

LEGISLATIVE COUNCIL BRIEF

Mutual Legal Assistance in Criminal Matters Ordinance (Chapter 525)

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (BELGIUM) ORDER

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (DENMARK) ORDER

INTRODUCTION

At the meeting of the Executive Council on 12 April 2005, the Council ADVISED and the Chief Executive ORDERED that –

- _____ (a) the Mutual Legal Assistance in Criminal Matters (Belgium) Order at **Annex A**; and
- _____ (b) the Mutual Legal Assistance in Criminal Matters (Denmark) Order at **Annex B**;

should be made under Section 4 of the Mutual Legal Assistance (MLA) in Criminal Matters Ordinance (the Ordinance), subject to the approval of the Legislative Council, to implement the bilateral arrangements for MLA in criminal matters with Belgium and Denmark.

JUSTIFICATIONS

2. The Hong Kong Special Administrative Region (HKSAR) is fully committed to international cooperation in combating serious crimes. In this connection, we have embarked on a programme to establish a network of bilateral agreements with other jurisdictions on MLA in criminal matters. These agreements ensure reciprocity between the contracting parties and enhance international cooperation in the fight against transnational crime.

3. The Ordinance provides the necessary statutory framework for implementing the MLA arrangements 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

4. The MLA in Criminal Matters Agreements with Belgium and Denmark were signed on 20 September and 23 December 2004 respectively (the Agreements). The two Orders to be made under section 4(1) of the Ordinance will enable the Agreements to be brought into force and enable the Ordinance, subject to the modifications summarized in **Schedule 1** to the relevant Order, to be applicable as between HKSAR and these countries. **Schedule 2** to each of the Orders contains a copy of the relevant bilateral agreement.

5. Section 4(2) of the Ordinance provides that the Chief Executive in Council shall not make an order unless the arrangements for MLA to which the order relates are substantially in conformity with the provisions of the Ordinance. The two Agreements do so conform. They are similar to the model agreement for HKSAR agreed by the former Sino-British Joint Liaison Group and approved by the former Executive Council before the reunification as the basis for the conduct of negotiations.

6. There are certain variations between the Agreements and the Ordinance which necessitate modifications to the Ordinance to enable HKSAR to comply with the obligations in the Agreements. Such modifications are summarized in Schedule 1 to each of the Orders in accordance with section 4(3) of the Ordinance.

7. An explanatory statement in relation to the modifications to the Ordinance is at **Annex C**.

8. The commencement dates of the two Orders will be appointed by the Secretary for Security by notice in the Gazette. These dates will coincide with the dates on which the relevant agreements enter into force. The commencement dates will be settled after consultation with the countries concerned and will depend upon when the necessary domestic procedures of those countries are completed.

LEGISLATIVE TIMETABLE

9. The Orders will be introduced into the Legislative Council on 11 May 2005.

IMPLICATIONS OF THE ORDERS

10. The Orders are in conformity with the Basic Law, including the provisions concerning human rights. They will not affect the current binding effect of the Ordinance. They have no sustainability, financial or civil service implications.

PUBLIC CONSULTATION

11. The Orders will permit the Agreements to be brought into force in accordance with the existing legal framework. Public consultation is, therefore, considered not necessary.

PUBLICITY

12. A Legislative Council brief will be issued. A spokesman will be available to answer enquiries.

BACKGROUND

13. Section 4(1) of the Ordinance provides that the Chief Executive in Council may, with the approval of the Legislative Council, in relation to any arrangements for MLA, by order direct that the Ordinance shall, subject to such modifications as may be specified in the order, apply as between the HKSAR and the place outside the HKSAR to which the arrangements relate.

14. Fifteen Orders in relation to MLA bilateral arrangements signed with foreign jurisdictions have been made under section 4(1) of the Ordinance. These jurisdictions are Australia, the USA, France, the UK, New Zealand, Italy, South Korea, Switzerland, Canada, Philippines, Portugal, Ireland, the Netherlands, Ukraine and Singapore.

ENQUIRES

15. Enquires on this brief should be directed to:-

	<u>Telephone No.</u>
Ms Manda Chan Principal Assistant Secretary for Security	2810 2329
Miss Jane Lee Assistant Secretary for Security	2810 3523

Security Bureau
20 April 2005

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
(BELGIUM) ORDER**

(Made by the Chief Executive in Council under section 4 of
the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)
subject to the approval of the Legislative Council)

1. Commencement

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Ordinance to apply between Hong Kong and Belgium

(1) In relation to the scheduled arrangements for mutual legal assistance, it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 1, apply as between Hong Kong and the Kingdom of Belgium.

