



Home Office

CLANDESTINE ENTRANT CIVIL PENALTIES

The Immigration and Asylum Act 1999

DRAFT Level of Penalty: Code of Practice

January 2023



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Presented to Parliament pursuant to section 32A(3) of the
Immigration and Asylum Act 1999

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INTRODUCTION

The Clandestine Entrant Civil Penalty Scheme ('the Scheme') is established under the Immigration and Asylum Act 1999 as amended ('the Act'). Two penalties are created by the Scheme. Under section 31A of the Act, the Secretary of State may impose a penalty on a responsible person for failing to secure a goods vehicle. Under section 32 of the Act, the Secretary of State may impose a penalty on a responsible person for carrying a clandestine entrant. Responsible persons are defined as owners, hirers and drivers (or in the case of detached trailers, owners, hirers and operators).

Measures to be taken by persons to operate an effective system for securing a goods vehicle and for preventing the carriage of clandestine entrants to the United Kingdom are set out in the Carriers' Liability Regulations 2002 as amended ('the Regulations')

A defence against the imposition of penalties for failing to secure a goods vehicle under section 31A of the Act is set out in at section 31A(9). This defence is that the responsible person failed to take the actions specified in Regulations because they were acting under duress.

A defence against the imposition of penalties for carrying clandestine entrant under section 32 of the Act is set out at section 34. This defence is that the responsible person or an employee of theirs who was directly responsible for allowing the clandestine entrant to be concealed was acting under duress.

However, if a person is unable to show a defence against the imposition of a penalty, then the Secretary of State may require that person to pay a penalty.

In accordance with section 32A(B1) of the Act, when imposing a penalty under section 31A or considering a notice of objection under section 35(4) in relation to a penalty under section 31A, the Secretary of State must have regard to a code of practice specifying matters to be considered in determining the amount of the penalty. This code of practice is issued in accordance with section 32A(A1) of the Act. The Secretary of State may also consider any other matters the Secretary of State thinks relevant.

In accordance with section 32A(2) of the Act, when imposing a penalty under section 32 or considering a notice of objection under section 35(4) in relation to a penalty under section 32, the Secretary of State must have regard to a code of practice specifying matters to be considered in determining the amount of the penalty. This code of practice is issued in accordance with section 32A(1) of the Act. The Secretary of State may also consider any other matters the Secretary of State thinks relevant.

This code of practice sets out the matters specified above and is issued in accordance with section 32A(A1) and section 32A(1) of the Act. The existing code of practice, 'Civil Penalty: The Immigration and Asylum Act 1999: Level of Penalty: Code of Practice' will apply to incidents discovered before 13 February 2023. This code of practice will apply to incidents discovered from 13 February 2023

PART ONE – SECTION 31A – FAILING TO SECURE A GOODS VEHICLE

Maximum level of penalty

The maximum level of penalty for failing to secure a goods vehicle under section 31A is £6,000 per responsible person per incident. The maximum aggregate penalty (the maximum total penalty payable by all liable responsible persons combined per section 31A incident) is £12,000.

Starting point for consideration of level of penalty

The maximum level of penalty will be used as the starting point in determining the responsible person's liability, subject to the following considerations relating to previous liability or involvement in incidents:

- If a responsible person has no record of liability in the five years prior to the incident under consideration, the maximum penalty to be used as a starting point in determining their level of penalty will be £1,500
- If a responsible person has been issued with one penalty in the five years prior to the date of the incident under consideration, the starting point will be £3,000.
- If a responsible person has been issued with two or more penalties in the five years prior to the date of the incident under consideration, the starting point will be £6,000.

Applying discounts to starting point level of penalty

The following matters will then be considered by the Secretary of State in determining any discount to be applied to the starting point level of penalty:

- 50% discount will be applied to the starting point level of penalty if the responsible person is a member of the Civil Penalty Accreditation Scheme.
- A further 50% discount will be applied to the starting point level of penalty if the responsible person is not the driver and was not present during the vehicle or detached trailer's journey to the United Kingdom, but they acted to ensure compliance with the Regulations.

The Secretary of State may also consider any other matters the Secretary of State thinks relevant.

Joint liability

Where a penalty is imposed on a person who is the driver of a goods vehicle pursuant to a contract with the vehicle's owner or hirer (whether or not a contract of employment), the driver and the owner or hirer are jointly and severally liable for the penalty imposed on the driver (whether or not a penalty is also imposed on the owner or hirer).

