Department for Transport

Environmental Impact Assessment: Technical consultation (transport regulations)

Government response

Moving Britain Ahead

December 2017

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Department for Transport
Great Minster House
33 Horseferry Road
London SW1P 4DR
Telephone 0300 330 3000
Website www.gov.uk/dft
General enquiries: https://forms.dft.gov.uk

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1. Introduction

In June 2016, 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.

1.1 In May 2014 European Directive 2014/52/EU came into force, 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" (EIA) Directive".

1.2 According to the European Commission, the 2014 Directive simplifies the rules for assessing the potential effects of projects on the environment in line with the drive for smarter regulation, and to lighten 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 2014 Directive which is available here: http://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf.

1.3 The Department for Transport ran a consultation between 26 January and 2 March 2017 seeking views on the proposed approach to implementing the amended Directive through the Transport and Works Act (TWA) 1992 and procedure rules made under that Act the Transport and Works Act (Application and Objections Procedure) (England and Wales) Rules 2006 (AOPR); the Highways Act 1980; and the Harbours Act 1964 ("HA64").

1.4 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. The proposals presented in the consultation sought to follow these principles in transposing the amendments made by Directive 2014/52/EU, and to minimise additional regulatory burden while protecting the environment.

1.5 In transposing the 2014 Directive, our view at the outset was that there is merit in retaining, as far as is practicable, the existing approaches to environmental impact assessment, as they are well understood by developers, by local planning authorities and by others involved in the procedures. Our consultation proposals therefore represented what we considered to be the minimum changes necessary

to the existing Regulations in order to bring them into line with the 2014 Directive. This will also minimise familiarisation costs and business uncertainty.

1.6 A total of 12 responses to the consultation were received. The Government is grateful for the thoughtful responses received, and values the evidence and opinions submitted. A full list of organisations that responded to the consultation is included in the Annex.

1.7 All responses to this public consultation have been reviewed and any common themes that emerged have been drawn out from these responses in order to obtain an indication of the most frequently expressed points of view.

1.8 Similar consultations were conducted on the changes proposed for EIA regulations managed by other Government departments. Where possible, a consistent approach to transposition with the rest of Government has been taken and therefore the responses provided to these other consultations have also been considered. In particular, our response references the outcomes of the consultation run by the Department for Communities and Local Government, which has the overall lead for the EIA Directive within Government. Their consultation considered the changes needed to the town and country planning system in England, and to the nationally significant infrastructure planning regime established by the Planning Act 2008. https://www.gov.uk/government/consultations/amending-environmental-impact-asssessment-regulations.

2. Consultation response

Summary

2.1 On the responses, some provided very specific comments and suggestions for wording, and others preferred to give strategic-level reflections. Most comments applied across all three sets of regulations, although a minority were more specific to a particular one. Given that many of the comments applied to all three sets of regulations, it is considered appropriate to summarise the responses together, drawing out more specific points separately where necessary.

2.2 The consultation paper gave a detailed explanation of the changes to the Directive. That level of detail has not been repeated in this document and reference should therefore be made to the consultation document where necessary. https://www.gov.uk/government/consultations/amending-environmental-impact-assessment-regulations-within-transport.

Definition of the EIA process

2.3 Article 1(2)(g) introduces a definition of the “EIA process”. The consultation proposed slightly different approaches to transposition for the different Transport Acts and regulations in order to fit the specific circumstances of each. It also proposed that the existing terms “environmental statement” and “applicant’s statement of environmental information” be retained rather than replace them with “EIA report” as used in the 2014 Directive.

Consultation response

2.4 Although several responses were content with the proposed approach, some also felt that the definition should be extended to recognise the role of EIA at all stages of the process including activities undertaken at an early stage before the formal submission of the report. One response expressed a preference for Article 1(2)(g) to be introduced by a new rule in AOPR which sets out the whole EIA process. Two responses suggested that the amended Definition of the EIA process should be provided in full in the Highways Act 1980.

