

THE ENERGY PERFORMANCE OF BUILDINGS (CERTIFICATES AND INSPECTIONS) (ENGLAND AND WALES) REGULATIONS 2007

This note is not intended to provide a comprehensive summary of the changes taking effect on the 6th April 2012 but simply aims to answer the most popular questions.

Please note:

The Department is unable to provide Legal advice and in any case we cannot provide a definitive interpretation of the law as only the Courts are able to do this. Nonetheless, we hope this information in relation to your query is helpful.

You may need to consult the legislation itself to see how it applies in your circumstances; it is your own responsibility to ensure that you comply with the legislation.

Should you require further clarification you should seek your own Legal advice.

This information may be updated by the Department as required.

Current Regulations: Key facts

- The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (the EPB Regulations) are the Regulations which deal with the duties to provide Energy Performance Certificates (EPCs) when buildings are constructed sold or rented out, the display of certificates (DECs) in certain public buildings and regular inspections of air conditioning systems.
- Sellers and landlords (referred to as the 'relevant person') are responsible for providing EPCs to prospective buyers and tenants.
- For sales of domestic properties only, an EPC must be available or have been commissioned before the property is put on the market and a person marketing on the relevant person's behalf (e.g. an estate agent) must be satisfied that this has happened before they start marketing.
- Local Weights and Measures Authorities (usually referred to as Trading Standards Officers) are responsible for enforcing the duties.
- Trading Standards Officers are also responsible for ensuring that owners of air-conditioning systems (over 12kW) are in possession of an inspection report. Systems also have to be inspected at least once every five years.
- Trading Standards Officers have powers to investigate, require the production of EPCs and serve penalty notices for failure to comply with duties in respect of EPCs or air-conditioning inspection reports.

Amended Regulations (Statutory Instruments 2011/2452 and 2012/809)

The amended Regulations will come into force on 6 April 2012. A copy of the amendments and the Explanatory Memoranda can be downloaded at:

<http://www.legislation.gov.uk/ukxi/2011/2452/introduction/made>

<http://www.legislation.gov.uk/ukxi/2012/809/regulation/1/made>

Changes affecting Energy Performance Certificates

1. Change to Regulation 5 - Clarifying when an EPC is required

Regulation 5 places a duty on the relevant person to make an EPC available free of charge to prospective buyers and tenants. The current rules provide that the EPC must be made available at the earliest opportunity and in any event before entering into a contract to sell or rent the building or, if earlier, when information in writing is first given to such a person who requests information about the building, or when the building is first viewed by such a person.

It is the responsibility of the relevant person to make sure that the EPC is made available to prospective buyers and tenants, even if, in practice, this is done by someone else (e.g. an estate agent or managing agent).

The amendment will delete the words '*before entering into a contract to sell or rent the building*' from Regulation 5(2)(b). The deletion of this phrase is intended to counteract the mistaken belief that it is legitimate to delay providing an EPC until the end of the transaction. The amendment will provide that the EPC must be provided at the earliest opportunity and no later than whichever of the following actions first takes place:

- when the relevant person provides information in writing about the building to a person who has requested it;
- when a pre-arranged viewing of the building takes place.

Q & A

Why are you making this change?

The amendment is intended to counter the erroneous belief that the provision of the EPC can legitimately be delayed until shortly before the parties enter into a contract for sale or rent.

How do you know there is a problem?

One industry survey found that 36% of estate agents believed that the EPC was only required at the point of sale.

Have you consulted on the change?

Yes. More than 90% of respondents to the Consultation Paper '*Making better use of Energy Performance Certificates and Data*' (DCLG May 2010) agreed with this action in order to make it absolutely clear that the EPC should be made available earlier in the process.

I have employed an estate agent to sell my home – are they responsible for providing a copy of the EPC to potential buyers?

No. It is ultimately the responsibility of sellers and landlords to ensure that an EPC is made available to potential buyers and tenants. The responsibilities of those acting on behalf of the relevant person are detailed in Regulation 6.

When should the EPC be made available under the new regulations?

