EXPLANATORY MEMORANDUM TO

THE HEAVY COMMERCIAL VEHICLES IN KENT (NO. 3) (AMENDMENT) ORDER 2021

2021 No. 109

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument provides the legal basis for requiring evidence of a recent negative Covid-19 test result for an HGV/HCV to travel to the Short Straits crossings via Kent. It also introduces the Expedited Return Scheme (ERS) which will allow for the prioritisation of outbound empty goods vehicles moving from the UK to the EU on an exceptional basis in the event of severe disruption in Kent, enabling them to restock and return speedily with fresh supplies. Finally, it allows Gibraltar-bound groceries to be added as a new category of priority goods under the Government's pre-existing prioritised goods scheme, allowing eligible vehicles to be expedited under similar arrangements through the Kent traffic management system. It also provides for compliance and enforcement of the above measures.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The amendments are a direct, urgent response to the unique circumstances surrounding the operation of the Short Straits routes to France. In late December 2020 the French authorities closed the border entirely for 48 hours and have since then imposed the requirement for all those travelling to France to have evidence of a negative Covid-19 test taken within 72 hours of departure. Unlike almost all previous travel restrictions there has been no exemption for road haulage, so urgent steps have had to be taken to set up a mass testing regime. But it is also necessary to have sufficient incentives to maximise the proportion of hauliers being tested further 'upstream' in order to minimise the pressure on Kent given the simultaneous challenge of adaptation to new border arrangements with the EU. The particularly acute risk of disruption also necessitates urgent steps to ensure priority can if necessary be given to certain HGVs.

3.2 These are contingency measures which may need to be activated at any time, therefore the amendment is required as a matter of urgency. Delaying the introduction of this legislation to comply with the 21-day rule would risk aggravating pressure on Kent roads, disrupting the UK food supply and other critical goods supply at a critical time.

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)

3.3 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

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

4.2 The territorial application of this instrument is the same.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 Section 17 of the Road Traffic Regulation Act 1984 allows the Secretary of State to make regulations governing the use of special roads (primarily motorways). Article 2 of this Order amends articles 1, 1A, 2, 3 and 7 of the Heavy Commercial Vehicles in Kent (No. 3) Order 2019, S.I. No.1210, to further regulate traffic using certain parts of the coastbound M20 and M2 Motorways in Kent during periods when cross-Channel travel disruption is likely or is occurring. Section 105 of the Deregulation Act 2015 enables these provisions, which rely on a power to make regulations, to be included in this Order.

7. Policy background

Covid-19 Testing Outside Kent

7.1 On 20th December 2020 the French Government made a decision to close its border to UK traffic. On 22nd December 2020 an agreement was reached between the United Kingdom and the French Government to allow accompanied freight services to resume between the two countries. Under the terms of the agreement, which remains in place, all people travelling from the UK into France are required to show proof of a negative Covid-19 test taken within the previous 72 hours. Unlike almost all previous travel restrictions there was no exemption for road haulage, so a solution had to be developed to provide testing for the drivers and passengers of all France-bound HGVs. This posed particular challenges in Kent, given the importance of the Short Straits routes for trade and the HCV volumes using the route. Large-scale testing facilities were rapidly established at Manston Airport and the new Sevington Inland Border Facility, but once the backlog of HCVs was cleared in late December the Government has been keen to move HCV testing ‘upstream’ to reduce pressure on Kent, especially given the simultaneous challenges of adjusting to the new trading arrangements with the EU. As a response the Department for Transport has rapidly rolled out free Covid-19 testing at its network of information and advice sites outside of Kent. These sites are located at motorway service areas and truck stops around the country. The Government has also worked with hauliers and e importers/exporters to encourage the establishment of testing at their premises before an HCV commences its journey to France.

