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**Paper for the House Committee meeting on
13 June 2003**

**Report of the Subcommittee on
the Mutual Legal Assistance in Criminal Matters (Ireland) Order
and the Mutual Legal Assistance in Criminal Matters (Netherlands) Order**

Purpose

This paper reports on the deliberations of the Subcommittee on the Mutual Legal Assistance in Criminal Matters (Ireland) Order and the Mutual Legal Assistance in Criminal Matters (Netherlands) Order.

Background

2. The Secretary for Security gave notice to move two motions at the meeting of the Legislative Council (LegCo) on 12 February 2003 to seek the Council's approval for two Orders made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (the Ordinance), to implement the bilateral arrangements for mutual legal assistance in criminal matters with Ireland and the Netherlands. The two Orders are -

- (a) Mutual Legal Assistance in Criminal Matters (Ireland) Order; and
- (b) Mutual Legal Assistance in Criminal Matters (Netherlands) Order.

3. The Ordinance provides the necessary statutory framework for implementing mutual legal assistance agreements 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 Mutual Legal Assistance in Criminal Matters Agreements with Ireland and the Netherlands were signed on 19 September 2001 and 26 August 2002 respectively. Schedule 1 to the Ireland Order and the Netherlands Order contains a copy of the relevant bilateral agreement. Schedule 2 to each of the Orders sets out modifications to the Ordinance to reflect areas in which the relevant agreement varies from the Ordinance.

5. 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 on when the necessary domestic procedures of those countries have been completed.

The Subcommittee

6. At the House Committee meeting on 24 January 2003, Members agreed to form a subcommittee to study the two Orders. At the request of the House Committee, the Secretary for Security withdrew her notice to move the motions at the Council meeting on 12 February 2003 to allow time for the Subcommittee to study the Orders.

7. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Hon James TO, the Subcommittee has held two meetings with the Administration.

Deliberations of the Subcommittee

Comparison with model agreement

8. In examining the two Orders, the Subcommittee has made an article-by-article comparison of the provisions of each Order with those in the model agreement on mutual legal assistance in criminal matters.

The Ireland Order

Article 6 (Limitations on Assistance)

9. The Subcommittee has noted that a subjective element is introduced for Article 6(1)(b) and (d) to enable the Requested Party to refuse assistance if it is considered that a request for assistance relates to an offence of a political character, or there are substantial grounds for believing that the request for

assistance will result in a person being prejudiced. Members consider this acceptable as it aims to give better protection to those affected by requests and is consistent with section 5(1) of the Ordinance.

10. The Administration has informed the Subcommittee that Article 6(3) is a new provision which is included at the suggestion of Ireland for the purposes of construing Article 6(1)(h). Article 6(1)(h) provides that the Requested Party shall refuse assistance if 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. In response to members, the Administration has explained that Article 6(3) makes it clear that in determining whether double criminality exists, the totality of the acts or omissions or conduct, must be examined rather than the legal elements of the offence. In other words, double criminality can exist if the underlying conduct constitutes an offence in both jurisdictions even if the elements of those offences are different. A similar provision can be found in Article IV(3) of the Hong Kong/United Kingdom Agreement.

11. The Administration has also advised that an amendment has been made to Article 6(5)(b) to allow for partial execution of a request for assistance, and a similar provision can be found in Article IV(6)(b) of the Hong Kong/United Kingdom Agreement.

Article 8 (Limitations on Use)

12. Regarding members' concern about maintaining the confidentiality of evidence and information provided by Ireland during open court proceedings, the Administration has advised that it will attempt to comply with this confidentiality obligation by resisting any application to a court for release of information provided by Ireland. While the grounds to be relied on in resisting such an application will depend on the facts of each case, one obvious ground that the Government could rely on is that the information is privileged because disclosure would be injurious to the public interest.

