

**立法會**  
**Legislative Council**

LC Paper No. CB(2)583/13-14

Ref : CB2/SS/3/13

**Paper for the House Committee**

**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 Fugitive Offenders (Czech Republic) 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 ("SFO") 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 which was 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 requirement 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

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 Mutual Legal Assistance in Criminal Matters (Spain) Order and the Mutual Legal Assistance in Criminal Matters (Czech Republic) Order ("the two MLA Orders") made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ("MLAO").

6. The two MLA Orders 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 agreements are reproduced in the respective Schedules 1 to the two MLA Orders. They specify the scope and procedures in relation to the provision of mutual legal assistance 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 two MLA Orders will come into operation on a day 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 and the two MLA Orders. Under the chairmanship of Hon James TO, the

Subcommittee has held three meetings with the Administration. The membership list of the Subcommittee is in the **Appendix**.

9. To allow more time for the Subcommittee to study the FO Order, the deadline for repeal of the FO Order has been extended from 4 December 2013 to 8 January 2014 by a resolution of the Council passed on 27 November 2013. In view of the formation of the Subcommittee, the Secretary for Security withdrew his notice for moving the two proposed resolutions under section 4 of MLAO at the Council meeting of 20 November 2013 to allow time for the Subcommittee to study the two MLA Orders in detail.

### **Deliberations of the Subcommittee**

10. In examining the FO Order, the Subcommittee has made an article-by-article comparison of the provisions of the Order with those in the HKSAR Model Agreement for the Surrender of Fugitive Offenders ("the Model Agreement"). The issues raised by members are summarised in the following paragraphs.

#### References to fugitive offenders

11. The Subcommittee notes that the references to "fugitive offenders" in the Model Agreement have been changed to "persons wanted for criminal proceedings" in the Agreement at the request of the Czech Republic. The Administration has explained that the Czech Republic does not have the concept of "fugitive offenders" in its law. Neither does it have the concept of "accused and convicted person" because there is no difference between a sentenced person and a convicted person under its law. According to the Administration, the term "persons wanted for criminal proceedings" is broad enough to cover persons wanted for prosecution or for the imposition or enforcement of a sentence contained in Article 1 of the Agreement.

#### Listing of offences

12. The Subcommittee notes that Article 3(2) of the Agreement, which sets out that each Contracting Party shall provide to the other a list of the offences for which surrender may be granted under its law, departs from the approach of setting out the list of extraditable offences in the Model Agreement and previous SFO agreements.

13. The Administration has explained that a number of the negotiation partners, particularly some European countries, have indicated genuine

difficulties in adopting the approach of setting out a list of offences for which surrender may be granted in the SFO agreements, as it is incompatible with their domestic laws and practices. Owing to such differences, a number of negotiations had been stalled. In order to move forward these negotiations and to conclude the agreements with a view to widening Hong Kong's international network in combating crimes, the Administration has, after consulting the Panel on Security in June 2005, adopted an alternative formulation where necessary in subsequent negotiations. Under the alternative formulation, it does not require a list of offences to be listed in the SFO agreement, but a statement in the agreement of the requirement that surrender should only be granted for offences for which surrender is permitted under the laws of both parties, and which carries penalty beyond a certain level, and that the parties should provide each other with a list of the offences for which surrender would be granted before the entry into force of the agreement. The alternative formulation is in full compliance with FOO. The agreement between Hong Kong and the Czech Republic is the first SFO agreement to adopt the alternative formulation.

14. Members have expressed concern that as the Agreement has not set out the list of offences for which surrender may be granted, it will be very difficult for members of the public to know from the text of the agreement the types of offences for which fugitives may be surrendered. This will create uncertainty in law.

