# ZEroCO2

# Zero Emission Communities

# “Guidelines on PPP setting up and management”



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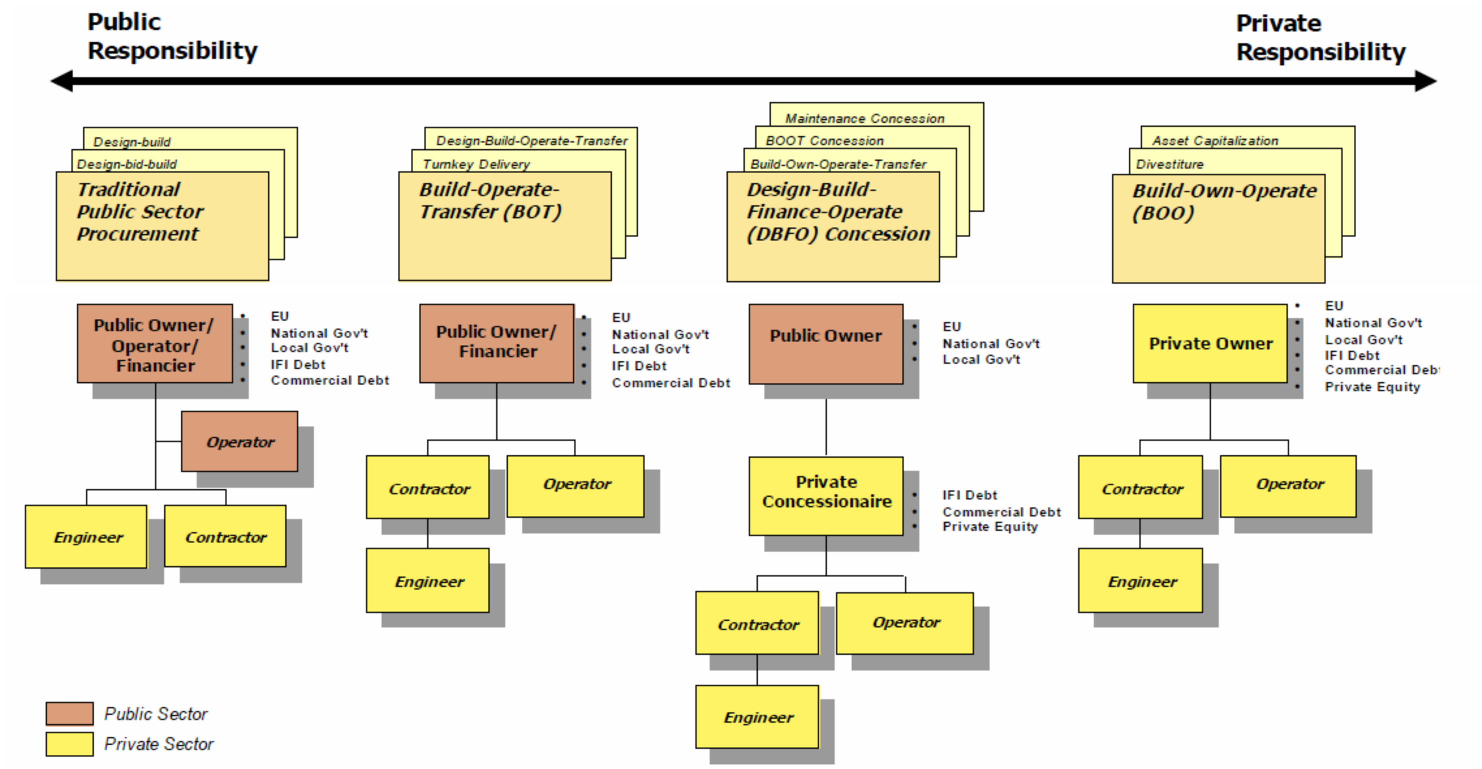
## PPP types and structures

A PPP is a partnership between the public sector and the private sector for the purpose of delivering a project or a service traditionally provided by the public sector. PPPs recognise that both parties have certain advantages relative to the other in the performance of specific tasks. By allowing each sector to do what it does best, public services and infrastructure can be provided in the most economically efficient manner.

Designed appropriately, PPPs can generate substantial benefits for consumers and taxpayers. The scope of potential benefit will, however, depend on the type of project being undertaken and the exact terms of the contract governing the PPP. It is important to note that public bodies have a critical role to play in the management and regulation of PPP during their design, construction and operation. PPPs also require effective contract monitoring procedures to ensure that contractual obligations continue to be met in terms of both quality and timing.

It is also essential to recognize that the nomenclature used to describe the partnership process has not been standardized. There are several terms often used. There are also single terms that are used loosely and can be applied to situations that are fundamentally different. As such, it is necessary for PPP practitioners to delve beyond the terms and concepts and become familiar with the way in which the partnership process itself works.

The following figure presents the interaction between public and private responsibility in combination with the various types of PPPs.



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Under the traditional public procurement model, government agencies can utilize the services of the private sector for design and construction, with the award of individual contracts made on a competitive basis. However, private sector participation usually does not extend beyond these functions.

Figure 1. Project Procurement Options (source: Guidelines for successful public-private partnerships, March 2003)

The abovementioned type involves cases where limited responsibilities assumed by the public sector are passed to private companies. However, the functions involved are at once discrete and relatively isolated. Integrated partnerships involve transferring responsibility for the design, construction, and operation of a single facility or group of assets to a private sector partner. This project delivery approach is known by a number of different names, including “turnkey” procurement and the build-operate-transfer (BOT) system.

The advantage of the BOT approach is that it combines responsibility for usually disparate functions – design, construction, and maintenance – under one single entity. This allows the partners to take advantage of a number of efficiencies. First of all, the project design can be tailored to the construction equipment and materials that will be used. In addition, the contractor is also required to establish a long-term maintenance program up front, together with estimates of the associated costs. The contractor’s detailed knowledge of the project design and the materials utilized allows it to develop a tailored maintenance plan over the project life that anticipates and addresses needs as they occur, thereby reducing the risk that issues will go unnoticed or unattended and then deteriorate into much more costly problems.

The structures described above provide new opportunities for the private sector to perform tasks that would otherwise be undertaken by the public sector. However, PPP arrangements can also involve private sector financing for projects that would otherwise be fully financed by the state. These types of PPP arrangements are particularly attractive as they afford all the implementation and operational efficiencies described early, together with new sources of capital. Access to additional sources of capital allows owners to implement important projects sooner by avoiding the need to wait for future government budget cycles for funding.

The primary vehicle for PPP opportunities involving direct private sector investment is the design-build-finance-operate (DBFO) concession agreement. These agreements enable a private investment partner to finance, construct, and operate revenue generating infrastructure improvement in exchange for the right to collect the associated revenues for a specified period of time. Concessions can be awarded for the construction of a new asset or for the modernization, upgrade, or expansion of an existing facility.

Concessions often extend for a period of 25 to 30 years, or even longer, and are awarded under competitive bidding conditions. Under a concession approach the ownership of all assets, both existing and new, remains with the public sector. It is their responsibility to ensure that the assets are properly used and maintained during the concession period and that they are returned in good condition when it is over. Concessions are generally awarded on following criteria:

- The end price offered to users
- The level of financial support required from the government and other grantors
- Ability to implement the project

Private divestiture involves the sale of assets or shares of a state-owned entity to the private sector (build-own-operate). Divestitures can be approached in many different ways, and can be either partial or complete. Divestiture is also often an integral part of the transformation of state-owned enterprises in Candidate Countries and can be used as a vehicle to transfer the ownership of assets from the central government to local governments and / or to private utility companies. The following discussion on divesture addresses the sale of assets to private investors only.

In the case of a complete divestiture, the entire assets of a utility would be sold either to a single investor, a group of investors, or possibly through a management buyout. In certain cases a divestiture can also be accomplished by making shares in the company available for purchase on the national stock market. A complete divestiture is similar to a concession in certain ways, as it gives the private investor complete control over investment in, and the operation and maintenance of whatever assets the company possesses. However, unlike concessions, divestiture also gives the private sector ownership of the assets themselves, and that ownership is permanent. As such, the government relinquishes further control with a divestiture approach, maintaining only a regulatory role, protecting consumers from monopolistic pricing and, in some cases, perhaps requiring a minimum maintenance and investment regimen.

With a partial private divestiture, the government would retain ownership of a certain portion of the former public company's assets. This is often a more attractive alternative to those governments or authorities who wish to maintain a certain level of control in the management of the assets. In such cases, the interplay of responsibilities between the public and private sectors is blended. A partial divestiture is an excellent way for the public sector to attract private capital and encouraging improvements in operational and management efficiency, while also protecting the public consumers as well as assets of national significance. The individual arrangements for sharing responsibility for management and investment decisions depend on the division of assets, as well as the sharing of costs. Therefore, they would need to be established on an individual basis. It is likely that the public sector would transfer as much of the costs as possible to its private partner. However, in order for a partial divestiture to be attractive to private investors there would have to be a reasonable scope for making a fair profit on its investment.

**European legislation on PPPs**

There is no specific legal framework for PPPs at European level.

Therefore, the Green Paper proposes the consult whether the Treaty that establishes the European Community (EC Treaty) and its secondary law are suitable and enough towards the special challenges posed by PPPs (http://europa.eu/legislation_summaries/internal_market/businesses/public_procurement/l22012_en.htm). This analysis refers to the selection of private partner and to the performance of the partnership.

Any act, through which a public entity trusts the provision of an economic activity to a third party, should be studied according to the rules and principles of the EC Treaty. With regard to freedom of establishment and freedom to provide services (Articles 43º to 49º), these principles include, namely, the transparency, the equal treatment, the proportionality and the mutual recognition. Thus, the EC Treaty is applicable to PPP.

Some forms of PPP are subject to European legislation on the procedures for celebrating public contracts. Revised in 2004, this legislation introduces, namely, a new procedure for celebrating: the competitive dialogue. This dialogue provides a legal basis for some forms of PPP in the case of very complex projects for which a competent authority has a specific need and look at the traders for the best technical solution.

PPP may be subject to concessions for works and services. These are distinguished from public procurement, to the extent that the trader is paid at least in part, through the exploitation of the work or service. At European level, the awards are partial, or even in the case of service concessions, totally excluded from the scope of the European Directives on public procurement. The Commission's interpretative communication on concessions under Community law [Official Journal C 121, April 29th, 2000] clarifies the obligations of public authorities in the selection of candidates for the award.

Main issues on the development of PPPs in the context of effective competition and legal clarity:

• Guidelines on procedures for selecting the private partner.

• The creation of PPP from private initiative.

• The contractual framework and any changes in the course of PPP.

• Subcontracting.

• Challenge of effective competition in the case of private partnerships.

# ITALY

## A.1. National legislation and regulation on PPPs

The development of PFI/PPP in Italy began in the early 90s. Being a Civil Law country, a bulk of new rules have been issued over the last 15 years to introduce PFI/PPP schemes similar to those used in the UK, and to fine-tune and harmonize them with the detailed Italian legislative framework governing public services and the planning of new infrastructures. In particular, three milestones in this process may be identified:

(a) **Merloni Ter**: after many minor steps and attempts, the first set of rules which was clearly identifiable as an organized PFI exercise was introduced at the end of 1998, by way of an amendment to the Public Works Act, Law 109/94, known as the Merloni Law. Law 415/98 was the second restatement of the Merloni Law and was then named Merloni Ter. It introduced a BOT concession scheme and a number of measures to ring-fence the project risk and makes it bankable on a no-recourse basis. It also introduced a new procedure to allow private initiatives, called promotore.

(b) **Legge Obiettivo**: between December 2001 (Law 443/01 and CIPE resolution 21/12/01) and August 2002 (Lg. D. 190/02), the so-called Legge Obiettivo (Target Law) exercise was carried out, to promote the development of PFI/PPP of strategic infrastructures, to streamline their permitting process, to introduce more flexibility in the contract schemes and to facilitate project financing.

