

EXPLANATORY MEMORANDUM TO
THE ENERGY PERFORMANCE OF BUILDINGS (CERTIFICATES AND
INSPECTIONS) (ENGLAND AND WALES) (AMENDMENT)
REGULATIONS 2011

2011 No. 2452

1. This Explanatory Memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These regulations amend the Energy Performance of Buildings (Certificate and Inspections) (England and Wales) Regulations 2007 (“the 2007 Regulations”) by, first, making it mandatory for owners of air conditioned buildings to lodge inspection reports of air conditioning systems (above 12kW) on the England and Wales central Register kept on behalf of the Secretary of State. They also make a number of changes to the system of compliance and enforcement in respect of energy performance certificates (EPCs) by, in particular, extending the compliance and enforcement regime under the 2007 Regulations which applies only to domestic sales, to all buildings marketed for sale or rent.

2.2 The 2007 Regulations implemented Articles 7.9 and 10 of the Energy Performance of Buildings Directive (OJ No L 1, 4.1.2004) (‘the Directive’)¹. In particular, as far as the amendments brought about by this instrument are concerned, Article 7 of the Directive relates to EPCs on the sale, renting out and construction of buildings and Article 9 relates to the inspection of air conditioning systems.

3. Matters of special interest to the Joint Committee on Statutory Instruments or Select Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The background to the 2007 Regulations was covered fully in the Explanatory Memorandum which accompanied them.

4.2 A copy of the Directive can be found at:
http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_001/l_00120030104en00650071.pdf

4.3 The 2007 Regulations (as amended), so far as they are relevant to the amendments in these Regulations:

¹ Directive 2002/91/EC.

- a) require that an EPC and report providing recommendations as to how the energy efficiency of the building can be improved is made available (regulation 5);
- b) require a seller of residential property to secure or commission an EPC before marketing is commenced, and require the person acting on their behalf to be satisfied that this has been done. Both persons are placed under a duty to use all reasonable efforts to secure an EPC within 28 days of the property being put on the market (regulation 5A);
- c) provide that a seller of residential property or person acting on their behalf should attach an EPC or asset rating to the written particulars of the property (regulation 6);
- d) provide that air-conditioning systems over 12kW are inspected every 5 years (regulation 21) and an inspection report is obtained (regulation 22); and
- e) ensure that the duties under the 2007 Regulations are enforced by every Local Weights and Measures Authority, who have the power to require the production of certain documents (regulation 39) and to give a penalty charge notice for breach of any duty (regulation 40).

4.4 The amendments made by these regulations are designed to improve various practical aspects of the functioning of the provisions outlined above, to achieve better compliance. The effects of the amendments are as follows:

- a) regulation 2(2) removes a definition of 'residential property' that is no longer necessary, consequential upon the change described in paragraph f) below;
- b) regulation 2(3) makes a minor drafting change to make it clearer when an EPC should be shown to a prospective buyer or tenant;
- c) regulation 2(4) extends the duties in regulation 5A to non residential buildings and to rental transactions;
- d) regulation 2(4)(c) reduces the period for securing the EPC from 28 days to 7 days;
- e) regulation 2(4)(d) introduces a new duty (inserting new paragraph (4A) into regulation 5A of the 2007 Regulations) to ensure that if an EPC is not obtained within the initial 7 day period it must be obtained within a further period of 21 days;
- f) regulation 2(5)(a) and (b) extend the requirements of regulation 6 to non residential buildings and to rental transactions;
- g) regulation 2(5)(c) removes the option of including the asset rating in written particulars so that the first page of the EPC has to be attached in all cases;

h) regulation 2(5)(d) provides a new definition of 'written particulars' which is different depending upon whether a building is sold or rented out;

i) regulation 2(5)(e) provides that the relevant person or a person acting for that person may have the address redacted in the EPC that is used for marketing purposes (under the terms of regulation 6 of the 2007 Regulations). The requirements of the 2007 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) must include the address;

j) regulation 3 amends regulation 31 (registration of certificates etc) by requiring the Secretary of State to maintain air conditioning inspection reports on a Register and imposes a duty on energy assessors to enter such an inspection report on the Register. An amendment is made to regulation 32 (fees for entering onto Register) so that a fee can be charged for lodging an inspection report on the Register. A number of minor consequential amendments are also made to other Parts of the 2007 Regulations to take account of the main changes described in this paragraph;

k) regulation 3(8) makes the new duty under the newly inserted regulation 5A(4A) one of which is enforceable. Regulation 3(9) amends regulation 39 (power to require production of documents) to provide enforcement authorities with a new power to require the production of evidence that an EPC has been commissioned. Regulation 3(10) makes this duty one in relation to which a penalty charge notice can be given under regulation 40. A related amendment is made to regulation 43 (penalty amount);

