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Report of the Subcommittee on the Mutual Legal Assistance in Criminal Matters (Ukraine) Order and the Mutual Legal Assistance in Criminal Matters (Singapore) Order

Purpose

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

Background

2. The Secretary for Security gave notice to move two proposed resolutions at the meeting of the Legislative Council on 14 January 2004 to seek the Council's approval for the following Orders to be made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), to implement the bilateral arrangements for mutual legal assistance in criminal matters with Ukraine and Singapore -

- (a) Mutual Legal Assistance in Criminal Matters (Ukraine) Order;
and
- (b) Mutual Legal Assistance in Criminal Matters (Singapore) Order.

3. The Mutual Legal Assistance in Criminal Matters Ordinance provides the statutory framework for implementing the mutual legal assistance arrangements and enables provision of assistance in the investigation and prosecution of criminal offences, such as 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 Ukraine and Singapore were signed on 2 April and 23 July 2003 respectively. Schedule 1 to the Ukraine Order and the Singapore Order sets out those areas in which the relevant Agreement varies from the Ordinance. Schedule 2 to each of the Orders contains a copy of the relevant Agreement.

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 9 January 2004, Members agreed to form a subcommittee to study the two Orders. As requested by the House Committee, the Secretary for Security withdrew his notice to move the motions at the Council meeting on 14 January 2004, 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

8. In discussing the two Orders, the Subcommittee had 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 Ukraine Order

The Agreement and the central authorities

9. The Administration has informed the Subcommittee that according to the Ukraine constitutional law, mutual legal assistance agreement must be signed between Ukraine and the other jurisdiction as the Agreement concerns human rights. The Agreement was therefore between Ukraine and the Hong Kong Special Administrative Region (HKSAR), and not between the two Governments. The Administration has confirmed that such an arrangement is acceptable as it will make no difference in international terms.

10. The Administration has also informed the Subcommittee that Ukraine has requested to include two central authorities, that is, the General Prosecutor's Office and Ministry of Justice, in the Agreement. The General Prosecutor's Office is in charge of pre-trial investigations, while the Ministry of Justice is responsible for the judicial proceedings. Due to the division of work of the two authorities in Ukraine, the provision for two central authorities in the Agreement is necessary. Where Hong Kong is the Requesting Party, it will forward the request to the appropriate central authority in Ukraine. That authority will process the request or forward it to the other central authority for processing as appropriate.

Obtaining evidence

11. The Subcommittee has asked the Administration to clarify whether the reference to "legislation" in Article 9(5)(a) and (b) of the Agreement will have the effect of confining the claim of privilege to cases where there are statutes in the Requested Party and Requesting Party which permit a witness to decline to give evidence. Members have asked whether the Article, in the way it is drafted, can adequately cover all privileges recognised in Hong Kong.

12. The Administration has explained that the reference to legislation in Article 9(5) is appropriate. As far as Hong Kong is concerned, the "claims of privileges" referred to in Article 9(5) are covered by section 10(7) and (10) of the Mutual Legal Assistance in Criminal Matters Ordinance which sets out the general circumstances where a person who is required to give evidence for the purpose of a criminal matter in a place outside Hong Kong is not compellable to give evidence. Section 10(10) of the Ordinance provides that a person who is required to give evidence, for the purpose of a criminal matter in a place outside Hong Kong, is not compellable to give evidence that the person could not be compelled to give in Hong Kong, "if that matter were a trial of a person for a Hong Kong offence or proceedings to determine whether a person should be tried for such an offence", or "on the ground that to do so might tend to incriminate him". The Administration considers that section 10(10) of the Ordinance already covers the common law privileges recognised in Hong Kong.

Location or identification of persons and articles

13. The Subcommittee Chairman has expressed concern that under Article 11 of the Agreement, Hong Kong as the Requested Party will be asked to "endeavour" to ascertain the location or identity of any person or articles. The Chairman has asked about the limits in law for Hong Kong to render legal assistance to a foreign jurisdiction, and whether compulsory measures such as that provided under section 33 of the Telecommunications Ordinance (Cap. 106) will be used to satisfy a request made under Article 11.