7.2 HCVs travelling to France via the Short Straits are already required to have a valid Kent Access Permit (KAP) issued by the Check an HGV is Ready to Cross the Border service ('Check an HGV') which was introduced in the Heavy Commercial Vehicles in Kent (No. 3) (Amendment) Order 2020 and came into effect on the 1st January 2021. The new Amendment Order would provide the legal requirement for the driver, and passengers 11 or older, to also be in possession of a negative Covid-19 test result upon arrival in Kent via the M20 or M2 and would be separate from and in addition to the requirement to have a KAP.

7.3 The requirement for proof of a negative Covid-19 test taken no more than 72 hours before departure would only be applied if large numbers of drivers continue to arrive in Kent without a negative Covid-19 test which could prevent the de-escalation of what are currently complex, disruptive traffic management arrangements involving diversion of all HCVs bound for the Port of Dover via Manston airport. Before any action is taken, we will endeavour to ensure our testing capabilities at our Information and Advice sites are able to meet the demand.

7.4 Under the existing Statutory Instruments, the Driver and Vehicle Standards Agency enforcement officers and Kent Police officers are able to stop HCVs if they are suspected of not having a valid KAP. If upon investigation the driver cannot prove they have a valid KAP or have a fraudulently obtained KAP, the driver can be fined £300. For UK drivers this fine takes the form of a Fixed Penalty Notice (FPN) payable within 28 days. Foreign HCV drivers are issued with a financial penalty deposit notice which is payable immediately.

7.5 In the same way if when asked the driver is not able to produce evidence of a negative Covid-19 test for themselves or their passengers the driver will under this amendment be liable for a £300 FPN or financial penalty deposit. This would apply to HCV drivers crossing the border via the Short Straits. It should be noted that like the need for a KAP the requirement for a negative Covid-19 test does not apply to domestic only hauliers delivering in Kent.

Expedited Return Scheme and Gibraltar

7.6 With regard to the ERS, the UK food supply chain runs on a 'just in time' basis, which means it is inherently susceptible to delays. Such disruption was seen in the UK in late December 2020 following the French Government's decision to close their border to UK traffic. This increased the average round-trip journey time for food hauliers from approximately 4 days to 8 days. Around 25% of supermarket deliveries were not completed for several days.

7.7 Whilst this disruption was largely resolved following agreement between the UK and French governments to allow accompanied freight services to resume and the implementation of the testing arrangements described above, the potential for further disruption remains high. This is particularly likely during the first few weeks and months of 2021 as new post EU transition period customs and export processes and procedures come into force and the continuing effects of Covid-19-related absences are felt.

7.8 The combination of these unprecedented factors is likely to contribute to delays at the UK and EU border which could, in turn, prevent the speedy return of empty food goods vehicles going to the EU where they can collect more food. Such delays would cause disruption to the food supply chain, given that approximately 10% of food

consumed in the UK travels across the Short Straits crossings from continental Europe. Most of these vehicles are empty on their return journey to the EU.

7.9 Small but visible changes in the availability of food products in the UK can trigger disproportionate consumer behaviour, including panic buying. At the beginning of March 2020, there were no food supply issues in the UK, but consumer stockpiling and panic buying destocked supermarket shelves on a daily basis. It is highly likely such behaviour would reoccur if food supply was subject to significant disruption.

7.10 In addition, Gibraltar relies on the UK for approximately 50% of its food supply. Should food supply from the UK to Gibraltar be disrupted, local alternatives may not be able to scale up at the speed necessary to fully supply Gibraltar, potentially causing supply issues and associated negative consumer behaviour as noted in paragraph 7.9.

7.11 The ERS is therefore designed to ensure that empty food vehicles travelling from the UK to the EU are not delayed at the Short Straits, so that they can be quickly refilled and return with food supplies. The amendments to the Heavy Commercial Vehicles in Kent (No. 3) Order 2019 provide the legal basis for the ERS and will provide the Secretary of State with the power to issue a priority food supply permit to vehicles that the Secretary of State considers critical to the maintenance of food supply to the UK.

