

**REVISED EXPOSURE DRAFT**  
**GUIDANCE ON THE PRACTICAL APPLICATION OF THE EPC REGIME TO**  
**COMMERCIAL PROPERTIES (NON-DWELLINGS)**

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## 1 WHICH LEGISLATION IMPOSES THE EPC REGIME?

There are several SIs which make up the relevant rules and which implement the European Directive 2002/91/EC (“**the Directive**”):

Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (SI 2007/991) as amended by Amendment Regulations 1 & 2 (SI 2007 Nos 1669 & 3302) and partly amended by the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment No 2) Regulations 2008 (SI 2008 No 2363) (together in this note called “**the Regs**”).

The Building Regs 2000 (SI 2000 No 2531) and the Building (Approved Inspectors etc.) Regulations 2000 (SI 2000 No 2532) as amended by Schedule 2 to the Regs, by the Building and Approved Inspectors (Amendment) Regulations 2006 (SI 2006 No 652) and by the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment No 2) Regulations 2008 (SI 2008 No 2363) (in this note called “**the Building Regs**”).

These are supplemented by Guidance (first issued in Jan 2008 and reissued in July 2008) from the Department for Communities and Local Government (in this note called “**the Guidance**”) entitled “Improving the energy efficiency of our buildings”. This is, as it states, only guidance, as are any comments from DCLOG that are set out in this document, having been made at various meetings.

Transitional arrangements were introduced by the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2008 (SI 2008 No 647). These were also amended by the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment No 2) Regulations 2008 (SI 2008 No 2363).

**Relevant  
Regulations**

**2 WHICH CLIENTS NEED TO MAKE AVAILABLE AN ENERGY PERFORMANCE CERTIFICATE (EPC)?**

**2.1 On sale or letting**

It is **compulsory** for those who are selling a freehold interest, assigning an existing lease or granting a new lease out of their interest in premises that: Reg 5

2.1.1 Qualify as a “building” (as defined in the Regs) (see 2.5)

2.1.2 Exceed the relevant size threshold at the time of the sale/grant (see 2.6) SI 2007 3302 Para 2 (for application of the size thresholds)

2.1.3 Are not an exempt building (see 2.7) Regs 4(1) and 7 (for exempt or excluded buildings)

2.1.4 Are not an exempt sale/new lease (see 2.8 and 2.9)

**2.2 On construction of a new building**

It is also **compulsory** for a client who has constructed a building that exceeds the relevant size threshold at the time of completion of physical construction and is not an exempt building. If this EPC is not provided, Building Control will not be able to issue the completion certificate. 17E(1)(a) Building Regs  
SI 2007 3302 Para 2 (for application of the size thresholds)  
9(5) Building Regs (for the exempt buildings)

**2.3 On modification of an existing building**

It is also **compulsory** for a client who has modified a building in such a way that both the following tests are satisfied: 17E(1)(b) Building Regs

- it has more or fewer parts that are designed to be used separately than it had before the modification (e.g. splits the demise in two or combines two units into one)

In theory this could include erecting modular/cellular offices within an open plan office floor if this resulted in separate occupations. However, if the work did not require Building Regulations Consent, it will de facto escape the need for an EPC.

**and**

- includes the provision (whether for the first time or by way of replacement) or extension of any existing fixed services for heating, hot water, air conditioning or mechanical ventilation. SI 2007 3302 Para 2 (for application of the size thresholds)

If the modification results in only one of these limbs being satisfied, then the requirement for an EPC is not triggered. 9(5) Building Regs (for the exempt buildings)

The requirement for an EPC based on modification applies only where the building exceeds the relevant size threshold at the time of completion of modification and is not an exempt building.

**2.4 Where preparing for future sale or letting**

## Relevant Regulations

It may be **advisable** for those clients who anticipate selling their interest or granting a new lease out of it in the future, if they are anxious to avoid potential delays to that deal when it goes live (e.g. if EPC cannot be done in a hurry either due to inability to find an assessor, or problems of gaining access/information on which to base the EPC). Whilst being well prepared is commendable, there are some drawbacks to doing an EPC in advance of the statutory trigger point:

- 2.4.1 others (e.g. tenants in the building) have no duty under the Regs to cooperate with the landlord in order to help him gain access/information needed to complete the EPC (or to do so on the most beneficial basis). If the statutory trigger point has not yet arisen, the landlord is not yet a person “under a duty to make available an EPC” and those with an interest in or occupation of the building need not cooperate with the landlord. Reg 50(1) and 50(2) (b)
- 2.4.2 the landlord may find it more difficult to justify the cost of producing the EPC as something that can be included in the service charge expenditure, if he has to rely for so doing on a clause that permits the recovery of costs of *statutory compliance* (because at this early point there is no statutory duty to provide an EPC).
- 2.5 **What is a building:** Reg 2(1)  
To satisfy the definitions it must be a construction
- with a roof AND
  - with walls *It is not clear whether the walls must enclose all sides of the building, or whether it would also catch a building that had walls on most sides, but for part of one wall had columns with gaps in-between, not closed off by doors. The first version of the Guidance suggested that a car park with open sides and lighting would NOT qualify as a building, but this example has been omitted from the second version of the Guidance* AND
  - for which energy is used to condition the indoor climate (this means heating, ventilation or air conditioning but NOT provision of hot water/lighting (even though, in practice, these can have a significant effect on energy efficiency))
- Page 28/9 of the Guidance deals with shell and core buildings. It recognises that, at the point of sale/letting, the building may not have services installed. However, where it is expected that the building will be fitted out, and services installed (ie an “expectation” that energy will be used to condition the indoor climate) an EPC should be provided. The Guidance goes on to explain that the EPC should be based on the most energy intensive fit out allowed under Part L of the Building Regs.*
- It has been argued that this Guidance is not in strict conformity with Reg 9(3) of the Building Regs, (which applies the energy efficiency requirements of the Building Regs (including Reg 17E being the provision of EPC certificates) to “buildings” within the definition of Reg 9(4). This requires the building to “use energy to condition the indoor climate”. Arguably a shell and core building with no services does not use any energy to condition the indoor climate. The Building Regs do not refer to an “expectation that the building will use energy to condition the indoor climate”. We think that this argument will not be regarded as meritorious by any enforcement agency, so the safest advice at present is to*

## Relevant Regulations

*meritorious by any enforcement agency, so the safest advice at present is to assume that the contractor building a shell and core building must supply an EPC when construction is finished, even if there are no services yet in the building.*

The definition of “building” includes any part of a building which has been designed or altered to be used separately (from the rest of that building). The guidance suggests looking at factors such as separate access and/or separate provision of heating/ventilation services (or at least the ability to separately control the delivery of heat/ventilation from common services). It states that shared use of kitchen or bathroom facilities would not stop it being a separate part of a building for EPC purposes. This is why the grant/assignment of a lease of an individual shop unit in a shopping centre or an individual floor of an office will generally trigger the requirement for the provision of an EPC. **For more information on EPCs of whole and part buildings see 2.11.**

Guidance Pg 7

2.6

### **What are the size thresholds and their dates of application:**

6<sup>th</sup> April 2008: all non-dwellings with “total useful floor area” of over 10,000m<sup>2</sup> (roughly 100,000 sq ft)

1<sup>st</sup> July 2008: all non-dwellings with “total useful floor area” of over 2,500m<sup>2</sup>

1<sup>st</sup> October 2008: all other non-dwellings

SI 2007 3302 Para 2 introduces staggered commencement dates

There is no definition of “non-dwelling” in the Regs. The Guidance (glossary) interprets it as a building which is NOT a dwelling. In the Regs a dwelling is defined as a “building or part of a building occupied or intended to be occupied as a separate dwelling” and the Guidance (glossary) expands this as meaning a self-contained unit designed to provide living accommodation for a single household (without sharing kitchen or bathroom facilities).

