

## Explanatory notes

### I. General section

#### 1. Introduction

On 10 March 2020, the second revision of the Energy Performance Directive was implemented in Dutch building regulations.<sup>1</sup> It concerns Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings (EPBD Directive) and Directive 2012/27/EU on energy efficiency (EED Directive).<sup>2</sup> This second revision of the EPBD Directive is hereinafter referred to as EPBD III. The EPBD III requires Member States to introduce system requirements for the energy performance, adequate installation, dimensioning, adjustment and adaptability of technical building systems. Technical building systems include space heating, space cooling and ventilation systems. These requirements aim to improve the energy performance of technical building systems.

For heating and air conditioning systems, this has led to rules on the inspection of these systems. Articles 14 and 15 of the EPBD III provide for exceptions. Under the Building Decree 2012 and the Building Works Decree (Bbl), an exception is included for the inspection obligation when an energy performance contract as referred to in the EED Directive (Annex XIII) has been concluded for the building. In addition, there is no inspection obligation if a heating or air-conditioning system is located in a building with a system for building automation and monitoring.

The Netherlands received a letter of formal notice from the European Commission on 9 February 2022 following the implementation of the EPBD III. The Lower House was informed of this by letter of 17 March 2022.<sup>3</sup> The Lower House was also informed by letter of 24 February 2023 that on 15 February 2023, the Netherlands received a reasoned opinion on the transposition into national law of the EPBD III.<sup>4</sup> It was found that the Netherlands had not fully implemented Articles 14(2) and 15(2) of the EPBD III. This amending act shall ensure that this is restored.

#### 2. Content of the Decree

The exceptions to the inspection obligation as included in EPBD III have been implemented in the Building Decree 2012 and the Bbl too narrowly. The following three aspects are concerned:

1. EPBD III states in Articles 14(2) and 15(2) that air conditioning and heating systems 'explicitly covered by an agreed energy performance criterion or a contractual arrangement specifying an agreed level of energy efficiency improvement, such as energy performance contracts' are exempted from inspection requirements. This wording expresses that, in addition to energy performance contracts, there are other forms of agreements that may include agreements on an energy performance criterion or energy efficiency improvement, which, strictly speaking, do not fall under the definition of energy performance contract as referred to in Article 2(27) of the EED.<sup>5</sup> In Dutch building regulations, the exemption option was limited to energy contracts.
2. The EPBD III also includes an exemption for technical building systems 'managed by a utility or network operator and therefore subject to system-side performance monitoring measures'. This option is lacking in the Dutch building regulations.

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<sup>1</sup> Bulletin of Acts and Decrees 2020, 84.

<sup>2</sup> OJEU 2018, L 156/75.

<sup>3</sup> Parliamentary Papers II 2021/22, 21109, No 254.

<sup>4</sup> Parliamentary Papers II 2022/23, 21109, No 258.

<sup>5</sup> 'a contractual arrangement between the beneficiary and the provider of an energy efficiency improvement measure, which is verified and monitored throughout the life of the contract, whereby the investments (labour, supplies or services) are paid for in such a way that they are proportionate to the contractually-agreed level of energy efficiency improvement or some other agreed performance criterion, such as financial savings'.

3. Finally, the EPBD III attaches a condition to the exemption options. Exemption from the inspection obligation is possible, 'provided that this approach produces the same overall result as the result of paragraph 1'. The Netherlands has only mentioned this in the Explanatory Note for the original implementation.<sup>6</sup>

Articles 6.37 (inspection of air-conditioning systems) and 6.42 (inspection of heating systems) of the Bbl and the corresponding provisions of the Building Decree 2012 have been amended by this Decree in such a way that an exception to the inspection obligation does not only apply if the system is covered by an energy performance contract, but rather for all cases referred to in Articles 14(2) and 15(2) of the EPBD. These can be energy-saving contracts, but this is not mandatory. In an energy performance contract, as in other forms of third-party financing arrangements, the beneficiary of the energy service avoids investment costs by using part of the financial value of the energy savings to repay all or part of the investment made by a third party.<sup>7</sup> However, the exemption from the inspection requirement also applies to air conditioning and heating systems explicitly covered by an agreed energy performance criterion or contractual arrangement specifying an agreed level of energy efficiency improvement.

Air-conditioning and heating systems that are operated by an energy supplier or a system operator and are therefore already subject to system-side performance monitoring measures are also excluded from the inspection requirement.

It has been added to these two exceptions that they may only be used if the result of the said approach is the same as the result achieved by the inspection. The wording of the provisions is as close as possible to the text contained in the EPBD III. The equivalent result must be demonstrated by the owner of the relevant technical building system.

### **3. Relationship with other national law**

The Bbl, which is amended by this Decree, is part of the system of the Environmental Law. The Environmental Law will enter into force on 1 January 2024. Until then, the provisions of the Building Decree 2012 apply.

### **4. Consequences of this Decree**

The Decree does not contain any changes with regulatory burden effects. Instead, the study on the impact of the inspection requirements in the EPBD looked at the impact of the possible exceptions.<sup>8</sup> That study indicated that the number of buildings that could use the exemption from the inspection requirement based on energy contracts was negligible.

### **5. Supervision and enforcement**

The supervision and enforcement of the requirements of the Bbl and Building Decree 2012 are primarily carried out by the municipality. To this end, they have the administrative law enforcement powers set out in the Environment Act and the General Administrative Law Act. This Decree does not add any new tasks or responsibilities to the tasks of the municipalities. Municipalities have policy space with regard to the way in which they implement the supervision and enforcement of the requirements of the Bbl and the Building Decree.

