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Paper for the House Committee meeting on 5 January 2007

**Report of the Subcommittee on
Mutual Legal Assistance in Criminal Matters (Germany) Order**

Purpose

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

Background

2. The Secretary for Security gave notice to move a motion at the meeting of the Legislative Council on 6 December 2006 to seek the Council's approval of the Mutual Legal Assistance in Criminal Matters (Germany) Order (the Germany Order) made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (the Ordinance).

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 Germany Order

4. The Germany Order sets out the scope and procedures in relation to the provision of mutual legal assistance in criminal matters applicable between the Hong Kong Special Administrative Region (HKSAR) and the Federal Republic of Germany, and the modifications to the Ordinance. The Order is made consequential of the agreement for mutual legal assistance entered into by the HKSAR Government and the

Government of the Federal Republic of Germany (the Agreement) and signed in Hong Kong on 26 May 2006.

5. The Germany Order will come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

The Subcommittee

6. At the House Committee meeting on 24 November 2006, Members formed a subcommittee to study the Germany Order. At the request of the House Committee, the Secretary for Security withdrew his notice for moving the motion at the Council meeting on 6 December 2006 to allow time for the Subcommittee to study the Order in detail.

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

Deliberations of the Subcommittee

Comparison with the Model Agreement

8. In examining the Germany Order, the Subcommittee has made an article-by-article comparison of the provisions of the Order with those in the Model Agreement for the HKSAR on mutual legal assistance in criminal matters.

Article 5 - Request for Assistance

9. Under Article 5(2)8, assistance shall include any other information which is required to facilitate execution of the request.

10. The Subcommittee has asked about the type of information that could be given under this provision to the Requesting Party, and whether such information will include information obtained under the Interception of Communications and Surveillance Ordinance (Cap. 589).

11. The Administration has explained that Article 5(2) relates to information which the Requesting Party may need to provide to facilitate execution of its own request. It does not relate to information which a Party provides in response to a request for assistance from the other Party. Nonetheless, as a general rule, materials that have been obtained by compulsory process for domestic purposes may not be transmitted to a foreign authority, unless there are statutory provisions to enable such transmission. The

Administration has undertaken to continue to observe this in implementing agreements on mutual legal assistance in criminal matters.

12. Article 5(3)2(a) provides that in the case of requests for delivery of property obtained, or to be obtained, by search and seizure, the requests for assistance shall include a declaration by a competent authority of the Requesting Party that seizure of the property could be obtained by compulsory measures if it were situated in the jurisdiction of the Requesting Party.

13. The Subcommittee has enquired about the reason for adding such a provision, and sought clarification on the meaning of competent authority as the term is not defined in the Agreement.

14. The Administration has explained that the provision is included at the request of the Government of the Federal Republic of Germany to reflect Germany's legal requirements. Under the law in Germany, if a request is received for delivery of property obtained, or to be obtained, by search and seizure, the requesting party is required to provide a declaration that seizure of the property could be obtained by compulsory measures if it were situated in the jurisdiction of the requesting party, or an order of a court in the requesting party authorising seizure of the property.

15. Regarding the meaning of competent authority, the Administration has explained that the term is not defined in order to allow flexibility in individual cases. For Hong Kong, in practice, such a declaration would likely be made by a counsel from the Department of Justice who prosecutes the case or who renders advice on the case to the investigating authority. As for the German side, such a declaration would be made by a competent authority of Germany, who would likely be a judge of the German court or an official from the Ministry of Justice.

16. The Subcommittee notes that under the Ordinance, a person who is required to give evidence for the purposes of criminal matter in a place outside Hong Kong is not compellable to answer a question if the person is not compellable to answer in the criminal matter in that place. If a person claims that he has the right to decline to answer a question under the law of the requesting party, Hong Kong will request the requesting party to provide a certificate or a declaration certifying or declaring that under the law of the requesting party, persons could or could not, generally or in specified proceedings, be required to answer a question. Such a requirement is not imposed in relation to seizure of property. The Subcommittee has queried whether Hong Kong should render assistance in relation to seizure of property if such seizure is not permissible in the law of the requesting party. At the request of the Subcommittee, the Administration has agreed to consider whether there is a need to include a provision similar to Article 5(3)2(a) in the domestic legislation.

Article 10 - Obtaining of Evidence, Documents, Articles or Records

17. Under Article 10(3), subject to the law of the Requested Party, judges or officials of the Requesting Party and other persons concerned in the investigation or proceedings may be permitted to be present at the execution of the request, to appear or be legally represented in the proceedings in the jurisdiction of the Requested Party and to question the person giving evidence at such proceedings.

18. The Subcommittee has pointed out that under section 10(4) of the Ordinance, the magistrate conducting a proceeding in relation to the taking of evidence shall permit the appropriate authority of the requesting party to appear at the proceeding before the magistrate. Under section 2 of the Ordinance, appropriate authority in relation to a place outside Hong Kong means, *inter alia*, a person whom the Secretary for Justice is satisfied is a person who may under the law of that place, in the case of a request by that place to Hong Kong for assistance in criminal matter, make such a request. It is provided in Article 2 that requests under the Agreement may be made by the authorities responsible for investigations. The Subcommittee has raised concern that the provision in Article 10(3) will allow officials from the Germany Police to appear in the proceedings in Hong Kong and to question the person giving evidence at such proceedings.

19. The Administration has responded that it is a preferred practice in Hong Kong that only legal representative from the requesting party will be permitted in court proceedings to question the person giving evidence at such proceedings. In the event that the German side requests for its Police officer to appear at court proceedings and to examine witnesses, Hong Kong will discuss with the German side and advise the German side to adopt the practice in Hong Kong.

20. At the suggestion of the Subcommittee, the Administration has agreed, when establishing bilateral agreements on mutual legal assistance in criminal matters in future, to assess whether the provisions made would have the effect of widening the scope of persons permitted to appear in the proceedings in Hong Kong courts and to question the person giving evidence at such proceedings.

Article 20 - Enter into Force, Suspension and Termination

21. Article 20(1) stipulates that the Agreement shall enter into force thirty days after the date on which the Parties have notified each other that their respective requirements for the entry into force of the Agreement have been complied with. The date of receipt of the second notification shall be decisive. Both Parties shall apply the Agreement provisionally from the date of signing of the Agreement in accordance with their respective law.

22. The Subcommittee has sought clarification on the need for a second notification, and how the Agreement could be applied provisionally from the date of signing the Agreement.

23. The Administration has explained that the second notification refers to the notification made by one Party after that made by the other Party. At the suggestion of the Subcommittee, the Administration has agreed to refine the drafting of similar provision in bilateral agreements on mutual legal assistance in criminal matters in future for the purpose of clarity.

24. As to how the Agreement could be applied provisionally, the Administration has advised that the provision is added at the suggestion of the German side. The Ordinance permits assistance to be granted in the absence of an agreement if there is an undertaking of reciprocity. Article 20(1) allows assistance to be provided without such undertaking pending entry into force of the Agreement.

Motion on the Germany Order

25. The Subcommittee has concluded scrutiny of the Germany Order. The Subcommittee does not object to the Administration's proposal for the motion on the Germany Order to be moved by the Secretary for Security at the Council meeting on 24 January 2007.

Advice Sought

26. Members are invited to note the deliberations of the Subcommittee and the date for moving the motion on the Germany Order.

**Subcommittee on
Mutual Legal Assistance in Criminal Matters (Germany) 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, GBS, JP

(Total: 4 Members)

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Mr LEE Ka-yun, Kelvin

Date 14 December 2006