(c) **Codice dei Contratti Pubblici di Lavori, Servizi e Forniture**: the Code was enacted in April 2006 to implement in Italy EU Directives 2004/17 and 2004/98 and to restate in a single piece of legislation the various acts relating to the Merloni Law and the Target Law.

*The key features introduced by the above legislation are:*

<u>The SPV</u>

The use of a project company as a Special Purpose Vehicle to ring-fence the risk of the project and enhance its bankability was introduced in 1998. It is now regulated by Art. 156 of the Code. Upon being awarded a concession, the concessionaire has the right to set up an SPV in the form of a company with a legal personality. Such SPV may replace the original awarded as the concessionaire, to all effects. If a grant/price is paid to the concessionaire during the construction phase, the SPV's shareholders are jointly and severally liable, with the SPV, for any reimbursement of the payment received. However, this liability may be avoided if the SPV provides the granting authority with a suitable bank or insurance advance payment bond, to be released upon the issue of the test certificate and acceptance of the work by the granting authority.

The SPV's minimum share capital is indicated in the tender notice and, if a bidder is formed by several enterprises, details of each of their participation in the SPV's capital must be included in the bid. The rules for transfer of an SPV's shares must be set out in the concession agreement. As a general rule, the shareholders who contributed the concessionaire's qualification requirements are bound to remain in the SPV and guarantee the correct performance of the concessionaire's obligations (within the limits described above), until the issue of the works' test certificate. On the other hand, banks and institutional investors may take and sell the SPV's shares at any time and without limitation. An SPV may issue bonds secured by a mortgage on its assets without the limitations imposed by the Civil Code for an ordinary commercial company.

Supervening Events

The regulations relating to supervening events which can undermine the concessionaire's financial balance are set out in Art. 143.8 of the Code.

The key conditions for the financial balance of the project must be set out in the recitals to the concession agreements and are deemed to be an essential element thereof. In the event of variation of such conditions affecting the concessionaire's economic and financial plan, the plan must be adjusted to re-set its balance conditions. The law identifies the following events which can affect the balance conditions:

(a) modifications unilaterally introduced by the awarding authority;

(b) new regulatory provisions which modify financial aspects (e.g. a new tariff mechanism) or the operating rules (e.g. new rules for the operation of the service) (change of law).

Even though not expressly provided for by law, it is arguable that the obligation to review the plan applies to any modification of the balance conditions due to circumstances beyond the concessionaire's control (e.g. force majeure events). However, it is good practice to introduce an express provision in this respect in the concession agreement, together with an exhaustive definition of force majeure. Should the modifications adversely impact on the concessionaire, the review of the plan may take effect either through a contribution by the awarding authority or a tariff increase, or through an extension of the concession term. If the economic-financial plan is not adjusted, the concessionaire may withdraw from the concession agreement.

The adjustment may cut both ways. If the supervening events are favourable to the concessionaire, the adjustment of the economic-financial plan may be in favour of the awarding authority. Under certain concession agreements, the concessionaire is entitled to recover non-amortized costs at the end of the concession. This is not however a requirement of law.

Termination due to Authority Default

Under Article 158 of the Code, in the event of termination of the concession due to a default by the awarding authority or for public interest purposes, the concessionaire is entitled to receive the following sums:

(a) if the infrastructure has been completed and tested, an amount equal to the value of the works carried out plus any related costs (including financial costs), net of amortization;

(b) if the works were not completed, all the costs actually incurred by the concessionaire;

(c) any liquidated damages to be paid by the concessionaire to third parties under related contracts;

(d) a sum covering all other costs incurred or to be incurred as a result of termination of the contract;

(e) damages for loss of profit equal to 10% of the value of the works still to be carried out, or of the consideration for the services still to be provided (assessed on the basis of the economic-financial plan of the concessionaire), depending on whether the works have or have not reached completion.

The concessionaire's lenders are preferred by law in the distribution of the above amounts. Furthermore, to preserve the rights of the concessionaire and those of its lenders, the effectiveness of the termination is conditional upon the actual payment by the awarding authority of all of the above sums.

Step-in Rights of the Lenders

Under Article 159 of the Code, the lenders benefit from a statutory step-in right to rescue the project and protect their interest. In the event of termination of the concession due to a default of the concessionaire, the lenders may avoid termination by nominating a new company (Newco) to replace the concessionaire, within 90 days of receipt of a written notice from the awarding authority's intention to terminate the concession agreement.

The awarding authority is bound to accept such replacement if:

(a) the technical and financial qualifications of Newco are substantially equivalent to those held by the concessionaire at the time of the concession award;

(b) Newco remedies the concessionaire's default within 90 days of its appointment.

Therefore, the lenders have a total period of 180 days to appoint a Newco and remedy the concessionaire's default. This term, however, may be extended by mutual agreement between the lenders and the awarding authority. Lien Under Article 160 of the Code, the concessionaire's lenders' credits are secured by a general lien over the project assets.

*Legislative Decree 152/2008 c.d. third order correction of the Code of Public Contracts*

Since the first procedure of custody, through the i.e. proceedings of the promoter with the Merloni law ter in 1998, five successive regulatory changes: a) *Law 166/2002 c.d. Merloni c*; b)*The Law 62/2005 "Community Act 2004"*; c) *Legislative Decree 163/2006 "Code of public contracts;* d) *Legislative Decree 113/2007 c.d. second order correction of the Code of contracts*; e) *Legislative Decree 152/2008 c.d. third order correction of the Code of Public Contracts;* until you get to the legislative decree 152/2008, which has completely rewritten the rules of procedure of the promoter (see Box 1).

The new framework is characterized by: *greater accountability of public administration with reference to the drafting of the feasibility of the projects*, the regulation of procedure expectations through the *definition of acts as the basis of race*, and is the approval of the project prior to the amendments derive from the Environmental Impact Assessment (SIA) and the conference service.

Greater accountability is also required to private/developer in the following respects: the requirement to possess the collateral and the preliminary draft with the relevant documentation for bankability/sustainability of operations, the so-called **sliding mechanism**, and the obligation to participate in the tender procedure in the event of inactivity for the PA, under penalty of not recovering the costs incurred.

With regard to economic and financial assessment of profiles, the order provides that the Economic and Financial Plan (PEF) are endorsed by a bank with the submission of the proposal to the contracting authority. The sworn statement should provide management with a professionally qualified on the fairness and financial sustainability of the PEF, on the basis of input data in the proposal. The added value of this support is quite low because:

1. the affidavit is made on the preliminary draft;
2. the affidavit does not imply any commitment by the bank to finance then the initiative;
3. the promoter is usually directed to their bank, which is difficult to deny a business opportunity with a client company, since the legalization of PEF is a paid service.

With the legislative decree 152/2008 the PEF is intended to be continuous adjustments, both during and prior to the award since the signing of the concession contract. These activities refine the PEF as a function of the changes required by the landlord, and make little use of the financial closing of the appeal of the affidavit.

Regarding *taxation scheme*, it should be noted that also with the leg. Dec. 152/2008 weren't introduced specific tax legislation for the area of PPP. In general we can say that the project company refers to the general tax treatment of limited liability companies. In this regard, the Finance Act 2008 (art. 1, paragraph 33, paragraph 5) amends the direct taxation of companies in general. With more direct reference to the PPP, a significant innovation in the field of IRES was the exclusion for the project company from the application of new rules on non-deductibility of interest expense to 30percent from the tax base. This exclusion, resulting in an effective tax benefit and an incentive for the construction of public works in PPP. Disincentive are instead the following provisions relating to Value Added Tax (VAT): a) *VAT applied to public contribution paid by the grantor diverts resources for the operation in favour of general taxation*; b) *VAT on public assistance paid by the grantor is applied at a reduced rate (10percent) only in certain areas*; c) *the VAT fee availability has a variable rate to a maximum of 20 percent;*

| BOX 1 – The new procedure of the promoter |
|---|
| The third corrective completely rewrites the standard art. 153 of the Code, now entitled "Project Finance", by repealing the following articles 154 and 155. In short, instead of the known procedure of the promoter, the rule is now three different procedures, in addition, as alternatives to the traditional mode of custody is governed by Articles. 143 et seq. of the Code, for contracts for public works concession relating to the operations covered by the programming tools formally approved by the contracting authority. In particular, there are three alternative procedures: |
| 1. a unique race for the identification of the promoter and the award of the concession contract (Article 153, paragraphs 1-14); |
| 2. a dual race with a right of first refusal in favour of the promoter (Article 153, paragraph 15); |

3. an ad hoc procedure in case of inaction by the Government, if it does not provide for the publication of notices within six months of the annual list of public works which are included in operations financed in whole or in part with private capital (Article 153, paragraphs 16-18).

Is be taken finally that the procedure (Article 153, paragraphs 19-20) which governs the operation of private works are not included in the programming tools already provided for in repealing Art. 153 of the Code, but are modified by the Third Corrective.

These new laws obligate the government to make ex ante many choices that were previously postponed to a later date (for example, the evaluation phase of the proposals) and to make known to the market the appropriate manner to suit you, already at the time of the procedure.

### A.1.1. Legal capacity of parties and legal requirements of the State to provide services

The typical object of an ESCO is to put in place technical measures needed to achieve energy savings through investments made by the ESCO itself or with the primary goal of savings through improved energy efficiency, on behalf of its customer users of energy. The task of improving energy efficiency through the participation of an ESCO as a rule is the Third Party Financing (TPF): which is a contractual arrangement involving a third party in addition to the energy supplier and the beneficiary of the measure to improve energy efficiency, it provides the capital for that measure and charge the beneficiary a fee equivalent to a part of the savings energy achieved as a result of that measure (Art. 3, c.1, lett. k Direttiva2006/32/CE). In this case, the third is a E.S.Co.

Through the instrument of the TPF, the E.S.Co. may facilitate efforts to streamlining efficiency, that is not longer supported only by contributions from public grants or credit from traditional investments, but can be activated with private capital and thus creating a form of public-private partnership (PPP). Where a public authority intends to use the services of an ESCO could not proceed with a public tender for the selection of the company. The contract could require different energy efficiency type of interventions that the administration wants to achieve, even down rules for the race will vary depending on type of contract. In particular, energy efficiency contracts are contracts for services, or mixed contracts for services, supplies and works, whose rules must be established with regard to the criteria for mixed contracts provided for in Article 14 of the Public Contracts Code (d. lgs.163/2006).

As mentioned earlier, even in the case of the creation of a joint enterprise (Newco) which creates energy saving and efficiency plus energy production, to the authorities is required to select the private partner with a public procedure in relation to the object that the company will be appointed to carry out. The option for this form of PPP means that the public partner is to ensure public and raise funds to be allocated to the capitalization of the joint enterprise for the share of public equity, while other funds will come from private sources (private equity) and bank loans. In the presence of limited public resources, the share of the private capital will be the majority. Where the basic conditions of the specific project permit, the Newco, can be used in project finance, structured finance. To reduce the financial risks, in addition to the typical ESCO Energy Service it may also include any production of energy from renewable sources, in order to increase the volume of incoming cash flow resulting from the operation of the project (Power Generation PE).

With the creation of a joint enterprise, the administrations are directly involved in management and therefore in the portion of the revenue generated by the exploitation of economic management activities. In those circumstances it is noted that although a semi-private partnership, like ESCO activities, can be considered the most effective and efficient organizational tool for the financing and provision of integrated energy services aimed at the achievement of the goals of general interest, should however also consider that the application of this model is not accompanied, in some cases, objectives of administrative simplification. The convenience of the use of joint enterprise for the financing, provision of energy services and execution of measures must therefore be evaluated case by case basis.