### **6. Advice and consultation**

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<sup>6</sup> Bulletin of Acts and Decrees 2020, 84, p. 21.

<sup>7</sup> Recital 47 of the EED Directive.

<sup>8</sup> Load-measurement implementation of the revised EPBD, Sira Consulting, 2009.

### *6.1 JTC and OPB*

The proposed amendments to this decision were submitted to the Legal-Technical Committee (JTC) on 23 June 2022 and then to the Building Regulations Consultation Platform (OPB) on 13 July 2022. A wide variety of parties participate in these two consultation platforms: the design, supply and construction industry, representatives of building users and owners and other interest groups. No comments were made concerning this amendment in the JTC. The OPB drew attention to the purpose of the EPBD III text and the definitions used.

### *6.2 SME test*

On 31 October 2022, an SME review took place of a Collective Reference of the Bbl, of which the EPBD III amendment also formed part. SMEs were invited to this meeting through various industry associations. Five SMEs eventually participated in the SME test (two curtain wall builders, a contractor, a construction consultancy and a certification body). SMEs mainly commented on the changes to the fire safety of façades for high-rise buildings in which people sleep, but not on the present amendment.

### *6.3 Online consultation*

From 15 December 2022 to 26 January 2023, the draft decision on 'Collecting change Bbl various topics' was published for consultation on [www.internetconsultatie.nl](http://www.internetconsultatie.nl), giving everyone the opportunity to respond. As mentioned in section 6.2, it also included the amendment EPBD III. To accelerate the creation process of the amendment to the inspection requirement as much as possible, given the infringement procedure, it was decided to include this amendment in a separate decision.

One reaction has been received regarding the EPBD III. In its response, the NLIingenieurs industry association calls attention to the wording of the article in relation to the equivalent solution. This comment has also prompted a further review and adaptation of the text of the amendments. For the sake of clarity, it has been chosen to align with the Dutch text of the EPBD III of this explicit condition ('provided that this approach produces the same overall result as the result of paragraph 1').

### *6.4 Regulatory Burden Advisory Council [Adviescollege toetsing regeldruk]*

On 26 January 2023, the Regulatory Burden Advisory Council issued its opinion on the proposal to amend the Building Works Decree [Besluit bouwwerken leefomgeving] in relation to national standardisation of energy and environmental performance for new buildings, improving health and safety in buildings and some other amendments. The amendment resulting from the EPBD III has been identified as a amendment without any regulatory burden.

### *6.5 Code of Intergovernmental Relations*

As part of the Code of Intergovernmental Relations, this decision was submitted to the Association of Netherlands Municipalities (VNG). In its response, the VNG requested clarification of these EPBD requirements and points to full transposition into the building regulations. The latter comment is satisfied by the present amendment. A detailed explanation of the inspection requirement itself was previously included in the Decree of 4 March 2020, amending the Building Decree 2012 and some other decrees on the implementation of the second revision of the Energy Performance of Buildings Directive.<sup>9</sup>

### *6.6 Preliminary scrutiny*

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<sup>9</sup> Bulletin of Acts and Decrees 2020, 84.

Pursuant to Article 23.5(1) of the Environment Act, the draft of this Order in Council was submitted to both Chambers of the States General on 23 May 2023, in order to give them the opportunity to express their views on the draft decree for its nomination and adoption. No comments were made or questions asked by either Chamber.

#### *6.7 Notification*

Pursuant to Article 5(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 on an information procedure in the field of technical regulations and rules on information society services (codification) (OJEU 2015, L241) submitted to the European Commission (notification number: TBC). *This section is supplemented following completion of the notification.*

### **7. Entry into force**

The envisaged date of entry into force of the amendment to the Bbl is 1 January 2024. Until that date, the Building Decree 2012 applies. In order for this amendment to enter into force as soon as possible before 1 January 2024 in view of the infringement procedure, Article III stipulates that the amendment to the Buildings Decree shall enter into force on the day following the date of issue of the Bulletin of Acts and Decrees in which it is published.

## **II. Part by article**

### **Articles I and II**

#### *Parts A and B*

Articles 6.37 (inspection of air-conditioning systems) and 6.42 (inspection of heating systems) of the Bbl and the corresponding provisions of the Building Decree 2012 have been amended by this Decree in such a way that an exception to the inspection obligation does not only apply if the system is covered by an energy performance contract, but rather for all cases referred to in Articles 14(2) and 15(2) of the EPBD. Point a(1) provides that the exemption from the inspection obligation applies to air conditioning and heating systems that are explicitly covered by an agreed energy performance criterion or a contractual arrangement indicating an agreed level of energy efficiency improvement.

Article (a)(2) states that air conditioning and heating systems operated by an energy supplier or a network operator are also excluded from the inspection requirement. The reason for this is that in that case, these systems are already subject to system-side performance monitoring measures. The definitions of energy supplier and grid operator are in line with those in the Gas Act, Electricity Act and Heat Act.

It has been added to these two exceptions that they may only be used if the exceptions achieve the same result as the inspection referred to in paragraphs 1 and 2.

### **Article III**

This Decree shall come into force on a date to be determined by royal decree. This shall allow the entry into force to be aligned with the entry into force of the Environment Act and the Bbl on 1 January 2024. Until the entry into force of the Environmental Law and the Bbl, the Building Decree 2012 applies. In order for the identical amendment to the Building Decree to enter into force as soon as possible prior to 1 January 2024, Article III stipulates that the amendment to the Building

Decree will enter into force on the day after the date of issue of the Official Gazette in which it is published.

The Minister for Housing and Spatial Planning,

Hugo de Jonge