The Project is co-funded by the Action Grants to support transnational projects to promote judicial cooperation in civil and criminal matters JUST/JCOO/AG/2018 of the European Union under Grant agreement No 831608.

MiRI Minor's Right to Information in EU civil actions

National Report

FRANCE

Children's right to information in civil proceedings in France

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The present report aims to present the results of the research carried out in France for the purposes of the *MiRI – Minor's right to information in EU civil actions* (JUST-JCOO-AG-2018) project.

The study focused on both the relevant rules and judicial practice, as far as it can be ascertained. The various statutory rules and related case law have been gathered, translated as appropriate, and presented in a systematic manner. Information on judicial practice has been sought in two directions. First, a translation into French of a questionnaire drafted by the project coordinators has been disseminated among practitioners. The information derived from the exploitation of the replies has been supplemented by references to the results of recent empirical studies conducted in France.

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The report comprises an overview of the children's right to information in civil proceedings in France (1), followed by a description first of the relevant framework (2) and then of judicial practice (3). On this basis, a critical assessment will be presented (4).

1. Overview: the children's right to information in civil proceedings in (the French) context

1.1. The involvement of children in civil proceedings and its implications

In French legal writing, the specific challenges that arise when children are involved in civil proceedings are usually divided into two categories, depending on whether the child is a party to the proceedings or merely has an interest in the proceedings.[1]

When the child is – or rather would be if he were an adult – a party to the proceedings, the focus is very much on the implications of his lack of capacity. In principle, the child is represented by his legal guardians, who normally are the child's parents, but the court can appoint another person in their place if it deems it to be in the child's interest, for instance if the parents die or lose parental authority. An *ad hoc* guardian can also be appointed when the interests of the minor seem to conflict with those of his legal guardians, either for the duration of a specific proceeding[2] or for a more sustained period of time.[3] Whichever configuration is involved, the guardian acts on behalf of the child, who will consequently not appear directly in the proceeding.[4] This makes the issue of the child's access to information vanish somewhat artificially, or rather it is to be assumed, absent a legal rule to that effect, that it falls on the guardian to provide the child with all necessary information. The issue of information thus only comes up, and obliquely at that, in relation to the rare instances where the law gives legal standing to the child himself. This happens, for instance, when the child is in danger, is a parent himself, or in some situations if he is over 16 years of age.[5] A child who finds himself in one of these admittedly circumscribed situations is entitled to – or sometimes must have – a lawyer of his own[6] and it is assumed that this lawyer will provide the child with the information that is relevant to the proceedings at hand.[7] Naturally, adult litigants should also be able to rely on their lawyers for such information, but representing children is a uniquely challenging task, particularly when it comes to communication, and the legal profession has undertaken various efforts to ensure that at least some of its members are specially trained. As these efforts are relevant to the legal representation of children generally, that is to say whether or not the child is party to the proceeding at hand, they will be addressed later on.

The report will otherwise focus on the situation where the child, while not party to a judicial proceeding, nonetheless has an interest in it. In this context, the child is entitled to be heard and to representation by a lawyer, and for this dual purpose the child is entitled to some information.

1.2. Historical development of the French framework

[1] See A. Gouttenoire, *Répertoire de procédure civile*, V° "Mineur".

[2] A form of guardianship *ad litem* provided for by art. 388-2 of the French Civil Code (hereafter CC).

[3] See art. 383 CC.

[4] A. Gouttenoire, above n. 1, n° 166.

[5] For an overview, A. Gouttenoire, above n. 1, n^{os} 211-247.

[6] The expenses will be covered by legal aid under Law n° 91-647 of July 10, 1991 (*Loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique*).

[7] A. Gouttenoire, above n. 1, n° 260. Again, no legal provision addresses this issue and it does not seem to have come up in case law.

*Disclaimer excluding Commission responsibility – This report was funded under the European Union's Justice Programme (2014-2020). The content of the MiRI Project (*JUST-JCOO-AG-2018-831608*), and its deliverables, amongst which this report, represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.*

The development of the French framework, such as it is, has been driven by the increasing protection of children's rights at supranational level.[8] With respect to the right to information, a preliminary step has been the implementation of the right to be heard in judicial proceedings. Formerly, the law only provided for this in scattered provisions, for instance in adoption proceedings or when the child's parents divorced.[9]

The ratification of the 1989 United Nations Convention on the Rights of the Child (or new York Convention) was then a turning point, as its article 12.2 provides that, for the purpose of the child's right to express her own views freely in all matters affecting her, when she is capable of forming such views, "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law". The entry into force of the Convention, in 1990, thus made a reform of the French rules of civil procedure necessary, and it was enacted by a 1993 law[10] which created a general framework for the hearing of children in all proceedings relating to them in article 388-1 of the Civil Code.

A few years down the line, the shortcomings of this original framework were thrown into sharp relief by subsequent international instruments, this time at European level. First, the 1996 European Convention on the Exercise of Children's Rights (or Strasbourg Convention),[11] which lists and enshrines various rights derived from the child's right to be heard during proceedings affecting him and conducted before a judicial authority. These, crucially, include the right "to receive all relevant information" (art. 3, a) and "be informed of the possible consequences of compliance with these views and the possible consequences of any decision" (art. 3, c), thus linking the two rights.[12] The other instrument which played a major role in shaping the French rules on the hearing of children in civil proceedings is the Brussels IIA Regulation of 2003,[13] which refers to such a possibility in four provisions (art. 11, 23, 41, 42).[14] The Regulation, however, does not refer directly to the right to information. Another reform thus appeared indispensable if the national rules were to be brought in line with the country's international commitments, and it was carried out by the combination of a

[8] P. Bonfils, A. Gouttenoire, *Droit des mineurs*, Dalloz, 2nd ed., 2014, n° 1137 et seq.

[9] B. Mallevaey (ed.), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, 2018, p. 14 (report available at http://www.gip-recherche-justice.fr/wp-content/uploads/2019/02/16.32.Rapport-final-ADEJAF.pdf, last accessed on 25.01.2021).

