

EXECUTIVE NOTE

The Environmental Impact Assessment (Scotland) Amendment Regulations 2007 (S.S.I 2007/484)

The above instrument was made in exercise of powers conferred on the Scottish Ministers by Section 2(2) of the European Communities Act 1972 and section 40 of the Town and Country Planning (Scotland) Act 1997. The instrument is subject to a negative resolution procedure.

POLICY OBJECTIVES

Introduction

The purpose of the above instrument is to place on a statutory footing the requirement that consideration must be given to the need for Environmental Impact Assessment (EIA) before determining a planning application for approval of a reserved matters. The requirement follows two related rulings from the European Court of Justice concerning the UK's transposition of European Directive 85/337/EEC as amended, on the assessment of the effects of certain public and private projects on the environment.

Background

European Directive 85/337/EEC as amended, (known as 'the EIA Directive') aims to ensure that the authority giving the primary consent for a particular project to proceed makes its decision in the full knowledge of any likely significant effects on the environment. Currently, in the case of an application for outline planning permission, Scots law provides only that an EIA may be required prior to the grant of that outline permission, and not during the subsequent approval of any reserved matters.

The ECJ has ruled in cases C-290/03 (*R v London Borough of Bromley, ex parte Barker*) and C-508/03 (*Commission v UK*) that outline planning permission and the decision that subsequently gives approval of reserved matters must now be considered to constitute a 'multi-stage development consent' within the meaning of Article 1.2 of the EIA Directive.

Following those rulings the Scottish Government issued interim guidance to planning authorities advising that those authorities must satisfy themselves that they have met the requirements of the EIA Directive and of the above ECJ rulings. These regulations seek to transpose these requirements onto a statutory footing through amendments to The Environmental Impact Assessment (Scotland) Regulations 1999 (SSI 1999/1), as amended.

CONSULTATION

A draft of the instrument was the subject of public consultation, having been contained in the consultation paper *Environmental Impact Assessment of Reserved Matters Applications*, published by the Scottish Government in June 2007. The consultation paper was distributed widely to a diverse range of organisations and individuals. The organisations consulted included all planning authorities and statutory consultees, industry and their representatives, environmental and community groups and professional bodies. The consultation generated a total of 16 responses. The comments made by respondents helped to inform Ministers in their consideration of the consultation proposals and in the production of the final statutory

instrument. A consultation report covering the responses received during the consultation period was published in October 2007.

FINANCIAL EFFECTS

A draft partial Regulatory Impact Assessment was included as part of the consultation. This draft RIA concluded that, whilst some additional procedural and financial requirements may fall to developers, in the majority of cases The Scottish Government does not consider there will be any significant costs over and above those of compliance with existing statutory provision on EIA. Responses to the consultation have not altered this overall view. Some minor amendments have been made to the final RIA to reflect consultation responses received. The RIA accompanies this Note.

Scottish Government Planning Directorate
October 2007

REGULATORY IMPACT ASSESSMENT

Proposed regulations to amend Part II of The Environmental Impact Assessment (Scotland) Regulations 1999¹ to place on a statutory footing the requirement that consideration must be given to the need for Environmental Impact Assessment (EIA) before determining a planning application for approval of reserved matters.

1. TITLE

1.1 Regulatory Impact Assessment for proposed amendments to regulations concerning outline planning permission, reserved matters and environmental impact assessment.

2. PURPOSE AND INTENDED EFFECT OF THE MEASURES

The Objective

2.1 The objective is to implement two related rulings from the European Court of Justice ('the ECJ') to place on a statutory footing the requirement that consideration must be given to the need for Environmental Impact Assessment (EIA) before determining a planning application for approval of reserved matters.

