



Energy Performance Certificates in Scotland

The purpose of this document is outline the views of the Association of Scotland's Self-Caterers (ASSC) on the introduction of Energy Performance Certificates in Scotland, as well as set out the main points of clarification we require from the Scottish Government relating to their interpretation of relevant EU Directives and their application in terms of energy performance.

Article 7 of the Energy Performance of Buildings Directive (EPBD) states that "Member states shall ensure that, when buildings are constructed, sold or rented out, an energy performance certificate is made available by the owner to the prospective buyer or tenant".

It is of utmost importance that we have some understanding of how the Scottish Government has interpreted the term 'rented out' and what the scope of that term is. If Scottish Government is taking the view that a holiday let is a 'lease' , and not a hire or a licence, that property would indeed require an Energy Performance Certificate (EPC).

However, a self-contained unit (SCU) (i.e. a holiday home / holiday let etc.) cannot be an assured tenancy and is excluded from the new private residential tenancy agreement introduced by the Private Housing (Tenancies) (Scotland) Act 2016. There is no formal lease agreement in place and there is no right to occupy. The occupancy agreement between a SCU operator and their guest does not therefore constitute a situation of the property being 'rented out' with a formal lease arrangement.

If the term 'rented out' is intended either by the EPBD or the Scottish Government to cover all possibilities regardless of the basis of the occupancy agreement – lease/licence/verbal contract/operator's licence – then the ASSC believes that there is little scope to argue that all such properties would require an EPC. Formal clarification of this point is sought.

The response to this point may open up a wider debate as to what other properties are rented out but are not subject to a lease, in the traditional sense, and where an EPC is not required, or where it is not understood that an EPC be

required. For example, this could include: hotel rooms, conference facilities, care homes, parts of property occupied under an operator's licence.

Article 2 of the EPBD defines a building as a "roofed construction having walls for which energy is used to condition the indoor climate": in this instance, a 'building' may refer to the building as a whole or thereof that have been designed or altered to be used separately.

SCUs meet this definition, both as standalone structures and where they form part of a larger structure such as an annex or interconnected attachment or wing.

There are a number of scenarios where one might not anticipate an EPC requirement, but strict application of the EPBD and the Regulations would require one.

- Holiday chalets and static caravans within corporate holiday parks may be an example, as each unit would be seen as a building and would therefore require an EPC.
- Hotel rooms may be considered to be more tenuous, however, self-contained suites in a hotel where an agreement is made between the owner of the property and an occupier of the space might require an EPC.
- A single room office in a building can be let separately and requires an EPC
- Indeed, any unit where a lock on the door renders it defensible require an EPC.

This line of thinking could be extended to a wide variety of situations where a small section of a larger property is 'rented out' but where an EPC requirement would not be anticipated.

The ASSC considers that SCU operators are entitled to be treated the same as other sections of the property market. Consistency and proportionality are paramount.

Scottish energy performance regulations do not differentiate between domestic property and non-domestic property in terms of the general requirement for an EPC on construction, sale or renting out of a building.

The presumption is that, subject to explicit exemptions contained in the Regulations, all property requires an EPC. The next question is: should the EPC be a residential EPC or a Non-Domestic EPC?

SCUs are typically residential in character but if made available for more the 140 days would be recognised or treated as being non-domestic in nature, and fall within the Business Rates system.

The Energy Performance of Buildings(s) Regulations 2008 states a Dwelling, within the EPB(s) Regulations, has the same meaning as in regulation 2 of the Building (Scotland) Regulations 2004. Within The Building (Scotland) Regulations 2004, a dwelling means a unit of residential accommodation occupied (whether or not as a sole or main residence):

- a) By an individual or by individuals living together as a family unit; or
- b) By not more than 6 individuals living together as a single household (including a household where care is provided for the residents)

It is the ASSC's position that SCUs would ordinarily be considered as residential in nature and thus the £50-£60 cost of an EPC for SCUs put forward by the Scottish Government is probably reflective of the costs of a residential EPC. Larger SCUs may require to be assessed as non-domestic properties, incurring commercial EPC fees, which are considerably more burdensome.

One potential consequence of SCUs being considered residential in nature for the purposes of energy assessment is that these properties will be impacted by the introduction of property improvements and minimum standards as part of Scotland's Energy Efficiency Programme (SEEP). This may well impact heavily on the ability of operators to keep their livelihoods.

Non-domestic buildings over 1,000sqm are currently required to be assessed under Section 63, with regard to what physical improvements can be made to a property. If SCUs were deemed to be non-domestic buildings of less than 1,000sqm they would be exempt from Section 63 assessments and not be subject to any statutorily required improvement.

If SCUs are deemed to be residential or domestic, what is the rationale behind being rated for business rates? In terms of the rise of peer-to-peer accommodation providers, where do they stand within the current guidelines? Given that these providers are not within the remit of local authorities who look after Business Rates, who would enforce an EPC requirement?

Many internationally renowned Scottish events rely on short-term rent / SCU accommodation to fulfil required bed spaces. Under the present guidance, every one of these would require an EPC.

The ASSC therefore requires clarification on the thresholds associated with the Scottish Government's interpretation of domestic or non-domestic accommodation.

Legal Position

On 17th August 2017, the Minister for Local Government and Planning, Kevin Stewart MSP, wrote to Willie Rennie MSP (ref: 2017/0027710):

"Concerns were raised with the Scottish Government regarding the legal position of the guidance leading to its withdrawal, following consultation, in 2012. Having reviewed our obligations, we confirmed that an EPC is required for some holiday properties in January earlier this year".

This in itself raises a number of questions:

- What were the concerns?
- Who raised the concerns?
- What legal opinion was received?
- What is the legal reason for withdrawing the guidance?
- What constitutes “some holiday properties”?

In the same letter, Mr Stewart outlined that:

“Officials wrote to all 32 Local Authorities who are responsible for enforcement of the legislation. ... As you will see we have asked that they consider regulations 16 and 18 of EPR should a complaint be made about provision of an EPC”.

This suggests that compliance is not anticipated, and could be seen therefore as a ‘bad law’. Is the action of this regulation proportionate to the concerns raised?

To recall, the consumer does not pay for the energy used in the property during the hire of the property. No responsibility is conferred to the occupier of the property to undertake any works to change or alter the EPC rating, nor would they have the right to alter the property during their occupancy. The EPC rating does not affect consumer choice in the case of SCUs.

Conclusion

The ASSC requests urgent clarification on the following issues:

- 1) What is the Scottish Government’s interpretation of the term ‘rented out’ and the scope of that term?
- 2) Are self-contained units considered domestic/residential or non-domestic/commercial?
- 3) What were the concerns associated with the withdrawal of the guidance in 2012 and what was the legal advice that led to the withdrawal of guidance, as per points above?
- 4) Is the action of this regulation proportionate to the concerns raised, and in line with other EU countries interpretation of the Energy Performance of Buildings Directive?
- 5) Will the Scottish Government introduce a clear and transparent policy and ensure that there is adequate guidance on the criteria that apply?