[10] *Loi n° 93-22 du 8 janvier 1993 modifiant le Code civil relative à l'état civil, à la famille et aux droits de l'enfant et instituant le juge aux affaires familiale*.

[11] The Convention was signed by France that same year, but it would not come into force until January 1, 2008, see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160/signatures?p_auth=8MAqd9Z8 (last accessed on 25.01.2021).

[12] See also article 6, b) of the Strasbourg Convention.

[13] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[14] Interestingly, the Brussels II Regulation (Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses) already included, among the grounds of non-recognition, the fact that the judgment "was given, except in case of urgency, without the child having been given an opportunity to be heard […]" (art. 15, 2), (b)), but this provision does not seem to have received much attention. The same could be said of the reference to the child's objection "to being returned" in article 13, § 2, of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

2007 law[15] which modified article 388-1 CC and a 2009 ministerial decree[16] which introduced several additional provisions (art. 338-1 et seq.) in the Code of Civil Procedure (hereafter CCP).[17] These, which have barely been amended since then, remain the only relevant statutory and regulatory provisions in the French legal order.

1.3. Essential Features of the French Framework

It should be emphasized at this point that the child's right to information in civil proceedings in general, let alone in cross-border cases specifically,[18] regrettably does not appear to be a major concern in France. This is hardly surprising however, given that as already explained the child's right to be heard in judicial proceedings, of which the right to information is both a key component and an indispensable prerequisite,[19] has itself only come to the fore fairly recently. In this respect, it appears significant that neither right is constitutionally protected in France.[20]

The general or default rules implementing the child's right to be heard in judicial proceedings affecting him or her are to be found first in article 388-1 CC, the first paragraph of which provides that "in any proceedings that concern him or her, a minor capable of discernment may, without prejudice to the provisions providing for his or her intervention or consent, be heard by the court or, if his or her interest so requires, by the person appointed by the court for this purpose".[21] The general regime, then, must be combined with the rules specific to various particular procedures.[22] These include proceedings with regard to *assistance éducative*,[23] proceedings pursuant to the 1980 Hague Convention or the Brussels IIA Regulation, proceedings involving a legal guardian appointed instead of the parents,[24] and adoption proceedings.[25] As these special rules do not deal directly with information provided to the child, but typically make it compulsory rather than possible that the child

[15] *Loi n° 2007-293 du 5 mars 2007 réformant la protection de l'enfance.*

[16] *Décret n° 2009-572 du 20 mai 2009 relatif à l'audition de l'enfant en justice*.

[17] For an overview, see L. Francoz Terminal, "Le nouveau régime de l'audition en justice de l'enfant concerné par une procédure judiciaire", *Droit de la famille*, sept. 2009 (9), étude 30.

[18] Nothing relevant appears, for instance, in the *Répertoire de droit international*'s entry on the rights of the child (F. Monéger, V° "Droits de l'enfant"), even in the section dedicated to the rights of the child to be heard and represented in the context of judicial proceedings (n^{os} 99-104). For their part, publications dealing with the hearing of children within the framework of international instruments tend to focus on the role played by the wishes of the child, and in particular on the weight which should be attached to it by the judge when reaching her decision, see U. Magnus, P. Mankowski (eds.), *European Commentaries on Private International Law (ECPIL), Vol. IV – Brussels IIbis Regulation*, Otto Schmidt, 2017, V° "Article 11", n° 16 et seq., V° "Article 23", n° 23, V° "Article 41", n° 27, and V° "Article 42", n° 19; A. Gouttenoire, "L'audition de l'enfant dans le règlement « Bruxelles II bis »", in H. Fulchiron, C. Nourissat (eds.), *Le nouveau droit communautaire du divorce et de la responsabilité parentale*, Dalloz, 2005, pp. 201-207; P. Klötgen "La portée juridique donnée à la parole de l'enfant", pp. 337-348, and A. Gouttenoire, "La parole de l'enfant enlevé", pp. 349-359, in H. Fulchiron (ed.), *Les enlèvements d'enfants à travers les frontières*, Bruylant, 2004.

[19] See part 2.1 below.

[20] P. Bonfils, A. Gouttenoire, above n. 8, n° 1151.

[21] The translations of French statutory or regulatory provisions contained in this report are provided by the author.

[22] For an overview, see A. Gouttenoire, above n. 1, n° 116 et seq.

[23] This protective regime for at-risk children involves the monitoring and support of children who are left in the care of their families, see art. 375 CC. et seq.

[24] See art. 1234 CCP et seq.

[25] See. art. 345 and 360 CC.

be heard, they will not be discussed further, with one important exception.[26] It should, however, be kept in mind that as a result the general regime applies at first instance before both family law courts (*juges aux affaires familiales* or *JAFs*), which have general jurisdiction over family law matters, and specialised children's courts (*juges des enfants*), who deal with *assistance éducative*).

Within the general rules, the issue of information is addressed by article 388-1 CC, § 4, which provides that "the judge makes sure that the minor has been informed of his or her right to be heard and assisted by a lawyer". This should be read in connection with the further rules contained in the Code of Civil Procedure,[27] which make clear that while the burden of providing the minor with this information rests with his or her parents or legal guardian (art. 338-1 CCP, § 1), it will also be mentioned in the various summons which will be issued and sent to the child (art. 338-1 CCP, § 2-3; 338-6 CCP, § 2, as applicable).

It should also be noted that the judge may entrust an independent third party, with past or current relevant professional experience, with the task of hearing the child (art. 338-9 CCP). This possibility, like the emphasis on providing children who so desire with the assistance of their own lawyers, could be construed as inspired, at least in part, by a determination to ensure in this context the effectivity of the children's right to information. Even if this proposition is accurate, however, it remains unacknowledged by the legislator, the courts and academics alike.[28]

This very basic body of rules, furthermore, has not been supplemented by case law, as very few cases have centered on the information provided to a child, or lack thereof. This only serves to emphasize the relevance of incorporating input relative to judicial practice. Indeed, there is some evidence to suggest that, in practice, the system operates in a way that is more respectful of the child's right to information in civil proceedings than could otherwise be feared.