### A.1.2. Cost recovery mechanisms

Tax Exemption

There are tax breaks for those who make energy saving measures. The tax, introduced by Finance Act 2007 and confirmed in the No.2 of January 28, 2009, are valid for those who carry out energy saving measures and consist of a 55% deduction from income tax income tax (personal income tax) or IRES (corporate income tax), to be divided in five equal annual rates. Can access all taxpayers including: 1. natural persons, including the trades and professions; 2. taxpayers who receive business income (individuals, partnerships, limited liability companies). The tax exemption rules are apply to expenditure incurred from 1 January 2009 and cover the following sectors:

• redevelopment of existing buildings energy;

• interventions on existing buildings;

• installation of solar panels;

• replacements of winter conditioning.

For interventions that were made before the adoption of Law No. 2, they have to respect the old guidelines of the 2008 Budget: the 2008 Budget was extended until December 31, 2010 the tax incentives introduced by the previous financial assistance for those who make energy savings, which consist of a 55% deduction from income tax income tax (personal income tax) or IRES (corporate income tax) spreads in the period from 3 to 10 years chosen by the taxpayer. The deduction should not be a tax credit for the 4types of work mentioned above.

Deductible expenses

It is possible to deduct the costs for the construction work associated with the intervention and those for services provided. These allow you to carry out interventions and facilitated to acquire the energy certification required to qualify for benefits. Also depending on the type of intervention are deductible individual expenditure items.

Procedures to obtain the deduction

It expects the communication from the Inland Revenue about the terms and conditions for access to funding.

White Certificate

The mechanism of white certificates (Energy Efficiency Certificates TEE) is a system of incentives established by DM 20/07/2004 and subsequent revisions, which determines the national quantitative targets to increase energy efficiency and how to achieve them.

The distributors of electricity and gas are obligated to buy and to adopt energy savings, at the same time the volunteers as ESCOs, are encouraged to identify niches of inefficiency and implement efficiency measures to obtain a statement from the energy savings from the Authority for Electricity and Gas (Authority) as TEE. To fulfil their obligation, distributors can make their actions and/or buy securities through bilateral negotiations or by the ESCO, all operations will be operate in the market for TEE managed by Electricity Market Operator (GME).

If you want to make an intervention to save power consumption or heat from buildings or infrastructure, an ESCO, may: 1) whether the savings reach the minimum threshold or if they can be incorporated in a campaign already underway; 2) develop methodologies for calculating savings for interventions for which there is no a technical standard; 3) manage relationships with the institutions involved in the evaluation and certification of savings; 4) market the securities issued on the platform of GME or bilateral agreements; 5) Depending on the energy savings, the proceeds from the sale of TEE can be a small contribution or an interesting incentive.

Guaranteed Savings

The customer is financing the design and installation of improved efficiency measures, assuming a contractual obligation of the payment and the resulting credit risk.

The loan, in this case, rests with the client's financial statements and reduced, as in an ordinary loan, the ESCO's ability to trust that, if the exposure would be ensured otherwise, could be used to fund other initiatives.

The ESCO's role is to recruit and organize the financing, assuming at the same time, the technical risk on the success of the changes and the accuracy of maintenance. The ESCO is committed to ensuring that savings are not inferior to an agreed minimum, established on the basis of feasibility.

This mode is always a form of performance contracting: the customer continues to pay the bills for utilities and fuel bills and pay a fee to the ESCO with which pays for the service management (O&M Operations & Maintenance). Normally, the total annual expenditure of energy expenditure may not exceed the highest one, by the customer.

In this case, however, the ESCO should have experience, references and asset (link) - to be able to offer guarantees on savings to the customer (either directly or through insurance contracts known as performance bonds). In general, but especially in the absence of these conditions could be very useful if not indispensable, state guarantee funds - the guarantee fund may offer you or I go out at about 40% of the guarantee and this has the same function of an ordinary bank guarantee - which intervenes only in cases where the project pays for itself, and that they can support the emergence of the sector in our country to the affirmation of subjects credible.

*Pay from Savings*

The formula is a Pay from Savings Guaranteed Savings type contract which states that the rate of repayment of the loan, the customer owes the bank, are not fixed and indexed to the actual savings achieved. The debt repayment plan depends on the level of savings, if the savings are high, the debt is extinguished faster. This model reduces the credit risk borne by the customer.

Shared Savings

This formula combines the benefits of third-party financing and the remuneration to performance.

In a shared savings contract, the investment is repaid on the basis of an agreement between the ESCO and the end user, a subdivision of the savings rate determined by the feasibility study. For example, a typical contract may give 70% of the savings to energy service companies and 30% of the user for a period of five years, with a 50/50 split in the next two years.

The savings attributable to the ESCO is usually higher than the contracts that guaranteed savings as the company assumes the financial burden and the associated credit risk. Other factors include the duration of the contract, payback period provided for, and extent of the investment.

The customer can get in some cases to recognize the ESCO 100% of savings achieved until the return of all project costs, including a profit margin (contracts of first-out or "limited global supply). The shared savings contract is of interest when the owner of the recipient of the intervention cannot or will not use their ability to care: in this case is the service company that enters into the loan and agrees to pay the rate of reimbursement. The ESCO then, in addition to technical risk inherent in the performance (which is tied to its return), as already stated, it also assumes the credit risk. Also, if the actual savings are less than estimated, the returns will be lower as they also savings and recurring billings are higher. This model (as the guaranteed savings), it is unsuitable for young companies with limited resources, which, after a series of funded projects would find themselves over-indebted and unable to face further action.

In Italy the application of this type of contract is difficult and risky, because our law is not based on the concept of "sanctity of contract, common law provides that in the negotiations for the immediate enforceability of the covenants that very quickly the judge apply ordinary, unlike what we experience in our judicial practice with long waits for a verdict of execution. *The risk of inappropriate timing of the application of the rights we actually discourage the use of all contracts on performance.*

First Out

The Assignment limited or Global First Out is a formula that has been widely used in Italy. With this approach, the ESCO can earn up to 100% of savings "real " achieved until you have completed the repayment of capital invested, including financing costs and profits. All costs and profits are declared in advance. The savings are used for full coverage of these costs. You will not benefit from any savings until the end of the contract, but the duration of the contract is less than that of other models (usually 3-4 years). Both the ESCO that are both motivated to maximize customer savings. Greater savings, the shorter the duration of the contract. The ESCO retains ownership of the plant until the end of the contract.

### A.1.3. Property issues of land and infrastructure

*Property Law*

Usually, under a PPP arrangement, the concessionaire is given a leasehold (*diritto di superficie*) or a similar concession right over the assets pertaining to the project. This is particularly the case under a DBOT model, under which the contractor is granted the right to design, build and operate the project and hand it back to the authority upon expiry or termination of the concession. It should be noted, however, that such leasehold right is limited by the fact that the property is destined to be a public service. Therefore, a mortgage taken over such property may not be enforceable or be subject to the same goal. The expropriation of the land is well-regulated under DPR 327/2001, and in average does not take more than 6 months. Private owners may only resist the expropriation in court if legal formalities are not duly performed by the expropriating entity, whilst claims relating to the amount of the indemnity cannot stop or delay the expropriation.

*Planning Law*

Normal planning law is used to obtain planning permission for PPP arrangements. Special procedures are provided in order to speed up the process to obtain planning permissions. Projects of national interest benefit from a streamlined permitting process, whereby the approval of their design replaces any required localization permit. Normally PPP projects benefit from streamlined procedures and do not meet specific property/planning difficulties. As anywhere else, the risks which could result in increased costs or delays are any unknown factors affecting the site, such as ground contamination or archaeological findings.

### A.1.4. Environmental issues / Environmental Impact Assessment

(Art.164, Art.185 “Codice dei contratti pubblici relativi a lavori,servizi e forniture in attuazione delle direttive” 2004/17/CE e 2004/18/CE) (Article 19, law no. No 190/2002)

The preliminary design of infrastructure, in addition to the requirements set out in the Technical Annex XXI shall disclose and properly prepared with proper mapping of the areas involved, their buffer zones and any necessary measures to safeguard the environment. It should also indicate and highlight the performance characteristics, the functional and spending limits infrastructure to be implemented, including the spending limit for any works and measures. Countervailing the spatial and social events has not exceed five percent and must include the entire cost of the infrastructure and the related works necessary to implement it; the percentage above are excluding charges mitigation of environmental impact identified under the EIA procedure. Where, under national or regional force, the work is subject to environmental impact assessment, the preliminary draft is accompanied also the environmental impact study and published in the manner provided by law national or regional.

The approval of the preliminary draft is not required, the expropriation notice to interested in the activities referred to in Article 11 of Decree President of the Republic June 8, 2001, No 327 or other communication made for any EIA procedure under this Article. Unless it is stipulated that EIA process, the preliminary draft is still filed with the competent office region, will be available for public consultation, and that the deposit it give notice on website of the region and the awarding authority. The environmental impact assessment identifies the direct and indirect effects of a project and Its main alternatives, including the zero alternative, human beings, fauna, flora, soil, on surface water and groundwater, air, climate, landscape and the interaction among these factors, as well as material assets and cultural heritage, social and environmental policies and also evaluates framework for the establishment and operation of works and installations. For the purposes of the assessments referred to in paragraph 1, by decree of President of the Council of Ministers, on a proposal of the Ministry of the Environment, after consulting the Minister of Infrastructure and Transport has established a special commission impact assessment environment, composed of eighteen members, including the chairman, chosen from among university professors, including professionals and experts, highly qualified in materials design, environmental, economic and legal, and between government executives. For impact assessments environmental infrastructure and strategic installations, where it has been recognized in the understanding a shared regional interest, the board is supplemented by a member appointed autonomous regions or provinces concerned. To this end, within fifteen days from the date of decree establishing the commission, regions and autonomous provinces of Trento and Bolzano ensure the appointment of persons with the same requirements as other members appointed state. The decree establishing the committee shall be established for the duration and conditions the organization and functioning.

### A.1.5. Forms of possible state financial support

As an alternative to the joint enterprise that is a form of PPP Institutionalized on the basis of the distinction made by the Green Paper European Commission in 2004, can be used forms of PPP contract. In particular with regard to rationalization and savings figures are the legal reference and public works concession the provision of public services, whose main features are set out as follow.

The concession contract of public works ex Art.143 d.lgs.n.163/2006, is a Contract under which a government (grantor) trust to a person Private (lessee) the design, construction, financing and functional and economic management of a public work or public utility. The typical feature of this contract, which differentiates it from the works contract public, is the fact that the consideration for the concessionaire is a right only to manage and exploit functionally cost of the opera (art.3, comma11 del d.lgs.163/2006) providing definition of public works concessions states that they "to make the same characteristics of a public works contract, except that the consideration of the work is a right only to manage the intervention or in this right together with payment. In other words, the grant must be transferred to the private entity called the economic risk for the overall operation. As for the price the public contribution it is expected that if the dealer is required to practicing against any third party user prices or prices lower than those corresponding to the return on investment and the sum of the cost of service and ordinary profit of the business, or if it is necessary to ensure to the dealer prosecution of the economic and financial equilibrium investment and related management in relation to the service to be provided (see art.3, comma11deld.lgs.163/2006).

The price is set by the contracting authority in the race and to this end, the Code provides that the tender and the contract contain a financial plan to cover investment and related management throughout the whole duration of the concession, including providing the specification of the residual value, net of annual depreciation, and any residual value is not amortized at the end of the concession. In order to ensure financial balance for the awarding body may provide that the duration of the concession is also more than thirty years, taking into account the performance of the concession, the percentage of the price mentioned above, compared to the total amount of work, and risks associated with changes in market conditions.

Due to the long period of time, the contract is also characterized by flexibility, discipline legislation provides that the changes made by the grantor with the conditions and basic conditions that determine the economic and financial equilibrium, and the legislative and tariff regulations that establish new mechanisms or new conditions for the pursuit of alleged concession, when they determine a change in the balance of economic and financial plan, they provide the necessary revision of the latter. This review is carried out by restating the new equilibrium conditions, including through extension of the expiry of the concession (see Art.143, comma8d.lgs.163/2006).

