

techUK ESOS Briefing: 5th November 2014

Q&A

These notes cover the Q&A session that followed the Environment Agency presentation. They should be used in conjunction with that presentation rather than in isolation as they complement rather than duplicate the content. They are not a direct transcript of the discussion and should not be quoted as such. You should use the ESOS legislation as the definitive information on how to comply with ESOS.

Compliance and Auditing

If a Director has to sign the ESOS submission off, presumably that means a Director as listed under Companies House?

Yes

When do you need to register?

You do not need to register this year, 31st December is the date on which you determine whether you are captured under the scheme or not. We don't have to hear from you until 5th December at the latest next year when you confirm you are compliant. However please try to submit your notification prior to this date to avoid any last minute issues.

How do people ensure that their audit regimes are compliant with ESOS methodology?

Compliance is in the guidance but if you want to be definitive then it is articles 26 and 27 in the regulations that specify exactly what you need to do to have an ESOS compliant audit and I would suggest you have a look at those. A fully compliant audit would be one which meets all the criteria of Articles 26 and 27 in the regulations. If you are not compliant with all the criteria for an ESOS compliant audit ensure you fully justify your position in your evidence pack.

Some companies are more complicated than others, should they be maintaining a constructive dialogue with you?

No not really: if all participants were maintaining an active dialogue with us, asking us to confirm if their approach was 100% compliant, we would be in constant contact with 10,000 organisations and would be auditing as we go. We want you to go away, read and interpret the guidance and helpdesk answers we provide, report and then if we decide to audit you; that would be the point at which we would expect an active dialogue for you to justify the approaches you have taken. Obviously we would expect people to be striving to be 100% compliant where possible. Yes we want to bring companies into compliance but this is not exactly the same as some other schemes so we are not intent on slapping a penalty on you at the first small indiscretion. It is a light touch regime, to raise awareness of energy auditing. We want you to comply and we will be auditing to ensure you are complying.

How often will you audit?

We aim to audit 5% of participants within each phase.

As EUETS emissions are regulated at what point are they included or excluded from ESOS?

Being captured under EUETS doesn't confer automatic compliance with ESOS because EUETS doesn't necessarily require an ESOS compliant audit. However you can use the data you have collected for EUETS for your ESOS audit. And you can take this further because if you have already done work on auditing and you believe that this auditing is ESOS compliant then you can count it.

Most big corporates are in and we know we are in. Most of us measure our energy and disclose travel and emissions through CRC, ETS, Carbon Trust Standard etc, do we then need a lead assessor to pull all that stuff together in order to comply?

You don't need a lead assessor to pull everything together, you can do that yourself and say, this is my data, this is the 90% that needs to be compliant, these assets are covered by this audit, those assets are covered by that audit, then all the lead assessor has to do is sign off (as long as they are confident you have done the work in accordance with the ESOS rules and you had the necessary skills to make those assessments/audits). If not all of the 90% has been covered then you would still need to do more work.

If you can't use your CRC data are the schemes not duplicative?

You can use your CRC data but CRC compliance is not a substitute for ESOS - the schemes are different. For CRC there is no requirement to audit your energy consumption to identify savings you just have to collect and report on the energy. You can use the energy data you have collected for CRC and then interrogate that as part of your ESOS audits, however remember that CRC only covers electricity and gas whereas ESOS covers all energy.

Landlord and Tenant

Who should obtain the DEC certificate, landlord or tenant?

If a valid DEC is available for a building and it covers all the building energy use then either party can obtain the DEC and under ESOS both parties could count this towards their ESOS compliance if they were both responsible for energy in the building

Similarly for ESOS compliant audits, it doesn't matter who does it, they can both share the audit findings and just report the recommendations applicable to them to their directors. Landlord and tenant treatment is different from CRC, which holds the landlord responsible. Under ESOS the focus is on who is using the energy and who is able to control usage and implement efficiency measures.

What if you are occupying fully serviced office space where you have no control at all over energy management?

The legislation could be clearer. The unconsumed supply rule doesn't actually have a clear cut rule about who is paying for the electricity. If you are occupying space and everything is paid for by the landlord to whom you pay an inclusive service charge then it is tricky. The way we are reading the legislation is that the person who uses the energy and has control over efficiency measures is the person who should be reporting and have the responsibility. But you will need a reasonable estimate of the energy you are using to be able to report on it and if there is no visibility of this

because it is tied up in service charges then again that is tricky. So there is some flexibility at the moment.

Ultimately the wider aim is to try and make buildings and activities within them as energy efficient as possible but the line you could take is that you only have to include the energy that you use.

But surely that could allow cynical landlords to exonerate themselves from accounting for energy to tenants if they themselves are not physically using it?