4.5 It is government policy to review provisions which take effect from EU measures and provision is made by regulation 5 to review these amendments made to the 2007 Regulations five years from the date of coming into force.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

The Directive and climate change policy

7.1 As part of its ongoing obligations under the Directive the Government has been monitoring the enforcement and compliance requirements implemented in the 2007 Regulations in order to determine the effectiveness of that regime. Further to that monitoring process the Government consulted

on a wide range of issues in its Consultation paper: 'Making better use of Energy Performance Certificates and data: Consultation'² (the Consultation paper). In particular, views were sought on proposals for:

- making better use of the energy performance data by extending and managing access to EPC data held on the England and Wales central Register;
- enabling Local Authorities (LAs) to use EPC data to support development of wider purposes such as support of local Carbon Frameworks as set out in the Household Energy Management Strategy (HEM) 2010;
- EPCs for houses in multiple occupation (HMOs) when rooms in such buildings are rented out;
- EPCs for short-term holiday lets;
- property adverts to show the EPC rating;
- extending the use of DECAs to commercial buildings;
- making lodgement of air conditioning reports on the England and Wales central Register mandatory; and
- clarifying when EPCs are required for sale or renting out of domestic and non domestic properties.

7.2 More recently an informal review of the Energy Performance of Buildings regime has been carried out which invited a range of partners to contribute to the debate on the future of EPCs and DECAs in the context of the Green Deal.

7.3 Therefore, in the context of the Consultation and its continuing obligation to monitor the effectiveness of the 2007 Regulations the Government has proposed a number of changes to the compliance and enforcement regime for air conditioning and EPCs.

Air conditioning

7.4 This instrument takes forward proposals in relation to lodgement of air conditioning reports. The 2007 Regulations require that written reports be produced after each regular inspection of air conditioning systems. The Directive requires that these inspections are carried out every five years. These inspection reports must include an assessment of the air conditioning efficiency and the sizing of the system compared to the cooling requirements and appropriate advice on possible improvement or replacement of the system and possible alternative solutions. Although there was no requirement to lodge inspection reports, assessors were encouraged to do so on a voluntary basis.

7.5 There is a requirement to lodge EPCs and accompanying recommendation reports and DECAs and accompanying advisory reports on the central England and Wales Register kept on behalf of the Secretary of State. The central England and Wales Register enables the Secretary of State to

² The Consultation paper was published on 2nd March 2010 and can be found at the following link: <http://www.communities.gov.uk/documents/planningandbuilding/pdf/1491167.pdf>

monitor the quality of those documents and also compliance with the requirements of the 2007 Regulations.

7.6 The amendments made in this instrument make it mandatory for air conditioning inspection reports to be lodged on the central England and Wales Register and for a fee to be charged on lodgement. This will put the lodgement of air conditioning reports on the same footing as EPCs and DECAs and will enable the Government to assess the quality of the inspection reports and monitor compliance with the requirements under the 2007 Regulations with a view to improving compliance with the requirements for inspection reports.

Enforcement of and compliance with EPC requirements

7.7 The instrument takes forward a number of proposals to ensure that the obligation in Article 7 of the Directive, that sellers and landlords provide an EPC on sale or rent is met.

7.8 Clarifying when an EPC is required (amendment to Regulation 5)

7.8.1 This amendment to the 2007 Regulations will clarify when an EPC is required. It will require the 'relevant person' to make the EPC available to prospective buyers or tenants as early as possible and in particular, when a prospective buyer or tenant requests information in writing or views the property in question. The amendment will remove an erroneous belief that the provision of the EPC can be delayed until shortly before the parties enter into a contract for sale or rent.

7.9 Making the EPC available within 7 days of marketing

7.9.1 Regulation 5A of the 2007 Regulations provides that, for domestic sales only, there is a duty on the seller to ensure that an EPC is either available or has been commissioned before the property is put on the market. There is also a complementary duty (under paragraph (3) of Regulation 5A) on the person acting on behalf of the seller to be satisfied that an EPC exists or has been commissioned before they start marketing the property on the seller's behalf. In cases where marketing starts without an EPC, paragraph (4) of Regulation 5A provides that both parties must use all reasonable efforts to ensure that the EPC is obtained within 28 days of marketing.

