



Department for
Communities and
Local Government

Environmental Impact Assessment: Technical consultation (regulations on planning and major infrastructure)



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Contents

Scope of the consultation	5
Exit from the European Union	7
Introduction	7
The Environmental Impact Assessment Process	8
Amendments to the Directive and how we propose to implement them	11
Introduction	11
Definition of the environmental impact assessment process	13
Exemptions	13
Determining whether environmental impact assessment is required (screening)	14
The assessment process	17
Information to be provided in the environmental statement	19
Consultation	22
Decisions	24
Other issues	26
Transitional Arrangements – Article 3 of 2014/52/EU	28
Other matters	28
Equalities	31
Business	31
List of Annexes	32
About this consultation	33

Scope of the consultation

Topic of this consultation:	The proposed approach to implementing European Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.
Scope of this consultation:	The consultation seeks views on draft regulations which will replace the existing regulations implementing the requirements of the Environmental Impact Assessment Directive insofar as they apply to the town and country planning and nationally significant infrastructure regimes.
Geographical scope:	<p>These proposals insofar as they relate to the town and country planning regime relate to England only – except to the extent that they apply to projects serving national defence purposes in Scotland, Wales and Northern Ireland.</p> <p>The nationally significant infrastructure regime extends to Wales and, for limited purposes, to Scotland. To the extent that these proposals address implementation of the Environmental Impact Assessment Directive in relation to this regime, they extend to Wales and Scotland.</p>
Impact Assessment:	As a European Union measure with no gold-plating, this is a Non-Qualifying Regulatory Provision (NQRP) under the Better Regulation Framework. An internal triage assessment has confirmed that the measures qualify for the Fast Track.

Basic Information

To:	This consultation is aimed at all those with an interest in the Environmental Impact Assessment Directive and how it interacts with the Town and Country Planning and Infrastructure Planning regulations.
Body/bodies responsible for the consultation:	Department for Communities and Local Government
Duration:	This consultation will last for 7 weeks from: 14 December 2016
Enquiries:	<p>For any enquiries about the consultation please contact:</p> <p>Tom Simpson tom.simpson@communities.gsi.gov.uk 0303 44 41704</p>
How to respond:	<p>You may respond by completing an online survey at:</p> <p>https://www.surveymonkey.co.uk/r/65BRJFN</p>

Alternatively you can email your response to the questions in this consultation to

eiaconsultation@communities.gsi.gov.uk

If you are responding in writing, please make it clear which questions you are responding to.

Written responses should be sent to:

Tom Simpson
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When you reply it would be very useful if you confirm whether you are replying as an individual or submitting an official response on behalf of an organisation and include:

- your name,
- your position (if applicable),
- the name of organisation (if applicable),
- an address (including post-code),
- an email address, and
- a contact telephone number

Exit from the European Union

1. On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

Introduction

2. The Government is inviting comments on the enclosed consultation which sets out proposals for implementing European Directive 2014/52/EU amending Directive 2011/92/EU '*on the assessment of the effects of certain public and private projects on the environment*' (known as the "Environmental Impact Assessment" or "EIA" Directive) insofar as the Directive applies to the town and country planning system in England, and to the nationally significant infrastructure planning regime established by the Planning Act 2008.
3. The Directive forms part of European law and must be incorporated into our national legislation. It first came into force in 1985 as Council Directive 85/337/EEC (the "1985 Directive") and was amended in 1997, 2003 and 2009. The 1985 Directive and its three amendments were codified by Directive 2011/92/EU (referred to as "the Directive" in this document) in advance of the European Commission adopting a proposal in October 2012 to amend the current Directive. Following negotiations in the European Parliament and Council a compromise text was agreed. The amending Directive entered into force on 15 May 2014 (as Directive 2014/52/EU – the "2014 Directive"). Member States have to transpose the amendments to the Directive into domestic legislation by 16 May 2017.
4. The Directive's requirements were originally integrated into the planning system in England through the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 and following a series of amendments are now contained in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. Environmental impact assessment is therefore well established in domestic legislation and planning practice. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 apply the Directive to nationally significant infrastructure projects.
5. The Directive also applies to project types which fall outside of the town and country planning and infrastructure planning regimes – including for example, some energy, port and highway projects. These projects are subject to separate consenting regimes and Environmental Impact Assessment Regulations. The amendments to the Directive must be implemented through each of these regimes, and other

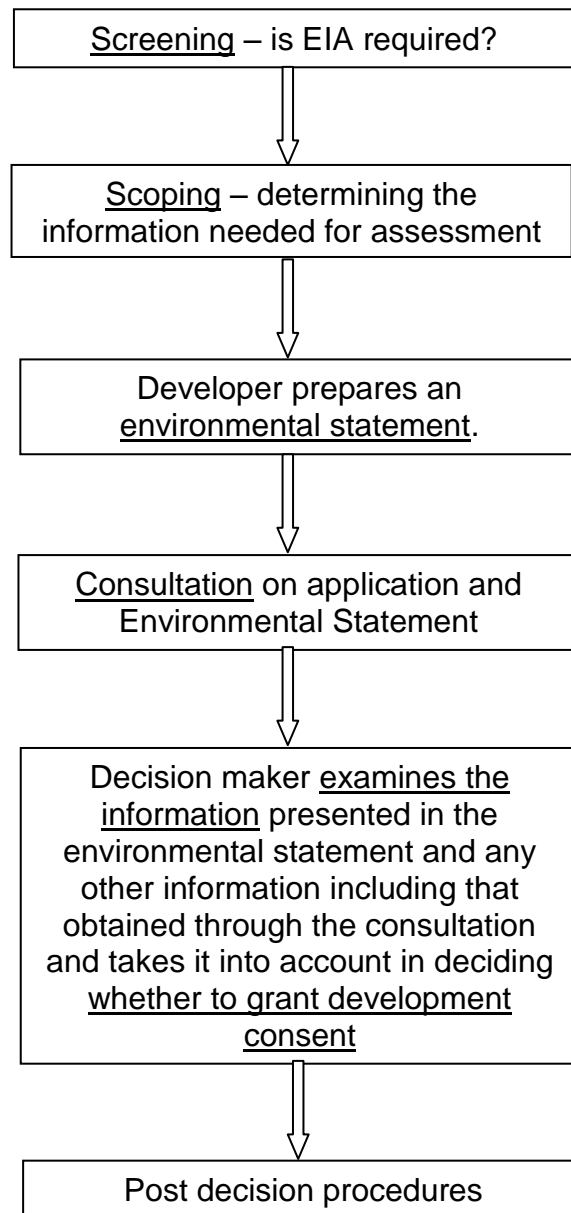
Government Departments¹ will lead on transposing the amendments to these regimes. The devolved administrations of Scotland, Wales and Northern Ireland are responsible for transposing the amendments in respect of matters which are devolved.

