

POLICY NOTE

THE TRANSPORT AND WORKS (SCOTLAND) ACT 2007 (APPLICATIONS AND OBJECTIONS PROCEDURE) AMENDMENT RULES 2017

SSI 2017/74

The above instrument was made in exercise of the powers conferred by –

- Section 2(2) of the European Communities Act 1972. The instrument is subject to negative procedure.
- Sections 4 to 6, 8 and 28 of the Transport and Works (Scotland) Act 2007
- Section 56 of the Finance Act 1973

These Rules transpose the requirements of Directive 2014/52/EU into domestic legislation.

Policy Objectives

Introduction

The purpose of these Rules is to update the Transport and Works (Scotland) Act 2007 (Applications and Objections Procedure) Rules 2007 (“the 2007 Rules”) in order to implement paragraphs (1) to (7) and (11) of Article 1 of Directive 2014/52/EU (“the 2014 Directive”) which amend Directive 2011/92/EU (“the 2011 Directive”). A separate update has also been undertaken for the Transport and Works (Scotland) Act 2007 through the Transport and Works (Scotland) Act 2007 (Environmental Impact Assessment) Regulations 2017. The Rules and Regulations together integrate environmental considerations into the preparation of projects in the Scottish Transport and Works regime with a view to reducing their environmental impact.

The Environmental Impact Assessment Directive aims to ensure the authority giving the primary consent for a particular project makes its decision in full knowledge of any likely significant effects on the environment. 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 these amendment Rules which update the 2007 Rules. 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.

Environmental Impact Assessment Process

Article 1(1) of 2014 Directive introduces a definition of “environmental impact assessment”. This sets out what an environmental impact assessment process is to consist of; Rule 4 which inserts a new Rule 2A reflects these changes. The process requires the applicant, if necessary, to prepare an Environmental Impact Assessment (EIA) report. The changes made by the 2014 Directive now specifically refer to a “report”. This is in effect what is currently referred to in domestic legislation as the “environmental statement”. The Rules now 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. This has some amendments, however the requirement to consult is a current requirement. The main consultation amendment for the Transport and Works System is the introduction of providing information to the public electronically. This change is set out in Rule 6 which substitutes a new Rule 5(17), Rule 7 which substitutes a new Rule 6(11), Rule 11 which inserts a new Rule 12(10) and Rule 18 which amends Schedule 5 to insert a new paragraph 12A into that Schedule.

Paragraphs (iii) to (v) of the new definition of “environmental impact assessment” introduced by the 2014 Directive now expressly set out as part of the EIA process the need for an examination of the environmental information. The competent authority is expressly required to integrate its reasoned conclusions on the significant environmental impacts of the project into its decision. Rule 4 inserts a new Rule 2A(d) and (e) which transposes these requirements.

Rule 5(3) sets out the powers to disapply the Rules in respect of projects whose purpose is in response to civil emergencies. This arises from changes to Article 1(3) of the 2014 Directive.

The main change made by Article 1(2) of 2014 Directive is the new requirement in paragraph (3) to carry out, where appropriate, coordinated or joint procedures for EIA and assessments required under the Habitats and Wild Birds Directives. This is now reflected in the terms of Rule 14 which inserts a new Rule 15A into the 2007 Rules.

Screening

The determination that a project should be made subject to EIA, is known as a screening decision. Changes made to Article 4(4) of the 2011 Directive mean that the developer is to provide certain information on the impacts of the project to enable a determination to be made. This requirement is set out in Rule 6 which substitutes a new Rule 5(6) imposing a requirement on the applicant to provide certain information etc. when making a request for a screening opinion. New Rule 5(7) specifically allows the applicant to include a description of mitigation measures which include both features of the project and other measures which are 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 but also

taking into account the results of other assessments carried out pursuant to other EU legislation. These requirements are to be found in new Rule 5(5).

Under current requirements the screening decision had to be made public. Article 4(5) of the 2011 Directive as amended now also requires the main reasons for screening decisions to be given and that to be done with reference to the Annex III criteria. This is required by new Rule 5(15). Article 4(5)(b) of the 2011 Directive as amended also requires that where there is a negative screening decision the determination must set out any proposed mitigation measures; this requirement is contained in new Rule 5(15)(b).

Changes made by the 2014 Directive mean that Article 4(6) of the 2011 Directive now imposes time limits for making screening decisions. New Rule 5(16) provides that the Scottish Ministers must issue their screening decision within 42 days of (as the case may be) –

- receiving a request for a screening decision from an applicant,
 - intimating their intention to issue a screening decision at their own volition,
- or
- receiving further information from the applicant following on from a request for such information by the Scottish Ministers.

EIA report

Article 5(1) is changed by the 2014 Directive. It refers to the submission of an EIA report and sets out what it is to contain by reference to a list and to Annex IV. Rule 9 sets out what an EIA report has to contain. The applicant 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”. This is required by new Rules 9(3) and (5) respectively.

The 2014 Directive also introduces an express duty, in Article 5(3)(c), on competent authorities to seek further information from the developer in order to ensure the completeness and quality of the EIA report. This is to be information which would be needed in terms of Annex IV and is directly relevant to reaching their reasoned conclusion on the significant effects of the project on the environment. Rule 13 which amends Rule 15 of the 2007 Rules sets out this duty.

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”. New Rule 26, reflecting current good practice, sets out this duty.

Transitional Arrangements

Article 3(1) of the 2014 Directive provides for transitional measures concerning certain applications for EIA screening of projects which are listed in Annex II of the 2011

Directive. The article states that 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. This is reflected in Rule 19.

Article 3(2) of the 2014 Directive provides transitional measures whereby the current 2011 Directive will continue to apply, as unamended by the 2014 Directive, for applications in which the applicant has, before 16th May 2017, submitted an environmental statement or where a scoping opinion has been sought. This is reflected in Rule 19.

Consultation

The Scottish Government consulted on proposals for amending EIA legislation through *The Consultation on Transposition of Environmental Impact Assessment Directive 2014/52/EU* between August and October 2016. 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 on the Scottish Government website. 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 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.

Transport Scotland
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