

Regulatory Impact Assessment

URN 06/1929/A1

1. Title of proposal

Proposals to improve the ability of the public to participate in the environmental assessment of proposed energy infrastructure.

2. Purpose and intended effect

The proposals cover new power stations (including offshore wind farms), overhead lines, gas transporter pipelines and commercial pipelines and have the objective of improving the transparency of existing requirements for energy infrastructure, in line with the requirements of the Public Participation Directive (2003/35/EC) – see the Directive's text attached.

- Since 1985 the EU has laid down requirements on how the environmental impact of public and private projects is considered, before a decision is made on such developments. The EU updated the requirements in 1997 and current UK regulations reflect that updating. Further updating is now required following the European Community's signature of the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention). This has led to the Public Participation Directive which amends prevailing requirements and which the UK Government is required to implement. The main amendments are:
 - It is proposed that the public should now always be informed of EIA proposals, supplementary information gathered in the process, and decisions, by both local and national notices. The Directive requires the public to be informed by appropriate means.
 - When an EIA proposal comes forward it is proposed that any supporting documents submitted by the developer with the environmental impact assessment, should be made available to the public concerned by being lodged with the relevant local planning authority.
 - It is proposed that additional information gathered in the process, as well as the formal supplements to the EIA currently provided for in the regulations, should be made available to the public concerned by being lodged with the relevant local planning authority. And the public should be informed of the existence of that information by both local and national notices.
 - It is proposed to include in the public notice and the decision statement, reference to the public participation process, and in the decision letter to examine the concerns and opinions expressed during the public participation process and to flag up the right to challenge the decision and the procedure for doing so.

- The proposed regulations would also incorporate a change in the definition of “consultative bodies” or “consultation bodies” in the regulations to meet the European Commission’s concerns that the existing definition was too narrow and did not adequately transpose the original requirements.
- *Rationale for government intervention*
To increase the accountability and transparency of the decision-making processes in the regimes which the DTI administers for proposed electricity and gas developments in England & Wales. These cover electricity generation and overhead lines, gas transporter pipelines and onshore, cross-country commercial pipelines for gas, oil and chemicals.
- *Rationale for action now*
The UK is already under Article 226 infraction proceedings for not transposing the Public Participation Directive into national law and this proposal will help remedy the situation.

3. Consultation

- Within government

In formulating our proposals we have had regard to the proposals of the Department for Communities and Local Government (DCLG) to transpose the requirements of the Public Participation Directive into the general planning regime under the Town and Country Planning Act 1990, whilst recognising the need to reflect the fact that the DTI regimes cover national energy infrastructure in which more than local interest is often shown.

- Public consultation

Soundings were taken of a representative sample of developers handling power station developments, both large and smaller, overhead lines, and gas pipelines. The need for changes to the existing regimes to transpose the European Directive was recognised. There was a consensus that the cost implications were likely to be marginal with concern being more about distraction of resources and potential for the process to become more protracted if additional information attracts interest. But against that it was recognised that this was information that would be likely to already exist and which people could already seek to access, albeit that it might be by a somewhat circuitous route.

Full formal consultation will be carried out with an emphasis on making the consultation available on the DTI web site. As well as those informally consulted from whom a fuller formal response is expected, the Department will be interested in hearing from other key stakeholders likely to be affected by the update, namely other companies developing the electricity and gas infrastructure covered by the regulations, and local planning authorities who may have infrastructure located in their areas.

It is also important that the regulations have the confidence of the public, as they may be affected by the development of such infrastructure, and

therefore the Department will be interested in responses from individuals and their representative groups.

The Department will be willing to hold meetings with particular stakeholder groups who offer detailed comments.

4. Options

The three options are:

- (i) do nothing;
- (ii) implement the Directive through regulations; or
- (iii) seek to implement the requirements by voluntary measures such as guidance and codes of practice.

Option (i) would mean that the UK would be non-compliant. It would leave the UK subject to infraction proceedings by the EU Commission for failure to comply with the requirements of a European Directive. At the same time it would leave decisions by the Secretary of State on developments open to legal challenge on the grounds that the EU procedures have not been followed. This could lead to decisions being quashed and the Department having to put a development through the consenting process again, or part of the process, to ensure the procedural deficiency is remedied. This would not only delay development but also create legal uncertainty for developers. The “do nothing” option would also not be contributing to raising public awareness of environmental issues and support for the decisions taken.

