EXPLANATORY MEMORANDUM TO

THE PORT SECURITY (PORTS OF LIVERPOOL AND THE MANCHESTER SHIP CANAL) DESIGNATION ORDER 2013

2013 No. 2181

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 boundaries of the Ports of Liverpool and the Manchester Ship Canal 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 two ports 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 a further one 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, 13 designation orders have been

made, 11 of which have come into force. The remaining 2 will come into force on 10 September. The 13 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
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 designation order delineates the boundaries of the Ports of Liverpool and the Manchester Ship Canal 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 order also designates a Port Security Authority ("PSA") for the Ports of Liverpool and the Manchester Ship Canal. 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. Peel Ports, the owners of both the Port of Liverpool and the Manchester Ship canal has elected to constitute the joint PSA as a body corporate.

5. Territorial Extent and Application

These instruments apply to all of the United Kingdom (although their subject matter specifically concerns port operations in the Ports of Liverpool and the Manchester Ship Canal).

6. European Convention on Human Rights

As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

7.1 The policy objectives of the Order are to identify port boundaries for the Ports of Liverpool and the Manchester Ship Canal for the purposes of the Port Security Regulations 2009 and to designate a combined Port Security Authority for those 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 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 the Ports of Liverpool and the Manchester Ship Canal.

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 Liverpool and the Manchester Ship Canal were included in a public consultation on a second batch of ports considered in scope of the Directive. The consultation was launched on 19 November 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 the Ports of Liverpool and the Manchester Ship Canal prior to the wider public consultation. An updated version of the consultation paper was issued on 6 December 2012 including revised plans for certain ports in the batch, including Liverpool.. Liverpool had been included in an earlier

consultation ((28 March to 9 May 2012) but was entered into the second batch of ports with the Manchester Ship Canal because Peel Ports, owners of both ports, had decided in the interim that they wished to form a single PSA covering both ports. In the consultation on the second batch of ports, consultees were informed of Peel Ports' preference and specifically asked if they favoured two separate PSAs or a single PSA. Consultees were also asked if they agreed with the proposed inclusion of the port facility at Tranmere in the PSA.

8.2 The consultation elicited 3 responses (from Peel Ports and two local police forces) all of which referred to both ports. Respondents unanimously supported the establishment of a single PSA for both ports and the inclusion of the Tranmere port facility. The proposed PSA boundary plan covering the jurisdictional limits of both harbours is therefore unchanged and no other issues were raised by respondents

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 the Ports of Liverpool and the Manchester Ship Canal - 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 ports 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 two ports. The port facilities based within the envisaged port boundaries 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 the ports of Liverpool and the Manchester Ship Canal 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 a Port Security Authority designated for the ports of Liverpool and the Manchester Ship Canal, 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 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.