Guidance (glossary) Reg 2(1)

“Total useful floor area” is the gross internal floor area of all enclosed spaces in the building (in common RICS parlance). This may present some difficulties for property owners/tenants who tend to record the net internal floor area of premises (e.g. for rent review purposes).

Guidance (glossary) and also (according to Reg 9(6)(b) Building Regs) defined in the Directive

In order to work out which size threshold to apply follow these rules:

2.6.1

For a sale/new lease: the safest approach is to look at the date on which the **last** of the following list of events occurs for that transaction. Whichever period that falls in (i.e. pre 6<sup>th</sup> April 2008; between 6<sup>th</sup> April 2008 and 30<sup>th</sup> June 2008; between 1<sup>st</sup> July 2008 and 30<sup>th</sup> September 2008 and on or after 1<sup>st</sup> October 2008) governs the size of commercial building that is caught by the EPC regime:

- sending out any written information about the building
- allowing the buyer/tenant to first view the building

Reg 5(2)

- exchange of contracts for the sale/agreement for lease
- (where there is no prior contract for sale/agreement for lease) on completion of the transfer/assignment/new lease itself (on grounds that it amounts to the contract for the sale/agreement for lease)

Reg 5(5)

*It is not clear how to apply this to a transaction that starts before one trigger date and hits other milestones after that trigger date and before the next. Both the Regs and the Guidance are silent. For example, a seller is selling a building with a total useful floor area over 50 sq m and under 2500 sq m. The seller supplies written information about the building on 1<sup>st</sup> August 2008 (no obligation for EPC triggered), the buyer views the building on 20<sup>th</sup> August 2008 (still no EPC obligation triggered), and the parties exchange contracts on 13<sup>th</sup> October 2008 (when the building would, prima facie, fall within the size threshold to trigger an EPC). It is not clear whether the seller*

- *should supply an EPC as soon as 1<sup>st</sup> October 2008 arrives, on the basis that Reg 5(2)(a) requires its production at the earliest possible opportunity OR*
- *should supply an EPC before 13<sup>th</sup> October 2008 at the latest.*

*What is clear from the Guidance (pg 36/37) is that it is not legitimate to argue that no EPC is required because provision of information and viewing took place in a period when they triggered no EPC*

- 2.6.2 For construction of a new building/modification of an existing building: look at the date the works were completed (not when they were started) and see which period (as set out in 2.6) it falls into.

Reg 4(2)

There are transitional arrangements for buildings which are “on the market” before the relevant threshold date for that size of building. These transitional arrangements will affect the point at which the EPC needs to be commissioned and/or supplied to the buyer/tenant. See 3.2 for further details.

- 2.7 **What buildings are exempt?** 9(5) Building Regs

- 2.7.1 Places of worship Reg 4(1)

- 2.7.2 Temporary buildings with planned time of use of less than 2 years

- 2.7.3 “Standalone” buildings with total useful floor area of less than 50m<sup>2</sup> (unless they are a dwelling – these are covered no matter how small).

There is no definition of “standalone” in the Regs. It comes straight from the Directive. The Guidance now defines it (in the glossary) as meaning a building which is entirely detached. It does not mean (as was initially contended) simply that it should be “self contained” as to services.

Thus all small units will be caught post 1<sup>st</sup> October 2008 unless they are structurally independent from the surrounding units/building. Very small units in shopping centres or parades of shops will still need an EPC, whilst kiosks standing alone in the middle of a mall or railway concourse do not.

- 2.7.4 Industrial sites, workshops and non-residential agricultural buildings with a **low energy demand**. In the guidance there are examples of “low energy demand” buildings. This is not the same as de facto low energy use. For industrial sites

## Relevant Regulations

and workshops it means buildings whose purpose is to accommodate industrial activities (e.g. foundries, chemical processing plants, packaging plants, heavy engineering, storage depots, warehouses) and in which there is no air conditioning (except local air conditioning appliances for the benefit of staff who may be at workstations dotted through the industrial process).

2.7.5 In addition, on sale or letting of buildings that are due to be demolished there will be no obligation to provide an EPC as long as the seller/new landlord can demonstrate ALL of the following tests are satisfied: Reg 7

- (i) Building is being sold/let with vacant possession (buildings with short term contracted out tenancies will not satisfy this)
- (ii) Building is suitable for demolition and resulting site is suitable for redevelopment
- (iii) They believe, on reasonable grounds, that the buyer/tenant intends to demolish the building

It may be difficult for a seller/new landlord to be able to obtain, from the buyer (unless it puts the buyer under contractual obligation to provide it) evidence of intent to demolish. There is no guidance as to what type of evidence will be sufficient to satisfy tests (i) and (ii) other than on pg 35 of the Guidance, which simply refers to the evidence from the fact that planning permission has been applied for or obtained. It is NOT essential for planning permission to have been obtained in order to satisfy the tests.

Contrast Reg 7(1) for dwellings, where all planning permissions have to be obtained with Reg 7(2) for non-dwellings which does not).

## 2.8 What transactions are exempt

2.8.1 Transactions that are not really sales to a new owner– CPOs, lease surrenders. **It is thought** that a sale and leaseback would not be exempt (even though the end result is that the property remains occupied by the same party) because the buyer is a third party. Para 3.3 Guidance

2.8.2 Transactions that are not really new leases e.g. a lease renewal to same tenant, or a lease extension (e.g. a deed of variation extending the term (which is an implied surrender and regrant)). By extrapolation (though not in the Guidance) a surrender and regrant of a longer lease to the same tenant would be similarly exempt. Para 3.3 Guidance  
Recital 10 of the Directive

2.8.3 Other “not for value” transactions dependent on circumstances. It is not at all clear what this will encompass. *There is no definition of “not for value” and the concept is not mentioned in the Regulations (which simply speak of “sales” and “renting out” of buildings). DCLOG have indicated (at meeting on 11/3/08) that they believe this means any situation where effectively there is no change in the economic position. Thus it is not confined to absence of monetary consideration. Any kind of real economic value given would suffice to take the transaction outside the exemption. It could be argued (but there is no consensus of opinion on this) that an assignment of a lease in return for no monetary consideration (but in which the assignee merely gives a covenant to observe and perform the provisions of the lease and indemnify the assignor) would not be a transaction which changes the economic position and would thus be exempt.* Para 3.3 Guidance

- 2.8.4 Sales of shares in an SPV that owns the lease/freehold of the property (because there is no disposition of the property)
- 2.8.5 Grant of the right to occupy living accommodation at a workplace and tied to the job
- 2.8.6 Sale by one co-owner of their share in beneficial interest in the property to someone else (probably).
- 2.8.7 Grant of a licence (rather than a lease) because it is neither a sale nor a lease.
- 2.9 **Transactions which we believe are not exempt despite the circumstances being such that the participants in those transactions may not be concerned about receiving an EPC.**
- 2.9.1 Intra group transactions, including intragroup sales and leasebacks, (unless it is possible to argue that exemption 2.8.3 will apply because the value of the group as a whole does not change. *It is unclear from DCLOG whether such an argument would be upheld. Certainly it will be difficult to run if there is some sort of value given for the overall company transfer of assets (even though not specifically attributable to the property transfer).*
- 2.9.2 Disposals by liquidators/receivers (unless it is possible to argue that exemption 2.8.3 will apply because no value is given – *we cannot tell at present whether that exemption will be held to apply. It certainly will not if there is some sort of consideration passing to the liquidator/receiver (other than, possibly, a covenant to observe the terms of the title/lease)*). In many cases the insolvent company seller may simply not produce an EPC (even though it should) because it knows there will be no company or assets to meet the fine, should Trading Standards Officers find out about and pursue the breach.
- 2.9.3 The grant of a reversionary lease to the existing tenant (i.e. granting a new lease for a term commencing on the expiry of the existing lease term). Whilst this has the same practical effect as a lease extension, the DCLOG view is that it is also the grant of a new lease, so will probably be caught. This is so even though it is being granted to an existing tenant who will not be interested in the EPC rating because it already knows about the building.
- 2.9.4 Short term lettings (as opposed to licences – see 2.8.6) (e.g. charity shops at Christmas).
- 2.9.5 Buildings where (for security purposes) the current owner does not want to permit EPC accredited inspectors to have access to collect the information needed to produce the EPC rating (eg those with sensitive industrial processes, those handling money or cheques, or even those where the staff do not yet know about the anticipated disposal of the premises).
- 2.10 **Transactions where we do not know whether they trigger an EPC or not**
- 2.10.1 Entry into an option to buy or to take a lease of an existing building. There is no contract for the sale/letting until the option is exercised, but, if the prospective purchaser/tenant asks for information about the building or views the building prior to entry into the option contract, is that enough under Reg 5 to trigger the



duty to produce the EPC because that person could be said to be a “*prospective buyer/tenant*”.

