

EXPLANATORY MEMORANDUM TO
THE ROAD VEHICLES (CONSTRUCTION AND USE) (AMENDMENT) (NO. 2)
REGULATIONS 2022

2022 No. 81

1. Introduction

1.1 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

2.1 The instrument amends the offence of using a hand-held mobile phone or similar interactive communication device while driving contained in regulation 110 of the Road Vehicles (Construction and Use) Regulations 1986 (S.I. 1986/1078) (“the C&U Regs 1986”) so that it captures standalone functions (such as taking photos or videos or searching for music stored on the phone) as well as the interactive communication functions that are covered now.

2.2 It also introduces a new exemption to the offence of using a hand-held mobile phone or similar device while driving to allow drivers to use their phone or device to make contactless payments for goods or services when they are stationary at, for example, a drive through food outlet or at a road toll.

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 this instrument is England and Wales and Scotland.

4.2 The territorial application of this instrument is England and Wales and Scotland.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 Section 41D(b) of the Road Traffic Act 1988 (“RTA 1988”) makes it an offence for a person to contravene a requirement of the C&U Regs 1986 “as to not driving or supervising the driving of a motor vehicle while using a hand-held mobile telephone or other hand-held interactive communication device, or not causing or permitting the driving of a motor vehicle by another person using such a telephone or other device”. The requirements in respect of this prohibition and offence are further contained in regulation 110 of the C&U Regs 1986.

6.2 This instrument amends regulation 110 and is being made in response to a High Court Judgment (see paragraph 7.7) which clarified the existing law and held that an offence is only committed where it can be proved not only that the driver was holding

the mobile phone or similar device and using it, but also that the mobile phone or similar device was being used to perform an interactive communication function such as making a call or sending a text rather than a ‘standalone’ function such as recording a video. The government considers that all use of a hand-held mobile phone while driving is dangerous, and not just when being used for the purposes of a call or other interactive communication. This instrument removes the distinction between standalone and interactive communication functions, and prohibits all hand-held use of a mobile phone or similar device, save in certain limited circumstances.

7. Policy background

What is being done and why?

- 7.1 This instrument amends the offence of using a hand-held mobile phone or similar device while driving in two key ways. In the interests of enhancing road safety and to ensure that the offence operates as it is intended, it broadens the parameters of the offence to cover more instances of “use”, and ensures that all mobile phones and similar devices are captured by the offence. It also creates a new exemption for drivers who want to make contactless payments using a hand-held mobile phone in certain carefully defined and safe circumstances to reflect 21st century use of technology.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.2 Since 2003, there has been a specific offence of using a hand-held mobile phone or similar device while driving. The offence is under section 41D(b) of the RTA 1988 and the precise requirement is contained in regulation 110 of the C&U Regs 1986. Whilst its main focus is the use of mobile phones, it also covers “a device other than two-way radio which performs an interactive communication function by transmitting and receiving data”. The offence was designed to be objective in nature, with no requirement on the police to use any subjective judgement in terms of determining whether the standard of driving was impaired, or whether the use of the mobile phone or similar device had caused a collision.
- 7.3 The seriousness with which the government regards this offence can be seen in the fact that in 2017 it doubled the penalties; the offence now carries a fixed penalty notice of £200 (see The Fixed Penalty (Amendment) Order 2017, (S.I.2017/66)) and six penalty points (see The Road Traffic Offenders Act 1988 (Penalty Points) (Amendment) Order 2017, (S.I.2017/104)). This means that a driver loses their licence after just two offences or, in the cases of a driver who has held a licence for less than two years, just a single offence will lead to revocation of the licence.

Why is it being changed?

- 7.4 A problem has arisen in recent years because the array of functions that mobile phones can now perform has outgrown the wording of the offence and its parameters.
- 7.5 Drivers are now using hand-held mobile phones to do more than make phone calls and send messages. They are now capable of being used to take photos or videos, to search for music stored on their phone, to play games stored on the phone and to read a book stored on the phone. Similar interactive communication devices have now become much more prevalent and can be used for a range of functions.