7.12 Additionally, we are proposing that Gibraltar-bound groceries be added as a new category of priority goods under the Government's pre-existing prioritisation of goods contingency plan. The Heavy Commercial Vehicles in Kent (No. 3) Order 2019 already contains provision for HCVs carrying single loads of live and fresh fish products for human consumption or day-old chicks to be prioritised through the Kent traffic management system through use of a 'priority goods' permit. The amendments to the Heavy Commercial Vehicles in Kent (No. 3) Order 2019 in relation to the 'priority goods' permit will extend the Secretary of State's power to issue 'priority goods' permits to vehicles carrying single grocery loads to be transported to a final destination in Gibraltar.

7.13 Were the arrangements to be activated in the event of significant disruption, all eligible vehicles under both schemes would be able to use the Operation Brock contraflow between Junctions 8 and 9 of the M20, thus by-passing queuing arrangements that would be in place for other HCVs.

7.14 The ERS and Gibraltar proposals are emergency measures, only to be used in extremis and for the shortest time possible where significant border delays exist, and food supply flow is reduced. Once this instrument comes into force, the Secretary of State would only exercise his powers to implement these contingency measures when the relevant trigger points are reached.

7.15 The key trigger points for implementation of the ERS and Gibraltar proposals are: congestion on the approach to Dover and Eurotunnel of 8 hours or more; and actual loads delivered to UK supermarkets falling below 75% of planned expectations for 2 consecutive days. These trigger points are not set out in this amendment and will be described fully in an operational policy document that will be published on gov.uk on the 21st January 2021.

7.16 Alongside these trigger points, other contextual indicators will be considered, including: increased consumer demand, indicated by the introduction of item limits by retailers and/or any reported uplifts in sales of key items which could signify the onset of panic buying; and increased retailer supply requirements, indicated by an uptick in

delivery bookings made by retailers of more than 10% which provides a proxy measure for concern about a run-on stocks.

7.17 The measures will cease as soon as traffic flow rates recover, delivery flow returns to near normal, and contextual indicators show that demand and supply issues are reducing. The measures will be suspended if they cause congestion in the contraflow or are otherwise deleterious to the Kent Traffic Management Plan.

7.18 The ERS must manage the number of vehicles using the scheme per day. The scheme cannot accommodate all UK food supply vehicles as this would overwhelm the Kent Traffic Management System. The scheme must also be simple to administer and to enforce. The policy is therefore that the scheme will be open to the major retailers that supply around 95% of the UK food market. These are Tesco, Sainsbury's, Asda, Morrisons, Aldi, Co-op, Lidl, Waitrose and M&S and their logistics partners. Similarly, with regard to Gibraltar-bound groceries the Prioritised Goods Scheme will be open to Gibraltar's largest supermarket, Morrisons, and its logistics partners.

7.19 ERS permits will be allocated in proportion to the retailer's current market share of the UK food retail sector and will not exceed a total of 300 per day (of which up to an estimated 10 per day will be for Gibraltar-bound HCVs under the Prioritised Goods contingency plan). This is to manage the number of vehicles using the scheme, safeguarding the Kent Traffic Management systems, whilst having the maximum benefit for food supply.

7.20 Offering access to the large supermarkets with around 95% market share across the whole of the UK gives us confidence that food supply will be maintained and will provide the consumer confidence we seek to reduce the risk of stockpiling, panic buying and other negative consumer behaviour. This will also help in administration of the scheme, keeping the number of vehicles within operable limits.

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

8.1 This instrument is not being made under the European Union (Withdrawal) Act 2018 or any other legislation relating to the United Kingdom's withdrawal from, or future relationship with, the European Union. But it relates to these matters as it would apply in the event of significant cross-Channel travel disruption, including any disruption relating to the new trading arrangements with the European Union following the end of the transition period.