The EPC should be made available as early as possible and in particular, when a prospective buyer or tenant requests information in writing or views the property in question. In addition, the seller or landlord must ensure that an EPC has been given to the person who ultimately becomes the buyer or tenant.

Can 'first day marketing' occur if the EPC is not available?

There is nothing in the amended provisions which would prevent 'first day marketing' within the first 7 days if an EPC has not been made available. The amended provisions require that an EPC is commissioned before the building is marketed. An EPC is not required to be available before or at the point that a property is marketed.

2. Changes to Regulation 5A – Commissioning an EPC before marketing

Under the current rules, Regulation 5A only applies to residential property sales. In cases where an EPC is not available, Regulation 5A(2) places a duty on the seller to ensure that an EPC has been commissioned before the property is put on the market.

Regulation 5A(3) provides that a person acting on behalf of the seller (e.g. a property or letting agent) must be satisfied that an EPC has been commissioned before they start marketing on the seller's behalf.

In cases where marketing starts without an EPC, Regulation 5A(4) provides that the seller and the person acting on behalf of the seller must use all reasonable efforts to ensure that it is obtained within 7 days of the start of marketing.

The changes being made will apply the duties in Regulations 5A(2) and 5A(3) to all buildings and to the 'relevant person'. This will have the effect of extending to all property transactions the duty to either have or to have commissioned an EPC before a building is advertised for sale or rent. This will result in:

- a new duty on sellers or landlords of non domestic buildings and domestic rentals to either have or have commissioned an EPC before marketing a building for sale or rent and
- a new duty on persons acting on behalf of the seller or landlords of such properties (e.g. an estate agent or letting agent) to satisfy themselves that an EPC is available or has been commissioned before marketing can begin.

Regulation 5A(4) has been amended to provide that the relevant person and the person acting on their behalf must use all reasonable efforts to ensure that the EPC is obtained within 7 days of the start of marketing (i.e. the period has been reduced from 28 days). In addition, the new Regulation 5A(4A) provides that the EPC must be obtained within the period of 21 days following the expiry of the 7 day period mentioned in 5(A)(4).

The effect of this is to provide an absolute duty to obtain an EPC within 28 days of the property going on the market. If the property remains on the market after the expiry of the 28 days, Trading Standards Officers may serve a penalty notice even if there is a legitimate reason for the delay.

Q & A

Why are you making this change?

The requirement to either have or to have commissioned an EPC before marketing starts in all cases will ensure that prospective buyers and tenants see the EPC much earlier in the process.

When does the change come into force?

The new regulations come into force on 6 April 2012 and will apply to buildings put on the market on or after that date.

How can a property or letting agent be sure that the relevant person has commissioned an EPC?

Agents will have to satisfy themselves that an EPC is either available or has been commissioned before they start marketing on behalf of the seller or landlord. Trading Standards Officers can ask for evidence of this.

It is unreasonable to reduce the period in which the EPC is expected to be obtained from 28 days to seven days

Evidence shows that most EPCs are obtained within three days so this should not be a challenge in most cases. A further 21 days is allowed if after using all reasonable efforts the EPC cannot be obtained within seven days.

Can 'first day marketing' occur if the EPC is not available?

There is nothing in the amended provisions which would prevent 'first day marketing' within the first 7 days if an EPC has not been made available. The amended provisions require that an EPC is commissioned before the building is marketed. An EPC is not required to be available before or at the point that a property is marketed.

What happens after 28 days if the EPC is still unavailable?

If the building is still on the market after 28 days, Trading Standards Officers may choose to serve a penalty notice.

What is the penalty for a breach?

For residential buildings the penalty is £200. For non residential buildings the penalty is a sum equivalent to 12.5% of the rateable value of the building, subject to a minimum of £500 and a maximum of £5,000.

Who will be liable for the penalty charge?

If the relevant person or a person acting on their behalf has not obtained an EPC after the 28 day period they may be liable for a penalty charge.

