

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (UKRAINE) ORDER

Article 11

At the meeting of the Sub-committee to consider the above order on 24 March 2004 the Administration was asked to advise in writing whether s.33 of the Telecommunications Ordinance (CAP 106) could ever be used for the purpose of executing a foreign request to locate a person pursuant to a provision such as Article 11 of the HKSAR/Ukraine Agreement on Mutual Legal Assistance in Criminal Matters. Provisions similar to Article 11 are common in mutual legal assistance agreements. They appear in all Hong Kong's signed agreements except those with France, Korea, The Netherlands and Switzerland.

2. At the outset it needs to be 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 would be those under the Mutual Legal Assistance in Criminal Matters Ordinance (CAP 525).

3. As to whether s.33 of CAP 106 could ever be used for the purpose of executing a foreign request to locate a person, it must be remembered that requests for the location or identification of persons under the agreement will be confined to the purpose of obtaining assistance in the investigation or prosecution of criminal offences in the requesting jurisdiction or in proceedings related to criminal matters in the requesting jurisdiction.

4. Section 33 of the Telecommunications Ordinance can only be invoked if the Chief Executive considers that the public interest so requires. The consideration of public interest can be multi-dimensional. The public interest 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 co-operation generally and the demonstration of Hong Kong's continuing commitment to assist in the international fight against crime. Obviously each case has 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 CAP 525.