage of the Act. On the other hand, as far as the directness of the election is concerned, electing indirect election structures, such as department or plant electors,



is *de lege lata* unacceptable. If such practices are applied, the election should be deemed to be legally defective.

All employees have the right to vote in the election for the members of the special negotiations team. This also includes those who are using their leaves – *lege non distinguente* – holiday, maternity, parental, paternity, and even unpaid leaves, at that time. Employees who are absent from work due to other reasons also have the right to vote. In the light of the provisions of Art. 13 item 7 of the Participation Act, the question arises whether the employee has one vote in the election or whether they may support a larger number of candidates. In my opinion, both versions may be adopted in the election regulations, provided that the directive of equality of the election is complied with. This means that each vote has the same weight and all employees have the same influence on the composition of the elected special negotiations team.

Pursuant to Art. 13 item 8 of the Participation Act, employees who are in sole charge of the establishment, their deputies, employees who are members of collective governing bodies (e.g., the Management Board), the Chief Accountant and the Legal Counsel, as well as members of the election committee do not have passive voting rights. This list is of an enumerative nature, so it cannot be interpreted in a broader way.

The election is considered as valid, if 50 per cent of employees take part, regardless of the number of votes cast. Attendance is calculated based on the principles specified in Art. 7 item 2 of the Participation Act. It includes all employees, regardless of whether they are currently performing work. In the event, if less than at least 50% of employees took part in the election, a re-election is conducted among the previously accepted candidates. The re-election is valid regardless of the number of participants. The competent body of the company shall notify the employees 10 days in advance about the date of the re-election, which should take place not later than 90 days after the commencement of the procedure aimed at establishing the special negotiations team.

The election results should be announced by the election committee in such a way that will enable all interested parties to know the results. The Participation Act does not foresee the verification of counting the votes, which is doubtlessly a disadvantage. However, I personally believe that such mechanism may be provided in the election regulations.

#### 4. THE LEGAL STATUS OF MEMBERS OF THE SPECIAL NEGOTIATIONS TEAM

Another issue that is worth focusing on is the status of members of the special negotiations team. Pursuant to the provisions of Art. 14 item 1 of the Participation Act, members of the special negotiations team are those candidates who have received the largest numbers of votes. If candidates receive the same number of votes and the number of seats to be filled is less than the number of candidates concerned, the election of a member of the special negotiating body shall be carried out by the Election Committee by drawing lots from among those candidates. The employer is under statutory obligation to inform the employees about the elected or appointed members of the negotiations team. They have universal participatory authority and represent all employees working in the company undergoing transformation, merger or division and in the interested subsidiary or the interested work establishment from the given Member State.

Pursuant to Art. 16 of the Participation Act, the mandate of a member of the special negotiations team shall expire in the following situations:

1. termination of employment relationship;
2. resignation from the function;
3. filing a motion for removal of the member signed by at least 50% of the employees who are employed by the companies and work establishments specified in Art. 9 as of the date of filing the motion;
4. if the member takes a position specified in Art. 13 item 8.

This provision is of a special nature, which means that it cannot be applied in circumstances that are not directly provided for therein. This interpretational option is also justified by the argumentation *exceptions non sunt excendendae*. Analysing the prerequisites for the expiration of mandate, it should be emphasised that the termination of the employment relationship foreseen in item 1 refers both to bilateral actions (e.g., terminating agreement) and unilateral ones (e.g., termination of employment contract without notice under Art. 52 of the Labour Code). On the other hand, the resignation by member consists in the employee voluntarily resigning from exercising the mandate. The

Participation Act does not specify the form of resignation, therefore, *lege non distinguente*, all actions that express the will of the employee in an adequate way should be accepted. However, one should maintain particular caution in the event of conclusive resignation from the function. The decisive factor in that matter is the intention of the employee that is manifested in form of the refusal to participate in the actions of the special negotiations team.

