EXPLANATORY MEMORANDUM TO

THE SHIP AND PORT SECURITY (AMENDMENT ETC.) (EU EXIT) REGULATIONS

2018 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 The European Union (Withdrawal) Act 2018 will convert the text of directly applicable EU legislation into domestic instruments. This instrument ensures that both converted EU ship and port facility security legislation and existing secondary legislation will remain legally operable when the United Kingdom (UK) has withdrawn from the EU. The instrument corrects a number of deficiencies which will arise as a result of EU withdrawal.

Explanations

What did any relevant EU law do before exit day?

2.2 Regulation (EC) No.725/2004 provides the basis for the harmonised interpretation, implementation and Community monitoring of the ship and port facility security provisions of the 1974 Convention of the Safety of Life at Sea (SOLAS), including the supplementary International Ship and Port Facility Security Code (ISPS Code) within the EU. The UK is a signatory to the SOLAS Convention. The Regulation provides a standardised regime of protective security for ships and port facilities within the EU.

The Ports Security Directive 2005/65/EC complements the security measures introduced by Regulation (EC) 725/2004, by expanding the area of a port which is subject to a security regime. The Directive was transposed into UK legislation by the Port Security Regulations 2009 and 33 designation orders which defined the boundaries of ports within the scope of the Directive.

Regulation (EC) No. 324/2008 establishes procedures for conducting Commission inspections to monitor the application of Regulation (EC) 725/2004 and of Directive 2005/65/EC at the level of each Member State and at the individual port facilities, ships and relevant companies.

Why is it being changed?

2.3 The proposed changes are designed to ensure that the existing regime of ship and port facility security remains effective after EU withdrawal. If these changes are not made the legislation will not be operable after EU withdrawal. This would mean that following EU withdrawal there would be no effective system in place to ensure the security of ships and port facilities and this would place the UK in breach of its international obligations under the SOLAS Convention.

A summary of the changes which are being made to the current legislation is below:

a) Minor amendments are being made to restate retained EU law in a clearer and more accessible way, such as omitting any unnecessary definitions;

b) Replacing all references which relate to the UK as an EU Member State, in order to ensure that existing regulatory requirements continue to apply within the UK when it is no longer an EU Member State;

c) Omitting or amending inappropriate language, including references to 'the Commission', to reflect that the United Kingdom will no longer be in the European Union;

d) Removal of references or terminology, such as 'intra-community 'which will cease to be meaningful in a UK context following EU withdrawal;

e) Removal of all obligations which will cease to operate effectively following EU withdrawal, such as requirements to provide information to the Commission.

Regulation (EC) 324/2008 will be converted into UK law on EU withdrawal and then revoked immediately as the UK will no longer be subject to Regulation (EC) 725/2004 or Directive 2005/65/EC. Inspections of UK ships and port facilities by Commission inspectors will neither be required or appropriate following EU withdrawal. The Department for Transport (DfT) and the Maritime & Coastguard Agency will continue to deliver the existing, well-established programme of ship and port facility inspections in the UK to ensure they meet the required security standards.

The changes being made to existing legislation will not alter outcomes for the shipping and ports industry following the UK's withdrawal from the EU. The system will continue to operate as it does today.

What will it now do?

2.4 The purpose of the instrument is to make the required amendments to the existing ship and port facility security legislation to correct deficiencies which arise as a result of the UK's withdrawal from the UK.

The intention is to ensure that the current regulatory framework remains operable in UK law and that this continues to provide for the protection of vital infrastructure, the travelling public and those working on UK flagged ships and at port facilities following the UK's withdrawal from the EU.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument is England, Wales, Scotland and Northern Ireland.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England, Wales, Scotland and Northern Ireland.

The territorial application of this instrument is England, Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 Nusrat Ghani, Parliamentary Under Secretary of State for Transport, has made the following statement regarding Human Rights:

"In my view the provisions of the Ship and Port Security (Amendment etc.) (EU Exit) Regulations 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 These Regulations are made in exercise of powers in section 8 of the EU Withdrawal Act 2018.

6.2 The European Union (Withdrawal) Act 2018, makes provision for repealing the European Communities Act 1972 (ECA) and will preserve EU law as it stands at the moment of withdrawal, converting this into UK law. It enables the creation of a new body of domestic legislation by converting the text of directly applicable EU legislation into domestic instruments, as well as saving EU-derived domestic legislation which were made to implement the UK's obligations as an EU Member State.

6.3 The Act also contains powers to make secondary legislation to enable Ministers and the devolved administrations to fix deficiencies in retained EU law, to ensure that the UK's legal system continues to function properly outside of the EU.

