



Department for
Communities and
Local Government

Government response to the technical consultation on Environmental Impact Assessment (regulations on planning and nationally significant infrastructure)



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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 invited comments on proposals for implementing European Directive 2014/52/EU. This amended 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. 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.
4. An important aim of the amended Directive is to simplify the rules for assessing the potential effects of projects on the environment in line with the drive for smarter regulation, and to lighten unnecessary administrative burdens. It should also improve the level of environmental protection, with a view to making business decisions on public and private investments more sound, more predictable and sustainable in the longer term.
5. 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 ('copy out' is where the implementing legislation adopts the same wording as the Directive or cross-refers to the Directive itself). 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.

6. In transposing the amendments to the Directive, our view at the outset was that there is merit in retaining, as far as practical, the existing approach to environmental impact assessment in both the town and country planning and the nationally significant infrastructure planning systems as it is well understood by developers, local planning authorities and others involved in the procedures. We therefore consulted on proposals which represented the minimum changes necessary to the existing regulations in order to bring them into line with the amended Directive.
7. Complete drafts of our proposed amended regulations were included in the consultation. In most cases the text of the Directive was 'copied-out' as far as practicable, but we proposed an alternative approach where this was considered beneficial. Comments were sought on our interpretation of the changes and how we proposed to implement them through regulations. Consultees were invited to consider the proposed draft regulations in their totality and provide any comments.
8. The consultation asked nine questions:

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?

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?

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?

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?

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?

Question 9: Do consultees agree that revocation or modification orders, discontinuance orders and the service of purchase notices may engage the

Directive? Do they have any views on the way in which these measures should be implemented?

9. This document provides a summary of the responses to the technical consultation and our response to each of the nine questions posed. It should be noted that in considering the responses, more weight has been given to the points put forward in support of, or against any particular proposal, rather than the absolute number who were for or against.
10. Respondents were invited to reply online using an internet survey package or to email or post written comments to the Department for Communities and Local Government.
11. We were grateful for all the responses received. They have been given full consideration.

Summary of responses to the consultation

12. There were 72 responses to the consultation. Responses were received from developers, local planning authorities, statutory consultees, representative organisations, and EIA consultants. Respondents addressed some or all of the questions set out in the consultation paper, offered comments on the draft changes, and in some cases, made specific suggestions for revised wording. While most comments applied to both sets of regulations, others were made in relation to either the planning or nationally significant infrastructure planning regimes. However, given the common approach to the transposition it was considered appropriate to consider all the responses together as they were equally relevant to both regimes.

Response by type of respondent	% breakdown
Local planning authority	8%
Representative body	22%
Construction industry	19%
Third sector	6%
Other	44%

13. The consultation paper gave a detailed explanation of the changes to the Directive. That level of detail has not been repeated here except where it relates to a specific question posed in the consultation. Reference should therefore be made to the consultation document where necessary.

Determining whether environmental impact assessment is required (screening)

Preliminary verification

14. When determining whether a project of a type listed in Annex II of the Directive is likely to have significant effects on the environment and be subject to assessment, the competent authority will be required to make its screening determination on the basis of the information provided by the developer. They should also take into account the results of 'preliminary verifications' or assessments of the effects on the environment carried out pursuant to other EU legislation. The term 'preliminary assessment' is not defined in the Directive and we are unaware of similar references in other relevant EU environmental legislation. We therefore proposed not to use the term in the regulations but sought the views of consultees.

Question 1. Do you agree with our proposal to omit the term 'preliminary verification'?

15. Forty four respondents agreed that the term 'preliminary verification' could be omitted from the regulations. Six disagreed.

16. The comments of those agreeing not to include the term 'preliminary verification' in the regulations included that the term is vague and has the potential to result in confusion. However, it was suggested that where a Local Planning Authority has already undertaken a strategic environment assessment of the environmental issues related to development sites set out in their Local Plan, this information may be a source of information that the local planning authority may consider during their screening determination. Others considered that the term should be included but did not indicate what it would involve other than consideration of the assessments of the effects on the environment carried out pursuant to other EU legislation.

