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# THE ENERGY PERFORMANCE CONTRACT AS A PRIVATE PUBLIC PARTNERSHIP OPERATION TO IMPROVE ENERGY EFFICIENCY OF PUBLIC REAL ESTATE ASSETS

**Summary:** 1. Introduction. 2. The energy performance contract. 3. The National Agency for New Technologies, Energy and Sustainable Economic Development position regarding the possibility of configuring the Energy Performance Contract as a private public partnership contract. 4. Conclusions: Energy Performance Contract as a (possible) private public partnership contract.

## 1. Introduction

The Italian National Energy Strategy (NES) 2017[1], in line with the original proposal for a directive on energy efficiency contained in the Clean Energy Package, assumed the 30% reduction target for consumption by 2030 compared to the 2007 reference scenario. The NES must be adequate to the 32.5%[2] target in the same time frame, set by Directive 2018/844/EU[3] which in meantime entered into force. For sectors not covered by the Emission Trading Scheme (ETS) (residential, services and a large part of the transport sector), the reduction target for Italy is 33% compared to 2005[4].

To date, our country has achieved high energy efficiency performance[5], especially in the industrial sector[6]. It remains a significant growth potential in the civil (both residential and tertiary) as well as in the transport sectors. The improvement of energy efficiency in buildings is due to two orders of difficulty: the lack of awareness of consumers about the benefits associated with it and investment costs generally high compared to the benefits obtained. In fact, the cost-effectiveness ratio of incentive tools dedicated to the construction sector (tax deductions and incentives for thermal energy) is, up to eight times higher than the mechanism of white certificates, mainly used in the industrial sector.

[1] Adopted by inter-ministerial decree of 10 November 2017.

[2] This is the point of arrival of a close negotiation between the Council, the Commission and Parliament. Indeed, the energy ministers of the EU Council conducted an initial review of the proposed package on 27 February, ruling for a 27% indicative target on energy efficiency by 2030, compared to 30% proposed by the EU Commission. On the other hand, the European Parliament approved a resolution that set the minimum binding target of 35% energy efficiency by 2030. The final text of the directive approved by the Parliament and the one which the Council adopted, as a compromise, contains the target of 32.5%. Italy is among the countries that pushed for an even more ambitious goal. The Commission X - Industry, Commerce, Tourism - of the Italian Senate approved a resolution (Doc. XVIII No. 203) on 23 May 2017 on the proposal for a directive on energy efficiency, which called for the adoption of a more ambitious target for the 40%.

[3] Directive 2018/844/EU revising Directive 2010/31/EU on the energy performance of buildings and of Directive 2012/27/EU on energy efficiency entered into force on 9 July 2018 and will have to be transposed by all member states by 10 March 2020.

[4] Target set in 2016 in the proposal to extend the Effort Sharing Decision to 2030.

[5] Defined by the art. 2, paragraph 1, let. f) of the Legislative Decree of 30 May 2008, n. 115, referred to art. 2, paragraph 1, let. a) of Legislative Decree 4 July 2014, n. 102: «the ratio between the results in terms of performance, services, goods or energy, to be understood as supplied performance and the input of energy».

[6] Italy, with an energy intensity of around 100 toe (tone of oil equivalent) per million euro of GDP in 2015, 18% lower than the Euro-EU average (EU 28): 120 toe per million euro of GDP. Better than Italy is the only United Kingdom with 94 toe per million euros of GDP.

The potential related to the energy efficiency of public real estate assets is particularly relevant. Directive 2010/31/EU on energy performance of buildings has set the obligation on each Member State to adapt, according to the best energy standards, by 3% yearly of the useful floor area of the central[7] public administration buildings. Article. 5 of the legislative decree n. 102 of 2014 states that, starting from 2014 and until 2020, interventions on the properties of the central public administration, including the peripheral ones, can be carried out, aiming at achieving the energy requalification of at least 3% per year of the covered useful floor air-conditioned area or, alternatively, involve a cumulative energy saving over the same period of at least 0.04 Mtoe.
Furthermore, in 2009 the European Commission promoted the so called Covenant of Mayors Pact, initiative aimed at encouraging local authorities to adopt, through the Sustainable Energy Action Plans (SEAP), measures to improve energy efficiency, promote energy saving and the use of renewables[8]. In this context, the Energy Performance Contract[9] and the use of the Public-Private Partnership can play a significant role.