The Environmental Impact Assessment Process

Introduction

6. Environmental impact assessment is a process. It aims to provide a high level of protection to the environment and to help integrate environmental considerations into the preparation of projects to reduce their impact on the environment. It seeks to ensure that proposals for development (referred to as 'projects' in the Directive) which are likely to have a significant effect on the environment, for instance, by virtue of their nature, size or location are subject to a requirement for development consent and an assessment of those effects before the development is allowed to proceed.
7. Some project types are always considered likely to have significant effects on the environment and must be subject to environmental impact assessment in all cases. These project types are listed in Annex I of the Directive. They include nuclear power stations, oil refineries and large quarries. Other project types are only considered likely to have significant effects in some cases depending on their nature, size and location. These project types are listed in Annex II of the Directive. These include urban development and smaller energy and infrastructure projects. Projects listed in Annex II must be subject to environmental impact assessment where it is determined that they are likely to have significant effects on the environment. The process for determining whether a project listed in Annex II is likely to have significant effects on the environment is usually referred to as 'screening'. Member States can decide whether a project listed in Annex II should be subject to environmental impact assessment through a case-by-case examination and/or by setting thresholds or criteria. Annexes I and II are replicated in Schedule 1 and 2 of the current regulations respectively.
8. Where an assessment is required, the developer must provide specified information to the relevant competent authority (for example a local planning authority), which enables the authority to make an informed decision on whether the project should proceed (for example, by granting planning permission or, in the case of nationally significant infrastructure projects, a development consent order). It also requires that the public and other bodies are consulted and given an opportunity to participate in the decision making process. The main steps are illustrated below:

¹ Department for Environment, Food and Rural Affairs (e.g. agriculture and marine works); Department for Business, Energy & Industrial Strategy (e.g. electricity and pipelines) and Department for Transport (e.g. highways and transport).



Implementation of the Directive through the town and country planning system in England

9. Most of the development in England that falls within the scope of the Directive is permitted through the planning system, and is currently subject to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.
10. The approach we have taken to determine which planning applications for Annex II development should be subject to environmental impact assessment has been to use a combination of case by case examination, thresholds and criteria. All projects which are located in, or partly in, defined 'sensitive areas' must be screened by the local planning authority (or the Secretary of State, in certain cases) for likely significant environmental effects to determine whether an environmental assessment is required. For projects outside of these areas, the Government established

regulatory screening thresholds and criteria for each project category which are listed in the second column of Schedule 2 to the 2011 Regulations. Projects which fall below these thresholds and are not within a sensitive area are not considered likely, in light of the criteria set out in Annex III to the Directive, to have significant effects for the purpose of the Directive, and do not need to be considered any further for environmental impact assessment².

11. The vast majority of planning applications (over 99%)³ fall below the screening thresholds set out in Schedule 2 to the Regulations and therefore do not normally fall within the scope of the regulations. Relevant Schedule 1 projects and those Schedule 2 projects that are determined likely to have significant effects on the environment are subject to the assessment process. There are around 500 - 600 environmental statements submitted each year in England representing about 0.1% of all planning applications. More detailed information on the process is available on the National Planning Practice Guidance website⁴.

12. The planning system provides a number of other ways of obtaining planning permission - including through Local Development Orders, Neighbourhood Development Orders and Enterprise Zone Orders. The Directive applies, where relevant, to these procedures. In some cases, for example Enterprise Zone Orders, the Government has decided that if an environmental impact assessment is required, an Enterprise Zone Order cannot be approved or adopted. In other cases, such as with Local Development Orders, where a proposal for development falling in Annex 2 of the Directive is likely to have significant effects on the environment, the environmental impact assessment procedure must be followed before an Order can be made. The Directive also applies to Reviews of Mineral Planning Permissions (ROMPs), and can also be relevant when enforcement action is being taken in the case of unauthorised development. The Regulations contain separate provisions for each of these procedures to ensure the Directive's requirements are properly applied. In implementing the amendments to the Directive we have sought to ensure that the changes apply, as appropriate, to each of these processes. When explaining how we have implemented the amendments to the Directive below we have used the normal planning application process as an example to illustrate the principles, other than where the context required alternative examples. However, consultees are invited to refer to the draft regulations for details of proposed implementation in respect of the different permitting procedures.

Implementation of the Directive through the Nationally Significant Infrastructure Planning Regime

13. The Planning Act 2008 Act created a new regime for granting planning and other consents for nationally significant infrastructure projects. The Directive insofar as it

² The Secretary of State has powers to determine that any project, including those that do not meet the thresholds or criteria, must be subject to environmental impact assessment.

³ Based on the estimated number of screenings undertaken annually compared with the number of planning applications.

