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Paper for the House Committee

Report of the Subcommittee on Fugitive Offenders (France) Order

Purpose

This paper reports on the deliberations of the Subcommittee on Fugitive Offenders (France) Order ("the Subcommittee").

The subsidiary legislation

Fugitive Offenders (France) Order

2. The Fugitive Offenders (France) Order (L.N. 240 of 2018) ("the Order") was made by the Chief Executive ("CE") 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 as between Hong Kong and the French Republic. The Order is made in consequence of the SFO agreement between the Government of Hong Kong Special Administrative Region ("HKSAR") and the Government of the French Republic which was signed in Hong Kong on 4 May 2017 ("the Agreement"). The Agreement is recited in the Schedule to the Order. Under section 2 of the Order, the procedures in FOO apply as between Hong Kong and the French Republic subject to the limitations, restrictions, exceptions and qualifications contained in the Agreement.

3. The 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 Order.

4. The Order will come into operation on a date to be appointed by the Secretary for Security by notice published in the Gazette. The commencement date will coincide with that on which the Agreement enters into force. Article 20 of the Agreement provides that it shall enter into force 30 days after

the date on which the Parties have notified each other in writing of the completion of their respective internal procedures required for entry into force of the Agreement.

The Subcommittee

5. At the meeting of the House Committee on 7 December 2018, Members agreed that a subcommittee should be formed to study the Order. Under the chairmanship of Hon James TO, the Subcommittee has held two meetings with the Administration. The membership list of the Subcommittee is in **Appendix I**.

6. To allow more time for the Subcommittee to study the Order, the deadline for repeal of the Order has been extended from the Council meeting of 12 December 2018 to that of 23 January 2019 by a resolution passed at the Council meeting of 12 December 2018.

Deliberations of the Subcommittee

7. In examining the Order, members have made reference to an article-by-article comparison of the provisions of the Agreement with those in the HKSAR Model Agreement for the Surrender of Fugitive Offenders ("the Model Agreement"). The deliberations of the Subcommittee are summarized in the ensuing paragraphs.

References to "fugitive offenders"

8. Members note that the references to "fugitive offenders" in the Model Agreement have been changed to "accused or convicted persons" in the Agreement at the request of the French Republic. The Administration has explained that the French side advised that the terms "accused persons" and "convicted persons" are used in all the extradition treaties of the French Republic, and the term "and" in French having a conjunctive sense is not appropriate in the context of the Agreement. The change does not affect the substance of the Agreement.

Listing of offences

9. Members note that Article 2 of the Agreement, which sets out that each Party shall inform the other in writing of the offences for which surrender may be granted under its law, departs from the approach of listing the offences for which SFO shall be granted in the Model Agreement.

10. According to the Administration, some prospective SFO agreement partners, particularly some European countries have indicated genuine difficulties in adopting the "listing" approach in the SFO agreements, as it is incompatible with their domestic laws and practices. The Administration has adopted, after consultation with the Panel on Security in 2005, an alternative formulation where necessary, which does not require a list of the offences to be provided in the agreement. Instead, a provision will be made in the agreement to require that surrender shall only be granted for offences for which surrender is permitted under the laws of both parties, and which carry penalty beyond a certain level, and that the parties shall provide each other with information on the offences for which surrender can be granted under their respective laws before the entry into force of the agreement.

11. While acknowledging the rationale for adopting the alternative formulation, members are concerned that the lack of an agreed list of extraditable offences in the Agreement may create uncertainty in law. The Administration has advised that the alternative formulation is in full compliance with FOO. FOO provides that, among others, as far as the requests to Hong Kong are concerned, the relevant offences must come within any of the 46 descriptions of offences specified in Schedule 1 and are punishable under the laws of both places with imprisonment for more than 12 months, or any greater punishment. As a past reference, the Administration has provided the list of offences for which fugitive offenders may be surrendered under the law of HKSAR to the Czech Republic under the Fugitive Offenders (Czech Republic) Order (Cap. 503AI), which has adopted the alternative formulation. The list of offences exchanged with the Czech Republic is also provided in the LegCo Brief on the commencement notice for the Fugitive Offenders (Czech Republic) Order issued in January 2015 for public viewing.