Government response

2.5 Government considers that to extend the definition of EIA as suggested would go beyond the Directive. For TWA the Article has been transposed by implementing a new rule in AOPR. In the case of the Highways Act 1980, it accepts the suggestion to include the amended definition of the EIA process. For HA64, the definition of "environmental impact assessment" similarly incorporates the preparation of the environmental statement. The Government has retained the existing terms as set out in the Consultation and not replaced them with the EIA Report.

Exemptions

2.6 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. The exemption has also been extended to include projects for which the sole purpose is to respond to civil emergencies. The consultation proposed new provisions to transpose the exemptions for defence and civil emergencies, in exceptional circumstances. Defence exemptions will only apply if the Secretary of State considers that the carrying out of an EIA would have an adverse effect on those purposes.

2.7 Article 2(4) also allows for Member States to exempt a project from the provisions of the Directive in exceptional circumstances, provided that the objectives of the Directive are met and that information derived from any other form of assessment and the reasons for the exemption are made available to the public. The Consultation proposed that this article would be transposed into the Highways Act 1980 and HA64. This has not been transposed into TWA as this requirement was optional and it is considered there would no exceptional circumstances to warrant exemptions from the Directive for the types of project covered by the TWA.

Consultation response

2.8 One response explicitly pronounced itself content with the proposed exemptions. One response considered that it was essential that the provision was only used where the EIA process would have a demonstrable adverse effect on defence or the response to a civil emergency and should not be used as a blanket exemption. It was also requested that guidance be provided. One consultation response expressed a preference for the exceptional circumstances exemption not to be transposed through the Highways Act 1980 – considering that this approach would not be consistent with what is being proposed for other EIA regulations.

Government response

2.9 The Government considers that the exemptions remain appropriate and is clear as to when they would apply. It has implemented this Article as set out in the Consultation.

2.10 In addition, Government has amended legislation to enable the Secretary of State to exempt TWA Orders in Scotland where the sole purpose of the proposed works is national defence. Scottish Ministers would be required to be informed about this direction.

2.11 The Government has implemented Article 2(4) for the Highways Act 1980 and HA64 as set out in the Consultation.

Co-ordinated procedures

2.12 Article 2(3) requires that, where a project is subject to assessment under both the EIA Directive and the Habitats and/or Wild Birds Directives, Member States must provide for either a co-ordinated or joint procedure. The consultation proposed providing for co-ordinated procedures.

2.13 The Directive also allows Member States to choose to apply joint or co-ordinated 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 the consultation did not propose to include it.

Consultation response

2.14 A majority of the responses to this question supported the proposal for a co-ordinated approach. This echoed the outcomes of the DCLG consultation where a large majority were in favour of this approach.

2.15 Two responses requested that guidance be provided including clarification as to who should be the lead authority where more than one authority is involved. One also stated that the co-ordinating authority should have access to expertise of relevance to both EIA and HRA and that this should be set out in the regulations.

2.16 There were mixed views on our proposal that co-ordinated approach should not be extended to apply to any other assessments required under EU law. In the DCLG consultation a significant majority of responses were in favour of not extending the requirements for co-ordination to include other EU assessments.

Government response

2.17 The Government welcomes all the comments and the general support for the co-ordinated approach in relation to the Habitats and Wild Birds Directives, including not to make it mandatory for other assessments to be co-ordinated. It has implemented this Article as planned, using co-ordinated procedures for all three regimes.

Determining whether EIA is required – screening

2.18 The consultation set out a variety of proposals to implement the amendments to Articles 4(4) 4(5) and 4(6). These set out the procedures for determining whether an EIA is required for a project and the factors that must be taken into account in making that determination. Article 4(6) requires the competent authority to make a screening decision with 90 days of receiving the relevant information, which can be extended in exceptional circumstances.

2.19 Government's proposals for transposing these articles take into account that for projects under the Highways Act 1980, the promoter and the competent authority are part of the same body, either Highways England or the Welsh Ministers.

