EXPLANATORY MEMORANDUM TO

THE PORT SECURITY DESIGNATION (AMENDMENT) ORDER 2013

2013 No. 2728

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

2. Purpose of the instrument

This Order amends the initial review date in six port security designation orders (those designating port security authorities (PSAs) at the ports of Dover, Aberdeen, Grangemouth, Portland, Tees and Hartlepool and Workington – "the Listed Ports") to be 5 years from the coming into force date of each of the six orders. The Order also effects additional amendments to the Port Security (Port of Grangemouth) Designation Order 2012 as Forth Ports Limited (the owner/operator of the port of Grangemouth) has elected to reconstitute the Grangemouth PSA as a company limited by guarantee.

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

None.

4. Legislative Context

4.1 Under Regulation (EC) 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security ("the EU Regulation") certain provisions of the International Maritime Organization's International Convention for the Safety of Life at Sea (SOLAS) 1974 (as amended by the addition of a new Chapter XI-2) and of the International Ship and Port Facility Security Code ("the ISPS Code") were incorporated into EU law. The aim of these measures was to enhance the security of ships used in international trade and certain domestic shipping and the security of the associated port facilities.

4.2 In 2005, the European Parliament and the Council adopted further legislation in the form of Directive 2005/65/EC of 26 October 2005 on enhancing port security ("the Directive"), so as to extend port security measures beyond the immediate "ship-port interface" (essentially the docking areas) covered by the EU Regulation and into the wider port area (including transport-related and other operational areas of the port). The Port Security Regulations 2009 (S.I. 2009/2048), which transposed the Directive in the United Kingdom, came into force on 1 September 2009.

4.3 Port security authorities are being progressively established at ports considered in scope of the Directive by means of designation orders which have to be made in order to apply the security measures contained in the Port Security Regulations 2009 at relevant ports across the UK. To date, 15 designation orders have been made and are in force, as follows (the orders for the Listed Ports have been italicised for ease of reference):

Order	*S.I. number*	*Date in force*
The Port Security (Avonmouth Dock and Royal Portbury Dock and Port of Bristol Security Authority) Designation Order 2010	2010/319	19th March 2010
The Port Security (Port of Dover) Designation Order 2011	*2011/3045*	*31st January 2012*
The Port Security (Port of Aberdeen) Designation Order 2012	*2012/2607*	*19th November 2012*
The Port Security (Port of Grangemouth) Designation Order 2012	*2012/2608*	*19th November 2012*
The Port Security (Port of Portland) Designation Order 2012	*2012/2609*	*19th November 2012*
The Port Security (Port of Tees and Hartlepool) Designation Order 2012	*2012/2610*	*19th November 2012*
The Port Security (Port of Workington) Designation Order 2012	*2012/2611*	*19th November 2012*
The Port Security (Port of Milford Haven) Designation Order 2013	2013/516	1st May 2013
The Port Security (Ports of Swansea and Port Talbot) Designation Order 2013	2013/1652	2nd August 2013
The Port Security (Port of Newhaven) Designation Order 2013	2013/1655	2nd August 2013
The Port Security (Port of Falmouth) Designation Order 2013	2013/1656	2nd August 2013
The Port Security (Port of Sullom Voe) Designation Order 2013	2013/2013	10th September 2013
The Port Security (Port of Hull, New Holland, Immingham and Grimsby) Designation Order 2013	2013/2014	10th September 2013
The Port Security (Ports of Liverpool and the Manchester Ship Canal) Designation Order 2013	2013/2181	3rd October 2013
The Port Security (Port of	2013/2272	9th October 2013

Southampton) Designation Order 2013		

Each designation order delineates the boundaries of a particular port for the purposes of the Directive, based on a port security assessment identifying all areas associated with the port which are relevant to port security and discussions with stakeholders during consultation. The orders also designate a port security authority ("PSA") for the delineated ports. Under regulation 3(5) of the Port Security Regulations 2009 (reflecting article 2(4) of the Directive), the provisions of the Directive and of the Port Security Regulations 2009 need not, however, be applied to ports where there is only one port facility and where the defined port area would not extend beyond the boundaries of that facility; in such a case the facility can continue to be governed by the EU Regulation and is effectively exempted from the provisions of the EU Directive.

4.4 The reasons for this two-fold legislative structure – comprising the generally applicable Port Security Regulations 2009 and the port-specific designation orders – are explained in paragraphs 4.5 and 4.6 below.

4.5 The Port Security Regulations 2009 ("the Regulations"), which were made under powers contained in section 2(2) of the European Communities Act 1972, transpose the port security measures in the Directive which have general application across all relevant UK ports. It was not however considered practicable to include in the Regulations themselves the provisions required to apply those general measures at every relevant port in the UK. The provisions in question relate to the delineation of the boundaries of each relevant port and the designation of a PSA. To attempt to include these specific provisions for all the relevant ports in the Regulations themselves would have resulted in an impracticably long instrument containing numerous schedules of maps.

