Minimum Energy Efficiency Standards

This has been coming down the road for a long and its current statutory roots lie in the Energy Act 2011. Having said that, it has evolved in its detail and is indeed still evolving. What we can be sure of is hat with an estimated 50% of all energy consumption being used in buildings, the property sector is going to continue to be the focus of upgrades as the Government seeks to reduce energy consumption.

MEES will only apply to assured shortholds, regulated tenancies and some domestic agricultural tenancies which we will not be discussing but can be found in the legislation. Below when we talk about "can't let a property" because it is band F or G we are talking about "can't let a property on one of these tenancies". Other tenancies do not have to comply. There are similar rules for commercial properties but we do not attempt to cover them here.

In order to make sense of some of the legislation it is important to understand some of the terminology. For example when they talk about needing and EPC when "works" re being done to a property. "works" means extending the services(for example, running wires or heating into an extension).

Trigger dates are dates in legislation after which certain actions can or cannot be carried out. The two key trigger dates are 1 April 2018 when a new agreement, including a statutory periodic agreement cannot lawfully be granted if the property is not band E or above and is not on the exemption register. The second trigger date is 1 April 2020 when all existing lettings will have to follow the same rules.

The second concept, and be careful not to confuse them, it trigger points. These are events that may happen at any time. Essentially the trigger points often, but not always, mirror when you need to provide an EPC so they are the sale, letting or construction of a property.

EPCs were, in the main, introduced from the autumn of 2008. They are valid for 10 years for lettings. There will be a few around from before October 2008 so be careful to check the expiry date. EPCs are therefore beginning to expire and it is more important to understand the issue this raises. This is because an EPC is only "legally required" for sale, letting or construction of a property and if you are not doing any of these things you are not legally required to have an EPC. This is significant because if you are not legally required to have an EPC you are not required to comply with MEES. Hold that thought as it is really important to understanding MEES and we will come back to it.

From April 2018 any property that is not band E or above on the EPC will be a "substandard property". It is these substandard properties that we are interested in as it will be these that may be restricted in the ability to offer them or rental. The fact that a property is substandard does not mean you WILL NOT be able to let it; you will have a few extra checks to make before a decision can be made.

From April 2018 the process will run something like;

Is there a trigger point? (if the answer is no then you can again ignore MEES till April 2020).

Is an EPC "legally required"? (if no you can ignore MEES for the moment).

Is it band F or G? If it is above band F then MEES will not affect you in the short term but watch the fact that the plans include increasing the minimum to D and then C by 2030).

Is there an exemption? (For many F and G rated properties this will be the most likely reason you will be able to continuing to let a substandard property).

From April 2020 the same tests can be asked apart from the trigger point question (in other words where as the rules only apply to new lets, sales and construction from 2018, from 2020 it will apply to existing tenancies too. This will still not require all properties in band F and G to be removed from the market. It is clear that many Rent Act 1977 tenancies will still be running with the same tenants since before EPCs were required and as they have not been legally required to have an EPC they will stay outside MEES in 2018 and 2020, unless a new tenant is found for the property. There may be some assured shorthold tenants where this is true too.

For both 2018 and 2020 actions lists above the last item is a question of if the property has a registered exemption. Note the use of the words "registered exemption"; an exemption is only valid if it has been registered on the exemption register. Outside this the property may meet the criteria but it is still not exempt till all the data is registered.

The first exemption is that all improvements that can be made have been made. This sort of links into other exemptions where, for example, funding is available for some improvements, but not all improvements needed to stop it being substandard. You have to do all the works you can, even if this is not enough to stop it being substandard, in order to register an exemption.

The second and probably most common exemption will be the fact that there is no funding for the improvements needed. This is because the basic rule is that the improvements needed should not have to be funded by the landlord (but see later in the notes about a consultation). The funding that may apply includes Green Deal, Energy Company obligations or other grants available from any source. If the works need cannot be funded without cost to the landlord then the landlord can register an exemption. The finance used may be a combination of finance (e.g some ECO funding and some Green Deal funding).

The next exemption is specific to wall insulation and the situation where insulating of the wall will result in damage to the wall. This needs evidence from an installer of the wall insulation or another specified professional. This is typically to address concerns in some exposed locations with certain building types where wall insulation may become wet and cause negative consequences.

Another exemption is the fact that the landlord cannot obtain consent to carry out the works. This might be planning permission, mortgage lender, freeholder or even the tenant themselves. It might be wise to consider this in drafting you tenancy agreement and the TFP agreement will be updated to reflect these changes.

Devaluing the property by 5% or more is another reason why energy efficiency works may not have to be done. It is hard to be specific but if you have a lovely thatched cottage and solar panels are the only improvement then if you can get a surveyor's report confirming devaluation then you could continue to let a substandard property having registered the devaluation exemption.

There is a special exemption for new landlords. You can register an exemption for six months after having becoming the landlord (inherited or purchased, for example). This is interesting in that it clearly tells you that the previous exemptions that were registered do not survive the sale. By the end of the six months you would need to have done the works or gathered the evidence in order to register another exemption.

With all these exemptions you have to do what you can do. In other words if you cannot secure planning to clad the wall but you can insulate the loft, you have to insulate the loft and only register the exemption for the cladding, including a copy of the rejected planning application as evidence of trying to obtain permission.

