

1. Title of Proposal

Transposition of the European Directive 2014/52/EU (the 'EIA Directive')

2. Purpose and intended effect

2.1 Background

The European Commission has set out a number of changes to the Environmental Impact Assessment (EIA) Directive (2011/92/EU) through EIA Directive 2014/52/EU. The requirements of the EIA Directive form part of European law and must be incorporated into the domestic legislation of Member States.

EIA aims to ensure that the likely significant environmental effects of a development proposal are properly understood before any development consent is granted. EIA therefore provides a means of assessing the likely significant environmental effects of a proposal, and the potential for avoiding, reducing, or offsetting any adverse impacts.

2.2 Objective

The objective is to transpose the requirements of the amended Directive into the regulations in a manner that adheres to the guiding principles for transposition set out in current Scottish Government guidance. These principles ensure that the domestic regulations meet the minimum requirements of the Directive, and the implementing measures come into force by the transposition deadline. In transposing the Directive we will apply the principle of minimal additional regulatory burden whilst ensuring protection of the environment.

2.3 Rationale for Government Intervention

The requirements of the EIA Directive form part of European law and must be incorporated into the domestic legislation of Member States. As such Scottish Government intervention is required to transpose these requirements into our relevant domestic legislation.

In Scotland there are eleven separate EIA regimes with their own competent authority/authorities and their own requisite legislation. As such there are a number of different statutory instruments which prescribe the process to assess the environmental impacts of a proposed project under a particular consenting regime.

The Scottish Government is responsible for the implementation of the European Directive across ten separate regimes. This BRIA assesses the potential business and regulatory impact resulting from the implemented changes of the Directive to the following regimes in Scotland; Planning, Energy Consents, Marine Licensing, Transport and Works Projects, Trunk Roads, Agriculture, Forestry. A separate assessment will be undertaken for the Flood Management.

Legislation will be laid in Parliament to implement the changes to the EIA Directive as noted below with separate arrangements being made in respect of Ports and Harbours (UK) and Flood Management. The following sets of legislation will be laid in Scottish Parliament for consideration:

- The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017
- The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017
- The Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017
- The Roads (Scotland) Act 1984 (Environmental Impact Assessment) Regulations 2017
- The Transport and Works (Scotland) Act 2007 (Environmental Impact Assessment) Regulations 2017
- The Transport and Works (Scotland) Act 2007 (Applications and Objections Procedure) Amendment Rules 2017
- The Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017
- The Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017

The changes to legislation contribute to delivering Scottish Government outcomes, by simplifying the rules for assessing the potential effects of projects on the environment in line with the drive for smarter regulation, aiming to lighten unnecessary administrative burdens. It aims to improve the level of environmental protection, with a view to making business decisions on public and private investments more sound, more predictable and sustainable in the longer term.

These changes in particular support the following National Performance Framework objectives:

- National Outcome 6: We live longer, healthier lives
- National Outcome 10 We live in well-designed, sustainable places where we are able to access the amenities and services we need;
- National Outcome 12: we value and enjoy our built and natural environment and protect it and enhance it for future generations
- National Outcome 14: we reduce the local and global environmental impact of our consumption and production.

The proposed regulations are also in line with the principles of the Scottish Government's Better Regulation agenda and through the transposition of these new measures we will be seeking to ensure that revised legislation is proportionate; consistent; accountable; transparent; and targeted.

3. Consultation

The Scottish Government undertook extensive engagement on the European Commission's draft Directive¹ and responses received formed the basis of our approach to the consultative draft provisions. The full details of this early engagement are set out in the Scottish Government's 2013 Stakeholder Engagement Report².

Since the Directive was formally adopted in 2014, there has been continuing engagement and dialogue with stakeholders to inform the Scottish approach to transposition, including through our annual EIA and Development Management Forum, our participation and support for joint EIA training with Scottish Natural Heritage, Scottish Environment Protection Agency and Historic Environment Scotland, regular meetings with officials from the UK Government Departments and other Devolved Administrations and monthly meetings of the Scottish Transposition Advisory Group.

