EXPLANATORY MEMORANDUM TO

THE CRIME (INTERNATIONAL CO-OPERATION) ACT 2003 (DESIGNATION OF PARTICIPATING COUNTRIES) (ENGLAND, WALES AND NORTHERN IRELAND) (NO. 2) ORDER 2010

2010 No.

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

2. Purpose of the Instrument

2.1 This Order designates Japan 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 32, 35, 43, 44 and 45 of the 2003 Act.

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

3.1 None.

4. Legislative Context

4.1 The UK opted in to a Council Decision to conclude a mutual legal assistance ('MLA') Agreement between the EU and Japan ('the Agreement') on 17 March 2010. Prior to conclusion of the Agreement by the EU and in order to comply with the provisions of the Agreement 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 section 51(2)(a) of the 2003 Act, 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 provision in question. As Japan is not an EU member State, this Order designates Japan as

a participating country for the purposes of sections 32, 35, 43, 44 and 45 of the 2003 Act.

4.3 Section 32 of the 2003 Act enables the Secretary of State, on request, to obtain customer information in relation to a person being investigated for serious criminal conduct in a participating country. Section 35 of the 2003 Act enables the Secretary of State, on request, to obtain account information in relation to an investigation into criminal conduct in a participating country.

4.4 Section 43 allows for a judicial authority in the UK to make a request to a participating country for information on whether a person holds any accounts, the details of these accounts and the details of transactions that occurred in a specified period of time. Such a request may only be made if: the person is being investigated in the UK for serious criminal conduct; if it appears that the person holds or may hold an account in the participating country; and, if this information is likely to be of substantial value to the investigation.

4.5 Section 44 allows for a judicial authority in the UK to request information from a participating country on the details of banking transactions carried out over a specified period. This information must be relevant to an investigation into criminal conduct in the UK.

4.6 Section 45 provides that requests for assistance made under sections 43 and 44 of the 2003 Act must be sent to the Secretary of State to be forwarded to the relevant authority in the participating country. In cases of urgency, however, the request may be sent directly to the court that has jurisdiction in the place where the information is to be obtained.

5. Territorial Extent and Application

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

6. European Convention on Human Rights

6.1 Baroness Neville-Jones, Minister of State for security and counter-terrorism, has made the following statement regarding Human Rights:

‘In my view the provisions of the Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (England, Wales and Northern Ireland) (No. 2) Order 2010 are compatible with the Convention rights’

7. Policy background

7.1 The Agreement seeks to improve international co-operation in the field of MLA between EU Member States and Japan. Until now MLA has been conducted with Japan on an informal basis and this agreement will, for the

first time, provide a comprehensive framework for MLA between the EU and Japan. As the UK opted in to the Council Decision to conclude this agreement between the EU and Japan there is an obligation on us to ensure we are able to give effect to the terms of the Agreement once it comes into force.

7.2 Article 18 of the Agreement enables one party to request the other to ascertain whether banks within their territory possess information on whether a suspect is the holder of an account and to produce records of any such accounts, transactions or recipient accounts. Sections 32, 35, 43, 44 and 45 of the 2003 Act provide the powers in domestic law through which we can comply with these obligations. 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 Agreement it will be necessary to designate Japan for the purpose of the provisions of the 2003 Act which are set out above.

7.3 Article 18(1) provides for the requested States to confirm whether a suspect holds or controls a bank account. Section 32 of the 2003 Act provides the powers in domestic law through which we can comply with this obligation. This allows for the UK to request a customer information order on behalf of a foreign authority.

7.4 Article 18(2) provides for the requested State to give information on bank accounts and records of banking operations. Section 35 of the 2003 Act provides for the Secretary of State to be able to apply, or arrange for the application of an account monitoring order on behalf of a foreign authority.

7.5 Sections 43, 44 and 45 of the 2003 Act provide the corresponding provisions under which the UK can request banking information from Japan for investigations and criminal proceedings in the UK. Section 43 allows for a judicial authority in the UK to make a request to a participating country for information on whether a person holds any accounts, the details of these accounts and the details of transactions that occurred in a specified period of time. Section 44 allows for a judicial authority in the UK to request information from a participating country on the details of banking transactions carried out over a specified period. Section 45 provides that requests for assistance made under sections 43 and 44 of the 2003 Act must be sent to the Secretary of State to be forwarded to the relevant authority in the participating country, save in cases of urgency.

8. Consultation Outcome

8.1 Consultation was carried out with the Foreign and Commonwealth Office, the Scottish Executive, the Crown Office, the Crown Prosecution Service, the Ministry of Justice, Her Majesty's Revenue and Customs, the

Serious Fraud Office, the Public Prosecution Service Northern Ireland and the Northern Ireland Office. 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

13.1 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.