Of the three options discussed, option (ii) would put the UK in the best position to defend any challenge of decisions on developments based on alleged non-compliance with the Directive. While this option does add slightly to the burden on business, it does mean the public can participate in the process, and the credibility of the process in terms of subjecting the environmental impact of a development to open scrutiny, is reinforced. The proposals do not change the position as regards confidential information set out in the existing EIA Directive at Article 10.

Option (iii), whilst capable of delivering the aims of the Directive, would mean the UK was non-compliant. It would not guarantee the aims of the Directive were fulfilled nor would it comply with the requirement of the Directive that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive. If it is left solely to voluntary action by developers, then the main concerns are that the public may not be alerted to relevant information and that the additional information to be put into the public domain becomes a matter of judgement for the particular developer rather than the competent authority. It therefore is more likely to give rise to compliance issues than option (ii).

5. Costs and benefits

Sectors and groups affected

The enhanced public participation requirements will impact on the electricity and

downstream gas sectors. They will apply to proposals for new power stations (including wind farms), overhead lines, gas transporter pipelines and commercial pipelines. Such proposals are critical to ensuring the continued security and reliability of the energy delivery systems that the public depend on for their electricity and gas supplies. Businesses bringing forward the projects will thus be affected by the requirements. But the local public, and the public more generally who take an interest in energy developments, will also be affected by the requirements.

The following tabulates the impacts of each option

| | Option (i) | Option (ii) | Option (iii) |
|---------------|---|--|--|
| Economic | Avoids additional regulatory costs but developers may face additional costs from legal challenge over non-compliance of the regime. | Imposes additional regulatory costs, albeit likely to be marginal. | A comparable level of costs to option (ii) may be incurred voluntarily. |
| Social | Could potentially keep pertinent information from the public. | Would provide better participation arrangements and dissemination of information. Adds to credibility of the regimes. | May provide better participation arrangements and dissemination of information, but dependent on what voluntary measures are agreed and whether they are followed. Adds nothing to the regulatory credibility of the processes. |
| Environmental | Some pertinent information on the environmental impact may not get the attention it deserves. | Could lead to better analysis from the process. | Could lead to better analysis from the process. |

Summary of costs and benefits

While option (i) might appear to offer the most favourable economic impact, that assumes that additional costs do not arise as a result of successful legal challenges to decisions taken. Options (ii) and (iii) offer the prospect of improved

credibility for the processes through improved public participation arrangements, at what looks to be a marginal cost.

The additional compliance costs are in the nature of additional publicity costs and the assemblage of the additional information now to be lodged in the public domain. All the existing regimes lay down public notice requirements, requiring in general local publicity. These are to be enhanced by adding national notice where this is not currently provided for. At the application, supplements to the EIA and decision stages, adding London Gazette advertising can cost in the region of £750 per advert adding in the worst case up to £5k to compliance costs. To this has to be added the publicity costs for the new requirement on additional information which could add a further £5k to compliance costs. Assemblage costs for additional information are unknown as this is a new requirement but it is worth noting that it is recorded information already available rather than the generation of new material, so the costs should be modest.

To put additional compliance costs in context, the main existing cost of complying with the EIA regulations is that of the production of an environmental impact assessment, which remains unaltered, and can cost in the region of £50k upwards, with major cases costing over £100k. The next major existing cost is the supplements to the environmental impact assessment, where that is required. That can vary considerably in production cost depending on whether it is clarifying existing information or providing further, new, information such as ecological studies or further alternative sites/routes analysis.

At the same time all these costs are relatively small in the context of multi-million pound projects. A major power station development will cost in the region of £300m, a 400 kV overhead line can cost between £0.5m - £1.5m per km and a high pressure gas pipeline between £0.8m - £1.5m per km. An onshore windfarm development can cost in the region of £50m.

The consultation exercise will seek to confirm the view that the additional regulatory burden is marginal.

Making additional information available may also make the process more challenging for business through the potential for additional probing by third parties and drip-feeding of information into the process, with consequential impact on timescales. But the proposal is to corral dissemination of additional information and to impose a deadline for representations on additional information so that timely decisions can still be made.

Options (ii) and (iii) offer the best prospect of better environmental impact analysis and improved decision taking, at what looks to be a marginal cost. In addition, option (ii) offers business greater certainty over the requirements and a level playing field across projects.

