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**Paper for the House Committee meeting on 21 February 2014**

**Second report of the Subcommittee on Fugitive Offenders (Czech Republic) Order, Mutual Legal Assistance in Criminal Matters (Spain) Order and Mutual Legal Assistance in Criminal Matters (Czech Republic) Order**

**Purpose**

This paper reports on the deliberations of the Subcommittee on Fugitive Offenders (Czech Republic) Order, Mutual Legal Assistance in Criminal Matters (Spain) Order and Mutual Legal Assistance in Criminal Matters (Czech Republic) Order in relation to the Mutual Legal Assistance in Criminal Matters (Spain) Order ("the Spain Order") and Mutual Legal Assistance in Criminal Matters (Czech Republic) Order ("the Czech Order").

**The subsidiary legislation**

Fugitive Offenders (Czech Republic) Order

2. The Fugitive Offenders (Czech Republic) Order (L.N. 166 of 2013) ("the FO Order") was made by the Chief Executive in Council under section 3 of the Fugitive Offenders Ordinance (Cap. 503) ("FOO"). It directs that the procedures in FOO for the surrender of fugitive offenders shall apply between Hong Kong and the Czech Republic. The FO Order is made in consequence of the agreement between the Hong Kong Special Administrative Region ("HKSAR") and the Czech Republic on Surrender of Persons Wanted for Criminal Proceedings and signed in Hong Kong on 4 March 2013 ("the Agreement"). The Agreement is recited in the Schedule to the FO Order. Under section 2 of the FO Order, the relevant procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the Agreement.

3. The FO Order is subject to a mechanism of scrutiny by the Legislative Council ("LegCo") provided in section 3(2) to (6) of FOO under which LegCo may only repeal but not amend the FO Order.

4. The FO Order will come into operation on a date to be appointed by the Secretary for Security by notice published in the Gazette. The date will coincide with that on which the agreement enters into force. The Agreement provides that it shall enter into force on the 30<sup>th</sup> day after the day on which the Contracting Parties have notified each other in writing that the requirements for the entry into force of the agreement have been complied with.

Mutual Legal Assistance in Criminal Matters (Spain) Order and Mutual Legal Assistance in Criminal Matters (Czech Republic) Order

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5. The Secretary for Security gave notice to move two motions at the Council meeting of 20 November 2013 to seek the approval of the Council for the Spain Order and the Czech Order made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ("MLAO"). The Secretary for Security subsequently withdrew his notice for moving the two proposed resolutions made under section 4 of MLAO at the Council meeting of 20 November 2013 to allow time for the subcommittee formed to study the two Orders in detail.

6. The Spain Order and the Czech Order are made in consequence of the agreement between the HKSAR Government and the Government of Spain signed on 15 November 2012 and the agreement between the HKSAR Government and the Government of the Czech Republic signed on 4 March 2013 respectively. The respective agreements are reproduced in the respective Schedules 1 to the two Orders. They specify the scope and procedures in relation to the provision of mutual legal assistance ("MLA") in the investigation and prosecution of criminal offences and in proceedings related to criminal matters. They also provide for safeguards of the rights of persons involved in criminal proceedings.

7. The Spain Order and the Czech Order will come into operation on the respective days to be appointed by the Secretary for Security by notice in the Gazette. The respective commencement dates will coincide with the dates on which the relevant agreements enter into force respectively. The respective agreements provide that they shall enter into force on the 30<sup>th</sup> day after the day on which the Contracting Parties have notified each other in writing that their respective requirements for the entry into force of the agreement have been complied with.

## **The Subcommittee**

8. At the meeting of the House Committee on 8 November 2013, members agreed that a Subcommittee should be formed to study the FO Order, the Spain Order and the Czech Order. The membership list of the Subcommittee is in the **Appendix**.

9. Chaired by Hon James TO, the Subcommittee reported its deliberations on the FO Order at the House Committee on 13 December 2013 and circulated its report vide LC Paper No. CB(2)583/13-14. The Subcommittee has held two further meetings with the Administration to discuss the Spain Order and the Czech Order.

