POLICY NOTE

The Roads (Scotland) Act 1984 (Environmental Impact Assessment) Regulations 2017

SSI 2017/

The above instrument was made in exercise of the powers conferred by Section 2(2) of the European Communities Act 1972 and Section 56 of the Finance Act 1973. The instrument is subject to affirmative procedure.

Policy Objectives

Introduction

The purpose of these regulations is to update and replace certain provisions of the Roads (Scotland) Act 1984 in order to implement paragraphs (1) to (15) of Article 1 of Directive 2014/52/EU ("the 2014 Directive") which amend Directive 2011/92/EU ("the 2011 Directive"). The Regulations integrate environmental considerations into the preparation of projects related to trunk road development with a view to reduce their environmental impact.

The Environmental Impact Assessment Directive aims to ensure the authority giving the consent for a particular project makes its decision in full knowledge of any likely significant effects on the environment. New provisions take into account the requirements of the amended Directive, which seek to define, clarify and expand upon aspects of the assessment process, on the basis of minimal additional regulatory burden, whilst ensuring protection of the environment.

Key changes

The following is a summary of the main changes made to the 2011 Directive by the 2014 Directive as they apply to the trunk road development system. The 2014 Directive also makes allowance for some transitional arrangements. References to "current" requirements are to those under the 2011 Directive before amendment by the 2014 Directive.

These Regulations detail the substitutions to be made in respect of Sections 20A and 20B, 55A and 55B, and paragraphs 7 and 13 of schedule 1 of the Roads (Scotland) Act 1984. Sections 20A and 20B and paragraph 7 of schedule 1 set out the requirements in relation to road construction projects .Sections 55A and 55B and paragraph 13 of schedule 1 apply to road improvement projects. In the following text, references to "section" and "paragraph" numbers are related to the specific amendment to the existing provisions of the Roads (Scotland) Act 1984 made by these Regulations.

Environmental Impact Assessment Process

Article 1(1) of 2014 Directive introduces a definition of "environmental impact assessment". This sets out what an environmental impact assessment process is to consist of and sections 20B and 55B reflect these changes. The process requires the Scottish Ministers to prepare an Environmental Impact Assessment (EIA) report. The content of this is set out in sections 20C(6) and 55A (6). The changes made by the 2014 Directive now specifically refer to a "report". This is in effect what is currently referred to in domestic legislation as the "environmental statement". The Regulations now refer to an EIA report rather than to an environmental statement.

The next step in the EIA process is the carrying out of consultations required under Article 6 and where relevant Article 7. This has some amendments, however the requirement to consult is a current requirement.

Paragraphs (iii) to (v) of the new definition of "environmental impact assessment" introduced by the 2014 Directive in article 1(1) now expressly set out as part of the EIA process the need for an examination of the environmental information. The competent authority is expressly required to integrate its reasoned conclusions on the significant environmental impacts of the project into its decision. Sections 20B(1)(d) and 55B- transpose these requirements.

The main change made by Article 1(2) of 2014 Directive is the new requirement in paragraph (3) to carry out, where appropriate, coordinated or joint procedures for EIA and assessments required under the Habitats and Wild Birds Directives. This is now reflected in the terms of section 20D and 55B.

Screening

The determination that a project should be made subject to EIA, is known as a screening decision. Changes made to Article 4(4) of the 2011 Directive mean that the Scottish Ministers require to consider certain information on the impacts of the project to enable a determination to be made. This requirement is set out in sections 20C (2), (3) and (4) and 55A (2), (3) and (4) .

Article 4(5) of the 2011 Directive as amended requires the Scottish Ministers to make its screening decision on the basis of information on the impacts of the project but also taking into account the results of other assessments carried out pursuant to other EU legislation. These requirements are to be found in section 20C(7) and 55A (7).

Under current requirements the screening decision had to be made public. Article 4(5) of the 2011 Directive now also requires the main reasons for screening decisions to be given and that to be done with reference to the Annex III criteria. This is required by section 20C (5)(a) and 55A (5)(a). Article 4(5)(b) of the 2011 Directive also requires – where there is a negative screening decision – the determination to set out any proposed mitigation measures and this requirement is contained in section 20C(5)(b) and 55A(5)(b)

EIA report

Article 5(1) is changed by the 2014 Directive. It refers to the submission of an EIA report and sets out what it is to contain by reference to a list and to Annex IV. Sections 20C(6) and 55A(6) sets out what an EIA report has to contain. The Scottish Ministers are now specifically required to ensure that the EIA report is prepared by "competent experts". This is required by sections 20C(8)(a) and 55A(8)(a).

The 2014 Directive also introduces an express duty, in Article 5(3)(c), on competent authorities to seek further information, where necessary, in order to ensure the completeness and quality of the EIA report. This is to be information which would be needed in terms of Annex IV and is directly relevant to reaching their reasoned conclusion on the significant effects of the project on the environment. sections 20C(13) and 55A(13) set out this duty.

