

Strasbourg, 01 July 2024 CDCJ(2024)07 prov.02

*Restricted*

**EUROPEAN COMMITTEE ON LEGAL COOPERATION**

**(CDCJ)**

|  |
| --- |
| **EUROPEAN CONVENTION ON INFORMATION ON FOREIGN LAW (ETS No.62) AND ITS ADDITIONAL PROTOCOL** **(ETS No.97)****-------------------****Draft practical guide, standard forms and FAQ** |

Document prepared by the Secretariat

Human Rights and Rule of Law Directorate-General - DGI

**Introduction**

At its 100th plenary meeting (30 May - 1 June 2023), the CDCJ adopted the progress report and evaluation of the implementation of the European Convention on Information on Foreign Law (ETS No. 62) and its additional protocol (ETS No. 97). In order to improve the Convention mechanism, the CDCJ decided to give priority to a dedicated webpage on which other tools would be made available, such as a practical guide, standard forms and an updated list of national contact points.

CDCJ members (or national experts) are invited to return their possible comments and suggestions (in a word format) on the draft practical guide, standard forms and FAQ below at their earliest convenience and **no later than 31 July 2024** to the following address: DGI-CDCJ@coe.int.

Based on the contributions received, the draft practical guide, standard forms and FAQ will be finalised for examination and adoption by the CDCJ at its 103rd plenary meeting (19-21 November 2024).

For follow-up purposes or additional information needs, please also fill in the form below.

|  |  |
| --- | --- |
| **Member State** |  |
| **Name of contact person**  |  |
| **Name of authority / office**  |  |
| **Telephone number**  |  |
| **E-mail address** |  |

**Practical guide**

**on the mechanism of the European Convention on information**

**on foreign law (ETS No.62)**

**and its Additional Protocol (ETS No.97)**

1. **AIMS OF THE CONVENTION AND PROTOCOL**

The aim of the two instruments is to facilitate the establishment of the content of foreign law in the states parties when questions about it arise in the course of legal proceedings. To achieve this, they establish communication between the authorities of the state party that has to apply the foreign law (requesting state) and the authorities of the state party from which that law emanates (requested state).

The authorities of the requested state are in the best position to know the law which is the subject of the query. They are not responsible for applying that law in the particular case which gives rise to the question, for providing a solution on the merits or for giving advice. Their task is solely to provide the authorities of the requesting state with objective and impartial information about their domestic law.

The material scope of application is broad:

* + Under the Convention, information may be requested concerning civil and commercial law and procedure as well as judicial organisation.
	+ Under the Protocol, information may be requested on criminal matters, substantive and procedural law, as well as judicial organisation, including the public prosecutor's office, and on the law relating to the enforcement of criminal measures.
1. **THE KEY POINTS OF A REQUEST FOR INFORMATION**
2. **The applicant**

The general idea is to avoid an influx of requests and keep to the essential ones.

1. *Civil and commercial matters*
	* Two cumulative principles are enshrined:
		+ **The first principle is that the request for information relating to foreign law must emanate from a judicial authority**. There are two exceptions to this rule:
			- The request may be made by another authority but must then be authorised by a judicial authority. It may be made, for example, by a notary or a liquidator faced with foreign law.
			- Under the Protocol, it can also come from any authority or person acting within the framework of an official system of legal aid or advice. There are, however, two restrictions: (i) they must act on behalf of economically disadvantaged persons; and (ii) they must do so within the framework of an official system. An association that provides legal assistance to persons in situation of poverty but is not authorised by the authorities of its state to do so cannot therefore have access to this mechanism.
		+ **The second principle is that the request must be related to proceedings that have been initiated or are being considered**. Knowledge of foreign law may in fact be decisive for the commencement of proceedings. For example, it may be essential for a person in situation of poverty to obtain useful information about the content of a foreign law on maintenance before bringing an action before a court. On the other hand*,* a request cannot be made with a view to drawing up a contract. Similarly, the condition that the request must be made in connection with a legal proceeding precludes the use of this mechanism by a civil registrar who has to apply foreign law in order to draw up a civil status record.
2. *In criminal matters, the rules are set out in the Protocol:*
	* **The request may be made by a court, but also by any judicial authority competent with prosecution or enforcement of final sentences**. The Public Prosecutor's Office may therefore be at the origin of such a request. However, the request must concern offences which, at the time the request is made, fall within the jurisdiction of the authorities making the request.
	* **The request may be made when proceedings have already been initiated, or when taking legal action is being considered**. Therefore, for states that apply the principle of double criminality, their authorities have the possibility of verifying that this condition is met, as the offence is punishable under foreign law, before prosecution is initiated.
3. **The content of the request**

This is a key point for the effectiveness of the conventional mechanism. Precise information must be provided so that the authority of the requested state can respond effectively. If this is not done, exchanges to clarify the request will have to take place, which inevitably lead to delays.