Article 9 (Obtaining of Evidence, Articles or Documents)

13. Miss Margaret NG and some other members have expressed concern about the requirement under Article 9(5) for the Requested Party (e.g. Hong Kong) to take evidence from a person, even if he could not be required to give evidence under the law of the Requesting Party (e.g. Ireland). Members have asked about the rationale for this provision and the procedure for taking of evidence under this Article, and whether the provision is consistent with the relevant provisions in the Ordinance.

14. The Administration has explained that the first part of Article 9(5) provides that if a witness asserts a claim of immunity, incapacity or privilege under the law of the Requested Party, it shall be resolved pursuant to the Requested Party's law. Nevertheless, if the claim is asserted under the law of the Requesting Party, the second part of Article 9(5) provides that the evidence will still be taken, and the claim made known to the Central Authority of the Requesting party for subsequent resolution of the claim by the appropriate authority of the Requesting Party.

15. The Administration has explained that the second part of Article 9(5) aims to prevent the possibility of a claim pursuant to the law of the Requesting Party being deployed as a delaying tactic to obstruct the provision of assistance under the Agreement. The Administration has advised that the common types of privileges accorded to witnesses under the law of other jurisdictions are usually covered under the law of Hong Kong, such as legal privilege, spouse privilege, and privilege against self-incrimination. In practice, if a witness asserts a claim under the law of the Requesting party, he will, in most cases, be able to assert a similar claim under the law of Hong Kong and hence be exempted from giving the evidence to which the claim relates, if the claim is made out.

16. As regards the procedure for taking of evidence, the Administration has explained that under section 10 of the Ordinance, the evidence will be taken before a Magistrate, in camera, if deemed necessary by the Magistrate. The evidence will be put in writing and will be certified by the Magistrate. If a witness asserts a claim of immunity, incapacity or privilege under the law of the Requesting Party, the witness will be asked to state the details of the claim and the grounds on which the claim is made. The Magistrate will then set out in a statement the details and grounds for the claim. The Magistrate will proceed to take the evidence to which the claim relates, and such evidence will be taken in a document which is separate from the rest of the evidence of the witness.

17. The Administration has further explained that the Magistrate will forward to the Department of Justice (i.e. as the Central Authority) the document containing the evidence to which the claim relates and his statement, separately from the other evidence. While the other evidence and the claim will be forwarded to the Requesting Party, the document containing evidence to which the claim relates will be retained by the Department of Justice pending the Requesting Party's determination of the claim.

18. The Administration has advised that if the Requesting Party confirms that the claim is valid, the Department of Justice will notify the witness and the document containing the evidence to which the claim relates will then be returned to the witness. If the Requesting Party confirms that the claim is without basis, the witness will be so informed and the relevant evidence forwarded to the Requesting Party. However, such act will not prevent an

interested party from contesting the admissibility of the evidence in subsequent proceedings in the Requesting Party.

19. In response to members' enquiries, the Administration has further advised that it is the usual practice for a witness to be supplied in advance a list of questions (or areas of questions) to be asked and things to be produced. The witness therefore has ample opportunity to consider and seek advice, if deemed necessary, as to whether a claim should be asserted in respect of any of the evidence sought.

Article 19 (Assistance in proceedings relating to proceeds of crime)

20. In response to the Chairman's enquiry, the Administration has advised that it is usual in Mutual Legal Assistance in Criminal Matters Agreements and entirely consistent with the Ordinance to allow for the confiscation of both the proceeds and instrumentalities of crime. The Administration has also advised that Article 19(4) contains more detailed provisions concerning the disposition or sharing of the proceeds and instrumentalities confiscated. The provision is consistent with section 10(7) of Schedule 2 to the Ordinance which empowers the Secretary for Justice to give directions on the payment of proceeds to the Requesting Party.