Prior to the public consultation we engaged with the following bodies:

- Convention of Scottish Local Authorities;
- Scottish Environment Protection Agency;
- Scottish Natural Heritage;
- Historic Environment Scotland; and
- Heads of Planning Scotland.

3.1 Public Consultation

The approach to the transposition was subject to full public consultation³ for 12 weeks from 09 August to 31 October 2016. This was accompanied by two sets of draft legislation: The Town And Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 and The Electricity Works (Environmental Impact Assessment) Regulations 2017. Comments were invited on all the regimes. Where there are differences in how regimes will apply the Directive these were highlighted throughout the consultation document.

As well as the written consultation we held four workshops on the consultation with: Heads of Planning Scotland, competent authorities and statutory consultees, the Institute of Environmental Management and Assessment (IEMA) and a public workshop during the consultation period.

3.2 Business

We received 64 responses including 31 from developers and consultants. The consultation asked specific questions on the impact of the changes on business and on the Partial BRIA that was published along with the consultation. We also obtained feedback from over 40 developers and consultants at the IEMA workshop and from around 60 organisations that attended the public workshop.

¹ Proposal for amending Directive 2011/92/EU (European Commission October 2012) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012PC0628>

² EIA Directive Proposals: Stakeholder Engagement Report (Scottish Government, May 2013). <http://www.gov.scot/Resource/0042/00422324.pdf>

³ EIA Transposition Consultation <https://consult.scotland.gov.uk/eia-transposition-team/transposition-of-environmental-impact>

4. Options

The following options were considered:

Option 1: 'Do nothing'

This would mean maintaining the current sets of Scottish EIA regulations without transposing the requirements of the Directive.

Choosing this option would result in being open to the European Commission initiating infraction proceedings against Scotland, through the UK, for failure to implement the Directive, potentially leading to fines imposed by the European Court of Justice.

Option 2: 'Implement the EIA Directive'

This would mean implementing the Directive in accordance with the Government's principles for transposing European Directives. This will ensure compliance with the amended Directive in a way that minimises regulatory burden whilst ensuring protection for our environment.

We will transpose the Directive using the Scottish Government's Better Regulation agenda which seeks to support and promote sustainable economic growth through ensuring that regulation adheres to the five Principles of Better Regulation. These Principles provide that regulation should be: proportionate, consistent, accountable, transparent, and targeted.

5. Sectors and groups affected

The transposition will affect those involved in EIAs: competent authorities, statutory consultees, and developers.

Competent authorities

Scottish Ministers (Directorate for Planning & Environmental Appeals);
Scottish Ministers (Energy and Climate Change Directorate);
Scottish Ministers (Rural Payments and Inspections Division);
Scottish Ministers (Marine Scotland);
Scottish Ministers (Transport Scotland);
Scottish Ministers (the Forestry Commissioners);
Planning Authorities;

Statutory consultees (not all applicable to each regime)

Scottish Environment Protection Agency;
Scottish Natural Heritage;
Historic Environment Scotland;
Scottish Water;
The Health and Safety Executive;
Local Authorities;
National Park Authorities; and
The District Salmon Fishery Boards (for fish farm developments)

Third parties

Non-statutory consultees
The public

6. Benefits and Costs

6.1 Benefits

Option 1 'Do nothing'

As we are required to transpose the Directive, doing nothing is not an option.

Option 2: 'Implement the EIA Directive'

The amended Directive requires more up front information at screening stage, with new express provision on the consideration of mitigation measures at the screening stage which may help to reduce the number of project applications requiring an EIA.

The Better Regulation principles should bring about more consistency across the various regulations. Changes to the Directive clarify that the assessment should consider the 'significant' effects⁴ of a project, leading to more proportionate Environmental Reports.

The anticipated benefits of the main changes are set out below in sections 6.3 to 6.13.

6.2 Costs

Option 1 'Do nothing'

There are no direct monetary costs associated with this option. However this would result in being open to the European Commission initiating infraction proceeding against Scotland potentially leading to fines imposed by the European Court.

