These notes refer to the Crime (International Co-operation) Act 2003 (c.32) which received Royal Assent on 30 October 2003

CRIME (INTERNATIONAL CO-OPERATION) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Miscellaneous

Section 80: Disclosure of information by SFO

144. This section amends section 3 of the Criminal Justice Act 1987 (which established the Serious Fraud Office ("SFO")).

145. It extends the circumstances in which the SFO can disclose information. Currently, the SFO is permitted to disclose information, in particular circumstances, for the purposes of any prosecution: the amendment will enable that disclosure also to take place for the purposes of any criminal investigation, whether in the UK or elsewhere.

146. This section also extends the categories of persons or bodies to which information may be disclosed. At present, disclosure of information by the SFO is limited to bodies with functions equating to those of the SFO. The amendment will improve international co-operation in respect of crime, and extends to bodies established under the Treaty on European Union (designed, in particular, to facilitate exchanges of information with Eurojust) or any other treaty to which the UK is a party.

Section 81: Inspection of Information Systems

147. This section extends the functions of the Information Commissioner under Part VI of the Data Protection Act 1998 (the "1998 Act"). It allows the Information Commissioner to inspect personal data recorded in the UK sections of three European information systems without a warrant. These information systems are the Schengen Information System ("SIS"), the Europol Information System ("EIS") and the Customs Information System ("CIS"). The requirement for an independent power of supervision arises from the Conventions referred to in subsection (7) of the section, establishing the SIS, EIS and CIS. These Conventions require the supervisory authority to have free access to the national sections of the systems. At present the Commissioner is only able to enter premises to carry out inspections of the EIS either by agreement with the relevant UK body, the National Criminal Intelligence Service ("NCIS"), or on production of a warrant. The UK is not yet connected to the SIS or the CIS, but similar arrangements would apply once connection has been established.

148. As required by the Conventions, the purpose of the Information Commissioner's inspections will be to ensure that the processing of personal data in the national sections of these systems is in compliance with processing requirements under the 1998 Act. The Information Commissioner will be required to notify the relevant data controller of his intention to inspect the systems (other than in cases of urgency), but a person obstructing the Information Commissioner in the course of his inspection or failing without reasonable excuse to give him any reasonable assistance will be guilty of an

offence. The penalties for the offence are as established by section 60 of the 1998 Act, which provides that a person guilty of an offence in relation to the powers of the Information Commissioner is liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £5,000). However, if required for the purposes of safeguarding national security, the additional powers attributed to the Information Commissioner under this section in respect of personal data in the systems will not apply.

Section 82: Driver licensing information

149. This section provides statutory authority for the Driver and Vehicle Licensing Agency ("DVLA") and Driver and Vehicle Licensing Northern Ireland ("DVLNI") to disclose certain data for the purposes of the SIS. The relevant data held by DVLA and DVLNI relates to driver licensing and is that held in any form under Part 3 of the RTA 1988, or Part 2 of the Road Traffic (Northern Ireland) Order 1981. This information is to be shared with the United Kingdom's national section of the SIS, and will ensure that the UK fully meets the requirements of its opt-in to the Schengen Convention according to EU Council Decision 2000/365/EC.

Section 83: Foreign Surveillance Operations

150. Article 40 of the Schengen Convention provides that police officers keeping a person under surveillance in their own country because he is suspected of having committed an extraditable offence may require neighbouring Schengen countries to assist in keeping the person under surveillance if he crosses the border into their territory. In the vast majority of cases such assistance will be requested in advance and, when the surveillance enters the UK, our own officers will take over the surveillance. These UK officers will need to be properly authorised to conduct such surveillance under the Regulation of Investigatory Powers Act 2000 ("RIPA") and the Regulation of Investigatory Powers (Scotland) Act 2000. However, on occasions it will not be possible for a request to be made sufficiently far in advance for a UK team to take over the surveillance at the point of entry to the UK. This section implements Article 40(2) of the Schengen Convention, which covers such cases by making provision for a foreign surveillance operation, which was initiated in one participating country but which has had to travel unexpectedly to another participating country, to continue lawfully to keep an individual under surveillance for a period of up to five hours. To legislate for this change, this section amends RIPA by introducing a new section (Section 76A Foreign surveillance operations) to allow police or customs officers from other Member States to continue surveillance on UK territory for this period.

151. At present, UK police officers are not allowed to follow suspects across the border into the territory of another Schengen state (and vice versa foreign officers may not travel into the UK to conduct similar activities). Instead they are expected to contact the police authorities of that state, and arrange for them to take over the surveillance operation. However, in practice police officers are not always immediately available to take over the operation, and this can result in losing the suspect. The provisions set out in this section are meant to avoid this occurrence.

152. This section applies in the circumstances set out in subsection (1)(a), (b) and (c). Subsection (1)(a) provides that before crossing the border the surveillance must be lawful in the country in which it is being carried out. In addition the surveillance must be "relevant surveillance". Subsection (2) defines this as being surveillance which would fall within the definition of directed or intrusive surveillance in RIPA, therefore being covert surveillance of which the target is unaware. In addition the target of the surveillance is suspected of having committed a relevant crime.

