

MEES: Are you ready for April 2023?

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From 1 April 2023, landlords of commercial property in England and Wales will generally be prohibited from continuing to let properties which have an Energy Performance Certificate (EPC) rating of 'F' or 'G' unless certain exemptions apply – where a property continues to be let in breach of MEES, the lease will remain valid and enforceable but the landlord will be in breach of these regulations and exposed to penalties.

Although MEES primarily affect landlords, it is equally important for a tenant to also review their property portfolio to determine whether their landlord can enter onto the property to undertake any relevant energy efficiency improvement works and/or recover any costs they incur in this respect from them.

In this note we take a look at when MEES apply, what exemptions are available, what the penalties are for non-compliance and what landlords and tenants can do to prepare for the future.

IMPACT ON LANDLORDS

The new application of MEES may impact on landlords in the following ways:

1. Your property may become illegal to let unless the property is upgraded to meet the minimum standard. It is estimated that approximately 20% of non-domestic properties are in the 'F' and 'G' rating brackets.
2. Valuations on such properties could be affected if their marketability is diminished.
3. Rent reviews for properties may be affected.
4. There may also be further implications for dilapidations assessments.

IMPACT ON TENANTS

Tenants will also be impacted and should be aware of the following:

1. Dependant on the agreements within your lease, you may be liable for the costs of improvements required to increase the EPC rating.
2. Your landlord may have rights to enter the property to carry out energy improvement works. Note you may benefit from certain protections which should minimise disruption.
3. If you are proposing alterations or fit-out works, consider whether these are energy efficient and whether better energy efficiency could be achieved for the same cost. It is likely that proposed alterations will be scrutinised in depth by your landlord to ensure there is no adverse impact on the EPC rating.

Determining whether a property and tenancy are caught by MEES is not always easy. Generally, MEES do not apply to:

1. a property which does not need an EPC such as e.g. industrial sites, workshops, non-residential agricultural buildings with a low energy demand, certain listed buildings, temporary properties and holiday lets;
2. a property without a valid EPC either because the EPC has expired or an EPC has not been commissioned – if the landlord does not commission an EPC, the property will not be brought into MEES;
3. a short tenancy for a term of 6 months or less (unless that tenancy contains either an option to review beyond the initial 6-month term or the tenant has already been in occupation for over 12 continuous months prior to grant of the tenancy);
4. a long tenancy for a term of 99 years or more; and
5. certain occupational licenses.

EXEMPTIONS AVAILABLE TO LANDLORDS

A landlord can continue to let a commercial property with either an 'F' or 'G' rating if any of the following exemptions apply and it has been registered on the PRS Exemptions Register:

1. All improvements made: this exemption can be relied on if all 'relevant energy efficiency improvement works' have been made, or there are none which can be made, and the property remains either an 'F' or 'G' rating;

Note! There are numerous examples of 'relevant' energy efficiency improvement works including double glazing, pipe work insulation and wall insulation measures.

2. 7 year payback: this exemption goes a little further than the 'all improvements made' exception – generally, if the 'relevant energy efficiency improvement works' do not pay for themselves by way of energy bill savings within 7 years, the property may be exempt from complying with MEES;
3. Wall insulation: this exemption can be relied on if the 'relevant energy efficiency improvements' for the property are cavity wall insulation, external wall insulation or internal wall insulation and the landlord has obtained written expert evidence showing that these measures would negatively impact the fabric or structure of the property;
4. Consent: a landlord can rely on this exemption if it can demonstrate that it has been unable to improve the energy efficiency rating of the property as a result of not being able to obtain any consents needed from third parties such as a lender, superior landlord, planning authority or tenant;

Note! If this exemption is based on lack of consent from a tenant, the exemption will lapse if that tenant vacates the property and the landlord must try to obtain consent from any replacement tenant.

5. Devaluation: this exemption can be relied upon by a landlord if an independent assessor determines that the relevant energy efficiency improvements that could be made to the property would likely reduce the market value by more than 5%; or
6. New landlord: this exemption is a little different to the others - MEES acknowledge that there are some limited circumstances where a person may become a landlord suddenly and, in such circumstances, it would be inappropriate or unreasonable to expect them to comply with MEES immediately. If anyone becomes a landlord in these circumstances, a temporary exemption of 6 months will apply.

Don't forget to register! Landlords cannot rely on an exemption until they have registered it on the PRS Exemptions Register. Once registered, exemptions generally last 5 years. After this, a landlord must revisit the exemption to see whether it still applies or it is now possible to increase the EPC rating of the property by carrying out improvements. If it is still not possible, a further exemption must then be registered.

PENALTIES FOR NON-COMPLIANCE

If a landlord fails to comply with MEES, there are both financial and publication ("name and shame") penalties - the maximum penalty amounts apply per property and per breach, so consistent failure to comply could be costly.

For breaches lasting up to 3 months, the financial penalty is the greater of £5,000 and 10% of the rateable value of the Property with a maximum cap of £50,000.