Option 2: 'Implement the EIA Directive'

The main direct financial costs arising from the Directive fall to developers in commissioning consultants to prepare an EIA Report. These costs are unlikely to change significantly. There are also procedural and administrative obligations falling to Competent Authorities and the Statutory Consultees, including planning authorities, SEPA, SNH, and Historic Environment Scotland. These administrative costs could rise during the 'familiarisation' period.

The anticipated costs resulting from the amendments are set out below in sections 6.3 to 6.13.

6.3 Assessment Process

The Directive defines the environmental impact assessment process for the first time and introduces the requirement for competent authorities to provide a reasoned conclusion which describes the impacts on the environment and the manner in which they will be dealt with.

Proposals to have a unified approach to integrate the EIA and HRA assessments were felt to be very positive particularly for larger more complex projects where the range of issues can have subtle interactions.

⁴ Informal consolidated version of EIA Directive
http://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf

6.4 Information to be Assessed

The Directive sets out broad requirements of the environmental factors that have to be considered in the assessment. Articles 3 and 4 of the Directive are amended to update the requirements concerning the content of the environmental assessment. For example, the Directive replaces 'Human Health' with 'Population and Human Health', providing an example of the risks to human health as being due to water contamination or air pollution; 'Flora and Fauna' is also replaced with 'Biodiversity', and there is new provision on cultural heritage. In practice we consider these matters are already taken into account and the changes are therefore unlikely to give rise to any substantive additional regulatory burden. .

In the aftermath of the Japanese earthquake and tsunami that caused a major accident at the Fukushima Nuclear Power Plant, the Directive asks that developers should consider if the project is vulnerable to risks of major accidents and natural disasters, including those caused by climate change. Some developers felt that this was a significant addition to the current scope of EIA and they may need external expertise to assess risk of major accidents, where relevant to the circumstances of the individual case, and this may come at a financial cost though this was not quantified.

In the case of projects for which there is an obligation to carry out an assessment under the EIA Directive and also under the Habitats and/or Birds Directives, the EIA Directive requires that either a coordinated procedure or a joint procedure should be used. The coordinated procedure is undertaken by designating a lead authority to coordinate the individual assessments.

We feel that coordinated procedures offer the greatest flexibility for developers around the phasing and timing of EIA and Habitats Regulations Appraisal (HRA).

6.5 Screening

The Directive introduces a more detailed list of information to be provided by the developer when requesting a screening opinion on whether an EIA is required. The screening process will identify if the project will likely have a significant adverse effect on the environment and whether therefore it should be subject to an EIA.

The intention is that screening will be subject to clear upfront requirements in terms of data to be provided, which should help developers identify how they can avoid significant environmental effects at an early stage in their project's design.

Legislating for early identification and consideration of significant effects may lead to a higher upfront workload for all parties; some respondents suggested that it may take longer to obtain a screening opinion. However the changes should ensure screening requests contain more relevant, detailed project and environmental information and should help to ensure that only those projects which are to have likely significant effects on the environment are required to complete an EIA Report.

In 2010 a Joint Statement⁵ was issued in Scotland by Architecture and Design Scotland, Forestry Commission Scotland, Historic Scotland, Scottish Environment Protection Agency, Scottish Natural Heritage, Scottish Water and Transport Scotland on pre-application engagement for National and Major Developments.

⁵ Joint Agencies Statement <http://www.snh.gov.uk/docs/A668043.pdf>

The Joint Statement sets out a practical framework by which the agencies will deliver their commitment to effective and timely pre-application engagement with developers and planning authorities in relation to developments of national or major significance. The introduction of early engagement will further enable the Key Agencies Group to meet their commitments.