12. In response to the enquiry from the legal adviser to the Subcommittee, the Administration has confirmed that the list of offences set out in Schedule 1 to FOO will be provided to France to fulfil the requirement of Article 2.3 of the Agreement. At the Subcommittee's request, the Administration has provided in **Appendix II** a list of offences for which surrender may be granted under the law of France based on a list provided by the French side to the Department of Justice¹ ("DoJ"). 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 difficult for members of the public to know from the text of the Agreement the types of offences for which fugitives may be surrendered. The Administration

¹ According to the Administration, as France is conducting its legislative exercise of the Agreement, the list of offences may be subject to further amendment.

has advised that it will, following the approach as agreed by the former Subcommittee on Fugitive Offenders (Czech Republic) Order, publish the final lists of offences to be exchanged with France on DoJ's website under "Treaties and International Agreements" and as Government notice in the Gazette when the Order is about to commence. Taking into account members' suggestion, the Administration will also include an editorial note to the Order in the Hong Kong e-Legislation with an embedded hyperlink to the "Treaties and International Agreements" page on DoJ's website for ease of reference of the users.

Surrender of nationals

13. Members note that Article 3.2 of the Agreement, which provides that nationality of a fugitive offender shall be determined at the time of the commission of the offence for which surrender is requested, is added to the Agreement at the request of the French Republic. Members have enquired how the nationality of a fugitive offender at the time of commission of the relevant offence is to be determined.

14. The Administration has advised that in determining the nationality of the wanted person under the SFO agreement with other jurisdictions, the requested party will consider available information in relation to the wanted person's nationality and make enquiries with the appropriate authorities when necessary.

Mandatory grounds of refusal

15. Under section 5(1)(c) and (d) of FOO and Article 6(b) and (c) of the Model Agreement, a person shall not be surrendered to a prescribed place² where he is likely to be prosecuted, prejudiced at his trial, or punished, detained or restricted in his personal liberty on account or by reason of his "race, religion, nationality or political opinions". Members note that Article 5.1b) and c) of the Agreement also refers to prosecution, punishment, detention, restriction or prejudice on account of "sex" as an additional mandatory ground for refusing a request for surrender. Members have questioned the reasons for such inclusion.

16. The Administration has explained that the refusal ground of "sex" is added to the Agreement at the request of the French Republic to reflect the French legal requirements, and it is not the same as "sexual orientation" as

² Under section 2(1) of FOO, "prescribed place" means a place outside Hong Kong to or from which a person may be surrendered pursuant to an SFO agreement.

appeared in the SFO agreement with Ireland.³ It is in line with the protection against sex discrimination under the Sex Discrimination Ordinance (Cap. 480) and the Hong Kong Bill of Rights Ordinance (Cap. 383).

Discretionary grounds of refusal

17. Article 6.1a) of the Agreement provides that surrender may be refused if the requested Party considers that the offence was committed fully or partly in a place where its law applies. Members note that the provision has been modified from the Model Agreement at the request of the French Republic, in order to ensure that the discretionary ground of refusal is not widened to offences committed outside the territory of France but over which France has extra-territorial jurisdiction under French law. According to the Administration, the Agreement shall apply to the entire territory of the French Republic, including its overseas territories.

18. Members have enquired about the procedures for refusal of SFO requests from other jurisdictions under FOO and whether the refusal will be made in written form and supported by reasons. The Administration has explained that on receipt of a surrender request from another jurisdiction, CE would first consider whether to issue an authority to proceed ("ATP") in accordance with section 6 of FOO before the request can be processed further. Where an ATP has been issued, committal proceedings will be conducted in accordance with section 10 of FOO. The court will determine whether to commit the wanted person to custody to await CE's decision to make an order for surrender under section 13 of FOO. CE's decisions are made after taking into full account the relevant facts and circumstances of each case for the purpose of complying with FOO and the applicable SFO agreement. DoJ will then follow the established practice and inform the requesting jurisdiction of CE's decision in writing.