⁴ <http://planningguidance.communities.gov.uk/blog/guidance/environmental-impact-assessment/>

applies to projects consented through this regime is currently implemented through the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

14. The environmental impact assessment procedures differ in some respects to those applied through the town and country planning system, reflecting the differences in the procedures for granting consent for the types of project that are subject to this regime. Obtaining development consent for a nationally significant infrastructure project involves a front loaded process where the developer consults on a proposed project before submitting an application. All development falling within Annex II of the Directive is screened to determine whether EIA is necessary. The application, once accepted, is then examined by a single inspector or a panel of inspectors (“the Examining Body”). On completion of the examination, the Examining Body will provide a report and recommendation to the Secretary of State who will decide whether consent should be given. Guidance on the application of the Directive to the nationally significant infrastructure planning regime has been published by the Planning Inspectorate⁵.

Amendments to the Directive and how we propose to implement them

Introduction

15. According to the European Commission⁶ the amended Directive will simplify the rules for assessing the potential effects of projects on the environment in line with the drive for smarter regulation, and lighten unnecessary administrative burdens. It also improves 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. The European Commission has produced an unofficial consolidated version of the Directive which is available here: http://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf.
16. The Government’s Better Regulation agenda includes the requirements that when transposing EU law the Government will ensure that the UK does not go beyond the minimum requirements of the measure which is being transposed and will use copy out for transposition where it is available, except where doing so would adversely affect UK interests. We have sought to follow these principles in transposing the amendments made by Directive 2014/52/EU, and to minimise additional regulatory burden whilst protecting the environment.
17. In transposing the amendments to the Directive, our view at the outset is that there is merit in retaining, as far as practical, the existing approach to environmental impact assessment in England as it is well understood by developers, local planning

⁵ <https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2015/03/Advice-note-7v4.pdf>

⁶ <http://ec.europa.eu/environment/eia/review.htm>

authorities and others involved in the procedures. Our proposals for consultation therefore represent what we consider to be the minimum changes necessary to the existing regulations in order to bring them into line with the amended Directive. This will also minimise familiarisation costs and business uncertainty.

18. The changes we consider to be of most significance which were introduced by the 2014 Directive are:
 - The addition of a definition of the environmental impact assessment process - Article 1(2)g;
 - Changes to the circumstances in which a project may be exempt from the requirements of the Directive – Articles 1(3);
 - Introduction of Joint and/or Coordinated procedures for projects which are subject to the Habitats or Wild Birds Directives as well as the EIA Directive – Article 2(3);
 - Changes to the list of environmental factors to be considered as part of the environmental impact assessment process – Article 3;
 - Clarification of the options for screening and amendments to the information which is required and the criteria to be applied when screening projects to determine whether the Directive applies – Article 4, Annex IIA and Annex III;
 - Amendments to the information to be included in the environmental statement – Article 5 and Annex IV;
 - A requirement for environmental statements to be ‘based on’ a scoping opinion, where one is issued – Article 5(2);
 - The use of competent experts - Article 5(3);
 - A requirement to inform the public of projects electronically - Article 6(2) and 6(5);
 - A new article elaborating on information to be given in decision notices and the decision making procedures – Article 8a;
 - Monitoring significant adverse effects - Article 8a(4);
 - A new Article requiring the avoidance of conflicts of interest – Article 9a;
 - The introduction of penalties for infringements of national provisions – Article 10a.

19. We have set out below these amendments from the 2014 Directive, and our approach to transposing them. Complete drafts of our proposed amended regulations are set out in annexes A and B. In most cases the text of the Directive has been ‘copied-out’ as far as is practicable, but we have proposed an alternative approach where this is considered beneficial. We welcome comments on our interpretation of the changes and how we propose to implement them through regulations. We will update the National Planning Practice Guidance in due course. While, as noted above, we have sought to identify in this document the main changes made by the 2014 Directive, consultees are invited to consider the proposed draft regulations in their totality and provide any comments.

Definition of the environmental impact assessment process

Article 1(2)(g)

“environmental impact assessment” means a process consisting of:

(i) the preparation of an environmental impact assessment report by the developer...

(ii) the carrying out of consultations ...;

(iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer ... and any relevant information received through the consultations...;

(iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and

(v) the integration of the competent authority's reasoned conclusion into any of the decisions

20. The 2014 Directive introduces a definition of the environmental impact assessment process. In our view the definition reflects existing practice in that the developer must prepare a report containing specified information on their proposed project (see Article 5 below); there should be consultation on the application and the report prepared by or on behalf of the developer, before the competent authority examines the relevant information and comes to a reasoned conclusion on the likely significant effects of the project on the environment and integrates that conclusion into their decision as to whether to grant consent.
21. The definition has been incorporated via regulations 4 and 26 in the Town and Country Planning regulations and by regulation 5 in the Infrastructure Planning regulations. We propose to retain the existing term ‘environmental statement’ as this is familiar to practitioners and not replace it with the term ‘environmental impact assessment report’ as used in the 2014 Directive.

Exemptions

22. The Directive provides a limited number of exemptions to the requirements of the Directive.

Defence and civil emergencies - Article 1(3)

Article 1(3)

Member States may decide, on a case-by-case basis and if so provided under national law, not to apply this Directive to projects, or parts of projects, having defence as their sole purpose, or to projects having the response to civil emergencies as their sole purpose, if they deem that such application would have an adverse effect on those purposes.

23. Article 1(3) has been amended to restrict the existing exemption for defence projects so that it can only apply where a project, or part of a project, has defence as its sole purpose. However, the exemption has also been extended to include projects which have the response to civil emergencies as their sole purpose. The exemption is transposed through regulation 5 of the Town and Country Planning regulations and regulation 7 of the Planning Infrastructure regulations.

Determining whether environmental impact assessment is required (screening)

Information to be provided for screening - Article 4(4)

Article 4(4)

Where Member States decide to require a determination for projects listed in Annex II, the developer shall provide information on the characteristics of the project and its likely significant effects on the environment. The detailed list of information to be provided is specified in Annex IIA. The developer shall take into account, where relevant, the available results of other relevant assessments of the effects on the environment carried out pursuant to Union legislation other than this Directive. The developer may also provide a description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.