Government response

17. The Government is grateful for the constructive comments received both in favour and against omitting the term 'preliminary verification'.

18. Screening is usually undertaken at an early stage in the project's design. When screening a project, it is important that the local planning authority takes account of the information provided by the developer and any other information relevant to the site and the development proposal. This can include, where relevant and available, the findings of earlier assessments such as strategic environmental assessment which are already provided for. The Government has therefore not included the

term in the regulations, but has made it clear in guidance the nature of the information that should be considered at the screening stage.

Screening thresholds

19. The Directive requires that when a Member State sets thresholds and criteria to determine which projects listed in Annex II should be screened, the criteria in Annex III must be taken into account. The existing thresholds and criteria have been in place since 1999, and while there have been some amendments to the criteria listed in Annex III as a result of the amendments to the Directive, our assessment was that these amendments did not require us to make any changes to thresholds or criteria set out in Schedule 2 of the EIA regulations.

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?

20. Forty three respondents agreed that the current thresholds and criteria set out in Schedule 2 of the EIA regulations remain appropriate, while three disagreed. A number of other respondents neither agreed nor disagreed but provided comments, particularly on issues that should be taken into account when screening individual projects, for example, cumulative impacts.

Government response

21. The Government agree that the Schedule 2 thresholds remain appropriate and so has not made any changes to them at this time.

Timeframe for screening

22. 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 relevant information. This period can be extended in exceptional circumstances.

23. For the Town and Country Planning regulations, where a local planning authority is adopting a screening opinion, we proposed to maintain the requirement to adopt an opinion within 3 weeks - or longer where agreed with the developer in writing. However, that longer period may not exceed 90 days. We also proposed 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 proposed 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 stating the reasons justifying the extension and an indication as to when the determination is expected.

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

24. Fifty three respondents agreed and three disagreed.

25. Many of those agreeing to retain the existing three week period were concerned that an extension of the time would cause delays to project programmes. However, there was support for setting a maximum timeframe of 90 days for response – despite some concerns that this will not be met. There was also concern that the 90 days would be interpreted as an absolute limit (ignoring the 3 week limit) as there are no incentives for it to provide the screening opinion sooner. Others suggested extending the 21 day period to 30 days or five weeks.

Government response

26. The Government welcomes the strong support in favour of retaining the existing 21 day screening period, whilst allowing extensions to the time of up to 90 days when agreed in writing with the developer. In accordance with the Directive, we have amended the provision to extend the time further where there are exceptional circumstances and it is not practicable to adopt the screening period within the agreed, extended time period. However, the ability of a developer to seek a screening direction from the Secretary of State if the local planning authority fails to issue a screening opinion within 21 days also remains. We have made similar provisions for the Secretary of State when making a screening direction.

The assessment process

Coordinated procedures

27. A new requirement has been introduced at Article 2(3) of the Directive. 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 the designation of an authority, or authorities, to coordinate separate assessments. The joint procedure requires Member States to endeavour to provide for a single assessment of a project's impacts on the environment.

28. The Government considered 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 or Wild Birds

Directives. 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.

29. The Directive also allows the Government to choose to 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 did not propose to include it in our regulations. However, we sought views on the matter.

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

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?

30. There were fifty two respondents in favour, and three against applying coordinated procedures where there was a requirement for both an EIA and an assessment under the Habitats or Wild Birds directives. There were 33 responses agreeing not to make coordination with other assessments mandatory and nine against. Two respondents didn't express a view, but suggested the need for guidance.

31. Many respondents commented that the coordinated procedure would provide the greatest flexibility for developers around the phasing and timing of the environmental impact assessment and an 'appropriate assessment' under the Habitats Directive and that this reflects existing practice in England. The joint procedure would, however, require the information to inform both assessments to be dealt with in a single assessment. The environmental impact assessment and appropriate assessment may have different timescales. It was suggested that a joint procedure could have unintended consequences, given the different purposes and outcomes of the two assessments.

