

EXPLANATORY MEMORANDUM TO
THE ENVIRONMENTAL IMPACT ASSESSMENT (MISCELLANEOUS
AMENDMENTS RELATING TO HARBOURS, HIGHWAYS AND TRANSPORT)
REGULATIONS 2017

2017 No. 1070

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Transport (“the Department”) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations amend:

- the Harbours Act 1964 (“the 1964 Act”);
- the Highways Act 1980 (“the 1980 Act”);
- the Transport and Works Act 1992 (“the 1992 Act”); and
- the Transport and Works (Application and Objections Procedure) (England and Wales) Rules 2006 (“the 2006 Procedure Rules”), the procedure rules made under the 1992 Act,

to enable the procedures governing applications for Harbour Revision and Empowerment Orders under the 1964 Act, decisions in respect of trunk road projects under Part 5A of the 1980 Act and applications for Orders under Part 1 of the 1992 Act to comply with a European Directive governing environmental impact assessments.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 These Regulations are being made to transpose Directive 2014/52/EU (“the 2014 Directive”), which amends Directive 2011/92/EU (“the EIA Directive”) (on the assessment of the effects of certain public and private projects on the environment). In particular this instrument implements the amendments to the EIA Directive across a number of regimes concerned with the consenting of transport-related projects. The 2014 Directive has a wider application to projects in other sectors and to other statutory authorising or consenting regimes and is being transposed in those other contexts by other statutory instruments, such as the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (S.I. 2017/571) and the Marine

Works (Environmental Impact Assessment) (Amendment) Regulations 2017 (S.I. 2017/588).

- 4.2 The European Scrutiny Committees were provided with an Explanatory Memorandum on the Commission’s proposals in December 2012 and they were updated following a vote in the European Parliament in October 2013 and following the agreement of a compromise text in February 2014. The House of Commons committee released the proposal from scrutiny on 19 March 2014 and the House of Lords scrutiny committee did so on 3 April 2014.
- 4.3 A transposition table in relation to the amendments to the 1964, 1980 and 1992 Acts and the 2006 Procedure Rules is available alongside this Explanatory Memorandum and is available at www.legislation.gov.uk.

5. Extent and Territorial Application

- 5.1 The extent of these Regulations is described in paragraphs 5.3 and 5.4.
- 5.2 The territorial application of these Regulations is described in paragraphs 5.3 and 5.4.
- 5.3 Subject to the exceptions described in paragraph 5.4, these Regulations extend to and have territorial application in England and Wales and Scotland.
- 5.4 The exceptions are:
- in relation to Schedule 1, paragraphs 4, 5 and 8(2) extend and apply to England and Wales only and paragraphs 6 and 8(3) extend and apply to Scotland only;
 - Schedules 2, 3 and 4 extend and apply to England and Wales only;
 - in relation to Schedule 5, Part 1 extends and applies to Northern Ireland only and Part 2 extends and applies to Scotland only;
 - in relation to Schedule 6, paragraphs 1 and 4 to 12 extend and apply to England and Wales only.

6. European Convention on Human Rights

- 6.1 The Secretary of State for Transport has made the following statement regarding Human Rights:

“In my view the provisions of the Environmental Impact Assessment (Miscellaneous Amendments) Regulations 2017 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 On 23 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 the exit negotiations will determine what arrangements apply in relation to EU legislation in the future, once the UK has left the EU.
- 7.2 Environmental impact assessment (“EIA”) is a process well established in domestic legislation and planning practice. It aims to contribute to providing a high level of

protection to the environment and to help integrate environmental considerations into the preparation of proposals for development to reduce their impact on the environment. It seeks to ensure that proposals which are likely to have a significant effect on the environment by virtue of (for example) their nature, size or location are subject to an assessment of those effects before the development consent for the project is granted.

- 7.3 These Regulations implement the 2014 Directive in so far as it applies to the 1964 Act, the 1980 Act, the 1992 Act and the 2006 Procedure Rules.
- 7.4 The basic requirements for EIAs have been in place since 1985 when the predecessor to the EIA Directive (Directive 85/337/EEC) came into force. The key aim of amending the EIA 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. The amendments also seek to 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.
- 7.5 The deadline for Member States to transpose the 2014 Directive into domestic legislation was 16 May 2017. For a combination of reasons, chiefly the need to amend primary legislation, the intervening General Election and other pressing priorities, it did not prove possible to achieve the transposition deadline in relation to the transport legislation, but the work has been prioritised by the Department to ensure that these Regulations were made as soon as it could be achieved. The Department does not expect that the development projects requiring EIAs, or the quality of the EIAs themselves, will be compromised as a result.
- 7.6 The most significant changes introduced by the 2014 Directive are (with references to the relevant article in, or annex to, the EIA Directive being amended):
- The addition of a definition of the EIA process – Article 1(2)g;
 - Changes to the circumstances in which a project may be exempt from the requirements of the EIA 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 EIA 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 EIA 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.

Consolidation

- 7.7 These Regulations amend the 1964 Act (predominantly Schedule 3). There are no current plans to consolidate the Schedule, nor the Act as a whole.
- 7.8 These Regulations amend the 1980 Act (predominantly Part 5A). There are no current plans to consolidate the Act.
- 7.9 These Regulations amend the 1992 Act. There are no current plans to consolidate the Act.
- 7.10 These Regulations amend the 2006 Procedure Rules. There are no current plans to consolidate the Rules.