2. The French framework regarding the children's right to information in civil proceedings

2.1. Supranational rules and guidelines

As already mentioned, the most directly relevant provisions at supranational level are articles 3 and 6, b) of the European Convention on the Exercise of Children's Rights, in that they are the only texts which explicitly refer to a right to information in judicial proceedings:[29]

> Article 3 – Right to be informed and to express his or her views in proceedings
>
> A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:
>
> a) to receive all relevant information;
>
> b) to be consulted and express his or her views;

[26] It regards the recently introduced out-of-court divorce, see part 2.2. below. Another minor exception is art. 1192 CPC, which provides that when an appeal is lodged against a first-instance judgment in matters of *assistance éducative*, the child must be informed together with the other parties if he or she is over 16 years of age.

[27] See part 2.2 below.

[28] For an exception regarding the assistance of a specially trained lawyer, see B. Mallevaey (ed.), above n. 9, pp. 112-113.

[29] Or, rather, the only provisions that are *binding* on France. Otherwise, article 6 of the 2003 Council of Europe Convention on Contact concerning Children, in particular, would have to be included.

c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

and

Article 6 – Decision-making process

In proceedings affecting a child, the judicial authority, before taking a decision, shall: […]

b) in a case where the child is considered by internal law as having sufficient understanding:

– ensure that the child has received all relevant information;

– consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child;

– allow the child to express his or her views; […]

These two texts link the right of the child to information and her right to be involved, and more specifically heard, during civil proceedings. Provisions which enshrine only the latter are consequently also relevant, albeit in an indirect way. The most significant of these is, naturally, article 12 of the New York Convention, which provides that:

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The second paragraph, which according to the *Cour de cassation* has direct effect,[30] in turns connects the right of the child to be heard with the rights of the child to express his or her views freely, and to have those views taken into account. In an even more roundabout way, then, article 24, § 1, of the Charter of Fundamental Rights of the European Union could also be brought into play:[31]

Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

The rights enshrined in the European Convention on Human Rights (ECHR), for their part, have not featured significantly in the French debates. Still, in the light of the previous discussions, the right to a fair trial protected under article 6 could be brought in the debate, as well as possibly the rights to respect for private and family life and to freedom of expression, which are protected under articles 8 and 10 respectively.[32]

[30] *Cass. civ. 1re*, 18.05.2005, n° 02-20.613. The court, reversing previous rulings, stated for the first time that a provision of the New York Convention had direct effect, see A. Gouttenoire, above n. 1, n° 13.

[31] It famously was by the Court of Justice of the European Union when interpreting article 42 of the Brussels IIA Regulation, see CJEU, Case C-491/10 PPU, 22.12.2010, *Aguirre Zarraga*. That case, however, does not directly touch upon the issue of the information that should be provided to the child.

[32] For a discussion of the European Court of Human Rights cases which could be relevant to the issue at stake, see the Italian National Report. The cases that come closest to touching upon the issue of the information which should be made available to children, however, concern criminal proceedings.

Turning to soft law instruments, the Committee on the Rights of the Child has stated, in its General Comment No 12 (2009) on the right of the child to be heard (§ 48), that:

> The child's right to be heard imposes the obligation on States parties to review or amend their legislation in order to introduce mechanisms providing children with access to appropriate information, adequate support, if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress.

The same year, the Parliamentary Assembly of the Council of Europe expressed, in its Recommendation 1864 titled "Promoting the participation by children in decisions affecting them" (§ 7), the view that:

> Children must therefore be listened to and allowed to participate in decisions in all fields, especially […] access to justice and the administration of justice. Additional efforts are needed to ensure that children are allowed to express their opinions freely during judicial and administrative proceedings in a climate of respect, trust and mutual understanding. When promoting a meaningful participation by children, […] children should have access to child-friendly information, appropriate to their age and to their situation.

The subsequent Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2011) tackle the issue of information fairly extensively and detail the kind of information that should be provided to children "before, during and after judicial proceedings". Information on the substantive rights of children as well as, broadly speaking, "the system and procedures involved" should be "provided to children in a manner adapted to their age and maturity, in a language which they can understand and which is gender and culture sensitive".

2.2. Statutory provisions and ministerial decrees

The statutory rules and those enacted by ministerial decree are to be found in the French Civil Code and Code of Civil Procedure. As explained above, two articles of the Civil Code may be relevant if the child is a party to the proceedings, with the latter providing for the appointment of a guardian *ad litem*:

Article 383 CC, § 1

> When the interests of the legal guardian or, as the case may be, of the two legal guardians, conflict with those of the minor, the former shall request that the guardianship court[33] appoint an ad hoc guardian. If there is a lack of diligence on the part of the legal guardians, the court may proceed with the appointment upon the request of the public prosecutor, of the minor himself or herself, or ex officio.[34]

Article 388-2 CC, § 1[35]

[33] When children are involved as opposed to vulnerable adults, the competence of the guardianship court is entrusted to the general family law courts (*JAF*).

[34] *Lorsque les intérêts de l'administrateur légal unique ou, selon le cas, des deux administrateurs légaux sont en opposition avec ceux du mineur, ces derniers demandent la nomination d'un administrateur ad hoc par le juge des tutelles. A défaut de diligence des administrateurs légaux, le juge peut procéder à cette nomination à la demande du ministère public, du mineur lui-même ou d'office*.

[35] The *Cour de cassation* has ruled that, in principle, a guardian *ad litem* should be appointed when the proceeding aims at contesting a parent-child relationship, see *Cass. civ. 1re*, 06.11.2013, n° 12-19.269.