24. The 2014 Directive has sought to standardise the type of information to be provided by a developer when asking the competent authority to screen a proposal. The information to be provided is set out in a new annex to the Directive, Annex IIA. It is hoped this will help focus environmental impact assessment on those cases where there really is a likelihood of significant effects. The 2014 Directive also confirms that a developer may provide a description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment. While this reflects existing domestic case law (see, for example, *R(on the application of Champion v North Norfolk District Council)*⁷) and practice, it is anticipated that more developers will seek to demonstrate that their project will not be likely to have significant environmental effects through earlier consideration of mitigation or avoidance measures. While the extent to which mitigation measures can be used to “screen out” development at the screening stage will depend on the specific circumstances in each case, this should help reduce the

⁷ [2015] UKSC 52.

number of projects subject to environmental impact assessment. We have incorporated the requirements set out in Annex IIA into existing screening procedures, for example, via regulation 6 of the Town and Country Planning regulations and regulation 8 of the Infrastructure Planning regulations.

Screening Determination – Article 4(5)

Article 4(5)

The competent authority shall make its determination, on the basis of the information provided by the developer...taking into account, where relevant, the results of preliminary verifications or assessments of the effects on the environment carried out pursuant to Union legislation other than this Directive. The determination shall be made available to the public and:

- (a) where it is decided that an environmental impact assessment is required, state the main reasons for requiring such assessment with reference to the relevant criteria listed in Annex III; or*
- b) where it is decided that an environmental impact assessment is not required, state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III, and, where proposed by the developer, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.*

25. The competent authority will be required to make its screening determination on the basis of the information provided by the developer under Article 4(4) and taking into account the results of ‘preliminary verifications’ or assessments of the effects on the environment carried out pursuant to other EU legislation. When considering the information provided by the developer, the competent authority, as now, must take into account the criteria listed in Annex III⁸. The criteria in Annex III have been amended, largely to provide more clarity about the issues to be considered. The changes to Annex III have been copied out in Schedule 3 to both the Town and Country Planning and Infrastructure Planning regulations. The changes in terms of the matters that an authority must take into account when screening have been incorporated into the domestic regulations (see, for example, regulation 5(6) of the draft Town and Country Planning regulations regulation 9(1) of the draft Infrastructure Planning regulations). The term ‘preliminary assessment’ referred to in Article 4(5) is not defined in the Directive and we are unaware of similar references in other relevant EU environmental legislation. We have not therefore used the term in the draft regulations and do not consider that its omission will make a material difference in the implementation of the Directive. We are required when setting the Schedule 2 screening thresholds and criteria to take the criteria in Annex III (Schedule 3) into account. The existing thresholds and criteria have been in place since 1999, and our initial assessment is that the amendments to Annex III do not require us to make any changes to the Schedule 2 thresholds or criteria.

⁸ See the Commission’s unofficial consolidated version of the Directive referred to above for details.

26. Article 4(5) will now also require that the authority must state the main reasons for its determination, including, if the determination is that an assessment is not required, any features of the proposed development and measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment. The Article also clarifies the matters that must be included in a decision that development does not require environmental impact assessment. These requirements have been included into the draft domestic regulations, for example, in regulation 5(7) of the Town and Country Planning regulations and regulation 8(8) of the Infrastructure Planning regulations. This replaces the previous requirement in a screening decision for an authority to provide a written statement giving “clearly and precisely the full reasons for its conclusion”.

Question 1 – Do you agree with our proposal to omit the term ‘preliminary verification’?

Question 2 – Do you agree that the Schedule 2 thresholds and criteria continue to be appropriate taking into account the changes to Annex III. If not, can you provide evidence in support of any changes?

Timeframe for screening - Article 4(6)

Article 4(6)

Member States shall ensure that the competent authority makes its determination as soon as possible and within a period of time not exceeding 90 days from the date on which the developer has submitted all the information required...

In exceptional cases, for instance relating to the nature, complexity, location or size of the project, the competent authority may extend that deadline to make its determination; in that event, the competent authority shall inform the developer in writing of the reasons justifying the extension and of the date when its determination is expected.

27. The 2014 Directive introduces the requirement that the competent authority must make its screening determination ‘as soon as possible’ and within a period of time not exceeding 90 days from the date on which the developer has submitted all the information required. This period can be extended in exceptional circumstances.

28. For the Town and Country Planning regulations, where a local planning authority is adopting a screening opinion, we propose to maintain the requirement to adopt an opinion within 3 weeks - or longer where agreed with the developer in writing. However, we have now provided that any longer period so agreed may not exceed 90 days. We also propose retaining the existing position that where a screening direction has been requested, the Secretary of State will have 3 weeks, or such longer period as may reasonably be required, to issue a direction. We have now provided that if the Secretary of State considers that a period of longer than 3 weeks is needed, this period cannot exceed 90 days other than where the Secretary of State considers that this is not practicable due to exceptional circumstances relating to the proposed development. If the Secretary of State

considers that the 90 day period needs to be extended then notice must be given in writing. The changes in terms of timeframes are set out in the regulations relating to screening, for example, regulations 5, 6 and 7.

29. The Secretary of State is responsible for issuing screening opinions under the Infrastructure Planning regulations. We propose to retain the existing 3 week period, with amendments to implement the revisions to Article 4(6). The provision is set out in the Infrastructure Planning regulations in regulations 7 and 8.

Question 3. Do you agree with our proposal to retain the existing 3 week period for the local planning authority and Secretary of State to issue a screening opinion?

The assessment process

Assessment scope – Article 3

Article 3(1)

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:

(a) population and human health;

(b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;

(c) land, soil, water, air and climate;

(d) material assets, cultural heritage and the landscape;

(e) the interaction between the factors referred to in points (a) to (d).

Article 3(2)

The effects referred to in paragraph 1 on the factors set out therein shall include the expected effects deriving from 'the vulnerability of the project to risks of major accidents and/or disasters that are relevant to the project concerned'.