## **Deliberations of the Subcommittee**

10. In examining the Spain Order and the Czech Order, the Subcommittee has made an article-by-article comparison of the provisions of the two Orders with those in the HKSAR Model Agreement for the Mutual Legal Assistance in Criminal Matters ("the Model Agreement"). The issues raised by members are summarized in the following paragraphs.

### The Spain Order

#### *Article 3 – Grounds for refusal*

11. Article 3 of the MLA Agreement between HKSAR and Spain ("the Spain Agreement") provides for the grounds under which the Requested Party shall refuse assistance.

12. Article 3(1)(b) of the Spain Agreement provides that the Requested Party shall refuse assistance if the request for assistance relates to an offence of a political character. Article 3(2) further provides that "For the purpose of Article 3(1)(b), an offence of a political character" does not include, among others, terrorist offences. The Subcommittee notes that this ground for refusing assistance is not provided in the Model Agreement. According to the Administration, the exclusion of "terrorist offences" from the category of "an offence of a political character" is added at the request of the Spanish side. Members have noted that there is no definition of "an offence of a political character" in Hong Kong law, and have enquired about the interpretation of such an offence under MLAO and by the courts in Hong Kong. Mr James TO

has expressed concern whether modification should be made to MLAO to fully reflect the meaning of "an offence of a political character" in Article 3(2).

13. The Administration has explained that there is no statutory definition of "an offence of a political character" under MLAO. According to the Administration, "offences of a political character" as a ground for refusing extradition and MLA requests derives from the practice of granting asylum to political refugees. When a Hong Kong court has to consider whether an offence is of a political character, it will take into account case law, the terms of the MLA Agreement, which is part of the subsidiary legislation, within the perimeter of MLAO, in addition to all the circumstances of the offence. The recent international judicial trend has been to exclude terrorist offences from "offences of a political character".

14. The Administration has advised that under section 5 of MLAO, a MLA request shall be refused if, in the opinion of the Secretary for Justice, the request relates to the prosecution or punishment of a person for an external offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character. In forming such an opinion, it would be appropriate for the Secretary for Justice to take into account case law and the provisions in the relevant MLA agreements. In the view of the Administration, Article 3(2) of the Spain Agreement seeks to put beyond doubts the scope of "an offence of a political character" as established by case law, rather than modifying MLAO as such.

15. Article 3(3) of the Spain Agreement provides that the Requested Party shall refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party. The Subcommittee, however, notes that section 5(3)(c) of MLAO provides that subject to certain conditions, a request by a place outside Hong Kong for assistance *may* be refused by the Secretary for Justice if the request relates to an external serious offence punishable with death. Members have questioned whether the use of the imperative "shall" in Article 3(3) is consistent with MLAO.

16. The Administration has explained that Article 3(3) of the Spain Agreement has been formulated in mandatory form at the request of the Spanish side. The Article does not go beyond the scope of section 5(3) of MLAO. In practice, when a request is made from Spain to Hong Kong, the Secretary for Justice will take into account all the factors including the Spain Agreement and exercise the discretion under section 5(3)(c) of MLAO accordingly. Article 3(3) has no real effect when Hong Kong makes a request to Spain, as Hong Kong does not have death penalty.

17. The Subcommittee also notes that Article 3(4) of the Spain Agreement, which provides that the Requested Party may refuse assistance if the request relates to an offence which is punishable according to the law of the Requesting Party with life imprisonment or carries a prison sentence of undetermined duration, is not contained in the Model Agreement. According to the Administration, Article 3(4) is a discretionary ground for refusal which is added at the request of the Spanish side to reflect the position under its law. Members have enquired about the consideration factors for exercising the discretionary ground under Article 3(4) to refuse assistance under the Spain Order. The Administration has explained that as Spain always provides a maximum sentence for her offences, it is expected that Hong Kong will not refuse assistance request from Spain on this ground. On the contrary, Spain may refuse to provide assistance to Hong Kong if Hong Kong is unable to give such assurance as Spain considers sufficient that the life imprisonment or a sentence of undetermined duration will not be imposed, or if imposed, will not be carried out. That said, when Hong Kong makes assistance requests to Spain that involve offences that carry a prison sentence of undetermined duration, Hong Kong may explain to Spain the sentence reviewing mechanism under the Long Term Prison Sentences Review Ordinance (Cap. 524), which allows the substitution of an indeterminate sentence of a prisoner by a determinate one, for Spain's consideration of whether to invoke the discretionary right of refusal.

