

Additional information following the pre-session on Germany

Issues:

1. Business and human rights: Due Diligence Law
2. Business and human rights: National Action Plan
3. Right of the child to rest, leisure, play, recreational activities, cultural life and the arts
4. Parental responsibility or custody
5. Access to justice and complaints procedure
6. Right to privacy
7. Violence against children and child sexual abuse materials

This information has been compiled by members of the National Coalition Germany – Network for the Implementation of the UN Convention on the Rights of the Child, including Berlin Working Group on Environment and Development (BLUE 21 e.V.) / Unfairtobacco, ECPAT Germany, German Children’s Fund (DKHW) and Digital Opportunities Foundation.



1. Business and human rights: Due Diligence Law

These elements are necessary for an effective due diligence law (Lieferkettengesetz) protecting children's rights in supply chains:

- The law should cover all companies that are based or do business in Germany.
- Companies must be required to exercise children's (human) rights and environmental due diligence in their operations both at home and abroad, reflecting their whole supply chain, and to take appropriate action.
- The law must require companies to document their compliance with due diligence requirements and to report on them publicly.
- The law must provide that failure to comply with due diligence obligations is subject to sanctions under public law (fines, exclusion from public procurement, etc.).
- The law must provide that companies are liable for children's (human) rights violations caused by their failure to comply with due diligence obligations.
- The law must stipulate that it also applies to cases in which foreign law would be applicable under private international law.

Therefore, the UN Committee on the Rights of the Child could ask the German government:

- What does the planned Due Diligence Law (Lieferkettengesetz) look like?
- When will it enter into force?
- How will it improve the situation for children in supply chains?

2. Business and human rights: National Action Plan

The Committee could focus on the failure of the voluntary approach of the monitoring of the National Action Plan for Business and Human Rights, the recovering travel and tourism sector after the COVID19 pandemic and the IT sector and the provider's responsibility at least to do no harm.

Specifically, the UN Committee on the Rights of the Child could ask the German government:

- What concrete measures is the German government going to take after the monitoring of the National Action Plan for Business and Human Rights?
- What measures will be taken in the travel and tourism sector to protect children from sexual violence?
- How is IT the providers' responsibility at least to do no harm specified and controlled?

3. Right of the child to rest, leisure, play, recreational activities, cultural life and the arts

During the pandemic, all offers of physical activities for children (including outside) have been forbidden although many institutions had an implementation plan according to the levels of the pandemic. Especially for children living in restricted housing conditions the lockdown with the loss of leisure activities offered by associations has been difficult. It took even over a month of lockdown until a public discussion began on how to open playgrounds under certain conditions.

The child's right to play: outdoors as well as by using digital media

- Promoting the child's own free choice, both natural, real as well as safe, equally available and high-quality virtual recreation spaces should be made available.
- There should be research on the risks and potentials of digital media for children; they should be educated and empowered to use them responsibly.
- Create new public spaces for children, e. g. by securing and making fallow areas accessible. Link real and virtual spaces e.g. by GPS-based district explorations.

The child's right to play – in urban planning and municipalities

- Right to play is not enshrined in law, only in Berlin there is a law regulating the spaces needed for play (Spielraumgesetz) as it has been eliminated in all other Länder. This is not in line with the basic law to create the same living conditions for everyone in Germany („gleichwertige Lebensverhältnisse“).
- Most municipalities do not have enough free areas to play for children. For instance although enshrined in law, it is not implemented in Berlin. According to the building laws of the Länder there is a regulation for private property developers to include areas to play (specified size per residential unit) but there is also an implementation deficit.
- The federal government should cooperate with the Länder and municipalities to promote the planning of playing spaces (Spilleitplanung).
- The road traffic regulation needs to become more child-friendly. It is a very old law that has not been adopted to the needs of people who mainly move by foot or bike (e.g. regarding speed limits or the creation of roads that can be used to play).
- Children should be involved in the municipalities' urban planning decisions, in the creation of action plans and in the design of playgrounds.