Consultation response

2.20 Two responses welcomed the proposed amendments in the TWA to clarify that the Secretary of State may take into account proposed mitigation measures in the screening decision. One questioned the use of the term 'may' used in para 2.13 of the Consultation, setting out that it does not appear logical to provide a choice on whether or not to consider mitigation measures in the screening decision.

2.21 A number of responses made suggestions for the consideration of mitigation measures at the screening stage. These included that there should be requirements that any measures being considered must be known to be effective and enforceable, must be clearly and precisely presented, and should not include offset/compensation elements at this stage. It was also suggested that that where screening determines that an EIA is not required based on proposed mitigation measures, developers should be required to set how these measures have been included in any application which relies on that decision.

2.22 Two responses welcomed the retention of the 42 day decision timescale in the TWA case, one of which requested that the developer is advised when an extension of the timescale is utilised and given an estimation of the timescale for a decision. The DCLG consultation also considered the issue of decision timescales and received strong support for retaining existing decision timescales where these were shorter than the 90 days set out in the Directive. A respondent suggested that the 42 days be applied to HA64 and another felt that the 90 day requirement for a Screening determination should be transposed into the Highways Act 1980.

2.23 One response considered that a wider range of interested parties should be consulted at the screening stage. Concerns were also raised that statutory agencies may not have adequate access to sufficient expertise to support the additional screening requirements. It was also suggested that regulations should require that screening information is prepared by competent experts and that decision makers should have access to competent experts at this stage.

2.24 Two responses suggested a consistent approach to implementing Annex III of the Directive into all the legislation.

2.25 One response set out that if there is any uncertainty over screening, the default position should be that an EIA is required. It was also set out that the objective of the screening process should be to deliver more proportionate EIAs rather fewer projects requiring an EIA.

2.26 In relation to the Highways Act 1980, one respondent commented on the potential risks of conflict of interest and questioned whether a single entity should retain its ability to act as both developer and competent authority. Another response said that on this point that it is important that the expectations of Article 4(4) – 4(6) are still met and this should be made clear in guidance.

Government response

2.27 The Government has implemented Articles 4(4) and 4(5) as set out in the Consultation.

2.28 With regard to the use of competent experts at screening stage, Government notes that the EIA Directive only requires competent experts to be involved in the preparation and examination of the environmental statement. Government does not propose to include a new requirement for competent experts at the screening stage as we consider this would place unnecessary additional burden on developers and go beyond the requirements of the Directive.

2.29 Under TWA, the Government accepts that the use of “may” regarding the consideration of mitigation measures by the Secretary of State in a screening decision was not clear. It has clarified its position in AOPR to make clear that when making a decision the Secretary of State shall take into account any information (which would include mitigation measures) provided by the applicant or other bodies when making a screening decision.

2.30 The Government welcomes support for retaining existing decision timescales where these are already shorter than the 90 days set out in the Directive and will do so in the TWA, where a 42 day decision timescale is in place. For the Highways Act 1980, it accepts the recommendation on transposing the 90 day period for decisions and has specified that the determination must be made as soon as possible and in any event within 90 days. The Government has used the same 90 day timescale in HA64 Schedule 3.

2.31 Government does not consider that it is necessary to extend the list of bodies required to be consulted on screening requests as such a process would be unnecessarily burdensome on developers and Government.

2.32 The issue of potential conflicts of interest is specifically covered later under 2.78.

The scope of the assessment process

2.33 Article 3 sets out the environmental factors that should be considered as part of the assessment where these are significant. As well as amending some of the terminology used, it introduces a new requirement to consider the expected effects as a result of the vulnerability of the project to risks from major accidents or disasters.

Consultation response

2.34 Three of the five responses which responded to this section explicitly agreed with the recommended approach. One noted that guidance would be welcome in relation to the new requirements set out. One felt that scoping should be made mandatory.

Government response

2.35 To make scoping mandatory would go beyond the requirements of the Directive and is not necessary for this transposition process. The Government has transposed Article 3 as set out in the consultation document.

