**EXPLANATORY MEMORANDUM TO**

**THE CARRIERS' LIABILTY (AMENDMENT) REGULATIONS 2023**

**2023 No. 29**

**AND**

**THE CARRIERS' LIABILITY (CLANDESTINE ENTRANTS) (LEVEL OF PENALTY: CODE OF PRACTICE) ORDER 2023**

**2023 No. 30**

## 1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.

## 2. Purpose of the instrument

2.1 The Carriers' Liability (Amendment) Regulations 2023 ("the 2023 Regulations") and the code of practice entitled 'Immigration and Asylum Act 1999: Level of Penalty: Code of Practice', laid in draft before Parliament on 16 January 2023 and brought into operation by the Carriers' Liability (Clandestine Entrants) (Level of Penalty: Code of Practice) Order 2023, reform the Clandestine Entrant Civil Penalty Scheme ('the Scheme'). The Scheme as reformed means that new levels of penalties can be imposed on a responsible person for carrying a clandestine entrant. There will also be a new penalty for failing to adequately secure a goods vehicle against unauthorised access. The statutory defence for both penalties will be limited to duress. A responsible person is defined as an owner, hirer or driver (or in the case of a detached trailer, an owner, hirer or operator). The Scheme has not been reformed since 2002.

## 3. Matters of special interest to Parliament

***Matters of special interest to the Joint Committee on Statutory Instruments***

3.1 None.

## 4. Extent and Territorial Application

4.1 The territorial extent of these instruments (that is, the jurisdiction(s) which these instruments form part of the law of) is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of these instruments (that is, where these instruments produce a practical effect) is the same as its extent.

## 5. European Convention on Human Rights

5.1 As the 2023 Regulations and the Carriers' Liability (Clandestine Entrants) (Level of Penalty: Code of Practice) Order 2023 are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

## 6. Legislative Context

6.1 The 2023 Regulations amend the Carriers' Liability Regulations 2002 (S. I. 2002/2817) ('the 2002 Regulations'), which make provision in relation to penalties for persons responsible for the transporting of clandestine entrants into the United Kingdom. These Regulations amend the maximum penalty amounts for carrying of clandestine entrants and prescribe penalty amounts for failing to adequately secure a goods vehicle against unauthorised access. The 2023 Regulations are made under powers conferred on the Secretary of State under sections 31A and 32 of the Immigration and Asylum Act 1999 ('the 1999 Act'), as amended by section 42 and relevant provisions in Schedule 5 to the Nationality and Borders Act 2022 ('the 2022 Act'). This is the first use of these powers under the 1999 Act as amended by the 2022 Act.

6.2 Before making these Regulations, under the 2022 Act, the Secretary of State has a duty to consult with such persons as the Secretary of State considers appropriate. During passage of the 2022 Act, the Government also committed to consulting on the level of penalty for failing to adequately secure a goods vehicle against unauthorised access (House of Lords, 8 February 2022, Column 1538). The Secretary of State held a public consultation on these issues between 18 July and 12 September 2022.

6.3 Please see below under 7.7 for details of the legislative context of the Carriers' Liability (Clandestine Entrants) (Level of Penalty: Code of Practice) Order 2023.

## 7. Policy background

***What is being done and why?***

7.1 Illegal migration is facilitated by serious organised criminals. The same criminal gangs and networks are also responsible for other illicit activity, ranging from drugs and firearms, trafficking to modern slavery and serious violent crimes. A significant number of people who try to come to the UK clandestinely do so through concealment in vehicles by tourist and freight transport routes. In many cases, this is a result of criminal gangs and opportunistic migrants taking advantage of unsecured or poorly secured vehicles. Despite extensive work with overseas partners to strengthen our shared borders and enhance our strategic partnerships, this method of entry continues and endangers the lives of those involved.

7.2 The Scheme as it stands under the 2002 Regulations means that a penalty can be imposed where a clandestine entrant is found concealed in or on a vehicle. The maximum penalty under the 2002 Regulations is £2,000 per clandestine entrant per responsible person. A responsible person is defined as the owner, hirer or driver of the vehicle (or the owner, hirer or operator of a detached trailer). The maximum aggregate penalty – which is to say the maximum total penalty for all responsible persons per clandestine entrant – is £4,000. The Scheme as it stands applies to all vehicles, commercial and private, as well as anything that is designed to be towed or carried by a vehicle (such as trailers, caravans, containers etc). In circumstances where the driver is employed by the vehicle's owner or hirer, the employer is also liable for the driver's penalty. The maximum penalty levels for the Scheme as it stands have not been changed since 2002.

