

Name of the country: **Germany**

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Transposition Act = Consolidated legislation Europäische Betriebsräte-Gesetz - EBRG

### 1. Presence of legally based administrative or judicial conflict solving procedures for:

		No	Yes	Unclear	brief explanation
A	SNB (including the pre-SNB phase, i.e. requesting the necessary information about the company, staff distribution, etc.)		Yes		
B	EWC based on Art. 6 agreements		Yes		
C	EWC based on art. 13 agreement	No			Generally, EBRG does not apply to Art. 13 agreements unless it concerns a significant structural change in the company <sup>1</sup>
D	EWC based on subsidiary requirements		Yes		
	Members of the information and consultation procedure (!)		Yes <sup>2</sup>		

### 2. Litigation on different sets of rights: presence of national provisions

		No	Yes	Which authority (e.g., court) is competent <sup>3</sup>
A	Breaches against the provision of information to the SNB as per art. 4 (4) of Directive 2009/38/EC (information on the number of employees)/Failure to establish a SNB		Yes	
B	Operation of the EWC: breaches and compliance with the law (statutes), agreement or Subsidiary Requirements		Yes	
C	Challenging management on the use of confidentiality and secrecy/withholding information)		Yes	
E	Individual rights of the SNB/EWC members under national EWC legislation		yes	
F	(Others to be filled in)			

### 3. Capacity to act in court

<sup>1</sup> Art. 37, EBRG (2011)

<sup>2</sup> Art. 44 para 3 of the EBRG (2011).

<sup>3</sup> Material and geographical competence.



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		Brief explanation/ differences for 2A-2F above)
1	Who/which body can start a judicial procedure?	EWC
2	What legal status (ius standi) is a requirement to start a judicial procedure? (legal personality, capacity to act in courts, other forms?)	A catalogue of eligible applicants is set in the EBRG (Art. 44 para 3): the special negotiating body, the European Works Council, the majority of the employees' representatives in an information and consultation procedure, the central management or a trade union represented in the undertaking shall be entitled to submit an application.
3	What is the legal status of the EWC (legal personality or other capacity to act in court)?	Court capacity
4	In case of lacking capacity to act in court: how can it be circumvented (think of representation by trade unions)?	
5	Who represents the EWC in law?	EWC collectively or its duly appointed representative
6	What is the capacity to act in court of joint type ('forum' or French-type) EWCs composed of both management and employees' representatives and can it be an obstacle?	No reference in law

#### 4. Starting a procedure and timelines

		Brief explanation
1	Does the law set conditions as to how the EWC can take a valid decision on entering a judicial procedure? Think of voting, quorum, the necessity of a physical meeting to take a decision,...	No (only reference is to a majority of members of an information and consultation procedure, Art 44. Para 3 EBRG)
1.a	Does the law contain any requirements on the internal rules concerning question 1?	No
2	How does one file a case in court? (Who, format, steps)	In Civil Procedure: Any ordinary proceeding starts with the filing of a statement of claim. The timing mainly depends on the applicable limitation period, which is a matter of substantive law. The general limitation period is three years and commences on the last day of the year in which the claimant became aware of the existence of the claim and the identity of the debtor, or would have been so aware had he or she not shown gross negligence. In principle, this period applies to claims for the performance of contracts, damage, tort, restitution



		<p>or unjust enrichment. The filing of a statement of claim suspends the applicable limitation period.</p> <p>The German judicial system requires the parties to submit all facts supporting their case and there are only limited means to have the opponent produce documents (see below). The concept is that each case should be dealt with within one single oral hearing, although it is not unusual that more than one hearing is held, for example to allow for the taking of evidence or a discussion of issues pointed out in an earlier hearing. In preparation for the hearing, a judge may either give the parties the opportunity to present their case in a preparatory oral hearing or – as is more often the case – order the parties to submit their arguments in written briefs.</p> <p>Although the Code of Civil Procedure provides for the principle that the decision of a court shall be based on the statements made in the oral hearing, the focus in almost all cases is on the written submissions of the parties (with the exception of the taking of evidence). The parties should always ensure that they plead all factual and legal submissions relevant to their case in writing. Written submissions are to be filed within the time limits set out by the judge in his or her discretion. If parties fail to comply with such time limits without proper excuse, late submissions may be precluded.</p> <p>Court proceedings must be conducted in German. Since the beginning of 2010, however, proceedings can be conducted in English before specific courts (Commercial Courts) in certain areas of Germany. For EWC Cases the Labour Courts are responsible.</p> <p>Oral hearings often take a surprisingly short time, during which the parties primarily refer to their written briefs. Permitted sources of evidence are documents, inspection by the court, witness statements, expert opinions and, to a rather limited extent, party testimony. As a general rule, written witness statements do not qualify as evidence. At the conclusion of a hearing, the judge usually sets a specific date on which he or she will render a decision, be it a judgment or an order as to the further procedure.</p> <p><sup>4</sup></p>
3	What is the deadline to start a judicial procedure?	There is no deadline in EWC cases