30. Article 3 sets out the environmental factors that should be considered as part of the assessment where they are likely to be significantly affected by the project. The 2014 Directive clarifies that the assessment should be of likely significant effects of the project on the environment. It also amends some of the terminology used. For example, the term “Human Beings” has been replaced by “Population and Human Health” and “Flora & Fauna” with the term “Biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC” (i.e. the Habitats and Wild Birds Directives respectively).

31. Article 3(2) of the Directive also introduces a new requirement to consider the expected effects deriving from the vulnerability of the project to risks of major accidents and/or disasters that are relevant to the project concerned for example including those caused by climate change.
32. The revised Article 3 has been introduced into the domestic regulations through regulation 4 in the Town and Country Planning regulations and by regulation 5 in the Infrastructure Planning regulations. We have also included, for the sake of clarity, a reference to the need to consider, where relevant “operational” impacts.

Coordinated procedures - Article 2(3)

Article 2(3)

In the case of projects for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and from Council Directive 92/43/EEC and/or Directive 2009/147/EC of the European Parliament and the Council, Member States shall, where appropriate, ensure that coordinated and/or joint procedures fulfilling the requirements of that Union legislation are provided for.

In the case of projects for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and Union legislation other than the Directives listed in the first subparagraph, Member States may provide for coordinated and/or joint procedures.

Under the coordinated procedure referred to in the first and second subparagraphs, Member States shall endeavour to coordinate the various individual assessments of the environmental impact of a particular project, required by the relevant Union legislation, by designating an authority for this purpose, without prejudice to any provisions to the contrary contained in other relevant Union legislation.

33. A new requirement has been introduced at Article 2(3). Where a project is simultaneously subject to an assessment under the Environmental Impact Assessment Directive and also under the Habitats and/or Wild Birds Directives, the 2014 Directive requires that, where appropriate, either a coordinated procedure or a joint procedure should be used. The coordinated procedure requires designating an authority, or authorities, to coordinate separate assessments. The joint procedure, on the other hand, requires Member States to endeavour to provide for a single assessment of a project’s impacts on the environment.
34. We consider that coordinated procedures provide the greatest flexibility for developers around the phasing and timing of environmental impact assessment and an ‘appropriate assessment’ under the Habitats Directive. This is thought to reflect existing practice in England. The joint procedure would, however, require the information to inform both assessments to be dealt with in a single assessment.
35. We propose transposing the requirement through Regulation 27 in the Town and Country Planning regulations and by regulation 26 in the Infrastructure Planning Regulations, by designating the authority responsible for taking the decision on an

application as the authority that must ensure, where appropriate, that the relevant assessments are coordinated.

36. We would welcome views from consultees as to the practical impacts of this change and whether they consider that additional provision on coordination of assessments would be helpful. For example, would it be helpful to make provision to deal expressly with the situation where more than one authority is involved in granting permission for a proposal? Do stakeholders have views as to whether provision should be made to prevent construction in respect of EIA development until all necessary consents and permits needed to operate the development are in place?
37. The Directive also allows Member States, if they wish, to choose to also apply joint or coordinated procedures to any assessments required under other EU law, including the Water Framework Directive, the Industrial Emissions Directive and the Waste Framework Directive. The provision is not mandatory and we do not propose to include it in our regulations.

Question 4. Do you agree that the coordinated procedure provides the most flexibility?

Question 5. Do you have any views on introducing provisions to deal with projects subject to environmental impact assessment under multiple consent regimes?

Question 6. Do you agree that it is appropriate not to make it mandatory to apply joint or coordinated procedures to assessments under EU legislation other than the Habitats and Wild Birds Directives?

Information to be provided in the environmental statement

Minimum information requirements – Article 5(1)

Article 5(1)

Where an environmental impact assessment is required, the developer shall prepare and submit an environmental impact assessment report. The information to be provided by the developer shall include at least:

(a) a description of the project comprising information on the site, design, size and other relevant features of the project;

(b) a description of the likely significant effects of the project on the environment;

(c) a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;

(d) a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main

reasons for the option chosen, taking into account the effects of the project on the environment;

(e) a non-technical summary of the information referred to in points (a) to (d); and

(f) any additional information ... relevant to the specific characteristics of a particular project or type of project and to the environmental features likely to be affected.

Where an opinion is issued... the environmental impact assessment report shall be based on that opinion, and include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment, taking into account current knowledge and methods of assessment.

The developer shall, with a view to avoiding duplication of assessments, take into account the available results of other relevant assessments under Union or national legislation, in preparing the environmental impact assessment report.

38. The Directive sets out the minimum information that a developer must provide in their environmental statement as part of the assessment process. The current Directive includes this in Annex IV together with a longer list of topics that should be covered where relevant. The amended Directive brings the minimum requirements into Article 5(1). There have been some other amendments to Annex IV⁹. However, our preliminary view is that it is likely in practice that all of the issues listed in the amended Annex should already be included in an environmental statement, where it is considered to be relevant to an assessment of the likely significant effects of development. However, we would be interested to hear from consultees as to the impacts of the amendments.
39. The provisions have been introduced into the domestic regulations via regulation 18 in the Town and Country Planning regulations and by regulation 14 in the Infrastructure Planning regulations. The amended Annex IV has been copied out as Schedule 4 to both sets of regulations.

Determining the scope and level of detail of the assessment (scoping) – Article 5(2)

Article 5(2)

Where requested by the developer, the competent authority, taking into account the information provided by the developer in particular on the specific characteristics of the project, including its location and technical capacity, and its likely impact on the environment, shall issue an opinion on the scope and level of detail of the information to be included by the developer in the environmental impact assessment report

The competent authority shall consult the authorities... before it gives its opinion.

⁹ See the Commission's unofficial consolidated version of the Directive referred to above for details

Member States may also require the competent authorities to give an opinion as referred to in the first subparagraph, irrespective of whether the developer so requests.

