



Home Office

CLANDESTINE CIVIL PENALTY

Consultation on proposals to improve the civil penalty regime

March 2016

Scope of the consultation

Topic of this consultation	Proposal to improve the clandestine civil penalty regime
Scope of this consultation	To seek views on our approach to the prevention of clandestine entrants, how the codes of practice governing the civil penalty regime should be modernised, and whether other improvements could be made to the regime; but also what more industry can do to mitigate the risk of illegal migrant abuse.
Geographical scope	United Kingdom, including the juxtaposed controls zones
Impact Assessment	The policy proposals in this consultation are high level and no Impact Assessment has therefore been provided at this stage. An Impact Assessment will be developed prior to revised codes of practice being laid before Parliament

Basic information

To	Public Consultation Targeted primarily at the haulage and goods transportation sectors, but also regulators and law enforcement bodies. Owners of private vehicles may also have an interest
Duration	6 weeks
Enquiries	By email to The Border and Visa Policy Unit at clandestineentrantcivilpenaltyconsultation@homeoffice.gsi.gov.uk
How to respond	By email to the above or in writing to Clandestine Civil Penalty Consultation, Border & Visa Policy, 3rd rd Floor Seacole, Home Office, 2 Marsham Street, London SW1P 4DF. The consultation closes on 18 April 2016
After the consultation	All responses will be considered by the Home Office and a Government response will be published
Alternative formats	Should you require a copy of this consultation paper in any other format, eg Braille, Large Font, or Audio, please write to the email or postal address above

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FOREWORD BY RT HON JAMES BROKESHIRE MP, MINISTER OF STATE FOR IMMIGRATION

The Government recognises the huge contribution the goods transportation industry makes to the UK economy. And we are very aware of the challenges that many operators are now facing in Northern France. Most hauliers are meeting the basic standards of lorry security; but a significant number are not. This poses a risk of illegal migrants gaining entry to the UK as clandestines. It can also result in damage to valuable cargos, delays to traffic, a threat to driver security and a risk to life of the migrants themselves. We therefore cannot ignore poor vehicle security.

Our overall approach is to support industry with best practice and guidance; prosecute those who break the law; and use the civil penalty to improve the behaviours of the careless or reckless.

We want to improve the civil penalty regime by strengthening the codes of practice so that they underline the need for all hauliers to show that they have effective security measures; with potential penalties if they don't. The codes have been in place for over ten years and so the time is right to ensure that they are as fair and effective as they should be. The regime should set out requirements in a clear and structured way, and we should not penalise operators where they can show that they have taken these simple basic steps. But we also want to reward industry where they have made greater efforts on vehicle security, and this consultation invites views on how we can best do that.

The transport of goods can involve complex supply chains and multi-modal operations. Whilst our focus is primarily the codes of practice, this consultation is framed in such a way as to look at what other improvements could be made to the regime; but also to encourage industry to look at itself, and consider how operations can be modernised to ultimately support our objective. To defeat the clandestine threat to goods traffic, Government and industry must work effectively in partnership to that end.

I look forward to hearing your views on this consultation.

BACKGROUND

Uncontrolled migration can have a significant impact on the UK's economy, but also impacts on our public services, such as schools and hospitals. And the costs to the UK can be high – it costs many thousands of pounds to remove each illegal migrant¹. It is not only the volume of clandestines which is of concern, but sometimes the threat posed by specific individuals. And clandestine activity in freight transport can have a significant negative impact on the effective transportation of goods. Industry estimates that about £2 million of transported food was being destroyed each month this Summer as a result of clandestine activity.

The UK faces a significant challenge from illegal migration. Around 40,000 attempts by clandestines to enter the UK illegally at the juxtaposed controls at Calais, Coquelles and Dunkerque were prevented by Border Force (BF) and the French authorities in 2014/15, compared to around 18,000 in 2013/14 and around 11,000 in 2012/13. There are still high numbers of irregular migrants living temporarily in the Nord de Pas de Calais region despite the increased presence of the French authorities.

