

Practical guide on the mechanism of the European convention on information on foreign law (ETS No. 62) and its additional protocol (ETS No. 97)



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Practical guide on the mechanism of the European Convention on information on foreign law (ETS No. 62) and its additional protocol (ETS No. 97)

**prepared by the European Committee
on Legal Co-operation (CDCJ)**

French edition:

*Guide pratique sur les mécanismes
de la Convention européenne dans le domaine
de l'information sur le droit étranger
(STE No 62) et son Protocole
additionnel (STE No 97)*

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Aims of the convention and protocol

The main objective of the [Convention](#) and its [Additional Protocol](#) is to facilitate the understanding of the content of foreign law in states parties when questions concerning it arise in the course of legal proceedings. To achieve this, these instruments establish communication between the authorities of the state party that has to apply a 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 best placed 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. It is also possible to request information on rules pertaining to other branches of law, where such rules have a bearing on a civil or commercial matter.
- ▶ 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.

Key points of a request for information

1. The applicant

The aim is to limit requests to essential questions in order not to overburden the authorities of the requested state and make it easier for them to respond in an effective and timely manner.

a. Civil and commercial matters

■ Two cumulative principles are established:

- ▶ **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 a 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 relate to proceedings that have been initiated. Under the Protocol, such a request may also be made when proceedings are being considered.** Knowledge of foreign law may in fact be decisive before commencement of proceedings. For example, under the Protocol, it may be essential for a judicial authority, or any authority or person acting within official systems of legal aid or legal advice on behalf of economically disadvantaged persons, to know the content of foreign law before bringing a case 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 legal proceedings 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.

b. 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 for prosecution or the 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.

2. The content of the request

To ensure the process is effective, precise information must be provided so that the authority of the requested state can respond properly. If this is not done, exchanges to clarify the request will have to take place, which inevitably will lead to delays.

■ On substance, two aspects are essential:

- ▶ *The law:* when requesting information on the law of the requested state, the request must 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. It may also be useful for the requesting state to give details of its national law in order to provide the context of its request, in particular by inserting hyperlinks to the relevant legislation.
- ▶ *The facts:* for the requested state to understand the request properly and formulate an accurate and targeted response, the facts must be set out as clearly as possible. Abstract questions should therefore be avoided. It is also important, as far as possible, that the requesting state does not ask questions whose answer would in itself settle the disputes about which the questions were asked. Finally, care must be taken to ensure that the elements of the case in question are anonymised, so as to protect the personal data of the parties involved in the case.

- ▶ 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. If an authority in the requested state refuses a request that has not been authorised, a new exchange between the competent authorities will be needed.
 - **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, the documents cannot replace the statement of facts. The sending of attachments should be limited to what is strictly necessary for a proper understanding by the requested state.

3. The 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, the use of another language (for example English or French) may be preferred for exchanges on the given question. In this respect, the [summary table](#) indicates the languages preferred by the receiving national authorities of the state parties.

■ **Delivery arrangements:**

- ▶ **The sender:** a request in civil or commercial matters under the Convention and in criminal matters under the Protocol is transmitted directly to the receiving agency of the requested state, either by the transmitting agency or, in the absence of such an agency, by the judicial authority from which it emanates. Under the Protocol, however, a request in civil and commercial matters emanating from any authority or person acting within the official framework of legal aid or legal advice on behalf of economically disadvantaged persons must always be transmitted 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: [Contact points - Summary table - European Committee on Legal Co-operation](#)

- ▶ **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: [Contact points - Summary table - European Committee on Legal Co-operation](#)
- ▶ **Format:** most states accept electronic transmissions and even encourage them because of the simplicity and speed of this method of transmission.

The [summary table](#) indicates the formats preferred by the receiving national authorities of the state parties.

A [standard application form](#) is available to requesting states. It has been developed to simplify the processing of requests by the requested state and to help prepare precise responses that meet the expectations of the requesting state. However, its use is not compulsory.

Key points for formulating a response

1. The authority responsible for the response

The authorities of the requested state have two options:

- ▶ Either 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.
- ▶ Or 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.

2. The 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 therefore not a matter of the authorities of the requested state providing 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 a specific case law at stake.

3. The scope of the obligations of the authorities of the requested state

- ▶ **Obligation to respond:** the authorities of the requested state are required to respond if the Convention or the relevant chapters (I or II) of the Protocol are applicable between the states concerned and the requests fall within their scope. 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 timeframe:** 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 on a case-by-case basis. The response should therefore be provided as quickly as possible. A general principle of promptness is therefore set out. The authorities of the requested state should 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 their 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 another language (such as French or English) chosen for the exchanges on the given

question. The [summary table](#) indicates the preferred languages of the receiving national authorities of the state parties.

4. The transmission of the response

- ▶ Under the Convention and its Protocol, it is the responsibility of the authorities of the requested state to transmit the reply through their receiving agency to the transmitting agency of the requesting state, if the request was transmitted by the latter, or to the judicial authority if the latter has referred the matter directly to it. Once again, practice shows that electronic means are widely accepted and used to speed up the procedure. A [standard reply form](#) is available to requested states. It has been developed to help prepare a precise response that meets the expectations of the requesting state. However, its use is not compulsory.

This practical guide provides guidance on the use of the mechanisms established by the European Convention on Information on Foreign Law and its Additional Protocol. These conventional mechanisms aim to facilitate the understanding and exchange of information on foreign law between states authorities and cover a broad scope that includes civil, commercial and criminal law and procedures, the organisation of the judiciary and law relating to enforcement measures.

This guide is designed as a practical tool for all judicial authorities and public officials. It explains how national authorities should co-operate, outlining the procedural and substantive requirements for submitting and responding to requests in the most efficient way.



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