

## **EXPLANATORY MEMORANDUM TO**

### **THE PORT SECURITY (AMENDMENT) REGULATIONS 2013**

**2013 No. 2815**

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**

These regulations amend the Port Security Regulations 2009 (S.I. 2009/2048, “the Port Security Regulations”) which transposed Directive 2005/65/EC of 26 October 2005 on enhancing port security (“the Directive”). The purpose of the amendments is to improve the transposition of the Directive. The amendments move responsibility from the port security authority to the Secretary of State for ensuring that a port security assessment is done under the Regulations. The amendments also ensure that the first port security assessment is done before the drawing of the boundary of the “port” as defined in the Port Security Regulations, and clarify that the first port security assessment informs the drawing of that boundary. The regulations also insert a standard 5-year review clause.

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 (“IMO”) 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 those measures was to enhance the security of ships used in international trade and certain domestic shipping and the security of the associated port facilities. The EU Regulation was implemented in the United Kingdom, so far as necessary, by the Ship and Port Facility (Security) Regulations 2004 (S.I. 2004/1495) and the Ship and Port Facility (Security)(Amendment) Regulations 2005 (S.I. 2005/1434).

4.2 The ISPS Code and the IMO are limited in their jurisdiction to maritime matters and shipping and have little or no jurisdiction over ports. Because the ISPS Code effectively stopped at the “ship-port interface” (essentially the docking areas), a further measure was generally considered necessary to apply security measures in ports themselves. The IMO’s sister

organisation, the International Labour Organization (“ILO”), devised a Port Security Code aimed at supporting the ISPS Code. The ILO code initiated discussions at the European Parliament. In 2005, the European Parliament and the Council adopted further legislation in the form of 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).

4.3 The proposal which resulted in the Directive was the subject of Explanatory Memorandum EM 6363/04. The House of Commons European Scrutiny Committee considered that Explanatory Memorandum on 10 March 2004, recommending the document to be politically important and requesting further information (Report 12 – Session 2003/04, 25377). The House of Lords Select Committee on the European Union referred the EM to Sub-Committee B (1172nd sift). Sub-Committee B considered the proposal on 15 March 2004. The Chairman wrote to the minister on 17 March welcoming the Directive and asked to be kept informed of the outcome of the industry consultation, and for a regulatory impact assessment (“RIA”) in due course. The minister wrote to the chairmen of both Scrutiny Committees on 20 May 2004 informing them of the outcome of the consultation exercise and promising an RIA in due course. The House of Commons European Scrutiny Committee cleared the proposal at their meeting on 9 June 2004, requesting to see an RIA once one had been produced (Report 22 – Session 2003/04, 25377). The chairman of the House of Lords Select Committee on the European Union wrote to the minister on 8 June 2004 clearing the proposal and also requested to see the RIA in due course.

4.4 An amended proposal was the subject of Explanatory Memorandum EM 10124/04. The House of Commons European Scrutiny Committee considered that Explanatory Memorandum on 30 June 2004. The Committee recommended that the document was politically important and cleared it, but requested to see the RIA in due course (Report 25, Session 2003/04, 25717). The House of Lords Select Committee on the European Union referred the EM to Sub-Committee B. The chairman wrote to the Minister on 13 July 2004, clearing the document. A ministerial letter and partial RIA were sent to both Committees on 14 June 2005.

4.5 The Port Security Regulations, which transposed the Directive in the United Kingdom, came into force on 1 September 2009.

4.6 Port security authorities are being progressively established at ports considered in scope of the Directive. This is being done by designation orders which have to be made in order to apply the security measures contained in the Port Security Regulations at relevant ports across the UK. To date, 15 designation orders have been made as follows, all of which have come into force:

<i>Order</i>	<i>S.I. number</i>	<i>Date in force</i>
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)	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
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	2013/2272	9th October 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 (which will be duplicated by new regulation 3(3) and reflects article 2(4) of the Directive), the provisions of the Directive and of 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 by the EU Regulation and is effectively exempted from the Directive.