153. Subsection (3) provides that a relevant crime is one that falls within Article 40(7) of the Schengen Convention, namely; murder, manslaughter, rape, arson, forgery of money, aggravated burglary and robbery and receiving stolen goods, extortion, kidnapping and

hostage taking, trafficking in human beings, illicit trafficking in narcotic drugs and psychotropic substances, breach of laws on arms and explosives, wilful damage through the use of explosives, illicit transportation of toxic and hazardous waste. Subsection (3)(b) sets out that a relevant crime can also be a crime as defined in other international agreements, which contain provisions on cross-border surveillance, specified by the Secretary of State by order.

154. Subsection (1)(b) provides that the surveillance can only be carried out in the UK. Subsection (1)(c) provides that the circumstances must be such that it is not reasonably practicable for UK officers (as defined in subsection (11)) to take over the surveillance when the suspect arrives in the UK under a normal RIPA authorisation (or its Scottish equivalent).

155. The purpose of subsection (4) is to provide that urgent cross border surveillance will be lawful under RIPA if certain conditions are complied with. Two key conditions from Article 40 have been placed on the face of the Act. The first refers to subsection (6) that implements the requirement in Article 40(2) for foreign officers to contact the authorities of the state into which they have entered immediately upon crossing the border and to submit a formal request for assistance. The second in subsection (4)(b) implements the condition in Article 40(3) that prohibits the officers from entering private homes or places. The Secretary of State is also given an order-making power to specify, if needed, other appropriate conditions for the conduct of foreign officers should their surveillance operation unexpectedly cross into the UK. Failure to comply with any such conditions would mean that the surveillance would not be lawful under this new section. Subsection (4) also provides that no surveillance is lawful by virtue of this subsection, even if all the other conditions covered by the section are satisfied, if the foreign officer subsequently seeks to stop and question the person under surveillance in the United Kingdom in relation to the relevant crime. This is in line with Article 40(3)(f) which provides that the officers conducting the surveillance may neither challenge nor arrest the person. Although it is most unlikely that a foreign officer would ever stop and question the person under surveillance, this unequivocal declaration in the subsection makes clear that such conduct would be unacceptable.

156. Subsection (5) provides that foreign police officers carrying out such surveillance operations are not subject to civil liabilities in relation to conduct which is incidental to surveillance which is lawful. Incidental conduct is considered to be conduct that is inextricably associated with surveillance to the extent that it is effectively unavoidable if the surveillance, which would have to be lawful, is to continue. Incidental conduct covers an extremely narrow set of circumstances, for example trespass. The same protection is given to UK officers by section 27(2) of RIPA in respect of UK officers who conduct surveillance authorised under RIPA.

157. Subsection (7) establishes that this type of unaccompanied surveillance should not last for more than five hours. The five hour period will allow officers to continue surveillance, whilst providing time for officers in the destination country to be mobilised. If resources are available to mobilise a UK surveillance team within the five-hour period, a joint operation will be established, with the UK officers taking over the surveillance and the foreign officers adopting observer status at the point of hand-over. If the UK has not taken over the operation by the time the five hour period has elapsed then the foreign officers will no longer have lawful authority to continue and will be expected to cease the surveillance.

158. Subsection (8) and (10) set out further restrictions on the operation of such teams. Subsection (8) permits the Secretary of State to designate persons within UK law enforcement with the power to terminate surveillance operations of this kind taking place in the UK, fulfilling the requirements of Article 40(2) of the Schengen Convention. The decision to terminate might be taken because UK officers have taken over the surveillance or because the surveillance was considered inappropriate.

159. Taking account of devolved responsibilities, the wording of this and the other order-making powers in section 76A provide for a single order to be made to cover the whole of the UK, subject to the consent of Scottish Ministers.

160. Subsection (11) includes a definition of UK officer which is relevant to subsection (1).

Section 84: Assaults on foreign officers

161. The purpose of this section is to provide, in accordance with Article 42 of the Schengen Convention, that officers from abroad conducting surveillance under the new section 76A are treated in the same way as constables while in England and Wales, Scotland or Northern Ireland with respect to offences committed against them.

162. The modifications to the relevant Acts put the foreign officers on to the same footing as domestic officers, in that just as it is already an offence to assault or obstruct a constable or a person assisting a constable in the execution of his duty, it shall also be an offence to assault or obstruct any foreign officer carrying out surveillance under section 76A of RIPA.

Section 85: Liability in respect of foreign officers

163. This section implements Article 43 of the Schengen Convention, which establishes that in the first instance the state in whose territory the surveillance operation is being undertaken, is liable to cover the cost of any damage foreign surveillance officers may commit, or legal action to which they may be subject. The UK has decided that NCIS should be responsible for such liabilities in the first instance in relation to persons carrying out surveillance under new section 76A of RIPA. Under the Schengen Convention, such sums may be recovered from the foreign state. Subsection (3) provides that such sums received from abroad by the Secretary of State shall be paid into the NCIS service fund.