The child's right to play – in educational and care institutions

- The education system needs to include more physical activities during the classes and teach children to move more during everyday life (as children do not have enough physical activity according to studies): Schools should provide access to nature (e.g. the creation of a learning-friendly environment outdoors).

- Learning concepts (e.g. all-day-learning), curricula and school processes must be evaluated as to whether they provide adequate room and time for play and fine arts.
- The school laws of the Länder should be evaluated with regard to the implementation of the CRC including Article 31.
- There should be campaigns in schools and other child and youth welfare facilities, aiming to educate parents on the right to play.

The right to play through the expression of art and culture

- Public infrastructure such as public transportation, playgrounds, libraries or museums and time and space for cultural development should be made available to all children equally.
- Structural disadvantages of children, especially those who are disabled or from poor or immigrant families, should be exposed. Culture, art, leisure activities and games should be free and accessible for all.

4. Joint custody and parity alternation model

Regarding German Family Law, it has to be stated that in general, parents received joint custody (§ 1627 BGB; German Civil Code), even though the right to determine place of residence might be separate from joint custody. Parents with joint custody must decide together on important issues, bearing in mind the best interests of the child. General decisions of daily life can be taken by the parent with whom the child resides, without consultation of the other parent (§1687 paragraph 1 sentence 2 BGB; German Civil Code).

When the rules of contact and the right to determine place of residence are negotiated in court, the best interests of the child take precedence over all other arguments. The judges examine where the child can be better looked after, to which parent it has a closer relationship and who has so far mainly taken care of the upbringing. Children over four years of age are usually asked about their wishes. Even if one parent has sole custody, the other parent is still allowed to have contact with the child and is obliged to have contact.

According to the Federal Constitutional Court, the so-called “parity alternation model” (Wechselmodell) for separated parents is not mandatory. Neither from the parental rights contained in the Basic Law (Constitution) nor from the UN CRC can be deduced that the legislature must prescribe the parity alternation model as a rule, when dealing with children the parents have in common (BVerfG decision April 12, 2018, file number: 1 BvR 2616/17; Federal Constitutional Court). Rightly, the previous instance (the higher regional court; Oberlandesgericht) rejected this form of care in the case in question, because of the child's best interests, given that the relationship between the parents was “highly controversial”.

There is therefore no contradiction to a decision by the Federal Court of Justice (BGH of February 1, 2017 file number: XII ZB 601/15). The latter had established that the parity alternation model could also be set out against the will of one parent. However, the standard is the best interests of the child in the specific case. The Federal Court of Justice (BGH) also focused on the will of the child. The older the child is, the more likely it is to have a say in a desired alternation model. The contact regulation based on a parity alternation model requires the parents to be able to communicate and cooperate.

If the relationship between the parents is subject to considerable conflict, the parity alternation model is usually not in the best interests of the child. As a result, the parity alternation model is possible but not the default case, since the decision has to be taken on a case by case basis.

5. Access to justice and complaints procedure

The state report (in para. 30) stipulates „contact points which receive individual complaints from children or their representatives ... need to be easily accessible to children, and they should be located in children’s immediate living environment. There are already numerous such contact and complaint points in Germany, particularly at municipal level.“ It makes reference to Annex 2 where the commissioners at Länder and municipal levels are listed. At the Länder level there are Länder offices only in Lower-Saxony and in Bavaria and individual commissioners only in Hesse and Saxony-Anhalt. Individual commissioners at municipal level only exist in 1% of municipalities. However, there is no overview/data on their mandates, resources and where the offices are located in the administrative hierarchy. Where they exist, they are usually heard and are able to influence municipal politics (with the views of groups of children which they gather through participation processes) to a certain extent.

However, their mandate does not include individual complaints of children. So there are no institutions (besides the developing youth and welfare ombuds offices) to which children in Germany can turn to to receive support to claim their rights. Moreover, there are no lawyers or contact points specialised in the legal counseling of children (as enshrined in the Council of Europe guidelines on child-friendly justice).