6.4 This instrument corrects a number of deficiencies in existing ship and port facility security legislation arising as a result of the UK's withdrawal from the EU. These deficiencies are found both in EU-derived domestic legislation and in directly applicable EU legislation.

6.5 The United Kingdom is a contracting government to SOLAS. The International Maritime Organisation responded to the September 2001 attacks in the USA by developing new security requirements for ships and port facilities to counter the threat of acts of terrorism. These requirements took the form of amendments to SOLAS (new Chapter XI-2) and the creation of the ISPS Code. Part A of the Code is mandatory for contracting governments and Part B contains recommendations. The SOLAS amendments and ISPS Code were formally adopted in December 2002 and were implemented on 1 July 2004.

6.6 The SOLAS amendments and ISPS Code are implemented in the EU by Regulation (EC) 725/2004. Regulation (EC) 725/2004 mandates the new Chapter XI-2 of SOLAS, Part A of the ISPS Code and specified paragraphs of Part B of the Code. It also imposes a variety of requirements on Member States in relation to their interaction with each other and with the Commission in this area. Regulation (EC) 725/2004 took effect in UK law from 1 July 2004.

6.7 Regulation (EC) 725/2004 has been implemented domestically, so far as was necessary to do so, by SI 2004/1495 the Ship and Port Facility (Security) Regulations 2004.

6.8 Directive 2005/65/EC on enhancing port security came into force on 15 December 2005. The aim of the Directive was to complement Regulation (EC) 725/2004 by improving security co-ordination between port facilities and the wider port area

beyond the immediate "ship/port interface" which occurs at the individual port facilities.

6.9 Directive 2005/65/EC was transposed into domestic legislation by SI 2009/2048, the Port Security Regulations 2009. At individual port level the Directive was implemented via a series of separate designation orders at ports deemed in scope.

6.10 Finally, Regulation (EC) 324/2008 governs Commission inspections of Member States' implementation of both the Regulation and the Directive.

6.11 This instrument is being made in order to correct various deficiencies which arise from the UK's exit from the EU. It also transfers from the Commission to the Secretary of State the power to block amendments to SOLAS and/or the ISPS Code.

6.12 Currently, the Secretary of State uses section 2(2) of the ECA to update the UK's port security regime. Following repeal of this Act, a new power will be required in order to maintain this regime. Accordingly this instrument creates that new power by way of an amendment to the Port Security Regulations 2009. The new power will be exercisable by way of the negative procedure.

7. Policy background

What is being done and why?

7.1 This instrument is designed to ensure that the UK meets its obligations under the SOLAS Convention and ensure that the existing regulatory framework of ship and port facility security remains operable in UK law when the UK withdraws from the EU. On withdrawal, the EU Regulation will be converted into UK law, becoming 'retained EU law'. In doing so, amendments are required which will remedy and mitigate failings or deficiencies which occur as a result of the UK's withdrawal from the EU.

7.2 Article 10 of Regulation (EC) 725/2004 contains ambulatory references to the ISPS Code and Chapter XI-2 of SOLAS. This has the effect of ensuring that changes to the ISPS Code and Chapter XI-2 of SOLAS made at the IMO have effect.

7.3 Following EU Withdrawal the ambulatory references will be maintained. In respect of international shipping the European Commission can currently block any amendments to the ISPS Code or Chapter XI-2 of SOLAS, if there is a manifest risk that the amendments will lower the standard of maritime security. In respect of domestic shipping the European Commission has a broader power to block amendments.

7.4 Following EU Withdrawal, these powers will be transferred to the Secretary of State. For international shipping the Secretary of State will have the power to exclude any changes to the ISPS Code or Chapter XI-2 of SOLAS, if it is determined that there is a manifest risk that implementation would lower the standards of maritime security and for domestic shipping the Secretary of State will have power to block changes. These powers will be exercised by Regulation and Parliament will have scrutiny of these changes through the negative procedure. This type of procedure is more akin than others to both the 'regulatory procedure with scrutiny' under Article 10(2) of the EU Regulation and the 'examination procedure' under Article 10(1) and (5) of the EU Regulation, thereby preserving the balance of powers between the legislature and the executive. Further, the negative procedure is considered appropriate given the limited nature of the discretion conferred on the Secretary of State, who may decide either to

adopt the changes or to leave the law unchanged. This instrument clarifies how these new powers are to be exercised.