- 2.10.2 Entry into an agreement to take a new lease of a building that is to be constructed (i.e. a prelet). On the face of Reg 5(2), an EPC should be made available, at the latest, by the time of entry into the agreement for lease. However, at that point, there is no building for which to calculate an EPC and Reg 4(2) states that no EPC need be given or made available before construction of the building has been finished.

**2.11 Do you need an EPC for the whole building or only the part being sold/let?**

In general terms the EPC should be for the property (whether whole or separate part of the building) that is being sold/let.

Where it is the whole of a building being sold/let, then an EPC (or combination of EPCs) must be provided that covers the whole building. For example there may be one EPC for the whole building or a combination of one EPC per unit plus a separate EPC for the communal areas.

If the part of the building being sold/let is designed/alterd for separate use then

- if the building has a common heating system serving that part and other parts, the EPC provided could be either the EPC for the whole building OR an EPC for that part only, but reflecting an apportioned part of the central plant efficiency
- if the building has no common heating system (ie the part is separately conditioned) then the EPC provided should be of the part only (not the whole)
- communal areas are ignored when producing the EPC for a part

Guidance is given on the various options in Para 4.2 of the Guidance plus its illustrative diagrams.

### 3 WHAT ARE THE TIME LIMITS FOR PRODUCTION OF AN EPC?

- 3.1 **Where the EPC is being produced for a sale/assignment or new letting**, it should be given to the buyer/assignee/tenant at the earliest possible opportunity and certainly by NO LATER than the *earliest* of the following points
- 3.1.1 When any written information about the building is provided in response to a request for information received from a serious prospective buyer/assignee/tenant
- 3.1.2 When a viewing takes place
- 3.1.3 Before entering into the contract for sale/assignment/lease OR, if there is no contract, before the transfer/assignment or lease itself (because Reg 5(5) says that a valid EPC must be given to the person who ultimately becomes the buyer or tenant).
- 3.2 **There are transitional arrangements applicable from 6<sup>th</sup> April 2008.** As there was a shortage of qualified energy assessors to meet demand for EPCs transitional arrangements were introduced and later extended. These arrangements delay the point at which the EPC must be provided.
- The transitional arrangements only apply where the property is being sold/assigned or a new lease of it granted. They do not affect the timing of production of an EPC on a new building (see 3.4).
- The transitional arrangements essentially apply ONLY to buildings of the correct size that were truly on the market before the relevant date for their threshold and remain so at that date.
- Moreover, the transitional arrangements do not remove the obligation to provide an EPC , they merely excuse delay in so doing.
- The transitional arrangements last until 1<sup>st</sup> October 2008 for dwellings and until 4<sup>th</sup> January 2009 for non-dwellings. After that deadline the normal rules for when the EPC has to be provided will apply, regardless of when the property was first put on the market.
- 3.2.1 The transitional arrangements apply to buildings
- (i) that were “put on the market” before the relevant commencement date (“put on the market” is defined as the point at which the fact that the building is or may be available for sale or rent is first made public (either to the public at large or to a section of the public) by the person who should be producing the EPC, where they make that public with the intention of marketing the building) AND
  - (ii) where some action took place before the relevant commencement date to make it public that the building was on the market, such action was taken with the intention of selling/letting the building before the commencement date and such action has been sustained to a reasonable extent AND
  - (iii) the building is still on the market at the relevant commencement date. If the building has been taken off the market in the meanwhile (unless it goes back on the market because the sale/letting falls through and does

|       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <b>Relevant Regulations</b>                        |
|-------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|
|       | so quickly) then the normal rules on when to provide the EPC will apply.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                    |
| 3.2.2 | <u>In those circumstances, there is no need to provide the EPC at the point described in 3.1.</u> Instead the seller/assignor/landlord must, when contracts are entered into for the sale/lease (if not already done by that point)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Reg 51(5)                                          |
|       | (i) commission an EPC as soon as reasonably practicable                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                    |
|       | (ii) use reasonable efforts to get the EPC as soon as reasonably practicable                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                    |
|       | (iii) give the EPC to the buyer/tenant/assignee free of charge when it is obtained (even if this is long after the contract, or even after completion).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                    |
| 3.2.3 | If the EPC is commissioned and obtained <u>before</u> 1 <sup>st</sup> October 2008/4 <sup>th</sup> January 2009 (whichever is relevant) it must be given to the buyer/tenant when it is obtained. There is no excuse for withholding it until that deadline date.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                    |
| 3.3   | <b>It is not necessary to provide an EPC</b> to someone                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Reg 5(3)                                           |
| 3.3.1 | whom the seller/assignor/landlord reasonably thinks is not serious (either because he has not got sufficient funds, or because he is not genuinely interested in the premises) OR                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                    |
| 3.3.2 | to whom the seller/assignor/landlord believes (on reasonable grounds) he is unlikely to be prepared to sell/assign/grant a lease (i.e. someone whose offer they do not want to entertain) (but remember that this ability not to deal with someone does not allow the seller/assignor/ landlord to do anything which is an unlawful act of discrimination)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Reg 5(3)<br>Reg 5(4)                               |
| 3.4   | <b>Where the EPC is being produced for a new building</b> , it has to be provided by the person carrying out the construction to the owner of the building within 5 days after the work is completed. At the same time, the person doing the construction must notify Building Control of the issue of the EPC and of its registered number.<br><br><i>There is no definition of who is the "owner of the building". Common sense suggests it is the person who employed the building contractor (so it may be the freeholder, or a leaseholder). DCLOG agreed with this at a meeting on 11<sup>th</sup> March 2008.</i><br><br><i>Likewise there is no definition of who is the person "carrying out" the construction. Again commonsense suggests it will be the contractor actually doing the work, (not the person who commissioned the work and is paying for it). DCLOG agreed with this at the meeting on 11<sup>th</sup> March 2008.</i> | 17E(3) Building Regs as amended by SI 2008 No 2363 |
| 3.5   | <b>Where a building is modified in the manner caught by the Regs</b> , the person carrying out the modification works has to provide an EPC to the owner of the building within 5 days after the work is completed and notify Building Control.<br><br><i>The same issues arise as to who is the person carrying out the works and who is the owner as in 3.4.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 17E(3) Building Regs as amended by SI 2008 No 2363 |
| 3.6   | <b>It is permissible to be later than these time limits in producing your EPC</b> if                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                    |
| 3.6.1 | You are taking advantage of the transitional arrangements explained in 3.2 OR                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                    |
| 3.6.2 | You requested its production at least 14 days before the EPC was required but                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Reg 42(1)(a)                                       |

despite reasonable efforts and enquiries (of which you should keep some written evidence so that you can show you took reasonable efforts), no EPC had been supplied by the relevant time (eg because you cannot find a qualified inspector at all, or only one who is too busy to prioritise your instructions to do the inspection of the property). This will not always mean that the person who should have provided the EPC is off the hook. If a penalty notice is served for not producing the EPC at one of the early triggers (e.g. first viewing of the building) the seller may well be able to claim the benefit of this excuse. However, if the other triggers are still outstanding (e.g. exchange of contracts), the seller should still try to produce the EPC at the earliest subsequent opportunity and in any event prior to that last trigger point (e.g. exchange of contracts) OR