14. The Administration has explained that provisions similar to Article 11 are common in mutual legal assistance agreements, and these provisions appear in all agreements signed between Hong Kong with other jurisdictions except those with France, Korea, the Netherlands and Switzerland. The expression "endeavour" in Article 11 simply means that the Requested Party will use its best efforts to locate the person. In making a request for assistance, the Requesting Party will have to provide the information required under Article 5(2) of the Agreement, including a brief description of the facts to show the connection of the person to the criminal matter. It is also necessary for the Requesting Party to provide sufficient information to facilitate the execution of the request, e.g. address and details of travel document of the person, his/her means of travel and date of arrival, etc. When the requirements under Article 5 of the Agreement are met, the relevant law enforcement agency will endeavour to locate the person in Hong Kong.

15. The Administration has emphasized that only rarely will compulsory measures be employed to execute a request to locate a person. In those rare cases, the compulsory powers used will be those under the Mutual Legal Assistance in Criminal Matters Ordinance.

16. The Administration has also advised that the power to intercept communications under section 33 of the Telecommunications Ordinance can only be invoked if the Chief Executive considers that public interest so requires. The consideration of public interest is multi-dimensional. While it could certainly include the prevention, investigation or prosecution of crimes with a Hong Kong element, it cannot be ruled out that it might also be considered to be in the public interest to assist a foreign jurisdiction to locate a person who is alleged to have committed a very serious crime, which does not itself have a Hong Kong element. Such a public interest could be engaged by virtue of Hong Kong's obligations under an international agreement, international comity, consideration of the benefits to be derived from international cooperation generally and the demonstration of Hong Kong's continuing commitment to assist in the international fight against crime. Each case would have to be considered on its own merits. In practice, the Department of Justice has not processed any request for locating a person necessitating the invocation of powers outside those under the Mutual Legal Assistance in Criminal Matters Ordinance.

Proceeds from crime

17. The Subcommittee has asked about the reasons for, and the effects of, providing a definition of "proceeds from crime" in Article 19(5) of the Agreement. Members have also requested the Administration to explain the measures to be taken by Hong Kong, as the Requested Party, to execute a request to ascertain "any proceeds from crime according to the law of the

Requesting Party", and "to prevent any dealings in, or transfer or disposal of, those suspected proceeds from crime", under Article 19(1) and (2) respectively. Miss Margaret NG and Ms Miriam LAU have expressed concern that Hong Kong may be requested under this Article to trace proceeds which are outside the definition of "proceeds" in the laws of Hong Kong.

18. The Administration has advised that the definition of "proceeds from crime" was proposed by Hong Kong and was based on the definitions of "external confiscation order" and "Hong Kong confiscation order" in the Mutual Legal Assistance in Criminal Matters Ordinance. Similar provisions are also found in other mutual legal assistance agreements signed by Hong Kong. Although the definition is inclusive, it goes some way to aligning the meaning of "proceeds" to the Ordinance.

19. As regards the Subcommittee Chairman's concern about the scope of property in Article 19(5)(c), the Administration has advised that this Article in fact replicates the relevant provisions in the Mutual Legal Assistance in Criminal Matters Ordinance. The Administration considers that property "intended to be used in connection with a criminal offence" should be liable to confiscation. In this connection, the Administration has pointed out that section 4A(1)(c) of the Dangerous Drugs Ordinance (Cap. 134) makes it an offence to commit acts preparatory to trafficking in dangerous drugs. For instance, the purchase of property for the purpose of facilitating drug trafficking may in itself be an offence, and such property is liable to confiscation.

20. On Article 19(1), the Administration has advised that the provision requires the Requested Party to ascertain whether proceeds from crime committed in the Requesting Party are located within its jurisdiction; in other words, the obligation is to trace the foreign proceeds. The Requesting Party will have to provide sufficient information, as required under Article 5 of the Agreement, to facilitate the Requested Party to execute a request. Usually, sufficient information will be available to enable the proceeds to be traced without resort to compulsory measures. Where necessary, compulsory measures (i.e. taking of evidence, production orders) under the Mutual Legal Assistance in Criminal Matters Ordinance can be used for tracing the proceeds. The Administration has confirmed that the Requested party is only required to take action in respect of "proceeds" within the meaning of its law.

21. The Administration has further advised that the measures permitted by the laws of Hong Kong for discharging the obligations under Article 19(2) are already set out in section 27 of the Mutual Legal Assistance in Criminal Matters Ordinance. For example, section 27(1)(b) of the Ordinance provides that action can be taken in accordance with Schedule 2 to restrain dealing in any property which may be available to satisfy an external confiscation order.