* + **On substance**, two aspects are essential:
		- *The law*: the points on which information concerning the law of the requested state are necessary should be formulated as precisely as possible. It is important to avoid requesting information on a general subject. For example, the authority of the requested state should not be asked about inheritance law in general, but about the rights of the surviving spouse if these are at issue.
		- *The facts*: in order to make it easier for the authorities of the requested state to respond, abstract questions should be avoided. In order to understand the request properly and formulate an accurate and targeted response, the facts must be set out as precisely as possible.
	+ **Additional information can or must be provided:**
		- *Origin of the request*: it is compulsory to indicate from whom the request originates.
		- *Decision authorising the request*: if the request is not made by a judicial authority, it must include the decision authorising it. Refusals by authorities in the requested state have already been noted in practice, which means that a new exchange between the competent authorities is required.
		- *Copies of documents may be attached*: the aim is to make it easier for the authorities of the requested state to understand what is at stake (contract, civil status certificate, expert report, etc.). However, they cannot replace the statement of facts.
1. **Transmission of the request**
	* **Translation requirement**: the request for information itself and its annexes must in principle be drawn up in the language or in one of the official languages of the requested state or be accompanied by a translation into that language. The quality of the translation is essential. The risk of misunderstanding is real and has been highlighted by many states. In the event of a misunderstanding, the response may be inappropriate or delayed because further exchanges are necessary. In practice, by mutual agreement between the two states parties concerned, it may be envisaged that the request for information be formulated in one of the two official languages of the Council of Europe, i.e. English and French, which will have been chosen for the exchanges on the given question.
	* **Delivery arrangements** :
		+ *The sender*: for states parties to the Convention and the Protocol, the request must be sent by the transmitting agency officially designated by the requesting state. It cannot be sent directly by the person formulating the question. The contact details of the transmitting agencies can be found at the following address: hyperlink to be added
		+ *The addressee:* the request must be sent to the receiving agency officially designated by the requested state. Details of the receiving agencies can be found at the following address: hyperlink to be added
		+ *Support:* most states accept electronic transmissions and even encourage them because of the simplicity and speed of this method of transmission.

[Standard request form to be inserted]

1. **KEY POINTS FOR FORMULATING A RESPONSE**
2. **The authority responsible for the response**

The authorities of the requested state have two options:

* + First, the reply may be formulated by a public authority of the requested state. This may be the receiving agency itself or another state or official body.
	+ Second, the request can be forwarded to a private body or a qualified lawyer who will formulate the response.

The choice between these two options is left to the discretion of the authorities of the requested state. Practice shows that the second option is rarely used. The only cases cited refer to technical issues requiring specific expertise that the public authorities do not have.