Article 6(7) of the Directive now requires a minimum consultation period of 30 days with the public concerned in respect of the EIA report and the minimum period is set in sections 20C(9) and 55A(9)

Decisions and Monitoring

Article 1(8) of the 2014 Directive replaces the current Article 8. Article 8 currently requires the competent authority to take into consideration the information gathered under Articles 5, 6 and 7 when making a decision to proceed with a project. The new Article 8 is essentially the same but rather than a requirement for this information to be "taken into consideration" it now must be "duly taken into account". This is reflected in the wording of sections 20A(b) and 55B which require the Scottish Ministers to take the environmental information into account. "Environmental information" is defined in section 151.

Article 1(9) of the 2014 Directive introduces a new Article 8a. This sets out certain information which is to be included in the decision to proceed with a project to which these Regulations apply.A decision to proceed must incorporate the Scottish Minister's reasoned conclusion on the environmental impacts. This reflects subparagraphs (iv) and (v) of the new definition of "environmental impact assessment", as inserted by article 1(1) of the 2014 Directive. The amendments to paragraphs 7 and 13 of schedule 1 set out the information which a decision notice must contain and in particular requires a decision notice to include a description of any mitigation measures and to confirm that the Scottish Ministers are satisfied that the reasoned conclusion" (i.e. on the significant effects of the project on the environment which is required as part of the EIA process) is still up to date. In addition the new Article 8a introduces measures relating to the inclusion of monitoring measures and therefore sections 20G and 55B requires monitoring measures to be required where it is appropriate to do so.

Article 1(10) of the 2014 Directive makes changes to Article 9 of the 2011 Directive. Article 9 is currently a duty to inform the public that a decision has been made to proceed and to make certain information available to the public. The amended terms

of Article 9 extend this duty to inform to a duty to inform the consultation bodies and to make information available to the consultation bodies. The decision notice is to contain the relevant information. A copy of the decision notice must be sent to the consultation bodies in terms of paragraphs 7(1B) and 13(1B) of schedule 1. The public are also to be notified of the decision and a copy of the decision notice is to be made available for inspection by members of the public.

Objectivity and Conflict of Interest

Article 1(11) of the 2014 Directive inserts new Article 9a into the 2011 Directive. This introduces an express requirement that member states shall ensure that competent authorities are objective and are not in situations giving rise to a conflict of interest. This is most likely to arise where the competent authority is also the developer. New Article 9a recognises this particular situation and requires an "appropriate separation between conflicting functions". Sections 20E and 55B, reflecting current good practice, sets out this duty.

Offences

New Article 10a, inserted by Article 1(13) of the 2014 Directive, provides for penalties applicable to infringements of the national provisions adopted pursuant to the Directive. New sections 22A and 22B provide that it is an offence for a person (or in the case of new sections 55C and 55D a body corporate, Scottish partnership, or Scottish unincorporated association) to knowingly or recklessly make a false or misleading statement or, with the intent to deceive, uses a false or misleading document or withholds material information in order to obtain a favourable decision.

Transitional Arrangements

Article 3(1) of the 2014 Directive provides for transitional measures concerning certain applications for EIA screening of projects which are listed in Annex II of the 2011 Directive. The article states that where screening for such projects has been initiated prior to 16 May 2017 then that project will be subject to the current 2011 Directive. This is reflected in Regulation 12.

Article 3(2) of the 2014 Directive provides transitional measures whereby the current 2011 Directive will continue to apply, as unamended by the 2014 Directive, for applications in which the developer has, before 16th May 2017, submitted an environmental statement or where a scoping opinion has been sought. This is reflected in Regulation 12.

Consultation

The Scottish Government consulted on proposals for amending the EIA Regulations through The Consultation on Transposition of Environmental Impact Assessment Directive 2014/52/EU between August and October 2016, this was accompanied by draft new regulatory provisions. The comments received have helped to inform the final statutory instrument. The responses, analysis paper and a full list of those consulted and who agreed to the release of this information are available on the Scottish Government website at http://www.gov.scot/Publications/2016/08/2499.

Impact Assessments

A suite of impact assessments have been undertaken and an Equality Impact Assessment (EQIA) has been published, this found that the legislation is not likely to generate any negative impacts on any of the equalities groups. In addition a strategic environmental pre-screening exercise and Children's Rights and Wellbeing screening have determined that the legislation is again unlikely to have a significant impact on the environment or a negative impact on children's rights and wellbeing.

Financial Effects

The Scottish Government consulted on a draft partial Business and Regulatory Impact Assessment (BRIA) as part of its August 2016 consultation paper. The partial BRIA concluded that some additional procedural and financial requirements will fall on local authorities, the Scottish Ministers and the Consultation Bodies, and some additional procedural and financial requirements may fall to developers. The Scottish Government does not consider there will be any significant costs over and above those of compliance with existing statutory provision on EIA. Responses to the consultation have not altered this overall view and minor amendments have been made to the final BRIA to reflect the responses received.

The final Business and Regulatory Impact Assessment accompanies this Note.

Transport Scotland
08 March 2017