32. One local planning authority commented that the joint approach would be beneficial while another considered that authorities should also have the option of requiring joint procedures and therefore provide for a single assessment of a project's impact on the environment.

33. Regarding coordination with other assessments, some respondents commented that the joint approach would be impractical, that the information might not be available and that it would make the consenting process increasingly complex.

Government response

34. The Government welcomes all the comments received and the general support for the coordinated approach in relation to the Habitats and Wild Birds Directives. It also welcomes the support for not making it mandatory to coordinate other assessments with the environmental impact assessment. The Government has taken this approach, and now requires a coordinated approach in relation to the Habitats and Birds Directive, but does not make coordination of other assessments mandatory.

Multiple consent regimes

35. We also asked whether it would be helpful to make provision to deal with the situation where more than one authority is involved in granting permission for a proposal, and linked to this, views were sought as to whether provision should be made to prevent construction in respect of EIA development until all the necessary consents and permits needed to operate the development were in place.

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

36. The overwhelming majority who responded were against the proposal, and in particular in relation to the suggestion that construction should be prevented until all consents and permits were in place. It was not considered necessary or beneficial, and it was accepted that any construction was at the developer's risk. It was suggested that the risks would be mitigated through the EIA process with conditions attached to the planning permission or section 106 obligations. It was also thought to pose unnecessary risk, lack flexibility, and front load costs to a developer. One respondent commented that although twin tracking planning and environmental permit applications is desirable, the reality is that applicants are often unable to commit resources to the environmental permit application until the outcome of the planning application was known. Given the project risk and potential expenditure involved, only the applicant is able to weigh up all of the issues and decide whether to jointly submit applications for planning and pollution control or whether an application for EIA consent should precede an application for an environmental permit.

37. One respondent suggested that if a single process were to be imposed, the risk is that development consent could be held up while the detailed design data needed for the environmental permit applications were obtained. This could seriously delay projects and impose major costs on developers. It also had the potential to put off investors because of new, untried and untested requirements adding an unquantifiable risk to a project before it even begins.

38. On the other hand, one respondent commented that it would provide greater clarity and certainty for developers, interested parties and the public if a coordinated response was prepared and delivered by all the relevant regulatory authorities and agencies, before any operations begin. However, it was suggested that the logistic and communication issues involved in coordinating submissions, consultations and responses may present challenges to current statutory timescales for decisions.

Government response

39. The Government wants to retain the flexibility that allows developers to decide whether to build before all other consents or permits are in place. It is recognised that the risk of failure to obtain all necessary consents rests with the developer.

Competent experts

40. The Directive 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.

41. We proposed including 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 would 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 did not define “competent expert” any further. Views were sought on this approach.

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?

42. There were 64 responses to this question, 27 agreeing with the proposal, 28 disagreeing and nine not expressing a particular view but requesting guidance. There was also a joint letter from nine organisations, most of which also provided separate responses, highlighting their shared concerns relating to the proposed approach to transposing the ‘competent expert’ requirements.

43. A number of those in favour of the proposed approach cautioned that there should be agreement between the competent authority and the developer at an early stage in the process to avoid later disputes or challenges which could hold up the process.

44. There were concerns expressed about the unnecessary enforcement of a certification or accreditation scheme. The nature of the expertise required was considered by some respondents to depend on the individual circumstances of each case. One respondent commented that it would be difficult (and unnecessary and inappropriate) to identify any single accreditation given the wide range of expertise needed to conduct a robust EIA process.
45. Another respondent suggested that in the event that the relevant authority determines that a particular expert is not competent there should be an obligation to specify the reasons for this and to indicate what additional expertise is required in order to satisfy this requirement.
46. There was support for the requirement for the environmental statement to include a statement setting out how the requirement for sufficient expertise has been met. However, a number of respondents commented that the competent authority must also have the appropriate level of competence to be able to determine whether those preparing the environmental statement had sufficient expertise.
47. The views of those opposing the proposals were reflected strongly by the signatories of the joint letter referred to above. They considered that requiring local planning authorities to confirm the competence of environmental professionals that prepare environmental statements for developers would act to gold plate the European requirements and add new risks to efficient consenting. It was seen as an additional burden on the consenting regimes and would introduce considerable risk. This included: increasing local authority workloads; generating delay and additional cost to developers; and opening a new avenue for legal challenge. Their view was that revising existing guidance to refer developers to the UK's network of environment and planning related professional bodies would deliver this. It was proposed that the regulations should simply copy-out the text of the Directive.

