

## **POLICY NOTE**

### **THE TOWN AND COUNTRY PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT) (SCOTLAND) REGULATIONS 2017**

#### **SSI 2017/102**

The above instrument was made in exercise of the powers conferred by Section 2(2) of the European Communities Act 1972, and section 40 of the Town and Country Planning (Scotland) Act 1997, as amended. Section 40 confers powers to make regulations in relation to the assessment of the environmental impact of development before planning permission is granted. The regulations deal with a wide range of situation and section 2(2) of the 1972 Act is the enabling power for those provisions, for example provisions in these Regulations relating to applications for multi-stage consents. The instrument is subject to negative procedure.

### **Policy Objectives**

#### **Introduction**

The purpose of these Regulations is to update and replace The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (SSI 2011/139) in order to implement paragraphs (1) to (15) of Article 1 of Directive 2014/52/EU (“the 2014 Directive”) which amends Directive 2011/92/EU (“the 2011 Directive”). The Environmental Impact Assessment Directive aims to ensure the authority granting the development consent for a particular project makes its decision in full knowledge of any likely significant effects on the environment. This helps to ensure the importance of the predicted effects, and the scope for avoiding or reducing any adverse effects, are properly understood before a decision is made.

The Regulations integrate Environmental Impact Assessment or ‘EIA’ procedures into the Scottish planning system, and supplement the usual planning process to provide a more systematic method of assessing the environmental implications of developments likely to have significant environmental effects.

New provisions take into account the requirements of the amended Directive, which seek to define, clarify and expand upon aspects of the Assessment process, on the basis of minimal additional regulatory burden, whilst ensuring protecting of the environment.

#### **Key changes**

The following is a summary of the main changes made to the 2011 Directive by the 2014 Directive as they apply to the Scottish planning system. The 2014 Directive also makes allowance for some transitional arrangements. References to “current” requirements are to those under the 2011 Directive before amendment by the 2014 Directive.

#### **Definition of Environmental Impact Assessment Process**

Article 1(1) of the 2014 Directive introduces a definition of “environmental impact assessment” and sets out what an environmental impact assessment process is to consist of. Regulation 4 reflects these changes. The process must include the preparation by the developer of an Environmental Impact Assessment (EIA) report. The content of this is

set out in regulation 5. The changes made by the 2014 Directive now specifically refer to a “EIA report”. This is in effect what is currently referred to in domestic legislation as the “environmental statement”. The Regulations therefore refer to an EIA report rather than to an environmental statement.

The next step in the EIA process is the carrying out of consultations required under Article 6 and, where relevant, Article 7. The 2014 Directive includes some procedural changes including a new express requirement to make information available electronically, as provided for in Regulation 21(3)(a). The requirement to consult is however an existing requirement of the 2011 Regulations.

The 2014 Directive requires the competent authority to reach a ‘reasoned conclusion’ on the significant effects of the project on the environment, and to integrate its reasoned conclusion into its decision. Regulations 4(1)(d) and 29 transpose these requirements.

### **Screening**

The determination as to whether a project requires EIA is known as a screening decision. Changes to Article 4(4) of the 2011 Directive introduce a requirement for the developer to provide certain information on the characteristics of the project and its likely significant effects on the environment to enable a screening decision to be made. This requirement is set out in Regulations 8(2) and 8(4). Regulation 8(3) specifically provides that the developer may include a description of any measures envisaged to avoid or prevent significant adverse effects on the environment.

Article 4(5) of the 2011 Directive as amended requires the competent authority to make its screening decision on the basis of the information provided by the developer, taking into account the results of any other relevant assessments carried out pursuant to other EU legislation. These requirements are to be found in regulation 7(1).

Under current requirements the screening decision must be made public but reasons do not have to be given for negative screening decisions unless requested. Article 4(5) of the 2011 Directive as amended introduces a requirement for the main reasons for screening decisions to be given with reference to the criteria in Annex III of the Directive (and as contained in Schedule 3 of the 2017 Regulations). This requirement is transposed by regulations 7(1)(a) and 7(2)(a). Article 4(5)(b) of the 2011 Directive also requires that – where there is a negative screening decision – the screening determination must set out any proposed mitigation measures. This requirement is contained in regulation 7(2)(b).

Article 4(6) of the 2011 Directive as amended introduces new time limits for making screening decisions. These should be made as soon as possible after the submission of the requisite information by the developer but in any event no later than 90 days after that date, except for “exceptional cases”. Regulation 9 refers.

Regulation 6(4) sets out the powers to disapply the Regulations in respect of projects whose purpose is in response to civil emergencies, as provided for in Article 1(3) of the 2014 Directive.

## **EIA report**

Article 5(1) of the 2011 Directive as amended refers to the submission of an EIA report and sets out the information to be provided with reference to Annex IV of the Directive (Schedule 4 of the 2017 Regulations). Regulation 5(2) sets out what an EIA report has to contain. The developer is now specifically required to base the EIA report on the scoping opinion, if one has been issued, and to ensure that the EIA report is prepared by “competent experts”. These provisions are transposed by regulations 5(3) and 5(5)(a), respectively.