April 2018 is the date by which you have to register an exemption and this normally lasts for five years from registration. However in the case of a new landlord it is only six months and in the case of tenant not giving consent for the works the consent lapses before the five years if there is a change in tenant. The exemptions database is open now (in email form) but the later you apply the longer exemption runs. Having said that you as you cannot re-let the property it would be worth having the evidence readily available to avoid a delay in re-letting.

You are required to provide up to date evidence the exemption so a valuation report that is five years old will not allow a new registration. Obviously, this means that there may be a cost to remaining on the exemption register.

On 28th December 2017 the Government launched another consultation around MEES. The discussion is around if landlords should be required to fund some improvements and if so, how much they should have to fund. The current proposal is for landlords to have to fund improvements to the total value of £2500.00 per property. "Total value" means that this would be £2500.00 including any Green Deal or ECO funding etc and if £1000.00 was available by that source then the landlord would have to spend up to £1500.00. This could be quite a big impact on landlords with a portfolio.

The funding must be spent on the relevant energy efficiency improvements (listed in the legislation). This may still not bring the property out of being substandard but the landlord will be required to do what they can within the budget. In order for tis to work they are proposing that exemptions based on affordability will lapse in April 2019 requiring the landlord to review the affordability, spend some of the their own money and if still substandard to re-register an exemption.

Conservation areas and listed buildings

The legislation does not talk about listed buildings but uses a wider definition around buildings of architectural importance. Agents are far more likely to have buildings in conservation areas than to have listed buildings. We will just refer to them as listed buildings but understand it is wider than this. We have said these should have EPC in order to let them. This could be important in terms of getting possession under section 21.

Therefore, as they will generally be required to have an EPC they will fall into MEES. So if the rating is F or G and you could, for example, install loft insulation then you must do this under the normal rules. However, there are other works that may be needed to get the building out of band F or G that would not be acceptable, cladding the walls externally is probably one such example. If these works cannot be done for funding reasons then you have to register an exemption. However, if you cannot do these works due to the impact on the listing then you are not required to do the works and you are not "legally required to have an EPC" in respect of these works and as MEES does not apply where you are note LEGALLY REQUIRED to have an EP, you do not have to do the works nor do you have to register an exemption every five years; it is a once and for ever situation. You do have to do as many works as you can. This is why the regulations say you do not need an EPC FOR THOSE WORSK (but by implication do need it for everything else).

EPC's MEES and Bedsits

Avoid saying you do or do not need an EPC for an HMO as some HMOs need them and some do not. Therefore the HMO status does not define whether or not an EPC is needed. If the tenant is renting only park of the dwelling , as with a bedsit, then this tenant is not required to be given an EPC and the landlord is not legally required to commission an EPC for the building. Legally required is the important concept, as with the listed buildings.

This means you are allow to own the building and let the individual rooms and not provide or commission an EPC or provide copies to the tenants. However, if a landlord buys a bedsit house an then lets out the rooms, the law did require an EPC (for the sale) and though you are not required to give a copy to each tenant, it will bring the letting of each room under the rules of MEES and, if the building is band F or G the room cannot be rented out without the usual rules applying. This will be particularly important in rent to rent situations where the letting of the whole house will be band F and so it cannot be sub-let without and exemption of some sort.

If the property has more than one EPC, one for the building and one for the room for example, the "most local" EPC that is legally required is the EPC that counts.

Though not totally clear from the guidance, as a new landlord has to register a new exemption, it is quite possible that the rent to rent tenant taking the property from the landlord would have to register another exemption in their own right as they have only just become the landlord on taking over their legal interest in the property.

After the first trigger date, provided the same tenancy exists between the same landlord and tenant the property can continue to be in band F or G without requiring any action to improve it or register and exemption. This is a potential advantage of setting up tenancies using the TFP tenancy agreement which avoids the statutory periodic tenancy and therefore the need for compliance (until you have a new tenant or 2020). Things to watch after April 2018 will be any situation that affects a surrender and re-grant, a change of tenant, trying to do an "extension" to a tenancy etc as all these will create a new tenancy introducing compliance liability.

Where you have a mixed use property the rules to be followed will be based on the contractual agreement for the letting. Therefore, if the whole building is let on a commercial agreement, follow the commercial rules (the second trigger dates is in 2023), if just the residential part is let on an assured shorthold then use the residential rules.

Actions

So what should agents be doing know? Obviously it will be important to know which of your properties are in band F or G through an audit of the portfolio. Then establish if each of them can be brought of the band F or G or if they qualify for some sort of exemption. This will mean when a tenant give notice you will know what you need to do in order to be able to get on and rent the property quickly.

In order to have up to two extra years to comply ten avoid statutory periodic tenancies. You could do renewals on band F and G properties now, before April and leave then on the Training for Professionals tenancy agreements to ensure a little longer to comply.

If you are planning on an exemption then consider the evidence you will need to support that claim so that it is readily available when you want to re-let the property.

One question where we have not read a definitive answer is whether an agent can register and exemption. On the basis that the agent can usually do most things the principal can do, we would presume this is OK.

Penalties

If a property is let for less than three months when it is below band E and not registered as an exemption the penalty is up to £2,000. Over three months the penalty rises to £4,000. There is also a penalty of £1,000 for registering false information for an exemption and £2,000 for failing to comply with a compliance notice from the local authority. There is an overall maximum penalty of £5,000 for each breach, though there is the additional penalty of publication penalty where some details of the offender are publicised, but this is limited to a second offence within 18 months. Obviously it will be important to keep evidence of why properties were exempt, the registration etc to defend any claims.