POWERING THE PUBLIC SECTOR

McDermott Will & Emery

MEMORANDUM

To:	Richard Murphy		
From:	David Birchall		
Subject:	TEC- ESOS Guidance	**Date:**	10 December 2014

1. INTRODUCTION

Here is a note on the application of the Energy Savings Opportunity Scheme ("**ESOS**") to higher education institutions.

More specifically, we provide guidance on the following:

1. clarification on the exemption outlined by the Department of Energy and Climate Change ("**DECC**") to ESOS for entities that are the 'required to comply' with the Public Contracts Regulations 2006 or the Public Contracts Regulations (Scotland) 2012 (together the "**Public Contract Regulations**");

2. implications of an entity voluntarily complying with the Public Contract Regulations in regards to obligations (if any) under ESOS;

3. whether funds channelled through the Student Loans Company amount to private or public funding in the context of whether an entity is publicly funded or not for the purposes of ESOS; and

4. alternative routes to ESOS compliance besides an ESOS audit.

2. SUMMARY

2.1 ESOS is a mandatory energy assessment and energy saving identification scheme that applies throughout the UK to large undertakings and their associated businesses.

2.2 An entity is likely to be caught by ESOS if on the qualification date (31 December 2014) it is**:**

i. an undertaking[1] which has 250 or more employees; or

ii. an undertaking which has fewer than 250 employees but has (a) an annual turnover exceeding 50 million euros and (b) balance sheet exceeding 43 million euros.

2.3 ESOS will operate in four-yearly compliance phases. Organisations in the UK must assess whether or not they are required to participate in ESOS on the qualification date of each phase. The qualification date for the first phase is the 31st December 2014.

2.4 As discussed below, whether or not an individual university (or any other higher education institution) is required to comply with the ESOS will depend in large part on how it is funded. If it is a large undertaking and derives more than half its fees from private sources then it is likely to be required to participate in ESOS.

2.5 Broadly ESOS requires participants to do three things:

i. measure its total energy consumption across its buildings, transport and industrial activity;

ii. conduct energy audits to identify cost-effective energy efficiency recommendations; and

iii. report compliance to the Environment Agency.

2.6 ESOS compliance bodies will have the authority to apply civil penalties against participating organisations/groups found to be non-compliant with its requirements. Penalties can include fines and court orders requiring compliance with ESOS.

3. OVERVIEW AND PURPOSE OF ESOS

3.1 The ESOS was introduced by the Department of Energy and Climate Change ("**DECC**") in response to the requirement for all Member States of the European Union to implement Article 8 of the Energy Efficiency Directive.

[1] An undertaking is defined as '(a) a body corporate or partnership, or (b) an unincorporated association carrying on a trade or business, with or without a view to profit'

3.2 The justification behind the new regime is that ESOS Energy Audits have the potential to increase profitability and competitiveness of businesses by identifying cost-effective savings which, if implemented, will improve energy efficiency. The scheme is estimated to lead to £1.6 billion net benefits to the UK with the majority being directly felt by businesses as a result of energy savings. While that is a laudable aim, there is natural concern as to the cost of compliance with the new scheme.

4. PUBLIC CONTRACTING REGULATIONS

4.1 Some higher education institutions may be excluded from the scope of ESOS if they fall within the definition of 'public body'. Public bodies are defined under ESOS as those bodies which 'must' adhere to the Public Contract Regulations[2] (the "**Exemption**").

4.2 An entity is required to adhere to the Public Contract Regulations if it falls within the definition of 'contracting authority'[3]. The test outlined by the Public Contract Regulations (the "**Test**") states that an entity falls under the definition of contracting authority if that entity:

i. is for the specific purpose of meeting the general interest, not having an industrial or commercial character;

ii. is financed wholly or mainly by another contracting authority; **and**

iii. is subject to management by another contracting authority or more than half of those responsible for management are appointed by another contracting authority.

4.3 The key test which has been considered by higher education bodies is whether more than fifty percent of its financing comes from public financing (including funding from another contracting authority), taking into account of all the entity's income, including income which results from commercial activity.[4]

4.4 In other contexts, there has been case law and debate which suggests that higher education institutions will not be public bodies for these purposes.

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[2] 3.4.1.1 Energy Savings Opportunity Scheme (ESOS) September 2014.
[3] Regulation 5(1) Public Contract Regulations 2006
[4] R. (on the application of the University of Cambridge) v HM Treasury (C380/98) [2000] W.L.R. 2514

4.5 The fact that the ESOS guidelines state that an entity **'must'** adhere to the Public Contract Regulations suggests that the main focus for the Exemption is whether or not the entity, satisfies the test outlined above, and particularly for these purposes, whether the entity is publicly financed. Hence the question is whether the entity falls within the definition of 'contracting authority' opposed to whether the obligations under the Public Contract Regulations are met.

4.6 Similarly the Public Contract Regulations are very clear that they only apply to contracting authorities, with no provisions catering for voluntary compliance. Indeed they specifically exclude certain contracts from the regulations; this further suggests that simple voluntary compliance would not be sufficient for purposes of the Exemption.

4.7 Where a university derives more than half of its income from private sources, such as fee-paying students, it may not need to comply with public contract regulations. In this case, it would not be deemed a public body for ESOS purposes, and would therefore need to participate in ESOS.

5. STATUS OF THE STUDENT LOAN COMPANY

5.1 If an higher education institution receives more than half its funding from the Student Loan Company, it is likely that it would be deemed to be publicly funded and outside the scope of ESOS.

5.2 The Student Loan Company is owned by the Department for Business Innovation and Skills, Scottish Ministers, the Welsh Assembly Government and the Department for Employment and Learning in Northern Ireland is entirely Government-funded and non-profit making[5].

5.3 Under the Test set out by the Public Contracts Regulations, the fact that the Student Loan Company is:

5.3.1 a non-profit organisation, entirely owned and funded by the Department for Business Innovation (a contracting authority under the Public Contracts Regulations[6]); and

5.3.2 indirectly supervised by a government body, suggests it is a contracting authority.

[5] http://www.slc.co.uk/about-us/remit.aspx
[6] Regulation 3(b) Public Contract Regulations 2006

5.4 It is arguable that if a higher educational institution is largely funded by the Student Loan Company, it would be considered a contracting party under the Public Contract Regulations and therefore be exempt from ESOS.

6. ADHERENCE TO ENERGY PERFORMANCE BUILDINGS LEGISLATION

6.1 One the organisation's total energy consumption has been determined- participants must audit assets and activities that amount to 90% of your areas of significant energy consumption.

6.2 ESOS provides participants with a number of possible routes to demonstrate that a compliant assessment of their organisation or group has been undertaken. The below are ways to comply with ESOS:

i. ESOS Energy Audits;

ii. ISO 50001 certification (which may be in place in any event or indeed be a preferable route to take);

iii. Display Energy Certificates (DECs); or

iv. Green Deal Assessments.

6.3 Having adopted one of the above routes, participants must provide a notification to the Environment Agency that it has complied with the requirements of ESOS on or before the compliance date of each phase. This notification includes the following details:

i. information on the participant;

ii. information on any aggregation or disaggregation that has taken place;

iii. information on the lead auditor; and

iv. information on the ESOS Assessment.

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McDermott, Will & Emery UK LLP