7.3 The Government is concerned that the existing Scheme is not a sufficient deterrent, as drivers are not taking the steps required to secure vehicles, and clandestine entrants are continuing to use unsecured vehicles to try to come to the UK. During the

financial year 2020-2021, there were 3,145 incidents where clandestine entrants were detected concealed in vehicles, despite the Covid-19 pandemic causing a lower volume of traffic. This rose to 3,838 incidents during the financial year 2021-2022. It is for this reason that the Government committed to review and overhaul the Scheme.

7.4 The key objective of these reforms is to increase compliance with our security standards, to stop people from using unsecured vehicles to try to come to the UK.

7.5 Changes to the Scheme are being delivered by commencing relevant provisions in section 42 and at paragraphs 1 to 7(2), 7(5) to 8(1) and 8(3) to 12 of Schedule 5 to the 2022 Act. These include the introduction of the new penalty for failing to adequately secure a goods vehicle against unauthorised access and the establishment of the statutory defence for both offences of duress.

7.6 Changes are also being delivered by commencing relevant provisions in section 125 and Schedule 8 to the Nationality, Immigration and Asylum Act 2002, insofar as they relate to certain clandestine entrants who arrive in the United Kingdom and who claim or indicate that they intend to claim asylum or who evade or who attempt to evade immigration control, and to ensure that relevant measures apply to the new penalty of failing to adequately secure a goods vehicle. We are also commencing relevant provisions in the Immigration and Asylum Act 1999, to ensure that relevant measures apply to the new penalty of failing to adequately secure a goods vehicle.

7.7 Changes are also being made to the statutory codes of practice associated with the Scheme:

- 'Prevention of Clandestine Entrants: Code of Practice' is being withdrawn. This code of practice is issued under section 33 of the 1999 Act. The commencement of provisions in the 2022 Act will have the effect of omitting Section 33, and so this code of practice will cease to have legal effect for new cases arising after it is withdrawn. 'Prevention of Clandestine Entrants: Code of Practice' is not being replaced. However, its provisions are largely being carried over into these new 2023 Regulations, including sections which set out the actions to be taken by each person responsible in relation to the securing of a vehicle against unauthorised access. This means that there will continue to be a statutory basis for the provision of instructions on how to prevent clandestine entrants.
- 'Immigration and Asylum Act 1999: Level of Penalty: Code of Practice' is being re-issued. This code of practice is issued under section 32A of the 1999 Act, which is being amended by the commencement of provisions in the 2022 Act. The amendments mean that the Secretary of State is empowered to issue separate 'Level of Penalty: Codes of Practice' for carrying a clandestine entrant and for failing to adequately secure a goods vehicle against unauthorised access. However, in the interests of simplicity, the Secretary of State is issuing one new combined 'Immigration and Asylum Act 1999: Level of Penalty: Code of Practice'.

7.8 Changes are also being delivered through these 2023 Regulations, which make provision in relation to penalties for persons responsible for carrying clandestine entrants and for failing to adequately secure a goods vehicle.

- Regulations 1 to 3 deal with general matters, including citation, commencement, extent and definitions.
- Regulation 4 sets out what is meant by a goods vehicle being adequately secured against unauthorised access.

- Regulations 5 to 8 set out rules regarding securing a goods vehicle against unauthorised access, in particular: actions to be taken by each responsible person to secure the vehicle; checks to be undertaken; requirements for each responsible person to report any unauthorised access to the police or equivalent agency; and records to be kept.
- Regulations 9 and 10 relate to maximum penalty levels. The maximum penalty for failing to adequately secure a goods vehicle will be £6, 000 per responsible person per incident. The maximum aggregate penalty for all responsible persons will be £12, 000 per incident. The maximum penalty for carrying a clandestine entrant will increase from £2,000 per entrant per responsible person to £10, 000 per entrant per responsible person. The maximum aggregate penalty will increase from £4, 000 per clandestine entrant to £20, 000 per clandestine entrant.
- Regulations 11 to 15 specify the rules a person must comply with in order to be eligible for a reduction in the level of a penalty for carrying a clandestine entrant concealed in a goods vehicle, a commercially operated bus or a vehicle other than a goods vehicle or a commercially operated bus.
- Regulation 16 establishes that when a person becomes responsible for a clandestine entrant, a penalty for either carrying a clandestine entrant or failing to adequately secure a goods vehicle must be issued within 180 days.
- Regulations 17 and 18 make technical amendments in relation to procedural matters such as the service of documents. They also set that where a transporter has been seized for non-payment of debt, the period within which a power of sale must be exercised is increased from 60 days to 80 days.
- Regulation 19 sets out 'The standard checks' – which is to say, the standard security checks, which persons responsible for a goods vehicle are expected to undertake, in accordance with these Regulations.

