EXPLANATORY MEMORANDUM TO

THE PORT SECURITY (PORTS OF CARDIFF, BARRY AND NEWPORT) DESIGNATION ORDER 2013

2013 No. 3180

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 Ports of Cardiff, Barry and Newport for the purposes of the Port Security Regulations 2009 (S.I. 2009/2048, amended by S.I. 2013/2815). The order also designates a single port security authority covering the ports of Cardiff, Barry and Newport for the purposes of regulation 5 of those 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. 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 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, 23 designation orders have been made, 15 of which have come into force and the remaining 8 of which will come into force on 9 January 2014. The 23 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 (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

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 port security authority ("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.

5. Territorial Extent and Application

This instrument applies to all of the United Kingdom (although its subject matter specifically concerns port operations at the Ports of Cardiff, Barry and Newport).

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 Ports of Cardiff, Barry and Newport for the purposes of the Port Security Regulations 2009, as amended by the Port Security (Amendment) Regulations 2013, and to designate a single port security authority for the three ports.

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 designation orders to allow the security measures contained in the Port Security Regulations 2009 to be applied at the Ports of Cardiff, Barry and Newport.

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

8.1 Cardiff (including Newport and Barry) was included in a public consultation held from 8 July to 16 August 2013. It had featured in a previous consultation held from 19 November 2012 to 4 January 2013 but an Addendum to that consultation, issued on 18 December 2012, informed consultees that it would be consulted upon for a second time with improved boundary plans.

8.2 There were four local responses to the earlier consultation. Three were from Associated British Ports (ABP) at each of Cardiff, Barry and Newport making a number of general points about implementation of the Directive which they made in respect of all the ABP ports featuring in that consultation. The fourth response was on behalf of Welsh police forces, Wales Extremism and Counter Terrorism Unit and the Wales Portal Group all of whom

expressed contentment with the proposals. The second consultation elicited two responses: one from ABP's South Wales representative and the other from Inver Energy, the operators of a port facility at Cardiff. Both respondents registered contentment with the proposals.

8.3 It emerged during a post-consultation visit by one of DfT's port security compliance officers to Cardiff that an ISPS[2] compliant passenger port facility owned by Cardiff Harbour Authority (CHA) was not included within the draft PSA boundary plan. Following discussions with the port facility security officer (PFSO) at CHA, it emerged that ISPS-compliant status had been attained several years previously specifically as a cruise vessel was due to arrive at the jetty operated by CHA. No cruise liners have called since or are expected to in the near future and the CHA PFSO has elected to relinquish his port facility security plan and will be returning his Statement of Approval to DfT maritime compliance. This means that no alterations are required to the proposed PSA boundary.

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 Committees at Cardiff, Barry and Newport 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 Cardiff, Barry and Newport 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 (DfT00245) is attached to this memorandum and will be published alongside the memorandum on www.legislation.gov.uk.

[2] ISPS = The International Ship and Port Facility Security Code (ISPS Code). This is a comprehensive set of measures to enhance the security of ships and port facilities, developed in response to the perceived threats to ships and port facilities in the wake of the 11 September 2001 attacks in the United States. The ISPS Code is implemented through chapter XI-2 Special measures to enhance maritime security in the International Convention for the Safety of Life at Sea (SOLAS), 1974.

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 Ports of Cardiff, Barry and Newport. 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 for Cardiff, Barry and Newport 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 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 for Cardiff, Barry and Newport designated, the Department 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 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

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.