As a general rule, children need the representation of their parents/legal guardian (in case of conflicts with the parents the family court orders a legal guardian specifically for the case „Ergänzungspfleger“) to bring a case to court and to engage a lawyer. Only in a few exceptional cases, under certain circumstances, children are capable to act legally in proceedings (e.g. § 9 para. 1 No. 3 FamFG, if the proceedings concern the child and a right to which he or she is entitled under civil law is asserted and, in accordance with Section 164 FamG, the ability to proceed in child-related matters).

In these cases, all procedural acts including the appointment of a legal advisor are covered by the procedural capability. However, the prerequisite for the regulations in family procedure law mentioned here is that the procedure is already ongoing. With the help of these regulations, children cannot initiate proceedings on their own. However, if the welfare of the child is in danger, the child has the possibility to initiate proceedings at the family court (§§ 24, 157, 1666 BGB). In addition, children can exercise the right to appeal against decisions at first instance in all matters relating to themselves (according to Section 60 FamFG), with limited legal capacity from 14 years of age.

In conclusion, the ratification of the OP3 had no positive consequences on access to justice for children in Germany. The existing children’s commissions on municipal and Länder level should be extended and further developed. Germany needs a horizontal and vertical structure of children’s commissions on different levels. That means that the commissions need to cooperate with other contact points und support institutions on the same level and need to be embedded horizontally in a support structure for children. From the municipal level the interests of children need to be carried on to the Länder and Federal level (vertical structure).

The issue of access to justice for children is directly linked to the issue of missing explicit children’s rights in the constitution. Because the CRC has a status below the Constitution, rulings can only be made with reference to the Basic Law (Constitution) interpreted in the light of the CRC. However, this

complicated derivation is often not taken by courts (under the Constitutional Court). Thus, it is difficult for children (through their parents) to claim their rights with reference to the CRC.

6. Right to privacy

In regard of children's right to privacy against their parents, the GDPR holds the potential of infringement. Art. 8 demands parental consent for children aged under 16 when they use information society services. In case of online counselling services, parental consent must be considered as an infringement of children's right to privacy and an infringement of children's rights to obtain counselling services without knowledge of their parents (SGB 8, § 8 (3) 1; Social Code).

7. Violence against children and child sexual abuse materials

In relation to COVID19, a rise of domestic violence is expected by the Federal Police and Youth Welfare. The Police Criminal Statistic of 2019¹ is the only resource available to give nationwide evidence on violence against children (domestic or not), listing only completed investigations:

- 112 children (2018: 136) were killed. 93 children were below the age of 6 years (2018: 108).
- 4.055 child victims of abuse (2018: 4.129)
- 2019 the number of sexual violence increased on 9% to 15.936 victims (2018: 14.606). Each day 43 children were victims of sexual violence.
- 12.262 cases (2018: 7.449) of production, possession and dissemination of child sexual abuse materials were counted, an increase of 65%! 41% of the accused were below the age of 21 years (26% in 2018), 23% (13% in 2018) between 14 and 18 years and 12% below 14 years (8% in 2018).

Peer-to-Peer violence and self-generated sexual materials are increasing and preventive approaches are urgently needed.²

Therefore, the UN Committee on the Rights of the Child could ask the German government:

- What concrete measures is the German government going to take to protect children from (domestic) violence?
- Police statistics reveal an increase of sexual violence, what is done pro-actively by the German government to better protect children?
- What measures will be taken in line with the Guidelines to implement the OPSC to prevent peer-2-peer violence, especially regarding self-generated sexual materials?

¹ Federal Criminal Office (2020):

https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2019/pks2019_node.html

² OPSC Guideline: https://www.ohchr.org/Documents/HRBodies/CRC/CRC.C.156_OPSC%20Guidelines.pdf
ECPAT International on self-generated images: <https://www.ecpat.org/news/12-things-sexual-images-produced-by-children/>