*Article 12 – Service of documents*

18. Article XII(3) of the Model Agreement requires that a request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served. Members have questioned the reasons for not including this Article in the Spain Agreement.

19. The Administration has explained that Spain is of the view that such an Article is not necessary as such information may be exchanged through Interpol. Spain has also expressed difficulties as it did not have such a provision in its other bilateral MLA agreements.

*Article 18 – Exchange of information relating to criminal proceedings*

20. The Subcommittee has noted that Article 18 is included in the Spain Agreement at the request of the Spanish side which provides for spontaneous submission of information from one Party to other Party. As similar provision is not included in the Model Agreement, members have enquired about the policy towards exchange of information under this Article.

21. The Administration has explained that under the Spain Agreement, provision of any information is on a voluntary basis and the article does not in any way oblige Hong Kong to provide information. In practice, information is not provided by the Department of Justice, as the Central Authority of Hong Kong, without prior request pursuant to an MLA agreement. However, Hong Kong has, from time to time, received spontaneous information from its counterparts in relation to offences which may be connected to Hong Kong.

### The Czech Order

#### *Article 4 – Refusal or postponement of assistance*

22. Members have noted that the heading of Article 4 of the Czech Order is modified from the corresponding Article IV of the Model Agreement (i.e. Limitations on Compliance) to include the reference to postponement of granting assistance, and have enquired about the application of postponement of assistance for the purpose of Article 4. The Administration has advised that the heading of Article 4 has been amended to reflect the content of Article 4(1)(e) under which a mandatory ground of torture or other cruel or inhuman or degrading treatment or punishment has been included at the request of the Czech Republic. The Administration considers that the request is in accordance with international human rights obligations and is acceptable to Hong Kong as the same obligations apply to Hong Kong.

23. Members have also noted that Article 4(1)(f) of the MLA Agreement between HKSAR and the Czech Republic ("the Czech Agreement") does not cater for the scenario as set out in section 5(1)(e) of MLAO, i.e. where the relevant person has undergone the punishment provided by the law of the place in respect of an external offence or of another external offence constituted by the same act or omission as that external offence. Members have expressed concern whether the power of the Secretary for Justice to refuse a request for assistance has been restricted under the Czech Order.

24. The Administration has advised that in processing a request from the Requesting Party, Hong Kong shall observe all the safeguards as specified under section 5 of MLAO, subject to the modifications to MLAO as set out in Schedule 2 to the Czech Order. All the statutory safeguards under section 5(1)(e) of MLAO and Schedule 2 to the Czech Order will be preserved. Accordingly, a request by the Czech Republic for assistance shall be refused if, in the opinion of the Secretary for Justice, the request relates to the prosecution of a person for an external offence in a case where the person –

- (a) has been convicted, acquitted or pardoned by a competent court or other authority in the place (i.e. Czech Republic), or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence; or
- (b) has undergone the punishment provided by the law of that place (i.e. Czech Republic) or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence.

To put it beyond doubts, members have requested the Administration to as far as practicable set out in future MLA agreements the requirements in MLAO.

#### *Article 8 – Limitations on the use of information*

25. According to the Administration, Article 8(1) and (2) of the Czech Order are substantially the same as the corresponding provisions in the Model Agreement. Article 8(3) is added to the Czech Order at the request of the Czech Republic, which permits the use of information obtained pursuant to a request to certain specific purposes that are not stated in the request. Mr James TO has expressed concern about the enforcement of Article 8(3) and the possible abuse of the information so provided.