We recognise that the clandestine challenge at the border can be varied. At one end of the spectrum, a clandestine could break into a lorry unknown to the driver and the haulage company who have taken all reasonable measures to secure the vehicle. At the other end of the spectrum, a driver could be knowingly transporting large numbers of clandestines to the UK having taken payment from an organised criminal gang.

The Government has a broad response to the full spectrum of clandestine entry, including: diplomatic efforts to address illegal migration 'upstream' in source countries; working with the partners in Europe to strengthen the Schengen border, strengthening international law enforcement cooperation; improving port infrastructure; and improving the checks undertaken at the UK border.

However, the Government cannot solve this alone and those seeking to transit the UK border have an obligation to ensure that they are playing their part. Security of vehicles, especially large goods vehicles, will continue to be an important element of this - vehicle operators need to ensure that they are taking all reasonable steps to ensure that their actions are not contributing to the problem.

Whilst many hauliers effectively secure their vehicles, there is a significant proportion which does not. A recent exercise identified that over one third of vehicles arriving in the UK were unsecure – this would equate to approximately 750,000² arriving vehicles a year. Lorry security is an international issue. Of the 2.2 million powered goods vehicles travelling to mainland

¹ The National Audit Office estimated that the cost of a failed asylum seeker could range between £3,000 and £25,000 for a single adult, depending on their profile and case type (Management of Asylum Applications by the UK Border Agency, Jan 2009)

² Department for Transport published statistics show that in 2014 there were 2.2 million powered goods vehicles travelling from GB to mainland Europe. It is assumed substantially the same number will make the same journey to GB for the purposes of this estimate.

Europe from GB in 2014, 1.9 million were foreign registered³. British drivers accounted for only 7% of penalties served from March 2013 to April 2014 despite being responsible for 14% of this traffic. This position is not sustainable - inadequately secured vehicles present a tempting and easy target for migrants seeking to enter the UK illegally, this impacts on border security, port fluidity and on those who play by the rules and secure their vehicles.

The existing civil penalty regime is an important part of our response to the clandestine challenge. The current regime takes a simplistic and binary approach – no penalty is raised where a vehicle been secured to a very basic minimum standard. This approach has served us well in the past but has failed to keep abreast with developments, either in the methods employed by migrants or in the technology available to secure freight vehicles. The current minimum standard no longer provides an adequate level of security and the binary approach does not recognise or reward those that have taken additional steps to secure their vehicle. We therefore want to introduce more effective, and widely understood minimum standards. And move to a position within the civil penalty regime where operators are rewarded for investing in better quality lorry security.

Our policy objective is to modernise the clandestine civil penalty regime so that we are sure it provides a fair and effective mechanism to incentivise operators to secure their vehicles effectively, thereby mitigating the clandestine threat.

This consultation invites views on how best to do this.

We are also seeking views on other ways that the industry can respond to this challenge. What role is there for consignees, whose cargoes are often delayed or even destroyed as the result of a migrant incursion? What role is there for the insurance sector, which can be liable for the costs of a destroyed cargo? There is good quality security technology on the market, and the revised regime has to incentivise operators to invest in this.

We are seeing significant numbers of migrants attempting to enter the UK illegally on rail freight wagons and freight shuttle wagons. We are working closely with rail operators and the French authorities to strengthen the security around their operations as part of our broader work to strengthen port security. We would welcome views on whether the extension of the civil penalty regime to this and the maritime sectors would be effective and/or proportionate.

Should a decision be made to extend the Clandestine Civil Penalty regime to rail operators we would propose to draft new codes of practice and lay them before Parliament prior to a re-introduction of the regime. These codes would be drafted in collaboration with the Rail sector to ensure that any regime is proportionate and does not conflict with other legal measures regarding the Channel Tunnel. We do however reserve the right in exceptional circumstances to re-impose the existing codes of practice for rail operators should this be required.

³ Department for Transport published statistics. It is assumed substantially the same number will make the same journey to GB for the purposes of this estimate.

This consultation will be supported by a number of workshops aimed at engaging with industry to understand the detail of the issues. In particular we will use these workshops to better understand the costs and benefits to industry of the options for refreshing the codes of practice.

The Home Office recently consulted on proposals for a Trusted Trader scheme. The responses are being analysed.