- 3.6.3 It is an emergency grant of lease. For this to be satisfied, all four of the following criteria must be satisfied: Reg 42(1)(b)
- (i) The tenant was seeking to take the lease due to an emergency requiring its urgent relocation
  - (ii) At the relevant time the relevant person did not have a valid EPC “in the wings”
  - (iii) There was insufficient time to get an EPC before letting the building (judged on an objective basis)
  - (iv) An EPC is given as soon as reasonably practicable after the lease is completed
- 3.7 **An EPC remains valid for 10 years** (unless another for the same building (or part building) has been obtained by the relevant person or has been provided to that relevant person – see 6.4 for more on this point. Reg 11(3)
- 3.8 **The prospective buyer/assignee/tenant cannot waive their right to receive an EPC** and let the seller/landlord off the hook. They may say they do not want or need to receive an EPC, but the seller/landlord must still comply with the Regs, or risk a penalty notice and fine if he does not. Guidance – Chapter 7

**4 MUST THE EPC BE AN ORIGINAL OR WILL A COPY SUFFICE?**

- 4.1 Where a person is under a duty to make an EPC available **on sale/new letting**, it is sufficient to make available a **copy** of a valid EPC for that building that is already in existence, or the original or a copy of a newly commissioned EPC. Reg 12
- 4.2 Where a person is under a duty to give an EPC **on construction of a new building/modification** of an existing building it must provide an **original** of a new EPC. Building Reg 17E
- 4.3 **An EPC** that must be made available to a purchaser/tenant/assignee **can be made available electronically** if the recipient agrees (this may cut costs) Reg 13  
 It is very doubtful whether a new EPC provided on construction of a new building or modification of an old one can be made available electronically *The Building Regs contain no equivalent provision to Reg 13 and Reg 13 is expressly applicable only to EPC obligations arising under 5(2), 5(3) and 9(2).*
- 4.4 **No copyright prohibition on copying EPC's.** Anyone who has a duty to comply with the Regs (e.g. to make a valid EPC available) has the right to copy and issue a copy of any document produced by an energy assessor. There should therefore be no copyright problems in so doing. This does not necessarily mean that the energy assessor will owe a duty of care to everyone who obtains/produces to others a copy of his EPC. Reg 28  
 Building Reg 17L
- 4.5 **When commissioning the EPC you may want to do so on terms which oblige the assessor to provide you with wider information.** It will be sensible for his terms of engagement to require production not only of the EPC, but also of the raw information and data from which the DSM/SBEM rating is produced (see 10) plus possibly a copy of the information entered in each field on the computer program which produced the EPC. The obligation to produce copies of this expanded information will not be necessary if it transpires that it will be both lodged in the Register of EPCs (along with the EPC itself) AND copies of it can be obtained from the Registrar. *Reg 31(2) as amended requires the energy assessor to enter on the register the certificate, the recommendation report and "the data which was used to calculate any asset rating or operational rating and produce the EPC". This suggests that the Register will contain some data (even though practice so far on the residential EPC register has been that only the EPC is registered and the assessor retains all the calculation data and copy of the fields entered into the computer program – just in case he is ever asked to audit his resulting EPC – see 11.2).* Reg 31(2) as amended by SI 2007 No 1669 and further amended by SI 2008 No 2363  
 According to the Government explanatory memorandum issued at the time of the SIs amending Reg 31(2) the changes were made to limit the data which needs to be placed on the register to the data which was used in accordance with the SBEM or DSM methodology in order to produce the EPC or DEC. Thus there would be, for example, no need to place the design plans for the building on the register or the raw information/measurements which the energy assessor made and from which he determined how to complete the fields on the computer program.  
*It could be very important to be able subsequently to see what the basis of the*

**Relevant  
Regulations**

*EPC rating was (eg for a subsequent owner of the building to be able to work out whether there have been enough changes to warrant repeating the EPC in the hope of a better rating). If only the assessor has access to the raw material, then all subsequent owners would have to hope to be able to track down that assessor and ask them to provide it. In the absence of a contractual obligation to do so, the assessor could set whatever terms he liked for such cooperation.*

- 4.6 **An EPC and Recommendation Report is only authentic if it is registered** Guidance Para 6.1  
(see 12)

**5 WHO PAYS FOR THE COST OF PREPARING/PRODUCING A COPY OF AN EPC?**

5.1 **The cost of preparing an EPC can be very significant.** It will be set by the market (not an independent body) so may fluctuate wildly. EPCs on more complex buildings will cost more. For a shopping centre it could be as much as £40,000 and take several months. Thus owners of large buildings will want to be sure that they can recoup the cost wherever possible, and that their expensive EPC cannot be invalidated by a subsequent EPC obtained by a holder of a subsidiary interest – see 6.4 for discussion of this latter point.

5.2 **Generally the recipient of an EPC cannot be required to pay**

5.2.1 Where an EPC is being made available on sale/assignment or grant of a new lease, the buyer/assignee/new tenant is entitled to receive the EPC without charge. Reg 5(2) and 5(5)

5.2.2 Where a person doing the construction of a new building or modification of an old one has to provide an EPC, there is nothing in the Regs or Building Regs that prohibits them from charging the “owner” of the building for that EPC. They may choose to roll up the cost of its provision in their general fee, or to charge separately.

5.3 **Provision of a copy of an existing valid EPC may therefore save costs.** It is not essential that a seller/assignor/new landlord makes available an EPC which was commissioned by them. They can make available an EPC that was produced by someone else (e.g. the superior landlord) if they know it exists, they can get hold of a copy and it is still valid (see 6 for more information on what constitutes a valid EPC).

5.4 **Obtaining a valid EPC from a superior landlord may incur a charge.** Where the assignor/prospective landlord is itself a tenant, and it obtains the EPC from its own landlord for onward transmission to its (the tenant’s) prospective assignee/subtenant, a charge CAN be made by the superior landlord to the tenant for initial production of the EPC or for supply of a copy of an existing EPC without contravention of Reg 5(5). This is because Reg 5(5) prohibits only the charging of the person who ultimately becomes the *assignee/subtenant*. Here the superior landlord is charging someone who is already a tenant. Reg 5(5)

Thus it will be possible in a lease to make it a condition of consent to assign/sublet that the tenant pays for the cost of production/supply of any EPC that its own landlord agrees to produce (either from scratch or a copy of an existing valid EPC).

5.5 **Can the cost incurred by a landlord in obtaining an EPC be recovered via the service charge?** Where a landlord of an existing building commissions an EPC for the whole building, in anticipation of the sale of the whole or a grant of a new lease of the whole or part (whether that transaction is immediately anticipated, or the landlord is simply getting ready well in advance) it is not clear that they will be able to bill the tenants of that building through the service charge for the cost of **preparation** of the EPC. There are two possible reasons for this:

5.5.1 the service charge clause in the lease may not be wide enough to permit that

cost to be charged. A clause permitting the landlord to charge for the costs of statutory compliance will not pick up the cost of preparing an EPC in circumstances where no duty to provide one has yet arisen (e.g. where no sale is yet contemplated, but the landlord is commissioning the EPC in advance). Moreover, the sweeper clause may not be worded sufficiently widely. The Guidance suggests that it should be possible to word leases in such a way that the cost of production is recoverable through the service charge. At present there is nothing in the current Service Charge Code specifically on whether the costs of EPCs should be recoverable from the tenants or not. The Code is being reviewed on this point.