The financial penalty for breaches lasting over 3 months is the greater of £10,000 and 20% of the rateable value of the property with a maximum cap of £150,000.

These penalties are enforced by Local Weights and Measures Authorities (LWMAs).

Note! Any breach of MEES does not affect the validity or enforceability of any provisions of a lease - tenants may not terminate their lease on the grounds that their landlord has continued to let an 'F' or 'G' rated property unless the lease explicitly states this.

WHAT SHOULD YOU BE DOING TO PREPARE? TIME IS SHORT TO MINIMISE RISK!

1. All property assets need to have a valid EPC. Review your portfolio to ensure your EPC rating is at least an E. If not, consider whether there are any exemptions available. Where the EPC rating is 'F' or 'G' (or is at risk of becoming so) an "Energy Efficiency Plan" should be put in place to improve the energy efficiency of the property. This should include assessing the costs and benefits of improving energy efficiency and weighing these against other impacting factors within the business plan for the property.
2. Make the right improvements. Check your lease to see if there are rights available for you to undertake improvement works and whether the costs of such works can be recovered. Energy efficiency improvements should take advantage of void periods, lease breaks and/or be included as part of the on-going maintenance and renewal programme.

WAYS TO IMPROVE THE ENERGY EFFICIENCY OF A COMMERCIAL PROPERTY

1. Replace the boiler – Opting for a new energy efficient boiler can cut down energy bills and reduce the building's EPC rating.
2. Install double glazing – Upgrading your windows and doors to double glazing can improve your EPC rating and reduce noise.
3. Install wall insulation – Insulating your walls can reduce your EPC rating significantly, making sure no energy is lost.
4. Install a renewable energy source – Installing solar panels can improve your EPC rating and provide you with cheaper, greener energy.
5. Replace the lighting – Replacing older fluorescent tubes and halogen bulbs with LEDs or more modern fluorescent lighting is an easy way to gain some valuable points on your EPC and save you money.

TAKE CAUTION ON EPC RENEWALS!

Where you hold a valid EPC or you are not otherwise required to obtain an EPC for a property, a new EPC may see a property's rating downgraded which may engage MEES obligations where the property could otherwise have been lawfully let for the foreseeable future

UPCOMING DEVELOPMENTS TO MEES

The long-term trajectory envisages that all non-domestic rented buildings will meet EPC B rating by 2030. It is an ambitious target intended to be put in place to drive clean growth and reduce emissions across the non-domestic rental building stock. This is in line with the Government's overall net zero proposal.

By consulting in 2019, the Government sought to provide the sector with an early sight of an upcoming future target to allow the landlords enough time to plan and implement the required works to their properties as part of their normal tenancy cycles.

Whilst many landlords may be content that their properties meet the EPC rating "E" or above for now but are they prepared for what's proposed to come into force in the not-so-distant future? Under the proposals set out by the Government, around one million properties are set to improve and achieve a "B" rating by 2030.

It has been proposed that there is a phased compliance window for the future EPC B requirement. This has been proposed to make the overall process easier but perhaps it has the opposite effect as it will impose yet another deadline that needs to be complied with. Under the proposal, the first compliance window will open in April 2025 and will last until 2027. In this period, the Government will require the property owners to provide a valid EPC "C" or above for their building by 1 April 2025. If they fail to do so, they have until 1 April 2027 to do the necessary improvements and provide an EPC "C" or above unless they register a valid exemption. The second compliance window is then proposed to commence in April 2028 and will last until 2030. This is the period in which the property owners are obligated to provide an EPC "B" or above. Unless of course they register a valid exemption.

It is proposed that a property compliance and exemptions database is introduced to assess compliance of properties. The consultation indicated that there are clear gaps in relation to the registration of the existing EPC data that makes enforcement difficult. In the Government's view, a new centralised database operated by a third party would "provide scrutiny and a decision for the exemptions, as well as guidance on compliance and exemptions". Property owners will need to ensure a copy of a valid EPC is uploaded to the database, showing that their properties are compliant. The Government suggests that this would be the method by which property owners

will fulfil the proposed requirement to present an EPC at the start of each compliance window. A registration fee of £30 per property is proposed, though the Government is considering whether there should be a maximum total registration fee for landlords with large property portfolios.

It is envisioned that Local Authorities will become the enforcing bodies. The consultation states “having a third-party operator will remove the additional pressure on local authorities to audit exemptions and ensure a consistent experience for landlords”.

Though it is not clear how this will work in practice. Whilst it would no doubt help to have a third-party operator, the Local Authorities are expected to take appropriate enforcement action which they may lack the resources to do so. It will certainly be interesting to see how the Government’s proposals work in practice in the not-so-distant future!

Looking at the positives, the proposals would mean delivery of buildings that are cheaper to run and be responsible for fewer carbon emissions, therefore overall, better for the environment!

FURTHER READING

- Non-domestic Private Rented Sector Minimum Energy Efficiency Standards (Implementation of the EPC B Future Target) - available [here](#).

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