It is hard to give a clear answer to that but again we would seek to enforce along the lines of the policy intention – that whoever can control efficiency improvements should be responsible, but we anticipate that as time goes on further clarifications will be issued on areas like this. Moreover, if you are a landlord you need to notify your tenants that you are not covering their spaces. There has to be some communication because you need to agree between you who is covering what. Whoever can most reasonably estimate usage should end up with the responsibility.

The Guidance notes are very well put together, thank you for that. When new guidance comes out does that always replace or “trump” existing guidance?

Yes, we will have to do that otherwise people will be using different guidance. At the moment we are in the process of updating but we are not changing the policy intent, just taking out duplications and there is some information we have to remove due to new government guidance rules that prevent us putting in examples of best practice. We will also include bits of clarification on certain topic areas, based on questions we have received on the helpdesk.

Taking the idea of serviced office space in a data centre context can you just reconfirm that what you are saying applies in that context. If they are renting and/or leasing space in data centres the person that is leasing that space and using those services, that is the person who should do the energy audit under ESOS?

Yes, if you agree between you. It is a grey area. You have to be able to make a reasonable estimate.

If the person using the data centre – the customer - is too small then that would be excluded?

Yes, technically.

How do you deal with a multi-tenanted building scenario where you as landlord and tenants have to establish which energy use is yours. In a normal building you will have gas and electricity and power to tenants may or may not be sub-metered. The landlord could take the view that as tenants use the energy they should be accountable. Is this right? And....

For common plant and common areas if the cost is passed on, is that something that landlord should be counting? We have heard conflicting views as to whether tenants take a share of this common energy or the landlord deals with it.

The regulations are not suitably definitive to give an exact answer for each of a multitude of scenarios. However, the policy intent is clear and has always been that whoever has the control to take energy saving opportunities is the person who should take responsibility for the energy. If you read article 23 in the Regulations it is not suitably definitive enough and there is no definition of control in the regulations. However, the way we are reading the regulations as regulator, and the way we plan to enforce, is that we are clear about the policy intention that whoever can control the energy efficiency should take responsibility.

It is true that where the regulations are unclear we cannot enforce rigidly but over time these uncertainties will get tightened up. As there is no cost in declaring the consumed power this uncertainty is less problematic than other schemes. You have to remember that the idea is to improve energy efficiency; it is not like the CRC where there is a monetary impact if you give us inaccurate information about your energy use. So our position is slightly different and it is not such a big issue as in other regulations.

I see a scenario where a landlord is trying to pass on a £10,000 audit bill to tenants who then say they are not responsible. We need firmer guidance so responsibilities are clear. Certain things are in grey areas.

The default for common areas like atria and common plant is that they are the landlord's responsibility. DECC wrote guidance and it sets out the policy intent. Common areas are the responsibility of the landlord. If less responsible landlords interpret it differently they will have to justify that at audit.

Landlord and tenant: who should do the audit? How do you avoid double counting if both audit and submit data for the same energy?

Either one can do the audit but you can both use the findings from that audit. The important thing is that you communicate. If there is double counting it isn't the end of the world because you are not paying a levy or tax based on your energy consumption.

Foreign undertakings

If you have consumption in the UK but there is no UK company presence, i.e. a totally overseas company with no UK subsidiary but who happen to have a building in the UK owned directly by the overseas company and employees are all employed directly by the overseas company, what then?

You are not included.

Also to add to that:

If you are a group and let's say you have company A which is registered in the UK and then Company B registered in France and the parent company, C is registered in Spain. If company A meets the qualification threshold and company B directly own an asset in the UK that asset is not included in ESOS even though the group have a qualifying UK undertaking.

If a company is registered with Companies House and meets the qualification criteria (and isn't subject to the public contracting regulations or insolvent) they will qualify and if there are any other UK companies that are in the same group even if they individually don't meet criteria they will also be in because they are part of the same group.

Even if directly owned by different overseas parents but all have the same ultimate global parent?

Yes: anyone in the same global group based in the UK will be in if one of the UK members qualifies. However once the group have qualified the default is that each highest UK parent will participate on its own unless they choose to participate together (if so keep the agreement in writing).

What if it is a branch registration of a foreign company?

Energy only relates to RELEVANT undertakings. If it is a branch registration/just site owned directly by a foreign company and not an undertaking in line with the Companies Act 2006 para 1161 then it will not be within the scope of ESOS. Talk to the company lawyers to ensure you know the corporate structure and whether they have any UK registered undertakings which control the branches or whether they are directly owned by the overseas undertaking.

Company structure

Does a company have to measure emissions across the supply chain? If you use an external distributor, which company has to report? Who takes responsibility for supply chain emissions?

You do not include contractors' emissions or supply chain emissions. They are responsible for their own energy use.

Can you disaggregate subsidiaries – eg pension funds?