Postponed or temporary surrender

19. Article 7.2 of the Agreement provides that if an accused or convicted person is being proceeded against or is under punishment in the requested Party for any offence other than that for which surrender is requested, the requested Party may temporarily surrender the person sought to the requesting Party for the purpose of prosecution. The person so surrendered shall be kept in custody by the requesting Party and shall be returned to the requested Party after

³ It is noted that prosecution, punishment, detention, restriction or prejudice on account or by reason of "sexual orientation" is included as an additional mandatory ground for refusing a request for surrender under Article 5(1)(b) and (c) of the SFO agreement signed with Ireland recited in the Schedule to the Fugitive Offenders (Ireland) Order (Cap. 503AF).

conclusion of the proceedings against that person. Notwithstanding that there is similar provision in SFO agreements with some other jurisdictions, it is not found in FOO in the context of requests for surrender made by Hong Kong. Members have suggested the Administration to consider the need to include a provision similar to Article 7.2. in FOO so as to provide the necessary legal basis for adopting the arrangement in other SFO agreements in future. The Administration has noted members' views.

Concurrent requests

20. Article 13 of the Agreement sets out how concurrent requests for surrender for the same person received from the other Party and a third state are to be dealt with, and requires the requested Party to make its decision having regard to all the circumstances, including the relevant provisions of the applicable SFO agreements, the seriousness and place of commission of the offences, the respective dates of the requests, the nationality and ordinary place of residence of the person and the possibility of subsequent surrender to another place. Members are concerned about Article 13.3 which states that for HKSAR, the provisions of Article 13 shall not affect the arrangements for the surrender of accused or convicted persons between HKSAR and any other part of the People's Republic of China ("PRC")⁴. Members have asked how Hong Kong will handle concurrent requests for surrender of the same person from the French Republic, a third state, and any other part of PRC.

21. The Administration has advised that currently, there is no SFO arrangement between Hong Kong and any other part of PRC. Such an arrangement is still under discussion. Members further note that FOO does not currently apply to any other part of PRC.⁵ There were, however, occasions in the past where, following discussion between the Hong Kong Police Force and the Mainland law enforcement authorities, the latter exercised discretion to return to Hong Kong certain Hong Kong residents suspected of having committed crimes in Hong Kong for investigation or trials. No fugitive offenders have ever been surrendered to the Mainland authorities by the HKSAR Government.

22. In the absence of SFO arrangement between Hong Kong and any other part of PRC, members have enquired the need for including Article 13.3 in the Agreement. Members have also enquired about the intent of Article 13.3.

⁴ Under section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), "People's Republic of China" includes Taiwan, HKSAR and Macau.

⁵ See the definition of "arrangements for the surrender of fugitive offenders" under section 2(1) of FOO.

The Administration has explained that Article 13.1 and 13.2 aim to specify that if a party to the Agreement receives requests from the other party to the Agreement and another state at the same time, how such requests should be dealt with. As HKSAR is part of PRC, Article 13.1 and 13.2 are not applicable to requests from other part of PRC to Hong Kong. It is the common practice that in other jurisdictions, in handling concurrent requests for surrender of the same person from a part of within the requested state and a foreign jurisdiction, the request from the former will normally take precedence over the latter. In the circumstances, the addition of Article 13.3 aims to ensure that the operation of Article 13 of the Agreement will not affect the future SFO arrangement between Hong Kong and any other part of PRC.

23. Noting that the SFO agreements with other jurisdictions do not contain any provision similar to Article 13.3 of the Agreement, members have suggested the Administration to consider whether there is any implication on the existing SFO agreements. The Administration has noted members' views.

Arrangements for surrender

24. Under Article 15.3, the requested Party may refuse surrender upon the requesting Party's failure to take custody of the person within the specified period. Article 15.4 sets out that if circumstances beyond its control prevent a Party from surrendering or removing the person, it shall notify the other Party. In that case, the two Parties shall agree a new date for surrender and Article 15.3 shall apply. Members are concerned that under section 14 of FOO, the wanted person may make an application to the Court of First Instance ("CFI") for his discharge after the expiration of the specified period. Members have enquired whether the operation of Article 15.3 would affect CFI's decision under section 14.

25. The Administration has explained that under section 14 of FOO, if a surrender order has been made in relation to a wanted person and the person's removal is not prohibited by the provisions of FOO, he may apply to CFI for his discharge if he is still in Hong Kong after the expiration of the specified period. If CFI is satisfied that reasonable notice of the proposed application has been given to CE, CFI may, unless sufficient cause is shown to the contrary, by order direct the applicant to be discharged. In response to any application for discharge under section 14 of FOO, the Administration will provide all available information, including the provision in Article 15.3 of the Agreement, for CFI's consideration.