- 5.5.2 even if the service charge clause is wide enough, charging the cost of production of the EPC through the service charge could be said to be in breach of Reg 5(5) if it is done at a point that will result in the new tenant/assignee being billed for service charge expenditure which includes that cost. This would amount (albeit indirectly) to that new tenant/assignee being charged for the EPC being made available.

It is possible to mount some counterarguments to this:

- (i) in the case of assignment of an existing lease, there is no breach of Reg 5(5) if the cost of production is put through the service charge for a period that is paid by the outgoing tenant not the incoming assignee.
- (ii) there is no breach of Reg 5(5) if the cost of production is included in the service charge expenditure, but the assignee/new tenant is not required to pay, through its service charge bill, its proportion of such cost. There is nothing in the Regs that prohibits the existing tenants being charged – this merely depends on the breadth of the drafting of the service charge clause.
- (iii) (a somewhat thin counter argument) that where the EPC is produced in advance by the superior landlord (perhaps the freeholder), and a copy of it is made available by an existing tenant to his prospective assignee (of his existing lease) or subtenant (a new lease), it is the cost of *making the EPC available* which cannot be charged to the assignee/subtenant (i.e. the cost of obtaining a copy of the EPC from the superior landlord, or from the register of EPCs). This is different from the cost of producing the EPC in the first place. There is nothing to stop that being billed to the assignee/subtenant, should the cost still have to find its way through the service charge.

- 5.6 **Can the cost of the EPC be recovered via an enhanced charge for granting licence to assign/sublet instead?** If it is thought that it is not possible to charge through the service charge, it has been suggested that a landlord (who has incurred expense producing an EPC) could recoup that in small contributions by charging an enhanced fee for giving consent to assignment or underletting. This argument has some drawbacks – it will not be predictable that there will be enough applications for consent to alienation for the cost to be recouped in full, and tenants who are commissioning their own EPC of part may not accept readily the idea that they are also paying for a part of the cost of production of



the EPC of whole.

**6 FOR HOW LONG DOES AN EPC REMAIN VALID?**

6.1 **An EPC remains valid for 10 years** from its issue unless another EPC for the building (or that separate part of the building, if the EPC is issued in respect of such part)

Reg 11(3)

- has been obtained by the current seller/assignor/new landlord OR
- has been obtained by someone else AND a copy of it has been provided to the current seller/assignor/new landlord.

6.2 **It is possible the 10 year period will be reduced** (there has been consultation on this in 2008).

6.3 **An existing EPC is not rendered immediately invalid when modification works are done** to the building which are extensive enough to trigger the production of a new EPC (see 2.3) by the contractor. Although the works trigger the need for a new EPC, the old one remains valid until that new EPC has been issued. DCLOG confirmed this at the meeting on 11<sup>th</sup> March 2008.

6.4 **Does a subsequent EPC of part of a building invalidate a prior EPC of the whole/another part of the building?**

Reg 11(3)(b)

Guidance Para 3.8

The definition of “building” (in Reg 2(1)) includes “a reference to part of a building which has been designed or altered to be used separately”.

From this proceeded the argument (now rejected by DCLOG in the Guidance) that a later EPC (even if done in relation to only one part of the building e.g. one retail unit in a multi-let building) will invalidate an earlier EPC of whole. This would have resulted in a potential waste of significant expense by landlords who chose to gear up well in advance of a potential sale and do their EPC of whole up front, only to find that a tenant of one unit, doing its own EPC for an assignment of that unit, had rendered the expensive EPC of whole invalid.

The Guidance now makes it clear that this is not the case. It explains that the later EPC does not invalidate (“trump”) the earlier EPC unless it is of exactly the same building/part of building. Thus a landlord’s prior EPC of whole remains valid even if the tenant of a unit obtains an EPC for that space only, and vice versa. Contrast the position if the landlord has done an EPC of a single unit/floor and then the tenant of that space prepared a subsequent EPC of that unit/floor. In these circumstances the landlord’s EPC would be rendered invalid.

**7 WHAT RAW INFORMATION/ACCESS TO THE BUILDING IS NEEDED TO PREPARE AN EPC AND WHO NEEDS TO PROVIDE THIS?**

**7.1 Is access to the building essential?**

An EPC is an asset rating, so it will initially be based on assessment of measured plans of building (ideally on CAD), the specification (which can be on paper) of the services in it, the specification of the materials that the building is made of (e.g. their thermal efficiency), the intended activities conducted within each part of the building (zones) and the geographical orientation of those zones (eg south/north facing). It is not based on actual energy consumption or wastage.

There is no *requirement* in the Regs that the assessor actually goes round the building. However, in practice all assessors will wish to inspect, particularly where the building is complex. Doing so will usually mean the EPC is more accurate and the energy rating better (e.g. because what may look to be an energy wasting feature on the plans may be offset on inspection).

**Where there are no plans then access is essential** because the computer model that the assessors use makes it compulsory to manually enter the size of the different zones, their geographical orientation and the extent to which they are glazed. Without this information, no EPC can be disgorged from the computer program.

As for the other features of the building (eg method of construction, types of glazing, extent of insulation, heating system), if the energy assessor is given no information and no opportunity to inspect, it will not prevent the issue of an EPC, because the relevant fields in the computer program can be completed, instead, with the default entry for that feature (which is pre-programmed into the computer software).

In practice, many modern buildings will have a written O&M Manual and/or a CDM Health and Safety File, which will contain many of the answers and information that an energy assessor might ask for.

**7.2 Does the Landlord/Superior Landlord have to help a tenant find/produce an EPC which it can make available to its proposed assignee or subtenant?** Reg 50

Yes – so far as is reasonably necessary as long as the tenant is a person who is under a duty to make an EPC available (a “responsible person”). Reg 50(2)(a) and (b)

Thus where the tenant is preparing an EPC in advance and has not yet reached a trigger point for production of an EPC to the prospective assignee or subtenant, there is no duty on the landlord/superior landlord to cooperate with him. If you want to make sure that the he will cooperate even in these circumstances, you will need to draft this into the landlord’s covenants in the relevant lease.

Even where the tenant is already under a duty to make an EPC available, Reg 50(2) does not mean that the landlord has to commission a new EPC of the building just because the tenant needs one. That would be unreasonable.

Reg 50(2) requires every person with an interest in the building or in occupation of it to

**Relevant Regulations**

- allow the energy assessor appointed by the responsible person such access to the building as is reasonably necessary to inspect it for the purpose of preparing an EPC. Where access is required to parts of the building that are demised to other tenants the landlord can either permit the assessor to enter pursuant to the rights reserved to the landlord in that other lease (if wide enough) or can invoke Reg 50(2)(a)/(b) against the other tenant to gain access even though the reserved right of entry is not wide enough.

Reg 50(2)(a)

- cooperate with the responsible person so far as is reasonably necessary to enable him to comply with his duty to make an EPC available in respect of a building.

Reg 50(2)(b)

The first limb should ensure that the tenant's chosen energy assessor will be given reasonable access to the parts of the building outside the tenant's demise, if such access is needed to produce the EPC for the tenant.

