EXPLANATORY MEMORANDUM TO

THE CRIME (INTERNATIONAL CO-OPERATION) ACT 2003 (DESIGNATION OF PARTICIPATING COUNTRIES) (ENGLAND, WALES AND NORTHERN IRELAND) ORDER 2010

2010 No. 36

1. This explanatory memorandum has been prepared by The Home Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the Instrument

2.1 This Order designates Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Israel, Montenegro, Serbia, and Switzerland as participating countries under section 51(2)(b) of the Crime (International Co-operation) Act 2003 ('the 2003 Act') for the purposes of sections 31, 47 and 48 of, and paragraph 15 of Schedule 2 to, the 2003 Act. In addition Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Israel, Montenegro and Serbia are also designated as participating countries under 51(2)(b) of the 2003 Act for the purposes of sections 4 and 4 B of that Act.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 As the designation of Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Israel, Montenegro, Serbia and Switzerland as participating countries is necessary in order to enable the UK to ratify the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters (Cmnd 5603 of 2002), the Order has been drafted so that it will come into force on the date on which the Protocol enters into force in respect of the UK. The Protocol will enter into force on the first day of the month following the expiry of three months after the date on which the UK deposits an instrument of ratification with the Secretary General of the Council of Europe. The Order also provides details of the page of the Council of Europe's website on which information as to the ratification of Council Europe instruments can be found. This information is included so as to enable the reader of the Order to discover when the UK has deposited the relevant instrument of ratification.

4. Legislative Context

4.1 The UK is a signatory to the 1959 European Convention on Mutual Assistance in Criminal Matters (ratified) and its Second Additional Protocol (not ratified). The UK now wishes to ratify the Second Additional Protocol. Prior to ratification and in order to comply with the provisions of the Second Additional Protocol, it is necessary for the UK to make an Order under section 51(2)(b) of the 2003 Act.

4.2 Part 1 of the 2003 Act provides statutory powers pursuant to which the United Kingdom can both seek and provide various forms of mutual legal assistance concerning criminal matters. Some of those statutory powers can, however, only be exercised where the country in question is a 'participating country' as defined in section 51(2) of the 2003 Act. Where a country is a member State of the European Union on the date on which a provision is commenced, that country will, by virtue of 51(2)(a), fall to be regarded as a participating country for the purpose of the commenced provision. Where, however, a country is not a member State on the date on which a provision is commenced, that country must be designated as a participating country under an Order made under section 51(2)(b) so as to be regarded as a participating country for the purpose of the commenced provision. This Order designates Albania, Bosnia and Herzegovina, Croatia, Israel, Montenegro, Serbia, Switzerland and the Former Yugoslav Republic of Macedonia as participating counties for the purposes of sections 31, 47 and 48 of, and Paragraph 15 of Schedule 2 to, the 2003 Act. In addition Albania, Bosnia and Herzegovina, Croatia, Israel, Montenegro, Serbia, and the Former Yugoslav Republic of Macedonia are to be designated for the purposes of sections 4 and 4B of the 2003 Act.

4.3 Section 4 of the 2003 Act establishes that where a person is located in a participating country process must be served on that person directly and by post. The only exceptions are where the person's correct address is unknown, where it has not be possible to serve the process by post, or where there are good reasons for thinking that service by post will not be effective, or is inappropriate. Section 4B of the 2003 Act (which was inserted into the 2003 Act by section 331 of, and paragraph 16 of Schedule 36 to, the Criminal Justice Act 2003) establishes that the same rules apply in relation to a written charge or a requisition which is served, pursuant to section 4A of the 2003 Act (which was also inserted into the 2003 Act by section 331 of, and paragraph 16 of Schedule 36 to, the Criminal Justice Act 2003), on a person located in that participating country.

4.4 Section 31 of the 2003 Act enables the Secretary of State, on request, to nominate a court so that a witness located in the UK may provide evidence by telephone for use in proceedings in a participating country. Paragraph 15 of Part 2 of Schedule 2 to the 2003 Act provides that the court in the participating country making the request must supervise the giving of the evidence.

4.5 Section 47 of the Act enables the transfer of a UK prisoner to a participating country to assist with a criminal investigation into an offence which was, or may have been, committed in the UK. This is subject to the consent of the prisoner and to an agreement being reached with the relevant participating country. Section 48 makes similar provision for the transfer of prisoners in participating countries to the UK to assist with investigations into an offence which was, or may have been, committed in

that participating country. Again, this is subject to the consent of the prisoner and to an agreement being reached with the relevant participating country.