> When, during a proceeding, the interests of a minor appear to conflict with those of his legal representatives, the guardianship court, as provided for under article 383 or, failing that, the court hearing the case, shall appoint an ad hoc guardian tasked with representing the minor.[36]

When the child merely has an interest in the proceeding, the relevant provision in the Civil Code, which includes some of the general rules relating to the hearing of the child, is:

Article 388-1 CC

> In any proceedings that concern him or her, a minor capable of discernment[37] may, without prejudice to the provisions providing for his or her intervention or consent, be heard by the court or, if his or her interest so requires, by the person appointed by the court for this purpose.
>
> The minor is entitled to be heard. If he or she refuses to be heard, the court may assess the merits of this refusal. The minor may be heard alone, or with the assistance of a lawyer or of a person of his or her choice. If this choice does not appear to be in the minor's interest, the court may appoint another person.
>
> The hearing does not make the minor become party to the proceeding.
>
> The court shall verify that the minor has been informed of his or her right to be heard and assisted by a lawyer.[38]

The other relevant provisions are found in the Code of Civil Procedure:

Article 338-1 CCP

> The minor capable of discernment shall be informed, by its legal guardian or guardians or, as the case may be, by the person or body he or she has been entrusted to, of his or her right to be heard and assisted by a lawyer in all proceedings that concern him or her.
>
> When proceedings are instituted by means of an application, the summons to attend the hearing shall be accompanied by a notice containing the text of article 388-1 of the Civil Code and of the first paragraph of the present article.
>
> When proceedings are instituted by means of a submission served by writ by a court officer, the notice mentioned in the previous paragraph shall be enclosed with the submission.[39]

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[36] *Lorsque, dans une procédure, les intérêts d'un mineur apparaissent en opposition avec ceux de ses représentants légaux, le juge des tutelles dans les conditions prévues à l'article 383 ou, à défaut, le juge saisi de l'instance lui désigne un administrateur ad hoc chargé de le représenter.*

[37] On this criterion, see part. 4.1 below.

[38] *Dans toute procédure le concernant, le mineur capable de discernement peut, sans préjudice des dispositions prévoyant son intervention ou son consentement, être entendu par le juge ou, lorsque son intérêt le commande, par la personne désignée par le juge à cet effet.*

Cette audition est de droit lorsque le mineur en fait la demande. Lorsque le mineur refuse d'être entendu, le juge apprécie le bien-fondé de ce refus. Il peut être entendu seul, avec un avocat ou une personne de son choix. Si ce choix n'apparaît pas conforme à l'intérêt du mineur, le juge peut procéder à la désignation d'une autre personne.

L'audition du mineur ne lui confère pas la qualité de partie à la procédure.

Le juge s'assure que le mineur a été informé de son droit à être entendu et à être assisté par un avocat.

[39] *Le mineur capable de discernement est informé par le ou les titulaires de l'exercice de l'autorité parentale, le tuteur ou, le cas échéant, par la personne ou le service à qui il a été confié de son droit à être entendu et à être assisté d'un avocat dans toutes les procédures le concernant.*

Lorsque la procédure est introduite par requête, la convocation à l'audience est accompagnée d'un avis rappelant les dispositions de l'article 388-1 du code civil et celles du premier alinéa du présent article.

Article 338-4 CCP

When the request [to be heard] is made by the minor, a refusal can only be based on the minor's lack of discernment or the fact that the proceeding does not concern him or her.

When the request [for the minor to be heard] is made by the parties, the court may also refuse if it deems it unnecessary to hold a hearing in order to decide the case or if deems it contrary to the interest of the minor.

The minor and the parties may be informed of the denial by any means. In all cases, the reasons for the denial shall be mentioned in the decision on the merits.[40]

Article 338-6 CCP

The court registry or, as the case may be, the person appointed by the court to hear the minor shall issue him or her, by simple letter, with a summons to attend the hearing.

The summons shall inform him or her of his or her right to be heard alone, or with the assistance of a lawyer, or of a person of his or her choice.

On the same day, the parties' lawyers and, failing that, the parties themselves, shall be informed of the forms in which the hearing will take place.[41]

Article 338-7 CCP

If the minor requests the assistance of a lawyer yet does not select one himself or herself, the court will require, by any means, that a lawyer be appointed by the chairperson of the bar.[42]

Article 338-9 CCP, § 1 and 2

If the court considers that the interest of the child requires it, it shall appoint to conduct the hearing a person who must not have any ties with either the minor or the parties.

That person must have past or current experience in the social, psychological or medical-psychological fields.[43]

Besides the general regime, the rules in matter of divorce must be included. In 2016, the legislator chose to break with the long-standing conception of divorce as an exclusively judicial by taking

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Lorsque la procédure est introduite par acte d'huissier, l'avis mentionné à l'alinéa précédent est joint à celui-ci.

[40] *Lorsque la demande est formée par le mineur, le refus d'audition ne peut être fondé que sur son absence de discernement ou sur le fait que la procédure ne le concerne pas.*

Lorsque la demande est formée par les parties, l'audition peut également être refusée si le juge ne l'estime pas nécessaire à la solution du litige ou si elle lui paraît contraire à l'intérêt de l'enfant mineur.

Le mineur et les parties sont avisés du refus par tout moyen. Dans tous les cas, les motifs du refus sont mentionnés dans la décision au fond.

[41] *Le greffe ou, le cas échéant, la personne désignée par le juge pour entendre le mineur adresse à celui-ci, par lettre simple, une convocation en vue de son audition.*

La convocation l'informe de son droit à être entendu seul, avec un avocat ou une personne de son choix.

Le même jour, les défenseurs des parties et, à défaut, les parties elles-mêmes sont avisés des modalités de l'audition.