7.9.2 When Home Information Packs (HIPs) were suspended in May 2010 the duty to ensure that either an EPC was available or had been commissioned was retained for sales of residential property. There was no obligation for EPCs to be obtained at the marketing stage for non domestic sales and rentals and domestic rentals. Where marketing starts without an EPC, the seller or the person acting on behalf of the seller must use all reasonable efforts to ensure that the EPC is available within 28 days of the start of marketing. This 28 day period was allowed for the production of a HIP and this period was retained following the suspension of the HIP. The 28 days may have been appropriate for the purposes of a HIP as some of the required documents could take a

while to assemble (e.g. evidence of title for the sale of an unregistered property) but this does not apply to the production of the EPC. A survey of almost 13,000 EPCs provided by Niche Communications UK in the period covering June – December 2010 reported that the average time taken was 3.3 days.

7.9.3 A reduction of the period during which the EPC is expected to be made available is therefore not unreasonable and will address the problems associated with the current 28 day period. The change being proposed will allow marketing to start without an EPC where one has been commissioned. If the EPC is not available after 7 days the parties must continue to make reasonable efforts to obtain it as soon as possible.

7.10 An absolute duty to obtain an EPC within 21 days where it is not obtained within the initial period of 7 days.

7.10.1 A new duty is introduced to ensure that where an EPC is not obtained within the (new) period of 7 days the relevant person has to secure an EPC within a further 21 days. There is not a defence of using reasonable efforts after the further period of 21 days has expired.

7.11 Requirement for an EPC to be obtained or commissioned before a property is marketed for sale or rent

7.11.1 Under the 2007 Regulations, the requirement to have commissioned an EPC before marketing starts only applies to sales of domestic properties. Enforcement Authorities have reported that they are unable to identify the relevant person for non domestic sales and rentals and domestic rentals as these properties are usually marketed through a third party (e.g. an estate agent or letting agent). The amendment will change this and will ensure that an EPC is obtained before or shortly after a property is put on the market for sale or rent. In effect, the proposed duties will apply to others acting on behalf of the relevant person e.g. estate or commercial agents. This will ensure better compliance and increase the likelihood that potential buyers and tenants see the EPC before they take a decision on whether to buy or rent the property in question. The requirement to either have or to have commissioned an EPC before marketing starts in all cases will also make non compliance easier to detect and enforcement less difficult.

7.12 Requirement to attach EPC to written particulars

7.12.1 At present, for domestic sales only, the seller or person acting on their behalf (e.g. their estate agent) is required to either attach the EPC to any written particulars for the property or to include the EPC rating in the written particulars. The amendments will change this so that, in future, the first page of the EPC must be attached to the written particulars in all cases. The amended rule will also apply to domestic rentals and non domestic sales and rentals. This amendment will make it more likely that potential buyers and tenants see the recommendations attached to the EPC, rather than just the rating and will therefore meet the objectives of the EPBD more effectively.

7.13 Omission of address from EPC attached to written particulars in certain circumstances

7.13.1 Following consultation with industry bodies and partner organisations, a decision was taken to preserve the confidentiality of certain transactions. Therefore, further provision is made which will enable the removal of the address of the building from the first page of the EPC that is attached to written particulars but only where the seller or landlord decides to withhold the address from the particulars. The address of the building cannot be removed from an EPC which is made available to potential buyers and tenants in other circumstances – e.g. under regulation 5(2) or which is handed over to the new owner or tenant under regulation 5(5).

7.14 Power to require production of documents

7.14.1 Local Authority Weights and Measures Authorities are responsible for enforcing the duties set out in the 2007 Regulations. Regulation 39 gives Trading Standards Officers a power to require a relevant person (i.e. the seller or landlord) to produce a copy of the EPC and the associated recommendation report for inspection and to take copies if necessary. Under the amended regulations these powers are extended in relation to the duty (under regulation 5A(3)) to ensure that the relevant person and a person acting on his behalf (e.g. an estate agent) have secured the commissioning of an EPC before marketing starts. Estate agents are already under a duty to ensure that an EPC is available or has been commissioned before they start marketing and to include energy information in written particulars under regulation 6 of the 2007 Regulations. The duties are enforced by Trading Standards Officers, who may serve a penalty notice in the case of a breach.

7.14.2 In cases where marketing starts before the EPC has been obtained, sellers and landlords and other persons acting on their behalf should be able to demonstrate that an EPC has been commissioned. The changes being proposed will amend Regulation 39 of the 2007 Regulations to enable enforcement authorities to require the production of this evidence.

7.15 Consolidation

7.15.1 A recast of the Directive³ (the recast Directive) has now been made and the Government will be implementing further obligations under that Directive in 2012. A new transposition note to cover the recast Directive (aligned with the consolidated regulations) will be provided at that time. As this is the seventh time that the 2007 Regulations have been amended, the Department will take the opportunity to consolidate the legislation when the recast Directive is implemented in 2012.