6. Small Firms Impact Test

To gauge the impact on small businesses, meetings were held with two representative companies who develop energy infrastructure and who could be said to be among the smaller firms operating in the sector – one developing windfarms, and one developing power generation and gas facilities. Both accepted that the EU would expect implementation by regulation and that the

driver in the changes was the EU. They acknowledged that seen against the costs of producing an EIA and the cost of the project itself, the additional costs were not likely to be that great. Their concerns were more if the process became more protracted, and if the arrangements for publishing and advertising additional information led to an unhelpful distraction of scarce resources. Both would consider responding more fully when they have seen the proposed regulations.

Given that the frequency with which additional information has to be disseminated is likely to be a feature of the project rather than the company doing the project, it is not felt that the changes in themselves convey any disproportionate effect. But it is acknowledged that in handling the dissemination of additional information, a small firm with a core of say 5 people, is likely to face more of a concern over distraction of resources than a major player with project teams.

7. Competition assessment

This RIA covers a raft of draft regulations which would impact on the energy market, in particular the electricity and downstream gas sectors. For the purposes of a competition assessment it is necessary to distinguish between those aspects which are regulated and those which are not. Thus the aspects of overhead lines and gas transporter pipelines which are implemented by regulated network companies can be discounted from the analysis. This leaves electricity generation and onshore commercial pipelines. The conclusions from looking at those activities are:

Option (i) would have no competition impact, as it is the “do nothing” option.

Option (ii) the draft Regulations, would impose some additional costs on those developing new infrastructure in those sectors. But those costs would be faced by any firm wishing to participate in those sectors since they are costs associated with running a proposal through a development control procedure. Such costs will be dependent on the project itself rather than the firm putting the project together. As such the Regulations are not seen as conveying any benefit to existing firms. Nor, given the nature of the additional costs, is it felt that they will impose any disproportionate cost on some firms such as small firms rather than on others. It is therefore concluded that they are unlikely to have an effect on competition.

Option (iii) would have a similar impact to option (ii).

8. Simplification assessment

In bringing forward its proposals the Department has sought to comply with better regulation practice.

It notes the need for “joined-up Government”, and regulating to bring into effect the Public Participation Directive would ensure the DTI regimes were in step with other UK development control regimes, such as the general planning regime of the Town and Country Planning Act, where regulations have already been consulted on, and with the Transport and Works Act regime where regulations are being produced. The DTI regimes would also be in step with other development control regimes in Europe which have to include the requirements of the Public Participation Directive.

The Department also notes that these regulations facilitate public access to more information on energy developments, making the regimes more transparent. At the same time it notes that the additional information, which is envisaged to include supporting information from the developer and information from third parties such as statutory bodies, is information which is already generated in the process. And it is information which currently the public may have to pursue more circuitous routes to obtain, such as through Freedom of Information requests or Environmental Information Regulations requests. The proposed way forward avoids the public having to invoke other procedures and thereby simplifies their access to such information.

The Department has also considered the scope for simplification in the process itself but notes the thrust of the Directive is to increase requirements to benefit the public and their participation in the processes. Thought has therefore been given to compensating simplification. It is not considered fruitful to look for this in the existing requirements laid down in the processes as the regulations have only recently been "proofed" by the Commission and infraction proceedings launched at any that were not considered up to the required standard of transposition. The Department has also considered whether rationalising matters through rationalising development control regimes would achieve simplification but concluded that this raises issues more suitable for handling in a policy review than the modest step change being addressed here.

9. Enforcement, sanctions and monitoring

The existing regulations are enforced by the Department of Trade and Industry. The fundamental sanction for ensuring compliance is that within the regulations themselves, the Secretary of State is barred from granting consent unless he is satisfied that the applicant has provided the required information and the procedures laid down in the regulations have been complied with.

Option (i) would provide no basis for taking action as the regulations would not be implementing the enhanced public participation requirements.

Option (ii) would provide a statutory basis for DTI assessing whether the enhanced public participation requirements have been complied with and for refusing to grant consent if the requirements had not been met. At the same time in order to ensure that the requirements have actually been met there is a need for DTI to make clear in guidance that before granting consent it will check on compliance.

Option (iii), since it is dependent on voluntary action, raises issues as to whether there can be an appropriate sanction for non-compliance, given that revoking of the consent seems a too draconian step for what at times may be a minor transgression e.g. a particular letter was not put in the public domain.