The granting of services is, however, defined in Article 3, paragraph 12 of D.Lgs.n. 163/2006 as a contract of the same type as a public service contract, except that the consideration for the provision of services is a right only to exploit the service or in this right together with payment, pursuant to art. 30 of d.lgs.n.163/2006.

### A.1.6. Public sector borrowing restrictions

There is no relevant information about it.

## A.2. Financial issues

### A.2.1. Financial obligations of the concessionaire

(*art. 47, EU directive 2004/18; art. 1,3 d.lgs. n. 157/1995; art. 13, d.lgs. n. 358/1995*)

Procurement of supplies or services, proof of financial capacity and economic competitors may be provided by one or more of the following documents:

a) appropriate statements from banks;

b) balance sheets or extracts from balance sheets;

c) a statement of overall turnover of the company and the amount for services or supplies in the area of race, made in the last three years.

The authorities shall specify in the notice requirements that must be possessed by competitor, and any references that are to be produced. The documents referred to in paragraph 1, letter b) may not be required to service or supply contracts established in Member States not involving the publication of the budget. If the competitor is unable, for valid reasons, including that on the constitution or the beginning of less than three years, to provide the references requested, he may prove their economic and financial capacity by any other document deemed appropriate by the contracting. The entrant certifies that the conditions provided in subparagraphs b) and c) by a declaration signed in accordance with the provisions of Presidential Decree of 28 December 2000 No. 445; the successful tendered is required documentary evidence, confirming as stated in the notice. The requirement referred to in paragraph 1, letter a) is proved to the declaration of at least two banks or brokers authorized under the 1 September 1993 N. 385.

### A.2.2. Tariff setting and tariff control, including:

#### *A.2.2.1. Concessionaire's authority to collect tariffs*

According to the "*Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE*" payment to the concessionaires can be done using a tariff system (art. 115 - 116).

#### *A.2.2.2. Tariff control methods, i.e. rate-of-return method, price-cap method*

The tariff control methods must depend by the selection of the incentive scheme decided at the moment of the agreement signature. The methodology to set the tariff system and the revision of prices must be agreed by both signing parties. The tariff is established on the basis of the incentive selected; a methodology to determine the savings must also be agreed and included in the contract.

#### *A.2.2.3. Policy considerations on tariff control*

In those circumstances of joint ventures, the required performance to the ESCO will identify the category of energy performance contracts, which normally provide advice on the modernization



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of facilities and planning of all the measures to be take in order to achieve the optimization of energy saving and efficiency of the building, facilities management and energy system installed. The private party takes on substantial risks, including risks related to events and performances inherent to the performance of the energy service, but it is still typical of the risks of the contract, as are those which make the provision agreed in the customer so as to spend less than the amount you receive from the contracting authority. The risk is therefore on the performance of the fixed contractually agreed services different from the typical risk identified in the report concession management program.

### A.2.3. Financial obligations of the contracting authority, including

#### *A.2.3.1. Direct payments*

The deadline for the issuance of certificates relating to advance payment of the fee contract may not exceed forty-five days from the vesting of any state of progress of work in accordance with Article 194. The deadline for ordering the payment of amounts due under the certificate may not exceed thirty days from the date of issuance of the certificate. The deadline for payment of the balance and release of the bank guarantee cannot exceed ninety days after the provisional acceptance certificate or certificate of full performance under Article 141, paragraph 9 of the Code. If the performer has not previously submitted guarantee for a period of ninety days from receipt of the guarantee the schedules and special contracts can provide for lower management action. (art. 29, d.m. ll.pp. n. 145/2000)

#### *A.2.3.2. Purchase commitments*

The contracting authorities may be provided, in respect of planning acts, to the contracting clients that can make use of the purchasing procedures in economics in the cases listed exhaustively in Article 125 of the Code, and the situations set out in regulations or administrative acts issued by the contracting authority with regard to their specific needs, in accordance with Article 125, paragraph 10 of the Code.

## A.3. Security interests

### A.3.1. Security interests in physical assets

For the work referred to in Article 129, paragraph 2 of the Code, the executor of the work and forced to conclude, from the date of issue of provisional acceptance certificate or certificate of full performance or otherwise expiry of twelve months from date of completion of works resulting from the certificate, an insurance indemnity to cover the ten-year risk of total or partial destruction of the work or the risks associated with severe defects. The policy must include the provision of payment to the customer as soon as they request it, even on slopes of liability and without any need for consents and authorizations of any kind. The limit of indemnity of the policy must be at least ten to twenty percent of the value of the work produced and not more than forty per cent, while respecting the principle of proportionality, taking into consideration the nature of the work.

The executor of the work and 'ALSO' forced to conclude, for the work referred to in paragraph 1, an insurance policy against civil liability for damages caused to third parties, from the date of issue of provisional acceptance certificate or certificate of running smoothly and for a period of ten years and for a fee equal to five per cent of the value of the structures built with a minimum of € 500,000 and a maximum of 5,000,000 euro. The liquidation of the instalment payment and conditional power of the policies referred to in paragraphs 1 and 2.

### A.3.2. Security interests in intangible assets

The contractors require to designers, as a form of insurance, the bill under Article 111, paragraph 1 of the Code in the case of procurement planning and execution in accordance with Article 53, paragraph 2, b) and c) of the Code the above policy and the foster application. This policy covers the liability of the professional designer to external risks deriving from errors or omissions in the preparation of detailed design or final that have led to new costs borne by the contracting of design and / or increased costs.

### A.3.3. Security interests in trade receivables

The release of anticipation, where permitted by law, and the provision of guarantee bank or insurance amount of the advance plus the statutory interest rate applied to the period necessary for recovery of the advance trial program of work. The amount of the guarantee is automatically and gradually reduced during the works, in relation to the progressive recovery of an advance by the awarding entity. The surety to guarantee payment of the balance and constituted as provided in paragraph 1.

### A.3.4. Security interests in the project company

The assumption by the guarantor, the obligation to implement the project is not configured as a succession in the contract; the contractor will entails subjective novation of the contract. The guarantor remains alien to the relationship between the contractor and the contracting or the awarding authority and cannot claim against the principal exceptions to the incumbent contractor. The activation of the guarantee of replacement does not involve the removal of the contractor's liability for damages resulting from the contracting authority or contracting entity in case of termination pursuant to the provisions of regulations of the Civil Code and special laws governing the matter.

The contracting or the awarding authority may require the guarantor to pay the amount due from the contractor on that basis, within the limits laid down in Article 135, paragraph 2. The guarantor must meet the requirements for issuing the guarantees provided for in Law 10 June 1982, No 348,



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and have issued sureties for public works contracts, valid to 31 December last year, for a total amount not less than 1.5 times the amount of work. The guarantee may also be issued by persons specified in Article 127, paragraph 3. The notice or warning notice may provide that the guarantee of replacement may also be paid by any parent company of the contractor, together with another sponsor, meeting the requirements of paragraph 4, providing the guarantee referred to in Article 113 of the Code. Any parent company of the contractor must possess, if it chooses to use it as a guarantor in the guarantee of succession, a net worth of not less than the amount of work and not exceeding 500 million euro.

The guarantee may be issued by several banks or insurance companies or by persons specified in Article 127, paragraph 3, which assume joint and several liability by designating one of themselves as an agent and sole representative. In this case, the requirement of paragraph 4 and 'achieved by adding the associated requirements. The successor must be in possession of the qualification requirements prescribed by the regulations and the notice or by notice of tender for the entire work. The guarantor may agree with the contractor that the execution of the work has occurred on their behalf, from a technical controller, to be chosen between the inspection bodies accredited under the European standard UNI CEI EN ISO / IEC 17020 by participating agencies at the European Cooperation for Accreditation (EA) or at least to the liking of both parties in possession of a certificate of quality system, the controller provides technical, according to the UNI, periodically to report to the guarantor status of works. The activation of PLC technician shall be notified to the contracting or the awarding authority, which makes available to the controller of all documents submitted to the contracting or the awarding authority.

## A.4. <u>Risk management plan</u>

Whenever there is an allocation of risks to the public or in private life is, in fact, must determine that one or other measures designed to mitigate and cover (preliminary investigations, insurance). In any case, when there is an allocation of risks on the private, the public part must always assess the economic impact that has on the cost of the transaction (financing costs) or the conditions of usability work (level of rates). In particular, the risk environment - which is detailed in these pages, is a common risk to construction and management being able to demonstrate systematically during the life of the project, albeit with varying intensity depending on the stage of the life cycle through from initiative.

The ERA (Environmental Risk) is about the possible negative effects that the construction of infrastructure due to the surrounding environment. The manifestation of the environmental risk can occur for various reasons. Some can even go to bind to the political risk. However, it should be distinguished. In the strict sense and the environmental risk is one that stems from the fact that the construction or operation of the plant can cause damage to the surrounding environment. The environmental impact may change and not just for natural and social processes, but also on the basis of criteria and parameters set by law. Thus, the change of the rules (so-called change in law) may result in variations to the building with a different environmental impact and increased investment costs. The most significant social phenomenon, which is another manifestation of environmental risk, public opposition is given to projects with high environmental impact.

This opposition can lead to review, for example - when the operation is already under way - the agreement between government and special purpose vehicle (known as Government Support Agreement), thereby creating conditions for the operational difficulties in the project, up to a block of the work to be carried out, resulting often from frozen conflicts, which can be more harmful because they make explicit conflict, over time, the project inertial emptied of its essential features or priority. There is, therefore, to say that the theme of the environment is critical for many classes of projects. Think of the transport sector and the construction of a road section in an area of interest; consider also the energy sector and the problem of emissions.

In recent years, inter alia, legislative measures to protect the environment have become more demanding: the Anglo-Saxon countries, for example, lenders are quite reluctant to seek guarantees represented by plant structure, because the responsibility for environmental damage resulting from the property - or the actual control - on the initiative. In Italy, the lender's responsibility for environmental damage caused by the financing is not currently sanctioned by law. However, apart from this case is highlighted as the most recent legislation, community, national, pay special attention to the environment. The Community Directives nos. 17 and 18 of 2004 (relating to the coordination of procedures for awarding public works contracts, supplies and services), for example, enhance the social and environmental needs both in the expectations both in the execution of contracts on public works.

Environmental requirements shall be protected by some statutory provisions, such as the usability of environmental criteria in assessing the most economically advantageous tender (as a criterion for choosing the best bid in the tender); the requirement for environmental and social conditions for the execution of the contract and the possibility of making the principle of economy in entrusting of public contracts, where it has paid particular attention to the environment.

The Code of public contracts for works, supplies and services, in implementing the directive, provides in Article 2, paragraph 2, of the guiding principles of this Code that the principle of economy – that should guide the administrative work - could be subject to the limits as expressly permitted by current standards, criteria, specified in the invitation, inspired by social needs and the protection of health and environment and promoting sustainable development.

These statutory provisions to protect the environment and landscape in of infrastructure, while mitigating the environmental risk the other hand increase the likelihood of the occurrence of risk administrative. This risk must be understood as any delay resulting in the project, generally, inefficiency government or by the complexity of administrative procedures earmarked for the implementation of the project. Hence the need for contracting authorities, to pay particular attention to the management of these types of risks during the planning of opera- King public and the routines for the award of PPP contracts. This is clear evidence that the PPP projects, the existence of private capital means that there is greater attention to the environmental risk of private investors that could result in long delays and increased costs to mitigate the risks and gain the consent ex post the implementation of the work. It follows, in other words, the environmental risk is embodied in any extra cost and delay implementation of the infrastructure due to a lack of identification (or proved that during construction) of the risk of environmental sustainability. That means no coverage (partial or total) risk with the consequence of reaching even to block the execution of the work itself. From the foregoing it is evident that the environmental risk in PPP projects can be mitigated through a properly-controlled setting of the process and administrative proceedings by all public bodies involved.