PART TWO – SECTION 32 – CARRYING CLANDESTINE ENTRANTS

Maximum level of penalty

The maximum level of penalty for carrying clandestine entrants under section 32 is £10,000 per responsible person per clandestine entrant. The maximum aggregate penalty for all responsible persons per clandestine entrant is £20,000.

Starting point for consideration of level of penalty

The maximum level of penalty will be used as the starting point in determining the responsible person's liability, subject to the following considerations relating to previous liability or involvement in incidents:

- If a responsible person has no record of liability in the five years prior to the incident under consideration, the maximum penalty to be used as a starting point in determining their level of penalty will be £6,000.
- If a responsible person has been issued with one penalty in the five years prior to the date of the incident under consideration, the starting point will be £10,000

Applying discounts to starting point level of penalty

The following matters will then be considered by the Secretary of State in determining any discount to be applied to the starting point level of penalty:

- 50% discount to the starting point level of penalty will be applied if the responsible person is a member of the Civil Penalty Accreditation Scheme.
- A further 50% discount will be applied to the starting point level of penalty if the responsible person is the driver, or another responsible person who was present during the vehicle or detached trailer's journey to the United Kingdom, and they complied with the Regulations.
- A further 50% discount will be applied to the starting point level of penalty if the responsible person is not the driver and was not present during the vehicle or detached trailer's journey to the United Kingdom, but they acted to ensure compliance with the Regulations.

The Secretary of State may also consider any other matters the Secretary of State thinks relevant.

Joint liability

Where a penalty is imposed on a driver who is an employee of the vehicle's owner or hirer, the employee and the employer are jointly and severally liable for the penalty imposed on the driver (whether or not a penalty is also imposed on the employer).

Where a penalty is imposed on a person who is the driver of a goods vehicle pursuant to a contract with the vehicle's owner or hirer (whether or not a contract of employment), the driver and the owner or hirer are jointly and severally liable for the penalty imposed on the driver (whether or not a penalty is also imposed on the owner or hirer).

PART THREE – MEANS TESTING

The Secretary of State will consider requests from responsible persons to apply means testing to reduce any remaining level of penalty.

For individuals, means testing will take into account that individual's income, including any overtime income, for the three months prior to the incident. In determining the exact level of penalty, the Secretary of State will consider any representations made by the individual regarding their personal financial circumstances, such as their outgoings.

For companies which are issued with a penalty, means testing will be available for small to medium sized enterprises (SMEs). The starting point for the reduction will be that the level of penalty will be reduced as follows:

Business size	Turnover or balance sheet total	Headcount	Starting point for reduction of any remaining level of penalty
Micro	Less than or equal to €2 million or €2 million	Less than 10	75% reduction
Small	Less than or equal to €10 million or €10 million	Less than 50	50% reduction
Medium	Less than or equal to €50 million or €43 million	Less than 250	25% reduction

The Secretary of State may also consider any other matters the Secretary of State thinks relevant.

Responsible persons should write to the Secretary of State to set out why they believe means testing should be applied and what they believe the level of penalty should be. Supporting documentation must be provided. For individuals, this could take the form of wage slips or bank statements. For companies, it could take the form of balance sheets or statements of fact signed by a director. Documentation which is not in English or Welsh must be accompanied by a certified translation into English or Welsh. Requests can be made at any point up to the date before which the penalty or penalties must be paid. Requests will not be considered after this date other than in exceptional circumstances at the discretion of the Secretary of State. Notwithstanding anything in this code of practice, the Secretary of State may decide, having considered a request, not to apply means testing. For example, where insufficient evidence is presented regarding the financial circumstances of the individual or company in question or where that evidence does not support any request being made.

PART FOUR – EXAMPLES

Section 31A – Failing to secure a goods vehicle

Scenario 1: First incident for a driver, second incident for an owner, involving an HGV. The owner was not a member of the Accreditation Scheme.

The driver of an HGV arrived at the Port of Calais and was selected for security checks by Border Force. The vehicle was found to be unsecure as the rear doors of the trailer were not secured by a lock, seal or other security device. The driver had therefore not complied with the requirements laid out in the Regulations. This was the driver's first instance of liability for failing to secure a goods vehicle.

