

立法會
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Paper for the House Committee meeting on 24 June 2005

**Report of the Subcommittee on
Mutual Legal Assistance in Criminal Matters (Belgium) Order and
Mutual Legal Assistance in Criminal Matters (Denmark) Order**

Purpose

This paper reports on the deliberations of the Subcommittee on Mutual Legal Assistance in Criminal Matters (Belgium) Order and Mutual Legal Assistance in Criminal Matters (Denmark) Order.

Background

2. The Secretary for Security gave notice to move two motions at the meeting of the Legislative Council on 11 May 2005 to seek the Council's approval of the following Orders made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (the Ordinance) –

- (a) Mutual Legal Assistance in Criminal Matters (Belgium) Order; and
- (b) Mutual Legal Assistance in Criminal Matters (Denmark) Order.

3. The Ordinance provides the necessary statutory framework for implementing mutual legal assistance agreements and enables provision of assistance in the investigation and prosecution of criminal offences, which includes the taking of evidence, search and seizure, production of material, transfer of persons to give evidence and confiscation of the proceeds of crime.

The Orders

The Belgium Order

4. The Belgium Order sets out the scope and procedures in relation to the provision of mutual legal assistance in criminal matters applicable between the Hong Kong Special Administrative Region (HKSAR) and the Kingdom of Belgium, and the modifications to the Ordinance. It also provides for safeguards of the rights of persons involved in criminal proceedings.

5. The Order is made consequential of the agreement for mutual legal assistance entered into by the HKSAR Government and the Government of the Kingdom of Belgium (HKSAR/Belgium Agreement) and signed in Brussels on 20 September 2004.

The Denmark Order

6. The Denmark Order sets out the scope and procedures in relation to the provision of mutual legal assistance in criminal matters applicable between the HKSAR and the Kingdom of Denmark, and the modifications to the Ordinance. It also provides for safeguards of the rights of persons involved in criminal proceedings.

7. The Order is made consequential of the agreement for mutual legal assistance entered into by the HKSAR Government and the Government of the Kingdom of Denmark (HKSAR/Denmark Agreement) and signed in Hong Kong on 23 December 2004.

Commencement dates of the Orders

8. The two Orders will come into operation on days to be appointed respectively by the Secretary for Security by notice published in the Gazette.

The Subcommittee

9. At the House Committee meeting on 29 April 2005, Members formed a subcommittee to study the two Orders. At the request of the House Committee, the Secretary for Security withdrew his notice for moving the motions at the Council meeting on 11 May 2005 to allow time for the Subcommittee to study in detail the two Orders.

10. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Hon James TO, the Subcommittee has held two meetings, including one meeting with the Administration.

Deliberations of the Subcommittee

Comparison with the Model Agreement

11. In examining the two Orders, the Subcommittee has made an article-by-article comparison of the provisions of each Order with those in the Model Agreement for the HKSAR on mutual legal assistance in criminal matters.

The Belgium Order

Article I - Scope of assistance

12. Under Article I(2)(k), assistance shall include other assistance consistent with the objects of this Agreement which is not inconsistent with the law of the Requested Party. Members have enquired about the specific form of other assistance that may be provided.

13. The Administration has explained that this provision is to cater for new forms of assistance which may become available in the future. For instance, if a multilateral convention on mutual legal assistance in criminal matters is formulated in the future, the provision would be able to cover the possibly wider form of assistance under the convention. However, such form of assistance must be consistent with the provisions in the Ordinance if Hong Kong is the Requested Party.

Article X – Obtaining of evidence, articles or documents

14. Under Article X(5), any privilege under the laws of the Requesting Party from giving testimony shall not be taken into consideration in the execution of requests, but any such claim shall be noted in the record.

15. Regarding the procedures for the Requested Party for taking evidence from a witness asserting a claim for such privilege, the Administration has explained that if a witness asserts a claim for privilege under the law of the Requesting Party, it is envisaged that the taking of evidence in the Requested Party will proceed but the evidence obtained will be sealed. The sealed evidence together with a record of the claim of privilege made by the witness will be transmitted to the Requesting Party. The court or organ responsible for determining the validity of a claim of privilege in the Requesting Party will examine the validity of the claim by the witness. The evidence obtained in the Requested Party will only be released to the relevant prosecuting/investigating authorities in the Requesting Party after the said court or organ is satisfied that the claim is not substantiated. If the claim for privilege is found substantiated, the evidence will be returned to the Requested Party intact.

