

Watered-Down Revisions to EU Environmental Impact Assessment rules finalised

After lengthy negotiation, a suite of changes to the EU Environmental Impact Assessment (EIA) Directive has been agreed and published in a new Directive (the Revised Directive)¹. The initial proposals, made in October 2012, would have led to major reform of environmental impact procedures in the UK. As a result of major objections from some Member States (including the UK), the revisions have been diluted and the effects in the UK are likely now to be much less significant. They are likely however to lead to additional burdens on information provision and analysis, additional bureaucracy in decision-making and greater challenge risk to projects.

In reviewing the current EIA Directive, the European Commission's aim was to ensure that EIA is being applied consistently to projects across the EU. The Commission had been concerned at poor application of screening procedures, the use of blanket exemptions, and the provision of poor quality environmental information. It sought to deal with new challenges of biodiversity and climate change. It also wanted to reduce the burden on stakeholders by concentrating EIA only on the most significant impacts and more generally speeding up the consenting of projects.

Given the developed state of EIA law and practice in the UK compared with some areas of the EU, many of the changes contained in the Revised Directive are already contained in current UK EIA procedures and practice, and this briefing therefore concentrates on the new aspects².

Key issues

- Greater level of information required for screening requests.
- Increased emphasis placed on biodiversity, climate change, landscape and disaster risks in the ES.
- Implementation of mitigation and offsets imposed with monitoring.
- Greater level of reasoning required in decisions with consequent increase in challenge risk.

¹ Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

² In making comments about the impacts of the proposed changes on the domestic EIA process, this briefing describes the position with regard to England only.

EIA Screening

The screening process for Schedule 2 projects³ is to be tightened up by prescribing the information that developers will have to provide: In particular, impacts from waste or use of natural resources would have to be explained. In addition, specific consideration will need to be given to impacts of a project on, and its resilience to, climate change, and impacts on cultural heritage and landscape. Information on risks from major accidents or disasters, cumulative effects with any existing or planned projects and any mitigation works which would reduce the environmental impacts also need to be included. Many authorities will already require this sort of information in the environmental statement (ES) but this may require a more detailed level of information provision and analysis in some cases.

A number of the more draconian proposals on screening were dropped including:

- Making both screening and scoping stages mandatory;
- Establishing a deadline for the screening decision; and
- Limiting the ability to establish specific criteria or thresholds for Schedule 2 developments to be subject to EIA.

Content of the Environmental Statement

Following on from the required screening information, the Revised Directive inserts clearer requirements for the assessment of the impact of projects in a number of areas including biodiversity, climate change, landscape and disaster risks (which would include, for example, flooding). Whilst these will generally be covered where relevant in current ESs, this is likely to require an increased emphasis in these areas. There is significant concern that ESs are already too lengthy and these sorts of changes could simply exacerbate the problem. Additional requirements are incorporated on topics with which UK developers have become familiar, including assessment of baselines and cumulative effects.

The ES will now have to be prepared by a "competent expert". The proposal for experts to be accredited has been dropped and it is unclear what controls the Government might impose in this area. Also dropped from the draft Directive was the suggestion of third party verification of the ES. More significant perhaps is the requirement that the local authority considering the ES has, or has access to, specific expertise to consider the ES. This may result in more authorities having to draft in consultancy assistance.

The proposal for a mandatory requirement to consider "alternatives" to the project (e.g. in terms of project design, technology, location, size and scale) was dropped. In the Revised Directive, the ES only has to set out the alternatives actually considered by the developer. Considering alternatives will, however, remain advisable for developers.

Process and decision-making

The Revised Directive provides that public consultation on the EIA must not last less than 30 days. This will be an extension from the current minimum 14 or 21 day limits applying in the UK. More generally, information for consultation has to be made electronically available. Whilst many authorities already provide access to environmental information in relation to applications, this may require new systems to be put in place for others.

The Revised Directive requires that developers implement any mitigation schemes or measures to offset harm, which form part of the project, or are associated with it. In addition, a monitoring system must be put in place to ensure compliance. Whilst guidance in England already suggests that mitigation measures should be subject to planning condition or planning obligation, the monitoring of such measures would in the future become a legal requirement, possibly enforceable by third parties.

³ Schedule 2 projects only need to be assessed if they are likely to have significant environmental effects. These include e.g. large regeneration projects.

The local planning authority will also formally have to consider whether the ES is up-to-date before determining the application which will possibly trigger more requests for developers to provide updated environmental information, in particular in the context of reserved matters applications for outline planning permissions.

There is a new requirement for the development consent⁴ to contain a "*reasoned conclusion by the competent authority on the significant effects of the project on the environment*" as well as setting out how the conclusion integrates into the decision itself to grant or refuse consent. The obligation to provide specific reasoning on the environmental effects is likely to involve the local planning authority providing more detailed reasoning than under the current EIA process in England which requires the "*main reasons and considerations on which the decision is based*" to be set out. This could provide increased potential for legal challenge to decisions.

The Revised Directive also seeks to improve the co-ordination of assessments required under different legislation. Authorities must choose to either combine "appropriate assessments" under the European Habitats Directives or simply co-ordinate the assessments. It looks unlikely that the UK would choose to combine the assessments given the changes to current procedures this would involve and also that, in some cases, a different authority is involved in making the assessment (i.e. local authority / Secretary of State). The European Commission will also produce guidance on co-ordinating or combining other types of assessment (e.g. environmental permitting procedures) with EIA.

The original proposal had included deadlines to complete the EIA process. This proposal was likely to have major impact on EIA procedures and decision-making in the UK and was ultimately dropped.

Penalties

Member States will have to impose "effective, proportionate and dissuasive" penalties for breach of the Directive. Often criminal penalties are introduced in response to such a requirement. It remains to be seen whether the UK might consider criminalising development undertaken without EIA (similar to the current offence of demolition undertaken in a conservation area without planning permission).

Final Comments

Member States will need to ensure that projects comply with the new rules from 16 May 2017 at the latest. There are transitional provisions allowing projects to be subject to existing rules where, before that date, screening or scoping is underway, or the ES has been submitted.

The Revised Directive creates an updated EIA framework which builds in some of the lessons learned from operation of EIA over the last decades. For England, the changes will be less radical than in some countries. However, increased information and analysis to be provided by developers, additional bureaucracy in decision-making and greater legal challenge risk to projects will not be welcome. Whilst the changes are likely to help improve consistency in applying EIA across Member States, they are likely to do little to fulfil the European Commission's other goal of speeding up development projects.

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⁴ This could be planning permission, or development consent under the Planning Act 2008 in England.

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