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**Paper for the House Committee meeting
on 9 June 2000**

**Second Report of the Subcommittee to study
the Italy Order, the South Korea Order and the Switzerland Order
made under section 4 of the
Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)**

Purpose

This is the Second Report of the Subcommittee to study the Italy Order, the South Korea Order and the Switzerland Order made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (the Ordinance). This Report covers the Subcommittee's deliberations on the Switzerland Order.

Background

2. Pursuant to section 4(2) of the Ordinance, the Chief Executive in Council has made three Orders to implement the bilateral arrangements for mutual legal assistance in criminal matters with Italy, South Korea and Switzerland. These three Orders specify the scope and procedures in relation to the provision of assistance. They also provide for safeguards of the rights of persons involved in criminal proceedings.

The Subcommittee

3. At the House Committee meeting held on 15 October 1999, members agreed that the Subcommittee formed earlier to study the France Order, the Australia Order, the United Kingdom Order, the New Zealand Order and the United States of America (US) Order should also study the Italy Order, the South Korea Order and the Switzerland Order. The Subcommittee was re-named as the "Subcommittee to study the Italy Order, the South Korea Order and the Switzerland Order made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)". A membership list of the Subcommittee is at the **Appendix**.

4. The Subcommittee had submitted a report to the House Committee meeting on 7 January 2000 recommending that the resolutions on the Italy Order and the South Korea Order be supported. The resolutions were subsequently passed by the Council at the meeting on 19 January 2000.

Deliberations of the Subcommittee

5. The main deliberations of the Subcommittee on the Switzerland Order are set out in the following paragraphs.

Notification of imprisonment

6. Some members have expressed concern about the requirement in Article 15 of the Hong Kong Special Administrative Region (HKSAR)/Switzerland Agreement (the Agreement) that there be notification of the imprisonment of Hong Kong permanent residents in Switzerland irrespective of their consent.

7. The Administration has explained that the provision in Article 15 of the Agreement is to facilitate the provision of consular assistance in line with Article 22 of the European Convention on Mutual Assistance in Criminal Matters. The Administration has pointed out that Article 15 of the Agreement is consistent with similar provisions in the Consular Agreements with the US, Canada and the United Kingdom which also do not require the consent of the person concerned prior to informing his consular post of his detention. The Administration is also of the view that Article 15 would not greatly infringe on the privacy of Hong Kong permanent residents sentenced to imprisonment in Switzerland, as the HKSAR Government would not publicise advice received as to their imprisonment. Moreover, the fact of their imprisonment would be in the public forum in Switzerland and expected to become public knowledge in Hong Kong.

8. Members enquire whether the HKSAR Government would unilaterally forfeit the rights to receive such notifications by administrative means if there is no consent.

9. The Administration has pointed out that there is no international unanimity that consent should be a prerequisite to informing a consular post of the detention of its nationals. Article 36 of the Vienna Convention on Consular Relations (VCCR) actually reflects the compromise reached between two different stances as to whether a consular post should be automatically informed of the custody of its nationals in the receiving state. On the one hand, some states considered that the wishes of the individuals (who might not want consular help or might not want the fact of their imprisonment to be known to the authorities of their country) should be respected. On the other hand, some states considered

that if consular officers were not automatically informed of the custody of their nationals, this might put their nationals at risk.

10. The Administration has advised that Article 36 of the VCCR was eventually drafted to make notification contingent upon request of the detained individual but with the rider that the person concerned be informed of his right to request notification. However, the fact remains that many countries, when concluding bilateral agreements with other states on the establishment of consular posts, do include clauses regarding unconditional notification to the consular posts concerned of the detention of their nationals. The Administration is of the view that provisions which provide for unconditional notification can more adequately protect the interests of Hong Kong people than provisions which require consent particularly if the provisions in a bilateral agreement do not contain the requirement such as that contained in the VCCR for the person concerned to be informed of his right to request notification. The Administration has further advised that to forego unilaterally certain rights would be tantamount to amending the Agreement. In the Administration's view, such a course of action is undesirable from the external affairs perspective.

11. Members acknowledge that the HKSAR Government has a duty to protect the interests of Hong Kong residents who have been sentenced to imprisonment in Switzerland. However, they consider that it is equally important to respect the wishes of the individuals concerned who might not want consular help or might not want the fact of their imprisonment to be known to the HKSAR Government. These members suggest that the Administration should consider whether, in cases where a Hong Kong resident is sentenced to imprisonment in Switzerland, the Swiss Government could be requested to notify the HKSAR Government of the details of the sentence such as the term of sentence, the crime committed and the location of imprisonment, but without disclosing the identity of the person concerned unless the Swiss Government has obtained his written consent.

12. The Administration has advised that the legal aspects of the arrangement proposed by members will need to be examined in detail. The Administration has undertaken that, if the proposed arrangement is not considered to be in breach of any provisions of the Agreement, it will request the Swiss Government to adopt such an arrangement.

Tracing of proceeds of crime

13. Members enquire about the extent to which the HKSAR Government would render assistance in locating the proceeds or instrumentalities of a crime against the law of Switzerland, as provided in Article 22 of the Agreement. For example, whether the HKSAR Government would make enquiries to find out if a person under investigation by the Swiss Government has accounts with the local banks.

14. The Administration has explained that Article 22 is a standard provision in a mutual legal assistance agreement. The Administration replied that the HKSAR Government would, upon request from the Switzerland Government, seek the assistance of the Police to find out whether a person under investigation holds any bank accounts in Hong Kong. In doing so, the Police would be bound by all the constraints under the existing laws of Hong Kong. The Administration has further explained that the Requested Party would not accede to such a request without the Requesting Party first notifying the Requested Party of the basis of its belief that such proceeds or instrumentalities might be located in its jurisdiction.

Provision of spontaneous information

15. Members have expressed reservation about Article 25 which seeks to provide the other Party with spontaneous information on proceeds or instrumentalities of crime if it is considered that the disclosure of such information may assist the other Party in investigations of crimes and related proceedings. Members consider that such exchange of information may put the persons/organizations concerned in a compromising position.

16. The Administration has advised that the intention of Article 25 is to enhance the administration of justice and the co-operation with overseas law enforcement agencies in the prevention and detection of crime. In providing spontaneous information on proceeds or instrumentalities of crime to the other Party, the Police would have regard to the fact that they would not be in breach of any laws of Hong Kong.

Recommendation

17. The Subcommittee is of the view that the Switzerland order is substantially in conformity with the provisions in the Ordinance. In the light of the Administration's undertaking referred to in paragraph 12 above, the Subcommittee recommends that the Switzerland Order be supported.

Advice Sought

18. Members are invited to note the deliberations of the Subcommittee and support the recommendation in paragraph 17 above.

Legislative Council Secretariat

8 June 2000

Appendix

Subcommittee to study the Italy Order, the South Korea Order and the Switzerland Order made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)

Membership list

Hon James TO Kun-sun (Chairman)

Hon David CHU Yu-lin

Hon Margaret NG

Hon Jasper TSANG Yok-sing, JP

Hon Mrs Miriam LAU Kin-yee, JP

Total : 5 members