*The scope of the second limb is not yet clear. It may include*

*- provision by the landlord of plans or information on services in the building, which are reasonably requested by the tenant and which plans/information the landlord has reasonably available. The Regs do not appear to prohibit the landlord from charging for these copies of plans and other information.*

*- (where the landlord has an existing valid EPC which the tenant wants to use), provision by the landlord to the tenant of the details of the EPC number so that it can apply for a copy from the register*

*- (where the landlord has an existing valid EPC which the tenant wants to use) supply by the landlord to the tenant of a copy of that valid EPC and/or the underlying data. (If it did so, the landlord could charge a fee for production of those copies. This would not be in breach of Reg 5(5) because the charge is being made to the party that has to make the EPC available not to the recipient of that EPC).*

**7.3 Does a Tenant have to cooperate with its Landlord/Superior Landlord when they seek to produce an EPC?**

Reg 50(2)

Yes – so far as is reasonably necessary and so long as the landlord/superior landlord is under a duty to make an EPC available. Again, if the landlord is trying to gear up in advance and preparing the EPC ahead of time, the duty to cooperate will not yet apply. Should the landlord want to be sure of cooperation from the tenant in these circumstances, it will have to provide for such in the tenant's covenants in the lease.

Where the landlord/superior landlord is a "responsible person" (because it is already under a duty to make an EPC available) the two-limbed duty to cooperate will mean that:

- whether or not there is a reserved right of entry in the lease, the tenant would have to provide access for the landlord's energy inspector AND

Reg 50(2)(a)

- the tenant must cooperate so far as is reasonably necessary in other ways (eg providing such other information as it has reasonably available and is reasonably necessary for the energy assessor to calculate the EPC). *It is not clear whether the duty to cooperate would mean that the tenant (if it had a valid EPC itself for*

Reg 50(2)(b)

*the building) would have to give the landlord/superior landlord the number of that EPC or even a copy of that EPC.*

To be sure of gaining such cooperation, it would be better, in the lease itself, to reserve the right of entry and impose an obligation to provide the other information and/or copy of a valid EPC on demand, rather than relying on Reg 50(2).

**7.4 No duty of cooperation is owed to the prospective buyer/tenant etc.**

The duty under Reg 50 is to cooperate with the person responsible for producing the EPC NOT with the person who is due to receive it.

**7.5 An EPC for a part of a building can be prepared using data from another similar one**

Where a building is divided into units, the certificate for one unit can be based either on the building as a whole (so long as there is a common heating system and the unit is not a dwelling) or on the assessment of another “representative” unit in the same block.

Reg 11(7)  
Guidance Para 5.4

Para 5.4 of the Guidance indicates that it is for the energy assessor to decide if the various factors make another unit/dwelling “representative”. The only clear requirement is that that comparison, representative, unit must be in the same building or block. Otherwise the assessor may (but not must, or exclusively) consider age of property, method of construction, orientation, position in the block, type of heating, relative insulation, and presence of double glazing.

Where a block with the common heating system has one or more dwellings in it, the EPC for the commercial units can be based on a common EPC for all the commercial parts of the building (but excluding the dwellings).

This is why it may be important to be able to capture not just the EPC for the other unit, but also the raw data that fed into its production (so that the assessor can decide if that other unit is “representative” or not) – see 4.5.

Reg 11(8)

## 8 WHO CAN PREPARE AN EPC?

### 8.1 Who is qualified to do one?

Only accredited energy assessors of at least the minimum level of competence applicable to that type of building.

### 8.2 How do you know they are qualified?

Check them on the register maintained by the accreditation scheme that they belong to – check them by number or by name. See [www.ndepcregister.com](http://www.ndepcregister.com)

### 8.3 How many accreditation schemes are there?

Currently 13 (July 2008).

Guidance Para 3.7

### 8.4 How do you find an energy assessor?

Approach one of the accreditation schemes and ask them for members in your area or search the register at [www.ndepcregister.com](http://www.ndepcregister.com)

### 8.5 How do energy assessors qualify for accreditation?

They have to demonstrate their competence by one of several approved means, must keep their skills up to date, must have appropriate insurance, must participate in their accreditation scheme's assurance scheme and abide by its guidance and advice.

### 8.6 What are the levels of competence for a non-residential energy assessor?

Guidance Para 3.7

8.6.1 Level 3: existing simple small buildings

8.6.2 Level 4: new and existing buildings that don't fall within Level 3 or 5

8.6.3 Level 5: new and existing complex buildings

so when recruiting an assessor, you will have to check both their registration AND that they hold accreditation at the correct level to do your type of building. It may require a site visit by the assessor just to determine which level of building they are being asked to deal with. More information is given in the Guidance glossary as to what features determine whether a building falls within Level 3, 4 or 5

Guidance glossary

### 8.7 To whom does the energy assessor owe their duty of care?

They will owe a contractual duty to the person who engages them to do what they are engaged to do properly. They may also accept a duty towards people to whom they give a collateral warranty (such as a lender).

In addition they will have a statutory duty to carry out the assessment with reasonable skill and care which duty is owed

Reg 27

Building Reg 17H

8.7.1 (for EPCs made available on sale/letting) to the person whose responsibility it is to provide the EPC (whether or not the assessor knew who that would be when they did the work) (the "relevant person")

8.7.2 (for EPCs made available on sale/letting or on new construction or modification of an existing building) to any prospective/actual buyer or tenant i.e. any person to whom the EPC is made available during its

period of validity, not just the first intended recipient.

8.7.3 (for DEC's only) also to the occupier of the building

8.7.4 (for EPC's made available on new construction or on modification of an existing building) also to the owner (i.e. the person to whom that new EPC has to be provided – see 3.4).

Thus, an energy assessor employed by the freeholder to do an EPC in advance of a sale of the freehold may find that he has a statutory duty of care (where the superior landlord provides a copy of that EPC for use by the tenant on a prospective assignment/sublease) not only to the freeholder, but also to the tenant (as the person who has responsibility for producing the EPC) and the subtenant/assignee, even though at the time he did the EPC work, he did not know who they were/would be.

**8.8 When does the duty of care expire?**

Reg 27(2)(b)

The contractual duty of care is governed by normal contractual principles.

Building Reg 17H  
(2)(b)

Likewise, if there is a duty of care in tort (under the Hedley Byrne principles), that would be governed by normal tortious principles (which may not last the full 10 years from date of issue that the EPC remains valid).

The statutory duty of care applies only whilst the EPC is valid. See 6 for more on this.

**8.9 Check the assessor's PI cover**

## **9 WHAT DOES AN EPC SHOW?**

- 9.1 A numerical rating which places it on a scale. The rating shows how much carbon is emitted per square metre. This is called the “asset rating” because it is based on the fabric of the building and its services only NOT on actual use or actual energy consumption figures (in contrast to a DEC)
- 9.2 A standard benchmark for this type of building if it were built new, or if it were an average building from existing stock (to see how much worse/better than average this building is).
- 9.3 The Recommendations Report which accompanies every EPC sets out suggestions for how to improve energy efficiency. These are split into 4 categories according to the length of time over which they would be likely to pay for themselves. The recommendations are generic for the particular feature of the building that has shown weaker energy efficiency than is desirable. They are not specially tailored to the particular building (for example, if the roof was considered to be inadequately insulated, the recommendation will be to improve the insulation, but it will not go into the detail of where, in this particular roof, the insulation is too thin, nor what materials to use to insulate it).



## 10 HOW DOES THE ASSESSOR WORK OUT THE RATING?

10.1 By entering the raw information that he has gleaned from the plans, specification and inspection into the right fields in either the DSM computer model (for complex buildings) or the SBEM computer model for all other non-residential buildings.

10.2 We understand from a leading assessor that they cannot fill in some compulsory fields in the computer program unless they have at least received (or been able to prepare their own based on inspection)

- floor plans (so they can measure zones)
- geographical orientation of the building (and thus the zones)
- information on whether there is boundary glazing to each zone (in order to calculate potential for heat loss/gain)

Thus, if the party commissioning their services cannot/will not supply that information and will not permit inspection, then the assessor will have to decline to act.

10.3 Most of the remaining fields in the computer model (eg the material the walls are made of, whether there is underfloor heating, the type of insulation) can be completed using the pre-programmed default values in a drop down list (if the assessor has no written information and no opportunity to inspect what is actually at the building). These default values are based on the average characteristics of a building of that age, size and nature (generally taking that average information from the building regulations prevailing at the relevant time of construction).