5. Territorial Extent and Application

5.1 This instrument applies to England, Wales and Northern Ireland.

6. European Convention on Human Rights

Lord West of Spithead, Parliamentary Under Secretary of State, has made the following statement regarding Human Rights:

In my view the provisions of the Crime (International Cooperation) Act 2003 (Designation of Participating Countries) (England, Wales and Northern Ireland) Order 2010 are compatible with the Convention rights.

7. Policy background

7.1 The UK has signed and ratified the 1959 European Convention on Mutual Assistance in Criminal Matters. This forms the treaty basis for a high number of both incoming and outgoing requests for criminal mutual legal assistance. The Second Additional Protocol to the 1959 Convention is aimed at strengthening mutual legal assistance amongst ratifying states and widening the pool of mutual legal assistance available. The UK is a signatory to this Protocol but has not yet ratified it. The UK now proposes to ratify the Protocol.

7.2 There are a number of provisions of the Second Additional Protocol which the UK will need to make legislative changes to comply with. In the Second Additional Protocol Article 10 provides for hearing by telephone conference and Article 13 provides for the temporary transfer of detained persons to another country. Sections 31, 47 and 48 of, and Paragraph 15 of Schedule 2 to, the 2003 Act provide the powers in domestic law through which we can comply with these obligations under the Second Additional Protocol. These provisions are, however, applicable only in relation to a 'participating country'. As explained in paragraph 4.2 above, countries which were not Member States of the European Union on the date on which a provision of the 2003 Act was commenced must be designated as a participating country by order. So as to comply with the obligations that will be imposed by ratification of the Second Additional Protocol it will, therefore, be necessary to designate all those countries which have ratified the Second Additional Protocol but which are not currently deemed to be a 'participating country' for the purpose of the provisions of the 2003 Act which are set out above. These countries are Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Israel, Montenegro, Serbia, and Switzerland.

7.3 Designation of Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Israel, Montenegro, Serbia, and Switzerland as participating countries for the purpose of section 31 of the 2003 Act will allow for persons in the UK to give evidence via telephone to a court in any of these countries. In many cases, a witness may not wish to travel to the foreign country and providing evidence by telephone is a method of ensuring that the interests of justice are served without

causing distress or inconvenience to a witness. Where evidence is provided by telephone in this way Paragraph 15 of Part 2 of Schedule 2 to the 2003 Act ensures that this process will be supervised by a court in the participating country.

7.4 Article 13 of the Second Additional Protocol provides for the UK to request the temporary transfer of a person in custody in the UK to another State in order that they assist with a UK criminal investigation or proceeding. Similarly, the UK can be the subject of such a request from another State. It is possible for countries to make a declaration under this article as to whether consent would be required from the person in custody before any transfer could take place. The UK envisages making a declaration under Article 13(7) to the effect that the UK will always require the consent of the detained person before any transfer could take place. Designation of Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Israel, Montenegro, Serbia, and Switzerland as participating countries is necessary under s47 and s48 of the 2003 Act in order to comply with our obligations under Article 13.

7.5 Article 16 of the Second Additional Protocol allows for process to be served directly by post. Although already permitted under our existing legislation it is felt that designation under sections 4 and 4B of the 2003 Act will make postal service more likely and, thus, reduce bureaucracy. Sections 4 and 4B establish, respectively, that service of process and service of written charge or requisition to participating countries must be done by post unless one of the listed exceptions apply. Switzerland is already deemed a 'participating country' for the purposes of these sections but Albania, Bosnia and Herzegovina, Croatia, Israel, Montenegro, Serbia, and the Former Yugoslav Republic of Macedonia need to be designated.

8. Consultation Outcome

8.1 Consultation with the Foreign and Commonwealth Office, the Home Office, the Crown Prosecution Service, the Revenue and Customs Prosecution Office, Her Majesty's Revenue and Customs, The Attorney General's Office, the Crown Office and the Procurator Fiscal Service, the Scottish Executive, the Metropolitan Police, the Serious Organised Crime Agency, the Northern Ireland Office, the Financial Services Authority and the Serious Fraud Office has taken place. No objections were raised.

9. Guidance

9.1 None.

10. Impact

10.1 There is unlikely to be any impact on business, charities or voluntary bodies as they are already required to comply with the necessary legislation.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument as no impact on the private, public or voluntary sector is foreseen.

11. Regulating small business

11.1 The legislation will not have an impact on small business.

12. Monitoring & review

12.1 The outcome will be subject to internal review after twelve months to assess if any unexpected impact has occurred.

13. Contact

Sara Khan at the Home Office Tel: 020 7035 0388 or e-mail: Sara.Khan@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.