**2. Energy Performance Contract**

The energy performance contract[10] (EPC) was introduced by the Directive 2006/32 /EC, on the efficiency of end-use energy and energy services, and implemented in the internal legal system with the Legislative Decree of 30 May 2008, n. 115, implementing the aforementioned directive. Today it is governed by Legislative Decree 4 July 2014, n. 102[11], whose art. 2, let. n), defines it as: «contractual agreement between the beneficiary or the person exercising the power of negotiation and the supplier of an energy efficiency improvement measure, verified and monitored during the entire duration of the contract, where investments (works, supplies

[7] The Commission X of the Italian Senate, with resolution dated 27 October 2017 (Doc. XVIII No. 223) called for the extension of this obligation to all real estate portfolio of the entire Public Administration.
[8] The new Covenant of Mayors, launched in 2015, has increased the CO2 reduction target, bringing it to 40% by 2030.
[9] Article 5, paragraph 11, of the legislative decree n. 102/2014 establishes that, for the realization of interventions included in the annual energy requalification program of at least 3 percent of the useful area of Central Administration buildings, the Public Administrations "favor the use of the financing instrument through third parties and contracts on energy performance and can do so through the intervention of one or more ESCo". Furthermore, Article 18 of Directive 27/2012/EU provides that Member States shall promote the energy services market and the access of SMEs to this market, inter alia, "d) supporting the public sector in examining energy service offers, in particular for building renovation interventions: i) offering standard contracts for energy performance contracts which contain at least the elements listed in Annex XIII; ii) providing information on best practices for energy performance contracts, including, if available, a cost-benefit analysis based on the life cycle approach".
[10] On the energy performance contract see: F. Benatti, "The energy performance contract" (general profiles) and P. Biandrino, "The energy efficiency contracts: civil law and public interest" (specific points), in P. Biandrino, M. De Focatiis (edited by) "Energy efficiency and efficiency of the energy system: a new model?" Milan, 2017, respectively, page. 137 ss. and page. 149 ss.; M.G. Landi, M. Matera, P. Telesca, C. Benanti, E. Valeriani, "Energy Performance Contracts (EPC)" RT/2017/39ENEA, in openarchive.enea.it; S. Trino, "The energy performance contract", in L. Carbone, G. Napolitano, A. Zoppini (edited by) "Public policies and energy efficiency discipline", Bologna, 2016, pp. 395 ss.; L. Parola, T. Arnoni, S. Granata, Energy efficiency contracts. Regulatory profiles and practices, in "The Contracts", 2015, pp. 517 ss.; M. Maugeri, "The energy performance contract and its "minimum elements"", in *Nuova giur. civ.*, 2014, page. 420 ss; M. Pennasilico (edited by), "Manual of civil law of the environment", Naples, 2014, page 242 ss.; P. Piselli, A. Stirpe (ed.) "The Energy Performance Contract", Turin, 2011, page 37 ss; P. Piselli, S. Mazzantini, A. Stirpe, "The energy performance contract" in www.treccani.it, 11 March 2010.
[11] Transposition of the Energy Efficiency Directive 2012/27/EU.

or services) made are paid according to the level of energy efficiency improvement established by contract or other agreed energy performance criteria, such as financial savings[12]".
Annex VIII of Legislative Decree no. 102/2014 indicates the minimum elements that must appear in the energy performance contracts signed with the public sector and in the related tender specifications[13], following a standardization process of this contractual figure initiated by art. 7 of the decree of the Ministry of economic development of 28 December 2012[14] and