15. The Administration has advised that the alternative formulation complies completely with the requirements under FOO. FOO provides that the relevant offences must come within any of the 46 categories of offences specified in Schedule 1 and are punishable in Hong Kong with imprisonment for more than 12 months, or any greater punishment. The Administration has assured members that any surrender must also fulfil the requirement of double criminality under FOO and SFO agreements. The alternative formulation therefore does not change Hong Kong's rights or obligations with respect to SFO under the agreement. As for the content of the lists, the Administration has pointed out that for Hong Kong's part, the list of categories of offences in Schedule 1 to FOO would be provided to the Czech Republic to fulfil the requirement of Article 3(2) of the Agreement. The Czech Republic has yet to provide the list of offences under the agreement but it might contain a description of the offences punishable by its laws by imprisonment or other form of detention exceeding a certain period of time, and will be available when or before the Czech Republic notifies HKSAR Government of completion of its domestic procedures.

16. While acknowledging the rationale for adopting the alternative formulation, members are of the view that the Administration should consider

ways to publicise the respective lists of offences for which surrender may be granted under the Contracting Parties' law, to be exchanged under Article 3(2) of the Agreement. Mr James TO has expressed concern that if the list of offences to be provided by the Czech Republic only contains a general description of all offences punishable by its law by imprisonment or other form of detention exceeding a certain period of time, there may be challenges against whether the exchange of lists of offences has been completed in accordance with Article 3(2) of the Agreement. He has asked the Administration to consider either setting out in another piece of subsidiary legislation the lists of offences to be exchanged, or repealing the FO Order and then making the Order again after completion of the exchange of lists of offences with the Czech Republic.

17. The Administration has explained that according to section 3(1)(a) of FOO, the Chief Executive in Council may make orders "reciting or embodying the terms of arrangements". As the lists of offences to be exchanged are not part of the arrangement, it is not appropriate to submit them to LegCo by means of subsidiary legislation. However, the Administration will publicise the lists of offences to be exchanged with the Czech Republic through Government notice in the Gazette and the Department of Justice's website for public viewing. In future, when the Administration is to submit to LegCo orders made under FOO which adopt the alternative formulation, it would invite the contracting partners to exchange the lists beforehand and submit them together with the orders to LegCo for consideration in one go.

18. Most members consider the Administration's proposal acceptable. While raising no objection to the proposed arrangement, Mr James TO maintains the view that Members should have an opportunity to study the lists of extraditable offences before the FO Order comes into force. Mr TO has asked the Administration to consider providing the relevant information in the LegCo Brief to be issued on the commencement notice for the FO Order, which is subject to the negative vetting procedure of LegCo, so that Members may consider whether there is a need to form a subcommittee to study the relevant commencement notice in detail. The Administration has responded that in addition to the arrangements mentioned in paragraph 17 above, it will provide LegCo with the respective lists of offences, to be exchanged under Article 3(2) of the Agreement, when or before the commencement notice for the FO Order is gazetted.

#### Discretionary ground to refuse surrender requests

19. Article 15(2) of the Model Agreement provides for "accusation against the person is not made in good faith in the interests of justice" as a discretionary

ground for refusal of surrender requests. Members have questioned the reasons for not including this Article in the Agreement.

20. The Administration has explained that the Model Agreement was drawn up by the Sino-British Joint Liaison Group before the Reunification. As the above discretionary refusal ground is now rarely used internationally and is not found in the United Nations model text of SFO agreement, Article 15(2) of the Model Agreement is not contained in a number of SFO agreements Hong Kong has entered into. According to the Administration, Article 7 of the Agreement provides that a person shall not be surrendered if the surrender request is made for the purpose of prosecution or punishment on account of race, religion, nationality, sex or political opinions, or if the person might be prejudiced at that person's trial on account of the above reasons. These safeguards are consistent with relevant requirements in many other SFO agreements in international community, and are capable of dealing with many situations arising from surrender requests not made in the interests of justice.

### **Recommendation**

21. The Subcommittee raises no objection to the FO Order, and will not move any motion to repeal it.

22. The Subcommittee will continue with its scrutiny of the two MLA Orders, and will provide another report to the House Committee when ready.

### **Advice sought**

23. 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