Information to be provided in the environmental statement

Minimum information requirements

2.36 Article 5(1) sets out the minimum information that must be included in an environmental statement and Annex IV provides a longer list of topics that should be covered where relevant. Article 5(1) also sets out that the environmental statement must be "based on" the scoping opinion. For the TWA and HA64 the consultation proposed requiring that the environmental statement be "based on the most recent scoping opinion given (so far as the works in question remain materially the same as the works which were subject to that opinion)".

Determining the scope and level of detail of the assessment - scoping

2.37 Article 5(2) clarifies the requirements that apply where a request is made for an opinion about the scope and level of detail of the information to be included in an environmental statement.

2.38 The existing provision for scoping opinions in articles 5(1) and 5(2) of the Directive is currently not expressly transposed in the Highways Act 1980 because in this case the developer and competent authority are the same body. Highways England already carries out a form of scoping opinion as part of its internal procedures and so the provision is implemented administratively. It is therefore not necessary to transpose the amendments to this provision. Highways England has prepared formal propriety guidance to show that there is a genuine separation. The Welsh Government will review the equivalent arrangements in Wales to ensure that they are compliant with the 2014 Directive.

Consultation response

2.39 Comments included some general support for an approach which requires the environmental statement be "based on the most recent scoping opinion given (so far as the works in question remain materially the same as the works which were subject to that opinion)", but one response felt that the approach to scoping proposed does not take into consideration the fact that the surrounding environment may change as well as the project, meaning that the scope of the assessment may also need to change. Some respondents also requested that further guidance be produced.

2.40 Two consultation responses said that changes to Annex IV should be fully transposed into the Highways Act 1980.

2.41 Two consultation responses noted that, where a developer requests a scoping opinion under Article 5(2) it automatically triggers a requirement on the competent authority to consult the statutory bodies set out under TWA and HA64 and asked for a similar consultation requirement to be included at this stage in the Highways Act 1980.

Government response

2.42 The Government has transposed Article 5(1) of the Directive into the Highways Act 1980. These provisions refer to "additional information specified in Annex IV", which will necessarily be the latest version of Annex IV of the Directive, as amended by the 2014 Directive. The Government has taken this approach for all three transport regimes as set out in the Consultation.

2.43 The Highways Act 1980 already requires that the Secretary of State or the strategic highways company must ensure that the consultation bodies are given an opportunity to express an opinion on the project and the EIA report before deciding whether to proceed with the construction or improvement. This already applies to every project under the Highways Act 1980 and so there is no need for it to be triggered by a request for a scoping opinion.

Competent experts

2.44 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 EIA report.

Consultation response

2.45 There were a number of comments regarding competent experts. One response welcomed the approach set out in the Consultation. One did not agree with the suggestion set out in para 2.21 of the Consultation in relation to TWA and for the Secretary of State to have an opinion on the expertise of the competent experts. The response highlighted that the Directive places the acceptability of competent experts with the developer and not the competent authority.

2.46 A number of comments received as part of the Consultation related to defining competent experts. Accreditation mechanisms were equally lauded and opposed and there was a wide variety of suggestions regarding the need for minimum competency requirements and for requiring detailed information about the expertise of individuals involved in the preparation of the EIA.

Government response

2.47 The Government notes the comments on this consultation and in the DCLG consultation. For all three regimes the Government has included a provision that the environmental statement must be accompanied by a statement from the applicant outlining the relevant expertise or qualifications of such experts. However, the Government does not accept the suggestion that competence should require specific accreditations, as this would unduly limit the field of consultants able to contribute.

Consultation

Consultation bodies

2.48 Article 6(1) requires Member States to designate environmental authorities which must be consulted on requests for scoping opinions or the submission of an environmental statement and adds a requirement to consult authorities "with local and regional competencies".

2.49 Under the TWA Regime, the Government proposed: removing the requirement for the Competent Authority to consult the applicant on a request for a scoping opinion.