(2) In subsection (1), “scheduled arrangements for mutual legal assistance” (列明的相互法律協助的安排) means arrangements which are applicable to the Government and the Government of the Kingdom of Belgium, a copy of which is annexed at Schedule 2.

SCHEDULE 1

[s. 2]

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows –

- “(e) the request relates to the prosecution of a person for an external offence in a case where the person –
(i)* has been convicted, acquitted or pardoned by a competent court or other authority in the place,** or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence;* or

(ii)* has undergone the punishment provided by the law of that place or Hong Kong** in respect of that offence or of another external offence constituted by the same act or omission as that offence.”.

2. Section 17(3)(b) of the Ordinance shall be modified to read as follows –

“(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 30 days after being notified that his presence is no longer required for any of the following purposes* ~~has had an opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for~~** –

- (i) the purpose to which the request relates; ~~or~~**
- (ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance.”.

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

SCHEDULE 2

[s. 2]

AGREEMENT BETWEEN THE GOVERNMENT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION OF
THE PEOPLE'S REPUBLIC OF CHINA AND THE
GOVERNMENT OF THE KINGDOM OF BELGIUM
CONCERNING MUTUAL LEGAL ASSISTANCE IN
CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region"), having been duly authorised by the Central People's Government of the People's Republic of China and the Government of the Kingdom of Belgium.

Desiring to improve the effectiveness of law enforcement of both Parties in the prevention, investigation and prosecution of crime and the confiscation of the proceeds and instruments of crime;

Agreeing that co-operation in the field of law enforcement shall be consistent with fundamental and internationally recognized human rights.

Have agreed as follows:

ARTICLE I
SCOPE OF ASSISTANCE

(1) The Parties shall provide, in accordance with the provisions of this Agreement, the widest measure of mutual legal assistance in the prevention, investigation and prosecution of criminal offences falling within the jurisdiction of the Requesting Party and in proceedings related thereto.

- (2) Assistance shall include:
 - (a) identifying and locating persons and objects;
 - (b) serving of documents;
 - (c) the obtaining of evidence, articles or documents;
 - (d) executing requests for search and seizure;
 - (e) facilitating the personal appearance of witnesses or experts;
 - (f) effecting the temporary transfer of persons in custody to appear as witnesses or for other purposes;
 - (g) obtaining production of judicial documents or other official documents;
 - (h) tracing, restraining, forfeiting and confiscating the proceeds and instruments of crime;
 - (i) providing information, documents and records, including criminal records;
 - (j) delivery of property, including lending of exhibits; and
 - (k) other assistance consistent with the objects of this Agreement which is not inconsistent with the law of the Requested Party.

- (3) Assistance under this Agreement may be granted in connection with criminal offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters provided the primary purpose of the investigation is not the assessment or collection of tax.

- (4) Assistance under this Agreement does not include:
 - (a) the detention or custody of persons for the purpose of extradition;
 - (b) the enforcement of criminal sentences in the Requested Party, which have been imposed in the Requesting Party; and
 - (c) the transfer of prisoners in order to serve sentences.

ARTICLE II
CENTRAL AUTHORITY

- (1) Each Party shall establish a Central Authority.
- (2) The Central Authority of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his or her duly authorised officer. The Central Authority for the Kingdom of Belgium shall be the Federal Public Service of Justice and, in urgent cases, the Office of the Federal Prosecutor. Either Party may change its Central Authority in which case it shall notify the other of the change.
- (3) Requests under this Agreement shall only be transmitted by the Central Authority of the Requesting Party to the Central Authority of the Requested Party. Requests shall be in writing. In urgent cases, the request may be sent by fax.
- (4) The Central Authority of the Requested Party shall promptly comply with requests or, as appropriate, forward them to its competent authorities for them to carry out.
- (5) All communications whose purpose is to obtain additional information may be made directly between the competent authorities responsible for executing the request.

ARTICLE III
OTHER FORMS OF ASSISTANCE

This Agreement shall not preclude assistance arising from other treaties or agreements applicable to the Parties, nor prevent other forms of assistance between the competent authorities of the Parties.