Pursuant to Art. 16 item 1 (3), the mandate of a member of the special negotiations team shall expire if a motion is filed for removal of the member signed by at least 50% of the employees who are employed by the companies and work establishments specified in Art. 9 of the analysed Act. Here, we are dealing with an exemplification of direct democracy in labour relationships. The required 50% of employees are calculated based on the state of employment as of the day of filing the motion. The motion is filed to the entity specified in the regulations (e.g., the chairperson of the election committee). The person is entitled to verify the signatures, provided that it is foreseen in the regulations. *De lege lata*, taking a management or independent position in the company by a member of the special negotiations team results in the expiration of their mandate. The mandate expires on the actual date of taking the position.

In the event if the mandate of a member of the special negotiations team expires, his seat in the team is taken over by the substitute member who has received the highest number of votes. If no substitute members were elected, then the composition of the team shall be completed by designation by trade unions or repeated election.

Within 14 days from the date of receiving information about the designation or election of the members of the special negotiations team, the competent body of the company undergoing transformation, merger or division shall convene the first meeting of the team. As part of its organisational activities, the team shall appoint a chairperson from among its members and adopt the internal regulations.

Pursuant to Art. 22 of the Participation Act, the special negotiations team shall make decisions by means of a resolution adopted by an absolute majority of members who represent an absolute majority of employees as of the day of voting. Each member of the special negotiations team shall have one vote.

## 5. PARTICIPATORY AGREEMENT

The main task of the special negotiations team is to achieve the participatory agreement (Art. 3 item 1 of the Participation Act). Negotiations are conducted with the competent body of the company that is undergoing transformation, merger or division. Pursuant to Art. 24 of the Participation Act, the agreement should be concluded within 180 days from the date of convening the first meeting of the team. However, the parties to the negotiations may jointly decide to extend this period to one year. Further prolongation seems unacceptable *de lege lata*.

Negotiations should be conducted in good faith. It means that they should be based on the principles of fairness, loyalty, and reasonability. The civil law notion of good faith, which refers to the psychological condition of a party, is rather useless here (Przybyłowski K, 1970 Vol. 15 pp. 3-12). In fact, it refers rather to respecting the interests of the employees and the company. A manifestation of good faith during negotiations is the fact that the governing bodies of the company are obliged to provide the special negotiations team with information about the plans and the course of the cross-border transformation, merger or division of the company. If the parties encounter a deadlock in negotiations, they may refer to a mediator. In this matter, according to the adequacy clause, the provisions of Art. 11 and Art. 111 of the Act on resolving collective disputes are applied (Tomanek A. 2019 pp. 440-447). The main task will be to develop a consensus between the parties to the negotiations.

In performing its duties, the special negotiations team may use the services of the experts or translators designated by it. Members of the special negotiations team together with experts or translators, representatives of the competent governing body of the company undergoing transformation, merger or division, and the mediator, may participate in meetings conducted with the use of means of electronic communication, as defined in Art. 2 item 5 of the Act of July 18 2002 on Providing Services by Electronic Means, provided that they comply with the principles of personal data protection. Obviously, there are no legal barriers that would prevent direct negotiations.

The main objective of the negotiations is to reach an agreement (Art. 3 item 1 of the Participation Act). It is concluded in written or electronic form, under the pain of nullity, The use of a different form means that the agreement is

ineffective and it is not binding for any of the parties thereto. The agreement is signed by persons who are authorised to make statements of will on behalf of the company that is undergoing transformation, merger or division, the chairperson of the special negotiations team, and at least one member of the team.

This agreement, which may be deemed as participatory, should determine the principles of the participation of employees in company management. However, it does not have the status of labour law sources as defined in Art. 9 of the Labour Code, as it does not define the rights and obligations of parties of an employment relationship, only the participatory competences of employee representation. The provisions of Art. 28 item 1 of the Participation Act do not specify the content of the agreement. The Act only provides examples of provisions that the parties may include in the agreement, concerning:

- the subjective scope of its application; the principles of participation, taking into consideration the number of members of the Supervisory Board or the Board of Directors of the company that emerges as a result of cross-border transformation, merger or division of companies, whom the employees may elect, appoint or recommend, or the number of members to whose appointment employees may oppose; the effective date of the agreement; the period of the agreement; situations when the agreement may be renegotiated;
- the negotiation procedure.

