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**Paper for the House Committee meeting
on 7 January 2000**

**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 paper reports on the deliberations of the Subcommittee on 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).

Background

2. 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 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.

3. 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

4. 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 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**.

Deliberations of the Subcommittee

5. Under the chairmanship of Hon James TO Kun-sun, the Subcommittee held two meetings with the Administration. The main deliberations of the Subcommittee on the Italy Order and the South Korea Order are set out in paragraphs 6 to 14 below. The Subcommittee will further deliberate the Switzerland Order and submit a further report in due course.

The Italy Order

6. Members consider that the scope of assistance to be provided under paragraph (2)(k) of Article I of the Hong Kong/Italy Agreement is too wide. The Administration has explained that paragraph (2)(k) of Article I is included to ensure that types of assistance which are not specifically listed would nevertheless be provided so long as such assistance is consistent with the objects of the Hong Kong/Italy Agreement and with the law of the Requested Party.

7. A member expresses concern about the provisions in paragraph (5) of Article VIII of the Hong Kong/Italy Agreement requiring a person asserting a claim of immunity, incapacity or privilege to give evidence first before such claim is made known to the authorities concerned for subsequent resolution as to whether the claim is valid.

8. The Administration has advised that such a situation will only occur when there is no provision in the law of the Requested Party for asserting a claim of immunity, incapacity or privilege. The Administration has pointed out that the reason for allowing the Requesting Party to determine whether a claim for immunity, incapacity or privilege is valid under the Requesting Party's law is that it is considered more practical for the Requesting Party to rule on questions that arise pursuant to its law.

9. Members note that in the modifications to the Ordinance set out in Schedule 2 to the Italy Order, a new sub-paragraph is included in section 5(1)(e) of the Ordinance to provide for refusal of assistance if the offence, had it occurred in Hong Kong, could no longer be prosecuted by reason of lapse of

time. This modification to section 5(1)(e) is the same modification provided in the France, the New Zealand and the United Kingdom Orders.

10. The Administration has explained that section 17(3)(b) of the Ordinance accords 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 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 to section 17(3)(b) of the Ordinance reflects the additional protection stipulated in Article XV(2) of the Agreement.

The South Korea Order

11. Members note that the modifications to the Ordinance set out in Schedule 2 to the South Korea Order are exactly the same as the modifications provided for in the Italy Order.

12. A member enquires whether the Department of Justice will obtain information on the legal system of an overseas jurisdiction when conducting negotiations with the jurisdiction concerned on mutual legal assistance in criminal matters.

13. The Administration has pointed out that although the Administration will not conduct exhaustive study on the criminal justice system of the other party, attempts would generally be made to obtain information on the mutual legal assistance legislation of the other Party.

Recommendation

14. The Subcommittee is of the view that the Italy and South Korea Orders are substantially in conformity with the provisions in the Ordinance. The Subcommittee recommends that the two Orders be supported.

Advice Sought

15. Members are invited to note the deliberations of the Subcommittee and support the recommendation in paragraph 14 above.

Legislative Council Secretariat
5 January 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