ARTICLE IV
LIMITATIONS ON COMPLIANCE

- (1) The Requested Party may, and if required by its law shall, refuse assistance if:
- (a) the granting of the request would, in the case of the Government of the Hong Kong Special Administrative Region, impair the sovereignty, security or public order of the People's Republic of China or, in the case of the Government of the Kingdom of Belgium, impair the sovereignty, security or public order of the Kingdom of Belgium;
 - (b) it is of the opinion that the granting of the request would seriously impair its essential interests;
 - (c) the request for assistance relates to an offence that is, or by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character or an offence connected to an offence of a political character;
 - (d) there are substantial grounds for believing that the request for assistance will result in a person being prosecuted, punished or prejudiced on account of his or her sex, race, religion, nationality or political opinions;
 - (e) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided;
 - (f) the request for assistance is for the purpose of the prosecution of a person for an offence in respect of which the person has been tried, and on whom final judgment has been passed, or has been pardoned in the Requested Party;
 - (g) in the case of requests involving compulsory measures the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence;
 - (h) the request relates to a military offence that does not constitute an offence under ordinary criminal law;
 - (i) the request does not comply with the provisions of Article V;

- (j) the request could lead to a judgment being pronounced by a court or tribunal established in exceptional circumstances or for exceptional cases, the operating rules and procedures of which would depart from internationally recognized principles of law.
- (2) The Requested Party shall not invoke banking secrecy as an essential interest for the purpose of refusing assistance under paragraph (1)(b).
- (3) Paragraph (1)(c) of this article does not apply to an offence which the Requested Party considers excluded from being a political offence by any international agreement that applies to the Parties.
- (4) The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.
- (5) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.
- (6) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority –
- (a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and
 - (b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.
- (7) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (6)(b), it shall comply with those terms and conditions.

ARTICLE V

REQUESTS

- (1) Requests shall include:
 - (a) the contact details of the authority on behalf of which the request is made;
 - (b) a description of the nature of the investigation, prosecution, offence or criminal matter, and a summary of the relevant facts and laws;
 - (c) if possible the identity and nationality of the person concerned, and the place of registered address or residence;
 - (d) a description of the purpose of the request and the nature of the assistance requested;
 - (e) any requirements for confidentiality;
 - (f) details of any particular procedure the Requesting Party wishes to be followed; and
 - (g) a statement of the desired deadline for implementation, and if possible the reasons for urgency.

- (2) The request and documents in support of the request shall be sent in one of the official languages of the Requesting Party accompanied by a translation in English. Costs of translating a request or a response to a request shall be borne by the Requesting Party.

ARTICLE VI

EXECUTION OF REQUESTS

- (1) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.

- (2) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.

(3) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

(4) To the extent not incompatible with the law of the Requested Party, the competent authority in the Requested Party may authorise judges and competent authorities of the Requesting Party, as well as other persons involved in the investigation or the proceedings and mentioned in the request, to be present at the execution of the request and to participate in the proceedings in the Requested Party.

ARTICLE VII EXPENSES

(1) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:

- (a) expenses of employing experts;
- (b) expenses of interpretation; and
- (c) travel expenses and allowances of witnesses, experts, persons being transferred in custody and escorting officers.

(2) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

ARTICLE VIII
LIMITATIONS OF USE

- (1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.
- (2) The Requesting Party shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

ARTICLE IX
ATTENDANCE AT EXECUTION OF REQUESTS

Upon request, the Requesting Party shall be informed by the Requested Party of the date and place of execution of requests so that the authorities of the Requesting Party or other parties concerned may attend, if the Requested Party so consents.

ARTICLE X
OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

- (1) Where a request is made that evidence be taken the Requested Party shall arrange to have such evidence taken.
- (2) For the purposes of this Agreement, the giving or taking of evidence shall include the taking of testimony and the production of documents, records or other material.
- (3) For the purposes of requests under this Article the Requesting Party shall specify the questions to be put to the witness or person giving evidence and the subject matter about which they are to be examined.
- (4) If necessary, any questions additional to those specified in paragraph (3) of this Article, may be put to the witness or person giving evidence by the competent authority

of the Requested Party, either of its own volition or if requested by any of the persons referred to in Article IX.

(5) A person who is required to give evidence as a witness in the Requested Party pursuant to a request for assistance may decline to give evidence if the law of the Requested Party would permit the person to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party. Any privilege under the laws of the Requesting Party from giving testimony shall not be taken into consideration in the execution of requests under this Article, but any such claim shall be noted in the record.