Background & Risk Assessment

2.2 The ECJ has ruled on cases C-290/03 (*R v London Borough of Bromley, ex parte Barker*) and C-508/03 (*Commission v UK*), that outline planning permission ('OPP') and the decision that subsequently gives approval of reserved matters must now be considered to constitute a multi-stage development consent for the purposes of Article 1.2 of Directive 85/337/EEC² ('the EIA Directive'). The effect of those rulings is therefore to require that consideration must now be given to the need for Environmental Impact Assessment (EIA) before determining a planning application for approval of reserved matters. Currently, the Environmental Impact Assessment (Scotland) Regulations 1999 ('the 1999 Regulations') provide that such consideration must be given prior to determining an application for OPP, but no such provision is made for EIA at the reserved matters stage.

2.3 The main aim of the EIA Directive is to ensure that the authority giving the primary consent for a particular project to proceed makes its decision in the full knowledge of any likely significant effects on the environment. The Directive therefore sets out a procedure that must be followed for certain types of project before they can be given 'development consent'. This procedure – known as Environmental Impact Assessment (EIA) – is a means of drawing together, in a systematic way, an assessment of a project's likely significant environmental effects. This helps to ensure that the importance of the predicted effects, and the scope for reducing them, are properly understood by the public and the relevant competent authority before it makes its decision. Article 1.2 of the Directive defines 'development consent' as '*the decision of the competent authority or authorities which entitles the developer to proceed with the project*'.

¹ The Environmental Impact Assessment (Scotland) Regulations, as amended. SSI 1999/1.

² Directive 85/337/EEC of 27 June 1985 as amended, on the assessment of the effects of certain public and private projects on the environment.

2.4 The European Commission initiated legal proceedings against the UK arguing that an application for OPP and the subsequent application for approval of reserved matters should together be considered as part of a multi-stage development consent process within the meaning of the EIA Directive. If the UK does not legislate to take account of the findings of the ECJ it will be subject to continued legal proceedings by the European Commission, and could incur a heavy fine .

3. OPTIONS

Option 1: Do Nothing

3.1 This is not an option as these are obligations under EU law and must be implemented by legislative means. Failure to implement properly will result in continued legal proceedings by the European Commission and ultimately in the European Court of Justice.

Option 2: Amend Regulations

3.2 The proposed amendments to the 1999 Regulations will transpose into domestic law the requirement that consideration must now be given to the need for EIA before determining a planning application for approval of reserved matters. Whilst the Scottish Government issued interim guidance³ to this effect in the period following the ECJ rulings, currently this is not provided for in legislation.

4. COSTS AND BENEFITS

Benefits

Option 1

4.1 There are no benefits associated with this option as by failing to fully transpose our European obligations the UK risks continued infraction proceedings by the European Commission.

Option 2

4.2 Interim guidance issued in July 2006 advised of the 'direct effect' of the EIA Directive and outlined the need for planning authorities to satisfy themselves that they have met the requirements of the EIA Directive and of these ECJ judgements in considering OPP and the subsequent approval of reserved matters, even though this is not at present required by legislation. It is intended therefore that the proposed amendments will transpose into Scots law provisions which are already in place on an administrative basis and that they will bring greater clarification and certainty on this matter.

Costs

Compliance Costs

Option 1

³ Michael Lowndes letter to Planning Authorities, 27 July 2006. Available at www.scotland.gov.uk/Publications/2006/08/07162005/0

4.3 Failure to comply with ECJ rulings could result in considerable costs if the European Commission were to continue infraction proceedings against the UK and ultimately if fines were imposed.

Option 2

4.4 The costs to business are expected to be minimal. This is because the requirement to prepare an Environmental Statement in accordance with the EIA Directive has not changed for the majority of cases. An application for OPP which requires EIA already has to include the full detail required by the EIA Directive. It is considered that where such a statement requires to be revised or updated in applying for approval of reserved matters, the cost of this revision will be minimal in comparison both to the original costs of preparing the statement and any planning fee that the applications themselves might attract. However, the ECJ rulings make it clear that it is not possible to eliminate entirely the possibility that it will not become apparent until the reserved matters stage that a project is likely to have significant effects on the environment. Under these very limited circumstances an Environmental Statement ('ES') may be required for the first time at reserved matters stage. The cost of preparing an ES would fall to the developer and whilst it is difficult to disentangle the cost of preparing such a Statement from the other costs of a development proposal, the Scottish Government considers such costs are likely to range from £30,000 - £150,000 and will be generally related to the cost and scale of the development itself.