- 7.6 Over recent years, increasing numbers of drivers have been acquitted in the courts on the basis that they were not using a hand-held mobile phone for interactive communication purposes. The police were, therefore, faced with a dilemma: either they use disproportionate amounts of resources in each and every case to prove the nature of any mobile phone use, or they enforce under the offence of “Careless, and inconsiderate driving” under section 2 of The Road Traffic Act 1991 where the penalties are not as tough as for the dedicated mobile phone offence.
- 7.7 The High Court case of *DPP v Ramsey Barreto* [2019] EWHC 2044 (ADMIN) brought the matter to a head. Mr Barreto had been caught using a hand-held mobile phone to film the aftermath of a road traffic collision, whilst driving. The magistrates’ court found him guilty. He appealed to the Crown Court, arguing that using the video function on his phone did not involve interactive communication and therefore he was not contravening the mobile phone offence. The Crown Court accepted his argument and quashed his conviction. The DPP appealed to the High Court on the basis that regulation 110 of C&U Regs 1986 prohibited all use of a hand-held mobile phone while driving (subject to the specific exemptions such as calling the emergency services).
- 7.8 The High Court found in favour of Mr Barreto. The court concluded “The legislation does not prohibit all use of a mobile phone held while driving. It prohibits driving while using a mobile phone or other device for calls and other interactive communication (and holding it at some stage during that process).” “It follows that the activity of the respondent did not come within Regulation 110 and the Crown Court was right to quash the conviction.”

What will it now do?

- 7.9 The government decided, in light of the High Court Judgment, to promote a change in the law. Its intention is to remove, on road safety grounds, the distinction between interactive use of a hand-held mobile phone and “standalone” use; there is no distinction between the inherent risk associated with either type of use and no distinction between the harm that either type of use can cause.
- 7.10 This instrument will therefore amend regulation 110 of the C&U Regs 1986, so that the offence of using a hand-held mobile phone or similar device is triggered when a driver holds a mobile phone or similar device and uses it regardless of whether that use involves interactive communication. The instrument will also ensure all mobile phones and similar devices are captured by the offence in regulation 110; the amended regulation will cover any device which is capable of interactive communication even if that functionality is not enabled at the time, for example because mobile data is switched off, or the device is in flight mode.
- 7.11 The instrument makes one further change which the government has decided to make in order to reflect the way in which mobile phones are used. The change will introduce an exemption, subject to two conditions, from the offence of using a hand-held mobile phone while driving to allow the driver to make a contactless payment using a mobile phone or similar device. The conditions are that the vehicle must be stationary, and the goods or services must be provided or delivered at the time or after the contactless payment is made.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 The Department has no current plans to consolidate the C&U Regs 1986 and does not consider it proportionate to do so now.

10. Consultation outcome

- 10.1 The government consulted on the proposals to amend regulation 110 of the C&U Regs 1986 from 17th October 2020 to 17th January 2021. The consultation was published on gov.uk and was specifically brought to the attention of road safety, road user, enforcement and judicial stakeholders.
- 10.2 The government's response¹ to the consultation which contains an analysis of responses received as well as next steps, was published in November 2021.
- 10.3 The consultation elicited 423 responses. Just over 80% of respondents agreed with the government's proposal to expand the offence to cover standalone functions and 75% of respondents agreed with the proposal to bring within the offence any device which is capable of interactive communication, even if that capability is not enabled in the vehicle. Of the minority who objected to the proposal to broaden the offence, one of the main reasons for doing so was based on a misunderstanding that they would no longer be able to use a phone in a cradle to act as a satnav. Consequently, the government confirmed within its response to the consultation that it will review the advice on gov.uk with a view to making it clearer what constitutes hand-held use and what constitutes hands-free use.
- 10.4 82% of respondents agreed with the proposal to introduce a new exemption for contactless payments where the driver is using the phone or device to pay for goods or services that would be received immediately. The most constructive feedback on this proposal was a question mark over whether the new law should require the service or goods to be delivered "immediately" given the time lapse between, for example, a fast-food outlet taking payment and delivering the food. The government has taken account of this feedback and has not included a requirement that the goods or services are received immediately. Rather, the regulations will allow drivers to make a contactless payment for goods or services that are received at the same time as, or after the contactless payment is made, provided the vehicle is stationary.

11. Guidance

- 11.1 For road users, the government is making changes to The Highway Code to reflect the law changes in this instrument. The government will also expand the advice contained on gov.uk to address some common misconceptions about the law on mobile phone use while driving which became evident through the consultation process.
- 11.2 For those responsible for enforcement (police and courts), the government will rely on them to alter their guidance as necessary to reflect the changes to the law.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.

¹ <https://www.gov.uk/government/consultations/expanding-the-offence-of-using-a-hand-held-mobile-phone-while-driving-to-include-non-connected-mobile-application-actions>

12.3 A full Impact Assessment has not been prepared for this instrument because there are no significant impacts as a result of the changes in this instrument.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The government regards road safety as a priority and keeps the law under regular review. This measure will be subject to regular review of the law.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Darren Freezor at the Department for Transport Telephone: 07780 224904 or email: Darren.freezor@dft.gov.uk can be contacted with any queries regarding the instrument.

15.2 Pauline Reeves, Deputy Director for Road Safety Division, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Baroness Vere, Parliamentary Under Secretary of State at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.