(6) Where possible and consistent with their laws, the Parties may agree on a case by case basis that testimony shall be taken by means of video conference under specified conditions.

ARTICLE XI SERVICE OF DOCUMENTS

(1) The Requested Party shall effect service of any legal process which is transmitted to it for this purpose by the Requesting Party.

(2) The Requesting Party shall transmit a request for the service of a document pertaining to an appearance in the Requesting Party at least 40 days before the scheduled appearance.

(3) Service may be effected by simple transmission of the document to the person to be served. If the Requesting Party expressly so requests service shall be effected by the Requested Party in the manner provided for the service of analogous documents under the law of the Requested Party or in a special manner consistent with such law.

(4) The Requested Party shall, insofar as its law permits, return a proof of service in the manner required by the Requesting Party.

(5) 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.

ARTICLE XII
PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

(1) Subject to its law the Requested Party shall provide copies of publicly available documents.

(2) Subject to its law, the Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available.

ARTICLE XIII
CERTIFICATION AND AUTHENTICATION

Evidence, documents, records or other material transmitted by either Party pursuant to this Agreement shall not require any form of certification or authentication unless expressly requested by the Central Authority of the other Party. Material shall be certified or authenticated by consular or diplomatic officers only if the law of either Party specifically so requires.

ARTICLE XIV
TRANSFER OF PERSONS IN CUSTODY

(1) A person in custody in the Requested Party who is needed for purposes of assistance under this Agreement in the Requesting Party shall be transferred from the Requested Party to the Requesting Party, provided the Requested Party and the person consent and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.

(2) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the Requesting Party the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody.

(3) Time spent in custody in the Requesting Party shall be treated as part of the sentence to be served in the Requested Party.

ARTICLE XV TRANSFER OF OTHER PERSONS

(1) If the Requesting Party considers the personal appearance of a witness or expert for the purpose of providing assistance necessary it shall so inform the Requested Party. The Requested Party shall invite the witness or expert to appear and advise the Requesting Party of the reply from the witness or expert.

(2) Where a request is made pursuant to this Article the Requesting Party shall advise the approximate amounts of allowances payable, including travelling and accommodation expenses. If a witness or expert so requests, the Requesting Party may make a down payment.

ARTICLE XVI IMMUNITY

(1) A person who consents to transfer pursuant to Articles XIV or XV shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence or be subject to civil suit being a civil suit to which the person could not be subjected if the person were not in the Requesting Party for any act or omission which preceded his departure from the Requested Party.

(2) A person who consents to transfer pursuant to Articles XIV or XV shall not be subject to prosecution based on his testimony, except for perjury.

(3) A person who consents to transfer pursuant to Articles XIV or XV shall not be required to give evidence in any proceedings other than the proceedings to which the request relates.

(4) A person who does not consent to transfer pursuant to Articles XIV or XV shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

(5) A person who responds to a summons from the Requesting Party to answer for acts forming the subject of proceedings against him shall not be prosecuted or detained or restricted in his personal liberty in the Requesting Party for acts or omissions which preceded his departure from the Requested Party and which are not specified in the summons.

(6) Paragraphs (1) and (5) shall not apply if the person, being free to leave, has not left the Requesting Party within a period of 30 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

ARTICLE XVII SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to a proceeding or investigation in relation to a criminal matter, where the offence is punishable under the law of the Requesting Party with a maximum term of imprisonment of:

- (a) in the case of requests to the Hong Kong Special Administrative Region, not less than 24 months; and
- (b) in the case of requests to the Kingdom of Belgium, not less than 12 months.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party.

ARTICLE XVIII PROCEEDS OF CRIME

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of a crime against the law of the Requesting Party are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in its jurisdiction.

(2) Where pursuant to paragraph (1) suspected proceeds of crime are found the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a Court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds of crime such request shall be executed pursuant to the laws of the Requested Party.

(4) Proceeds of crime confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

(5) Proceeds of crime include instruments used in connection with the commission of an offence.

ARTICLE XIX
PROVISION OF OTHER INFORMATION
IN CONNECTION WITH PROCEEDINGS

- (1) Where an offence has been committed within the area of a Party and that offence may also be prosecuted by the other Party the former Party may inform the latter Party if it decides not to prosecute the offence. Upon request, the former Party may provide information and evidence in relation to that offence.

- (2) If jurisdiction over the offence is established in the latter Party it shall inform the other Party of the options and legal remedies available to persons within its jurisdiction.