**11 WHAT IF YOU THINK THE RATING IS WRONG?**

- 11.1 If you think it was produced fraudulently – contact the police Guidance para 6.4
- 11.2 If you think the assessor got the assessment wrong, then challenge whether the assessor did the job with reasonable care and skill (i.e. was negligent). Use the accreditation scheme’s complaints procedure in the first instance. They will arrange to have an audit done of the original EPC.
- 11.3 If the building’s features have changed in a way that does not (under the modification rules) require a new EPC to be provided by the person doing the construction, the owner of the building/tenant may choose to have the EPC redone in the hope of getting a better EPC rating. Doing so will invalidate any previous EPC for that building (see 6.4 for discussion of whether it invalidates any previous EPC for other parts of the building).

**12 HOW DO YOU FIND AN EPC THAT HAS BEEN DONE ALREADY?**

- 12.1 **Look on the register.** There is one central register for all EPCs regardless of which accreditation scheme the assessor belonged to. That register is maintained by Landmark.
- 12.2 **Search by unique report reference number.** Anyone who requests a document from the register using its reference number will be given it, and also details of any document of the same kind relating to the same building/part of building issued in the last 10 years (in case this has invalidated the one requested by number).  
A seller/assignor/new landlord may not have the unique ref number of previous EPCs done for the building, either because they never knew them (e.g. because they were done by the superior landlord, or by their predecessor in title) or because, even though they commissioned a previous report, they have since lost the details.
- 12.3 **Search by Property Address (possible for non-dwellings only).** For non-dwellings it is possible to search the EPC register by property name. Here the register keeper will disclose whether there is an EPC for the property, and the date that it was issued, but will not disclose its unique reference number. The seller/assignor/new landlord will then have to find out the number somehow in order to request a copy of the EPC (in order to use it for their transaction). If they cannot obtain the reference number they will have to commission a new EPC.
- 12.4 **The keeper of the Register can only supply copies of EPC's/underlying data to a restricted list of people.**  
In addition to giving information to those who quote the unique reference number (12.2) or (for non-dwellings) the property address (12.3), the keeper of the Register may disclose an EPC (and the Recommendations Report and/or data collected for the purpose of preparing either document) to the following people only. Anything else is an offence which can lead to a fine.
- 12.4.1 The accreditation scheme operator whose scheme accredited the energy assessor who prepared the EPC that is to be disclosed
- 12.4.2 (for dwellings only) an energy assessor who is assessing that dwelling or has been commissioned by the owner/tenant to do something for it in relation to that dwelling
- 12.4.3 (for dwellings only) to the Energy Savings Trust on an anonymous basis so that they can mass mail homeowners with details of the financial support available to them to improve their home's energy performance or for statistical research
- 12.4.4 the local authority/enforcement officers
- 12.4.5 the Secretary of State (on an anonymous basis) for statistical or research purposes
- 12.5 **Limited disclosure by third parties of EPCs.** Anyone other than the owner or tenant of the building concerned (who is free to give copies of EPCs, reports and

data to anyone) can only disclose those documents and data for limited purposes. Disclosure outside these restrictions is an offence. Disclosure is permitted where necessary to comply with the duty to provide an EPC, to the same range of people and purposes as outlined in 12.5, where disclosure is required by enforcement officers, and if it is needed to prevent crime.

- 12.6 **Will supporting data go on the register too?** Yes, but we are not sure how much data (see 4.5) Reg 31(2)

*We will have to wait and see what the practice is for commercial EPCs whose details are entered on the central register and whether this is done by submission of a computer data file recording the data that was plugged into the program which produced the EPC rating, or by submission to the register of copies of the documents and plans that the assessor was looking at when deciding what data to enter into that computer program (the latter is unlikely). Whichever it is, the ability to get a copy of it from the register will make later updating of the EPC much easier.*

- 12.7 **Getting supporting data from the seller/landlord/assignor.** To bolster what may be filed on the register, where an EPC has been done by the seller, it may be sensible to add a contractual obligation in the sale contract whereby the seller agrees to provide the data/plans/specifications to the buyer if asked. It would not be possible to rely on Reg 50 in this case, because following completion the seller has no continuing interest in, or occupation of the building, so is not obliged to cooperate.

Where it is a leasehold situation, it may be enough to rely on Reg 50 to ask the tenant/landlord to supply the data which underpin its EPC. However, since it is not clear how far the duty of cooperation requires people to go, it may be better to put an express covenant in the lease (either by tenant or landlord or both) to provide the data/plans/specifications which underpin its EPC. However, neither Reg 50 nor a contractual promise will work if the party you seek cooperation from does not actually have the data because their energy assessor never gave such data to them.

## Relevant Regulations

### 13 HOW DOES A DEC DIFFER FROM AN EPC AND WHEN IS IT NEEDED?

- 13.1 **A DEC shows the operational rating** for the premises in the previous twelve months and (where practicable) the two years before that, and (where an EPC has been obtained) the asset rating. The operational rating need not be shown in any DEC that is displayed by a new occupier of the building who has occupied for less than 15 months.
- The assessor will look at the consumption of energy over a 12 month period as well as the size, use and fabric of the building and the types of heating and ventilation equipment. Attached to the DEC will be an advisory report, which remains valid for 7 years.
- 13.2 **DECs are not required to be produced until 1<sup>st</sup> October 2008.**
- 13.3 **DECs will initially be needed only for buildings *with total useful floor area over 1000m<sup>2</sup>* which are occupied by public authorities OR by institutions providing public services to a large number of people and regularly visited by those people.** Rumour has it that all NHS buildings have been given special exemption from the DEC regime.
- The Regs are phrased badly, and it can be argued that*
- *a DEC is needed only where the building is occupied BOTH by a public authority and an institution providing public services, which would cut down the number of properties affected. Whilst arguable on the pure wording of the Rules this would be completely out of step with the Directive, so is probably wrong.*
  - *a DEC is required for buildings occupied by public authorities ONLY if they are regularly visited by the public. This requires a very strained use of English grammar and syntax and is again probably wrong.*
- 13.4 **A DEC is only required for the parts of the building occupied by the public authority or institution** (not the whole building).
- 13.5 **A DEC is to be produced by the occupier.** The typical tenant's covenant to comply with statute should pick up the obligation to provide a DEC.
- 13.6 **DECs are to be displayed in a public place at all times.** The need to have one is not just triggered by a prospective sale or lease, nor by construction/modification. The accompanying advisory report need NOT be displayed.
- 13.7 **A DEC is valid only for 12 months** so will need to be renewed annually.
- 13.8 **You still need an EPC** if there is a sale/letting/construction/modification (in addition to the DEC)
- 13.9 **The likelihood is that this DEC regime will be extended** to all buildings of the relevant size and public use, regardless of who is the occupier.
- 13.10 **There is no compulsion to act** on the advisory report issued with a DEC.

