

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



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 will be no "ban" in **Scotland** on letting commercial buildings with poor energy efficiency. Instead, Scotland has chosen to encourage owners to carry out improvements, or improve efficiency through monitoring emissions from a building.

### Scotland

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

The Scottish Government has been ahead of the rest of the UK in its attempts to introduce methods that are designed actually to change behaviour and encourage people to operate in buildings in a more energy efficient way. On **1 September 2016**, regulations<sup>1</sup> made under the provisions of the Climate Change (Scotland) Act 2009, will come into force that will require 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 the building, and reduce emissions of greenhouse gases produced by the building. An Action Plan will be needed for the many of the sales and lettings of commercial buildings in Scotland.

#### The Action Plan

It will continue to be a requirement on the sale or lease of a property that, if no EPC exists for the building, one must be obtained. The Action Plan procedure will apply to the sale or letting of larger buildings: that is 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.

Some buildings will be 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: the Green Deal plan
- buildings constructed to the 2002 building standards, (and pre 2002 buildings that have been retrofitted to meet recent energy standards) – 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 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.

The Action Plan must:

- specify any *identified improvement measures* for the building. These are measures, taken from a

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

<sup>2</sup> As required by the Energy Performance of Buildings (Scotland) Regulations 2008



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; and
  - (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 3½ years after the date the Action Plan is issued.

### 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 7 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.

If no improvement measures are identified by the section 63 advisor, then the Action Plan must state this. It will be 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*.

### 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 will be up to the section 63 advisor to determine whether *operational ratings* measures are to be implemented in respect of the

building. Presumably there will be consultation with the owner on the options available 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, including advice on, and 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 likely to be 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 himself. 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 will allow 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.

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

	Scotland	England
<b>Comes into force</b>	1 September 2016	1 April 2018 for new tenancies and renewals of existing tenancies. 1 April 2023 for all other tenancies in scope (including existing tenancies).
<b>Properties affected</b>	Buildings or building units with a floor area over 1,000m <sup>2</sup>	All sub-standard buildings with energy performance indicator below E.
<b>Triggers</b>	Sale or new lease	New lease or lease renewal/extension
<b>Letting prohibited</b>	No	Yes
<b>Regulations do not apply to:</b>	<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 2 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>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 2 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 6 months or less</li><li>Tenancy of term certain of 99 years or more</li></ul>
<b>Exemptions when regulations do apply</b>	None other than the situation where, having run the preliminary assessment, no prescriptive measures apply and therefore no savings target relevant. 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 5 years</li><li>3<sup>rd</sup> 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 6 month exemption for new landlords</li></ul>
<b>Required action</b>	Obtain an EPC if none exists. Prepare an Action Plan (data from existing EPC can be used if suitable, otherwise new EPC required); carry out improvements within 42 months, or monitor operational ratings and display a display energy certificate.	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, which 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 for that property. The relevant provisions come into force on 1 October 2016, but the prohibition will not apply until **1 April 2018**.

A landlord may not grant a new tenancy on or after that date, or extend or renew an existing tenancy, of a property which is "sub-standard", in other words has an energy performance certificate where the energy performance indicator is below E, the minimum level of energy efficiency permitted by the regulations. These regulations only apply to let properties, and not a sale of a building.

Existing leases are not totally off-the-hook, however: from **1 April 2023**, the regulations will apply to **all** privately rented 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. Postponing the date of application to all relevant premises is intended to give the landlord sufficient time to improve the energy efficiency of the building up to at least the minimum efficiency level of E, otherwise, the landlord will be prohibited from **continuing** to let.

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 being prohibited from continuing to occupy, but also for the energy efficiency savings it is likely to achieve in improvement to the building, and reduced energy costs.

#### *Excluded property*

Certain properties will be exempt from the regulations. These include:

- a property which does not require to have 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 to have an EPC under the Building Regulations 2010;
- a property let on a tenancy granted for a term certain 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;
- a property let on a tenancy granted for a term certain of 99 years or more.

#### *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 making 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 that the measures will reduce the property's value by more than 5%.
- *Temporary exemption*: there will be a six months' exemption where the landlord 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.
- *Five year exemption*: where, despite the property being sub-standard, the landlord has already made all the relevant energy efficiency improvements for the property, or there are none that can be made, the prohibition will not apply for a period of five years.

Where a landlord wishes to rely on any of these exemptions, they must first register information about the property, and evidence showing the entitlement to the exemption in the PRS 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 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:

<sup>3</sup> For an earlier commentary on these regulations see our June 2015 briefing: <http://www.shepwedd.co.uk/sites/default/files/MEE%20Briefing.pdf>

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

<sup>5</sup> 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.





- 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 is identified as a recommended improvement in a green deal report, a recommendations report or a report prepared by a surveyor; or
- an improvement 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 or replacing existing windows, and is 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 as or more than the calculated repayment cost of the work.

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

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