EXPLANATORY MEMORANDUM TO

THE PORT SECURITY (PORT OF ROSYTH) DESIGNATION ORDER 2014

2014 No. 2007]

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

The order defines the port boundaries for the Port of Rosyth for the purposes of the Port Security Regulations 2009 (S.I. 2009/2048, amended by S.I. 2013/2815).

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

This order implements two of the three recommendations of the House of Lords Secondary Legislation Scrutiny Committee. See paragraphs 4.9 to 4.12 below.

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. They were amended by the Port Security (Amendment) Regulations 2013 (S.I. 2013/2815) which came into force on 29 November 2013.

4.3 This order is part of a series of designation orders in respect of individual ports and PSAs 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, 31 designation orders have been made (or 32 including Gibraltar), 30 of which have come into force. The 31 orders which have been made in the UK 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 (amended by S.I. 2013/2728[1])	31st January 2012
The Port Security (Port of Aberdeen) Designation Order 2012	2012/2607 (amended by S.I. 2013/2728)	19th November 2012
The Port Security (Port of Grangemouth) Designation Order 2012	2012/2608 (amended by S.I. 2013/2728)	19th November 2012
The Port Security (Port of Portland) Designation Order 2012	2012/2609 (amended by S.I. 2013/2728)	19th November 2012
The Port Security (Port of Tees and Hartlepool) Designation Order 2012	2012/2610 (amended by S.I. 2013/2728)	19th November 2012
The Port Security (Port of Workington) Designation Order 2012	2012/2611 (amended by S.I. 2013/2728)	19th November 2012
The Port Security (Port of Milford Haven) Designation Order 2013	2013/516	1st May 2013

[1] The Port Security Designation (Amendment) Order 2013 – This extends the initial review date in six designation orders to 5 years from the coming into force date. For Grangemouth, that amendment order also makes amendments to reflect the reconstitution of the port security authority as a company limited by guarantee.

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 Southampton) Designation Order	2013/2272	9th October 2013
The Port Security (Port of Barrow) Designation Order 2013	2013/3074	9th January 2014
The Port Security (Port of Cromarty Firth) Designation Order 2013	2013/3075	9th January 2014
The Port Security (Port of Fowey) Designation Order 2013	2013/3076	9th January 2014
The Port Security (Port of Glasgow) Designation Order 2013	2013/3077	9th January 2014
The Port Security (Port of Great Yarmouth) Designation Order 2013	2013/3078	9th January 2014
The Port Security (Port of Peterhead) Designation Order 2013	2013/3079	9th January 2014
The Port Security (Port of Troon) Designation Order 2013	2013/3080	9th January 2014
The Port Security (Port of Tyne) Designation Order 2013	2013/3081	9th January 2014
The Port Security (Ports of Cardiff, Barry and Newport) Designation Order 2013	2013/3180	20th January 2014
The Port Security (Port of Belfast) Designation Order 2013	2013/3184	20th January 2014
The Port Security (Port of Shoreham) Designation Order 2013	2013/3185	20th January 2014

The Port Security (Port of Plymouth) Designation Order 2014	2014/8	14th February 2014
The Port Security (Port of Medway) Designation Order 2014	2014/82	17th February 2014
The Port Security (Port of London) Designation Order 2014	2014/577	10th April 2014
The Port Security (Port of Bramble Island Dock, Felixstowe, Harwich, Harwich International, Ipswich and Mistley Quay) Designation Order 2014	2014/604	14th April 2014
The Port Security (Port of Londonderry) Designation Order 2014	2014/1811	11th August 2014

Each designation order delineates the boundaries of a particular port for the purposes of the Directive, based on a port security assessment defining all areas associated with the port which are relevant to port security and discussions with stakeholders during consultation. The orders also designate a PSA for the delineated ports. Under regulation 3(3) of the Port Security Regulations 2009, as amended by the Port Security (Amendment) Regulations 2013 (reflecting article 2(4) of the Directive), the provisions of the Directive and of Parts 2 to 6 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 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 as amended ("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 define 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 defining 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.

House of Lords Secondary Legislation Scrutiny Committee

4.9 The House of Lords Secondary Legislation Scrutiny Committee, when considering the Port Security (Port of Plymouth) Designation Order 2014 (S.I. 2014/8), recommended three revisions to Schedule 2 to the orders, to make practical changes to the running of the Port Security Authority (PSA). Stephen Hammond MP, Parliamentary Under Secretary of State at DfT, agreed to consider these recommended revisions in relation to future orders.

4.10 In relation to the Port Security (Port of Rosyth) Designation Order 2014, the Department for Transport has, following further consultation, implemented two of the Committee's three recommendations. The two recommendations implemented are that notices given by members under paragraph 1(3) of Schedule 2 should be in writing and that the requirement in paragraph 1(7) for members to appoint a proxy should apply only where reasonably practicable.

4.11 An additional revision has been made, at paragraph 1(4), to require notices given by the Secretary of State to be in writing. This was not one of the Committee's recommendations but is a sensible revision to match the revision made to paragraph 1(3).

4.12 The Committee had also suggested that at paragraph 2(2) it would be better to set a quorum rather than leave it to the Port Security Authority to set it. This recommendation has not been implemented. It is preferred to keep regulation to a minimum in this area and leave the matter of quorum to the

PSA in conjunction with the comprehensive guidance issued by DfT covering the regulation of the Port Security Authorities. In addition, at the time the minister replied to the Committee, five designation orders remained to be made. Changing the quorum provisions in those five orders would have created a significant, and unacceptable, difference between the 28 orders already made (or 29 including Gibraltar) and the five that remained to be made.

5. Territorial Extent and Application

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

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 this order are to define port boundaries for the Port of Rosyth for the purposes of the Port Security Regulations 2009, as amended by the Port Security (Amendment) Regulations 2013, and to designate a port security authority for the port.

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 UK's obligation to implement the Directive; and the Government needs to make a designation order to allow the security measures contained in the Port Security Regulations 2009 to be applied at the Port of Rosyth.

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, as amended by the Port Security (Amendment) Regulations 2013 - 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

Rosyth was included in a public consultation held from 8 August 2013 to 20 September 2013. There are two major operators: Babcock International Group and Forth Ports Ltd. Both operators had issues with the boundary plan, which they said did not accurately reflect their port estates, and also with the extent of the seaward boundary. In addition neither operator could agree on the legal status of the PSA which could be either a body corporate or an unincorporated

association, paragraph 4.8 above refers. These issues were the subject of deliberation between the operators but were resolved in April 2014.

9. Guidance

The Department for Transport 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's implementation of the EU Regulation, and the activities of the existing Port Security Committees, have 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 the port and that the order 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 (DfT00254) is attached to this memorandum and will be published alongside the memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 Implementation of the Port Security Regulations 2009, as amended by the Port Security (Amendment) Regulations 2013, is likely to apply to a number of small businesses based at, or working within, the Port of Rosyth The port facilities based within the boundary designated by this order 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 Rosyth Port Security Authority under the new legislation.

11.2 The Port Security Regulations 2009, as amended by the Port Security (Amendment) Regulations 2013, 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 for Transport 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 the Department for Transport will continue its enforcement programme to ensure compliance with the Port Security Regulations 2009 (as amended), 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 for Transport 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 risk assessments and in drawing up the port security plan has been taken up by a number of the ports considered in-scope of the Directive.

12.3 Each designation 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

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