



## Briefing

construction - summer 2008

### Energy performance certificates in the context of construction works

**EU statistics attribute 40% of carbon emissions to commercial buildings. The Government is required by an EU Directive to introduce Energy Performance Certificates (“EPCs”) for new and old commercial buildings**

The EPCs are being phased in during 2008 as follows:

- 6 April 2008 – EPCs required for the construction, sale or rent of commercial buildings with a floor area over 10,000 m<sup>2</sup>;
- 1 July 2008 - EPCs required for the construction, sale or rent of commercial buildings with a floor area over 2,500 m<sup>2</sup>
- 1 October 2008 - EPCs required on the construction, sale or rent of all remaining commercial buildings.

In March this year, the EPC Regulations were amended to relax the strict 6 April deadline for an EPC upon sale or letting on or after that date where it had been on the market and intended to be sold or let before that date. This on the market transitional arrangement does not however apply to the need to produce an EPC for new buildings over 10,000 m<sup>2</sup> completed after 6 April.

This note addresses the construction related implications for commercial buildings. We have a separate briefing note on the implications for property transactions. The key legislation is the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007. There are a number of uncertainties arising from those Regulations and words in inverted commas below are quotes from

the Regulations highlighting some notable areas where there is room for different interpretations.

#### What is an Energy Performance Certificate (EPC)?

The EPC must be carried out by a registered accredited assessor for the category of building being assessed who will provide a certificate lasting 10 years, giving the building an asset rating of A-G much like those given to electrical appliances. The certificate must include an indication of “the amount of energy estimated to meet the different needs associated with a standardised use of the building” and supplemental information including (but not limited to):

- a reference number (allowing confirmation of its validity on the national register);
- “an estimate of the total useful floor area”;
- “a reference value such as a current legal standard or benchmark” against which the building can be compared; and
- a declaration of any personal or business relationship which the assessor has with the person commissioning the certificate or who has an interest in the building.

It is the duty of the energy assessor to ensure that the certificate and accompanying recommendation report are entered onto the register.

A Display Energy Certificate (“DEC”) will need to be provided in respect of buildings with a total useful floor area greater than 1000 m<sup>2</sup> occupied by “public authorities and by institutions providing public services to a large number of persons and therefore frequently visited by those persons”. This essentially requires an EPC to be displayed (or more specifically the asset rating but not a reference value) “in a prominent place clearly visible to the public”, together with an operational rating indicating the amount of energy consumed during a 12 month period of operation. An asset rating is not however required where the occupier was in occupation before 6 April 2008 or the occupier does not have an EPC “made available or given to it” when it enters into occupation after that date. Until 4



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Jan 2009 an operational rating does not have to be given by an occupier who has been in occupation for less than 15 months and, if an asset rating is also not required, until 4 Jan 2009 there is no duty to display a DEC.

### **All new building have to be energy efficient anyway don't they under the Building Regulations?**

Minimum energy performance requirements under the Building Regulations (Reg 17C) came in in April 2006, requiring that a target CO2 emission rate is calculated and the actual as constructed CO2 rate does not exceed that. This is in addition to the general requirement under Part L of the Building Regulations to make reasonable provision for the conservation of fuel and power in buildings by limiting heat gains and losses and providing and commissioning energy efficient fixed building services with effective controls. An EPC is a further additional requirement under the Building Regulations. The person carrying out the work is required to give an EPC to the owner of the building and give to the local authority/approved inspector notice to that effect. The latter is important as, where asked to give a completion certificate the local authority or approved inspector must be satisfied that an EPC has been given. How the minimum energy performance requirements relates to EPC A-G ratings and the reference value is unclear.

### **Who is responsible for making sure there is one and what if one is not obtained?**

For new buildings it is "the person carrying out the work" who is responsible for producing one. As the duty is to give an EPC to the owner of the building the owner is arguably not under this duty which means that the duty is placed on the contractor. The owner for this purpose is the person receiving a rackrent or who would receive it if it were let at a rackrent, so a developer may not be the owner. Responsibility should be clarified in building contracts and development agreements. Failure to give an EPC is not a criminal offence (unlike many other contraventions of the Regulations) but there is civil liability for breach of the Building Regulations. If you have undertaken contractually to comply with statute in carrying out work you will have contractually committed to obtain an EPC as that is required for compliance with the Building Regulations. Contractors beware! – have you priced for this?

If an energy assessor fails to carry out an energy assessment with reasonable skill and care, there is a statutory right of action (Reg 17H of the Building Regulations) by the owner or any prospective or actual

buyer or tenant during the 10 year period of validity of the EPC.

### **When can I know what sort of EPC I will get?**

The EPC must be given at the same time as the notice of pressure testing must be given to the local authority, namely not later than 7 days after the final test is carried out. Contrast the position where a dwelling is marketed before completion of construction, in which case the HIP must include a predicted energy assessment.

The assessor is also required to provide with the EPC a recommendation report which will suggest optional ways to improve the energy efficiency of the building to obtain a higher rating – a bit late once the building is built! Can we know what rating we will get from the detailed design? Are we going to see a building specification requiring it to have say an "A" rating? Designers and contractors will need to be very careful what contractual undertakings they give in this respect.

