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Insights

MEES, THE NEXT CHAPTER: PLOTTING COMMERCIAL REAL ESTATE'S ROUTE TO NET ZERO

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SUMMARY

1 April 2023 sees the last step in the MEES phase 1 journey come to fruition – meaning that (with limited exceptions) you cannot continue to let sub-standard property (that has an EPC rating below an E) without registering an exemption. Failure to comply may result in adverse publicity and a fine of up to £150,000. In this article we look at this in more detail and consider what phase 2 may look like as the Government tries to map a viable route for commercial property's journey to net zero.

WHAT ARE MEES?

Minimum Energy Efficiency Standards (**MEES**) were brought into force (pursuant to the Energy Efficiency (Private Rented Property) (England & Wales) Regulations 2015 (the **Regulations**)) in stages from 2016, with the intention of improving the energy efficiency of privately rented buildings in England & Wales. The standards are measured by reference to the energy performance certificate (**EPC**) rating (A-G) of a property and affect private rented properties in both the residential and commercial sectors. This note deals with MEES in relation to commercial properties (referred to in the Regulations as "non-domestic") only.

THE RULES

The Regulations are staggered so that initially (from 1 April 2018) only new tenancies/renewals were caught but from 1 April 2023 all commercial properties which are let including on existing tenancies must have an EPC rating of E or higher. Where a property's EPC rating is lower than an E it is termed "sub-standard" and the Regulations require landlords to make energy efficiency improvements to rectify that, or register a relevant exemption on the PRS Exemptions Register.

EXCEPTIONS & EXEMPTIONS

The Regulations do not apply if:

1. the term of the tenancy is less than 6 months (unless it contains an option to renew the term or extend it beyond 6 months, or if the tenant has already been in occupation for more than 12 months);

2. the term of the tenancy is more than 99 years; or

3. the need for a current EPC certificate has not been triggered for the relevant building or space. For most new or existing tenancies, the need for an EPC will have been triggered, but this will not always be the case.

Where the Regulations do apply, but landlords will also be permitted to continue to let sub-standard commercial properties if one of the following exemptions applies and is formally claimed:

Exemption (and relevant Regulation)	**Details**	**How to claim an exemption**
Consent (31 & 36)	The landlord needs to obtain third party consent in order to carry out improvement works but, despite the landlord's reasonable efforts, the relevant third party has refused.	Landlords must make an application on the PRS Exemptions Register on the Gov.uk website in order to avoid enforcement action. Exemptions (*excluding the New Landlord Exemption*) are valid for a maximum of five years and cannot be transferred.
New Landlord (33)	A person has become the landlord of a sub-standard property and it is unreasonable to comply with the Regulations immediately. Note - this exemption is valid for 6 months only.	
Improvements already made (29(1)(a))	All the relevant energy efficiency improvements for the property have been made and the property remains sub-standard.	
No improvements can be made (29(1)(b))	The landlord has obtained a report and/or the EPC shows that there are no improvements that can be made.	
Wall insulation (28(2))	The landlord has obtained a report from an expert stating that a recommended	

	wall insulation measure would have a negative impact on the property.	
Devaluation (32(1))	The landlord has obtained a report from an independent surveyor which states that making the relevant improvement needed to lift the property from the sub-standard category would result in a reduction of more than 5% in the market value of the property.	
Seven Year Payback (28(3))	The landlord can show that the expected value of savings on energy bills over seven years is less than the cost of the improvements.	

CONSEQUENCES OF BREACH

A breach of the Regulations will not invalidate a tenancy per se. There may, however be both reputational damage to the landlord (including publication of the breach on a publicly accessible part of the PRS Exemptions Register) and financial penalties as follows:

(a)	For breaches lasting less than 3 months:	Up to £5,000 fine or if higher 10% of the property's rateable value up to a maximum of £50,000. (NB if this penalty is imposed a landlord shouldn't also be served with (b) but could face an add on in (c))
(b)	For breaches lasting more than 3 months:	Up to £10,000 fine or if higher 20% of the property's rateable value up to a maximum of £150,000. (NB if this penalty is imposed a landlord shouldn't also be served with (a) but could face an add on in (c))
(c)	For providing false or misleading information or failing to comply with a compliance notice:	Up to £5,000 fine

It is for local authorities (weights and measures/trading standards) to pursue breaches but to date they have struggled with the resource (and arguably the incentive) to do so – at the date of writing there is still no evidence on the register of any breaches being recorded or fines being levied. Recognising this challenge, BEIS ran an enforcement pilot in 2019, followed by an enforcement competition in 2021 with extra funding for the 59 winning authorities. Best practice guidance has been promised – there have long been rumours a future fix will include a direct cut of the penalty pot for local government.

WHAT NEXT?

In its 2020 energy white paper, "Powering our Net Zero Future", the Government set out the target to deliver net zero by 2050. It suggested that commercial properties should have an EPC rating of B or higher by 2030 but crucially only where "cost effective". MEES consultations were run in 2019 and in 2021 but to date have not resulted in any commitment to further legislation. The 2021 consultation envisaged two enforcement windows – the first running 2025-2027 to achieve an EPC C and second running 2028-2030 to hit an EPC B, with all EPCs in a single register. Better visibility of data would allow local authorities to enforce more effectively. There might also be obligations on tenants to assist with compliance – a burden that rests entirely on landlords under the current regime.

However, there is a plethora of factors the Government needs to carefully balance before making its next move including the state of the economy and the strain on businesses (both landlords and tenants) still recovering from the effects of Covid-19 and Brexit. The policymakers need to consider a backdrop of cynicism on EPCs from industry experts including an April 2022 RICS published article warning that they (and in particular the Standard Assessment Procedure on which the rating is largely based) must be updated in order to remain fit for purpose. Meanwhile, as the race to quality accelerates, the premium commercial market is moving towards accreditations that more accurately reflect the way in which premises perform once occupied, such as NABERS UK and BREEAM and the shared obligations and opportunities they entail.

RELATED PRACTICE AREAS

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- Real Estate Sector
- Energy Transition
- Planning & Zoning

MEET THE TEAM

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