4.6 The possibility of including in the Regulations a power for the Secretary of State at a later stage to delineate the boundaries of each port, and to designate a PSA for each port, was considered. This option was rejected however because it was considered that it would involve unlawful legislative sub-delegation to the Secretary of State. By virtue of paragraph 1(1)(c) of Schedule 2 to the European Communities Act 1972, it is unlawful to include in an instrument made under section 2(2) of the Act a provision that sub-delegates power to *legislate* to another individual or body. (A power to give directions as to *administrative* matters is not regarded as a power to legislate. However, on the basis that the delineation of port boundaries and the designation of port security authorities would give rise to legal effects it was considered that these would be regarded as legislative rather than administrative acts.)

4.7 The identification of the port boundary in each designation order takes into account information resulting from the port security assessment undertaken in accordance with Annex I of the Directive, and views expressed by stakeholders during the consultation process. The boundary embraces the

port facilities situated within the port, and the port areas that could have an impact on the security of the port.

4.8 Port operators are free to recommend whether the legal status of a PSA should be that of a body corporate or an unincorporated association, and Forth Ports Limited the owner/operator of the port of Grangemouth has elected to reconstitute its PSA as a company limited by guarantee, necessitating amendments to the Grangemouth order. A body corporate PSA is a legal person in its own right, separate and distinct from its individual members, and could sue and be sued in its own name rather than in the names of its members. An incorporated PSA would also be able, if it wished, to employ staff or contract for services in its own name, and to obtain its own public liability or employers' liability insurance.

5. Territorial Extent and Application

This instrument applies to all of the United Kingdom (although its subject matter specifically concerns port operations at the Listed Ports).

6. European Convention on Human Rights

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

7. Policy background

7.1 Extending the initial review dates in the orders for the Listed Ports to 5 years from their respective coming into force dates accords with the Coalition Government's Better Regulation policy for legislation to include a statutory review provision requiring the implementation of the measure(s) to be formally reviewed within five years of the date the measure(s) came into force. The orders for the Listed Ports already contain provision for subsequent reviews to occur every five years, thereby maintaining adherence to this policy.

7.2 Conducting 5-yearly reviews enables the effectiveness of UK's implementation of the Directive to be regularly assessed and, if deemed necessary, any steps taken in response to such a review.

7.3 There has not been a high level of public or media interest in the policy.

7.4 The amending order is important to ensure that the first review of each order is done after the order has been in operation for some time. The original review date in each of the orders being amended was too early to allow for proper review. The amendment to refer to the body corporate in the case of Grangemouth is legally necessary given that the PSA is now a body corporate.

8. Consultation outcome

8.1 A public consultation was held on the proposed extension of the initial review dates in the orders for the Listed Ports. The consultation ran from 9 September to 22 October 2013. A single response was received, from Aberdeen Harbour Board, supporting the proposed initial review date extension in the order for Aberdeen. The consultation paper also informed consultees of Forth Ports Limited's intention to reconstitute the Grangemouth Port Security Authority as a company limited by guarantee, but, there being no requirement in Directive nor the Regulations, for a PSA to be constituted as a particular entity, no specific consultation question was posed in relation to that change (and in any event, no consultation comment was received in relation to that change).

9. Guidance

The Department has produced a Port Security Officers' Handbook for guidance on dealing with the port security assessment and port security plan relating to the designation orders. No guidance is needed in relation to the particular changes being made by this amending order.

10. Impact

10.1 As the extension of the initial review date imposed no burden on industry, the public sector, charities or voluntary bodies, no impact assessment was considered necessary.

11. Regulating small business

11.1 The extension of the initial review date in the orders for the Listed Ports has no impact on micro, small or medium businesses at the Listed Ports.

12. Monitoring & review

12.1 Once the Order is in force, the initial review date in the orders at the Listed Ports will be in line with the Coalition Government's Better Regulation policy for legislative measures implemented to be reviewed every 5 years.

12.2 The Department has an established port security enforcement programme which includes monitoring compliance with the Port Security Regulations 2009, and thereby complying with the UK's obligations under the Directive. The guidance has been structured in a manner to reflect each of the stated requirements of the Regulations: these are given as objectives, with subsequent paragraphs indicating how they should be met. In the meantime, the current compliance and enforcement programmes will continue.

12.3 The Department has a dedicated team of Compliance Security Inspectors who regularly monitor and review their respective port areas according to Departmental policy.

13. Contact

Caroline Wall at the Department for Transport (Tel: 020 7944 6251 or e-mail: caroline.wall@dft.gsi.gov.uk) can answer any queries regarding the instruments.