7.9 The Home Office intends to deliver these reforms in two phases.

- In phase 1, from 16 January to 12 February 2023, the focus will be on education and engagement with drivers and companies. This will be supported by the relaunch of the existing Civil Penalty Accreditation Scheme for Hauliers, which provides guidance and support to road transport companies and their drivers.
- In phase 2, from 13 February 2023 onwards, the focus will be on enforcement. Delivery of phase 2 is dependent on the will of Parliament in permitting these 2023 Regulations to come into effect on 13 February 2023.

## 8. European Union Withdrawal and Future Relationship

8.1 These instruments do not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act.

## 9. Consolidation

9.1 The Government intends to consolidate some immigration legislation, but there are currently no plans to consolidate the secondary legislation for clandestine entrants.

## 10. Consultation outcome

10.1 The Home Office ran an initial public consultation on plans to reform the immigration and asylum system, including proposals to reform the Scheme, from 24 March to 6

May 2021. Stakeholders welcomed the review of the current vehicle security Code of Practice and supported looking to articulate the required standards more clearly. There was also support for the existing Accreditation Scheme; greater enforcement against repeat offenders and those with unpaid civil penalty debt; and increasing the penalty amount for the existing offence of carrying a clandestine entrant from the current £2,000. The Government published its response to this consultation on 22 July 2021:

https://www.gov.uk/government/consultations/new-plan-for-immigration/outcome/consultation-on-the-new-plan-for-immigration-government-response-accessible-version

10.2 The Home Office then ran a further public consultation, as set out above, on further proposals to reform the Scheme, from 18 July to 12 September 2022. Most consultation respondents agreed with the basic premise that vehicles should be adequately secured. Most respondents said the levels of penalty for the existing offence should either be unchanged or should be reduced. Stakeholders also emphasised possible adverse impacts on trade if penalty levels were too high. The Government published its response to this consultation on 16 January 2023:

https://www.gov.uk/government/consultations/clandestine-entrant-civil-penalty-scheme

## 11. Guidance

11.1 The Home Office will be publishing new guidance for drivers and companies in a range of different languages on Gov.UK. This includes the provision of a new checklist to support drivers to comply with the security standards being set out by these 2023 Regulations:

https://www.gov.uk/government/publications/clandestine-entrant-civil-penalty-scheme

## 12. Impact

12.1 The impact on business, charities or voluntary bodies is anticipated to be low. Monetised costs are limited to the time it will take responsible persons to familiarise themselves with reforms to the Scheme, with a central estimate of one-off costs of £30,500[1]. Additional costs such as the purchase of security equipment are considered but have not been monetised as they are anticipated to be minimal. This is because the reforms to the Scheme do not introduce any requirements to purchase new security equipment that vehicles are not already expected to have. We also do not factor in penalty costs, as these can be avoided through compliance.

12.2 The impact on the public sector is higher. Monetised costs amount to familiarisation costs for Border Force, with a central estimate of one-off costs of £5,500. There will also be staffing costs of £30.10 million over a ten-year appraisal period, due to the increase in the number of penalties we expect to issue. Non-monetised benefits are those arising from increased compliance with our security standards. Monetised benefits are those arising from penalty income, with a central estimate of income at £36.90 million over a ten-year appraisal period. This gives an estimated Net Present Social Value of £6.77 million.

[1] £ figures are in 2022/23 prices and are discounted in line with HM Treasury Green Book guidance.

12.3 An economic note is submitted with this memorandum and published alongside it on the legislation.gov.uk website.

## 13. Regulating small business

13.1 This legislation applies to activities that are undertaken by small businesses.

13.2 To manage the potential impact of reforms to the Scheme on small businesses (with a turnover or balance sheet total of less than €10 million, employing up to 50 people), the Secretary of State retains the discretion to apply means testing in setting penalty levels. Small businesses can themselves manage the potential impact of reforms by complying with the new standards and thereby mitigating their risk of being fined.

## 14. Monitoring & review

14.1 The impact of reforms to the Scheme will be monitored by Border Force, as part of an evaluation phase which will conclude by 31 March 2024.

14.2 These instruments do not include a statutory review clause.

## 15. Contact

15.1 Jonathan Sanders at the Home Office, Telephone: 0300 072 1437 or email: jonathan.sanders3@homeoffice.gov.uk can be contacted with any queries regarding these instruments.

15.2 David Livesey, Senior Responsible Officer at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rt Hon Robert Jenrick MP, Minister for Immigration at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.