ARTICLE XX
SPONTANEOUS INFORMATION

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 this Agreement.

ARTICLE XXI
SETTLEMENT OF DISPUTES

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

ARTICLE XXII
ENTRY INTO FORCE AND TERMINATION

- (1) This Agreement shall enter into force on the first day of the second month after the month in which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.
- (2) This Agreement shall apply to requests whether or not the relevant acts or omissions occurred prior to the Agreement entering into force.
- (3) Either of the Parties may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect on receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

In WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

DONE in duplicate in Brussels this twentieth day of September, Two Thousand and Four in the Chinese, English, Dutch and French languages, each text being equally authentic.

Clerk to the Executive Council

COUNCIL CHAMBER

2005

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and the Kingdom of Belgium. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of the Kingdom of Belgium and signed in Brussels on 20 September 2004. A copy of those arrangements is annexed at Schedule 2 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 1 to the Order.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
(DENMARK) ORDER**

(Made by the Chief Executive in Council under section 4 of
the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)
subject to the approval of the Legislative Council)

1. Commencement

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

**2. Ordinance to apply between Hong Kong
and Denmark**

(1) In relation to the scheduled arrangements for mutual legal assistance, it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 1, apply as between Hong Kong and the Kingdom of Denmark.

(2) In subsection (1), "scheduled arrangements for mutual legal assistance" (列明的相互法律協助的安排) means arrangements which are applicable to the Government and the Government of the Kingdom of Denmark, a copy of which is annexed at Schedule 2.

SCHEDULE 1

[s. 2]

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows –

"(e) the request relates to the prosecution of a person for an external offence in a case where the person –*

(i)* has been convicted, acquitted or pardoned by a competent court or other authority in the place;** or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence;* or

(ii)* has undergone the punishment provided by the law of that place or Hong Kong**, in respect of that offence or of another external offence constituted by the same act or omission as that offence;"

2. Section 17(1) of the Ordinance shall be modified by deleting paragraph (ii).

3. Section 17(3)(b) of the Ordinance shall be modified to read as follows –

"(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 15 days after being notified that his presence is no longer required for any of the following purposes* ~~has had an opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for~~** –

- (i) the purpose to which the request relates; ~~or~~**
- (ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance."

4. Section 23(2)(a) of the Ordinance shall be modified –

- (a) by adding "or" at the end of subparagraph (i);
- (b) by deleting subparagraph (ii).

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

SCHEDULE 2

[s. 2]

AGREEMENT BETWEEN THE GOVERNMENT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION OF
THE PEOPLE'S REPUBLIC OF CHINA AND THE
GOVERNMENT OF THE KINGDOM OF DENMARK
CONCERNING MUTUAL LEGAL ASSISTANCE IN
CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorised by the Central People's Government of the People's Republic of China and the Government of the Kingdom of Denmark,

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and the confiscation of criminal proceeds;

Have agreed as follows:

ARTICLE 1

SCOPE OF ASSISTANCE

(1) The Parties shall afford each other, in accordance with the provisions of this Agreement, the widest measure of mutual assistance in the investigation and prosecution of criminal offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of ordinary criminal law courts of the Requesting Party and in judicial proceedings related thereto.

(2) Assistance shall include:

(a) taking evidence and statements from persons;

- (b) providing information, documents, articles and records, including judicial and official records, and transfer of exhibits;
- (c) identifying and locating persons;
- (d) effecting the temporary transfer of persons in custody to provide assistance;
- (e) facilitating the voluntary appearance of persons in the Requesting Party to provide assistance;
- (f) executing requests for search and seizure;
- (g) identifying, tracing, restraining, seizing, forfeiting and confiscating the proceeds of crime; and
- (h) serving of documents.

(3) In the case of requests related to fiscal offences assistance may not be refused unless the primary purpose of the investigation is the assessment or collection of tax.

(4) This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not by itself give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.

(5) This Agreement does not apply to offences under military law which are not offences under ordinary criminal law.

ARTICLE 2

CENTRAL AUTHORITY

- (1) The Central Authorities shall process requests for mutual legal assistance made in accordance with the provisions of this Agreement.

- (2) The Central Authority of Hong Kong Special Administrative Region is the Secretary for Justice or his or her duly authorised officer. The Central Authority for Denmark is the Danish Ministry of Justice. Either Party may change its Central Authority in which case it shall notify the other of the change.

- (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 the International Criminal Police Organisation (Interpol).