## 14 WHAT IS THE ENFORCEMENT REGIME FOR EPCS?

### 14.1 Failure to provide an EPC

Trading Standards are responsible for enforcement of the obligation to provide a valid EPC prior to sale or rental. Up to 6 months after expiry of the period in which it should initially have been produced they can ask the seller/prospective landlord to produce a copy of the EPC and recommendations report for inspection. Reg 39(4)

If an EPC exists but a copy is not supplied to Trading Standards within 7 days (not long) of such request, there is a fixed fine of £200 UNLESS the person so requested to produce the copy has a reasonable excuse for not complying with the request (e.g. the 7 days ran over a holiday period, or he was off work sick). Reg 43(1)(e)

If no EPC was produced under Reg 5, or the copy of it is not produced within 7 days of request without reasonable excuse, then a penalty notice can be issued, as long as this is done within the same 6 month period. The penalty notice must be withdrawn if the recipient can demonstrate that he took all reasonable steps and exercised all due diligence to avoid breaking his duty to make an EPC available or in the circumstances outlined in 3.6.. Reg 40(1)  
Reg 40(7)

If the penalty notice is upheld, then the recipient has to pay a fine equal to 12.5% of the rateable value of the property (from a minimum of £500 up to a maximum of £5000). If there is no rateable value then the fine is £750. Reg 43(1)(a)(ii)  
Reg 43(2)(d)(ii)

There is a period of 28 days to pay the fine. Reg 44

It is possible to appeal against a confirmed penalty notice. Reg 45

### 14.2 Are multiple fines possible?

Arguably if no EPC is commissioned despite the enforcement action Trading Standards can levy another penalty notice and another fine up to £5000 and this can be repeated as often as needed until an EPC is provided. The legislation is unclear. So paying £5000 is not yet a reliable alternative to commissioning an EPC. *If it is correct that the seller must produce an EPC in accordance with the penalty notice, or face the risk of repeated fines, this will raise some awkward questions where, by the time the enforcement action is taken successfully, the seller has parted with the property and the documents that go with it, so will not be able to give the assessor access to the building, or information in order to produce a certificate retrospectively. We are waiting to see what DCLOGs advice to Trading Standards officers on this point will be.*

### 14.3 Are Trading Standards going to enforce EPC legislation vigorously?

Trading Standards may not be geared up (in terms of manpower or resources) to pursue contravention of the EPC legislation on a wide basis initially. Enforcement may be very patchy. However, there are suggestions that Trading Standards will in due course use the open Land Register to track deals that would have precipitated a need for an EPC. The Trading Standards Officer can

issue a penalty notice “if he believes that a person has committed a breach of duty”. That belief does not have to be reasonable, nor does it have to have come about due to a complaint by an aggrieved buyer/tenant/assignee/owner.

There has been a suggestion that enforcement officers may be rewarded in some way for the number of successful penalty notices issued. This would provide an incentive to go looking for failures to comply with the legislation.

In order to counter a Trading Standards Officer’s allegation that no EPC was provided, sellers/landlords should keep details of the EPC they provided and recommendations report and its reference number for at least 6 months after completion of the transaction. Likewise they should keep evidence of having requested an EPC, even if it has not yet materialised.

- 14.4 **Building Control will enforce failure to provide a valid EPC on completion of construction or relevant modification** by simply refusing to give a completion certificate if evidence of supply of the EPC is lacking.
- 14.5 **Complaints about whether an EPC is of reasonable quality or sufficiently accurate** (i.e. negligence issues) should be referred to the relevant accreditation scheme for the assessor who produced it.
- 14.6 Since **failure to provide a valid EPC** when it should be provided becomes immune from challenge by Trading Standards after 6 months, where the parties have, by agreement, not supplied or received an EPC (e.g. on an intra-group transfer or on a surrender) they will be immune from enforcement if 6 months passes without a penalty notice being served.
- 14.7 **It seems extremely unlikely that a successor owner inherits the breach by his predecessor in failing to supply an EPC** e.g. new landlord buys a block and discovers the seller failed to give EPC to the new tenant to whom he granted lease 3 months earlier. Sadly the legislation is not clear on this. We would argue that the “relevant person” who should have provided the EPC was the person who was granting the lease ie the former owner, and that the enforcement action should therefore be taken against them.

## 15 EPCS FOR MIXED USE PROPERTIES

The application of the Regs to mixed use properties is extremely complex and not yet fully understood. To understand how the Regs apply to mixed use properties it is necessary to understand how they apply to individual dwellings.

- 15.1 **For some time an EPC has been needed for a dwelling** (meaning a building or part of a building occupied or intended to be occupied as a separate dwelling (and includes one that is being or is to be constructed)) **if a Home Information Pack (HIP) is required on the sale of the dwelling** as an EPC is one of the mandatory contents of a HIP.

Part 5 Housing Act  
2004

Where any dwelling is marketed for sale (other than in the circumstances set out in 15.3), it is necessary to prepare a HIP (unless marketing started before the relevant date on which HIPs became necessary for that category of dwelling (according to the number of bedrooms)). Until 1 June 2008 there was a derogation in place that allowed marketing to start so long as a HIP had been ordered (i.e. it did not actually need to have been obtained).

The Home  
Information Pack  
(Amendment)  
Regulations 2007

- 15.2 Sales of new dwellings built to the most recent Building Regulations (Regulation 17C, Part L 2006) were exempt from the requirement for a HIP until 6 April 2008. Any new dwellings put on the market on or after that date required a HIP. In addition if completion of the *construction* of such a dwelling takes place on or after 6 April 2008, an EPC must be prepared under the Regs whether or not a HIP is required.

The Housing Act  
2004  
(Commencement  
No 11) (England &  
Wales) Order, Reg  
8 and Sched 2

- 15.3 **Until 30 September 2008 certain transactions were exempt from the requirement for a HIP, including:**

Reg 5 of HIP Regs  
Guidance Pg 11

- properties being sold without vacant possession
- non-residential property
- residential property being sold for non-residential use
- holiday accommodation
- residential property being sold together with non-residential property where the seller makes it clear that the residential property will not be sold separately
- portfolio of residential properties where the seller makes it clear that properties will not be sold individually
- residential property that is unsafe for occupation
- property due for demolition
- residential property that is sold without being marketed
- residential property that is being let at a market rent (not a lease granted at a premium)

**From 1 October 2008**, an EPC will be needed on sale in all the above circumstances and for all lettings of dwellings even though a HIP is not required. The only exception is property due for demolition where an EPC will never be required so long as the relevant tests are satisfied.

- 15.4 **Where a building comprises more than one dwelling (e.g. a block of flats), a**

Guidance Para



|      |                                                                                                                                                                                                                                                                                                                                         | <b>Relevant Regulations</b>        |
|------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------|
|      | <b>separate EPC will be required for each dwelling.</b> No EPC will be needed for any common parts.                                                                                                                                                                                                                                     | 4.2.1 and Example A3               |
| 15.5 | <b>Where a building comprises both residential and non-residential property each accessed separately.</b> A separate EPC will be required for each dwelling, and the owner has a choice whether the non-residential property is dealt with by one EPC for the whole of the remainder of the building or by separate EPCs for each unit. | Reg 11(8)<br>Guidance Para 4.2     |
| 15.6 | <b>Exceptionally, where a building comprises both residential and non-residential property and access to the residential part is through the non-residential part</b> (e.g. living accommodation above, and accessed through, a ground floor shop), <b>the requirement for a separate EPC for the residential part does not apply.</b>  | Guidance Para 4.2.1 and Example A4 |

**16 EPCS FOR AUCTION SALES**

The EPC need not be made available in the auction catalogue.

Guidance Para 4.1

However it must be made available to prospective buyers/tenants (eg as part of a pack) at the normal point in time (see 3.1).

Reg 6

If the auction catalogue includes two or more of the following: a floor plan or plans, descriptions of room sizes or photographs of the building, then it must also include the asset rating, displayed in the approved format, in the catalogue (even though the EPC itself need not be in the catalogue).

**WARNING**

This note has been produced by members of the London Property Support Lawyers Group and of the Association of Property Support Lawyers.

It represents their best interpretation of the legislation and Government Guidance but has not been approved by any representative of DCLOG. Any statements in it of DCLOG views are not legally enforceable. The note does necessarily represent the views of all members of those Groups on all points covered by the note.

As will be apparent, there are areas of the legislation and Guidance which are unclear. The note is intended as an exposure draft, to stimulate discussion and ultimate clarification of the EPC regime. No warranty is given that the contents are complete or accurate. If definitive advice is sought on the issues covered by this note, specific legal advice should be commissioned from your normal legal advisers.

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