<sup>4</sup> <https://thelawreviews.co.uk/title/the-dispute-resolution-review/germany>



4	Are there other relevant deadlines in the judicial procedure?	In civil proceedings: 3 years from the breach to file a case to court.
5	What is the role of out of court settlements once a case has been filed?	The Code of Civil Procedure provides that the court shall consider at all times during the proceedings whether a settlement can be reached. In particular, courts are required to enquire whether an amicable solution is an option prior to the first oral hearing. It is at the discretion of the judge how far he or she pursues such an enquiry. Whereas some judges merely ask whether the parties wish to settle the case and, if this is denied, promptly enter into the proceedings, other judges discuss their preliminary evaluation of the case with the parties in detail and make concrete proposals as to what the terms of a settlement could be. <sup>5</sup>
6	How long does a judicial procedure typically take?	While the duration of any litigation depends on the complexity of the case and, to a large extent, is subject to the discretion of the court, the average duration from the initiation of an action until the issuance of a judgment is in the range of seven months (local courts) to 15 months (regional courts) in the first instance and between 22 months (regional courts) and 27 months (higher regional courts) in the second instance. <sup>6</sup>
7	Is an injunction or a summary procedure possible?	Yes. “In addition to regular court procedures, a party may initiate a number of alternative proceedings. Summary collection proceedings provide for a rapid procedure by which the applicant may obtain a collection order without an oral hearing if the subject matter is the payment of a certain sum of money. The evaluation by the court is limited to whether the claim appears to be plausible. Upon written objection by the defendant, the dispute is transferred to the competent court and the matter turns into a regular lawsuit. Generally speaking, a collection procedure is only an option if the defendant is likely to pay immediately or fail to respond, or if a limitation period needs to be suspended on short notice. Further, a plaintiff may initiate summary proceedings that allow for documents or a bill of exchange as the only means of evidence. If a judgment is rendered against the defendant, the latter may ask for the judgment to be set aside in subsequent proceedings. If the defendant makes use of this right, the dispute remains pending as a regular lawsuit, entitling both parties to resort to regular means of evidence.

<sup>5</sup> <https://thelawreviews.co.uk/title/the-dispute-resolution-review/germany>

<sup>6</sup> <https://thelawreviews.co.uk/title/the-dispute-resolution-review/germany>



		<p>Along with these options, a party may initiate ancillary proceedings such as a procedure for the taking of evidence independent of a pending lawsuit or proceedings for interim measures.</p> <p>Two different kinds of interim measures exist: attachment orders and preliminary injunctions. Both are provisional court orders issued in summary proceedings to obtain security for the future execution of a claim. While an attachment order secures satisfaction of monetary claims, a claim for payment of a purchase price or damages, for example, a preliminary injunction may be issued with regard to a non-monetary claim, for example a claim for the omission of a contractual violation.</p> <p>To support a motion for interim measures, the applicant must submit facts establishing the jurisdiction of the court, the potential claim and the reasons why interim relief is required. In doing so, the applicant – unlike in regular proceedings – is not required to provide full evidence but may rely on prima facie evidence. In contrast to regular proceedings, this includes the submission of written affidavits regarding the facts of the case by the applicant or by third parties.</p> <p>The execution of interim measures follows, in principle, the same rules as the enforcement of a regular judgment. Enforcement is restricted, however, to measures that safeguard the applicant's interests without fully satisfying the claim.</p> <p>Proceedings concerning provisional remedies are handled with priority and can be extremely fast. In urgent cases, a judge may decide without an oral hearing. Thus, in practice, it may take no longer than a few days, sometimes only hours, to obtain a court order or injunction.</p> <p>In any case, the defendant may oppose the order of the court. Upon such a motion, the court will decide by judgment. Appeals against such judgments follow the general rules.”<sup>7</sup></p>
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## 5. Costs

		Brief explanation
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<sup>7</sup> <https://thelawreviews.co.uk/title/the-dispute-resolution-review/germany>