Let us, finally, to indicate some of the tools for the mitigation of environmental risk, aimed at reducing the occurrence of risky and, therefore, to contain the time and cost of the project:

a) the implementation of comprehensive environmental studies of territorial framework and infrastructure to be implemented;

b) the preparation of feasibility studies. The SDF identifies the instrumental works to meet the public needs and indicate the functional, technical, managerial and financial-economic and contain the same analysis of the actual state of all components of any intervention in its historical and artistic, architectural, landscape, and its components of environmental sustainability, socio-economic, administrative and technical matters (Article 128 of the Public Contracts Code);

c) the timely and correct preparation of the program of public works through consultation between the institutions;

d) identification of the precise location of the intervention to be implemented and compensation works, to be determined ex ante in the design phase;

e) the involvement of different levels of government to share the benefits arising from the implementation of infrastructure;

f) coordination among the different agencies involved (planning agreements and conference services);

g) the involvement of citizens (as individuals and / or associates) and the provision of a timely and transparent communication between all parties involved;

h) the creation of a social and political consensus to create ex ante.

Of course, we talked about here is no accident risk mitigation. The tools listed are used to define properly the risk then that should best be allocated. Generally, given the nature of environmental risk and the related difficulties in finding adequate insurance coverage, this form of risk is allocated in the hands of the contracting authority. The occurrence of environmental risk, pending the extent and severity of the resulting situation may lead to a restatement of the economic or financial forms the basis of the project to be implemented in the PPP and the contract - at the expense of public entity - or, in more serious cases, termination of contract.



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# GREECE

## B.1. National legislation and regulation on PPPs

In Greece PPPs are defined by the Law No 3389/2005 (J.O. A' 232) which establishes the legal framework for the implementation of Public-Private Partnerships in Greece. The law defines the Public Entities (Central Administration, local government organizations, legal entities under public law) that can implement partnership contracts with Private Entities, in areas falling within the scope of their competence.

Law 3398/2005 provides incentives for both public and private entities to be engaged in partnerships for constructing infrastructure or delivering services, mainly through the simplification of relevant procedures. It defines the minimum content of a PPP contract, with clear description of the rights and obligations of both parties, regulating particular issues such as financing, the participation of public entities in partnerships, the payment mechanism, granting of permits, protection of the environment, treatment of archaeological findings, expropriations and cases of projects undertaken by Public Utility companies. Moreover, legal issues related to these partnerships, such as the transfer of claims, validity of sureties in rem, taxation and resolution of disputes are clearly defined.

Under Law 3389/2005, two new administrative bodies have been established, aiming at the support of Public Authorities, in order to improve the effective preparation and management of PPP projects:

- The Inter-Ministerial Committee for Public-Private Partnerships (IM PPP Committee) is a collective governmental body that defines and specializes PPP policy, approves PPP projects that fall under Law 3385/2005 for the provision of infrastructure and the delivery of services by private funds, and coordinates and monitors the implementation of PPP projects.
- The Special Secretariat for Public-Private Partnerships (PPP Unit) has been established within the Ministry of Economy and Finance. This Special Unit identifies projects that can be delivered via a PPP scheme, promotes their implementation and provides support and assistance to IM PPP Committee and to the Public Entities in the context of all necessary procedures for the finalization of a PPP project.

Furthermore, the new Law 3855/2010 "Measures to improve energy efficiency in end-use, energy services and other provisions", implementing Directive 2006/32/EC on energy end-use efficiency and energy services, which was issued on June 23, 2010, defines Energy Service Companies (ESCOs) and other issues related to the improvement of energy end-use efficiency. This law sets the conditions for the development of an energy services market, making specific reference for this purpose to ESCOs and setting out the basic principles of Energy Performance Contracts" (EPC), agreed between consumers and ESCOs.

B.1.1. Legal capacity of parties and legal requirements of the State to provide services

According to article 17 of Law 3389/2005, the Partnership Contracts have clear and detailed descriptions of the rights and obligations of both Parties (Public - Private Entities) for the Partnership object. The method of monitoring the performance and operation of the project is agreed in the contract and can be done either by independent companies recruited for this purpose by the Public and Private Entities acting in common, or by the competent State authorities.

Article 11 of Law 3389/2005 defines the following procedures for contract award:

*Open procedure*

In the case of open procedure, any Private Entity may submit a tender (including supporting documentation on their financial adequacy, their professional qualification and their technical and financial offer) provided that it may be qualified and able pursuant to the requirements of the Invitation to tender.

*Restricted procedure*

In the case of restricted procedure, any Private Entity may request to participate, provided that it is qualified as able. In the second stage, only these Private Entities meeting the qualification criteria are invited by the Contracting Authority to submit a tender.

*Competitive dialogue*

The competitive dialogue is a new procedure introduced by the EU Directive 18/2004. In the case of particularly complex contracts, where the Contracting Authority considers that the use of the Open or Restricted Procedure will not permit the awarding of a particular contract, it can have recourse to the Competitive Dialogue Procedure. The contracting Authority will publish an Invitation to Tender setting out its needs and requirements. The Contracting Authority will open with the candidates selected a dialogue, the aim of which is to identify and define the means best suited to satisfy the Authority's needs. During this dialogue, the Contracting Authority will ensure equality of treatment among all candidates making sure, *inter alia*, that all candidates are provided with exactly the same information. The solutions, proposals and in general all confidential information entrusted to the Contracting Authority by a candidate are confidential and must not be communicated to other candidates without the consent of the candidate providing the information.

The Competitive Dialogue Procedure may take place in successive phases, in order to reduce the number of solutions being examined during the dialogue phase by applying the contract award criteria indicated in the Invitation to Tender. After selecting the solution or solutions which best meet its needs, the Contracting Authority will declare the dialogue concluded and inform accordingly the candidates, inviting them to submit their final tender on the basis of the solution(s) selected during the dialogue. The Contracting Authority will evaluate the tenders on the basis of the contract award criteria laid down in the Invitation to Tender, and choose the most economically advantageous Tender. If the Contracting Authority deems that the cost of participation in the

Competitive Dialogue Procedure is high, it may award prizes or pay part of the respective expenses incurred by the Tenders.

*Negotiated procedure*

The Contracting Authority may use the Negotiated Procedures in the following cases:

a. After an Open or Restricted Procedure, or Competitive Dialogue, provided that:

aa. The Tenders submitted were unacceptable under the provisions of Law 3389/2005 or did not meet the terms and conditions of this law.

bb. The terms of the proposed contract are not substantially altered from the terms proposed during the Open or Restricted Procedure, or the Competitive Dialogue.

b. In exceptional cases involving works or services whose nature or various non definable factors do not allow prior overall pricing.

c. In the case of Service Contracts and particularly intellectual services contracts, insofar as the nature of the services is such that the specifications of the contract cannot be determined with sufficient precision and for this reason the contract cannot be awarded on the basis of the selection of the best tender according to the rules governing the Open or Restricted Procedures.

d. In the case of Work Contracts for works performed exclusively for purposes of research, testing or development, and not with the aim of ensuring profitability or recovering research and development costs.

According to Article 16 “Energy Performance Contracts” of Law 3855/2010, an Energy Performance Contract including the responsibilities of both parties and liabilities of the ESCO, should describe at least:

- the design and management of the energy service and energy project to be provided,
- the methodology of estimation of the energy to be saved and of the resulting total financial benefit,
- the purchase, installation, and putting in operation of the necessary energy equipment, such as electrical/mechanical and electronic systems, as well as building materials (fixed or not), that improve the energy performance during end use,
- management, operation and maintenance of equipment,
- the total project cost including purchase and installation of equipment, operation and maintenance cost, financing cost and ESCO reimbursement,
- the procedure of assessment of the energy benefit, and
- the way and time of payback.

B.1.2. Cost recovery mechanisms

In the case of PPP projects the private sector undertakes a significant part of risk, related with financing, constructing and providing infrastructure or services. Their investment is repaid either by the Contracting Authority or by the end users. This means that these projects are funded, in total or partly by funds and resources of the private sector.

The private sector is responsible for the initial financing of the project, its maintenance and the delivery of relevant services during the lifetime of the contract. The invested private funds return to the private sector through periodic payments, whereas the State knows beforehand the precise payments that have to be made during the contractual period. These payments cannot increase, if the private sector that has undertaken the project faces issues with risks undertaken by itself. Payments on behalf of the State or the end-users can only be made once the project is operational, and are directly linked with the performance of the offered services, which the private sector must maintain up to certain quality standards, until the very last day of the contract. Low services result to lower payments.

B.1.3. Property issues of land and infrastructure

In the projects where the end-user pays a fee to the private partner, the infrastructure is transferred to the public entity at the end of the contractual period.

In the projects where the public sector reimburses the private sector, the private partner undertakes the management and operation of the project throughout the contractual period should cater for the efficient operation and maintenance of the infrastructure or the services that it provides and upon its termination, the infrastructure is transferred to the public entity.

The expropriations required for the construction of works or the provision of services under this law, or the constitution of rights in rem or liens to those properties, where permitted, serve purposes of obvious public interest and shall be regarded as urgent and of major significance, provided that the official approval of the compulsory purchase includes adequate evidence that the particular expropriation serves objectives of public interest. The expropriation of such properties or the constitution of rights in rem or liens to those properties shall be effected to the benefit of the Public Entity involved in each case. The expropriation shall be declared by joint decision of the Minister of Economy and Finance, and the Minister in the field of competence relevant to the project. If the scheduled deadline for completion of the expropriation or for constitution of rights in rem or liens to those properties passes and the relevant procedures are still pending, then the Special Purpose Company shall be entitled to request, and the Public Entity shall be obligated to grant, an extension of the Contract time-schedule and deadlines equivalent to the effective delay. In these cases, the Special Purpose Company shall be entitled to seek redress for any loss it may have sustained as a result of the said delay. If the compulsory expropriation or the constitution of right in rem or liens to the above properties is made at the expenses of the Special Purpose Company, these expenses shall be construed as payment for the use of these properties or the rights thereon.

### B.1.4. Environmental issues / Environmental Impact Assessment

The principle of protection of the environment and sustainable development requires that the planning and implementation of the Work, Service or Mixed Contracts ought to take into account that the natural and man-made environments are assets that must be protected per se, in order to maintain the environmental balance, and to preserve natural resources for the sake of coming generations.

The environmental impact studies required in each project shall be prepared and submitted for approval, and need to be approved before the award of the Partnership Contract. If the Public Entity involved, for reasons that could not originally have been predicted even if special care was applied, imposes additional regulations, it must indemnify the Special Purpose Company for any additional cost or expense it may have sustained. The Partnership Contract may include measures for increased protection of the natural and cultural environment, as long as these measures have been included in the respective Invitation to Tender.

### B.1.5. Forms of possible state financial support

*a) Privately financed projects repaid by the State (PFI-Private Financed Initiative)*

In the context of such partnerships, the private entity sets up a Special Purpose Vehicle (SPV), which may be composed of specialized contractors, construction companies, operation and management companies, technical equipment suppliers and other institutions with proven previous experience in delivering services, as required by the output specifications of the project. Other entities that usually participate in the SPV are financial institutions (mainly banks that usually provide big long-term loans).

Loans and equity of the SPV are used for the construction of infrastructure or the delivery of services related with the PPP project. No payments are made until the structures and the relative services are delivered for use to the contracting authority.

During the operational period of the contract, the contracting authority makes annual payments (availability payments) based on a payment mechanism, which is linked to the quality specifications set. With these payments, the Special Purpose Vehicle repays its loans and ensures a legitimate profit.

*b) Privately financed projects requiring State revenue support*

In the context of such partnerships, commercial or other uses stemming from the exploitation of infrastructure or services may arise (e.g. exploitation of commercial spaces in a building, in which availability is accommodated public). In the case of these projects, the State supplements with annual entity payments the income of the SPV from the exploitation of such uses. Basically, it is the same payment mechanism, as in the first case, which, because of the additional income from commercial exploitation, renders the payments that are finally paid by the State smaller.

