

# 立法會 *Legislative Council*

LC Paper No. LS 11/99-00

## **Paper for the Subcommittee on Resolutions made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)**

### **Mutual Legal Assistance in Criminal Matters (Italy) Order Mutual Legal Assistance in Criminal Matters (South Korea) Order Mutual Legal Assistance in Criminal Matters (Switzerland) Order**

On 30 September 1999, the Secretary for Security gave notices to move three motions at the LegCo's meeting to be held on 27 October 1999 to approve the following Orders :

- (a) Mutual Legal Assistance in Criminal Matters (Italy) Order (“the Italy Order”);
- (b) Mutual Legal Assistance in Criminal Matters (South Korea) Order (“the South Korea Order”); and
- (c) Mutual Legal Assistance in Criminal Matters (Switzerland) Order (“the Switzerland Order”),

made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (“the Ordinance”). On 14 October 1999, the Secretary for Security gave further notice to withdraw the three motions so as to give Members more time to scrutinise the Orders. At the House Committee meeting held on 15 October 1999, members agreed that these Orders should be referred to this Subcommittee for scrutiny.

2. Section 4(1) of the Ordinance provides that the Governor in Council (now the Chief Executive in Council) may, with the approval of the LegCo, in relation to any arrangements for mutual legal assistance, by order to which is annexed a copy of the arrangements direct that the Ordinance shall, subject to such modifications thereto as may be specified in the order, apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate. Section 4(3) requires that the modifications be summarized in a Schedule to the order. Section

4(7) restricts the LegCo's power under section 35(b) of the Interpretation and General Clauses Ordinance (Cap. 1) to amend the whole or any part of the subsidiary legislation by only allowing LegCo to accept or repeal the whole subsidiary legislation.

3. Schedule 1 to each of the Orders exhibits the bilateral arrangements entered into between Hong Kong with Italy, South Korea and Switzerland for mutual legal assistance in criminal matters.

#### The Italy Order

4. 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 III(1)(f) of the Hong Kong/Italy Agreement extends this protection to conviction, acquittal or pardon in the requested jurisdiction as well. The modification expands the scope of section 5(1)(e) to reflect the provision in the Agreement.

5. Section 5(1)(e) is further modified by allowing the Secretary for Justice to refuse a request for assistance in respect of an act or omission that, if it had occurred in Hong Kong, could no longer be prosecuted in Hong Kong by reason of lapse of time. This modification also reflects Article III(1)(g) of the Hong Kong/Italy Agreement.

6. Section 17 of the Ordinance gives a person who comes to Hong Kong from another jurisdiction to render assistance certain immunities. 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 XV(2) of the Hong Kong/Italy Agreement provides that the immunities will continue to be applicable for a period of fifteen days after the person has had the opportunity of leaving Hong Kong. The modification reflects the protection in the Agreement by providing for a fifteen day period in section 17.

#### The South Korea Order

7. The modifications to section 5(1)(e) of the Ordinance are exactly the same as the modifications provided for in the Italy Order (see paragraphs 4 and 5 above). They reflect Article 4(1)(e) of the Hong Kong/South Korea Agreement.

8. The modification to section 17 of the Ordinance is the same as the modification provided for in the Italy Order (see paragraph 6 above). This reflects the protection in Article 15(2) of the Hong Kong/South Korea Agreement.

#### The Switzerland Order

9. The modification to section 5(1)(e) of the Ordinance reflects Article 3(1)(f) of the HKSAR/Switzerland Agreement which extends the protection in section 5(1)(e) to conviction, acquittal or pardon in the requesting state, requested state or a third jurisdiction.

10. The modification to section 17 of the Ordinance is the same as the modification provided for in the Italy Order (see paragraph 5 above) except that the period is thirty days. The modification reflects the protection in Article 21(5) of the Hong Kong/Switzerland Agreement.

11. Article 3.1(d) of the Hong Kong/Switzerland Agreement provides that the Requested Party shall refuse assistance if the request relates to an offence considered by the Requested Party to be a fiscal offence; however the Requested Party has the option of complying with the request if the investigation or proceeding concerns a fraudulent scheme or a fraud relating to a fiscal matter. In response to our enquiry, the Administration replies that "fiscal offences" mean offences relating to taxation, customs duties, foreign exchange control or other revenue matters.

12. Article 15 of the Hong Kong/Switzerland Agreement provides for exchange of information from criminal records of nationals of the Requesting Party and Requested Party. Upon enquiry, the Administration says that the effect of Article 15 is to facilitate consular assistance in the case where Swiss nationals are sentenced to imprisonment in Hong Kong or Hong Kong permanent residents are sentenced to imprisonment in Switzerland. The Administration further confirms that section 57(2) of the Personal Data (Privy) Ordinance (Cap. 486) allows Hong Kong to inform Switzerland, pursuant to Article 15 of the Agreement, of sentences of imprisonment imposed on Swiss nationals in Hong Kong without breaching data protection principle 3 (use of personal data) because-

- (a) disclosing the information would represent compliance with Article 15 of the Agreement thereby safeguarding international relations with Switzerland; and
- (b) failure to disclose would be likely to prejudice Hong Kong's international relations with Switzerland on the basis that Hong Kong is not complying with Article 15.

13. Copies of correspondence between the Administration and Legal Service Division are annexed for Members' reference.

14. The three Orders specify the scope and procedures in relation to the provision of assistance in criminal matters. They also provide for safeguards in the rights of persons involved in criminal proceedings. They are substantially in conformity with the provisions in the Ordinance.

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

16. Members may refer to LegCo Brief File Reference: SBCR 3/5691/95 of 28 September 1999 from Security Bureau for background information.