4.7 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 4.8 and 4.9 below.

4.8 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 Directive which have general application across all relevant UK ports. It was not however considered practicable to include in the Port Security 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 Port Security Regulations themselves would have resulted in an impracticably long instrument containing numerous schedules of maps.

4.9 The possibility of including in the Port Security 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.)

4.10 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 with the Port Security Regulations, 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.

## **5. Territorial Extent and Application**

This instrument applies to all of the United Kingdom.

## **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 Amending the port security assessment provisions in the Port Security Regulations addresses the European Commission's concern that the Regulations did not properly transpose the Directive. In particular, the amendments address the commission's concern that the Regulations should expressly provide that the port security assessment informs the drawing of the port boundary. The amendments also address another of the commission's concerns by providing for the Secretary of State to have responsibility for the port security assessment. The provisions in the Regulations for the carrying out of the assessment reflect the provisions of the Directive, including the provisions of Annex I of the Directive.

7.2 The amendments by these regulations will not affect the main requirements under the Port Security Regulations; those are for a PSA to be established, a PSA area to be delineated, a Port Security Officer appointed, a port security assessment to be carried out, and a port security plan based on it to be produced and maintained. The main changes are to make clear that the first port security assessment must be done before the drawing of the port boundary, and to place responsibility on the Secretary of State to ensure that the assessment is carried out. The amendments will add clarity, align the Port Security Regulations more closely with the Directive, and make the Port Security Regulations subject to 5-yearly reviews in line with the Government's Better Regulation policy.

7.3 Consequential amendments are made to reflect these changes. The consequential amendments include a new definition: "port facility locality". This is introduced to describe what exists in the first instance before a "port" as defined in the Port Security Regulations (effectively the "end-product" with a designated PSA and delineated PSA area) can be said to exist.

7.4 More detail of some of the amendments is set out at paragraphs 7.5 to 7.7 below.

7.5 In regulation 14 (port security assessment) of the Port Security Regulations as currently drafted, the responsibility for doing the port security assessment is allocated to the PSA. There is also a presumption in the wording that the assessment is done by the PSA after its designation has come

into force and a timescale of 9 months is imposed within which the PSA must request Secretary of State approval for the port security assessment. Regulation 3A(1) which replaces regulation 14(1) now provides that the Secretary of State must ensure that a port security assessment is carried out for every port facility locality (see paragraph 7.7 below regarding the new term “port facility locality” to be introduced into the Port Security Regulations). This amendment places responsibility for the port security assessment on the Secretary of State rather than, as at present, on the PSA.

7.6 “Port” is currently defined in the Port Security Regulations as follows:

*“an area of land and water –  
(a) within boundaries that have been identified by the Secretary of State in an Order made under section 2(2) of the 1972 Act<sup>1</sup>, and  
(b) that contains at least one port facility that is covered by an approved port facility security plan.”*

This effectively represents the “end-product” arrived at after the PSA has been designated (by order) and a port boundary designated (also by order) – there is currently no term in the Port Security Regulations for what exists in the first instance prior to those designations.

7.7 The Directive uses the word “port” to mean both what exists prior to the PSA boundary being drawn and what exists within the boundary once the boundary has been drawn. It would be confusing if the Port Security Regulations did the same thing. The term “port facility locality” will therefore be substituted for “port” in the Port Security Regulations wherever it seems the Directive is talking about what exists prior to the PSA boundary being drawn. Wherever it appears that the Directive is talking about the area inside the boundary once the boundary is drawn, the Port Security Regulations will continue to refer to “port”. This distinction between “port facility locality” and “port” is purely a drafting device necessitated by the fact that “port” within the meaning of the Port Security Regulations does not exist until after the PSA boundary has been drawn. It is not a change of substance.

