

Minimum Age of Criminal Responsibility (MACR) – Comparative Analysis International Profile - Germany

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This international profile presents information and evidence on the minimum age of criminal responsibility in Germany. It specifically focuses on policies and practices about investigating offences committed by children/young people.

Key Findings:

- MACR is 14; however, it depends on the age and mental development of the child
- Every participant in criminal proceedings (adult or child) has the right to be heard before the court (respond to the charges or not to make any statement)
- Provisions in place to ensure identity of defendants (children or adults) is protected
- Detention of children is a last resort measure
- In cases involving young people, all measures should be according to the principle 'leniency before severity'
- Fundamental principle of educational measures above custodial sentences
- Best interests of the child are of prime consideration

Background

In Germany, the minimum age of criminal responsibility depends on the age and mental development of the youth/ young adult, not on the offence. Any person 14 to 18 is considered to be a youth and any person 18 to 21 is considered to be a young adult. Children under 14 are not held responsible; however, a child can be held responsible for damage caused to someone else according to civil law. A child above 14 is only held responsible if he/ she is morally and mentally mature when the offence took place; this way he/she can realise the unlawfulness of his/her behaviour and act according to that realisation. However, the minimum age of procedural capacity is 14 for cases relating to family/placement in care, 15 for employment and 16 for migration and asylum.

If children are involved in criminal proceedings, the cases take place in youth courts, which are less intimidating and more child friendly. Judges and prosecutors handling cases with children should have specialised training and experience in upbringing children.

In youth trials the participation of Youth Courts Assistance Service (YCAS) is required. They are social workers of the youth welfare offices responsible for describing the aspects of education, social life and welfare of the child relevant to the case. Their participation is also required to give evidence on the child's background and help in finding the appropriate sanction.

Private prosecution against children is not possible. It only takes place if the victim of a serious offence (against life, physical integrity or sexual self-determination) has been gravely damaged or endangered.

The youth court can impose supervisory measures, disciplinary measures and youth penalty. The court can apply to young adults the provisions that apply to children above 14, if at the time of the offence his/her moral and mental development was equivalent to that of a child between 14 and 18 (while taking into consideration the family environment), or if the type and circumstances of the offence indicate the offence was youth misconduct. Youth penalty refers to measures including deprivation of liberty in an appropriate facility. It can be imposed if supervisory measures or disciplinary measures are not sufficient, or if necessary due to the seriousness of the offence. The German Constitution states personal freedom is 'inviolable', therefore imprisonment can only be imposed by a judge and is kept between six months and 10 years. The number of children in contact with the Police in 2010 was 231,543 (10.8% of all contacts with the Police). The number of convictions for the same year was 55, 388.

Findings

If a child above 14 is going to be subjected to a penalty, the prosecutor or the president of the youth court must interview the child before he/she is charged. He/she must be informed of his/her rights according to his/her development, education and majority. The parents/guardians/legal representatives of the child, in general, hold the same rights as the child and must be informed of his/her rights as well; if they are not present, they must be informed in writing.

Before the first interview by the prosecutor or the president of the youth court takes place, a child above 14 should be informed of: the offence and law provisions, the right to respond or not make a statement on the charges, the right to consult a lawyer at any stage, the right to request evidence to be taken in his/her defence, the right to submit a written statement under certain circumstances, the possibility of perpetrator-victim mediation, the opportunity to dismiss the reasons for suspecting him/her and recognise the facts in his/her favour.

When court proceedings commence, an investigation into the child's family background, development, school environment, past conduct, etc. should be conducted and everyone involved should be heard, if possible, to help in the assessment of his/her character, psychological and emotional state. Also, the parents/guardians/legal representatives share the same rights with the child to be heard, ask questions and be present during the investigation.

