EXPLANATORY MEMORANDUM TO

THE PORT SECURITY (PORT OF DOVER) DESIGNATION ORDER 2011

2011 No. 3045

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 identifies the port boundary for the port of Dover for the purposes of the Port Security Regulations 2009 (SI 2009/2048) (Regulation 3). The Order also designates the "Dover Port Security Authority" as the Port Security Authority for that port for the purposes of Regulation 5 of the Port Security Regulations.

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 on the Saving 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, 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 (SI 2009/2048), which transposed Directive 2005/65/EC (the "EU Directive") in the United Kingdom, came into force on 1 September 2009.

4.3 This Order is one of a series of designation orders in respect of individual ports and port security authorities which will be made in order to apply the security measures contained in the Port Security Regulations at relevant ports across the UK. The first designation order, in relation to the port of Bristol, came into force on 19 March 2010. Each designation order will

delineate the boundaries of a particular port area for the purposes of the EU Directive, based on a port security assessment identifying all areas associated with the port which are relevant to port security and discussions with the Dover Harbour Board and any views expressed by other stakeholders during the consultation process; and will also designate a port security authority for the delineated port. Under Regulation 3(5) of the Port Security Regulations (reflecting Article 2(4) of the EU Directive), the provisions of the EU Directive and the Port Security Regulations 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 under Regulation (EC) 725/2004.

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

4.5 The Port Security Regulations, which were made under powers contained in section 2(2) of the European Communities Act 1972, transpose the port security measures in the EU 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 port security authority for each of those ports. 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 port security authority for each port was considered. This option was rejected however because it was considered that this would constitute unlawful legislative sub-delegation to the Secretary of State. Under Schedule 2 paragraph 1(1)(c) of 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 the Designation Order takes into account information resulting from the port security assessment undertaken by the Department for Transport in accordance with Annex I of the EU Directive, and discussions with the Dover Harbour Board and any views expressed by other 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. After this Order has come into force, and has designated the Dover Port Security Authority, the Dover

Port Security Authority is required to complete their own port security assessment in accordance with regulation 14 and schedule 3 of the Port Security Regulations, which is scrutinised and approved by the Department. This is because, as a matter of policy, it is considered appropriate for each port security authority to carry out, and take responsibility for, the risk assessments undertaken for their ports.

5. Territorial Extent and Application

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

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 The policy objectives of the Order are to identify the port boundary for the Port of Dover for the purposes of the Port Security Regulations 2009 and to designate the Dover Port Security Authority.

7.2 As indicated in paragraphs 4.3 to 4.7 above, there is a need to legislate in this area in order to fulfil our EU obligation to implement the Directive 2005/65/EC on enhancing port security; and the Government needs to produce this Designation Order to allow the security measures contained in the Port Security Regulations 2009 to be applied at the port of Dover.

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

7.4 The legislation is politically and legally important as the Department for Transport advocates good security practice and this instrument is one of a series of port security designation orders which - in conjunction with the Port Security Regulations - provide the legal framework for extending port security measures to transport-related and operational areas in relevant ports beyond the immediate “ship/port interface”. As mentioned above, the first of this series of designation orders, in relation to the port of Bristol, came into force on 19 March 2010.

8. Consultation outcome

8.1 A public consultation was launched on the 9 August 2010 and ran for six weeks until 20 September 2010. The reduced length of the consultation from the usual twelve week period was agreed by Ministers and was due to the focussed local nature of the consultation and the fact that the proposals were discussed with the key stakeholders prior to the wider public consultation.

8.2 There were 4 responses to the consultation. The only substantive issue raised was from Dover District Council who raised concerns about the

proposed port boundary. Following discussion with Dover Harbour Board and Dover District Council, it was agreed that the boundary on the land side will remain as proposed in the consultation. However, Dover Harbour Board requested that, on the water side, the boundary be extended to 1 nautical mile beyond the harbour wall to allow for this area to be included in the port security assessment and to bring the boundary into line with article 3 of the Dover (Pilotage) Harbour Revision Order 1988, and this change to the draft Order has been made. There were no other proposed changes to the draft Order.

9. Guidance

9.1 The Department has produced a Port Security Officers' Handbook for guidance on dealing with the port security assessment and port security plan. 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.

10. Impact

10.1 The impact on business is not high as the UK implementation of the EU Regulation (and the activities of the existing Port of Dover Port Security Committee) has in practice already put in place the majority of the provisions of the Directive in operational terms and therefore we anticipate that the coming into force of this Order will have only moderate operational impact at the port and does not pose a major policy change. There will be no impact on charities and voluntary bodies.

10.2 The additional impact on the public sector is not anticipated to be high as the police are already engaged in activity around assisting ports to undertake multi-agency threat and risk assessments ("MATRA" assessments).

10.3 An Impact Assessment is attached to this Memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 Implementation of the Port Security Regulations 2009 is likely to apply to a number of small businesses based at, or working within, the designated port of Dover. The port facilities based within the envisaged port boundary are already regulated by the Department for Transport under the existing port security regime. Under the current regime these facilities also have Port Facility Security Plans in place which are regulated by the Department for Transport and these plans will feed into the wider Port Security Plan to be managed by the Dover Port Security Authority under the new legislation.

11.2 The Port Security Regulations 2009 recognise the need to avoid overburdening smaller ports by allowing a number of port facilities to combine under the umbrella of a single port security authority, thereby taking

advantage of economies of scale. The current Port Security Committee membership at the Port of Dover includes Brett Hall Aggregates, which is a joint venture port facility owned on a 50/50 basis between Brett Aggregates and Cemex. Brett Hall Aggregates will become a member of the new Dover Port Security Authority, but the Department has been advised that the port of Dover will choose to abolish the existing Port Security Committee and include the same membership in the new Port Security Authority. There will therefore be no additional cost to Brett Hall Aggregates for their membership of the Dover Port Security Authority.

11.3 Brett Hall Aggregates, as a member of the Dover Port Security Authority, will be asked to participate in the Port Security Risk Assessment which will incur some cost. The Port of Dover has informed the Department that the task of completing the Port Security Plan is likely to be delegated to the Port of Dover Port Security Officer; hence small firms will not incur any costs from this activity.

11.4 The costs identified correspond to 2% of total annual costs (excluding transition costs) being borne by small business. Remaining costs will be borne by the Dover Harbour Board (a large business). A detailed cost breakdown has been provided in the attached impact assessment.

11.5 The Department undertook a full consultation on the Port Security Regulations in 2008, including all port operations of which many would be classified as small businesses. No particular concerns emerged from these operations. There was support for the combination of smaller ports under single umbrella port security authorities.

12. Monitoring & review

12.1 Once the Order is in force and the Dover Port Security Authority designated, the Department will continue its enforcement programme to ensure compliance with the Port Security Regulations, and thereby with the UK's obligations under Directive 2005/65/EC on enhancing port security. In the meantime the current compliance and enforcement programmes will continue.

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

12.3 The Department has a duty to review the operation and effect of the Order, and will publish a report before 1st January 2014 and within every five years after that. The review must cover whether the regulatory system established by the Port Security Regulations and the Order is achieving its objectives, whether those objectives remain appropriate and whether they could be achieved with less regulation. Following a review it will fall to the Secretary of State for Transport to consider whether the Order should remain as it is, or be revoked or be amended. A further statutory instrument would be needed to revoke the Order or to amend it.

13. Contact

Tony Smith at the Department for Transport (Tel: 020 7944 5875 or e-mail: tonyl.smith@dft.gsi.gov.uk) can answer any queries regarding the instrument.