40. A developer can require a competent authority to issue a scoping opinion setting out the information to be included in their environmental statement. Where scoping is undertaken, the competent authority must consult the ‘consultation bodies’ (see paragraph 47 below) before issuing a scoping opinion.
41. The 2014 Directive retains the provision for a developer to seek a scoping opinion if they choose. It now provides that the competent authority must issue an opinion on the scope and level of detail of the information required in the statement, taking into account the information provided by the developer on the specific characteristics of the project and its likely impact on the environment. It also introduces the requirement that where a scoping opinion has been requested, the environmental statement should be “based on” that opinion. In the regulations, we have primarily copied out the text of the Directive, but have referred to the environmental statement being “based on the most recent scoping opinion or direction issued (so far as the proposed development remains materially the same as the proposed development which was subject to that opinion or direction)”. This addition is to take account of situations where the details of a project change after a scoping opinion has been made, for example, or where the initial assessment work demonstrates that the actual significant effects identified differ from those foreseen at the scoping stage.
42. The general provisions for seeking a scoping opinion are transposed through regulations 15 and 16 of the Town and Country Planning regulations with the new requirement to base the environmental statement on that opinion by regulation 18, and in regulations 10 and 14 in the Infrastructure Planning regulations.

Competent experts – Article 5(3)

Article 5(3)

In order to ensure the completeness and quality of the environmental impact assessment report:

(a) the developer shall ensure that the environmental impact assessment report is prepared by competent experts;

(b) the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report;

43. The 2014 Directive includes a new Article 5(3). This requires the developer to ensure that the environmental statement is prepared by competent experts, while the competent authority must ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental statement.
44. We propose to include a requirement in the regulations that the environmental statement must be prepared by persons who in the opinion of the competent authority, have sufficient expertise to ensure the completeness and quality of the

environmental statement. This will be supported by a requirement for the environmental statement to include a statement setting out how the requirement for sufficient expertise has been met. We have not sought to define “competent expert” any further, both because it is considered to be a sufficiently clear term, but also because it is likely to depend on the individual circumstance of each case. Views are sought on this approach.

45. Our initial view is that at present most decision makers either have persons with sufficient expertise within their planning or wider teams to examine the environmental statement, or could readily obtain access to such expertise. They will also have any comments of the statutory consultation bodies, including Natural England and the Environment Agency to assist them.
46. The requirement for the environmental statement to be prepared by competent experts is transposed by regulation 18 of the Town and Country Planning regulations and regulation 14 of the Infrastructure Planning regulations. The requirement for the competent authority to have access to sufficient expertise is included in regulations 4 and 5 respectively.

Question 7 – do you agree that the competent authority, informed where appropriate through the consultation process, is best placed to determine whether those preparing an environmental statement have sufficient expertise for that purpose?

Consultation

Consultation bodies – Article 6(1)

Article 6(1)

Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent taking into account, where appropriate, the cases referred to in Article 8a(3). To that end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by- case basis.

47. The Directive requires Member States to designate certain authorities with environmental responsibilities which must be consulted, where relevant, where a request has been made for a scoping opinion or following the submission of an environmental statement. The Town and Country Planning regulations in England refer to these authorities as ‘consultation bodies’ and include organisations such as Natural England, the Marine Maritime Organisation and the Environment Agency. It also includes in England, any body which a relevant planning authority is required to consult when they receive a planning application. In the Infrastructure Planning regulations, which extend to Wales (and to Scotland for limited purposes), the “consultation bodies” for purposes of environmental impact assessment include any body that an applicant would be required to consult by virtue of section 42 of the Planning Act 2008 and the Infrastructure Planning (Applications: Prescribed Forms

and Procedure) Regulations 2009 (the “Prescribed Forms Regulations”), local authorities, and where land is in London, the Greater London Authority. The 2014 Directive adds the phrase ‘authorities with local and regional competencies’ to the paragraph. We consider that such authorities are already included within the definition of consultation bodies, so we do not propose to make any changes to the regulations in this case.

48. The consultation bodies are defined in regulation 2(1) of the Town and Country Planning regulations and regulation 3(1) of the Infrastructure Planning regulations.

Electronic communication – Article 6(2) and 6(5)

Article 6(2)

In order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and whether by public notices or by other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures ...

Article 6(5)

... Member States shall take the necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level.

49. The 2014 Directive adds the requirement that the public should be informed about an application and the matters set out in Article 6(2) electronically through “at least a central portal or easily accessible points of access”. There are already provisions requiring local planning authorities to publish certain information relating to planning applications on their websites (see regulation 15(7) of the Town and Country Planning (Development Management) Procedure Order 2015 (the “Development Management Procedure Order”). In practice, it is thought that environmental statements are generally made available on authorities’ websites. In the case of nationally significant infrastructure projects the Planning Inspectorate already publishes notices and environmental statements on their websites. The Government considers that this is the appropriate administrative level for the purposes of the planning and infrastructure regulations. There should therefore be no change to existing practice.
50. To transpose Article 6(2) we have required that notices publicising applications for environmental impact assessment development are published electronically – see for example, in the case of the Town and Country Planning regulations, regulations dealing with publicity (e.g. regulation 20) and also the amendments to other legislation such as the changes to article 15 of the Development Management Procedure Order by regulation 73(3). In the case of the Infrastructure Planning regulations, publicity is dealt with, for example, in regulation 19, and also through amendment of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (“the Prescribed Forms Regulations”).

51. To transpose Article 6(5) we have required that environmental statements and any “further” information considered necessary for the environmental statement to properly assess the likely significant impacts of a proposal are published on a website. See for example, in the case of the Town and Country Planning Regulations, regulations 20 and 25, and amendments to other legislation made by regulations 73, 75 and 76. In the case of the Infrastructure Regulations, see for example regulations 27 and the amendments made to the Prescribed Forms Regulations by regulation 35.

Consultation timeframes

Article 6(7)

The time-frames for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) shall not be shorter than 30 days.