17. The legal and drafting aspects of the Orders are in order.

Encl.

Prepared by

Lam Ping-man, Stephen  
Assistant Legal Adviser  
Legislative Council Secretariat  
20 October 1999

**Letter 1**

LS/R/1/99-00  
2869 9468  
2877 5029

Mr John Hunter  
Deputy Principal Government Counsel (IL)  
Department of Justice  
7/F, Main Wing  
Central Government Offices  
Hong Kong

8 October 1999

**BY FAX**  
Fax No. : 2877 2130  
Total no. of page(s) : 2

Dear John,

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

We are scrutinising the legal and drafting aspects of the Order.  
We would be grateful for your clarification of the following points-

Article 3.1(d)

It provides that the Requested Party shall refuse assistance if the request relates to an offence considered by the Requested Party to be a fiscal offence; however the Requested Party has the option of complying with the request if the investigation or proceeding concerns a fraudulent scheme or a fraud relating to a fiscal matter.

Can you give examples of offences considered by Hong Kong to be fiscal offences?

Can you give examples of offences considered by Switzerland to be fiscal offences?

Article 15

What is the purpose of allowing the Requesting Party to have access to criminal records of the nationals of the Requested Party?

What is the significance of the phrase "subject to the requirements of its law" in the provision?

In facilitating us to report on the Order to the House Committee meeting to be held on 15 October 1999, it is appreciated that your reply, in both

languages, would reach us by **11 October 1999**.

Yours sincerely,

(Stephen Lam)  
Assistant Legal Adviser

Letter 2

IL/LEG/46/1/1 (IV)

LS/R/1/99-00

(852) 2810 2006

11 October, 1999

Mr. Stephen Lam,  
Assistant Legal Adviser,  
Legislative Council Secretariat,  
Legislative Council Building,  
8 Jackson Road,  
Central,

Dear Stephen,

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

I have the following comments on the points raised in your letter of 11 October.

**Article 3(1)(d)**

As a matter of international practice jurisdictions do not provide assistance to other jurisdictions for the purpose of assisting in the levying or collecting of revenue; assistance is however provided in relation to fiscal offences. Hong Kong's agreements accordingly generally seek to emphasize this point. An example is Article 1(3) of the Hong Kong/Australia agreement which reads -

*"Assistance under this Agreement may be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control, or other revenue matters but not in connection with non-criminal proceedings thereto."*

Provisions such as this reflect what Hong Kong considers to be fiscal offences, namely offences relating to taxation, customs duties, foreign exchange control or other revenue matters.

It is our understanding that Switzerland has the same view as to what constitutes a fiscal offence. Swiss practice in the area of Mutual Legal Assistance is based on the European Convention on Mutual Assistance in Criminal Matters. Whereas this Convention does not define "fiscal offence" the Additional Protocol does provide that in considering whether double criminality exists in relation to fiscal offences "assistance is not to

be refused because the law of the requested Party does not impose the same tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind".

It follows that, pursuant to the European Convention, fiscal offences are also offences relating to taxation etc.

Finally it should be noted that s. 5(2) of the MLA Ordinance [Cap. 525] provides for refusal of assistance in the case of investigations into taxation offences where the primary purpose of the request is the assessment or collection of tax. This provision is consistent with the international practice referred to above.

### Article 15

The effect of Article 15 is that Hong Kong has agreed to inform Switzerland of sentences of imprisonment imposed on Swiss nationals in Hong Kong AND Switzerland has agreed to inform Hong Kong of sentences of imprisonment imposed on Hong Kong permanent residents in Switzerland. This information will facilitate the rendering of consular assistance.

The phrase "subject to the requirements of its law" is included to ensure that the provision of this information will be consistent with the relevant "privacy" laws of the Party providing the information.

A Chinese translation of this letter will be forwarded tomorrow.

(John M. Hunter)  
Deputy Principal Government Counsel  
(International Law)

**Letter 3**

LS/R/1/99-00  
2869 9468  
2877 5029

Mr John Hunter  
Deputy Principal Government Counsel (IL)  
Department of Justice  
7/F, Main Wing  
Central Government Offices  
Hong Kong

12 October 1999

**BY FAX**  
Fax No. : 2877 2130  
Total no. of page(s) : 1

Dear John,

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

Further to our yesterday's telephone conversation, I should be grateful if you would confirm the operation of section 57(2) of the Personal Data (Privacy) Ordinance (Cap. 486) allows the Administration to comply with Article 15 of the Hong Kong/Switzerland Agreement.

Your reply, in both languages, by close of play today is appreciated.

Yours sincerely,

(Stephen Lam)  
Assistant Legal Adviser

Letter 4

IL/LEG/46/1/1 (IV)

LS/R/1/99-00

(852) 2810 2006

12 October, 1999

Mr. Stephen Lam,  
Assistant Legal Adviser,  
Legislative Council Secretariat,  
Legislative Council Building,  
8 Jackson Road,  
Central,

Dear Stephen,

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

I refer to your letter of 12 October 1998.

In my view section 57(2) of the Personal Data (Privacy) Ordinance [Cap. 486] would allow Hong Kong to inform Switzerland, pursuant to Article 15 of the Agreement, of sentences of imprisonment imposed on Swiss nationals in Hong Kong without breaching data protection principle 3. This is because -

- disclosing the information would represent compliance with Article 15 of the Agreement thereby safeguarding international relations with Switzerland [see s. 57(2)(a)]; and
- failure to disclose would be likely to prejudice our international relations with Switzerland [see s. 57(2)(b)] on the basis that Hong Kong was not complying with Article 15.

(John M. Hunter)  
Deputy Principal Government Counsel  
(International Law)