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Hearing children in family proceedings: Germany

1. General Obligation to hear children

- Germany has implemented a general statutory provision to fulfill the right of the child to be heard. There is a legal obligation to ensure children are heard in the most favourable settings and under the most suitable conditions, having regard to their age, maturity and level of understanding (FRA, 2015b, p. 5).
- The right to be heard is guaranteed in Art. 103(1) of the Constitution (the right of all persons on a hearing in accordance with the law), and in Section 28 of the Administrative Procedure Act (the right to be heard before an administrative measure interfering with a person's rights can be taken). However, both provisions do not specifically refer to children (Ballesteros et al., 2013).
- Sect. 159 of the Law on the Proceedings regarding Family Matters and Voluntary Jurisdiction (FamFG) explicitly governs the hearing in child-related proceedings and contains rules on how to arrange hearings of children at the Family Court and on participation of a guardian ad litem (Schulz et al., 2016).

2. Minimum age

- Pursuant to statutory law, the hearing of the child is compulsory from the age of 14 years (Section 159 FamFG; EC, 2015, p. 12) in custody or visitation cases (FRA, 2015a, p. 42). It is common practice to hear children in child-related family court procedures and the minimum age of 14 in custody and visitation cases is said to be flexible (FRA, 2015a, p. 49). For children below 14, the law provides that the child should be heard in person if it is considered appropriate and important and when the preferences, relationships, or the wishes of the child are significant to the decision or when an in-person hearing is otherwise indicated (p. 33).
- For younger children, practice has been evolving. Constitutional Court decisions have since 1981 been strengthening the rights of the child to be heard. Starting at the age of 3, a personal hearing of the child might be important. Small children do not yet have their own free will, but quite notable wishes, tendencies, preferences and aversions that might become visible by attitudes or reactions and could be relevant for the decision. Because of the Constitutional Court decisions, the family judges regularly hear all children starting at the age of three in family cases concerning custody and access. This



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guarantees the right of the child to be heard, the judge gets to know the personality of the child. When not doing so, the judge is in danger that the appeal court classifies the lack of hearing the child as a procedural fault (Schulz et al., 2016).

3. Who hears the child?

- The judge hearing a child's case (custody, access and child protection) will always hear the child in person. In Germany, such personal hearing is mandatory for custody and contact cases, and thus family judges are used to doing it (German Federal Ministry of Justice, 2010, p. 19). The judges are aware that the return procedure can pose a major challenge in order not to cause more harm than good to the child in these sensitive cross-border family cases (Schulz et al., 2016).
- When making a decision (after having heard the child, the parents, the youth welfare office and the child's guardian ad litem), the judge will take into account the child's maturity. He/she will draw conclusions from what the child said and from the child's behaviour, taking into account the professional limitations (judges are no child psychologists), the fact that the child has an own perspective and may be influenced directly or indirectly by the tense situation, and keeping in mind that the judicial hearing only gives a "momentary snapshot" (Schulz et al., 2016).
- The Jugendamt and a special guardian ad litem (regularly appointed in return proceedings) representing the child in custody/access proceedings are often asked to provide an opinion in court (Section 158 FamFG; Bruckhaus, 2006, p. 14; Country Profile, 2015; Erb-Klünemann, 2014, p. 32). In addition, the child can also be heard through their own legal representative (Country Profile, 2015). The appointment of such own legal representative, however, is extremely rare (Schulz et al., 2016).
- Only the guardian ad litem, if appointed, is allowed to participate in the hearing of the child by the judge. The hearing takes place between judge and child (Schulz et al., 2016).

4. Specific rules for hearing children in child abduction cases?

- Since 1999, Germany limited the jurisdiction for Hague return proceedings to 22 out of the currently 661 family courts (German Federal Ministry of Justice, 2010, p. 12).
- Children older than 14 are always heard in return proceedings. Hearing younger children is at the discretion of the judge. If their wishes and feelings are important to the decision, they should be heard (Section 159 subsection 1 of the FamFG) (Country Profile, 2015). Because of the constitutional court decisions and the advantages from hearing the child the judges hear children in Hague cases also regularly starting at the age of three (Schulz et al., 2016).



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- Children are also heard where there are allegations of domestic violence or abuse, but the judge will normally avoid addressing the issue directly (German Federal Ministry of Justice, 2010, p. 14). The hearing of the child is no means to collect evidence. It is to guarantee the right of the child to be heard (Schulz et al., 2016).
- When a child objects return under Art. 13(2) of the Hague Convention, normally, the older and more mature the child is the more weight is given to his or her views by the German courts, but the judges are aware that refusal based on the child's will remains an exception. They also try to assess whether the child has been influenced by the abducting parent, and his or her will should therefore be given less weight (German Federal Ministry of Justice, 2010, p. 19). They also try to assess whether the child refuses out of fear to be separated from the primary caregiver (regularly the abductor) or whether the child has reasons not to be willing to return to the country of habitual residence. This is rarely the case.
- In exceptional cases and under strict time limits, an expert opinion as to the child's maturity might be requested if the child objects to be returned and the judge cannot reach a clear impression on the child's maturity (German Federal Ministry of Justice, 2010, p. 19; Schulz et al., 2016).

5. Cross-border element (i.e. hearing a child who is abroad in second-chance procedure Brussels IIbis?)

Legal professionals from Germany (Schulz et al., 2016) provide the following extra information: "As children adapt quickly, there is often no need for an interpreter. If an interpreter is needed the judge has to take care that the interpreter is able to work with children so that an atmosphere is created in which the child feels in a good position and that he/she has the impression that the judge speaks directly to him/her.

Concerning older children, the hearing also has the aim to explain the return proceeding to the child. The issue is not with whom you shall live in the future. If return is ordered, this does not necessarily mean that you have to live with mummy/daddy (the left-behind parent) in the future. Mummy/daddy (the abducting parent) can return to country X with you, and there the courts will then decide what happens next" (Schulz et al., 2016).

6. Other relevant matters

- German judges report awareness about the importance to reach the aim of minimising the risk of parental influences and of putting pressure on the child. Training of judges by psychologists is offered and very important: open questions having



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regard to the age, maturity and situation of the child, no questions bringing the child in a position that the child has to decide between the parents etc. (Schulz et al., 2016).

- Germany has implemented procedures to provide support to a child before, during and after family proceedings. Screens, separate rooms and child-friendly facilities with technological equipment exist (FRA, 2015b, p. 6).
- The legal obligation to ensure that children are informed in the most appropriate way, having regard to their age, maturity and level of understanding and any communication difficulties they may have, including provisions for specifying the responsible authority, person, time, consent and format of the information provided, as well as information in a child-friendly manner, is implemented (FRA, 2015b, p. 7).

7. Legal sources on hearing the child

- Art. 103(1) of the Constitution
- Section 28 of the Administrative Procedure Act
- Section 159 FamFG (Act on Proceedings in Family Matters)

8. Sources in literature

- Ballesteros et al., 2013, pp. 181-192
- Bruckhaus, 2006
- CEFL, 2005
- Erb-Klünemann, 2014
- European Commission, 2015
- FRA, 2015a
- [FRA, 2015b](#)
- [German Federal Ministry of Justice](#), 2010
- [Hague Convention Country Profile](#) section 10.4 (updated November 2015)
- Contact persons in Germany: Andrea Schulz, Martina Erb-Klünemann & Sabine Brieger