

EXECUTIVE NOTE

THE CRIME (INTERNATIONAL CO-OPERATION) ACT 2003 (DESIGNATION OF PARTICIPATING COUNTRIES) (SCOTLAND) ORDER 2011

SSI 2011/7

1. This Order is made in exercise of the powers conferred by section 51(2)(b) of the Crime (International Co-operation) Act 2003 (the “2003 Act”), which provides that the Scottish Ministers may designate certain “participating countries” in relation to any provisions of Part 1 of the 2003 Act. The instrument is subject to affirmative resolution procedure under section 50(5)(b) of the 2003 Act as it concerns the designation of a country other than an EU member state.

Policy Objectives

2. The purpose of the instrument is to designate Japan as a ‘participating country’ under section 51(2)(b) of the 2003 Act for the purposes of sections 37, 40, 43, 44 and 45 of the 2003 Act.

3. The European Union concluded an Agreement with Japan on Mutual Legal Assistance in Criminal Matters on 7 October 2010. This Agreement will come into force on 2 January 2011. This Order is required so that domestic law in Scotland reflects the terms of this international agreement.

Background

4. The Agreement concluded on 7 October is the first such mutual legal assistance agreement between EU member states and Japan. Amongst other things it creates obligations to respond to requests for assistance in locating banking accounts and to provide banking information relating to criminal investigations. It should assist the parties in tackling serious international crime, in particular economic crime and money laundering.

5. The domestic powers to make and receive requests of this nature are contained in Chapter 4, Part 1 of the 2003 Act. These provisions already operate in relation to a number of other “participating countries”.

6. Secondary legislation is required for Japan to be designated as a participating country under the 2003 Act. Under chapter 4 of the 2003 Act – “Information about Banking Transactions” - the relevant sections relating to Scotland under which Japan requires to be designated as a participating country are:-

- s.37 - customer information;
- s.40 – account information; and
- s.43 to 45 – requests for information about banking transactions for use in the UK.

7. Section 37(3) of the 2003 Act confers on the Lord Advocate a discretionary power to direct a procurator fiscal 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 sheriff 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.

8. Section 40 of the 2003 Act confers on the Lord Advocate a discretionary power to direct a procurator fiscal 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 sheriff 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.

9. Section 43 of the 2003 Act allows for a judicial authority in the UK to make a request to a participating country for information on whether a person holds any bank 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.

10. Section 44 of the 2003 Act 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.

11. Section 45 of the 2003 Act provides that requests for assistance made under sections 43 and 44 of the 2003 Act will be forwarded by the Lord Advocate to the relevant court or authority.

Grounds for refusal

The agreement between EU member states and Japan contains a set of grounds of refusal (a political offence exception, non-discrimination clause, double jeopardy, dual criminality). It explicitly stipulates that where a request concerns an offence punishable by death, the requested Member State may refuse assistance unless it agrees with Japan on the conditions under which the request can be executed.

Financial Effects

12. A Business and Regulatory Impact Assessment has not been prepared for this instrument as it has no significant impact on business, charities or voluntary bodies.

Consultation

13. This Order has been prepared in consultation with officials in the Home Office who have laid an equivalent order in respect of the rest of the United Kingdom before the UK Parliament (the Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (England, Wales and Northern Ireland) (No. 2) Order 2010)).