ARTICLE 3

OTHER ASSISTANCE

The Parties may provide assistance pursuant to other agreements, arrangements or practices.

ARTICLE 4

GROUNDINGS FOR REFUSAL

- (1) The Requested Party may and, if required by its law, shall refuse assistance if:

- (a) the Requested Party being the Government of Hong Kong Special Administrative Region, the execution of the request would impair:
 - (i) the sovereignty, security or public order of the People's Republic of China; or
 - (ii) the essential interests of Hong Kong Special Administrative Region;
- (b) the Requested Party being the Government of the Kingdom of Denmark, the execution of the request would impair the sovereignty, security, public order or other essential interests of the Kingdom of Denmark;
- (c) the request for assistance relates to an offence of a political character;
- (d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, religion, nationality or political opinions;
- (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requested Party or for which the Requested Party has made a final decision to waive or discontinue proceedings;
- (f) the request for assistance relates to the prosecution of a person for an offence for which the person could no longer be prosecuted if the prosecution were to take place in the jurisdiction of the Requested Party; or

(g) the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.

(2) For the purposes of paragraph (1)(g), for offences relating to taxes, duties or customs control, it shall be immaterial that the law of the Requested Party does not impose the same kind of tax, duty or customs control or does not contain a tax, duty or customs regulation of the same kind as the law of the Requesting Party.

(3) The Requested Party may refuse assistance if the request relates to an offence which is punishable with death under the laws of the Requesting Party and the laws of the Requested Party do not permit such punishment for that offence unless the Requesting Party provides such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

(4) The Requested Party may refuse assistance if the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided.

ARTICLE 5

REQUESTS

(1) Requests shall be made in writing, or by any means capable of producing a written record under conditions allowing the Requested Party to establish authenticity.

(2) Requests for assistance shall include:

(a) the name of the authority on behalf of which the request is made;

- (b) a description of the purpose of the request and the nature of the assistance requested as well as the relevance to the investigation, prosecution or proceedings;
- (c) a description of the nature of the investigation, prosecution or proceedings and the offence;
- (d) where proceedings have been instituted, details of the proceedings;
- (e) a summary of the relevant facts and laws or the text of the relevant provisions including the maximum penalty for the offence;
- (f) any requirements for confidentiality;
- (g) details of any particular procedure or formalities that the Requesting Party wishes to be followed; and
- (h) details of the period within which the request should be complied with and the reasons therefor.

(3) The Requesting Party may include any other information that is required to facilitate execution of the request.

(4) A request and all documents submitted in support of such request to Hong Kong Special Administrative Region shall be either in English or Chinese. A request and all documents submitted in support of such request to Denmark shall be in English.

ARTICLE 6

EXECUTION OF REQUESTS

- (1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.
- (2) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.
- (3) A request shall be executed in accordance with the law of the Requested Party and the provisions of this Agreement and, as far as practicable, in accordance with the directions stated in the request, including those relating to deadlines, provided that they are not contrary to the law of the Requested Party.
- (4) The Requested Party shall keep confidential a request and its contents except:
 - (a) where otherwise permitted by the Requesting Party; or
 - (b) where the Requested Party is required under its law to disclose.
- (5) On the express request of the Requesting Party, the Requested Party shall, as far as practicable, provide information about the date and the place of execution of the request. Representatives of the Requesting Party may be present during the execution of the request if the Requested Party consents.
- (6) The Requested Party may request additional information when it appears necessary for the execution of the request in accordance with its law or when it can facilitate such execution.

(7) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

(8) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(9) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority:

(a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and

(b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(10) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (9)(b), it shall comply with those terms and conditions.

ARTICLE 7

LIMITATIONS ON USE

(1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished under this Agreement, including documents, articles or records, be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.

(2) The Requesting Party shall not disclose, transmit or use information or evidence furnished, including documents, articles or records, for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

ARTICLE 8

TAKING OF EVIDENCE AND STATEMENTS FROM PERSONS

(1) Where a request is made that evidence or a statement of a person be taken the Requested Party shall arrange to have such evidence or statement taken.

(2) In addition to the information required under Article 5(2), a request for assistance under this Article shall specify the questions or subject matter on which the person is to give evidence or statements.

(3) Where evidence is to be taken, pursuant to a request for assistance under this Article, representatives of the Requesting Party, the person to whom the investigation, prosecution or proceedings in the Requesting Party relates and their legal representatives may, subject to the laws of the Requested Party, be present, if so requested by the Requesting Party.