[42] *Si le mineur demande à être entendu avec un avocat et s'il ne choisit pas lui-même celui-ci, le juge requiert, par tout moyen, la désignation d'un avocat par le bâtonnier.*

[43] *Lorsque le juge estime que l'intérêt de l'enfant le commande, il désigne pour procéder à son audition une personne qui ne doit entretenir de liens ni avec le mineur ni avec une partie.*

Cette personne doit exercer ou avoir exercé une activité dans le domaine social, psychologique ou médico-psychologique.

consensual divorces out of course as a matter of principle.[44] This, however, is subject *inter alia* to the absence of opposition on the spouses' minor children:

Article 229-2 CC

> The spouses may not mutually consent to the divorce in a private deed countersigned by their lawyers if:
>
> 1° The minor, informed by his or her parents of his or her right to be heard by the judge under the conditions of article 388-1, requests a hearing;[45] […]

This provision is supplemented by two articles in the Code of Civil Procedure:

Article 1144

> The information provided for under article 229-2 of the Civil Code, 1°, takes the shape of a form addressed to each of the couple's minor children, which mentions the child's right to be heard by the judge under the conditions of article 388-1 as well as the consequences of this choice on the remainder of the proceedings.
>
> The template form will be specified by a ministerial order of the Minister for Justice.[46]

Article 1144-2

> The divorce settlement agreement, if applicable, mentions that the information provided for under article 229-2 of the Civil Code has not been delivered for lack of discernment on the part of the minor child involved.[47]

The relevant ministerial order[48] contains the following template form:

> My name is [first name and surname]
>
> I was born on [date of birth]
>
> I have been informed that I have a right to be heard, either by the court or by a person appointed by the court, so that my feelings may be taken into account for the purpose of organizing my relationships with my parents who wish to divorce.
>
> I have been informed that I have a right to be assisted by a lawyer.
>
> I have been informed that I can be heard alone, or with the assistance of a lawyer or of a person of my choice, and that an account of the hearing will be provided to my parents.
>
> I gave understood that, as a result of my request, the divorce of my parents will be brought before a court.

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[44] See art. 229-1 CC et seq.

[45] *Les époux ne peuvent consentir mutuellement à leur divorce par acte sous signature privée contresigné par avocats lorsque :*

1° Le mineur, informé par ses parents de son droit à être entendu par le juge dans les conditions prévues à l'article 388-1, demande son audition par le juge ; […]

[46] *L'information prévue au 1° de l'article 229-2 du code civil prend la forme d'un formulaire destiné à chacun des enfants mineurs, qui mentionne son droit de demander à être entendu dans les conditions de l'article 388-1 du même code ainsi que les conséquences de son choix sur les suites de la procédure.*

Le modèle de formulaire est fixé par arrêté du garde des sceaux, ministre de la justice.

[47] *La convention de divorce mentionne, le cas échéant, que l'information prévue au 1° de l'article 229-2 du code civil n'a pas été donnée en l'absence de discernement de l'enfant mineur concerné.*

[48] *Arrêté du 28 décembre 2016 fixant le modèle de l'information délivrée aux enfants mineurs capables de discernement dans le cadre d'une procédure de divorce par consentement mutuel par acte sous signature privée contresigné par avocats, déposé au rang des minutes d'un notaire*, NOR : JUSC1633188A.

I request to be heard:

YES NO

Date

Signature of the child[49]

2.3. Ministerial Circulars

In the aftermath of the reform enacted by the 2007 law and 2009 decree,[50] the Minister for Justice released a ministerial circular[51] which aimed at providing further explanations regarding the framework that had just been set up. Even though such a document is devoid of binding force, the guidelines it contains can be regarded as influential, particularly over judges who are its intended audience. Besides, the text offers insight into the thinking behind the reform. The circular is particularly interesting in two respects.

First, it provides an explicitly non-exhaustive list of the civil proceedings to which the general rules implementing the child's right to be heard apply. These includes proceedings in matters of parental responsibility, whether they involve only the parents or third parties as well, and whether or not they are conducted in the context of a divorce; applications made by the parents to change their matrimonial property regime;[52] proceedings in matters of filiation;[53] and tort claims where the child has suffered damage.[54] The omission of maintenance proceedings from the list has been noted, and is broadly supported as a matter of principle because of their purely financial character, and because

[49] *Je m'appelle [prénoms et nom]*

Je suis né(e) le [date de naissance]

Je suis informé(e) que j'ai le droit d'être entendu(e), par le juge ou par une personne désignée par lui, pour que mes sentiments soient pris en compte pour l'organisation de mes relations avec mes parents qui souhaitent divorcer.

Je suis informé(e) que j'ai le droit d'être assisté(e) d'un avocat.

Je suis informé(e) que je peux être entendu(e) seul(e), avec un avocat ou une personne de mon choix et qu'il sera rendu compte de cette audition à mes parents.

J'ai compris que, suite à ma demande, un juge sera saisi du divorce de mes parents.

Je souhaite être entendu(e) :

OUI NON

Date

Signature de l'enfant.

[50] See part 1.2. above.

[51] *Circ. DACS n° CIV/10/09, 211-7 C1/2-2-7/MLM du 3 juillet 2009*, *Journal du droit des jeunes*, n° 295, 2010/5, pp. 46-48 (available for instance at: https://www.cairn.info/revue-journal-du-droit-des-jeunes-2010-5-page-46.htm, last accessed on 26.01.2021).

[52] The dominant view is critical of the inclusion of these proceedings in the scope of the art. 388-1 CC framework. Even though a change to the parents' matrimonial property regime might indeed, in time, affect the child's financial situation, the causal relationship appears too weak, see P. Bonfils, A. Gouttenoire, above n. 8, n° 1178.

[53] The circular also refers to the child's application to change his or her first name, but this matter has now been diverted out of court, see article 60 CC.

[54] In such a case, the child would be party to the proceeding were it not for her lack of capacity, which entails that the claim will be brought by her legal guardian on her behalf. There is however little doubt that she has "an interest" in it.

the minors are not directly creditors.[55] It remains possible however that a court might exceptionally deem it appropriate or necessary to hold a hearing.[56] On the whole, this part of the circular only reinforces the impression that family law courts are the main (civil) actors when it comes to child hearings.

