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# Carrots and sticks – improving energy efficiency of non-domestic buildings



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Both the Scottish and the UK governments have produced regulations that are intended to improve the energy efficiency of existing buildings in the UK, and so reduce carbon emissions, helping towards our national emissions reduction targets. But the respective administrations have approached the issue in very different ways.

The approach in **England and Wales** is to prohibit letting of a sub-standard building, until improvement works have been carried out to raise the energy performance indicator to at least the minimum energy efficiency level of “E”.

In contrast, there is no “ban” in **Scotland** on letting commercial buildings with poor energy efficiency. Instead, Scotland chose to encourage owners to carry out improvements or improve efficiency through monitoring emissions from a building. For residential properties, this may be about to change.

## Scotland

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### Assessment of the energy performance of non-domestic buildings – impact on Scottish sales and lettings

The Scottish Government has often been ahead of the rest of the UK in its attempts to introduce behaviour-changing methods, designed to encourage people to operate buildings more energy efficiently.

On **1 September 2016**, regulations<sup>1</sup> made under the provisions of the Climate Change (Scotland) Act 2009 came into force, requiring owners of affected properties to prepare an Action Plan that sets out a programme for:

- the implementation of measures to improve the energy performance of affected buildings; and

- reduction of greenhouse gas emissions produced by those buildings.

An Action Plan is now needed for many of the sales and lettings of commercial buildings in Scotland.

But more action is required if Scotland is to meet its emission reduction targets. To this end, the Scottish Government is proposing new legislation, in the form of the Heat in Buildings Bill, which will seek to reduce greenhouse emissions from heat by accelerating the implementation of clean heating systems.

## The Action Plan

It continues to be the case that, on the sale or lease of a property, if no Energy Performance Certificate (EPC) exists for the building, one must be obtained. The Action Plan procedure applies to the sale or letting of larger buildings, defined as: large public

and private buildings with a floor area greater than 1,000 square metres. The Regulations also apply to “building units”: part of a building that is designed or altered to be used separately.

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1. The Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016, <http://www.legislation.gov.uk/ssi/2016/146/contents/made>

Some buildings are exempt from the Regulations. These include:

- buildings which have installed green deal measures – this is because they would already have in effect an EPC and an action plan;
- buildings constructed to the 2002 building standards (and pre-2002 buildings that have been retrofitted to meet recent energy standards), as they are already sufficiently energy efficient so no action plan is necessary; and
- temporary buildings with a planned time of use of two years or less, workshops, and non-residential agricultural buildings with low energy demand.

On sale or lease of an eligible property, an EPC still must be obtained<sup>2</sup> unless a valid current EPC already exists. In addition, an Action Plan must be prepared by a section 63 advisor – a qualified member of an approved organisation.

The section 63 advisor undertakes the assessment of the energy performance of the building, using the energy performance data from the EPC, and prepares and issues the Action Plan.

## Identified improvement measures

Where identified improvement measures include upgrading heating controls, low energy lighting, installing an insulation jacket to a hot water tank, or insulation in an accessible roof space, the reduction in the cost of the energy consumed in the building over a period of seven years after the date on which the measure is carried out has to be greater than the cost of carrying out the measure. This requirement is not dissimilar to the “golden rule” approach used in the Green Deal, where the improvements have to pay for themselves over a period of time.

The Action Plan must:

- specify any identified improvement measures for the building – these are measures, taken from a prescribed list, which it would be practicable to carry out in respect of the building, namely:
  - a) installing draught stripping to doors and windows;
  - b) upgrading lighting controls;
  - c) upgrading heating controls;
  - d) installing an insulation jacket to a hot water tank;
  - e) upgrading low energy lighting;
  - f) installation of insulation in an accessible roof space;
  - g) replacement of a boiler that is more than 15 years old;
- include the energy performance target and the emissions target for the building; and
- specify the actual improvement measure that the section 63 advisor recommends should be carried out (building improvement measures).

Where building improvement measures are specified in the Action Plan, these must be carried out within three and a half years after the date the Action Plan is issued.

If no improvement measures are identified by the section 63 advisor, then the Action Plan must state this. It is permissible to specify alternative improvement measures that could be used to achieve the emissions reduction instead of the prescribed improvement measures, or the work to be carried out can be a combination of both.

The building improvement measures to be carried out in accordance with the Action Plan must, once they are completed, reduce the energy consumption of the building to meet the energy performance target, and reduce the emissions from the building to meet the emissions target.

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2. As required by the Energy Performance of Buildings (Scotland) Regulations 2008

## Reporting option

There is an alternative option for owners, however. Instead of carrying out improvement works, a building owner can make arrangements to measure, report, and display operational ratings for the building, on an annual basis. According to the Regulations, it is up to the section 63 advisor to determine whether operational ratings measures are to be implemented in respect of the building. The Section 63 Advisor will usually discuss the options available with the owner at the time of preparing the Action Plan.

The operational rating of a building is a numerical indicator of the energy consumption associated with the actual use of the building, and implementing operational ratings measures involves assessing and recording the energy consumption associated

with that use. The results for the previous 12 months must be displayed in a display energy certificate for the relevant year of assessment, in a prominent place in the building.