(4) Where a statement is to be taken pursuant to a request for assistance, representatives of the Requesting Party may be present if the Requested Party consents.

(5) Where a person is required to give evidence in the Requested Party pursuant to a request for assistance:

- (a) 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;
- (b) 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.

ARTICLE 9

OBTAINING OF DOCUMENTS, ARTICLES AND RECORDS

- (1) Where a request is made for the obtaining of documents, articles or records, the Requested Party shall arrange to have such documents, articles or records produced.
- (2) Assistance under this Article may be provided subject to such terms and conditions as the Requested Party deems necessary.

ARTICLE 10

LOCATION AND IDENTITY OF PERSONS

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person within the territory of the Requested Party as specified in the request.

ARTICLE 11

TEMPORARY TRANSFER OF PERSONS IN CUSTODY TO THE REQUESTING PARTY

(1) A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purpose of providing assistance shall, if the Requested Party consents, be temporarily transferred to the Requesting Party provided that the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.

(2) Transfer may be refused:

(a) if the person in custody does not consent;

(b) if his presence is necessary at criminal proceedings pending in the Requested Party;
or

(c) if there are other overriding grounds for not transferring him to the Requesting Party.

(3) Where the Requested Party advises the Requesting Party that the transferred person is no longer required to be held in custody, the Requesting Party shall ensure the person's release from custody.

ARTICLE 12

VOLUNTARY APPEARANCE OF OTHER PERSONS IN THE REQUESTING PARTY

(1) The Requesting Party may request the assistance of the Requested Party in inviting a person within the territory of the Requested Party to appear in the Requesting Party to provide assistance.

(2) The request shall contain the following information:

- (a) the reason for the request;
 - (b) the dates on which the person shall appear;
 - (c) information with regard to travel to and accommodation in the Requesting Party and any allowance payable to the person; and
 - (d) name of a representative in the Requesting Party who can be contacted concerning the practical arrangements.
- (3) Upon receipt of such a request the Requested Party shall invite the person to travel to the Requesting Party and inform the Requesting Party of the person's response.

ARTICLE 13

SAFE CONDUCT

- (1) A person who consents to provide assistance pursuant to Articles 11 and 12 shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence which preceded his departure from the Requested Party, except as provided in Article 11.
- (2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 11, and being free to leave, has not left the Requesting Party within a period of 15 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.
- (3) A person who consents to give evidence under Articles 11 or 12 shall not be subject to prosecution based on his testimony, except for perjury.

(4) A person who consents to provide assistance pursuant to Articles 11 or 12 shall not be required to provide assistance in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to give evidence or provide assistance pursuant to Articles 11 or 12 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

ARTICLE 14

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and transmission of any material to the Requesting Party.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is transmitted to the Requesting Party.

ARTICLE 15

PROCEEDS OF CRIME

(1) The Requested Party shall, upon request, endeavour to identify and trace any proceeds of crime located within its jurisdiction and shall notify the Requesting Party of the result of its

inquiries. In addition to the information required under Article 5(2), the Requesting Party shall state in the request the basis of its belief that such proceeds may be located in the jurisdiction of the Requested Party.

(2) Where pursuant to paragraph (1) proceeds of crime are found the Requested Party shall upon request take such provisional measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those proceeds of crime, pending a final determination in respect of those proceeds by a court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds of crime such request shall be executed pursuant to the laws of the Requested Party.

(4) In addition to the information required under Article 5(2), a request made under paragraph (3) shall be accompanied by a copy of the confiscation order made by the court in the Requesting Party and a declaration by the Central Authority of the Requesting Party that the confiscation order is final and enforceable.

(5) Proceeds of crime confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

(6) For the purposes of this Agreement "proceeds of crime" includes –

- (a) property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property derived or realised, directly or indirectly, from the commission of an offence or the value which represents such property; and

- (b) property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences.

ARTICLE 16

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

- (1) Subject to its law the Requested Party shall provide copies of publicly available documents.
- (2) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

ARTICLE 17

SERVICE OF DOCUMENTS

- (1) The Requested Party shall serve any document transmitted in accordance with this Agreement to it for the purpose of service.
- (2) A request for service of documents shall be accompanied by a short summary of their contents.
- (3) Where there is reason to believe that the person to be served does not understand the language in which the document is originally drawn up, the Parties shall consult with each other in order to determine whether it should be translated into one of the official languages of the Requested Party or any other language.