*c) Privately financed projects repaid by the end-users*

The difference of retributive projects from the two previous forms presented above is that in this case, the Private Entity, apart from the design, construction and financing of work or service, will also undertake the operation or exploitation of the underlying infrastructure.

Via the operation or exploitation of infrastructure and the fees imposed to the final users, the SPV does not receive any payment from the State. These projects, because of the higher risk undertaken by the Private Sector, need special preparation and regulation of a series of issues that are related with their bankability. Based on the experience of concession agreements that were ratified by the Greek Parliament in the past for such projects, Law 3389/2005 introduces a series of special regulations that facilitate the bankability of such projects.

### B.1.6. Public sector borrowing restrictions

The obligation of Private Entities to secure the financing of the projects, in whole or in part, leads them inevitably to bank loans, as proven internationally. Indicatively, the usual ratio of equity and bank loans for financing PPP projects ranges from 10-20 to 90-80. The involvement of banks in PPP projects contributes to their prompt implementation, as banks will monitor Private Entities which have undertaken their implementation. This monitoring keeps the cost of the project low and helps to meet the deadlines set in the Contract. Moreover, the monitoring continues throughout the Contract (25 years for instance). In this way the quality of the offered services according to pre-determined output specifications is ensured. Private Entities have to be consistent with their contractual obligations in order to get repaid by the Public Authorities and pay off their bank loans.

## B.2. Financial issues

### B.2.1. Financial obligations of the concessionaire

According to their financing scheme, PPP projects fall into the three following categories:

- Projects that are designed, built, financed and maintained / operated by the private sector and their cost is repaid directly by the public sector (e.g. hospitals, schools, and prisons).
- Projects, the cost of capital of which is shared between the State and the private sector, while the private sector has the total responsibility for the project.
- Financially free-standing projects, financed by the private sector, the investment of which is repaid via revenues from the end-users of the project.

B.2.2. Tariff setting and tariff control, including:

*B.2.2.1. Concessionaire's authority to collect tariffs*

Specified in the contract (There will be a model contract)

*B.2.2.2. Tariff control methods, i.e. rate-of-return method, price-cap method*

Specified in the contract (There will be a model contract)

*B.2.2.3. Policy considerations on tariff control*

Specified in the contract (There will be a model contract)

B.2.3. Financial obligations of the contracting authority, including

*B.2.3.1. Direct payments*

In the projects where the end-user pays a fee to the private partner, the initial investment of the private partner is reimbursed via the fees that the end-users pay directly to the SPV for the use of the infrastructure or service provided. Under such schemes, the private partner constructs the project and following its completion has the right to collect fees from the end-users for the services provided. The amount of these fees, the conditions and their collection mechanism are clearly defined in the contractual agreement between the Contracting Authority and the selected private partner. In case the fees paid by the end-users are not sufficient enough to cover the whole cost of the project, the public sector may support this venture, either through lump sum contributions during the construction phase or through availability payment during the operational period.

In the projects where the public sector reimburses the private sector, the initial investment of the private partner is reimbursed by the Contracting Authority through regular availability payments, linked with pre-determined output specifications criteria for the provision of quality infrastructure and services. Under such schemes, the private partner constructs the infrastructure of the project and upon its completion receives availability payments from the public partner, based on the provision of pre-agreed quality services. In order for the availability payments to be made in full (without any penalty or even full probation) the private partner should cater for the efficient operation and maintenance of the infrastructure or the services that it provides.

In the case of EPC. When the financial benefit from the energy saved is lower than that specified in the Energy Performance Contract. The ESCO is obliged to reimburse the end user or the end user pays less than agreed, as long as the latter has operated the energy equipment according to the contract terms. In case the financial benefit is higher than the one agreed, it is the end user who benefits, unless specified differently by the Contract.



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*B.2.3.2. Purchase commitments*

The Public Entity (Contracting Authority) wishing to implement a PPP project may submit a proposal to the PPP Unit, which then evaluates the feasibility of the specific project under a PPP scheme. The PPP Unit collects all needed information, examines the proposal of the Public Entity and evaluates its implementation as a PPP project, so as to include it in the provisions of Law 3389/2005. In case that this proposal meets the evaluation criteria, then the PPP Unit includes the project in the ''List of Proposed Partnerships'' and drafts a brief report to the IM PPP Committee. The PPP Unit notifies the Public Entity about this decision. This Public Entity must submit an 'Application for Inclusion' to the IM PPP Committee, within two months after this notification. For each project or service, which is included in the ''List of Proposed Partnerships'', the PPP Unit drafts a brief report to be presented to the IM PPP Committee, presenting the following:

a) the financial, technical, socio-economic and legal reasons for which it considers that the construction of the specific works or provision of the specific services ought to proceed by means of a PPP,

b) the criteria taken into account to select the specific works or services that have been included in the List of Proposed Partnerships,

c) the actions which may have been taken by the Public Entity involved to meet the needs of preparing the award of the relevant contracts, such as – for example – the recruitment of financial, technical and legal advisors, the elaboration of preliminary designs and/or studies and the preparation of draft contracts,

d) the form of the proposed Contract Award Procedure, as defined in article 8 of Law 3389/2005, which is deemed most appropriate for the particular case, as well as the Public Entity acting as Contracting Authority,

e) an indicative time schedule of the Contract Award Procedure

f) a report of the indicative budget of the works or services to be undertaken by the partnership under the contract and, where appropriate, the ancillary agreements.

If the involved Public Entity decides to submit an 'Application for Inclusion'' within no more than two months after the date of notification the Minister of Economy and Finance, acting as the President of the IM PPP Committee, sets this application as an item of the agenda of the next meeting of the IM PPP Committee and invites all regular members and the Minister that supervises the involved Public Entity. In this meeting, the report drafted by the PPP Unit is presented to the IM PPP Committee, and all necessary and additional information and clarifications are provided, so as to help Ministers to reach a decision. After that, the IM PPP Committee announces its decision, to either approve or reject the application. If the IM PPP Committee decides to approve a partnership, the PPP Unit shall coordinate and monitor all contract award procedures, as defined in Law 3389/2005, so as to select the SPV that will participate to the partnership.

Beyond specific regulations related with the award of PPP contracts, it must be noted that Law 3389/2005 is in line with the general principles applied under both national and Community law. The adherence to all following principles aims at ensuring conditions of true competition for all involved private entities: *equal treatment, transparency, proportionality, mutual recognition, protection of the public interest, protection of the rights of private individuals, free competition, protection of the environment* and *sustainable development*.

## B.3. Security interests

### B.3.1. Security interests in physical assets

It is the private sector that assumes the construction risk, the financing risk, and the availability / demand risk. The payments of the Public Sector to Private Entities are linked with the pre-determined output specifications for the provision of infrastructure and services of high quality. In each PPP contract, there is a number of parameters that determine the quality and performance of the project, so as to quantify whether the contractual obligations of the Private Sector are fulfilled. Low quality services result in reduced payments by the Public Authorities. This way, the quality of a project throughout the contractual period is ensured.

According to Article 17 “Real Security” of Law 3855/2010

- A pledge on the mobile energy equipment between the end user and the ESCO is allowed in the EPC framework, according to the provisions of the Civil Code and without the surrender possession of the property, according to the provisions of 2844/2000. In this case, the written agreement of the end consumer as pawner and the ESCO as pledgee is recorded in the Register of Article 3 of Law 2844/2000, according to the specific conditions that are defined therein, applied in all other provisions of the Civil Code.
- In the case where the ESCO resumes responsibility to purchase energy equipment by third party financing in the EPC framework, for the continuous and permanent service of the end user installation, the claim of the third party for the provided financing may be ensured with a mortgage on the aforementioned equipment in the end user installation and with his consent, according to law 4112/1929.

### B.3.2. Security interests in intangible assets

The Inter Ministerial PPP Committee approves PPPs and integrates the annual payments in the Public Budget, according to Law 3389/2005. Therefore, it needs to ensure that the services provided by the private sector are viable and that the financial data are realistic and for the benefit of the State, in relation to the results they produce. The Special Secretariat when approving PPPs or launching tenders it evaluates a lot of parameters that prove the necessity for implementing such projects.

According to Law 3855/2010, an ESCO is responsible for ensuring energy savings and financial benefits during the whole duration of the contractual period, as verified in regular time intervals foreseen in the EPC.

### B.3.3. Security interests in trade receivables

There is no relevant information about it.

### B.3.4. Security interests in the project company

According to the principle of Proportionality, any measure adopted by the Contracting Authority should be necessary and suitable for attaining the respective objective, and cause the fewest possible problems in the exercise of an economic activity. In the specific context of the Contract Award Procedures, there ought to be no requirements for technical, professional or financial capabilities that are disproportionate or excessive in respect of the object of the Work Contract, Service Contract or Mixed Contract in question.

With respect to ESCOs, the end user is obliged to allow the ESCO access to its premises at fixed time intervals foreseen in the EPC, so that the ESCO can take necessary actions for the proper operation, maintenance, and verification of technical parameters of the energy equipment.

## B.4. Risk management plan

The form of PPP that will be implemented depends on the allocation of the risks between the two contracting parties and on the extent of the involvement of the private sector, which is a decision to be made by the Contracting Authorities, depending directly on the optimum allocation of risk. Key for their success is that risk is undertaken by the party that can better deal with it.

The Private Entities that undertake the implementation of a PPP project also bear the construction, availability and / or demand risks. In this way, the State avoids possible budget overruns that could result from problems and delays during the construction phase and which could lead to budget overruns. On signing the Partnership Contract, the annual payments of the Private Entity for the implementation of the project are arranged.

The repayment of PPP projects by the State or by the end users begins once the project is operational. This means that the Private Entities are motivated to deliver the project to the public sector in time and with no delays, so as to start receiving the availability payments.

The implementation of PPP projects where the Public sector reimburses directly the private sector creates future obligations for the State. The Special Secretariat, in collaboration with the respective departments of the Ministry of Economy and Finance, monitors all the financial obligations undertaken by Public Entities, so that the State knows precisely the future burden on the Public

Investments Programme, resulting from the implementation of PPPs and the payments to be made.



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# SPAIN

## C.1. National legislation and regulation on PPPs

PPPs are being promoted in Spain thanks to **Royal Decree 6/2010, measures to boost economy and employment** (Real Decreto-ley 6/2010, de 9 de abril, de medidas para el impulse de la recuperación económica y el empleo), that includes measure to promote ESCOs. In the framework of this Royal Decree, on January 2010 was signed by the Ministries Cabinet an agreement to approve the **Energy Efficiency Activation Plan in the State Administration Buildings**. In addition, the **Sustainable Economy Law** (not yet approved) sets the basis for an environmental friendly energy model based on the security of supply and economic efficiency that establishes energy savings targets for public administration.

However, PPPs are not explicitly disciplined by Spanish law, although all contracts whereby a public body awards a work involving an economic activity to a third party are subject to the general principles on the freedom of establishment and the freedom to supply services. As a consequence, PPP contracts have to comply with requirements of transparency, equal treatment, proportionality and mutual recognition.

Finally, contracts between public administration and private parties are regulated by the **Spanish Law on Public Sector Contracts (LCSP)** (Ley 30/2007, de 30 de octubre, de Contratos del Sector Público).

### C.1.1. Legal capacity of parties and legal requirements of the State to provide services

According to LCSP, contracts signed by public bodies are determined by (i) the type of public body and (ii) the object of the contract. As a consequence, a contract with the same object is subjected to different rules depending on which public body is signing it (Ministry, Managerial Public Body of a Regional Administration, Public Enterprise in competition with private enterprise).

Moreover, these rules are divided into (i) rules related to preparation and award of contracts and (ii) rules related to rights and duties of the parties, deadlines, etc.

Article 5 of the LSCP defines six typologies of contracts: (i) works, (ii) work concession, (iii) public utilities management, (iv) supply, (v) services (vi) contract of collaboration between public and private sector (CPP) and (vii) mixed contracts.