Disaggregation does not mean that smaller entities/subsidiaries can avoid the scheme. There are pros and cons. It may be easier for a smaller entity to undertake the scheme separately. However, that entity would then have to assess its total energy and report on 90% of it. Whereas if you all participate as own group it might be that the smaller subsidiaries fall within the 10% de minimus for the group and consequently wouldn't have to be audited. Organisations need to see what suits them. Here you just confirm in writing between the parties that you are participating separately and the highest UK parent will mention the companies that have been disaggregated in their notification.

If you are a company that at your last accounting period, say April, you were captured but since have shrunk and by December 31st your status is smaller, would you qualify.

Yes, you would qualify. You have to follow accounting rules which are clear on this. You do not change your status from large to SME overnight, it takes several accounting periods.

Lead Assessor

How long does it take to qualify as a lead assessor?

We don't provide the qualification for lead assessors, we have approved a number of membership bodies who in turn assess the levels of competency of individuals. They have specific membership criteria that must be met. If you have the relevant experience then it shouldn't take more than a month or so to qualify.

Can a large company registered in the UK get a member of their own staff registered as lead assessor? If so will that lead assessor be able to act in other member states where that company has operations, as this is part of the same piece of EU legislation?

Not necessarily, each member state will have individually determined what counts as lead assessor and the bodies who can accredit that assessor. But if you are a foreign national and want to be an ESOS assessor then you can register in the UK.

Companies that have operations across Europe therefore have to be looking at the implementation in individual states as opposed to centralising their compliance strategy. This is because each member state has an obligation to implement article 8.4 of the directive, but there is some

discretion as to how they do it so it will be enshrined in legislation differently in different member states.

What we have been able to glean is that the UK is leading the way as far as implementation of the Directive goes. Some countries aren't as advanced as the UK in terms of practical implementation of the rules.

GE has done a comparative study. The UK is ahead, we know how it will work and the guidance is good. France and Italy are also well on the way though there are differences. Germany is in draft. UK is the only one so far with the hardcore aggregation rule. The UK is in a good position because we have put in place robust guidance at an early stage to improve certainty.

I understand there are only 112 lead assessors. Will this be enough?

From our point of view we are not concerned at this stage – we don't expect the register to be peopled instantly or automatically. What really matters is that there are enough lead assessors next year when they are needed to sign off the audits. Yes, it takes time to become a lead assessor but not a prohibitive amount. Moreover the lead assessor is only needed for sign-off and there is lots of work that can be done by others. In fact one would expect the majority of data gathering would not be done by the lead assessor.

If we cannot get a lead assessor will you take a pragmatic view?

In the very unlikely event that there will not be enough lead assessors, yes, we would be pragmatic but we don't think that will happen. We would also want to see that sufficient effort had been made to identify one. We would take a dim view of a company turning round on 5th December 2015 and saying that at that point they could not get a lead assessor. We are not planning draconian measures for companies that are clearly doing their best to comply. Fines are discretionary.

Measuring transport and fuel

What about business travel by employees?

Fuel used by company cars or any other fuel paid for by the business is covered but not for public transport. It is only where the business is directly paying for fuel or reimbursing staff for paying for fuel as opposed to train tickets of which fuel is only an indirect partial cost. If part of the fuel is used for private travel but the company pays this can be factored out by estimate but it is not crucial – we wouldn't expect exhaustive detail on that. Officially you only have to include things you use for business.

If you have ISO 50001, transport emissions aren't covered so what do you do about transport? Are you still able to use the ISO 50001 route?

If you don't want to have to use a lead assessor then you would need to ensure all your energy use was covered by your ISO 50001 certification. If transport is not covered by your certification then this means that you will need to calculate your total energy consumption and use a lead assessor, and depending on what proportion of your energy use your transport makes up you may have to do some additional ESOS compliant audits. Note that even if your transport only made up 9% of the

total a lead assessor would still be required to confirm that the total energy consumption had been calculated correctly and that 90% was compliant via ISO 50001 (although the lead assessor would not have to review the detail of the ISO 50001 certification).

How do we measure fuel input?

If you cannot measure fuel input exactly then you can use cost data as a proxy when you are doing the total energy calculation. All companies will know what they have been invoiced for fuel deliveries. However, if the fuel is captured within the 90% then you can't use money you would have to back calculate or estimate the fuel usage as part of analysing the energy use and identifying efficiencies.

On generators are you assessing on electrical energy produced or fuel energy input?

All forms of energy: under this scheme you have to measure the input energy in terms of fuel that is combusted in the generator AND the energy that is produced by that generator if you are using that energy. This is all part of the total energy calculation. Yes you could say this is double counting but we are looking here at opportunities for efficiency, including the generation process and then how you use the electricity. It is not trying to add up the total emissions associated with a facility or company.