	Which court is competent?	For EWC Cases the Labour Courts are responsible (Section 82 ArbGG) Labour courts have jurisdiction in respect of all civil disputes between employees and employers and disputes between the social partners. The other responsibilities of the labour courts arise from Sections 2 and 2a of the Labour Courts Act (Arbeitsgerichtsgesetz, ArbGG).
1	What are the court fees for a judicial procedure?	No court fees required to start litigation. In Germany courts are free to determine the sanction (see Bauckhage 2006: 155). However, those costs are not charged for EWCs in labour court proceedings <sup>8</sup>
2	Is legal representation by a lawyer required in a judicial procedure?	Whether a claimant needs to be represented in a civil court action or not, depends on the court of jurisdiction and the amount in dispute. <ul style="list-style-type: none"> <li>• Representation can only be by a member of the bar (lawyer).</li> <li>• Only in a Local Court (Amtsgericht) a litigant may bring a court action without being represented. The Local Court has, in principle, jurisdiction for cases with a value of less than 5.000 Euros.</li> </ul>
3	Who pays the costs for:	General clause on coverage of operational expenses by the employer <sup>9</sup> In Germany, under Article 30 of the Act on European Works Councils transposing Directive 94/45/EC (EWR-Gesetz of 1996) extended by the 2011 Act transposing the recast directive, only general provisions are in place. The practice has been, however, by analogy with the general regulations for works councils in Germany, a common recognition of the company's obligation to reimburse a statutory EWC for the costs of any necessary judicial proceedings. This also includes the costs of EWC legal representation and counsel, provided that the judicial steps taken are deemed necessary. In practice, before the case is brought to court its viability and the subject of the dispute are assessed by a lawyer, who then decides whether or not to pursue litigation.
	- Legal expert	<ul style="list-style-type: none"> <li>• The EWC and the select committee may be assisted by experts of their choice;</li> <li>• It may also be authorised union representatives Article 25 (Section 39) (2011); Limited</li> </ul>

<sup>8</sup> European Commission (2018): 58.

<sup>9</sup> Article 25 (Section 39.1) (2011)



		to one expert (unless agreed otherwise). Normally, legal representation fees are covered.
	- Court fees	Yes, normally legal costs are considered operating costs of EWC.
	- Other costs (travel/interpretation)	
4	Does a EWC normally have an independent budget and/or an own bank account under a given national legislation?	No. This is considered by the German trade unions to be a limitation/straightjacket on EWC operation as in Germany all operating costs are to be covered by the employer.
5	Can the EWC be sentenced to pay the costs of the other party in the judicial procedure?	To be decided by the court (in theory possible). The levels of both court and lawyers' fees are determined by the 'value' of the dispute, as decided by the court
6	Can the EWC <i>members</i> be sentenced to pay the costs of the other party in the judicial procedure?	To be decided by the court (in theory possible). The levels of both court and lawyers' fees are determined by the 'value' of the dispute, as decided by the court

## 6. Sanctions

		Brief explanation
	How is a breach of law classified?	Administrative offence
1	What are the sanctions for breaches of EWC laws?	<p>Fine: 30,000 DM (approximately 15,000 euros)  + penal / criminal sanctions (imprisonment).  + a custodial sentence not exceeding two years (for breaches of confidentiality)<sup>10</sup></p> <p>Sanction related to <b>establishment</b> of EWC: Imprisonment up to 2 years and fine  Sanction related to <b>operation</b> of EWC: fine up to EUR 15 000</p>

<sup>10</sup> Art. 43, EBRG (2011).



2	Can the court rule to stop or reverse the companies' decision-making?	Yes, in certain cases <sup>11</sup> , but not to the same extent as national works councils <sup>12</sup>
3	Whom should fines be paid to?	Public authorities
4	Can a member of management be held personally liable (personal vs. corporate liability)?	Yes <sup>13</sup>
5	Can individual EWC members be sentenced to pay fines or be subject to other sanctions?	Yes
6	Can the EWC collectively be sentenced to pay fines or be subject to other sanctions?	EBRG (European Works Councils Act) Section 39 Costs, material expenses and experts (1) The costs incurred in connection with the establishment and operation of the European Works Council and the Committee shall be borne by the central management. (This includes the costs of the judicial procedure).

## 7. Out of court settlements

	Brief explanation
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<sup>11</sup> Article 85 II Labour Courts Act. The issue has reportedly been broadly debated: the Landesarbeitsgericht (Regional Labour Court) in Cologne in Case 13 TA267/11 (point 30 of the judgment) stated that concerning the Works Constitution Act (Betriebsverfassungsgesetz) the Federal Labour Court confirmed the principle of applicability of the general injunction to suspend actions causing infringement in cases of employers' violations of the codetermination rights (Mitbestimmungsrechte) provided for in § 87 Abs. 1 BetrVG. A commentary on this case (Hayen 2012) explains the limitations of applicability of the injunction to the infringement of information and consultation rights of EWCs. The applicability of injunctions in the German law depends on their applicability in relation to infringements of national works councils, which differs according to topic: on some issues where the latter have true codetermination rights the courts have recognised an Unterlassungsanspruch (claim to injunctive relief) until the prescribed procedures are adhered to; in other instances where national works councils have weaker rights (right to give an opinion, right of information and consultation) there is no generally recognised 'Unterlassungsanspruch' (however, this issue has been under legal debate since the 1990s; see Bauckhage 2006: 164 ff.). § 87 BetrVG contains a catalogue of issues where national works councils must agree to company policy—in the event of disagreement, there can be recourse to arbitration.