26. The Administration has explained that Article 8(3)(b) was added at the request of the Czech Republic. The article sets out the exceptional circumstances where the Requesting Party may use the information provided by the Requested Party for purposes other than those stated in the request. The exception is only valid for the prevention of serious crime and serious threat to public order. It is not to be used when any such crime has already been committed, where a request for assistance would still be necessary. Thus, the primary rule that the information is not to be used for the purpose of any other investigation or prosecution still holds. The Administration has pointed out that the exception would only be triggered in serious cases of criminal activities (such as murder) or imminent threats to public order, and it is expected to be rarely utilized.

27. The Administration has further explained that the provision is consistent with the exception in section 58(2) of the Personal Data (Privacy) Ordinance (Cap. 486), which provides for express exemption in cases where use of personal data is necessary for prevention of crime. The spirit of Article 8(3)(b) echoes the exception provided under section 58(2) of Cap. 486. It caters for the prevention of imminent serious crime where it may be impractical to seek consent from the Requested Party e.g. to prevent an immediate terrorist attack.

*Article 17 – Safe conduct*

28. Article 17 of the Czech Agreement deals with criminal and civil immunity to a person who goes to the Requesting Party to render assistance in a criminal matter. Members have noted that the time element contained in the corresponding Article XVII(1) of the Model Agreement, i.e. "preceded his departure from the requested party" has not been included in Article 17(1)(b), and have expressed concern about the implication of the absence of such time element and the safeguards to the person concerned.

29. The Administration has advised that the safeguards to protect the legal rights of a person to provide assistance to or from Hong Kong are contained in sections 17 and 23 of MLAO. According to the Administration, the transfer of the person to provide assistance is a consensual agreement. The transfer must be agreed by both parties to the MLA agreement as well as the person sought to be transferred. The person will be advised of the transfer arrangements and relevant undertakings before departure. The person, if not satisfied with the proposed arrangements and the undertakings provided, has the option of not giving consent and no transfer will be effected. The difference in formulation between the Model Agreement and the Czech Agreement does not affect the rights enjoyed by the person sought to be transferred.

*Article 20 – Spontaneous information*

30. The Subcommittee notes that Article 20 of the Czech Agreement which allows law enforcement agencies to provide to each other information considered relevant for criminal proceedings without a request is not included in the Model Agreement. Members have expressed concern about the Administration's policy towards exchange of information under this Article.

31. The Administration has explained that the article was included at the request of the Czech Republic, as it may exchange information without any request under its law. Similar to the Spain Agreement, provision of any information under the Czech Agreement is made on a voluntary basis and the article does not in any way oblige Hong Kong to provide information. In practice, information is not provided by the Central Authority of Hong Kong without prior request pursuant to an MLA agreement. However, Hong Kong has, from time to time, received spontaneous information from its counterparts in relation to offences which might be connected to Hong Kong.



*Article 23 – Entry into force and termination*

32. The Subcommittee has noted that the second sentence of Article XXI(2) of the Model Agreement, which provides for the continuous execution of requests made prior to the service of the termination notice, has not been included in Article 23(2) of the Czech Order. According to the Administration, that sentence has been deleted at the request of the Czech Republic. Nonetheless, Article 23(2) provides for termination to take effect six months after the giving of notice.

**Recommendation**

33. The Subcommittee raises no objection to the Spain Order and the Czech Order. The Administration will give fresh notices for moving the motions to seek the Council's approval of the two Orders.

**Advice sought**

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

**Subcommittee on  
Fugitive Offenders (Czech Republic) Order,  
Mutual Legal Assistance in Criminal Matters (Spain) Order and  
Mutual Legal Assistance in Criminal Matters (Czech Republic) Order**

**Membership list**

**Chairman**            Hon James TO Kun-sun

**Members**            Hon LEUNG Yiu-chung  
                             Hon IP Kwok-him, GBS, JP  
                             Hon SIN Chung-kai, SBS, JP

(Total : 4 members)

**Clerk**                Miss Betty MA

**Legal adviser**      Miss Carrie WONG

**Date**                 22 November 2013