³ Directive 2010/31/EU.

8. Consultation outcome

8.1 The Consultation paper sought views on the following proposals:

- making lodgement of Air Conditioning Inspection Reports on the England and Wales central Register mandatory and
- clarifying when EPCs are required for sale or renting out of domestic and non domestic properties.

8.2 The outcome of the consultation was that 85% of respondents were in favour of the proposal to make air conditioning lodgements a statutory requirement whilst 70% agreed with the proposed fee associated with the lodgement. We are also aware of support from some Accreditation Schemes who would like to see the same requirements applied to all Accreditation Schemes.

8.3 A total of 91% of respondents agreed that the EPB Regulations should be amended to make it clear that the EPC should be made available earlier in the process.

8.4 All of the amendments proposed have been discussed with the Accreditation Schemes and other industry bodies as part of a wider engagement with our partners. Industry representatives including energy assessors also belong to six groups: the Technical Steering Groups and the Domestic and Non Domestic EPC and Air Conditioning Convention Groups who have contributed to the development of the proposals. Energy assessors are able to feed comments and raise issues via their Accreditation Scheme. The schemes have welcomed the changes proposed by these policy amendments.

9. Guidance

9.1 Proposals are in place to introduce an air conditioning quality assurance framework as there is for the EPCs and DECAs. The DCLG guidance advises that the appropriate methodology for the energy inspection of air conditioning systems is the CIBSE TM44 guidance (or equivalent). CIBSE (Chartered Institution of Building Services Engineers), will be revising TM44 in 2011, which will provide the basis of the quality assurance framework for air conditioning. This will be developed in parallel to the revision of the TM44 guidance; both revisions are expected to be completed by Autumn 2011. Where appropriate the National Occupational Standard that references TM44 would also be revised. This will ensure a more consistent approach and make it easier to assess the quality of the air conditioning inspection reports.

9.2 DCLG will issue instructions about the statutory air conditioning lodgements to Accreditation Schemes. Furthermore, the DCLG guidance, 'A guide to air conditioning inspections for buildings' will also be re-issued to take into account the statutory lodgement of air conditioning inspection reports. This will be produced in line with TM44.

9.3 The Department will also ensure that guidance on the compliance and enforcement provisions is produced before the provisions take effect.

10. Impact

10.1 There is no impact on civil society organisations.

10.2 The impact on business is as follows.

10.3 In terms of the impact on business and the amendments relating to air conditioning; based on an estimated figure of 300,000 air conditioning systems we expect an impact of an average annual cost of £0.816 million to be passed to either building owners or managers of the system. The current lodgement fee is set at £5.36 and each assessor may also be required to pay an administration fee costing on average £25.00.

10.4 In terms of the impact on business and the amendments relating to compliance and enforcement; only one of the amendments has an associated cost, i.e. the requirement to attach a copy of the EPC (one additional sheet of paper if a paper copy is provided) to written particulars (the property details). The costs are low - approximately £0.08M per year.

10.5 There is no impact on the public sector in terms of either the amendments for air conditioning or the amendments relating to enforcement and compliance.

10.6 Two Impact Assessments are attached to this memorandum and will be published alongside the Explanatory Memorandum on the OPSI website.

11 Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is as follows. Accreditation Schemes currently lodge EPCs and DECAs on the central England and Wales Register. The amendments in relation to air conditioning will require that the same administrative procedure is followed for air conditioning inspection reports. In terms of the compliance and enforcement amendments; the impact on small businesses, in this case mainly estate agents, is small and will in effect only require changes to their administrative procedures. The Department will produce guidance to cover both sets of amendments and will work with partners to ensure that the amendments are clearly understood across industry. The Accreditation Schemes and other partners have been involved in policy development via consultation and partner meetings.

12 Monitoring and review

12.1 The regulations, as required by current Government policy, impose a statutory requirement for the Secretary of State to carry out a review of the provisions of these Regulations before the end of 5 years from the date of coming into force and to set out the conclusions of the review in a report. In carrying out the review the Secretary of State must, so far as is reasonable, compare the transposition of European obligations in the Directive with the transpositions of those obligations in other Member States. It should be noted though that such a review is likely to be overtaken by, and taken up in relation to, the UK's obligation to implement the recast Directive.

12.2 The report must, in particular, set out the objectives intended to be achieved by the regulatory system established by the current amendments, assess the extent to which those objectives have been achieved, and assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation. The Secretary of State must publish the report before the end of the review period. The aim of these provisions is to improve compliance with the 2007 Regulations. So in addition to the review DCLG will monitor the effect of these changes on an annual basis to determine their effectiveness.

13. Contact

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