Based on the directive of contractual freedom, I am of the opinion that there are no legal barriers that might prevent the parties from including other important issues in the agreement, for example those related to the legal mechanisms of maintaining the negotiations confidential. The special negotiations team may also include in the agreement a consent for limiting the employees' participation rights in a company created as a result of trans-border transformation, merger or division of companies. This refers to reducing the number of members who represent employees in the Supervisory Board or the Board of Directors of the company. However, it requires a qualified majority of two thirds of votes representing at least two thirds of the number of employees as of the voting date, in the special negotiations team.

## 6. CONCLUSION REMARKS

The special negotiations team as an entity of a participatory nature has a temporary status because its main task is to enter in the participatory agreement with the competent body of the company. Upon concluding the agreement, the team is dissolved *ex lege*. However, it plays an important role at the initial stage of the cross-border transformation of companies in the European participation model. Despite some drawbacks and doubts indicated in this study, the regulations adopted in the Participation Act essentially correspond to the standards established in EU regulations.

## REFERENCES

---

- Baran, K.W. (2019). (in:) Zbiorowe prawo pracy. Komentarz [*Collective Labour Law. A Commentary*], K.W. Baran (ed.). Warsaw.
- Baran, K. W., Lekston M, (2019). (in:) Zbiorowe prawo pracy. Komentarz [*Collective Labour Law. A Commentary*], K.W. Baran (ed.). Warsaw.
- Gładoch, M. (2005). Uczestnictwo pracowników w zarządzaniu przedsiębiorstwem w Polsce. Problemy teorii i praktyki na tle prawa wspólnotowego [*Employees' participation in an enterprise management in Poland. Theoretical and practical problems in the light of the Community law*], Toruń.
- Hajn, Z. (2013). Zbiorowe prawo pracy. Zarys systemu. [*Collective Labour Law. A system outline*] Warsaw.
- Książek, D. (2019). (in:) Zbiorowe prawo pracy. Komentarz [*Collective Labour Law. A Commentary*], K.W. Baran (ed.). Warsaw.
- Lekston, M. (2019). (in:) Zbiorowe prawo pracy. Komentarz [*Collective Labour Law. A Commentary*], K.W. Baran (ed.). Warsaw.
- Perdeus, W. (2022). (in:) Kodeks pracy. Komentarz [*The Labour Code. Commentary*], K.W. Baran (ed.), Vol. 2. Warsaw.
- Przybyłowski, K. (1970). Dobra wiara w polskim prawie cywilnym (uwagi ogólne o pojęciu) [*Good Faith in Polish Civil Law. General Remarks*] *Studia cywilistyczne* 1970 Vol. 15.
- Świątkowski, A, Wujczyk, M. (2008). *Miękkie (soft) standardy międzynarodowe i „twarde (hard) krajowe o informacji i konsultacji pracowników* [*Soft international standards and hard national standards on information and consultation with employees*], (in:) *Informowanie i konsultowanie pracowników w polskim prawie*

pracy [*Informing employees and consulting with employees in Polish labour law*], A. Sobczyk (ed.), Kraków.

Tomanek, A. (2019). (in:) Zbiorowe prawo pracy. Komentarz [*Collective Labour Law. A Commentary*], K.W. Baran (ed.). Warsaw.

Wrątny, J. (2014). (in:) System prawa pracy [*The Labour Law System*]. Zbiorowe prawo pracy [*The Labour Law System. Collective Labour Law*], K.W. Baran (ed.), Vol. 5. Warsaw.

Włodarczyk, M. (2014). (in:) System prawa pracy [*The Labour Law System*]. Zbiorowe prawo pracy [*The Labour Law System. Collective Labour Law*], K.W. Baran (ed.), Vol. 5. Warsaw.