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22 June 2005

Legislative Council Secretariat
Legal Service Division
Legislative Council Building
8 Jackson Road, Central
Hong Kong
(Attn: Ms Connie Fung)

Dear Ms Fung,

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

I refer to your letter of 15 June 2005. The Administration's response to your questions is set out in the attached paper.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Jane Lee'.

(Miss Jane Lee)
for Secretary for Security

Mutual Legal Assistance in Criminal Matters (Denmark) Order
Claims for privilege by a witness under the law of the Requesting Party

a. Jurisdiction of a magistrate

The taking of evidence pursuant to a request for assistance under an agreement for mutual legal assistance in criminal matters is governed by section 10 of the Mutual Legal Assistance in Criminal Matters Ordinance (the "MLA Ordinance"). **Section 10(7)** of the MLA Ordinance provides that a witness is not compellable to answer a question in the proceedings under section 10 if he is not compellable under the law of the Requesting Party. **Section 10(8)** provides that a duly certified external law immunity certificate is admissible in the proceedings under section 10 as evidence of the facts stated in the certificate. **Section 10(9)** however provides that section 10(7) does not apply if its application is inconsistent with any provision in the prescribed arrangement concerned.

Some of HK's Agreements provide that where a witness claims that he need not answer a question because he would not be compellable in the Requesting Party his evidence will nonetheless be taken and the claim resolved by the Requesting Party. In these cases section 10(7) will have no application to the proceedings. The magistrate will take the evidence and leave resolution of the claim to the Requesting Party.

Where section 10(7) applies to the proceedings (as it will in the case of requests by Denmark), and a witness asserts a claim of privilege under the law of the Requesting Party, counsel representing the Requesting Party will apply to adjourn that part of the proceedings for the taking of the evidence to which the claim relates, so that the Requesting Party may be consulted on the claim. If the Requesting Party disagrees with the claim the magistrate may receive evidence on foreign law and decide on the issue as a matter of fact. Such evidence may be in the form of an external law immunity certificate.

b. External law immunity certificate

Section 10(8) provides that a duly certified external law immunity certificate is admissible in proceedings under section 10 as evidence of the facts stated in the certificate. A magistrate is not bound by the facts stated in an external law immunity certificate. In practice, however, if an external law immunity certificate has been provided by the Requesting Party confirming the privilege claim asserted by a witness, it is unlikely for the magistrate to disregard the facts stated in the certificate.