1. **Content of the response**
* **The reply must inform the authorities of the requesting state objectively and impartially about the law of the requested state**. It is not, therefore, a matter of giving the authorities of the requested state an opinion on the solution to be given to the merits of the case at hand. Their task is limited to providing the appropriate elements of their law that will enable the authorities of the requesting state to apply it in full knowledge of the facts.
* **Depending on the situation, the response must include an indication of the legislative and regulatory texts that are to be applied and/or the relevant case law**. Additional documents may be provided to shed further light on the matter (legal doctrine, preparatory works, etc.). In addition, explanatory but objective comments may be provided. This may be the case, for example, to explain the relationship between the various standards cited or to clarify the scope of specific case law at stake.
1. **Scope of the obligations of the authorities of the requested state**
* **Obligation to respond:** the authorities of the requested state are required to respond. However, there are exceptions to this principle. This is the case where the interests of the requested state are affected by the dispute in connection with which the request was made or where it considers that the reply would be likely to prejudice its sovereignty or security. This may be the case, for example, where the requested state is itself a party to the dispute giving rise to the question transmitted.
* **Response times**: this is a key point in the Convention system, and its effectiveness can be measured by the speed of the response. To take account of the particularities of each request, the Convention and the Protocol simply set out a flexible principle that can be adapted to each case. The response must therefore be provided as quickly as possible. A general principle of promptness is therefore set out. The authorities of the requested state must act as quickly as possible. If a long period is envisaged for answering the question, for example because of the complexity of the answer to be provided or the extent of the research to be carried out, the receiving authority must inform the authority that referred the matter to it.
* **Free of charge in principle**: recourse to the convention mechanism is in principle free of charge. However, there is an exception when a private body or a qualified lawyer is involved, in order to cover their fees. The requesting state is then responsible for paying these costs. To avoid complications and excessive financial burdens, the Convention provides that the authorities of the requesting state must be informed of the extent of the costs envisaged and its approval must be sought. The authorities of the requesting state cannot therefore be taken by surprise and have an unexpectedly high financial burden imposed on them.
* **Language**: in order to simplify the task of the authority of the requested state, the reply must be sent in the language of the requested state. No translation is therefore required on their part. If it proves necessary, it will be the responsibility of the authorities of the requesting state. In practice, by mutual agreement between the states parties concerned, it may be envisaged that replies be formulated in the official language of the Council of Europe, i.e. English or French, that will have been chosen for the exchanges on the given question.
1. **Transmitting the response**
* Under the Convention and the Protocol, it is the responsibility of the authorities of the requested state to transmit the reply to the receiving agency of the requesting state via their transmitting agency. Once again, practice shows that electronic means are widely accepted and used to speed up the procedure.

[Standard reply form to be inserted].

**Form for requesting information pursuant to the European Convention on Information on Foreign Law (ETS No.62) and
its Additional Protocol (ETS No. 97)[[1]](#footnote-1)**

Origin of the request

Transmitting agency of the requesting state

 Name:

 Contact details:

Authority/person making the request

 Name:

 Contact details:

Decision authorising the request

Information request

**Desired processing time**

[ ]  Emergency

Justification of the urgency:

[ ]  Normal

**Summary of the facts giving rise to the request for information**

**Points of law giving rise to the request for information**

Attachments

**Complete list of attachments to the request for information**

|  |  |  |  |
| --- | --- | --- | --- |
| Date of request  | Seal | Signature | Name of signatory |

**Form for replying to a request for information under the European Convention on Information on Foreign Law (ETS No.62) and its Additional Protocol (ETS No. 97)**

Origin of the response

Receiving agency of the requested state

 Name:

 Contact details:

Public authority issuing the response

 Name:

 Contact details:

Private body/qualified lawyer who formulated the response

 Name:

 Contact details:

Response to request for information

Relevant texts

Relevant case law

Other sources

Explanatory comments

Additional documents

Refusal to reply to request for information

[ ] The dispute affects the interests of the requested state

[ ] The response is likely to affect the sovereignty or security of the requested state

|  |  |  |  |
| --- | --- | --- | --- |
| Date of reply  | Seal | Signature | Name of signatory |

**Frequently asked questions**

1. **What is the purpose of the Convention?**

The objective of the Convention is to facilitate the establishment of the content of foreign law which is designated by the rules of conflict of laws of a state party. It is possible to ask the authorities of the state from which the rule in question emanates to provide information on their own law to the authorities of the requesting state.

1. **In what areas can the Convention be used?**

Information may be requested on civil and commercial law and procedure as well as the organisation of the judiciary and, insofar as the Additional protocol is concerned, on criminal law, both substantive and procedural, and the organisation of the judiciary, including the public prosecutor's office, and on the law relating to the enforcement of criminal measures. It is important to check beforehand whether the state whose law requires clarification has ratified the Convention and its Protocol in the area concerned.

1. **Which States are bound by the Convention?**

The Convention is in force in 47 states. The Protocol is in force in 41 states. The list of these states can be consulted at the following address:

* [States Parties to the European Convention on Information on Foreign Law](https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=062)
(ETS No. 62)
* [States Party to the Additional Protocol to the European Convention on Information on Foreign Law](https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=097) (ETS No. 97)
1. **Is the Convention reserved for magistrates?**

No.