Electronic communication

2.50 Articles 6(2) and 6(5) require consent applications and relevant environmental information to be electronically available.

Consultation timeframes

2.51 Article 6(7) requires the timeframe for consulting the public concerned on the environmental statement to be not shorter than 30 days.

Consultation response

2.52 For TWA one response considered that there was value in the current scoping consultation that included consultation with the developer as well as with statutory consultees.

2.53 Concern was raised that extending consultation to other bodies that have "local and regional competencies" may lead to differing opinions which could lead to more challenges to decisions.

2.54 One consultation response expressed a preference for a wider range of interested parties to have an opportunity to be consulted throughout the EIA process.

2.55 One suggested that a provision should be added for the competent authority to direct statutory bodies to restrict responses to cover only that within their statutory remit, so as to avoid conflicting advice. Another view was for statutory bodies to have a duty to comment on the EIA.

2.56 With regard to electronic communications one response noted that many larger proposals already have dedicated websites maintained by the developer/project sponsor. One comment was for a central point for access to environmental information at all stages of the EIA process. There was also a request for a set format for EIA information.

2.57 One consultation response said that the public should be able to access all relevant information on the EIA electronically (i.e. not just the EIA Report and decision). On the TWA process specifically, one asked for DfT to review the whole process in

order to cut down on paper copies of applications and to embrace the full potential of electronic communication.

Government response

2.58 Government does not consider that it is necessary for developers to consult all parties throughout the EIA process and make environmental information on a proposed development available before submitting an application. Interested parties will have an opportunity to comment on the application should one be submitted.

2.59 For TWA, with regard to consulting the developer in relation to scoping requests, it is noted that the developer will already have prepared the information provided to consultees. As the developer has already put forward its views this provision was considered unnecessary and was therefore removed from AOPR as set out in the Consultation.

2.60 The Government has transposed the provision of the Directive requiring consultation with bodies having "local and regional competencies".

2.61 Government considers that Statutory Bodies already tend to restrict comments to their area of expertise and Government sees no need to define what they should provide comments on.

2.62 The Government has transposed the requirement in all three regimes for the relevant environmental information to be made available electronically. For TWA this is a website maintained by or on behalf of the Secretary of State.

2.63 Government also notes the particular comments regarding amending the TWA process to allow greater use of electronic communication. This is something that will be considered in relation to any wider review of TWA.

Decisions

2.64 A new Article 8a sets out procedures for deciding whether or not to proceed with a project that is subject to an EIA. This includes article:

- 8a(1) (a & b) which sets out that that the competent authority's reasoned conclusion must be integrated into any decision and 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 are identified in the consent.
- 8a(2), which requires the main reasons to be given for a refusal to grant development consent
- 8a(4), which requires that the decision to grant development consent should also now include, where appropriate, monitoring measures.
- 8a(5), which requires that the competent authority takes a decisions within a reasonable period of time.
- 8a(6) requires that the reasoned conclusion on the significant impacts of a proposal is still up-to-date when a final decision is made.

2.65 Article 9(1) included a new requirement that certain information about a decision be made available to the environmental authorities referred in in Article 6(1), in addition to the public.

Consultation response

2.66 With regard to decision timeframes, there was one response which supported explicit time limits when making a decision. Other comments included, that the Regulations should set out what timeframes are considered reasonable and that the word 'promptly' be included with regard to the timing for informing the public of a decision.

2.67 It was suggested that the proposal for transposing Article 8a(6) for TWA should be changed so that the decision must have regard to 'current knowledge and methods of assessment' with current knowledge being defined in guidance, and that up-to-date survey work must be provided. It also recommended adopting an approach to transposing article 8a(6) in the Highways Act 1980 similar to that proposed for the HA64.