We are also taking the opportunity to add Marine Protected Areas (MPA) to the definition of 'sensitive areas' in the Planning and Electricity EIA regulations, bringing these regulations up to date to reflect the introduction of MPAs, and aligning the planning EIA regime with that of the Marine Works Regulations for proposals located on the coastline. In practice, such changes – which will require that all Annex II type development located in an MPA must be screened - are likely to be most relevant to marine fish farms. However, as new fish farms almost always meet or exceed the existing EIA screening threshold there is unlikely to be any change to current practice.

Where a change or extension is proposed to an existing fish farm, the relevant screening thresholds apply to the development as changed or extended, and it is already the case that a judgement must be applied to consider whether there may be significant adverse effects on the environment. For that reason, we consider this change is likely to have minimal impact with benefits arising due to improved certainty.

6.6 Scoping

The Directive has stated that Member States can decide to make it mandatory that competent authorities have to give a scoping opinion irrespective of whether the developer so requests. We do not propose to make scoping a statutory obligation therefore there are no changes to the regulations in this respect.

The Directive also states that the EIA Report has to be based on the scoping opinion, and where the scoping opinion is focused on the likely significant effects this should result in more proportionate EIA Reports saving time and resources for all stakeholders.

6.7 Assessment Quality and Competent Experts

The Directive states that the developer shall ensure that the EIA Report is prepared by competent experts and that the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report.

Developers already use competent experts in drawing up their EIAs therefore there should be no impact on them. Some competent authorities indicated that where they choose to buy-in specialist expertise, this may give rise to direct costs, however in practice some authorities may already choose to do this under the existing regime. Sharing expertise across competent authorities can help to minimise any new or additional costs arising in this respect.

Given the diverse range of EIA topics and different areas of specialist expertise, we do not propose to define in legislation any particular route to or procedures for accreditation in this respect. Business supports the move not to define expertise but asked for guidance to provide clarity.

6.8 Consultation & Publicity

The Directive states that competent authorities should make the information available electronically through easily accessible points of access. This is seen as a positive step which is in line with current practice for most regimes. Whilst a central database would be useful there would be resource implications. A preferred option was to use a sign-posting page on www.mygov.scot.

It also states that the timeframe for consulting with authorities should be no shorter than 30 days and that the information obtained from the consultees should be duly taken into account in the development consent procedure.

Most regimes already have a longer timeframe than 30 days for consulting and the few that have 28 days will increase them to meet the new requirement. An increase of 2 days in the minimum consultation period for certain regimes will have minimal, if any, impact on business.

6.9 Monitoring

The Directive requires, for the first time, that the decision to grant development consent should include, where appropriate, monitoring measures. The development consent should set out the type of parameters to be monitored and the duration of the monitoring which should be proportionate to the nature, location and size of the project and the significance of its effects on the environment. Existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication.

Some businesses are supportive of the proposed requirements regarding monitoring suggesting it would improve environmental outcomes and improve practice in the long-term. Some respondents suggested that if monitoring was not proportionate that there may be some additional costs to developers in implementing monitoring measures.

There may be some additional administrative burden for competent authorities, particularly as authorities familiarise themselves with the new requirements.

6.10 Decision

The Directive requires that competent authorities must make their decision regarding development consent within a reasonable period of time. Each regime currently has its own timescales dependant on the complexity of the project in line with the Directive. This will have no direct impact on business arising from the new regulations.

The Directive requires that the competent authority's reasoned conclusion shall be up-to-date, but does not set out what "up-to-date" means in this context. The onus will be on the competent authority to ensure that they are satisfied, having regard to current knowledge and methods of assessment, that the reasoned conclusion addresses the likely significant effects of the development on the environment.

This is in line with current practice and is unlikely to have any additional impact on business as a consequence of the regulations.

6.11 Conflict of Interest

The Directive requires that the competent authority must perform their duties arising from the Directive in an objective manner and do not find themselves in a situation giving rise to a conflict of interest.

Where the competent authority is also the developer there has to be in place appropriate separation between conflicting functions when performing the duties arising from this Directive. The new provision is not expected to have an impact on business.

6.12 Penalties

The Directive requires that we lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.

The consultation included proposals to introduce sanctions for any developer who knowingly or recklessly provides false information.

