EXPLANATORY MEMORANDUM TO

THE CRIME (INTERNATIONAL CO-OPERATION) ACT 2003 (DESIGNATION OF PARTICIPATING COUNTRIES) (ENGLAND, WALES AND NORTHERN IRELAND) (NO 2) ORDER 2009

2009 No.

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 Switzerland as a participating country under section 51(2)(b) of the Crime (International Co-operation) Act 2003 ('the 2003 Act') for the purposes of sections 4, 4B, 32, 35, 43, 44 and 45 of that Act. Norway and Iceland are also designated as participating countries under section 51(2)(b) of the 2003 Act for the purposes of sections 31, 32, 35, 43, 44, 45, 47 and 48 of, and paragraph 15 of Part 2 of Schedule 2 to that Act.

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

3.1 None

4. Legislative Context

4.1 This Order is necessary in light of two agreements that the European Union has concluded: the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto ('the Norway & Iceland Agreement'), and the Cooperation Agreement between the European Community and its Member states, of the one part, and the Swiss Confederation, of the other part, to Combat Fraud and any other Illegal Activity to the Detriment of their Financial Interests ('the Swiss Agreement'). Both these agreements relate to the provision of mutual legal assistance in criminal matters.

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 Norway, Iceland and Switzerland as participating counties for the purposes of certain provisions found in Part 1 of the 2003 Act.

4.3 Section 3 of the 2003 Act allows process issued or made in UK criminal proceedings to be served on persons who are located overseas. Section 4 of the 2003 Act, however, establishes that where the person in question 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 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, on a person located in a 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 32 of the Act confers on the Secretary of State a discretionary power to direct a senior police or customs officer to apply for, or to arrange respectively for a constable or a customs officer to apply for, a customer information order when a request for such information is received from a participating country. A customer information order is an order made by a judge which requires a financial institution to provide such customer information as is specified in the order in relation to the person in respect of whom the order is made.

4.6 Section 35 of the 2003 Act confers on the Secretary of State discretion to direct a senior police or senior customs officer to apply for, or to arrange respectively for a constable or a customs officer to apply for, an account monitoring order when a request for such information is received from a participating country. An account monitoring order is an order made by a judge that the financial institution specified in the application for the order must, for the period stated in the order, provide account information of the description specified in the order to the applicant in the manner, and at or by the time or times, stated in the order.

4.7 Sections 43 and 44 of the 2003 Act enable judicial and prosecuting authorities to make outgoing requests for customer and account information to participating countries. Section 45 of the 2003 Act provides that these requests will be forwarded to the participating country by the Secretary of State.

4.8 Section 47 of the Act enables the transfer of UK prisoners 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 an agreement being reached with the 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 an agreement being reached with the 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) (No 2) Order 2009 are compatible with the Convention rights.

7. Policy background

7.1 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.

7.2 The UK is a party to both the Norway & Iceland Agreement, and to the Swiss Agreement. The Swiss Agreement has been ratified by parliament and as such imposes obligations on the UK. In order to meet these obligations it is necessary to designate Switzerland a participating country for certain provisions of the 2003 Act. The Norway & Iceland Agreement provides for Norway and Iceland to be bound by certain articles of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000. Consequently, in order to ensure UK compliance with the Norway & Iceland Agreement both countries need to be designated as participating countries for the purposes of certain sections of the 2003 Act.

7.3 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. The aim of this direct transmission is to ensure that the process is not encumbered by unnecessary bureaucracy and that the relevant documents are served as expeditiously as possible.

7.4 Designation of Norway and Iceland 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 either of these countries. Paragraph 15 of Part 2 of Schedule 2 to the 2003 Act ensures that the court in the participating country supervises this. 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.

7.5 Chapter 4 of Part 1 of the Act implements the 2001 Protocol to the European Convention on Mutual Assistance in Criminal Matters 1959 which creates obligations for participating countries to respond to requests for assistance with locating banking accounts and to provide banking information relating to criminal investigations. The purpose of the 2001 Protocol is to assist signatories to tackle serious international crime, in particular economic crime and money laundering.

7.6 Designation of Switzerland, Norway and Iceland under section 51(2)(b) of the 2003 Act for the purposes of s 32, 43 and 45 of that Act will allow requests for customer information orders made by these countries to be executed in England and Wales and Northern Ireland and for such requests to be made to them by certain judicial and prosecuting authorities in England and Wales and Northern Ireland.

7.7 Section 47 of the Act enables the transfer of UK prisoners 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 an agreement being reached with the 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. This is subject to the consent of the prisoner and an agreement being reached with the participating country.

8. Consultation Outcome

8.1 Consultation with the Foreign and Commonwealth Office, Ministry of Justice, Her Majesty's Revenue and Customs, Crown Prosecution Service, the Attorney General's Office, Northern Ireland Office and the Scottish Executive took place. No objections were raised.

9. Guidance

9.1 None.

10. Impact

10.1 There is likely to be no 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 following twelve months to assess if any unexpected impact has occurred.

13. Contact

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