### **So if I lease or buy a newly constructed building what energy related documents should I expect to be given?**

Where a building has been "designed or altered to be used separately" a separate EPC is required for that part but where there is a common heating system an EPC for the whole building is sufficient (save that dwellings must have their own separate EPC). If parts of a building are to be let or sold separately after construction the building owner will wish to ensure that the contractor obtains separate EPCs for each such part (subject to the common heating exception).

The EPC should be accompanied by a report containing recommendations for improvements in the energy performance of the building.

These are in addition to the requirement under Part L of the Building Regulations to give to the building owner a Building Log containing sufficient information about the building, the fixed building services and the maintenance requirements so that the building can be operated in such manner as to use no more fuel and power than is reasonable in the circumstances.

### **Does an EPC apply to all building work?**

As for the minimum energy performance requirements, an EPC is required in relation to new buildings which are a roofed construction with walls and in relation to which energy is used to condition the indoor climate. As stated above separate parts of such a building



“designed or altered to be used separately” require separate EPCs. Some buildings are excluded: temporary buildings with a planned time of use of 2 years or less, “industrial sites”, “workshops” and “non-residential agricultural buildings with low energy demand” and stand alone buildings (other than dwellings) with a total useful floor area of less than 50m<sup>2</sup>.

Part L applies to alterations which constitute a material change of use, the insertion of insulating material, work to thermal elements and (under Regulation 17D) the whole building (if over 1000m<sup>2</sup>) when undertaking any extension, provision of a new fixed service or an increase to the installed capacity of any fixed building service (Regulation 17D requiring consequential improvements to the rest of the building, subject to them being “technically, functionally and economically feasible”). In contrast, EPC only apply to new buildings and where a building is modified so that it has more or less “parts designed or altered for separate use” and the modification includes “the provision or extension of any of the fixed services for heating, hot water, air conditioning or mechanical ventilation”.

Where a shell building is built and all the services have yet to be installed when the building is sold or let, the shell building will still require an EPC at the date of practical completion. The EPC has to be based on the “maximum design fit out specification”. A tenant may wish to obtain its own EPC based on its specific fit out.

### What about buildings currently under construction?

They will be caught when the relevant Regulations come into force (see table above). Contractors may not be able to recover the costs under the building contract e.g. it is not (to consider JCT contracts by way of example) such as to create a fee or charge legally demandable under any Statutory Requirement, nor is it likely to cause a divergence between the Statutory Requirements and any other document.

If you would like to discuss the legal implications of energy performance certificates, please feel free to ring John Conder (Partner) or Sadie Fairfax (Solicitor) in our construction team.



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John has been advising clients on the procurement of capital projects for many years and can call upon his experience, before qualifying as a solicitor, in the construction industry and as a project management consultant. His particular areas of expertise are Procurement, PFI/PPP contracts, facilities management, construction contracts and construction partnering.



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Sadie trained with Ashurst and qualified in March 2007, moving to Morgan Cole’s Oxford office in January 2008.

Sadie has worked on large cross jurisdictional property developments as well as housing developments in the UK. She has specific experience in relation to property finance issues having worked for funders and developers in connection with issues such as hardening periods on refinancing of property portfolios. She has general landlord and tenant experience, mainly in relation to shopping centres. She has been involved in PPP/PFI deals, more specifically the Government’s Building Schools for the Future initiative.

Sadie now specialises in Construction, Engineering and Public Procurement matters, dealing with non-contentious construction and procurement issues on behalf of both public and private sector clients.



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Our construction, engineering and energy group is one of the leading practices outside London and has the largest team of any firm in Wales specialising in these areas. Those who do not know us are surprised at the size and complexity of the projects with which we deal, the clients for whom we act and at the rates at which we do so. We offer a City firm expertise at provincial rates with lawyers with whom you can develop a long term relationship.

The range of procurement options has never been greater for clients; their initial approach often determines the success of a project. We work closely with clients advising them on how to work with the project team to ensure that the finished building will fulfil their expectations and will arrive on time and within budget, firmly believing that the key to certainty in construction projects is realistic expectations and a strict control change management. For contractors, we advise them on the risks they are assuming and how to ensure that their commercial interests are protected as the works progress. Our role continues as the project develops where we offer hands on advice as and when issues arise.

We advise all sides of the construction and engineering industry on a wide range of contentious and non-contentious construction and engineering matters. Below is a detailed list of our areas of expertise (two areas in bold link to further information):

- acceleration
- advice on bonds, guarantees, letters of credit
- amendment to Standard Forms of Contract such as JCT, GC Works, FIDIC, NEC, IChem E and ICE forms
- claims relating to extensions of time, disruption and prolongation
- defects
- design
- disputes
- drafting and negotiation of EPC Contracts
- environmental claims
- facilities management issues
- fee claims
- force majeure frustration and impossibility
- insurance issues
- measurement and payment disputes

- misrepresentation
- PFI/PPP
- procurement issues including framework and partnering agreements
- repudiation, termination and suspension of work
- variations and change orders
- warranty claims

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