Then, and more importantly for the present purpose, the circular addresses the issue of the information which must be provided to children. In this second respect, several points made in the text are enlightening. For instance, the circular explains the rationale of entrusting the child's legal guardians with the delivery of information, as provided for under article 338-1 CCP, § 1: "these persons, who are tasked with attending to the child on a day-to-day basis, seem best equipped to communicate with him or her using language which is attuned to his or her level of understanding".[57] Likewise, the requirement under various provisions in the Code of Civil Procedure that communication between the court and the parties include a notice containing the text of article 388-1 CC and of the first paragraph of article 338-1 CCP, is framed as an attempt to help the legal guardians discharge their obligation satisfactorily. The circular also reminds judges that they must verify that the required information has indeed been delivered to the child. This, or so the text continues, can be done either by the legal guardians submitting a signed statement to the effect that the child has received the information and elected not to request a hearing, or – in the case of oral proceedings – by the judge asking them direct questions. Finally, the circular endeavours to remind judges of the emphasis placed by the Brussels IIA Regulation on giving the child an opportunity to be heard, and the correlative importance of evoking this issue in the rulings. A model draft for the dedicated part of the judgments has even been made available, or so the circular says, on the department of judicial services'[58] intranet.

This preoccupation with compliance with EU requirements is also perceptible in another, earlier ministerial circular, dealing specifically with the hearing of children within the scope of the Brussels IIA Regulation.[59] In that text, which was adopted and circulated in 2007, the Minister for Justice encouraged judges to specify in their judgments, whenever children "capable of discernment" had not been heard, that they had been informed of their right to be heard and had declined to exercise it. The circular reminded judges only afterwards that they should verify that the children involved had indeed received the information they were entitled to under French law, to which the EU instrument refers back.[60]

2.4. Soft law documents at national and local levels

[55] CA Aix en Provence, 25.09.2014, RG n° 13/22303.

[56] For a discussion of this issue, see B. Mallevaey (ed.), above n. 9, pp. 33-39.

[57] *Ayant la charge quotidienne de l'enfant, ces personnes apparaissent les plus aptes à lui parler dans un langage adapté à son degré de compréhension.*

[58] The *Direction des services judiciaires*, or *DSJ*.

[59] *Circ. DACS n° 2007-06 du 16 mars 2007 relative à l'audition de l'enfant pour l'application du règlement « Bruxelles II bis » concernant les décisions sur la responsabilité parentale* (available at: http://www.textes.justice.gouv.fr/art_pix/boj_DACS_16%2003%2007.pdf, last accessed on 26.01.2021).

[60] *Dans l'hypothèse où l'audition n'a pas été souhaitée par les parents ni demandée par l'enfant lui-même, le visa des dispositions de l'article 388-1 pourrait donc s'accompagner d'une formule ainsi rédigée : « Cependant, les parties n'ont pas souhaité faire usage de cette possibilité eu égard à l'absence de conflit sur les dispositions concernant le mineur. Par ailleurs, ce dernier, informé de son droit à être entendu, n'a pas fait de demande en ce sens ».Il paraît à cet égard nécessaire que les débats devant le juge aux affaires familiales permettent de vérifier que même en cas d'accord entre les parents sur les modalités d'exercice de l'autorité parentale, les enfants ont été avisés de leur droit d'être entendus.*

Yet one step lower on the normativity scale, various soft law documents must be described briefly. One is the *Charte nationale de l'avocat d'enfant*, subsequently renamed the *Charte nationale de défense des mineurs*, which is a country-wide Charter adopted in 2008 by the Conference of the Bar Chairpersons (*la Conférence des bâtonnier*) and which aims to emphasize the specificities of the legal representation of children and set out guidelines.[61] Even though the Charter is firmly focused on criminal proceedings, the hearing of children and article 388-1 CC are mentioned, as is the necessity to provide the child with information relating both to the general framework of the lawyer's intervention and to the case at hand.[62] Together with the creation of a "children's law" (*droit des enfants*) specialisation which is recognized by the profession and with the rise of dedicated professional training,[63] this suggests that lawyers are determined to share the burden of implementing the children's right to information.[64]

The other relevant soft law instruments, which build on the 2008 Charter among other sources, are agreements concluded locally between judges sitting in first-instance family law courts and lawyers specialising in the legal representation of children. These agreements, sometimes referred to as protocols, contain guidelines on best practices relating to the hearing of children, and the impetus for their adoption seems to have been provided by the 2007 / 2009 reform, since the framework that was set up on that occasion was not devoid of gaps or ambiguities, few of which have been remedied since then.[65] It is difficult to know or estimate how many such agreements exist, but a research group funded by the *Mission de recherche Droit et Justice*,[66] and which released in 2018 a major report on the hearing of children before family law courts has gained access to 18 of them.[67] When it comes to the children's right to information, it seems that the agreements broadly reflect the statutory framework, with the addition of guidelines regarding the drafting of submissions (see art. 338-1 CCP above) aimed at lawyers. Another recurring feature is a template of a pre-filled document which the parents are invited to use when attesting that they have provided their children with the information they are entitled to. The agreement concluded in Montpellier, furthermore, also provides for additional information to be communicated to the parents, more specifically to the effect that the possibility to hear the child exists in the interest of the child and in order to enforce her rights. As a result, the parents are reminded that the decision of whether or not to conduct a hearing belongs primarily to the child herself, together with the judge. [68] Several agreements also provide that, if a hearing takes place, the child should be informed that what she tells the judge will be shared, in some form, with the parties to the proceeding, which will often comprise her parents.[69]

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[61] A virtually definitive version was published in the *Journal du droit des jeunes*, n° 275, 2008/5, pp. 42-46, available at: https://www.cairn.info/revue-journal-du-droit-des-jeunes-2008-5-page-42.htm (last accessed on 26.01.2021).

[62] *L'avocat explique son rôle au mineur, en fonction du cadre juridique de son intervention et les limites de celles-ci. […] L'avocat informe le mineur du contenu de son dossier, des procès verbaux, des rapports...*

[63] See A. Gouttenoire, above n. 1, n^{os} 248-251.

[64] See also D. Attias, "L'avocat d'enfants et l'audition de l'enfant devant le juge aux affaires familiales", *AJ Famille*, 2009, p. 330.

[65] See part 1.2 above.