The Singapore Order

Transfer of persons in custody

22. The Subcommittee has noted that the Singapore law does not allow transfer of persons in custody to a foreign jurisdiction to provide assistance. This is therefore not included in the Agreement. It would be up to Hong Kong to decide, in a particular case, whether to provide assistance to Singapore, by allowing Hong Kong prisoners to travel to Singapore to provide assistance, under section 23 of the Mutual Legal Assistance in Criminal Matters Ordinance.

Assistance in relation to taxation offences

23. The Administration has informed the Subcommittee that Singapore cannot provide legal assistance in relation to the investigation of taxation offences in a requesting jurisdiction. On the other hand, Hong Kong is empowered to provide assistance in taxation cases, if the conditions set out in section 5(2) of the Mutual Legal Assistance in Criminal Matters Ordinance are satisfied. It was therefore agreed between the two sides that the Agreement would be silent on this point, and it would be up to Hong Kong to decide in a particular case whether it would assist Singapore if a request was received.

24. The Subcommittee Chairman and Ms Miriam LAU have expressed concern that Hong Kong would be requested to provide legal assistance in taxation offences in other jurisdictions but not receive reciprocal assistance in this respect. They have asked the Administration to confirm whether it is the policy that Hong Kong will refuse a request for legal assistance from another jurisdiction which cannot provide reciprocal assistance.

25. The Administration has responded that Hong Kong is not obliged under the Agreement to provide legal assistance to Singapore in relation to taxation offences. This is because Singapore domestic law does not permit Singapore to make a mutual legal assistance request in respect of a taxation offence or to provide assistance in relation to such offences. The Administration has also advised that Hong Kong will attach great importance to the principle of reciprocity when considering whether to accede to requests for mutual legal assistance from foreign jurisdictions which fall outside the scope of the agreements. The Subcommittee has requested that the Secretary for Security should confirm this point in his speech in moving the proposed resolutions for the two Orders at a Council meeting.

Refusal of requests of assistance

26. The Subcommittee has noted that paragraphs 4(a) and (b) under Article 3 of the Agreement are new provisions included at the request of Singapore to set out its mandatory grounds for refusal of assistance. The new provisions stipulate that the Requested Party may and shall, if required by its law, refuse assistance if it is of the opinion that -

- (a) the offence to which the request relates is not an offence of sufficient gravity; or
- (b) the material requested is of insufficient importance to the investigation or could reasonably be obtained by other means.

27. The Subcommittee Chairman has suggested that similar provisions should be included in all future agreements to be signed by Hong Kong with other jurisdictions.

28. As regards refusal of assistance in relation to an offence carrying death penalty, the Administration has informed the Subcommittee that Hong Kong could rely on Article 3(1)(f) of the Agreement, i.e. the granting of the request would seriously impair the essential interests of HKSAR, to refuse assistance in such cases. A similar approach was followed in the Agreement signed with the USA and Philippines.

Confidentiality

29. The Subcommittee has noted that Article 21 of the Agreement provides that the consent of the Requested Party is required if the information or evidence furnished is to be used for purposes other than those stated in the request. In this connection, the Subcommittee Chairman has asked the Administration to provide a background paper on whether the confidentiality obligation in international agreements similar to that provided in Article 21 of the Agreement would constitute a defence for non-compliance, or a reasonable excuse from complying, with a summons requiring production of documents issued by the Court, or by a select committee of the Legislative Council using the powers under the Legislative Council (Powers and Privileges) Ordinance (Cap. 382). The Administration has agreed to provide the background paper in due course.

Recommendations

30. The Subcommittee has concluded scrutiny of the two Orders. The Subcommittee supports the Administration's proposal that the motions on the two Orders be moved by the Secretary for Security at a future Council meeting.

Advice sought

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

Council Business Division 2
Legislative Council Secretariat
22 April 2004

**Subcommittee on
the Mutual Legal Assistance in Criminal Matters (Ukraine) Order
and the Mutual Legal Assistance in Criminal Matters (Singapore) Order**

Membership list

Chairman Hon James TO Kun-sun

Members Hon Margaret NG
 Hon Jasper TSANG Yok-sing, GBS, JP
 Hon Miriam LAU Kin-ye, JP

(Total : 4 members)

Clerk Mrs Constance LI

Legal Adviser Ms Connie FUNG

Date 19 February 2004