Article 5(3)(c) of the 2011 Directive as amended introduces express provision such that competent authorities shall, where necessary, seek from the developer supplementary information to ensure the completeness and quality of the EIA report. Regulations 26(2) and (3) refer.

Article 6(7) of the 2011 Directive as amended introduces a minimum public consultation period of 30 days on the EIA report and this is provided for in Regulation 21(2)(f). Currently the 2011 Regulations require a minimum of 4 weeks.

## **Decisions and Monitoring**

Article 1(9) of the 2014 Directive introduces a new Article 8a into the 2011 Directive as amended. Article 8a sets out certain new information to be included in the decision to grant, or refuse, development consent, which must include the competent authority’s reasoned conclusion on the significant effects of the project on the environment, and a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment. Regulation 29 sets out the information which a decision notice must contain and in particular regulation 29(2)(f) requires a decision notice to include a description of any mitigation measures as well as a statement confirming that the planning authority or the Scottish Ministers as the case may be are satisfied that the “reasoned conclusion” on the significant effects of the project on the environment is still up to date. In addition the new Article 8a introduces new provisions on monitoring as transposed by regulations 29 and 30.

Article 1(10) of the 2014 Directive amends Article 9 of the 2011 Directive and concerns the duties of the competent authority to inform the public that a decision has been made to grant or refuse development consent and to make certain information available to the public. The amended terms of Article 9 require that the consultation bodies must also be informed and this is provided for in regulation 31(1)(b).

## **Coordinated procedure**

Article 1(2) of 2014 Directive introduces in paragraph (3) a statutory requirement to carry out, where appropriate, coordinated or joint procedures for EIA and Habitats Regulations Assessment under the Conservation (Natural Habitats, &c.) Regulations 1994. In line with existing best practice, Regulation 53 requires the planning authority, or the Scottish Ministers as the case may be to ensure such assessments are co-ordinated.

## **Objectivity and Conflict of Interest**

Article 1(11) of the 2014 Directive inserts new Article 9a into the 2011 Directive. This introduces an express requirement that member states shall ensure that competent authorities are objective and are not in situations giving rise to a conflict of interest. This is most likely to arise where the competent authority is also the developer. New Article 9a recognises this particular situation and requires an “appropriate separation between conflicting functions”. Regulation 52 sets out the relevant duty.

## **Offences**

New Article 10a, inserted by Article 1(13) of the 2014 Directive, provides for penalties applicable to infringements of the national provisions adopted pursuant to the Directive. Regulations 54 and 55 respectively provide that it is an offence for a person or bodies corporate to knowingly or recklessly make a false or misleading statement or, with the intent to deceive, uses a false or misleading document or withholds material information in order to obtain a favourable decision on an application.

## **Transitional Arrangements**

Article 3(1) of the 2014 Directive provides for transitional measures where a request for a screening decision is made before 16<sup>th</sup> May 2017 and provides that the relevant screening criteria to be applied are those of the 2011 Directive. This is reflected in Regulations 60(4) to (7).

Article 3(2) of the 2014 Directive provides for transitional measures whereby the 2011 Directive will continue to apply unamended, for applications for planning permission in which the developer has, before 16<sup>th</sup> May 2017, submitted an environmental statement or where a scoping opinion has been sought for the proposed development. This is reflected in Regulation 60(2) and (3).

## **Multistage Consents**

Where a consent procedure comprises more than one stage (a ‘multi-stage consent’), the Directive requires that the environmental effects of the project must be identified and assessed at the time of the principal decision. However, if those effects are not identified or identifiable at the time of the principle decision, assessment must be undertaken at the subsequent stage. The 2017 Regulations generally bring up to date and replace current provisions on multi-stage consents. The 2017 Regulations also extend existing provisions to provide for circumstances where an application for multi-stage consent is made following a grant of deemed planning permission under section 57 of the Town and Country Planning Act 1997, as amended (development with government authorisation). Part 8 of the Regulations refers.

## **Consultation**

The Scottish Government consulted on proposals for amending the EIA Regulations through *The Consultation on Transposition of Environmental Impact Assessment Directive 2014/52/EU* between August and October 2016, this was accompanied by draft Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017. The

comments received have helped to inform the final statutory instrument. The responses, analysis paper and a full list of those consulted and who agreed to the release of this information are available on the Scottish Government website at <http://www.gov.scot/Publications/2016/08/2499>.

### **Impact Assessments**

A suite of impact assessments have been undertaken and an Equality Impact Assessment (EQIA) has been published, this found that the legislation is not likely to generate any negative impacts on any of the equalities groups. In addition a strategic environmental pre-screening exercise and Children's Rights and Wellbeing screening have determined that the legislation is again unlikely to have a significant impact on the environment or a negative impact on children's rights and wellbeing.

### **Financial Effects**

The Scottish Government consulted on a draft partial Business and Regulatory Impact Assessment (BRIA) as part of its August 2016 consultation paper. The partial BRIA concluded that some additional procedural and financial requirements will fall on planning authorities, the Scottish Ministers and the Consultation Bodies, and some additional procedural and financial requirements may fall to developers. 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 and minor amendments have been made to the final BRIA to reflect the responses received.

Scottish Government  
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