With the aim of providing energy services, the typologies that better fit are: (v) services, (vi) contract of collaboration between public and private sector (CPP) and (vii) mixed contracts. Within these contracts, the services contract is the more suitable one. However, the agreement can not exceed four years (article 279, LCSP) and the variety and complexity of energy services usually require a longer contract. In order to solve this handicap, mixed contracts and, for more complex features, CPP contracts accomplish the needs of the two parties (public body and private party) and speed up the procedure.



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The mixed contract might include features of all the other typologies of contracts included in the LCSP, so it can be adjusted according to the needs of the two parties for a specific energy service. Under the contract of collaboration between public and private sector, the Public Authority contracts a private organisation during a predetermined period of time, depending on depreciation rules, to carry on a global intervention that includes investment, construction and supplies for the global maintenance of complex installations.

### C.1.2. Cost recovery mechanisms

Different mechanisms can be set up to guarantee the cost recovery:

**Guarantee of savings and savings share:** there are different formula to guarantee and share the energy saving achieved between the ESCO and the client:

- Guaranteed savings: the ESCO guarantees a fixed saving to the client, usually as a percentage.
- Shared savings: the ESCO shares with the client the savings achieved.
- Guaranteed and shared savings: it is a mixture of the former options. The ESCO guarantees a fixed percentage of savings. Extra savings are shared between the ESCO and the client.

**Distribution of savings:** when the project is financed through the savings achieved and depending on the client needs and the amount of savings foreseen, the ESCO can offer to the client one of these possibilities:

- Saving distribution since the beginning of the project: savings are distributed between the client and the ESCO since the beginning of the project. The contract duration must be longer due to the fact that not all the savings achieved are used to finance the project. On the other hand, the client starts reducing the energy bill since the first year of implementation. However, it exists the possibility of receiving a percentage of the savings that will be increased year by year as the project goes by. The client will received all the savings achieved only at the end of the contract.
- Savings at the end of the project: the savings achieved are entirely used to finance the project. The client doesn't perceive any reduction in the energy bill till the end of the project. In this case, the duration of the contract between the ESCO and the client can be shorter.
- Other formula: the distribution of savings between the client and the ESCO can be negotiated depending on the characteristics of every particular project.

### C.1.3. Property issues of land and infrastructure

There are different formulas to establish property issues of land and infrastructure that are describe below:



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Energy Supply Contracting (ESC):

This kind of contract is focused on supplying energy services (heating, lighting, etc) generally through the subcontracting of the energy supply. The client is offered a guarantee for the capacity of the installations. This is the kind of contract most widely implemented in Spain. It has been used to implement big installations. **The ESCO is the owner of the installation** and sells the energy produced (steam, warm water, cool, etc). **At the end of the contract, the client becomes the owner of the installation**. The ESCO usually assumes the financial risk.

Within this kind of contract, one of the most commonly used is the *Chauffage* contract. The ESCO is responsible for supplying to the client agreed energy services (heating, lighting, etc) plus the fuel or electricity supply. It consists on contracting the energy management to the energy supplier. The client pays an agreed amount to the ESCO that corresponds to the energy bill less a fixed saving percentage (between 5 and 10%) or is calculated based on the squared meters of the building to be managed. On the one hand, the ESCO guarantees to the client an immediate saving in the energy bill. On the other hand, the ESCO is responsible for improving the energy service in order to reduce the energy bill. The more efficient the project is the more revenue for the ESCO. This kind of contract usually includes savings share added to the guaranteed savings in order to motivate the client. Thus, all the savings up to a pre-established percentage are used by the ESCO to finance the energy efficiency project. Extra savings are shared between the client and the ESCO. The length of a Chauffer contract it takes usually between 20 and 30 tears. During this period, the ESCO is in charge of the operation and maintenance.

Energy Performance Contracting (EPC):

The EPC contract is defined in the Directive 2006/32/CE. Within this kind of contract, the ESCO undertake a previous audit of the installation in order to determine the potential savings. Then the ESCO offers the implementation of the project during a certain period and guarantees the savings during this period.

Since the beginning of the project, the ESCO guarantees some energy savings, and so economical savings that will be used as return of the project investment. The contract usually lasts between 5 and 15 years. **Once it is finished, the client becomes the owner of the equipment.**

The difference between the ESC and the EPC contract is that the ESC is focused on service supply while EPC has the target of saving in the energy production and distribution.

The EPC contract has been mainly used to implement energy efficiency measures that do not affect to the structure of a building (substitution of boilers, change of the energy source, optimization of the lighting system and of the heating and cooling systems, installation of non sophisticated RES systems).

Though this kind of contract is not widely used in the Spanish market, it is foreseen that the number of EPC contracts will be increased in the next years.

P4.

Within this contract **the public body is the owner of the installation**. The ESCO can offer up to five services to the client. A previous audit is also required in order to establish the conditions of the contract. The services that can be offered are:

P1: Energy management. It includes the energy management required for the correct functioning of the installations included in the contract (energy supply management, quality control, etc).

P2: Maintenance. It includes the maintenance of the installations included in the contract in order to keep the capacity of the equipment.

P3: Total guarantee. Repairing and substitution of all the damaged items of the installations included in the contract.

P4: Works to upgrade and refurbish energy consuming installations. It includes the financing and realisation of the works to upgrade and refurbish energy consuming installations included in the contract. The client decides the installations to be included. The ESCO assumes the financial risk corresponding to new equipment. The return of the project investment to the ESCO is done through a periodical payment by the client, though the foreseen savings are not achieved.

P5: Investment in energy saving and RES. It aims to promote the energy efficiency. It includes the substitution of non efficient equipment for efficient one as well as the promotion of RES. The return of the project investment assumed by the ESCO is based on the energy savings achieved.

### C.1.4. Environmental issues / Environmental Impact Assessment

According to article 70 of the LCSP, the public body can demand for certificates from independent organisms on fulfilment of environmental requirements by the private party (EMAS or ISO 14.001 certificate).

In addition, the article 103 of the LCSP, establishes that the public body can include in the list of conditions of the tender process the rules on environmental impact assessment and environment protection that must be accomplished. In this case, it is compulsory to fulfil these requirements in the offer presented by the tenderers.

### C.1.5. Forms of possible state financial support

In an energy services contract, the investment can be assumed by the private party, the public body, shared by them both or assumed by a third party (financial entity). It is the investment by the private party what is usually recommended for several reasons:

- The public body might not satisfy the credit rating required by the bank.
- The public body might be more willing to contract energy services if initial investment is not assumed.
- The public body indebtment can constrict its capacity to assume the financial risk.

The main inconvenience for the private party to assume the investment is that the feasibility of project depends on the capacity of the private party to obtain the loan, what suppose a handicap for SMEs. Moreover, it could be an obstacle for the ESCO to be able to implement other projects, as the debt it can assume is limited.

The initial investment can also be shared between the public body and the private party. Thus, the public body is more involved in the project and the length of the contract can be reduced.

As already mentioned, if the public body or the private party assume the financial risk on own resources, their endebtment might constrict the development of the private party or will prevent the public body from investing in other projects. In order to avoid this situation, the project finance model can be set up.

Within the project finance model a financing entity is also involved. It is in charge of the initial investment. The project finance model requires a solid, moderate-risky project, reasonably predictable cash flows, suitable profits and enough cash flow beyond the duration of the debt. On the other hand, it is necessary to set up a Society for the Project (SP), that will be in charge of developing the project, with the aim of allocating the risk within the project limits. The SP is who perceives the cash flows and who assumes the endebtment. Thus, the creditors (financial entities) only have access to the incomes of the SP. Moreover, the financial risk of the parties involved is limited to the money invested in the project.

The disadvantages of this model are that the financial cost rises, it is required a more complex structure than for an ordinary loan (an external expertise committee is required) and the procedure to obtain the loan is longer and more complicated.

The majority of the ESCOs in Spain are financing the energy services on own resources. The project finance model is not being implemented for energy efficiency projects due to the fact that the investment required (form 1 to 5 million euros generally) is not enough to justify the adoption of this model.

On the other hand, the Spanish Institute for the Diversification and Saving of Energy (IDAE) offers financing programmes for ESCOs. In order to have access to these programmes, the ESCOs must fulfil requirements on supply capacity, technical skills and economic capacity.

In addition, the Energy Agency of Valencia Region (AVEN), within the measures included in the Spanish Saving and Energy Efficiency Strategy 2004-2012 (E4), has launched funds addressed to ESCOs to implement energy services projects.

### C.1.6. Public sector borrowing restrictions

The public sector borrowing rules are regulated by the Royal Decree 2/2004 that regulates local Inland Revenue (Real Decreto Legislativo 2/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley Reguladora de las Haciendas Locales). According the law, public bodies are allowed to ask for long and short term credit operations to public and private financial entities.

The payment of the short term credit operations must be guaranteed by a bank guaranty made by the local entity when the public body that asks for the loan is an autonomous organisms or public enterprises created by the town council. When it is the local entity who asks for the loan, the payment must be guaranteed with their tributary resources.

For long term credit operations, the payment must be guaranteed by any of the above mentioned formula or by a guaranty made on the local entity heritage.

In addition, the credit operation must be previously approved in the budget of the current year.

Credit operation contracting is not regulated by the Spanish Law on Public Sector Contracts (LCSP), so no tender process must be established. However, the approval or modification of a credit operation requires a report from the civil servant in charge of the finances of the local entity where it is analysed its capacity to assume the financial duties lead by the credit operation.

For long term credit operation, an approval by the Inland Revenue Ministry is also required.

## C.2. Financial issues

### C.2.1. Financial obligations of the concessionaire

The concessionaire of a contract with a public body must demonstrate its economic capacity (art. 43. LCSP). It can be accomplished by presenting a signed declaration of a independent financial entity, by presenting their accounting reports validated by a official entity or by presenting their turnover in the three years previous to the signature of the contract (art. 64).

The concessionaire must also set up a guaranty of 5% the cost of the service or project object of the contract (VAT excluded) in cash, through an endorsement or by contracting an assurance (art. 83).

### C.2.2. Tariff setting and tariff control, including:

#### *C.2.2.1. Concessionaire's authority to collect tariffs*

According to the LCSP, payment to the concessionaires can be done using a tariff system (art. 75).

The list of requirements of the tender process must describe the tariff setting and tariff control to be established (art. 115).

*C.2.2.2. Tariff control methods, i.e. rate-of-return method, price-cap method*

The tariff control methods must be studied for each concrete energy services contract. The methodology to set the tariff system and the revision of prices must be agreed by both signing parties. When the tariff is established on the basis of the savings achieved, a methodology to determine the savings must also be agreed and included in the contract. The methodology for the revision of prices must also be clearly defined in the contract.

*C.2.2.3. Policy considerations on tariff control*

When the tariffs are based on savings achieved, it is crucial to define a methodology to determine those savings that must be agreed by both parties and included in the contract.

In the course of the implementation of the project, the private party must establish when the measurement and verification of savings achieved will be done.

Public body as well as private party should have detailed information on historic consumption data and on features of the installation object of the contract in order to define the baseline consumption data.

C.2.3. <u>Financial obligations of the contracting authority, including</u>

*C.2.3.1. Direct payments*

The contracting authority must pay the concessionaire the amount agreed in the contract (art. 200, LCSP). It can be a full or a part payment. The latest must be effective in the deadlines establish for each payment. The concessionaire is allowed to do a payment claim before the starting up of the service in order to cover the initial expenditures.

Payments by the contracting authority should be made within 60 days maximum from the date of the payment claim submitted by the concessionaire. The concessionaire must attach to the payment claim a certificate describing the works undertook in the corresponding period, according to the contract. If the payment is delayed, the concessionaire can include the corresponding interest. If the delay is more than 4 months, the concessionaire can cancel the contract.