3. Changes to Regulation 6 – Written Particulars

Under the current Regulations, Regulation 6 places a duty on the relevant person or another person acting on their behalf to include energy information with any written particulars that have been prepared for people who may be interested in buying a residential building.

Written particulars are a description of the property given to such persons by the seller or someone acting on the seller's behalf. When a valid EPC has been obtained, Regulation 6(2) provides that the written particulars must either include the asset rating from the EPC (i.e. the graph showing the energy efficiency rating and the environmental impact), or, alternatively, the EPC itself (though not the recommendation report) may be attached to the particulars. Regulation 6(3) provides the current definition of written particulars.

The giving of written particulars includes making them available electronically, such as in an email or as information on a website.

Regulation 6(1) has been amended to apply the duties to all buildings being marketed for sale or rent.

Regulation 6(2) has been amended to remove the option to include the asset rating in written particulars. This means that a copy of the first page of the EPC must be attached in all cases.

The new Regulation 6(3) provides two new definitions for written particulars, one for buildings to be sold and one for buildings to be rented. In relation to a building to be sold, the duties apply to a written description of the property which includes at least two of the following:

- a photograph of the building or any room in the building,
- a floor plan of the building,
- the size of the rooms in the building, or
- the measured area of the building.

In relation to a building to be rented out, the duties apply to a written description of the property which includes at least two of the following:

- a photograph of the building or any room in the building,
- a floor plan of the building,
- the size of the rooms in the building,
- the measured area of the building, or
- the proposed rent.

The new Regulations 6(4) and 6(5) provide that the relevant person or a person acting on their behalf may omit the address from the EPC that is attached to written particulars provided under Regulation 6(2). Regulation 6(4)

does not apply to residential properties. The requirements of the EPB Regulations will continue to apply where an EPC is provided in other circumstances, however, so that an EPC provided to a potential buyer or tenant under regulation 5(2), for example, must include the address.

Q & A

Why is it no longer appropriate to include the asset rating with the written particulars as before?

The requirement to attach a copy of the first page of the EPC will ensure that prospective buyers and tenants see the key recommendations attached to the EPC.

When does the change come into force?

The new Regulations will come into force on 6 April 2012 and will apply to buildings put on the market on or after that date. There will be no requirement to change the written particulars for buildings already on the market before this date.

Are buildings on the market before 6 April 2012 required to comply with the new Regulations?

Provided that the building has been **continuously marketed** since before the common commencement date of 6 April 2012 and there is no **break in the marketing**, then the new Regulations will not apply to buildings currently on the market.

Does the whole EPC have to be attached to the written particulars?

No only a copy of the first page.

Can the EPC be re-sized and provided in an A5 format?

The EPC can be reproduced in a smaller size provided it is still legible and meet any other legal obligations, such as the Equality Act 2010.

Does the copy EPC have to be in colour?

No a black and white copy is acceptable.

Do the regulations also apply to electronic written particulars on internet sites?

Yes. The EPC Register Operator has provided a technical solution which will enable property agents to retrieve the EPC from the Register and to attach it to on-line written particulars. This service has been provided at the request of property agents. More detailed information for property agents is available on request at: EPC.Enquiry@communities.gsi.gov.uk

Can anyone register to have access to the Property Agents EPC Retrieval Service?

No, this service has been set up at the request of property agents so that they are able to meet the obligation to attach the EPC where written particulars are given to prospective buyers or tenants. Only property agents who will need to comply with the regulations will be able to register to use this service.

How will the Property Agents EPC Retrieval Service operate?

Following successful completion of a registration process, property agents will be able to request a URL link for an EPC lodged on the central Register when they have provided the Register Operator with details of the Report Reference Number for the building in question. The URL can then be passed to those organisations responsible for preparing internet or on-line property details or to prospective buyers or tenants if written particulars are provided electronically.

Do the regulations apply to all property adverts?

No. Only the more detailed descriptions (referred to as written particulars) produced for potential buyers or tenants as defined by the Regulations. In essence this is where an agent provides written particulars to a person (i.e. a specific individual) who may be interested in buying or renting the building.