Where the operational ratings option is chosen, an advisory report may also be prepared, which should include cost effective and technically feasible recommendations for the improvement of the energy performance of the building and the reduction of emissions from it. This may involve recommendations for building energy management measures, upgrading building services, or using low and zero carbon technologies.

The reporting option is not therefore a “do nothing” option, but it can mean there is no requirement to spend lots of money on physical improvements to the building.

## Sale and leasing

The implementation of the Action Plan is often the subject of some discussion or even negotiation between parties to a sale or leasing transaction, since the requirement to obtain it is triggered on sale or letting, and one or other of the options must be chosen. The Action Plan must be made available to a prospective purchaser or a prospective tenant.

A buyer might want to see some of the essential improvements carried out by, or at the expense of, the seller. Sellers would probably prefer that the monitoring and reporting option be “chosen” by the buyer.

A landlord might want to get the incoming tenant to agree to carry out some of the improvements or reserve rights of access to do them themselves. If monitoring and reporting is chosen, the landlord

should ask to receive that information as production of the display energy certificate is the owner’s responsibility. This will require the cooperation of the tenant and so provisions will need to be set out in the lease.

The energy performance data relating to the Action Plan, and the operational rating information if that option is chosen, must be sent to the EPC register. This allows the Scottish Government to monitor effectiveness and, if necessary, review and revise the arrangements in the future. The assumption is that even the monitoring option will improve energy efficiency, as with the knowledge of how energy is being consumed an occupier is likely to take steps to improve energy efficiency.

## Heat in Buildings Bill

The proposed Heat in Buildings Bill will mandate certain upgrades to heating systems on the purchase of property and may also implement a longstop date by which all buildings must make the move towards clean heating.

The finer details of the Bill have still to be determined, however, it is proposing an integrated two-pronged approach which will make up the Heat in Buildings Standard.

First, the Bill will set a minimum energy efficiency standard that will apply to **homes only** – not to non-domestic buildings. This will be coupled with a prohibition of “polluting” heating systems such as gas boilers and other systems reliant on fossil fuels.

It is anticipated that the Heat in Buildings Standard will be enforced gradually with private rented property being expected to meet the minimum energy efficiency standard by 2028 and owner-occupied property by 2033.

There will then be a longstop date by which all buildings, including commercial buildings, must replace and cease to use polluting heating systems. It is expected that this longstop date will be in 2045 but to avoid a spike in demand for replacement systems in the lead up, there will also be a trigger event for replacement when property is sold, the burden of which will fall on purchasers. An allotment of time, perhaps several years, will be allowed for the work to be completed. More detail will emerge during the Bill’s passage through the parliamentary process.

## Energy Efficiency Regulations for non-domestic property: Differences between Scotland and England

	Scotland	England
In force	1 September 2016	1 April 2023
Properties affected	Buildings or building units with a floor area over 1,000m <sup>2</sup>	All sub-standard buildings with energy performance indicator below E
Triggers	Sale or new lease	All existing, new, and renewal leases
Letting prohibited	No	Yes
Regulations do not apply to:	<ul style="list-style-type: none"> <li>Buildings constructed to building standards applicable from March 2002, or that otherwise meet those standards (e.g. through retrofitting)</li> <li>A Green Deal improved property</li> <li>Temporary buildings with a planned time of use of two years or less</li> <li>Workshops and non-residential agricultural buildings with low energy demand</li> <li>Stand-alone buildings with total useful floor area of less than 50m<sup>2</sup></li> <li>Renewal of lease to same tenant</li> <li>Buildings where construction is not yet completed</li> <li>Lease for a period of not more than 16 weeks (and not previously let in the previous 36 weeks)</li> </ul>	<ul style="list-style-type: none"> <li>Buildings with an energy performance indicator of E or above</li> <li>Buildings that are to be demolished on a site suitable for redevelopment</li> <li>Certain listed buildings</li> <li>Buildings used primarily or solely as a place of worship</li> <li>Temporary buildings with a planned time of use of two years or less</li> <li>Industrial sites, workshops, and non-residential agricultural buildings with low energy demand</li> <li>Stand-alone buildings with total useful floor area of less than 50m<sup>2</sup></li> <li>Lease of six months or less</li> <li>Tenancy of term certain of 99 years or more</li> </ul>
Exemptions when regulations do apply	If, having run the preliminary assessment, no prescriptive measures apply and therefore no savings target is relevant – an Action Plan recording this fact must still be lodged	<ul style="list-style-type: none"> <li>All relevant energy improvements already made, or none that can be made</li> <li>Tenant has refused consent in preceding five years</li> <li>Third-party consent refused or granted subject to unreasonable conditions</li> <li>Reduction of more than 5% of market value if works carried out</li> <li>Temporary six-month exemption for new landlords</li> </ul>
Required action	<ul style="list-style-type: none"> <li>Obtain an EPC if none exists</li> <li>Prepare an Action Plan (data from existing EPC can be used if suitable, otherwise new EPC required)</li> <li>Carry out improvements within 42 months, or monitor operational</li> </ul>	Carry out relevant energy efficiency improvements to bring property up to at least the minimum level of energy efficiency

## England and Wales

### Minimum level of energy efficiency for non-domestic rented property<sup>3</sup>

#### PROHIBITION ON LETTING

The regulations produced by the UK Government, that apply in England and Wales<sup>4</sup>, stem from the Energy Act 2011. This Act provides that regulations must prohibit a landlord from letting a non-domestic property which falls below an E rating in the Energy Performance Certificate for that property, until they have carried out energy efficiency improvements.