(4) The Requesting Party shall transmit a request for the service of documents pertaining to a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.

(5) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.

(6) A person who has been served with a document requiring appearance in the Requesting Party as a witness and who has failed to appear or has declined to appear shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requested Party or the Requesting Party.

ARTICLE 18

REPRESENTATION AND COSTS

(1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.

(2) The Parties shall not claim from each other the refund of any costs resulting from the execution of a request under this Agreement, except:

- (a) fees of counsel and experts engaged by the Requested Party at the specific request of the Requesting Party;
- (b) costs incurred by the attendance of representatives from the Requesting Party in the Requested Party;

(c) costs incurred by the temporary transfer of persons in custody; and

(d) costs of a substantial or extraordinary nature.

(3) The arrangements for the payment of costs under paragraphs (2)(a) and (d) shall be made by consultation and agreement with each other prior to the execution of the request.

ARTICLE 19

CERTIFICATION AND AUTHENTICATION

Documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. In any case certification and authentication by the Central Authorities of the Parties is sufficient.

ARTICLE 20

SUBMITTING INFORMATION IN CONNECTION WITH PROCEEDINGS

(1) When a Party becomes aware that an offence has been committed within the jurisdiction of the other Party, the first Party may request the second Party to consider taking appropriate action under the law of that Party.

(2) The first Party may without prior request submit information or evidence to the second Party with a view to proceedings in that Party.

(3) The first Party may request information from the second Party about any action taken by it.

ARTICLE 21

SETTLEMENT OF DISPUTES

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

ARTICLE 22

ENTRY INTO FORCE AND TERMINATION

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.

(2) Each of the Parties may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect on receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

In witness whereof the undersigned, being duly authorised by their respective governments have signed this Agreement.

Done at the Hong Kong Special Administrative Region, this twenty-third day of December Two thousand and Four in the Chinese, English and Danish languages, each text being equally authentic. In case of divergence of interpretation, the English text shall prevail.

Clerk to the Executive Council

COUNCIL CHAMBER

2005

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and the Kingdom of Denmark. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of the Kingdom of Denmark and signed in Hong Kong on 23 December 2004. A copy of those arrangements is annexed at Schedule 2 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 1 to the Order.

Explanatory Statement on the Modifications to the Ordinance

**Mutual Legal Assistance in
Criminal Matters (Belgium) Order**

Previous Convictions etc

Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article IV(1)(f) of the Hong Kong/Belgium Agreement provides for this protection in relation to convictions etc in the requested jurisdiction. The modification to section 5(1)(e) reflects the provision in the Agreement by extending the protection to cover convictions etc in the requested jurisdiction.

Immunities

2. Section 17 of the Ordinance gives certain immunities to a person who comes to Hong Kong from another jurisdiction to render assistance. These immunities cease to apply if the person has had the opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for the purpose of rendering assistance. Article XVI(6) of the Hong Kong/Belgium Agreement provides that the immunities will continue to be applicable for a period of 30 days after the person, being free to leave Hong Kong, had been notified that his presence is no longer required. The modification reflects the additional protection in the Agreement by providing for a 30 day period in section 17.

Explanatory Statement on the Modifications to the Ordinance

Mutual Legal Assistance in Criminal Matters (Denmark) Order

Previous Convictions etc

Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article 4(1)(e) and (f) of the Hong Kong / Denmark Agreement provides for this protection in relation to conviction etc in the requested jurisdiction. The modification to section 5(1)(e) reflects the provision in the Agreement by extending the protection to cover convictions etc in the requested jurisdiction.

Immunities

2. Section 17 of the Ordinance gives certain immunities to a person who comes to Hong Kong from another jurisdiction to render assistance. These immunities cease to apply if the person has had the opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for the purpose of rendering assistance. Article 13(2) of the Hong Kong / Denmark Agreement provides that the immunities will continue to be applicable for a period of 15 days after the person, being free to leave Hong Kong, has been notified that his presence is no longer required. The modification reflects the additional protection in the Agreement by providing for a 15 day period in section 17.

3. Sections 17(1)(ii) and 23(2)(a)(ii) of the Ordinance give a person rendering assistance in the requesting jurisdiction immunity from civil suits. Such immunity is omitted from the Agreement as the immunity is not available under the Danish law. The modifications to sections 17(1) and 23(2)(a) reflect the deletion of such immunity from civil suits.