EXPLANATORY MEMORANDUM TO

THE PORT SECURITY (PORT OF NEWHAVEN) DESIGNATION ORDER 2013

2013 No. 1655

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 Newhaven for the purposes of the Port Security Regulations 2009 (S.I. 2009/2048) (Regulation 3). The Order also designates a port security authority for the Port of Newhaven 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 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 This order is one of the three most recent (the other two relate to Falmouth and to Swansea and Port Talbot) in a series of designation orders in respect of individual ports and port security authorities 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, 8 designation orders have been made and brought into force. Those 8 orders are:

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

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. As a body corporate, a PSA would be 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. As an unincorporated association, the PSA would not be a legal person in its own right.

5. Territorial Extent and Application

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

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 a boundary for the Port of Newhaven for the purposes of the Port Security Regulations 2009 and to designate a Port Security Authority for the Port of Newhaven.

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 the U.K.'s obligation to implement the Directive; and the Government needs to make designation orders to allow the security measures contained in the Port Security Regulations 2009 to be applied at Newhaven.

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 2009 - provide the legal framework for extending port security measures to transport-related and operational areas in relevant ports beyond the immediate "ship/port interface".

8. Consultation outcome

8.1 Newhaven was included in a public consultation on a second batch of ports considered in scope of the Directive. The consultation was launched on the 19 November 2012 and ran for six weeks until 4 January 2013. The reduced length of the consultation from the usual twelve-week period was agreed by Ministers and was due to the focused local nature of the consultation and the fact that the proposals were discussed with key stakeholders at Newhaven prior to the wider public consultation.

8.2 The consultation elicited one response regarding Newhaven. No substantive issues were raised and the proposed PSA boundary remains unaltered following the consultation.

9. Guidance

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 Security Committee at Newhaven) has in practice already put in place the majority of the provisions of the Directive in operational terms. We therefore anticipate that the coming into force of this Order will have only moderate operational impact at Newhaven and does not constitute 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 with regard to 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 Port of Newhaven. 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. These plans will feed into the wider Port Security Plan to be managed by the Port Security Authority at Newhaven 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.

11.3 The Department undertook a full consultation on the draft 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 Port Security Authority designated for the Port of Newhaven, the Department will continue its enforcement programme to ensure 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 Port Security Regulations 2009: 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.

12.2 The Department has a dedicated team of Compliance Security Inspectors who regularly monitor and review their respective port areas according to Departmental policy. Their offer of assistance (at no cost) in carrying out the port security risk assessment and in drawing up the port security plan based on it has been taken up by a number of the ports considered in-scope of the Directive.

12.3 The Order contains a standard review clause in accordance with the Coalition Government's Better Regulation principles. The review clause stipulates that the first report following this review must be published within five years from the coming into force of the designation order.

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.