CLANDESTINE CIVIL PENALTY REGIME

The Immigration and Asylum Act 1999 (the 1999 Act) (Section 32) defines a clandestine entrant as a person who passes, or attempts to pass, through UK immigration control concealed in a vehicle, arrives in the UK concealed in a vehicle, ship, aircraft or rail freight wagon, or arrives in the UK on a ship or aircraft having embarked concealed in a vehicle at a time when the ship or aircraft was outside the UK. Persons responsible for bringing clandestine entrants to the UK are subject to the civil penalty regime set out at Sections 32 to 37 of the 1999 Act. In specific circumstances where a charge is levied, the Home Office has the power to detain a vehicle and then if a charge remains outstanding, to sell the transporter.

The provisions in the 1999 Act have been enacted for road vehicles. The provisions have previously been enacted for rail operators and could be again. They have not been enacted in respect of aircraft and ships as there is no real clandestine problem on aircraft, where the issues are more to do with inadequate documentation; and lorries are the main concealment on maritime traffic. Aircraft and ships are both subject to the separate civil penalty regime for inadequately documented passengers.

An appeal in November 2003 (Loane⁴) challenged the approach in the 1999 Act and the relevance of factors that should be considered by the Home Office and / or an appeals Court when considering objections and appeals. This led in 2004 to the introduction of two codes of practice governing the civil penalty regime for vehicles. These are the 'Civil penalty prevention of clandestine entrants: code of practice' (the prevention code) and the Civil penalty level of penalty: code of practice' (the level of penalty code). These codes of practice are available on the Gov.uk website at <https://www.gov.uk/guidance/secure-your-vehicle-to-help-stop-illegal-immigration>. The codes of practice have not been revised since 2004.

The purpose of the civil penalty provisions is to encourage road hauliers and others to take measures to prevent their vehicles being utilised by persons seeking to circumvent the UK's border control. Where reasonable measures are not taken to secure and check vehicles before embarkation for the UK, a penalty of up to £2,000 may be imposed on each person responsible for each clandestine entrant carried in the vehicle. The £2,000 maximum level for both driver and/or owner/operator of a vehicle is set out in secondary legislation, the Carriers' Liability Regulations 2002 (SI 2002 No. 2817). The maximum charge level has been at the same level for over ten years.

The UK also operates an Accreditation Scheme to encourage haulage companies to operate in line with the requirements of the prevention code. Were the Government to conclude that the

⁴ Loane [2004] EWCA Civ 1013

Civil Penalty regime should also apply to rail freight trains and freight shuttle wagons, it would also be content to introduce an Accreditation Scheme for the Rail sector if desired by operators.

BROADER APPROACH

The review of our approach to clandestine entrants and the civil penalty regime (codes of practice) is not taking place in isolation. The Government has been working closely with industry over the last two years to raise awareness of the clandestine threat and the importance of vehicle security. This has included:

- **Regular Ministerial level contact with industry.** For example, over recent months the Minister for Immigration has hosted a series of roundtable discussions with the haulage, goods transportation and insurance sectors to discuss the issues around lorry security;
- **BF support for industry on lorry security issues.** This has included a number of presentations to hauliers, consignees and the insurance industry, as well as ad hoc advice to companies from the team managing the civil penalty regime;
- **The relaunch of the Accreditation Scheme.** This includes refreshed guidance, approved branding for accredited companies, and publication of the list of accredited companies as requested by industry. There are now over 300 accredited companies;
- **Translation of the prevention code into key European languages** as well as the circulation of awareness material stressing the importance of good vehicle security and maintaining driver safety; but also providing drivers with advice on what to do if they think they have clandestines in their vehicle;
- **Close working between BF and the Traffic Commissioners (TCs) (UK regulator for haulage industry).** We intend to develop Memoranda of Understanding which allow BF to pass on details of UK and non-UK hauliers to the TCs and European regulators respectively; and
- **Joint work with the rail freight operators** to develop the security around the rail freight operations.