*C.2.3.2. Purchase commitments*

According the Spanish LCSP, public bodies must initiate a tender process except when the budget of the purchase is less than 18.000 € (art. 122). In any case, equality and transparency must be respected. Also confidentiality on the information provided by the tenderers (art. 124)

## C.3. Security interests

### C.3.1. Security interests in physical assets

The Spanish Institute for the Diversification and Saving of Energy (IDAE) has elaborated a proposal of a contract model for energy services and maintenance in public administration buildings. It includes templates to elaborate the tender process documents. According this model, the list of requirements of the tender process includes an article (13.4) that sets that the physical assets to be submitted by the concessionaire should accomplish with the law requirements as well as the features included in the list of technical requirements of the tender process. In addition, the concessionaire is responsible of the quality of the material and equipment surveyed (art. 13.6). The concessionaire can elude this responsibility only when the material or equipment is damaged as a consequence of an order given by the contracting authority.

### C.3.2. Security interests in intangible assets

According the IDAE model of contract, the list of requirements of the tender process must include an article (13.5) that establishes that the concessionaire is responsible of any complaint related to intellectual, industrial or commercial rights of third suppliers. In addition, the concessionaire must indemnify the contracting authority all the damages and losses caused by the management of complaints.

### C.3.3. Security interests in trade receivables

No statements related to this topic have been found in the Spanish LCSP neither in the contract model produced by IDAE.

### C.3.4. Security interests in the project company

No statements related to this topic have been found in the Spanish LCSP neither in the contract model produced by IDAE.

## C.4. Risk management plan

According the Spanish LCSP, the risk management must be assumed by the concessionaire (art. 199). However, for the typology of contract 'collaboration between public and private sector', the same law establishes that a risk management plan must be included in the contract. This management plan must define how the risk will be shared. It must first identify separately each risk and then define accurately which part will assume the risks derived from the variety of the cost of the service or the change on the demand of these services (art. 120b).

# PORTUGAL

**D.1. <u>National legislation and regulation on PPPs</u>**

In Portugal, the Resolution of the Council of Ministers nº 80/2008, 20th May, that approves the **PNAEE – National Action Plan for Energy Efficiency**, defines a set of programs and energy efficiency measures framed in three strategic areas, including the area of **<u>Incentives and Financing</u>.** This includes, among others, the encouraging to the creation of ESCOs, addressed as follows: *"promotion of Energy Services Companies with the use of procurements and strong incentives to the creation of ESCOs, framed by Efficiency Contracts designed to give a legal framework to the relationship"*.

Besides this Resolution, it was approved by the Portuguese Council of Ministers on December 9th the Decree-Law that establishes the legal framework applicable to the creation and execution of management contracts for energy efficiency, to be established between the Portuguese Government and the ESCOs.

This Decree Law establishes a system of recruitment of energy services by the state and other public bodies, having in mind the implementation of energy efficiency measures in public buildings and facilities allocated to the provision of public services in order to meet the commitment assumed by Portugal in the context of European Policies to combat climatic changes (Climate Energy Packing 2020), in order to increase in 20% its energy efficiency by 2020.

Thus, this Decree Law establishes the role that the public sector should play in the promotion of a market for energy services and the adoption of measures to improve the energy efficiency. The hiring of energy service companies (ESCOs) throughout a competitive process will allow these ones to identify potential energy savings in buildings and public facilities, as well as the implementation of procedures for enhancing energy efficiency gains in the final energy bill.

This Decree Law also stipulates the establishment of procedural rules applicable to the creation of contracts that shall be signed with the ESCOs, with a clear focus on a model of evaluation of the proposals as simplified and objective as possible.

Besides the establishment of procedural rules applicable to energy efficiency management contracts, this Decree-Law also includes a system of identification of entities capable of celebrate energy efficiency management contracts with private entities, staffed with qualified technical in order to perform the services which are the subject of such contracts. This scheme is provided by Decree-Law 29/2011, February 28th which entered in force in March 5th 2011.

To the execution of the energy efficiency management contract is applicable the provisions of the Portuguese Public Procurement Code (Decree-Law no.18/2008, January 29th, with the changes made by Decree-Law no. 278/2009, October 2nd).

D.1.1. Legal capacity of parties and legal requirements of the State to provide services

The a.m. Decree Law refers that, in order to streamline and quick the procedure of energy efficiency management contracts (i.e. EPC – Energy Performance Contracts) creation to be signed for each public building or facility, it is expected (for the pre-contractual phase) the establishment of a classification system of economic operators, thus staying the selected authorities authorized to participate in further training procedures for contracts' creation. It is also envisaged in the Decree Law that if the building in the tender already has as an energy audit, the contracting entity may waive some stages of the tender and adopt a procedure of energy efficiency management contracts' creation only with an invitation and the presentation of final proposals, which follows the adjudication.

Nevertheless, the ESCOs that will to present a proposal for the EPC are intended to perform an energy audit in order to define the baseline to accomplish the energy consumption reduction and the consequent monitoring plan.

D.1.2. Cost recovery mechanisms

The payment for services is based in whole or in part:

a) At the level of efficiency obtained;

b) In other performance criteria established by the parties.

In Portugal, one can find the following mechanisms that can be set up in order to guarantee the cost recovery of the PPP:

1. **Shared Savings –** in this model, the ESCO shares with the client the savings achieved. There are different formula to guarantee and share the energy saving achieved between the ESCO and the client:
    - All package (energy services + funding);
    - Variable award (based on a percentage of monthly savings);
    - Scale award (there is no award until the recovery of the investment by the ESCO); and
    - Specified award (fixed monthly value + share between the parties of the surplus saving).

When the project is financed through this model, the ESCO can offer to the client the saving distribution since the beginning of the project (savings are distributed between the client and the ESCO since the beginning of the project), savings at the end of the project (the savings achieved are entirely used to finance the project) or throughout other formula (the distribution of savings between the client and the ESCO can be negotiated depending on the characteristics of every particular project).

2. **Guaranteed Savings** – in this model, the ESCO guarantees a fixed saving to the client, usually as a percentage:
   - Guaranteed level of pre-contract savings (total or part of the savings identified in energy audits);
   - The funding is fully responsibility of another party.

3. **No Guaranteed Savings -** in this model, the ESCO plays the role of consultant:
   - The ESCO only provides energy audit services, design, construction management of the commissioning of equipment;
   - There is no contractual guarantee of savings;
   - The responsibility of funding and financial risk is totally assumed by the other party.

D.1.3. <u>Property issues of land and infrastructure</u>

According to the Decree-Law no. 29/2011, 28th February (article 35º):

a) One can consider that all the existing goods in the buildings and equipments allocated to the provision of public services subject to the intervention at the time of the contract, as well as the assets to create, build, own or install the Energy Service Company in pursuing the contract, and that are indispensable for the proper development of the management of energy efficiency, whether the property right belongs to the public contracting, the ESCO or third parties, are allocated to the management contract for energy efficiency;

b) The Energy Service Company cannot overtax public goods allocated to the contract;

c) The Energy Service Company can only alienate or overtax own goods essential to the development of activities carried out under the management contract for energy efficiency by authorization of the public contractor, who must safeguard the existence of goods suitable for attaining the objective of energy efficiency defined in the contract;

d) The Energy Service Company may alienate or overtax own goods not essential to the development of activities carried out under the management contract for energy efficiency if it ensures the existence of goods functionally able to pursuing the goal of energy efficiency set by the contract.

e) In the case of goods covered under the contract, by transference clause, we shall apply the provisions of c) to their alienation or overtax;

f) The Energy Service Company can take by rent, leasing or similar, goods and equipments to be allocated to the management efficiency contract since it is reserved for the public contracting party the right, by contrast, to access the use of these assets and succeed in their contractual position in case of abduction, ransom or termination of the contract, but shall in any case, the duration of their contract exceeds the term of the management efficiency contract to which it relates;

g) The assets used by the ESCO in the management contract and which are essential to the sustainability for the future of the measures to improve energy efficiency adopted on/or in buildings and equipment involved in the provision of public services subject of intervention, with the term of the contract, become ownership of the public contractor, having with no place (in the absence of contractual provisions) to the payment of any reimbursement.

### D.1.4. Environmental issues / Environmental Impact Assessment

It is recognized by the Portuguese Government the value of the contribution of Energy Service Companies in order to ensure the right to the environment, in the context of sustainable development, as an instrument for the promotion of rational use of natural resources and environmental education.

### D.1.5. Forms of possible state financial support

Project Finance is a financing technique commonly associated with the type of financing of PPP.

It is particularly suitable for the implementation of infrastructure and it is mostly characterized by being a long-term financing, thus allowing the debt relief in the initial phase of the project.

It is also characterized by having a strong financial leverage, i.e. once the debts are smaller in the initial phase, this fact allows companies to keep a healthy level of debt, thereby enhancing the possibility that they may invest in other projects simultaneously. The debt to third parties and the shareholders' funds used as projects' guarantees are repaid only, or partially, by cash flow generated by the company in the operationalization of the project, instead of being paid by the property (own capital/resources) within the company. In a more comprehensive way, the business flows only with the resources of the business itself (self-funded business).

The funding model underlying a PPP involves, in what concerns the private partner, a major financial effort in the construction phase, which may appeal to bank financing and benefit, at this stage, from public funding throughout European funds or even public partner own resources.

The remuneration of the private partner can be made by the public partner and/or the consumers/final end-users of the service, having always as basis the payment criteria only after the start-up of the service and the services standards pre-agreed.

D.1.6. Public sector borrowing restrictions

Not applicable

## D.2. Financial issues

### D.2.1. Financial obligations of the concessionaire

In the absence of contractual provisions, it is ESCOs' obligation the funding of all measures of improvement of energy efficiency to implement.

### D.2.2. Tariff setting and tariff control, including:

*D.2.2.1. Concessionaire's authority to collect tariffs*

Not applicable

*D.2.2.2. Tariff control methods, i.e. rate-of-return method, price-cap method*

Not applicable

*D.2.2.3. Policy considerations on tariff control*

Not applicable

### D.2.3. Financial obligations of the contracting authority, including

*D.2.3.1. Direct payments*

It is obligation of the contracting authority to pay the contract price set in the tender awarded.

The term of the contract is fixed according to the time required for the amortization and remuneration, in the normal conditions of purchase profitability, of the capital invested by the ESCO.

*D.2.3.2. Purchase commitments*

According to the Portuguese Public Procurement Code, for the formation of contracts covering services that are or might be subject to market competition, contracting entities must adopt one of the following types of procedure:

a) Private Treaty

b) Tender

## D.3. Security interests

### D.3.1. Security interests in physical assets

Not applicable

### D.3.2. Security interests in intangible assets

Not applicable

### D.3.3. Security interests in trade receivables

Not applicable

### D.3.4. Security interests in the project company

Not applicable

## D.4. Risk management plan

PPPs are a form of public procurement extremely complex, thus requiring a rigorous and balanced distribution of risks between each partner.

The optimal level of transfer is characterized by a situation of "win-win", where both the public and the private partner maximize/optimize their return relatively to the incurred costs.

However, in most cases, the risks associated with the project are allocated mainly to the private sector, but it should be remembered that the public sector shall also have a more or less significant responsibility by the provision of service and the satisfaction of the collective adjacent need.

A PPP Project may face several risks throughout the project period, which are different at each stage of the project and hence need to be mitigated appropriately:

- Engineering and Construction Phase
- Project Start-Up Phase
- Operation Phase

In addition to the risks specific for each phase of the project, there are other risks like political risks and force majeure risks that remain throughout the project period, though the impact may vary based on the project phase.

Nevertheless, the contract between the public body and the ESCO must include a meaningful and effective transfer of risk to the ESCO. The sharing of risks between the public body and the Energy Service Company must be clearly contractually identified and must follow the below mentioned principles:

a) The various risks inherent to the contract shall be divided between the parties according to their ability to manage them;
b) It should be avoided the creation of risks that have not a proper justification in the significant reduction of another existing risks;
c) The risk of financial unsustainability of the contract, for reasons not attributable to failure or unilateral modification of the contract by the public body contracting, or force majeure situation, should be as much as possible transferred to the ESCO.