Do newspaper adverts or window cards for property lets meet the definition of written particulars?

No. The requirement to attach a copy of the front page of the EPC to written particulars is where an agent provides written particulars to a person (i.e. a specific individual) who may be interested in buying or renting the building. This implies that a copy of the front page of the EPC does not need to be attached to 'advertising material', i.e. a newspaper or window card.

Why has 'proposed rent' been included in the description of written particulars?

Compliance in providing an EPC for rental buildings has been particularly poor compared to sales. The inclusion of the 'proposed rent' in the definition of written particulars is necessary to address the imbalance between sales and the rental sector.

Will auction catalogues be captured by the new requirements?

If the details in the auction catalogue meet the definition of written particulars, as defined in the Regulations, then an EPC will need to be included with the details of those properties. The option of including an asset rating only will no longer apply.

Do buildings advertised for sale or rent on property portals require an EPC to be attached to those details?

Where the relevant person or a person acting on their behalf intends to make information available on a website and the information provided meets the definition of written particulars then a copy of the first page of the EPC must be attached to those details.

What does 'attached' mean?

If property or letting agents wish to attach the first page of the EPC by including it in the brochure itself this is acceptable. If property or letting agents wish to attach the first page by fastening, affixing or joining the EPC to the written particulars this is also acceptable.

In brochures and auction catalogues, must a copy of the first page of the EPC be included on the same page as the written particulars?

There is no requirement for the written particulars and the EPC relating to that building to be on the same page. It must, however, be clear from the brochure or auction catalogue which written particulars the EPC refers to and that the EPC is legible. In these circumstances the EPC and written particulars do not have to be included on the same page.

Where the address of the building is not included in the written particulars can the address be omitted from the EPC?

The address of the non residential building can be concealed from the EPC if the address has also been omitted from the written particulars. Where there is a confidentiality issue surrounding a commercial property transaction, the EPC Register Operator has provided a technical solution to enable the EPC to be retrieved from the EPC Register and attached to on-line written particulars with the address removed. The Regulations only allow the Register Operator to remove the address from a commercial EPC. This enhanced service has been provided at the request of property agents. More detailed information for property agents is available on request at:

epc.enquiry@communities.gsi.gov.uk

Can the address be removed from the domestic EPC?

No, the Regulations do not permit this. Following discussions with property agents representatives it was agreed there was no requirement to extend this service to domestic sales and rentals.

Why is the Register Operator charging a fee of £0.50 for the enhanced Property Agents EPC Retrieval Service?

The enhanced service, which will enable the address of a commercial building to be removed from the EPC if the written particulars also exclude the address, was specifically set up at the request of property agents. We, therefore, believe it is not appropriate for the tax payer to subsidise the cost of providing this service through the Register lodgement fee.

Will general marketing details, which do not provide specific information about a building, require an EPC to be attached to the written particulars?

If the information provided in the general marketing details meet the definition of written particulars as defined in Regulation 6 of the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations (as amended) then a copy of the first page of the EPC must be given to prospective buyers or tenants with those particulars.

Do I need to publish the full address of the property in marketing material because of these Regulations?

No. Only the more detailed descriptions (referred to as written particulars) produced for potential buyers or tenants will require this. In essence this is where an agent provides written particulars to a person (i.e. a specific individual) who may be interested in buying or renting the building.

Will the use of Quick Response codes in property brochures meet the requirement to attach a copy of the first page of the EPC to written property details?

We do not consider that providing a copy of an EPC solely by way of a Quick Response code in a property brochure would meet the requirement to attach a copy of the first page of the EPC to written particulars for prospective buyers or tenants. It is important to recognise that the person giving the written particulars must ensure that a copy of the EPC has been provided in readable form to all prospective buyers and tenants.

4. Changes to Regulations 39, 40 & 43

The new Regulation 39(1A) makes the new duty under the newly inserted Regulation 5A(4A) one which is enforceable. Regulation 39 now provides enforcement authorities with the power to require the production of evidence that an EPC has been commissioned. Regulation 40 has been amended to make this duty one in relation to which a penalty charge notice can be given and a consequential amendment has been made to Regulation 43.