The UK also hosted an International Lorry Security Conference in Brussels on 28 September, the aim of which was to spread good practice on lorry security. The event was attended by hauliers, regulators, Governments and trade bodies, with 17 countries represented. The Conference featured a keynote speech from the Second Permanent Secretary at the Home Office (on behalf of the Minister for Immigration), a presentation by BF on the UK's model, and the Transported Asset Protection Agency gave an industry perspective. There were also workshops on: the vehicle security technology available to industry; the UK's approach; and the opportunities for better international engagement.

The Conference demonstrated the breadth of the lorry security challenge we face as well as the range of views as to how the situation can be improved.

CONSULTATION PROPOSALS

We have **six** key proposals for the strengthening of the civil penalty regime. The proposals are high level and the consultation questions in this document have been crafted to help us draw up the detail of how the proposals should be turned into effective policy.

The proposals are:

1. Revise the civil penalty regime (codes of practice) so that it **provides a fair and transparent charging framework** which:
 - punishes the worst offenders; and
 - doesn't sanction operators where they can show they have implemented the required security standards
2. Ensure that the clandestine civil penalty regime overall **incentivises operators to invest in high quality security measures**. This could be through enhancements to the accreditation scheme, a more graduated or discounted charging regime or use of any faster clearance processes.
3. We wish to seek views on extending the clandestine civil penalty regime to rail freight wagons and freight shuttle wagons⁵. We want to see if this would provide greater balance in the deterrent and build on our existing operational relationship with rail operators. (We are not proposing to extend to the maritime sector at this stage as this mode is not experiencing the same level of abuse).
4. We want to **encourage a continual improvement in vehicle security in the transportation sector overall**. The civil penalty regime is an important part of that, but we want to work with industry to identify other incentives.
5. We want to **work with industry to target those operators who deliberately flout the rules**, undermining the UK border as a result and bringing the industry into disrepute.
6. Explore with industry other levers to **incentivise good practice**.

⁵ As defined in The Carriers' Liability (Clandestine Entrants) (Application to Rail Freight) Regulations 2001 (SI2001/280) and The Carriers' Liability (Clandestine Entrants) (Application to Rail Freight) (Amendment) Regulations (SI 2001/3232).

CONSULTATION QUESTIONS

1. We want to work with industry to refresh the codes of practice to ensure they take account of recent developments in the transportation sector. But we also need to ensure that the revised codes are fair and transparent, and provide a clear incentive for hauliers to properly secure their vehicles.

Do you have any comments on the refresh of the codes of practice or the policy objective overall?

2. During the Ministerial roundtable discussions and the International Lorry Security Conference the role of the insurance industry was repeatedly raised. There seem to be two main concerns: firstly that the insurance sector is not providing sufficient incentive for companies to invest in effective vehicle security; and secondly, that some operators believe the insurance sector is not paying out in all the circumstances they would expect.

How should the insurance sector best approach this issue in order to incentivise effective lorry security, and provide effective support for industry?

3. The transportation of goods to the UK can be a complex process, often involving lengthy supply chains and contracted relationships. It appears as though the clandestine pressure on the border has exposed weaknesses in these arrangements. By ensuring resilience in the operating processes, industry will be better able to ensure there is good vehicle security in place.

How should industry best manage its supply chains and structure its contracts in order to ensure clear responsibility and effective security at each stage of the journey to the UK?

4. The sophistication of migrant attacks on goods vehicles has increased whilst the technology available to secure these vehicles has moved on a pace. There is a variety of security measures on the market, some of which are relatively inexpensive. But despite the growing awareness of what is available there are still high numbers of vehicles coming to the UK with poor security in place.

What do you see as being the obstacles to operators achieving these security standards, and how can these be overcome?

5. The vehicle prevention code is over ten years old. Since publication there have been developments in industry and we would like to take views as to how these may impact on the code. As we saw at the International Lorry Security Conference there are effective and affordable security products on the market, and we want to encourage an overall improvement in the security levels in the haulage industry.

How should the prevention code be refreshed? In particular, how should a revised code take account of recent developments in security technology and other developments eg secure

parking? How can we reward operators for their investment in higher quality security measures?

6. Again, the vehicle level of penalty code is over ten years old. We would like the code to provide a fair and transparent charging framework. But we also want the framework to effectively address the full range of behaviours, so it should be harsh on the reckless, encourage the careless to improve, and reward those who have invested in security.