The Netherlands Order

Article 4 (Grounds for refusal)

21. The Administration has advised that Article 4(g) in the Hong Kong/Netherlands Agreement provides for refusal of assistance when immunity from prosecution has been acquired in the requested jurisdiction. This is to the same effect as section 5(1)(e) of the Ordinance which deals with double jeopardy. The modification to section 5(1)(e) is purely to extend the protection in the Ordinance to cover immunity from prosecution acquired in the requested jurisdiction as well as the requesting jurisdiction. Most other orders have provided for a similar modification.

22. On the reason for not including a provision to cover the situation of refusal of assistance if the request related to an offence carrying death penalty in the Requesting Party, the Administration has explained that the Dutch authorities do not favour the inclusion of this provision because the death penalty has been abolished in both the Netherlands and Hong Kong. It was nevertheless agreed with the Netherlands that "essential interests" referred to in Article 4(c) could be used as the ground to refuse assistance for death penalty offences should death penalty be re-introduced by either Party and assistance requested for a death penalty offence. The same approach was followed in the US and Philippines Agreements.

Article 10 (Taking of testimony in the Requested Party)

23. Article 10(5) provides that "if a person claims that there is a right to decline to give testimony under the law of the Requesting Party, the Central Authority of the Requested Party shall, where appropriate, consult with the Central Authority of the Requesting Party and rely on a declaration provided by that Authority.". The Administration has explained that this Article is equivalent to Article 9(6) of the model agreement with the addition of "where appropriate" to reflect the situation that where the legal representatives of the Requesting Party are present, no declaration (such as an external law immunity certificate as defined in the Ordinance) will be required since the legal representatives of the Requesting Party will be able to provide the necessary legal opinion.

24. Ms Audrey EU has sought clarification on the procedure to be adopted by the Magistrate of Hong Kong in case there is dispute over the claim of immunity by a witness. She has asked whether the Magistrate in Hong Kong has the power to resolve such dispute and whether a separate document procedure will be adopted, similar to that provided in the Ireland Order (paragraphs 16 to 19 above refer), for the part of evidence which is disputed.

25. The Administration has clarified that the opinion of the legal representative provided by the Dutch authorities will, consistent with Article 10(5), be admissible in evidence to enable a Magistrate to rule on an immunity claim by a witness. If there is dispute over the claim, the Magistrate has the discretion to decide whether a separate document procedure (see paragraphs 16 to 19) should be adopted to deal with that part of evidence under dispute. The Administration has also advised that the Magistrate's decision on the claim is judicially reviewable.

Chinese translation error in Article 14(5)

26. The Subcommittee has noted that the Chinese translation of the "Requesting Party" and "Requested Party" in Article 14(5) had been reversed. The Administration has subsequently informed the Subcommittee that it has proposed to the Dutch authorities that the translation error be rectified by way of an exchange of Notes. The Dutch authorities have indicated agreement and will be forwarding a diplomatic note to Hong Kong concerning the amendment. As it is not expected that there will be sufficient time to complete all necessary procedures before the end of this session, the Administration has proposed to resubmit a fresh Netherlands Order to LegCo for approval in the next session.

Recommendations

27. The Subcommittee has completed scrutiny of the two Orders. The Subcommittee supports the Administration's proposal that the motion on the Ireland Order be moved by the Secretary for Security at the Council meeting on 2 July 2003. The Subcommittee has no objection to the Administration submitting a fresh Netherlands Order to rectify the Chinese translation error in Article 14(5).

Advice sought

28. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
12 June 2003

**Subcommittee on
the Mutual Legal Assistance in Criminal Matters (Ireland) Order
and the Mutual Legal Assistance in Criminal Matters (Netherlands) Order**

Membership list

Chairman Hon James TO Kun-sun

Members Hon Margaret NG
 Hon Jasper TSANG Yok-sing, GBS, JP
 Hon Miriam LAU Kin-yee, JP
 Hon Audrey EU Yuet-mee, SC, JP

(Total : 5 members)

Clerk Mrs Constance LI

Legal Adviser Miss Connie FUNG

Date 13 March 2003