8. Consultation outcome

- 8.1 On 26 January 2017 the Department for Transport undertook consultation on technical issues raised by the 2014 Directive, with a deadline of 2 March for responses. In the interests of expediting the process as far as possible, the Department elected not to wait until a draft of these Regulations were available before consulting. Twelve responses were received. The consultation was one of a number undertaken by Government on implementation of the 2014 Directive across government departments, and given the overlap of infrastructure consenting regimes across numerous sectors it is likely key transport-related stakeholders had an interest in some of these other consultations. For example the ports industry would have had an interest in the DCLG, Defra and DfT consultations.
- 8.2 The response to the Department's consultation was limited and generally supportive of the proposed approach. Several respondents called for greater consistency across the modes, which has been accommodated where possible. Greater clarity on the use of competent experts was called for and the Government has taken this into account and included a requirement that the environmental statement must set out the relevant expertise or qualifications of the competent experts. However the Government also accepted that a proposal that the Secretary of State should decide the acceptability of the competent experts went beyond the requirements of the 2014 Directive and as such this has been removed.

9. Guidance

- 9.1 The EIA process is well established in domestic legislation and planning practice. It is well understood by planning professionals and the business consultancies that often undertake an assessment on behalf of a developer. A number of the changes to the EIA Directive do not have an impact as they are already in line with industry best practice, and, in line with the aim of the EIA Directive, the amendments made by these Regulations simplify and clarify the EIA process.

- 9.2 In relation to the 1964 Act, the authorities that handle applications provide information on their websites on how to make an application for a Harbour Order and any additional requirements, where that application falls within the EIA process. Where a Harbour Order application is linked with a marine licence application, as will often be the case, the EIA should be coordinated accordingly. Substantive guidance currently appears at <https://www.gov.uk/guidance/marine-licensing-impact-assessments#EIA>.
- 9.3 In relation to the 1980 Act, the Secretary of State for Transport and Highways England (in England), and Welsh Ministers (in Wales), are the only developers of projects covered by the Act. Therefore, no external guidance is necessary.
- 9.4 In relation to the 1992 Act and 2006 Procedure Rules, guidance is available (at <https://www.gov.uk/government/publications/transport-and-works-act-orders-a-brief-guide-2006>) with respect to the procedure involved in applying for an Order under Part 1 of the Act. This guidance includes information about the EIA process. The amendments made by these Regulations do not significantly change the EIA process, and relevant stakeholders are experienced and knowledgeable in this area, however the Department will keep the need for additional guidance under review.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is low and falls below the threshold for preparing an Impact Assessment.
- 10.2 The impact on the public sector is also minimal as the 2014 Directive makes only minor adjustments to existing processes.
- 10.3 An Impact Assessment has therefore not been prepared for these Regulations as the amounts involved for each sector fall below the threshold for producing one.
- 10.4 With respect to the 1964 Act, the additional costs incurred by business and the public sector as a result of the changes are likely to be small and are estimated at approximately £83,000. This is because, whilst the EIA changes do introduce some new requirements, these are not significantly different from established requirements or current practice and procedures. The underlying assumptions include an average of 6 EIA applications per annum adding a midpoint estimate of 5% to cost, reflecting the extension to the reach of EIA process.
- 10.5 In terms of the amendments to Schedule 3 to the 1964 Act, these changes will affect fewer than 10 cases per annum. Even if the additional annual costs to business of transposing the 2014 Directive into the 1964 Act were significantly higher than the estimated cost of approximately £83,000, and/or there were significantly more applications than has historically been the case, the total impact on business would still be well below the £1 million a year threshold.
- 10.6 As the Secretary of State for Transport and Highways England (in England), and Welsh Ministers (in Wales) are the only developers of projects covered by of the 1980 Act, no Impact Assessment is needed as there are no impacts on individuals or businesses.
- 10.7 Similar to the harbours regime the additional annual costs to business of transposing the 2014 Directive into the 1992 Act and 2006 Procedure Rules were estimated to be approximately £83,000. Even if costs were significantly higher than estimated and/or there were significantly more applications than has historically been the case the total

impact on business would still be well below the £1 million a year threshold for submitting an impact assessment.

11. Regulating small business

- 11.1 The 1964 Act does apply to activities that are undertaken by small businesses. Harbour revision and empowerment orders can be applied for by existing and prospective harbour authorities. Harbour authorities include organisations of all sizes from small to large trust ports, municipal ports, and private sector ports including some owned by large multi-nationals.
- 11.2 However, although micro and small businesses are not exempt from the requirements of the EIA Directive, given the scale of development that is subject to the EIA process it is less likely that such small harbours would apply for an order authorising harbour works projects of a large enough scale to fall within the scope of the EIA Directive requirements, and therefore be affected by the changes. No action has therefore been taken specifically to minimise the impact on small businesses.
- 11.3 As the Secretary of State for Transport and Highways England (in England), and Welsh Ministers (in Wales), are the only developers of projects covered by the 1980 Act, there are no impacts on small businesses.
- 11.4 TWA Order applications are mostly made by public sector bodies or Government owned companies. In the past 5 years that data has been collected, only two TWA applications that have required an EIA have been undertaken by private sector companies, and both have been large businesses. Accordingly it is considered unlikely that the amendments to the 1992 Act and 2006 Procedure Rules will impact small business and no specific action is proposed to minimise regulatory burdens on small business.

12. Monitoring & review

- 12.1 Schedules 1, 2 and 3 amend primary legislation, and as such section 28 of the Small Business, Enterprise and Employment Act 2015 is not engaged.
- 12.2 In relation to the 2006 Procedure Rules, a review provision has been included, at new rule 29, to comply with section 28(2)(a) of the Small Business, Enterprise and Employment Act 2015. In accordance with that rule, the Secretary of State must carry out a review of the instrument and publish conclusions of that review before 5 December 2022. Subsequent reviews must be carried out at intervals of not less than 5 years.

13. Contact

- 13.1 Tim Deverell at the Department for Transport Telephone: 020 7944 4495 or email: tim.deverell@dft.gsi.gov.uk can answer any queries regarding these Regulations.