Q & A

What kind of evidence will Trading Standards Officers accept as proof that an EPC has been commissioned?

The Regulations do not specify this but could be written confirmation from the seller or landlord that an EPC has been commissioned or a copy of the commission itself. This is a judgement call for the Trading Standards Officer.

5. General Q & A on EPCs

What is an Energy Performance Certificate (EPC)?

The EPC must have been prepared by an accredited energy assessor. Domestic EPCs give buildings both an energy performance and an environmental impact rating on a scale of A-G. Non-domestic EPCs are slightly different in that they only give buildings an energy performance rating. EPC ratings are similar to consumer-friendly fridge ratings and are based on factors such as age, property layout, construction, heating, lighting and insulation.

The ratings for both domestic and non-domestic EPCs are standard so the energy efficiency of one building can easily be compared with another building of a similar type. Both domestic and non-domestic EPCs also include a recommendation report advising property owners or occupants on cost effective ways to improve its energy efficiency. The certificate will also show the rating that could be achieved if all the cost effective recommendations were implemented.

What is a Display Energy Certificate (DEC)?

A DEC, which must be prepared by an accredited energy assessor, and provided for all public buildings over 1,000m², gives a building an energy performance operational rating on a scale of A-G similar to that for EPCs. It shows the actual amount of energy used in a given 12 month period and must also be accompanied in the first year by an advisory report on how to improve the energy performance of that building.

A recast of the Directive, to be implemented in 2013, will reduce the threshold for public buildings to 500 m². This threshold will fall to 250m² in 2015. Additionally, in commercial buildings above 500 m², which are frequently visited by the public, an EPC, where it already exists, must be displayed.

Why have an EPC? Are they necessary?

From 1 October 2008 it has been a legal requirement for all buildings whenever sold, rent or let to have one. They are necessary because buildings are responsible for almost 50% of the UK's energy consumption and carbon emissions. If the Government is to reach its target of reducing carbon emissions by 60 per cent by 2050 the energy efficiency of buildings needs to be improved. EPCs and DECs are therefore an important part tool in achieving the Government's overall carbon reduction targets. However, it will be critical to improve the quality of EPCs if they are to fulfill their potential.

What is the Energy Performance of Buildings Directive?

The Energy Performance of Buildings Directive is a European Union Directive (EPBD) intended to tackle climate change by reducing the amount of carbon produced by buildings across the EU. There is now an overwhelming body of scientific evidence that indicates that climate change is a serious and urgent issue. While there are some remaining uncertainties about the eventual impacts, the evidence is now sufficient for the pressing need for action. The

Climate Change Act 2008 commits the UK to making at least an 80% cut in greenhouse gas emissions by 2050. Nearly half of all carbon emissions in the UK come from buildings. Article 7 of EPBD requires all buildings that constructed, sold or rented out to have an EPC. EPCs mean that for the first time consumers will know how energy efficient those buildings are, and how to make them perform better.

What have we introduced to implement the Energy Performance of Buildings Directive?

Article 7 of the Directive requires any building which is sold, rented out or constructed to have an EPC which has been issued by a qualified and accredited assessor in an independent manner. This part of the Directive has been implemented into law in England and Wales by the Energy Performance of Buildings Regulations (2007/991).

Through these we have introduced a package of measures including:

- EPCs for all properties providing A-G efficiency ratings and recommendations for improvement;
- requiring public buildings to display energy certificates;
- requiring inspections for air conditioning systems and
- giving advice and guidance for boiler users.

Does the EU Directive apply to Scotland, Wales and Northern Ireland?

The EU Directive applies in all Member States although the implementation differs from region to region. The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 only apply in England and Wales. Scotland and Northern Ireland have both introduced their own separate regulations.

How does the EU Directive affect newly built homes?

For all homes that are physically completed on or after 6 April 2008 there is a requirement to provide an EPC to the owner, with evidence shown to building control.