Requests for transit

26. Members note that Article 19 is added to the Agreement to cater for cases of transit of a person surrendered through one of the Parties to the other Party by a third party. Members have expressed concern that in some cases, when a person pursuant to a transit request is being transported in custody through Hong Kong to a place outside Hong Kong, another jurisdiction may make a request for the surrender of the same person. To put it beyond doubt, members have suggested the Administration to consider the need to state explicitly in FOO how a request for the surrender of a person who is being transported in custody through Hong Kong pursuant to a transit request made by another jurisdiction should be dealt with. The Administration has noted members' views and would review at opportune time.

Recommendation

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

Advice sought

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

Subcommittee on Fugitive Offenders (France) Order

Membership list

Chairman Hon James TO Kun-sun

Members Hon CHAN Hak-kan, BBS, JP
Hon Kenneth LEUNG
Hon Dennis KWOK Wing-hang

(Total : 4 members)

Clerk Miss Betty MA

Legal adviser Mr Bonny LOO

List of offences for which surrender may be granted under the law of France*

1. genocide or direct and public incitement to commit genocide;
2. assassination, murder, poisoning, violence leading to unintentional death, involuntary homicide;
3. sexual assault or rape, especially when committed against minors, indecent exposure, sexual harassment, offences relating to the dissemination, printing, saving or transmission of an image or representation of a minor of pornographic nature;
4. deliberate violence, torture and barbaric acts, death threats, endangering others by manifestly deliberate breach of a duty of safety or care;
5. breaches of legislation on narcotics, psychotropic substances and precursor compounds and basic chemical substances used for illegal manufacturing of narcotic and psychotropic drugs; drug trafficking offences;
6. offenses regarding firearm legislation;
7. abortion offences;
8. incitement to suicide followed by effects;
9. enforced disappearances, abduction, deprivation of liberty, arbitrary detention, including as regards hostages; enslavement; human trafficking;
10. hijacking of aircraft, ships or any other means of transport;
11. procuring;
12. corruption of minors;
13. violence or harassment by a person who is or was the spouse, cohabitee or civil partner of the victim, neglect of a minor, family abandonment, non-representation of children, abduction of minors, putting children at risk, incest on minors; bigamy;
14. theft, especially when aggravated by circumstances of violence or breaking and entering; extortion; blackmail; fraud; breach of trust; concealment of property; fraudulent conversion of securities or pledges, money-laundering, presentation of incorrect accounts to hide the situation of stock companies or limited companies;
15. bankruptcy, fraudulent conveyance;
16. serious or dangerous destruction, especially when committed by fire or dangerous means;
17. attacks on automated data processing systems;

* Prepared on the basis of a list provided by France on 10 December 2018.

18. breaches of legislation regarding active and passive corruption, active and passive trading in influence and misappropriation of public funds;
19. unlawful taking of interest and favouritism, misappropriation of corporate assets, bankruptcy;
20. offences against the administration of justice;
21. offences of forgery and use of forgeries;
22. offences regarding evasion of authorities and rebellion;
23. breaches of legislation regarding intellectual property rights, copyright and related rights, patents, designs, models and trademarks;
24. breaches of legislation on explosives;
25. breaches of legislation on air, soil or water pollution, legislation on classified facilities, trafficking of waste or protection of public health punishable by sentences of imprisonment;
26. mutiny;
27. smuggling of prohibited goods; breaches of legislation regarding import and export bans; trafficking of historical and archaeological artefacts;
28. offences regarding irregular immigration;
29. gambling or lottery offences;
30. tax offences, regardless of whether the Requesting Party has or does not have a direct or indirect tax or customs law of the same nature as that of the Requested Party;
31. deceptive marketing practices;
32. offences undermining the transparency of calls for tender;
33. where they are provided for by law, offences regarding concealment or laundering of the product of any offence subject to surrender under this Agreement;
34. offences for which individuals may be surrendered under international conventions of which the provisions apply to the Parties; offences which result from decisions by international organizations which are legally binding for the Parties;
35. where it is provided for by law, criminal association with a view to committing an offence for which individuals may be surrendered under this Agreement, or attempts to commit any such offence;
36. collusion in an offence for which individuals may be surrendered under this Agreement;
37. any other offence for which individuals may be surrendered pursuant to the legislation of the two Parties.