Article XI – Service of documents

16. Article XI(5) provides that a person who fails to comply with any process served on him shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requested Party.

17. In response to the Subcommittee's question on whether a person who fails to comply with any process served on him would be liable to any penalty or coercive measure pursuant to the law of the Requesting Party, the Administration has explained that the HKSAR/Belgium Agreement does not confer immunity from penalty or coercive measures pursuant to the law of the Requesting Party. As far as Hong Kong is concerned, Hong Kong courts have no jurisdiction to penalise a person who fails to comply with any process of Hong Kong courts served on him through the Belgium authorities pursuant to the Agreement. The Belgium side would like to retain jurisdiction under its domestic law over persons in Hong Kong who fail to comply with any process served on them pursuant to a request from Belgium under the Agreement.

18. The Administration has pointed out that section 31(3) of the Ordinance only confers immunity under Hong Kong law when foreign process is served in Hong Kong. It does not seek to provide for immunity under the law of the requesting jurisdiction. The provision in Article XI(5) is therefore consistent with the Ordinance.

Article XX – Spontaneous information

19. Article XX provides that without prejudice to its own investigations or proceedings a Party may, without prior request, forward to the other Party information concerning the commission of criminal offences when it considers that such information might assist the receiving Party in carrying out investigations or proceedings or might lead to a request by that Party under the HKSAR/Belgium Agreement.

20. Members have queried why the provision for spontaneous exchange of information has been added, as mutual legal assistance should be rendered on the basis of request.

21. The Administration has explained that the provision has been included in the Agreement at the request of Belgium. Even without the provision, exchange of information for investigation can be made in accordance with the Interpol practice. Having regard to members' view, the Administration has agreed to consider the necessity of including such a provision in mutual legal assistance agreements in the future.

The Denmark Order

Article 2 – Central Authority

22. Under Article 2(3), requests for mutual legal assistance shall be made directly between the Central Authorities and shall be returned through the same channels. In urgent cases, a request may be transmitted through Interpol.

23. The Subcommittee notes that transmission of urgent requests through Interpol has been added at the request of Denmark. Hon James TO is of the view that the relevant internal guidelines of the Police should cater for the Police's notification to the Central Authority (i.e. the Secretary for Justice or her duly authorised officer) of requests for mutual legal assistance received through Interpol.

Article 8 – Taking of evidence and statements from persons

24. Under Article 8(5), where a person is required to give evidence in the Requested Party pursuant to a request for assistance, he may decline to do so if the law of the Requested Party permits that person to decline to give evidence in similar circumstances in proceedings which originate in the Requested Party. The Requested Party shall consult with the Requesting Party regarding the execution of the request, if that person claims that there is a right to decline to give evidence under the law of the Requesting Party.

25. The Administration has explained that the provision has been added to reflect the legal position in Denmark. Under the Danish law, a judge will determine any claim by a witness to decline to give evidence according to Danish law. As it is difficult to generalise the cases, it was agreed that the HKSAR/Denmark Agreement should include such a provision to enable the Requesting and Requested Parties to consult each other on how to establish a claim for privilege in a particular case. For instance, where Hong Kong is the Requested Party, Hong Kong authorities will consult Denmark if a witness claims that he has a right to decline to give evidence under the Danish law.

Motions on the Orders

26. The Subcommittee has concluded scrutiny of the two Orders. The Subcommittee supports the Administration's proposal that the motions on the Belgium Order and the Denmark Order be moved by the Secretary for Security at the Council meeting on 6 July 2005.

Advice Sought

27. Members are invited to note the deliberations of the Subcommittee and the date for moving the motions on the two Orders.

Council Business Division 2
Legislative Council Secretariat
22 June 2005

**Subcommittee on Mutual Legal Assistance in Criminal Matters
(Belgium) Order and Mutual Legal Assistance
in Criminal Matters (Denmark) Order**

Membership list

Chairman Hon James TO Kun-sun

Members Hon Margaret NG
Hon LAU Kong-wah, JP

Total: 3 Members

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Ms Connie FUNG

Date 18 May 2005