4.5 There is also the risk that implementing these Regulations could result in OPP being revoked, or modified, or that further conditions relating to mitigation of adverse environmental impacts as a consequence of significant environmental issues being identified at the reserved matters stage may be imposed. In such circumstances this could impact on business by affecting commercial viability of developments. In instances of revocation or modification of an OPP provision is made for claims for compensation from Planning Authorities under section 76 of the Town and Country Planning (Scotland) Act 1997. However, the Scottish Government considers that, where compliance with existing EIA provisions have been met in full at OPP stage, the risk of new environmental issues being identified at reserved matters stage as a consequence of implementing these Regulations is minimised. Section 76 of the Town and Country Planning (Scotland) Act 1997 allows that where it is shown that a person interested in the land-

- (a) has incurred expenditure in carrying out work which is rendered abortive by the revocation or modification, or
- (b) has otherwise sustained loss or damage which is directly attributable to the revocation or modification,

the planning authority shall pay that person compensation in respect of that expenditure, loss or damage. For the purposes of this section, any expenditure incurred in the preparation of plans for the purposes of any work, or upon other similar matters preparatory to it, shall be taken to be included in the expenditure incurred in carrying out that work. Subject to that provision, no compensation shall be paid under section 76 in respect of-

- (a) any work carried out before the grant of the permission which is revoked or modified, or
- (b) any other loss or damage arising out of anything done or omitted to be done before the grant of that permission (other than loss or damage consisting of depreciation of the value of an interest in land).

Business Sectors Affected

4.6 The burden of some additional procedural requirements will fall on planning authorities, the Scottish Ministers and the Consultation Authorities. Some procedural and financial requirements may fall to developers. It is expected that business sectors affected will be mainly larger scale developers, including utility companies. In the majority of cases The Scottish Government does not consider there will be any significant costs over and above those of compliance with existing statutory provision on EIA.

5. SMALL FIRMS IMPACT TEST

5.1 We consulted on a draft regulatory impact assessment which indicated that business sectors affected will be mainly larger scale developers by virtue of the nature of developments which tend to require EIA. We have not received any consultation responses contrary to this view. A Small Firm's Impact Test has therefore not been carried out.

Test Run of Business Forms

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

6. COMPETITION ASSESSMENT

6.1 The proposals will affect all business seeking approval of a planning application for reserved matters for EIA development equally. As no competition impacts are anticipated, a competition assessment has not been completed.

7. CONSULTATION

7.1 A full public consultation on the policy to deliver option 2 ran for 12 weeks from June 2007. A draft Regulatory Impact assessment formed part of that consultation.

8. ENFORCEMENT, SANCTIONS AND MONITORING

8.1 Responsibility for implementing the regulations will fall primarily to planning authorities. Permissions granted in breach of the Regulations are vulnerable to court challenges; there is no change in this respect.

9. IMPLEMENTATION AND DELIVERY

9.1 The proposed amendments will apply to all applications for approval of reserved matters which are still to be determined by either the relevant planning authority or the Scottish Ministers on the date the amendments come into force. Since the proposed amendments will transpose into Scots law provisions which are already in place on an administrative basis no transitional arrangements are considered necessary.

10. POST IMPLEMENTATION REVIEW

10.1 The Scottish Government, as part of its package of reform to the planning system, has proposed changes to outline planning permission which it intends to replace with a system whereby

applications may be made for 'planning permission in principle' with provision for new procedures for the subsequent approval of conditions. It is the Scottish Government's intention to set out further details of its proposals in this respect later this year, with an estimated commencement date of late 2008. Those proposals will take into account the requirements of the ECJ rulings and subsequent EIA case law concerning multi-stage applications and, should any further amendments to regulations be required in that context, they will form part of the package of amendments anticipated in 2008.

11. DECLARATION

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.

Signed.....

Date.....

Ministers details (name, dept etc)