The parents/guardians/legal representatives of the child have the right to choose a lawyer and file for legal remedies. However, if they are believed to be involved in the child's misconduct, the judge can revoke these rights. If these rights have been revoked, the judge (with family or guardianship matters jurisdiction) can appoint a carer to make sure the child's interests are preserved.

YCAS must be informed if a custody order is issued for a child and if he/she is to be placed under temporary arrest. There are no specific provisions on how the child is arrested and transported to the police station or to the prison; however handcuffs should not be used on children below 15.

Pre-trial detention should only be imposed on children above 14: if necessary and proportional, if it is strongly believed the child has committed the offence and, therefore, there is a ground for arrest, if there are facts that the child is evading arrest or the criminal proceedings or he/she might tamper with the investigation. For children under 16, pre-trial detention due to a risk of flight is accepted only if the child has already succeeded in/ attempted to evade arrest/criminal proceedings or does not have a fixed residence. It should not last longer than six months, however, it can last for more than six, if due to major difficulties, a judgment has not been issued.

If pre-trial detention is ordered during the investigation, the court must justify the insufficiency of other measures and prove the proportionality of the detention (while taking into consideration the stress it causes to children). If a child is being held in pre-trial detention, he/she is automatically eligible for mandatory defence. The proceedings must be conducted quickly to protect the child and YCAS must be informed. Detention should be based on educational principles according to the child's needs and be set in a safe environment. If possible, the child must be placed in a special institution (or in a special department of the prison/youth detention facility). However, children may be placed with adults.

The judge may allow the absence of the child during the hearing, if it is believed this is against the child's educational and developmental needs. However, the child must be kept informed of the proceedings. Also, the child's parents/guardians/legal representatives may be excluded from the hearing if: there is risk of harm to the child, witness or other person, they are suspected of being involved in the offence,

their presence prevents revealing the truth or if the personal life of a person involved is discussed. To prevent violations of child rights and avoid stigmatisation, the court may request a closed trial. The publication or broadcast of any recording of the hearing is prohibited; moreover, the media self-regulate to protect the right to privacy of the child.

To avoid trial, the prosecutor may abandon the case if: the child has committed a misdemeanour, the offence is minor and there is no public interest in the prosecution. In order to do so, the prosecutor does not need a judge's consent. In general, if children commit less serious offences, the investigations can end with diversion measures.

If the child is found guilty, he/she will be notified orally and, later, in writing. The judgment should include: the circumstances which determined the sanction, the measures ordered or the reasons from refraining from them. While doing so, it should take in consideration the moral, intellectual and physical capacity of the child. However, the child may not be informed if it is to have a negative impact on his/her education and development.

Sanctions imposed on children above the minimum age of criminal responsibility are usually not registered in the Federal Crime Register (FCR), but in an access-restricted one. Only youth penalties -suspended or not- are recorded in the FCR. If the proceedings end with instructions (not a final judgment), the case will not make part of the child's criminal record. However, it will make part of the Educative Measures Register (EMR). Courts, prosecution and prison service, police, tax authorities and other organisations have unrestricted access to information included in the criminal records, which can be accessed by requesting a register statement. When the child is above 14, he/she may inspect his/her files upon request.

A certificate of conduct may be requested by an employer, however it includes less information than the register statement, e.g. day fines and very short prison sentences will not be included if no other information can be located in the register. Only non-suspended prison sentences of more than two years will be recorded with regard to children. The information on children's offences will be deleted after a shorter period of time than those of adults, i.e. after three to 20 years, depending on the sanction.

Evidence

The information presented was based on data collected and collated through policy and evaluation documents and academic papers on the criminal justice system, human rights and rights of the child in Germany. Further contacts have been made (Federal Ministry of the Interior) to gather relevant information, however, no materials have been made available yet.

As a final note, given the limited time to collect the data, the limited sources available as well as the length of the expected output, we should be aware of the restricted outcome of the fieldwork and the data collected. Triangulation of the collected data took place where possible; where not possible, the most recent publication was taken into consideration.

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