52. Article 6(7) sets a new minimum time frame for public consultations on the environment statement. This should be no shorter than 30 days. The existing minimum period for consultation in the town and country planning system is 21 days (see, for example, regulation 15 of the Development Management Procedure Order). The minimum period in the infrastructure planning system is 28 days. This will be increased to 30 days for both regimes – see for example, regulation 19(5) in the Town and Country Planning regulations and the amendments made to other legislation by regulations 73, 75 and 76, and in regulation 19(5) and the amendments made by regulation 35 in the Infrastructure Planning regulations.

Decisions

Information to be included in a decision – Article 8a (1) and (2)

Article 8a(1)

The decision to grant development consent shall incorporate at least the following information:

(a) the reasoned conclusion referred to in Article 1(2)(g)(iv);

(b) any environmental conditions attached to the decision, 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 as well as, where appropriate, monitoring measures.

Article 8a(2)

The decision to refuse development consent shall state the main reasons for the refusal.

53. A new Article 8a(1) and (2) sets out requirements for information to be included in a decision to grant development consent. Article 8a(1)(a) reflects the requirement in

Article 1(2)(g)(v) that the competent authority's reasoned conclusion must be integrated into any decision.

54. Article 8a(1)(b) requires that in addition to any environmental conditions attached to the decision, competent authorities must also ensure that any mitigation measures and, where appropriate, monitoring measures (see below) are identified in the consent.
55. These requirements have been transposed through regulation 29 of the Town and Country Planning regulations and regulation 30 of the Infrastructure Planning regulations.

Monitoring of significant environmental effects

Article 8a(4)

In accordance with the requirements referred to in paragraph 1(b), Member States shall ... determine the procedures regarding the monitoring of significant adverse effects on the environment. The type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the project and the significance of its effects on the environment. Existing monitoring arrangements resulting from Union legislation other than this Directive and from national legislation may be used if appropriate, with a view to avoiding duplication of monitoring.

56. The decision to grant development consent should also now include, where appropriate, monitoring measures. It is for Member States to determine the procedures regarding the monitoring of significant adverse environmental effects. The type of parameters to be monitored and the duration of the monitoring 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.
57. We consider this requirement can be dealt with, where appropriate, by authorities through existing provisions, such as conditions (or requirements in the case of nationally significant infrastructure projects) and planning obligations.
58. This requirement has been incorporated into regulation 26 of the Town and Country Planning regulations and regulations 21 of the Infrastructure Planning regulations.

Up-to-date reasoned conclusion – Article 8a(6)

Article 8a(6)

The competent authority shall be satisfied that the reasoned conclusion referred to in Article 1(2)(g)(iv), or any of the decisions referred to in paragraph 3 of this Article, is still up to date when taking a decision to grant development consent. To that effect, Member States may set time-frames for the validity of the reasoned conclusion referred to in Article 1(2)(g)(iv) or any of the decisions referred to in paragraph 3 of this Article.

59. Article 8a(6) requires that the competent authority’s reasoned conclusion on the significant impacts on a proposal is still “up-to-date” at the time a final decision is taken. In practice, our initial view is that, in the town and country planning and the infrastructure planning systems, it is likely that the period between an authority coming to a conclusion on the significant effects of a proposal and the decision as to whether permission or consent is to be granted will be limited. And for that reason, the practical impacts of this provision will be limited. However, there may conceivably be rare occasions where information on a project’s significant effects becomes available only at a late stage, and this needs to be taken into account in the decision making process. We propose that the reasoned conclusion should be considered up to date if the competent authority is 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.
60. These requirements have been introduced into the domestic regulations via regulation 26 of the Town and Country Planning regulations and regulation 21 of the Infrastructure Planning regulations.

Informing the public of the decision – Article 9(1)

Article 9(1)

When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall promptly inform the public and the authorities referred to in Article 6(1)... ensure that the following information is available ...

- (a) the content of the decision and any conditions attached thereto;*
(b) having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process.

61. Article 9(1) sets out the requirements for the competent authority to inform the public and the consultation bodies about the decision on whether to grant or refuse development consent. It adds to the information to be included in the decision, including a summary of the consultation responses.
62. These requirements have been introduced into the domestic regulations via regulation 30 of the Town and Country Planning regulations and regulation 31 of the Infrastructure Planning regulations.

Other issues

Conflicts of interest – Article 9a

Article 9a

Member States shall ensure that the competent authority or authorities perform the duties arising from this 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, Member States shall at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions when performing the duties arising from this Directive.

63. A new Article 9a deals with avoiding conflicts of interest where an organisation is both the developer and the consultation body and/or competent authority. Where the competent authority is also the developer there must be an appropriate separation between functions. The competent authority or authorities must perform their duties arising from the Directive in an objective manner and not find themselves in a situation giving rise to a conflict of interest.
64. We do not consider at this stage that this will have any new effects in practice. Bias is already a ground for judicial review¹⁰. The Town and Country General Planning General Regulations¹¹ include provision in the case of a local planning authority making an application to itself to avoid conflicts of interest (see regulation 10). In practice, authorities will normally ensure an administrative separation to help ensure that conflicts of interest do not arise. The requirements have been transposed through a new regulation dealing with 'objectivity and bias' – see regulation 65 of the Town and Country Planning regulations and regulation 34 of the Infrastructure Planning regulations.

Penalties

Article 10a

Member States shall 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.

65. A new Article 10a requires that Member States must 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.
66. In the planning context, our view is that the existing enforcement provisions in legislation are sufficient to meet the requirements of the Directive. For example, enforcement provisions in respect of unauthorised development are set out in Part 7 of the Town and Country Planning Act 1990. Enforcement action under this Part is discretionary, but the courts have made extensive comment on the degree of an

¹⁰ See for example *Georgiou v Enfield LBC* [2004] LGR 497.

¹¹ S.I. 1992/1492.

authority's discretion in this area¹². However, to reinforce the position, we propose to place an explicit duty on local planning authorities to have regard, when exercising their enforcement functions (as described in regulation 36 of the draft Town and Country Planning regulations) to the need to secure compliance with the requirements and objectives of the Directive (see regulation 37 of the Town and Country Planning regulations). In terms of the nationally significant infrastructure project regime, Part 8 of the Planning Act 2008 makes provision for offences either for carrying out development without first obtaining a development consent order, and for failing to comply with the terms of an order.