Government response

48. The approach proposed by the Government in the consultation draft of the regulations was intended to provide a procedure for determining the competence of those preparing environmental statements. It was not intended to gold plate the Directive or to increase the legal risk of non-compliance, or to delay applications. However, in light of the responses from consultees, and in particular the view that as drafted, the regulation providing for competent experts could have potentially gold-plate the Directive, the Government decided to revert to copy-out of the wording of the Directive. The regulations now provide that the responsibility for ensuring the competence of those preparing environment statements rests with the developer. The Government has provided further detail in guidance.

Penalties

49. Article 10a of the directive requires us to lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to the Directive. It is the Government's view that in the planning context, the existing enforcement provisions in legislation are sufficient to meet the requirements of the Directive. In terms of the nationally significant infrastructure planning regime, Part 8 of the Planning Act 2008 makes provision for offences both 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?

50. There were 38 responses supporting the Government's position that there are already sufficient powers in place and seven against. There was also support for the proposal that we should reinforce the position, by placing an explicit duty on local planning authorities to have regard when exercising their enforcement functions to the need to secure compliance with the requirements and objectives of the Directive.

51. Some respondents that disagreed considered that the Directive's requirements go further than enforcement action and that existing powers are seldom exercised by local planning authorities. There were also suggestions that the Government should ensure that the provisions were applied to all aspects of the EIA process including in relation to ensuring mitigation measures are in place and that monitoring is undertaken.

Government response

52. The Government welcomes the constructive comments received, and is continuing to rely on existing provisions. It has supplemented this with a new duty on local planning authorities to have regard when exercising their enforcement functions to the need to secure compliance with the requirements and objectives of the Directive. The Government has also prepared appropriate guidance on the matter.

Other matters

Other consenting processes

53. The consultation paper identified a number of other consenting processes for which no provisions had been made in the town and country planning regulations – in

particular: permission in principle, revocation and modification orders; discontinuance orders; and the serving of a purchase order.

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?

54. There were 33 responses agreeing that the various processes could engage the directive and one that disagreed. The main point raised by respondents was the need for guidance.

Government response

55. Regulations to complete the implementation of permission in principle will be brought forward in stages and will take account of EIA in the context of permission in principle. The Government will consider this issue in tandem with this process.

Transitional provisions

56. A number of respondents identified that there was a lack of consistency between the transitional arrangements provided for by the Directive and as explained in the consultation paper compared with the text of the draft regulations. In particular, concern was raised that the regulations were more restrictive than they needed to be.

Government response

57. The Government is grateful to those consultees that identified that the transitional provisions in the draft regulations did not reflect those in the Directive or the policy intent set out in the consultation document. The regulations have been amended so that they reflect the requirements of the Directive.

Other issues raised

58. Respondents raised a number of other issues which the government has dealt with through guidance. These include:

- The application of exemptions for defence and civil emergencies
- The scope of environmental factors such as human health and the consideration of major accidents and disasters
- The screening process and ensuring that mitigation measures identified at that stage are incorporated into the final design of the project
- The requirement for environmental statements to be 'based on' a scoping opinion, where one is issued

- The consideration of reasonable alternatives
- Consultation requirements including timescales and electronic publication
- Monitoring of significant adverse environmental effects
- The requirement for an up-to-date reasoned conclusion

Government response

59. The Government has updated its Planning Practice Guidance and National Infrastructure Planning Advice Notes to take account of changes to the regulations and is grateful to respondents for identifying specific areas requiring consideration.