In civil and commercial matters, the request may emanate from a judicial authority, be made by another authority and be authorised by a judicial authority or be made by any authority or person acting within the framework of an official system of legal aid or advice on behalf of economically disadvantaged persons.

In criminal cases, the request may be made by a court or by any judicial authority with jurisdiction over the prosecution or enforcement of final sentences.

However, the question must pass through the transmitting agency designated by the requesting state and the reply must pass through the receiving agency designated by the requested state (see question 7).

1. **Is it possible to request a consultation on foreign law with no link to a case through the Convention?**

No.

In civil matters, the claim must be related to proceedings that have been commenced or are contemplated.

In criminal matters, the request may be made in the context of proceedings that have already begun, or when the institution of proceedings is being considered.

1. **Is the Convention free to use?**

Yes, in principle, recourse to the Convention mechanism is free of charge. However, there is an exception where a private body or a qualified lawyer is involved, in order to cover their fees. The requesting state is then responsible for paying these costs. In such cases, the Convention stipulates that the authority of the requesting state must be informed of the extent of the costs envisaged and its approval must be sought.

1. **Is direct communication possible between the authority making the request and the authority preparing the reply?**

No. The request must always be sent by the transmitting agency of the requesting state and addressed to the receiving agency of the requested state. The contact details of these bodies can be consulted at the following address: hyperlink to be added

The request cannot therefore be sent directly by the person formulating the question and must pass through the transmitting agency.

Similarly, the reply must be sent by the receiving agency of the requested state to the transmitting agency of the requesting state and not directly to the authority that made the request.

1. **Can the request and reply be sent by e-mail?**

Yes, even if the text of the Convention does not provide for it, practice shows that most states accept exchanges by electronic means.

1. **How do I submit a request for information?**

Some elements are compulsory:

* The authority making the request must indicate as precisely as possible the points on which information concerning the law of the requested state is sought.
* The facts of the case must be set out as precisely as possible.
* You must always indicate who is making the request.
* If the request is not made by a judicial authority, it must include the decision authorising it.

Copies of documents may also be attached to the request to make it easier for the requested authority to understand the issue at hand (contract, civil status certificate, expert's report, etc.).

1. **Is the authority of the requested state obliged to respond?**

Yes, the Convention provides for a binding mechanism. The authorities of the requested state are therefore obliged to respond.

There are, however, exceptions to this principle. This is the case when the interests of the requested state are affected by the dispute in connection with which the request was made or when it considers that the reply would be likely to prejudice its sovereignty or security.

1. **What should the content of a response be?**

The reply must inform the authority of the requesting state objectively and impartially about the law of the requested state. Depending on the situation, the reply must indicate the laws and regulations that are to be applied and/or the relevant case law. Additional documents may be provided to shed further light on the matter (legal doctrine, preparatory works, etc.). Explanatory comments may also be provided. The answer provided should not be limited to general references to the relevant legislation but should give precise indications of the provisions directly related to the question raised.

1. **Does the authority of the requested state have to give its opinion on how the case should be resolved?**

No. The task of the authority of the requested state is limited to providing information about its law to enable the authorities of the requesting state to apply it in an informed manner.

1. **Is the response provided by the authority of the requested state binding?**

No. The authority that has requested information on foreign law is free to decide on the response it receives, in accordance with its own procedural rules.

1. **Is there a specific deadline for the response?**

No. There is only a general principle of promptness. The response must be provided as quickly as possible.

1. **In what language should the request be submitted?**

The request for information itself and any annexes thereto must be drawn up in the official language or one of the official languages of the requested state or accompanied by a translation into that language. However, the states concerned may by mutual agreement decide that the request be made in one of the two official languages of the Council of Europe (English and French).

1. **In which language should the answer be given?**

The reply must be sent in the language of the requested state. No translation is therefore required from the authorities of the requested state. However, the states concerned may by mutual agreement decide that the reply should be drawn up in one of the two official languages of the Council of Europe (English and French).

1. In the case of a request covered by the Additional Protocol, the requesting state must check that the requested state is also a party to the Protocol ([list of ratifications](https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=097)). [↑](#footnote-ref-1)