The relevant provisions came into force on 1 October 2016, with prohibitions commencing for new tenancies and renewal of existing tenancies on 1 April 2018. Since **1 April 2023**, this requirement applies to all privately rented non-domestic properties that come within the scope of the regulations, even where a lease has been in place for some time and there is a tenant in occupation. The landlord is prohibited from granting a new tenancy, renewing an existing tenancy, or continuing to let if the energy efficiency of the building is “sub-standard”, in other words, if it does not meet the minimum efficiency level of E. These regulations only apply to let properties, and not a sale of a building.

Improving the efficiency level of the building will of course require the cooperation of the incumbent tenant, but it is also in the interests of the tenant to improve the energy efficiency of the property it occupies. Not least to avoid prohibition from occupancy, but also for the energy efficiency savings it is subsequently likely to achieve.

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#### EXCLUDED PROPERTY

Certain properties are exempt from the regulations. These include:

- a property which does not require an EPC under the Energy Performance of Buildings Regulations<sup>5</sup> (i.e. buildings which are used primarily or solely as places of worship; temporary buildings with a planned time of use of two years or less; industrial sites, workshops, and non-residential agricultural buildings with low energy demand; stand-alone buildings with a total useful floor area of less than 50m<sup>2</sup> which are not dwellings; and buildings that are to be demolished);
- a property which does not require an EPC under the Building Regulations 2010;
- a property let on a tenancy granted for a term not exceeding six months, unless the tenancy agreement provides for renewing the term or for extending it beyond six months from its beginning, or, at the time when the tenancy is granted, the tenant has been in occupation for a continuous period exceeding 12 months; and
- a property let on a tenancy granted for a term certain of 99 years or more.

3. For an earlier commentary on these regulations see our June 2015 briefing: <https://shepward.com/knowledge/new-minimum-energy-efficiency-standards-are-you-ready>

4. The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (SI 2015/962)

5. The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 and The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2012.

## EXEMPTIONS

Landlords may be exempt from the requirement to meet the minimum standard if they can provide evidence of one of the following:

- the measures are not cost-effective, either within a seven-year payback, or under the Green Deal's Golden Rule;
- consent exemption – the landlord cannot obtain the tenant's consent to make the required energy efficiency improvements or, despite reasonable efforts, cannot obtain the consent of third parties, such as lenders and superior landlords;
- devaluation exemption – an independent surveyor has provided a report stating that the measures will reduce the property's value by more than 5%;

- temporary exemption – there will be a six-month exemption where an involved person becomes the landlord, in certain circumstances such as where the landlord was a guarantor or former tenant who exercises the right to obtain an overriding lease; or
- a five-year exemption – the prohibition will not apply for a period of five years, despite the property being sub-standard, if the landlord has already made all of the relevant energy efficiency improvements for the property, or there are none that can be made.

Where a landlord wishes to rely on any of these exemptions, they must first register information about the property, including evidence showing entitlement to the exemption in the Private Rented Sector Exemptions Register.

## RELEVANT ENERGY EFFICIENCY IMPROVEMENTS

Where the property is sub-standard and is not excluded or exempt, the landlord must make relevant energy efficiency improvements to bring the property up to at least the minimum E level of energy efficiency.

Relevant energy efficiency improvements are defined, so that only appropriate, permissible, and cost-effective improvements are carried out. Such improvements include

an energy efficiency improvement which falls within the definition in the Green Deal (Qualifying Energy Improvements) Order 2012<sup>6</sup>, such as:

- cavity wall insulation;
- draught proofing;
- duct insulation;
- installation of air source or water source heat pumps or biomass boilers;
- roof insulation;
- secondary glazing and under-floor heating or insulation; and

- actions identified as a recommended improvement in a green deal report, a recommendations report, or a report prepared by a surveyor.

It also includes improvements listed in Table 6 of the Building Regulations Approved Document L2B, for example:

- upgrading heating or cooling systems, air-handling systems, or general lighting systems;
- installing energy metering;
- replacing existing windows; and
- actions identified as a recommended improvement in a green deal report, a recommendations report, or a report prepared by a surveyor.

An energy efficiency improvement listed in Table 6 of Document L2B is a relevant energy efficiency improvement if it would achieve a simple payback of seven years or less, i.e. the value of savings over a period of seven years is the same or more than the calculated repayment cost of the work.

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6. <http://www.legislation.gov.uk/uksi/2012/2105/contents/made>



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