2.68 There were a number of individual comments about the monitoring of significant effects. These suggested that:

- Consent should be conditional on the clear identification of any mitigation measures and monitoring approaches.
- A provision should be included to ensure that where monitoring determines a development is having an adverse effect there are processes in place to ensure this is remedied along with effective penalties for non-compliance.
- That guidance should be provided that monitoring measures are located in a single location within the Environmental Statement to increase transparency.
- The monitoring of significant effects is welcome but existing penalty provisions are not considered to be sufficient.
- Clarity should be given to developers as to why monitoring is needed, what will happen with the information gathered through monitoring and what will happen if an adverse effect is discovered that was not identified at the time the environmental statement was produced.
- Responsibility for monitoring should lie with local authorities or an appropriate statutory body with developers required to make a financial contribution to this.

Government response

2.69 With regard to time limits for decisions on EIA Applications, Government notes that each application is different and that a number of factors can influence how long a decision can take - including requests from applicants to allow time to negotiate objections. There are currently non-statutory targets set out for all TWA applications (not just ones where an EIA is required) in published guidance and Government is content that these are sufficient. Similarly, harbour orders are already subject to administrative time limits.

2.70 Government notes the comments with regard to the additional wording proposed to be introduced in relation to Article 8a(6) but considers that doing so would go beyond the requirements of the Directive and so is not necessary. This Article has been transposed for all three regimes as planned.

2.71 With regard to the comments around monitoring, going further than the requirements of the Directive is not necessary for this transposition process. Thus the changes suggested would not be consistent with the overall approach to transposition.

2.72 The Government has transposed the Articles in relation to Decisions as set out in the Consultation.

Other issues - penalties and enforcement

2.73 New Article 10a requires Member States to lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to the 2014 Directive. The penalties provided must be effective, proportionate and dissuasive. The consultation proposed that the existing enforcement provisions are sufficient to meet the requirements of the amended EIA Directive.

Consultation response

2.74 One consultation response disagreed that existing enforcement provisions are sufficient to meet the requirements. The DCLG consultation outlined a similar approach to penalties and a majority of responses to that consultation (38 for, 7 against) supported the Government's position that there are already sufficient powers in place.

2.75 Further comments on penalties and enforcement included that:

- Penalties and enforcement action should apply when applicants or competent authorities do not comply with EIA objectives and requirements, particularly in cases of non-compliance of mitigation/monitoring measures.
- Regulations should be clear about which aspects of the EIA are subject to enforcement and what should happen if mitigation or monitoring measures are not implemented.
- Competent authorities should ensure that they have adequate resource to undertake enforcement action and penalties.

2.76 One response considered that providing false information warranted penalties and sanctions.

Government response

2.77 The Government notes the responses but continues to believe that existing enforcement provisions for all the three transport regimes set out in the Consultation Document are sufficient to meet the requirements of the amended Directive.

Other issues - conflicts of interest

2.78 New Article 9(a) of the Directive requires that, 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. The consultation noted that there are already procedures in place to ensure that the two functions are carried out by separate parts of Highways England and the Welsh Government. It is therefore considered that the provision on conflicts of interest in article 9(a) of the 2014 Directive will be implemented administratively and does not require further transposition.

Consultation response

2.79 One consultation response recommended that Highways England adopts a similar process to that put forward by DCLG i.e. through a new regulation dealing specifically with objectivity and bias.

Government response

2.80 On the issue of potential conflicts of interest, the Government has not changed the existing arrangements where Highways England or the Welsh Government act as both developer and competent authority for projects under the Highways Act 1980. This is consistent with our overall approach to the transposition of the amended Directive, as set out in the consultation paper and in the introduction to this response document. [However, Highways England has prepared formal propriety guidance to show that there is a genuine separation to ensure there are no conflicts of interest. The Welsh Government will be reviewing their administrative arrangements in light of the 2014 Directive for roads schemes, and will make any further adjustments required to their administrative arrangements to ensure compliance with the 2014 Directive.

Annex: List of respondents

Historic England
Institute of Environmental Management and Assessment (IEMA)
Natural England
Network Rail
Portsmouth City Council
RSPB
Temple Group
The Chartered Institute for Archaeologists
The Environment Agency
The Wildlife Trusts
Transport for London
Trinity House