7.8 Consideration was given to consolidating the Port Security Regulations with these amendments. The amendments are being done to a tight timescale in view of the need to improve the transposition of the Directive. Consolidation would have required a broader consultation, attracting potentially many more responses than the current amendments attracted. In view of that, and given that this is the first set of amendments, it was decided not to consolidate the present amendments. Consideration will of course be given to consolidation if further amendments are made.

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

---

<sup>1</sup> The European Communities Act 1972.

## **8. Consultation outcome**

8.1 A public consultation was held on the proposed amendments to the Regulations between 31 July and 11 September 2013. Two responses were received, from a representative body of major ports in the UK and a port authority.

8.2 The representative body supported the proposed amendments.

8.3 The port authority, while not opposing the proposed amendments, queried other provisions in the Port Security Regulations: the necessity for a port security plan to be submitted for approval when no changes were deemed necessary following a review under the circumstances listed in regulation 18(1) of the Port Security Regulations.

8.4 In light of that consultation response, consideration has been given to the issue of submission for Secretary of State approval of port security plans that are unchanged following review. Regulation 18(6) requires submission of plans for approval whether amended or not but excludes from the requirement a review under regulation 18(1)(a) “at each meeting of the Port Security Authority”. This exclusion will be retained as it would be overly burdensome for a plan to be submitted for approval following every PSA meeting.

8.5 Following consideration, the Secretary of State has concluded also that it is right to retain the requirement for plans unchanged following review in the other circumstances - those listed in regulation 18(1)(b) to (f) - to be submitted for approval. Those circumstances are within 30 days of a major operational or structural change in the port or of a major security incident, a written request from the Secretary of State, or not more than 5 years after a plan or assessment was approved. It is considered that the Secretary of State should retain the opportunity to disagree that a port security plan or assessment should remain unchanged in these significant circumstances. The wording will therefore remain as it is.

8.6 In responding to the consultation, the port authority also expressed concern about wording in the same regulation of deemed refusal of approval by the Secretary of State of a submitted port security assessment or plan if the PSA did not receive a response within 30 days, and the requirement in those circumstances for the PSA to submit a revised assessment or plan within the 30 days following with apparently no guidance on where any deficiency lay. The Department for Transport has assured the port authority that the Secretary of State, if dissatisfied with an assessment or plan, would always take positive steps to notify the PSA before 30 days had elapsed; he would not use a 30-day silence as a means of communicating dissatisfaction. He would also say in what way the assessment or plan was unsatisfactory. The Department has explained to the port authority respondent that the 30-day default in regulations 16(8) and 18(8) is necessary to cater for an unforeseen situation beyond the Department’s control which prevents a response within 30 days.

## **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 done pursuant to the Regulations. The guidance has been structured in a manner to reflect each of the stated requirements of the Port Security Regulations: these are given as objectives, with subsequent paragraphs indicating how they should be met.

9.2 No guidance is considered necessary in relation to the particular changes being made by these amending regulations. Ports are however being given informal help and guidance as to implementation by the Department for Transport, and that help and guidance will continue. The need for formal guidance in relation to the changes made by these regulations will be reviewed at a later stage and formal guidance will be issued if it becomes appropriate.

## **10. Impact**

As none of the proposed amendments impose a burden on industry, the public sector, charities or voluntary bodies, no impact assessment was considered necessary. The amendments lift a burden by removing from the port security authority the requirement to conduct the first port security assessment.

## **11. Regulating small business**

The proposed amendments will have no impact on micro, small or medium businesses at ports considered in scope of the Directive.

## **12. Monitoring & review**

12.1 Once the regulations are in force, the Port Security Regulations as amended will be subject to 5-yearly review. This will be in line with the Coalition Government's Better Regulation policy for legislative measures implemented to be reviewed every 5 years.

12.2 The Department for Transport has an established port security enforcement programme which includes monitoring compliance with the Port Security Regulations, thereby complying with the UK's obligations under the Directive.

## **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 instrument and the Regulations it amends.