7.5 The EU Withdrawal Act 2018 repeals the ECA. The Secretary of State has used section 2(2) of the ECA to transpose and implement the Port Security Directive. To ensure that the Secretary of State can continue to perform his statutory duties in relation to the Ports Security Regulations 2009 this instrument provides a replacement power which will be exercisable in the same manner and subject to the same conditions as prior to EU withdrawal, but will ensure that the effectiveness and operability of the current ship and ports security legislation is maintained after this.

7.6 If this replacement power were not available, the existing regime and legislation would effectively become 'frozen' in time and no amendments could be made to these Regulations as and when these become necessary.

7.7 Under Article 3 of Regulation (EC) 725/2004, Member States are required to determine the extent to which they will apply the provisions of this Regulation to different categories of ships operating domestic services and the port facilities which serve them, other than Class A passenger ships (to which the Regulation automatically applies). This determination must be made following a risk assessment, which must be conducted at least once every five years. DfT has conducted such risk assessments and the Secretary of State has determined that the Regulation should apply to Class B ships certified to carry more than 250 passengers and tankers operating domestic services. The exception to this is that provisions relating to the ship security alert system and the declaration of security do not apply to such Class B ships and tankers. Class A and Class B ships are defined by reference to Article 4 of Directive 2009/45/EC, which has been implemented in the UK through the provisions of Merchant Shipping Notice 1747(M). This instrument preserves the current application of the Regulation.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made under paragraph 21 of Schedule 7 to the European Union Withdrawal Act 2018, as a number of incidental and consequential changes are also being made.

8.2 In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this explanatory memorandum.

9. Consolidation

9.1 There are currently no plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 No formal consultation has been undertaken, as the instrument maintains the regulatory status quo and ensures that those to whom the amended instrument applies are able to operate within the existing legislative regime once the UK withdraws from the EU.

10.2 The Department has engaged closely and discussed the proposed changes to the existing legislation with stakeholders within the UK ports and shipping sectors. The National Maritime Security Committee (Industry) has also been briefed and did not raise any significant concerns.

10.3 Although maritime security is a reserved matter, the Department has written to the Devolved Administrations and the Scottish, Welsh and Northern Ireland offices, to provide information about the proposed amendments to the existing ship and port security legislation and invited comments. No substantial comments have been forthcoming.

11. Guidance

11.1 The Department will keep the need for guidance under review but considers none is currently required.

12. Impact

12.1 There is no impact on business, charities or voluntary bodies.

12.2 There is no impact on the public sector.

12.3 An Impact Assessment has not been prepared because there is no impact on business, charities, voluntary bodies or the public sector.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 However, as this instrument maintains the current regulatory position and is not anticipated to have any impact on small businesses, it is not necessary to take action to minimise the impact of the requirements on small businesses.

14. Monitoring & review

14.1 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

14.2 Requirements to review the implementation of Directive 2005/65/EC on enhancing port security are set out in regulation 39 of the Port Security Regulations 2009. This instrument does not amend this requirement, but the provisions of paragraph 9 of Schedule 8 to the European Union (Withdrawal) Act 2018 mean that the UK will no longer have regard to how the Directive is implemented by EU Member States.

15. Contact

15.1 Craig Griffiths at the Department for Transport, email: MARITIMESECURITY@dft.gov.uk can answer any queries regarding the instrument.

15.2 James Driver, Deputy Director, Maritime Security and Resilience Division at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Nusrat Ghani, Parliamentary Under Secretary of State at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/ESIC
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 77	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA Sis	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal	Sub-paragraphs (3) and (7)	Ministers of the Crown	Set out the 'good reasons' for creating a

offences	of paragraph 28, Schedule 7	exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s.2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s.2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Parliamentary Under Secretary, Nusrat Ghani, has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view, The Ship and Port Security (Amendment etc.) (EU Exit) Regulations 2018 do no more than is appropriate. This is the case because the instrument ensures that existing ship and port facility security legislation will remain legally operable when the United Kingdom (UK) has withdrawn from the European Union (EU)".

2. Good reasons

2.1 The Parliamentary Under Secretary, Nusrat Ghani, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded that they are a reasonable course of action. This instrument ensures that existing ship and port facility security legislation will remain legally operable when the United Kingdom (UK) has withdrawn from the European Union (EU)".

2.2 The instrument corrects a number of deficiencies in existing ship and port facility security legislation created as a result of the UK's withdrawal from the EU. This will preserve the legal status quo in relation to ships entering UK ports and ensure that the UK continues to provide an effective protective ship and port security regime after EU withdrawal.

3. Equalities

3.1 The Parliamentary Under Secretary, Nusrat Ghani, has made the following statement:

"The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts".

3.2 The Parliamentary Under Secretary of State, Nusrat Ghani, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, the Department for Transport have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.