9. Consolidation

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

10. Consultation outcome

10.1 The Department for Transport and The Department for Environment, Food and Rural Affairs launched separate consultations on the proposed amendments on Tuesday 12th January 2021 via email. Given the urgency the consultation lasted for 48 hours. The two Departments consulted on the proposed amendments outlined above with a range of key stakeholders, including trade associations, supermarkets, local MPs, Kent Police, Highways England, Kent County Council, Kent Fire and Rescue, Port of Dover, Eurotunnel, the Road Haulage Association, and Logistics UK. These key stakeholders were specifically chosen on the basis of the high likelihood that they

would be affected by or have strong views about the schemes proposed in the amendment.

10.2 Of those who responded to the Department for Transport consultation, over 60% agreed with the proposals, acknowledging the significant levels of potential disruption that could occur in Kent from a lack of testing readiness. Some respondents did express reservations about the proposals, notably regarding the burden of compliance placed on hauliers and the potential imposition of fines. A number of respondents made additional suggestions, the provision of more upstream testing and retention of local testing facilities for hauliers based in Kent. Respondents also stressed the need for a clear and targeted communications campaign, especially for those en route to the UK. The Department has listened carefully to all the responses and is urgently considering how to integrate the new requirement into the Check and HGV service, including adding an additional question to prompt the user that this is a new legal requirement and action must be taken.

10.3 The 25 businesses which replied to Defra's consultation were largely supportive of the proposed measures. In total, two-thirds of respondents agreed with the need for the Expedited Returns Scheme. Half of these agreed in principle to the scheme but expressed reservations of varying degrees. Reservations included concerns about the scheme's operational feasibility and resource requirements, its exclusivity to supermarkets and impact on fair competition, and its limitation to empty vehicles only. The Government has considered all responses carefully but concluded that the policy remains justified and that the arrangements will be operationally feasible. Some amendments have however been made to the proposals, notably the length of time permitted for empty lorries to restock in the EU and return to the UK from 7 to 10 days. We will engage with the Kent Local Resilience Forum to address specific points raised around operationalising the scheme and trigger points.

10.4 Responses to the consultation show that two thirds of respondents agreed (at least in principle) with the proposal to introduce Gibraltar-bound groceries as a new category of priority goods under the Prioritised Goods Scheme.

11. Guidance

11.1 The Government recognises the importance of hauliers and haulier managers being made aware of all these measures. We will continue to work closely with the sector and will update all relevant guidance on gov.uk, including the Haulier Handbook which pulls together all guidance on all EU Transition matters of primary interest to the industry. The handbook will be available online in multiple different languages, with updated hard copies will also be available from our network of Information & Advice sites shortly.

11.2 We will be putting in place a robust communications plan that will alert HGV drivers to the measures. Defra will undertake targeted communications with the food retailers concerned to ensure full understanding of the ERS and Gibraltar measures, and DfT will ensure there is awareness of the potential Covid-19 testing requirement amongst the haulage community. Were the measures to be activated we would take further steps to ensure drivers were aware of the Covid-19 testing requirement in particular, including signs on the motorways leading to Kent, stakeholder engagement and through national press. We will be engaging with our EU counterparts and via EU trade associations to ensure understanding amongst non-UK international hauliers.

12. Impact

12.1 There is no significant, lasting impact on business, charities of voluntary bodies. With the requirement of proof of a negative Covid-19 test already in place by the French Government it is expected that there will be no material impact on hauliers as HGV/HCV drivers will need to obtain a test before reaching the UK EU border. It is reasonable to expect hauliers to obtain a test before they enter Kent. The impact of these measures will not be significant as fines or penalties incurred for non-compliance are not considered with the cost to business.

12.2 There is no, or no significant, impact on the public sector.

12.3 A light touch Impact Assessment for the Defra amendments is submitted alongside the consultation response and is available on the gov.uk site.