Question 8. Do you agree that subject to the small change to the enforcement provisions, we already have sufficient legislation in place to achieve the requirements on penalties?

Transitional Arrangements – Article 3 of 2014/52/EU

Article 3

1. Projects in respect of which the determination referred to in Article 4(2) of Directive 2011/92/EU was initiated before 16 May 2017 shall be subject to the obligations referred to in Article 4 of Directive 2011/92/EU prior to its amendment by this Directive.

2. Projects shall be subject to the obligations referred to in Article 3 and Articles 5 to 11 of Directive 2011/92/EU prior to its amendment by this Directive where, before 16 May 2017: (a) the procedure regarding the opinion referred to in Article 5(2) of Directive 2011/92/EU was initiated; or (b) the information referred to in Article 5(1) of Directive 2011/92/EU was provided.

67. Article 3(1) of Directive 2014/52/EU provides transitional measures where an application for screening was initiated prior to 16 May 2017. Article 3(2) provides transitional measures for projects for which an environmental statement was submitted or where a scoping opinion has been sought before 16 May 2017. In such cases, the provisions of the 2011 Directive will apply.
68. The transitional measures have been transposed through regulation 77 of the Town and Country Planning regulations and Regulation 36 of the Infrastructure Planning Regulations.

Other matters

¹² See e.g. *Ardagh Glass Ltd v Chester City Council* [2011] 1 All E.R. 476; *R. (Padden) v Maidstone BC* [2014] EWHC 51.

Other consenting processes

69. It is considered that there are a number of procedures in the planning system, not currently expressly addressed in the Town and Country Planning Act (Environmental Impact Assessment) Regulations 2011 which should be addressed in the amended regulations. These are:
- a. Revocation or modification orders¹³. Section 97 of the Town and Country Planning Act 1990 provides powers for a local planning authority to revoke or modify a planning permission where this is considered expedient. When doing so the authority must have regard to the development plan and to any other material considerations. Orders to which there is objection must be confirmed by the Secretary of State; whereas if there is no objection an order may come into effect without confirmation. There are also powers for a Secretary of State to make such an order themselves.
 - b. Discontinuance orders. Section 102 of the Town and Country Planning Act 1990 provides that if, having regard to the development plan and to any other material considerations, it appears to a local planning authority that it is expedient in the interests of the proper planning of their area (including the interests of amenity) that: use of any land should be discontinued; or conditions should be imposed on the continuance of a use of land; or any buildings or works should be altered or removed, then the authority may issue an order making appropriate provision to address the issue identified. Such an order may grant planning permission. A discontinuance order made by a local planning authority must be confirmed by the Secretary of State before it can take effect. The Secretary of State also has powers to make such an order themselves.
 - c. Section 137 of the Town and Country Planning Act 1990 provides, broadly, that an owner of land (or someone with an interest in land) may serve a purchase notice on their local authority where: planning permission is refused; planning permission is revoked or modified; or a discontinuance order has been made, and the effect of this is that the land is incapable of reasonably beneficial use. If the authority is not willing to comply with the purchase notice, then they must first send the Secretary of State a copy of the notice and also their response to it. One of the options (see section 141) open to the Secretary of State at this point is to grant planning permission for the proposed development in question.
70. No provision is made in the draft Town and Country Planning regulations in respect of these processes for the time being. However, in all three case it is considered conceivable that a decision of the local planning authority or the Secretary of State, as appropriate, could constitute a development consent for purposes of the Directive (if it results in a consent for the execution of construction works or other installations

¹³ The Court of Appeal confirmed in the case of *Smout v Welsh Ministers* [2011] EWCA Civ 1750 that order modifying an existing permission could constitute a distinct project within the meaning of the Directive.

or schemes, or some other interventions in the natural surroundings and landscape¹⁴). For that reason, our intention is to make provision in the Town and Country Planning regulations requiring screening of such proposals and, where relevant, for the environmental impact assessment process to be followed.

71. It is also noted that the Housing and Planning Act 2016 introduced provisions relating to “permission in principle”. Consultation on implementation of that measure was carried out earlier this year and responses are being considered.

Question 9. Do consultees agree that these processes may engage the Directive? Do they have any views on the way in which these measures should be implemented?

¹⁴ See Article 1(2) of Directive 2011/92/EU.

Assessing Impacts

Equalities

While developing these proposals we have had regard to the public sector equality duty. The duty requires public authorities, in exercising their functions to have due regard to the need to:

- Eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act;
- Advance equality of opportunity between people who share a protected characteristic and people who don't; and
- Foster good relations between people who share a protected characteristic and people who don't.

Our initial assessment is that there is limited scope for these regulations to have significant impacts on persons with protected characteristics, and have taken the factors above into account so far as relevant when formulating our proposals (for example, in relation to consultation requirements). However, we would be interested in any views or information that consultees have on any potential equalities impacts.

Business

As a European Union measure with no gold-plating, this is a Non-Qualifying Regulatory Provision (NQRP) under the Better Regulation Framework. An internal triage assessment has confirmed that the measures qualify for the Fast Track.

List of Annexes

Annex A - Draft Town and Country Planning (Environmental Impact Assessment) Regulations 2017

Annex B - Draft Infrastructure Planning (Environmental Impact Assessment) Regulations 2017

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About this consultation

This consultation document and consultation process have been planned to adhere to the Consultation Principles issued by the Cabinet Office.

Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department for Communities and Local Government will process your personal data in accordance with DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.
Individual responses will not be acknowledged unless specifically requested.

Your opinions are valuable to us. Thank you for taking the time to read this document and respond.

Are you satisfied that this consultation has followed the Consultation Principles? If not or you have any other observations about how we can improve the process please contact DCLG Consultation Co-ordinator.

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