[66] The *Mission de recherche Droit et Justice* (http://www.gip-recherche-justice.fr/) is an entity co-founded by the French Ministry for Justice and the National Centre for Scientific Research (CNRS) with the aim to fund and support research on topics related to law and to the justice system.

[67] B. Mallevaey (ed.), above n. 9, pp. 24-25.

[68] *Ibid*., pp. 69-70.

[69] In order to comply with the principle that both sides must be heard (*audi alterem partem* principle), see *Ibid*., pp. 137-138.

2.5. Case law

Case law concerning the children's right to information is surprisingly scarce, and what little can be found does not support the view that this particular right is robustly enforced in France.

In one notable judgment,[70] the *Cour de cassation* ruled that the general regime structured around art. 388-1 CC applied only to hearings before the court, to the exclusion of expert appraisals. The implication, naturally, is that when the judge commissions an appraisal by an expert, the child need not be informed about his right to be heard and assisted by a lawyer. Compelling though this distinction may be in the abstract, it becomes blurred when the court delegates the conduct of the hearing to a third party, as it is entitled to do under articles 388-1 CC, § 1, and 338-9 CCP. Only the legal basis for the appointment can thus distinguish an expert appraisal from a hearing delegated to a third party under art. 388-1 CC.[71]

The guarantees afforded to children under the general hearing regime have also been undermined in other ways. First, the *Cour de cassation* has stated that while the failure on the lower court's part to check that the child has indeed received the information he is entitled to does constitute a "violation" of article 388-1 CC, this did not provide an adequate basis to challenge an interlocutory judgment ordering that a biological test be performed, as the lower court had not exceeded its powers.[72] Then, the *Cour de cassation* has, on occasions, shown itself to be somewhat easily satisfied that the requirements of article 388-1 CC had been met.[73] The Court has, lastly, proved reluctant to accept that the child's parents could invoke an infringement to the child's right to information, given precisely that the burden of providing that information rests in the first place on them.[74] Again, this is logical up to a point, but it also means that very few consequences, if any, are attached to an infringement of the child's right to information.

3. The children's right to information in judicial practice

3.1. Summary of the replies to the questionnaire

A translation into French of the questionnaire drafted by the MiRI project coordinators has been disseminated among practitioners in various ways (posts on social media and several specialised blogs, targeted email campaigns, direct communication to the French Ministry for Justice…). Despite these efforts over a sustained period of time, only four completed questionnaires were received back, with quite concise, if not brief, answers. More positively, the profiles of the respondents are fairly varied: one judge with over 10 years of experience, and three lawyers, two of whom with an experience of between 1 and 5 years, and the third of between 5 and 10 years. The answers nonetheless are broadly consistent, which should not necessarily be taken to mean that they reflect

[70] *Cass. civ. 1re*, 23.03.2011, n° 10-10.547.

[71] P. Bonfils, A. Gouttenoire, above n. 8, n° 1171.

[72] *Cass. civ. 1re*, 06.10.2010, n° 09-16.335.

[73] *Cass. civ. 1re*, 26.10.2011, n° 10-19.674, in which the Court inferred from the facts that the child knew about the proceeding, and had written to the court in order to present his position, without however requesting to be heard, that he had been informed of his right to be heard and to be assisted by a lawyer.

[74] *Cass. civ. 1re*, 11.09.2013, n° 12-18.543; *Cass. civ. 1re*, 28.09.2011, n° 10-23.502. The Court also rules at regular intervals that the argument drawn from the minor's lack of information cannot be raised for the first time before it; in other words, this argument is inadmissible if it has not previously been raised before the lower courts. See, among many others, *Cass. civ. 1re*, 26.06.2019, n° 18-19.017; *Cass. civ. 1re*, 26.06.2013, n° 12-17.275.

well on the reality of the French system. Unfortunately, three of the completed questionnaires include input on Belgian law as well as on French law, while the compatibility of some answers with French law appears doubtful.

Taken together, these observations suggest that the task of exploiting the replies should be approached with caution, and that they lend themselves to a presentation in synthetic rather than systematic form. Broadly speaking, then, the answers submitted confirm the central role played, in all the areas of the law surveyed,[75] by the general rules branching out from article 388-1 CC. As a result, courts enjoy a significant degree of discretion, even though the best interest of the child looms large. The possible appointment of an *ad hoc* guardian and the possibility for the child to be assisted by his or her own lawyer in some circumstances[76] seem well known, but are not always sufficiently distinguished, particularly when it comes to their respective legal bases.

But what makes the answers provided to the questionnaire striking is how often they consist of "I don't know" or "there are no fixed rules". Children only "sometimes" receive information before the proceedings and "rarely" afterwards, even when a return order is given! Similarly, there seems to be no clarity regarding the timeline according to which information is delivered, or even regarding the person who delivers it. These sore points are balanced, to a limited extent, by the fact that, when information is communicated before or during the proceeding, it seems to be fairly comprehensive. In the same vein, cases involving children with special needs or who do not speak French seem to be handled reasonably well.

The last section of the questionnaire also elicited some answers of interest. While half of the respondents report having followed a training course on children's rights, none have been trained in communication techniques specific to children or parents. Perhaps unsurprisingly at this point, the answers to the last but one question express dissatisfaction with the *status quo*. This takes the form of calls for clearer guidelines or legislative reform.

3.2. Other input

This ambivalent image is, by and large, corroborated by the 2018 report supported by the *Mission de recherche droit et justice*. Two points, among many, stand out from the interviews conducted by the authors with family law court judges.

First, several judges mentioned the pre-filled document which, in accordance with the agreements applicable before their respective courts, the parents were invited to use when attesting that they had provided their children with the information they were entitled to under 388-1 CC. All these judges, strikingly, admitted to taking these written statements at face value, without checking in any way that they reflected actual communications of information. [77]

Conversely, the interviews support the view that, when a hearing does take place, a significant amount of information is passed on by the judges. According to the report,[78] most of them divide the hearings they conduct into several phases, the first of which, tellingly referred to as the "explanation phase", is entirely dedicated to the communication of information to the child. This information concerns the way the proceeding in general, and the hearing in particular, will unfold; as well as the use to which the child's statements will be put. Most judges, or so it would seem, encourage the child to express

[75] The answers do reflect the ambiguous situation of maintenance proceedings in this respect, see part 2.3 above.