Section 86: Schengen-building provisions of the 1996 Extradition Convention

164. The UK is participating in Chapter 4 of the Schengen Convention (Articles 59 to 66) which relates to extradition. No legislation is needed to implement these provisions as they have been superseded by two further Conventions on extradition in 1995 and 1996 which build on the Schengen provisions - the Convention on Simplified Extradition Procedure between Member States of the European Union (the "1995 Convention") and the Convention Relating to Extradition between Member States of the European Union (the "1996 Convention"). The 1995 Convention and the 1996 Convention have already been implemented in the UK by the European Union Extradition Regulations 2002 (S.I. 2002/419) (the "2002 Regulations"), which amended existing extradition legislation contained in the 1989 Extradition Act.

165. As non-EU Member States, Norway and Iceland were not original parties to the 1995 and 1996 Conventions but they are participants in Schengen, including the extradition provisions. As such, it is open to them, subject to the approval of the Member States, to seek to participate in those elements of the 1995 Convention and the 1996 Convention that have been classified as "Schengen-building". The 1995 Convention is entirely "Schengen-building", and such a decision would bring the Convention into force between the UK and Norway or Iceland under the 2002 Regulations. However, the 1996 Convention is only partially "Schengen-building", and if Norway and Iceland chose to participate in the "Schengen-building" parts alone, the Convention as a whole would not be in force between the UK and Norway or Iceland and the implementation of the 1996 Convention under the 2002 Regulations would not suffice. This section therefore provides a power for the UK to bring into force the relevant parts of the 1996 Convention by Order in Council, subject to the negative resolution procedure. This would enable the relevant provisions of the Extradition Act 1989 to apply to Norway and Iceland; and to any other state which may participate in these Schengen-building measures. EU Member States are currently in the process of negotiating an

agreement with Norway and Iceland that will introduce surrender procedure similar to the European Arrest Warrant between them. In the light of these negotiations, Norway and Iceland are no longer interested in applying the 1995 and 1996 Conventions.

166. The Schengen-building provisions are concerned with the definition of extraditable offences; extradition for fiscal offences; statute barring of extradition; barring by amnesty; and facsimile transmission of documents in extradition requests.

Section 87: States in relation to which 1995 and 1996 Extradition Conventions are not in force

167. This section is designed to allow the UK unilaterally to apply the provisions of the 1995 Convention and the 1996 Convention to countries which have not ratified the Conventions themselves. The section is largely necessary so that the UK is able to fulfil its Schengen obligations to Italy and France, which have ratified the Schengen extradition provisions but have not subsequently ratified the 1995 Convention and the 1996 Convention.

168. Rather than introduce a different extradition regime to that for other EU Member States, this section creates an enabling power which may be used to extend to Italy and France the relevant provisions of the 1995 Convention and the 1996 Convention by providing for the application of the relevant provisions of the Extradition Act 1989. (The power could also be used to apply these to such other states as are specified by Order in Council.) It is expected that in both cases this will be a short-term measure, as it is anticipated that all existing EU Member States will have implemented the Framework Decision on the European Arrest Warrant by 1 January 2004, which will significantly alter current extradition proceedings within the EU.

Section 88: False monetary instruments: England and Wales and Northern Ireland

169. This section implements Article 2 of the 2001 Framework Decision. The purpose of the 2001 Framework Decision is to ensure that fraud and counterfeiting involving non-cash means of payment are recognised as criminal offences and are subject to effective sanctions in all EU Member States. Since these offences occur increasingly on an international scale, it was considered appropriate for action to be taken at EU level.

170. UK law already covers most of the provisions of the 2001 Framework Decision. However, Article 2 requires Member States to make it a criminal offence to misuse specified "payment instruments", where misuse includes possession of a stolen instrument or of a counterfeit instrument for fraudulent purposes. The Forgery and Counterfeiting Act 1981 (the "1981 Act") criminalises the forgery and fraudulent use of any instrument. However, simple possession is only an offence in relation to a specific list of forged instruments, as set out under section 5(5) of the 1981 Act. The list is not quite as extensive as that covered by the 2001 Framework Decision. This section therefore extends the list of instruments covered by section 5(5) of the 1981 Act to include bankers drafts, promissory notes and debit cards, all of which fall within the scope of the 2001 Framework Decision. The section also creates a power for further monetary instruments to be added by order, should future developments require this. This power will be exercised by the Secretary of State.

Section 89: False monetary instruments: Scotland

171. This section makes provision for Scotland in relation to the 2001 Framework Decision. The position in Scotland is different from the rest of the UK because under the common law of Scotland forgery itself is not a crime and only becomes so when a false instrument is uttered as genuine. Section 5 of the Forgery and Counterfeiting Act 1981 does not apply to Scotland. This section inserts a new section 46A into the Criminal Law (Consolidation) (Scotland) Act 1995. This new provision creates an offence of counterfeiting or falsifying a specified monetary instrument - ("specified" means by order of the Scottish Ministers). It will also be an offence for a person to have in his

custody or control equipment for making a specified monetary instrument. The new section 46A also makes provision relating to offences committed by companies and partnerships.

Section 90: Freezing of Terrorist Property

172. This section gives effect to Schedule 4, which introduces the mutual recognition of orders freezing terrorist assets. An explanation of Schedule 4 follows in these explanatory notes.