The Town and Country Planning (EIA) Regulations 2017 came into force in May 2017 and introduced more prescriptive requirements in respect of the information to be provided with requests for screening opinions. In many cases these requirements are already adopted as part of best practice when seeking to establish if a proposal is EIA development.

One important change, however, is the ability for mitigation measures to be taken into account when screening proposals to establish whether it is EIA development. Some developers may see this as an opportunity to front load the process to avoid the need for EIA. However, there are implications of relying upon mitigation measures that need to be carefully considered by developers, practitioners and Local Planning Authorities (LPAs).

Regulation 5(4)(c) requires such of the selection criteria listed in Schedule 3 as are relevant to the development to be taken into account when deciding whether Schedule 2 development is EIA Development. The selection criteria have been amended to require that the likely significant effects of a development on the environment must be considered taking into account ‘the possibility of effectively reducing the impact’ (Schedule 3, paragraph 3(h)) – in effect taking account of mitigation measures.

Developers will have to demonstrate that mitigation can successfully avoid, or prevent, what might otherwise have resulted in significant adverse effects on the environment.

In some cases, this could be straightforward, however, in others it may involve as much technical assessment work as undertaking an EIA. So, in the long run, would adopting such an approach really save time and money for a developer?

As EIA screening is undertaken at an early stage in most projects, there is also the possibility that a precautionary approach is taken to the need for mitigation, which may mean committing to mitigation measures that in reality may not be necessary, as the potential impact does not materialise, or is avoided through the evolution of a proposal. Again, potentially not saving time or money for a developer.

Committing to mitigation at the outset of a project, which subsequently cannot be delivered may result in the need to re-screen the project and if alternative mitigation measures cannot be implemented, the need to undertake an EIA. Not only would this not save a developer time or money, it could even result in additional costs and take longer to gain consent and deliver a project.

For local authorities adopting screening opinions, updated planning practice guidance advises that ‘the extent to which mitigation or other measures may be taken into account in reaching a screening opinion depends on the facts of each case. The local planning authority must have regard to the amount of information available, the precautionary principle and the degree of uncertainty in relation to the environmental impact. However, there may be cases where the uncertainties are such that Environmental Impact Assessment is required’ (Paragraph: 023 Reference ID: 4-023-20170728,
The guidance appears to suggest that local authorities should take a cautious approach when taking mitigation measures into account, especially where there is any uncertainty. Given this guidance and the risk of legal challenge of subsequent planning decisions, local authorities may be reluctant to adopt a negative screening opinion that is reliant on mitigation measures to avoid, or prevent, significant adverse effects.

As well as taking a precautionary approach to dealing with uncertainty, updated planning practice guidance also states that ‘LPAs will need to consider carefully how such measures are secured. This will usually be through planning conditions or planning obligations, enforceable by the local planning authority which has powers to take direct action to ensure compliance’ (Paragraph: 018 Reference ID: 4-018-20170728, Revision date: 28 07 2017).

Attaching planning conditions or using S106 agreements to secure the mitigation is fine where a development requires planning permission (provided the local planning authority remember to do so). However, what if a proposal could be implemented under permitted development rights if it is not EIA development? As conditions cannot be attached to a screening opinion, it is important that the implementation of the proposal incorporates the measures relied upon to mitigate any significant effects such that it would not constitute EIA development. Failure to do so would potentially open the developer to enforcement action as without these measures, the proposal would not benefit from permitted development rights and would effectively be unauthorised development.

The time and cost savings of not undertaking EIA could be considerable for developers, however, it is essential that the requirements of the EIA Regulations are carefully considered especially where mitigation measures are being relied upon. Only time will tell how successful the opportunity to rely upon mitigation measures will be.