[76] As already explained, this is in principle excluded when the child is party to the proceeding as a result of his lack of capacity, see part 1.1 above.

[77] B. Mallevaey (ed.), above n. 9, pp. 71-72.

[78] *Ibid*., pp. 139-143.

his own views, while trying to impress upon him that these views will not bind the judge. The aim, naturally, is to downplay the significance of the hearing, in order to relieve the pressure which the child might be feeling. If the child is heard alone, some judges will check that she has been informed of her right to be assisted by a lawyer. Some of these points will frequently be taken up again during the last phase of the hearing. The record of the hearing, which has to be shared with the parties to the proceeding,[79] is also discussed, and sometimes read to the child. In order to facilitate communication, the judges seem prepared to use a child-friendly language.

4. Critical assessment

4.1. The shortcomings of the current approach

Even though significant progress has been achieved over the course of the last three decades or so, the French approach to safeguarding the children's right to information in civil proceedings is currently the focus of criticism. Some of the shortcomings are merely the consequence of broader inadequacies, notably a relative lack of attention paid to the specificities of judicial proceedings involving children as well as to the adjustments which would be necessary as a result. Others are specific to the issue of information, and only these will be discussed here.

First, the incomplete nature of the current legislative and regulatory framework leads to considerable uncertainty, and to divergences between the practices followed by different courts.[80] Whether or not a child does receive adequate information depends too much on the commitment, training and sensitivity to the issue of the lawyer who assists him (if there is one) and of the judge who is in charge of the proceeding. Situations where the child is not heard are, as a result, particularly concerning.[81] This should not however draw attention away from the observation that a significant proportion of what seems to function in France can be attributed primarily not to the legislative framework, but to the horizontal, spontaneous, and often multilateral initiatives set up by practitioners.

Further criticism is directed at particular aspects of the rules and practices. The fact that the right to information only benefits children "capable of discernment", according to article 388-1 CC, is a frequent target. This criterion, derived from the French version of article 12 of the United Nations Convention on the Rights of the Child, is described as less evocative and precise than the phrase "capable of forming his or her own views" which is used in the English version.[82] While the *Cour de cassation* consistently refuses to accept that lack of discernment may be established merely by reference to the age of the child,[83] this factor seems to play an understandably pivotal role in the judges' appreciation, which makes a clarification desirable, for instance by setting up a system of presumptions.[84] The over-reliance of the overall system on the legal guardians, often the parents, and the correlative disengagement of judges,[85] is another point of criticism. To put it strongly, the focus sometimes seems to be the communication of information to the guardians rather than to the child

[79] See part 2.4 above.

[80] B. Mallevaey (ed.), above n. 9, pp. 174-175.

[81] Which explains the calls for the hearing of the child to be explicitly made the principle, and the absence of a hearing the exception, see *Ibid*., p. 107.

[82] *Ibid*., p. 42.

[83] *Cass. civ. 1re*, 18.03.2015, n° 14-11.392.

[84] B. Mallevaey (ed.), above n. 9, pp. 49, 59

[85] See part 3.2 above.

herself.[86] That is all the more problematic given that the parents often have a personal interest in the proceeding, and so may not evaluate their child's discernment objectively nor relay information to her in an objective manner.[87] In its current form, then, providing information to the child might best be described as a parental prerogative as opposed to a legal obligation.[88] Lastly, the limited scope of the child's right to information is also criticised, particularly inasmuch as it does not include the clarification that the costs of legal representation, should the child choose to bring in a lawyer, will be covered by legal aid.[89]

4.2. A nascent push for reform

In light of the above, that the next round of reforms might be on the horizon will undoubtedly be welcomed. It has, in particular, been argued that such a step is indispensable if French law is to be made compliant with the rules that will become applicable when the Recast of the Brussels IIA Regulation[90] comes into force in 2022,[91] since the new instrument has been hailed as furthering the protection of the rights of children involved in cross-border family disputes.[92]

The current shortcomings which affect the translation into practice of the right of the child to be heard in the context of judicial proceedings, it should be noted, feature heavily in the 2020 annual report on children's rights of the Human Rights Defender (*Défenseur des droits*)[93] titled "Taking into account the voice of the child: a right for the child, a duty for the adults" ("*Prendre en compte la parole de l'enfant : un droit pour l'enfant, un devoir pour l'adulte*").[94] Among the recommendations which are formulated, several are directly inspired by the 2018 *Mission de recherche droit et justice* report. [95]

Furthermore, the rules adopted in 2016 regarding out-of-courts divorces, while not perfect, undoubtedly express a different, and much more tailored, approach to the children's right to information in civil proceedings.[96] Although these rules reflect in part the specificities of the French out-of-court divorce, and more specifically the significant – and controversial – pressure it places upon minor children, they may also signal a broader shift in this matter.

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[86] B. Mallevaey (ed.), above n. 9, p. 68.

[87] *Ibid*., pp. 65-66.

[88] G. Barbier, "La pratique bordelaise de l'audition de l'enfant", *AJ famille*, 2012, p. 498.

[89] B. Mallevaey (ed.), above n. 9, p. 74. See also part. 1.1 above.

[90] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

[91] B. Mallevaey, quoted in V. Avena-Robardet, "Parole de l'enfant : la fin du discernement ?", *AJ Famille*, 2020, p. 613.

[92] S. Corneloup, T. Kruger, "Le règlement 2019/1111, Bruxelles II : la protection des enfants gagne du ter(rain)", *Revue critique de droit international privé*, 2020, p. 215.

[93] Available at https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_rae_rapport.pdf (last accessed on 27.01.2021).

[94] See also the 2013 Report, titled "L'enfant et sa parole en justice" (available at https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=11170, last accessed on 27.01.2021).

[95] See, in particular, the Recommendation n° 3.

[96] See part 2.2 above.