How should the level of penalty be refreshed? In particular:

- **Should we retain the approach of a single minimum standard?**
- **Or should we move to a more graded charging regime that provides discounts based on the level of security investment (above a base minimum)?**
- **How can operators best evidence their compliance with the prevention code, and how should this link into the level of penalty code?**

7. Incentivising better lorry security is a priority, but we also recognise that any requirements placed on the industry must be proportionate. We will seek to minimise burdens and improve clarity for the industry wherever possible.

How could the revised codes of practice keep burdens on the transportation sector to a minimum, without compromising the objective of incentivising the security of vehicles? Do you have any specific proposals that would minimise burdens on small (<50 employees) and micro (<10 employees) businesses, in particular?

8. The vast majority of hauliers are law abiding. However, there is a small minority that deliberately flout the rules around illegal migration, and neither Government nor industry should tolerate this. The regulators for the sector – in the UK and elsewhere in Europe - are primarily responsible for managing this behaviour.

How can haulage regulators best manage errant hauliers? How can regulators best operate across national boundaries?

9. The problems in Northern France this year have highlighted the importance of vehicle security to the UK Government. However, this is a European issue as most of the hauliers coming to the UK are not registered in this country; but also, we are seeing repercussions of poor lorry security elsewhere in Europe.

How can we address the problem of poor vehicle security at European level? What should be the role of other European Governments in encouraging better lorry security?

10. Illegal migration is a complex challenge. Governments need to work in partnership with all parts of the transport industry.

10a. What would be the difficulties if we were to extend the civil penalty regime to rail freight wagons and rail shuttle wagons?

10.b Are there alternative methods of reducing the risk of clandestines using rail transport (rail shuttle wagons and rail freight wagons), particularly rail freight wagons which like road hauliers operate services on extended routes across the whole of Europe.

10c Is there more that other partners could be doing e.g. ferry companies and port operators?

NEXT STEPS

Our intention is to bring revised versions of the codes of practice into effect. Before issuing the codes of practice the Secretary of State is required by the 1999 Act to consult such persons as she considers appropriate. This is the purpose of this consultation. Also, before issuing revised versions of the codes of practice the 1999 Act requires the Secretary of State to lay these before Parliament in draft.

Response Form

Name:
Address:
Postcode:
Email:

Company Name or Organisation:
(if applicable)

Please tick **one** box from the list below that best describes you/your company or organisation:

- Small or Micro Enterprise (up to 50 employees)
- Medium company (up to 250 employees)
- Large company Representative organisation Interest Group
- Local Government Central Government Law Enforcement
- Member of the public
- Other (please describe):

.....

If you are responding on behalf of an organisation or interest group how many members do you have and how did you obtain the views of your members:

Number of members.....

Views were obtained by.....

Country in which the organisation or interest group is based.....

I would like my response or personal details to be treated as confidential (tick box).

Reasons (please explain below):

Provide your responses underneath, before returning to the address provided.

Thank you for taking the time to respond to this consultation. Please now send your response (to reach us by Monday 18 April 2016) to:

Email us at: clandestineentrantcivilpenaltyconsultation@homeoffice.gsi.gov.uk

Post: Home Office Clandestine Civil Penalty Consultation
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Consultation Guidelines

This consultation follows the Government's '**Consultation Principles**' available in full on the Cabinet Office website at:

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

Confidentiality & Disclaimer

The information you send us may be passed to colleagues within the Home Office, the Government or related agencies.

Information provided in response to the consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory code of practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

The department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation co-ordinator

If you have a complaint or comment about the Home Office's approach to consultation, you should contact the Home Office Consultation Co-ordinator. Please DO NOT send your response to this consultation to them.

The Co-ordinator works to promote best practice standards set by the Government's '**Consultation Principles**' advises policy teams on how to conduct consultations and investigates complaints made against the Home Office. They do not process your response to the consultation.

The Co-ordinator can be emailed at: HOconsultations@homeoffice.gsi.gov.uk or alternatively write to:

Consultation Co-ordinator
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