12.4 There is potential for the ERS measures in particular to impact smaller suppliers, wholesalers or other food supply chain operators falling out of scope of the scheme. The ERS must balance security of food supply with the number of vehicles using the scheme per day. The scheme cannot accommodate all UK food supply vehicles as this would overwhelm the Kent Traffic Management system. The scheme must also be simple to administer and enforce. Limiting the number of ERS permits to 300 per day (plus up to an estimated 10 per day Gibraltar-bound vehicles under the Prioritised Goods Scheme) will safeguard the Kent Traffic Management systems, whilst having the maximum benefit for food supply.

12.5 Offering access to the ERS to the large supermarkets with around 95% market share across the whole of the UK gives us confidence that food supply will be maintained and will provide the consumer confidence we seek to reduce the risk of stockpiling, panic buying and other negative consumer behaviour. This will also help in administration of the scheme, keeping the number of vehicles within operable limits.

12.6 These are emergency measures, only to be used in extremis and for the shortest time possible so long as significant border delays exist and food supply flow is reduced. Even once the underpinning legislation is in place, the Secretary of State would only implement these contingency measures when the relevant trigger points are reached.

13. Regulating small business

13.1 The vast majority of HCV drivers travelling via the Eurotunnel and Port of Dover work for foreign hauliers, although there are a small number of small and medium-sized businesses in the United Kingdom that undertake this activity. All cross-Channel HCV drivers must carry the required customs and import/export documentation as required by the EU's import controls and show them when asked and this now includes the requirement of evidence of a negative Covid-19 test with 72 hours of intended departure. If they cannot show the documentation, they risk being stopped by the French authorities or UK port authority and could thus cause delay and disruption to the Short Straits and queues on the roads of Kent. This is true regardless of whether or not the HCV driver works for a small and medium sized business. It would not be appropriate to give any HCV driver an exemption from needing a negative Covid-19 test, and there is no mechanism that could meaningfully reduce the impact of these proposals on small and medium businesses without compromising the objectives of this legislation.

13.2 There is potential for the legislation to impact the activities that are undertaken by small businesses who fall out of scope of the ERS. These impacts have been noted

via the consultation process. The overarching objective of the ERS, nonetheless, is to maintain consumer confidence in the UK's food supply. The scheme must balance security of food supply with the number of the vehicles using the scheme per day. It cannot accommodate all UK food supply vehicles as this would overwhelm the Kent Traffic Management system. We are confident that offering access to the largest supermarkets with around 95% market share across the whole the UK will maintain food supply, will provide the consumer confidence we seek, and reduce the risk of stockpiling, panic buying and other negative consumer behaviour.

14. Monitoring & review

14.1 This Order does not include a statutory review clause as the substantive provisions amended by it, i.e. articles 1A, 2, 3 and 7 of the Heavy Commercial Vehicles in Kent (No. 3) Order 2019, S.I. No.1210, cease to have effect at the end of 31st October 2021. In accordance with the requirements of the Small Business, Enterprise and Employment Act 2015 Rachel Maclean, Parliamentary Under Secretary of State, has made the following statement:

"Having had regard to the Statutory Review Guidance for Departments published under section 31(3) of the Small Business, Enterprise and Employment Act 2015, in my view, it is not appropriate or necessary to provide for a review of these provisions as the substantive provisions amended by this Order will cease to have effect after a short and fixed period of time."

15. Contact

15.1 Mallory Sedgwick at the Department for Transport Telephone: 07977 426480 or email: Mallory.sedgwick@dft.gov.uk can be contacted with any queries regarding the instrument.

15.2 Konrad Bishop at the Department for Environment, Food and Rural Affairs Telephone: 0788 044 5878 or email: konrad.bishop@defra.gov.uk can be contacted with any queries regarding the instrument.

15.3 Richard Thomas and Helen McGill, jobshare Deputy Directors for Future EU Roads Relationship, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

15.4 Dan McCartney / Laura Denison, Deputy Directors for Food Resilience and Supply Chain, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.5 Rachel Maclean MP, Parliamentary Under Secretary of State at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.