The owner, as a responsible person, was also liable for a penalty. The owner had not ensured that the vehicle was equipped with locks or other security devices. This was the second instance of the owner attracting liability for failing to secure a goods vehicle. The owner was not a member of the Civil Penalty Accreditation Scheme

There were no requests for means testing.

The driver receives a £1,500, penalty for a first incident, with no reduction in the penalty level.

The owner receives a £3,000 penalty for a second incident, with no reduction in the penalty level, with additional joint liability of £1,500 for the driver's penalty.

Scenario 2: First incident for an operator, involving an unaccompanied detached trailer. The operator was a member of the Accreditation Scheme.

A driver working for an operator which is a member of the Accreditation Scheme company delivered an unaccompanied detached trailer to the port of Santander. On arrival in the UK, the unaccompanied trailer was selected for security checks by Border Force. The trailer was found to have a broken TIR cord. It was therefore not effectively secured in compliance with the requirements laid out in the Regulations.

The operator provided a record of checks to Border Force, which showed that the vehicle was secure at the point at which it passed into the operational control of the port authorities in Santander. The record of checks was endorsed by the port authorities to show that it was a true reflection of the secure state of the trailer.

The driver is not liable for a penalty as drivers are not 'responsible persons' for the purposes of detached trailers.

The operator receives a £0 penalty, receiving a 50% reduction in their penalty level because they are a member of the Accreditation Scheme, and a further 50% reduction on the original penalty amount because they can show that they complied with the Regulations – the trailer was effectively secured at the time it left their operational control.

Section 32 – Carrying clandestine entrants

Scenario 1: Eight clandestine entrants were detected in a curtain-sided goods vehicle. The owner is a member of the Accredited Scheme.

A curtain-sided goods vehicle arrived at the Port of Portsmouth and was selected for checks by Border Force. These checks revealed eight clandestine entrants concealed in the load inside the trailer. There was a large cut to the roof of the trailer, and the record of checks completed by the driver did not state

that the roof was checked before the journey began, nor that the driver checked the load space after the last two stops prior to embarking to the United Kingdom. The driver had therefore not complied with the requirements laid out in the Regulations. The driver had no previous liability to a penalty.

The owner, as a responsible person, is also liable for a penalty. However, the owner had ensured that the vehicle was equipped with locks or other security devices and had also complied with all of the other applicable parts of the Regulations. The owner was also a member of the Accreditation Scheme.

The driver receives a £48,000 penalty (£6, 000 per clandestine entrant).

The driver requested means testing, which may further reduce this level of penalty, depending on their circumstances and the nature of the evidence they produce in support of their request.

The vehicle owner receives a £0 penalty, as they are accredited and fully complied with the requirements laid out in the regulations. They nevertheless remain joint and severally liable for the driver's penalty

Had the vehicle owner not been accredited, they would have received a penalty of £24,000 (£3, 000 per clandestine entrant), as well as being held joint and severally liable for the driver's penalty.

Scenario 2: One clandestine entrant detected in the luggage locker of a coach. The owner was not a member of the Accreditation Scheme.

A coach arrived at the Port of Coquelles and was selected for security checks by Border Force. These checks revealed one clandestine entrant in the luggage locker underneath the coach. Further inspection showed that the inherent security lock on the luggage compartment was broken. The driver stated that it was broken when he picked up the coach from his employer, the owner of the vehicle. The vehicle was therefore not effectively secured and so neither the driver nor owner have complied with Regulations. The driver had no previous liability, however the owner had two previous incidents where they were found liable within the last five years.

There were no requests for means testing.

The driver receives a £6, 000 penalty.

The vehicle owner receives a £10, 000 penalty, with additional joint liability of £6,000 for the driver's penalty.

Scenario 3: Two clandestine entrants detected in the rear storage compartment of a campervan.

A campervan being used for non-commercial purposes arrived at the port of Dover and was selected for checks by Border Force. These checks revealed two clandestine entrants concealed in the rear storage compartment of the vehicle. Inspection reveals that the inherent lock on the compartment had been forced to allow unauthorised access. The driver of the vehicle confirms that they had not checked the rear compartment after their last stop before embarking to the United Kingdom, as they had locked it and believed it was secure. By failing to carry out a check that the rear compartment was still secure and that no unauthorised access had been gained, the driver had failed to comply with the Regulations. The driver has no previous liability to a civil penalty.

The driver receives a £12, 000 penalty, subject to consideration of means testing.

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