It was suggested this would be of benefit as it would ensure that information is more likely to be accurate saving time in the long run. It is anticipated that this is unlikely to be an issue in practice therefore there should be little burden, if any, arising.

6.13 Transitional Arrangements

The Directive has set out transitional measures concerning certain applications for EIA screening of those projects which are listed in Annex II of the 2011 Directive. Where an application for screening for such projects has been initiated prior to 16 May 2017 then that screening application will be subject to the current 2011 Directive.

It also provides transitional measures whereby the current 2011 Directive will continue to apply, as unamended by the 2014 Directive, for applications in which the developer has, before 16th May 2017, submitted an environmental statement or where a scoping opinion has been sought. These measures will allow business to proceed as normal.

7. Scottish Firms Impact Test

In addition to the informal engagement that informed the creation of the various sets of regulations, throughout the formal public consultation period Scottish Government officials met with a wide range of businesses who may be affected by the legislative provisions.

Officials consulted directly with individual businesses throughout Scotland, to better understand the impacts of this legislation on them. A draft Business and Regulatory Impact Assessment accompanied the Scottish Government's consultation paper. The outcomes of the responses and discussions have fed into the development of legislation.

8. Competition Assessment

The proposals will affect all business seeking approval of a development application for an Annex I or Annex II development under the 2011 EIA regulations equally. As no competition impacts are anticipated, a competition assessment has not been completed.

9. Test run of Business Forms

The Scottish Government does not propose introducing any new forms as a result of this legislation.

10. Legal Aid Impact Test

This section has been discussed with colleagues in the access to justice team who are content that the legal aid implications have been given due consideration.

The Directive requires that we lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.

The consultation included proposals to introduce criminal sanctions for any developer who knowingly or recklessly provides false information. The responses suggested that this would be of benefit as it would ensure that information is more likely to be accurate.

It is not envisaged that there will be any significant impact on the legal aid fund.

11. Enforcement, sanctions and monitoring

Permissions granted in breach of the new EIA regulations will remain vulnerable to court challenges.

12. Implementation and Delivery Plan and Post-implementation Review

The Scottish Government is committed to transposing the Directive into legislation. The new legislation will come into effect on 16 May 2017. Similar legislation will come into force throughout the UK.

Article 12(2) of the new Directive requires that every 6 years from 16 May 2017 that Member states shall inform the Commission of the number of projects made subject to an EIA, a breakdown of EIAs according to the project categories, the number of projects made subject to a determination, the average duration of the EIA process, and a general estimate on the average direct costs of EIAs, including the impact from the application of this Directive to SMEs. Scottish Government returns will be submitted via the UK Government as required.

13. Summary and recommendation

The Scottish Government is required to transpose the EIA Directive by 16 May 2017. A 'do nothing' approach is not a viable option. The key focus has been to ensure compliance with the Directive and to modernise legislation to achieve greater consistency across the Scottish EIA regimes and where possible to streamline procedures.

Option 2 to consolidate and update the regulations is recommended.

13.1 Summary costs and benefits table

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1 Do nothing	This is not an option.	Failure to implement the Directive by 16 May 2017 can lead to infraction proceedings being taken against Scottish Government.
2 Implement the EIA Directive	<p>Meets the requirements to implement the Directive.</p> <p>Improves public access to information and opportunities for participation in decision making.</p> <p>Strengthens consideration of environmental issues.</p> <p>Once transposed the new screening requirements should mean fewer EIAs.</p> <p>Where EIA is required the scope will be narrower as the assessment is limited to significant environmental effects only.</p>	<p>It will take time to achieve the changes and therefore benefits will likely be long term rather than immediate.</p> <p>The introduction of new terminology such as 'competent experts,' 'biodiversity' up-to-date', 'population and human health,' 'climate change' and 'reasonable' and new procedural requirements could give rise to some new direct and indirect costs, however these are not expected to be significant and are likely to reduce as all parties become familiar over time with the new requirements.</p>

14. Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

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