<sup>12</sup> In Germany, works councils have co-determination rights and, by means of an application for an injunction, can stop the employer from implementing any decisions taken without their agreement; if the employer is in breach of its mandatory obligations of co-determination, any measures taken are null and void (Fannigan 2012). The same rights do not seem to apply (at least directly) to decisions taken in breach of the EWC's right to information and consultation (this being different from co-determination). The importance of the availability of such court authority was highlighted in 2011 by Hanna Schelz from the German Federal Ministry of Labour in Bonn, who pointed out that an early involvement of EWCs in decision-making processes was important; she also expressed the view that the possibility of penalties after the violation has taken place was less useful to the EWC than the pre-emptive use of legal options (EBR Newsletter 2/2011). In her statement Ms Schelz could obviously not declare whether such suspensive injunctions would be used by judges, yet she did not exclude that one day they might find their way into practice (ibid.).

<sup>13</sup> EBRG (2011): § 45 Rules on fines "It shall be an offence for any person (...)"



1.	<p>In general, are alternative conflict resolutions available in a given country can out of court settlements be reached once a case has been filed? Does it happen in practice?</p>	<p>No<sup>14</sup></p> <p>Mediation is theoretically possible but has only little significance in German labour law. Arbitration allowed only in disputes relating to collective agreements and thus not possible in case of EWC agreements which are qualified as works council level agreement<sup>15</sup>.</p> <p>However, “generally speaking, when there is no formal legal requirement that a particular kind of dispute or matter must be dealt with in court, mediation is always permitted. The Mediation Act (Mediationsgesetz) (Article 1 of the Act to promote mediation and other procedures for out-of-court dispute settlement of 21 July 2012, Federal Law Gazette I (Bundesgesetzblatt I), p. 1577), entered into force in Germany on 26 July 2012. This was the first piece of legislation to formally regulate mediation services in Germany. The Act also transposes the European Mediation Directive into German law (Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, p. 3). The scope of the German Mediation Act exceeds the requirements of the European Directive; while the Directive provides only for cross-border civil and commercial disputes, the German Mediation Act covers all forms of mediation in Germany, irrespective of the form of dispute or the place of residence of the parties concerned.</p> <p>The Act promotes mutual dispute settlement by including a number of different incentives in the official procedural codes (e.g. the Code of Civil Procedure, Zivilprozessordnung). Henceforth, for example, when parties bring an action in a civil court, they will have to say whether they have already sought to resolve the issue via out-of-court measures, such as mediation, and whether there are specific reasons for not considering this course of action. The court may furthermore suggest that the parties try to settle the conflict via mediation, or another form of out-of-court settlement; if the parties refuse to apply this option, the Court may choose to suspend the proceedings. Legal aid for mediation is not envisaged for the time being. Under section 278(5) of the Code of Civil Procedure, the court may, for the purpose of the conciliation procedure and for further attempts at amicable settlement, refer the parties to a conciliation judge (Güterichter) who is designated specifically for that purpose and does not have decision-making powers. The conciliation judge may use all methods of dispute settlement, including mediation.</p>
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<sup>14</sup> European Commission 2018: 58.

<sup>15</sup> van Hoek & Hendrickx F. (2009): 97.



		<p>The Federal Government complied with its legal obligation to report back to the Bundestag (lower house of parliament) on the impact of the Act five years after its implementation by means of its report of 20 July 2017.</p> <p>It shows that mediation as an alternative tool for dispute settlement in Germany is not yet used to the extent desirable.”<sup>16</sup></p>
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## 8. Resources for EWCs

		Brief explanation
1.	Can unions provide legal support or financing for litigation?	Normally, EWCs are supported by their trade unions both with counsel and with financial guarantees if the court decides that they must cover the cost of litigation. The levels of both court and lawyers’ fees are determined by the ‘value’ of the dispute, as decided by the court
2.	What other resources are available in terms of legal support to EWCs and/or EWC members in your country (e.g., Arbeiterkammer, legal support centres)	Cooperation with national works councils that have stronger co-determination rights and a more direct (undisputed) access to injunctions (see above). Foundations providing advise on labour matters (e.g. Hans Boeckler Foundation) and active in the area of EWCs.

<sup>16</sup> [https://e-justice.europa.eu/content\\_mediation\\_in\\_member\\_states-64-de-en.do?member=1](https://e-justice.europa.eu/content_mediation_in_member_states-64-de-en.do?member=1)