[12] M.G. Landi, M. Matera, P. Telesca, C. Benanti, E. Valeriani, Energy Performance Contracts (EPC), op.cit., Note that, despite the literal translation of EPC "Energy Performance Contract" is "contract of providing energy services ", was introduced in our Italian legal system by Legislative Decree no. 115/2008 as an "energy performance contract". The authors highlight the promiscuous use of the nomenclature in Legislative Decree no. 102/2014, which defines in art. 2, lett. n) the «energy performance contract», refers in art. 14, paragraph 1, of «energy performance contracts». The abovementioned text authoritatively opts - considering the ENEA technical report - for the use of the name "energy performance contract" as "performance in general can refer only to the operation of the plant while the service considers the building system in relation to user's profile related to the allocation and performance of the plants, but also to the performance that the building develops based on the improvement of the plants themselves ». It seems, however, to the writer, beyond the technical meaning of the terms, preferable to keep the title given to the contract by the Legislator. The latter, in fact, uses the terms energy "performance" and "services" indifferently, so that the Italian translation of the English title of Directive 2002/91/EC "on the energy performance of building" is "on the energy performance of buildings" while the translation of the same English title of Directive 2010/31/EU is "on the energy performance of buildings". The original text of art. 2, paragraph 1, lett. c) of the Legislative Decree of 19 August 2005, n. 192, implementing Directive 2002/91/EC "on the energy performance of buildings", contained the definition of "energy performance, energy efficiency or performance of a building" demonstrating that the various nomenclatures were considered equivalent. The current text of the law, as amended by art. 2, paragraph 1, law decree June 4, 2013, n. 63, converted with amendments by the law 3 August 2013, n. 90, refers only to the "energy performance of a building", defined as "the annual quantity of primary energy actually consumed or expected to be needed, with a standard use of the building, the various energy needs of the building, winter and summer air conditioning, hot water preparation for sanitary purposes, ventilation and, for the tertiary sector, lighting, lifts and escalators". Article. 2, however, does not contain a different definition of energy performance, thus confirming that it considers as equivalent terms. Article. 2, lett. n), Leg. Decree no. 102/2014, finally, indicates as subject of the energy performance contract the supply of a measure of energy efficiency improvement paid "according to the level of improvement of energy efficiency established contractually or other agreed energy performance criteria, such as financial savings ", showing conclusively that nomenclatures: "energy performance " and, " energy services" are considered equivalent.

[13] a) a clear and transparent list of efficiency measures to be applied or results to be achieved in terms of efficiency; b) the guaranteed savings to be achieved by applying the measures foreseen in the contract; c) the duration and the fundamental aspects of the contract, the methods and terms envisaged; d) a clear and transparent list of obligations on each contracting party; e) date or reference date for the determination of the savings achieved; f) a clear and transparent list of the stages of implementation of a measure or package of measures and, where relevant, the related costs; g) the obligation to fully implement the measures provided for in the contract and the documentation of all the changes made during the project; h) provisions governing the inclusion of equivalent requirements in any concessions contracted to third parties; i) a clear and transparent indication of the financial implications of the project and the shareholding of the two parties to the realized pecuniary savings (exp. remuneration of service providers); j) clear and transparent provisions for the quantification and verification of guaranteed savings achieved, quality controls and guarantees; k) provisions that clarify the procedure for managing changes to the framework conditions that affect the content and results of the contract (exp. modification of energy prices, intensity of use of a plant); (l) detailed information on the obligations of each of the contracting parties and on penalties for non-compliance.

[14] Laying down provisions on incentives for thermal energy production from renewable sources and small-scale energy efficiency measures. Article. 7 of the cited decree specified that, within ninety days from the entry into force of the decree Consip and the regions, also with the involvement of the ANCI, would have to jointly develop "templates of energy performance contracts, between public administrations, the ESCo and the funding bodies in order to facilitate access to incentives for energy efficiency and the production

implemented by art. 5 of the decree n. 63 of June 4, 2013 which, inserting the art. 4-ter in the legislative decree 19 August 2005, n. 192, entitled the National Agency for New Technologies, Energy and Sustainable Economic Development (ENEA), to make available, within 90 days from the entry into force of the provision, "a standard contract for the improvement of energy performance of the building, similar to the EPC European performance contract[15]". The need to define a standard model[16] is explained by the particular complexity of these contracts, which intertwine legal, economic (financing methods, performance calculation, etc.) and engineering (energy diagnosis, building redevelopment and plant upgrading interventions) [17].
Moreover, in practice, the EPC is usually divided into a number of related contracts (sub-contracts of the basic contract, connected contracts and ancillary contracts) that are interdependent[18]. The punctual typification of the energy performance contract made by the Legislator and, on the mandate of these, by ENEA, doesn't seem has changed its nature of an atypical[19] contract, having its main characteristic in the combination of activities and instrumental services to improve energy efficiency, which is the cause or function of the contract, far beyond the parties' contingent interests[20].

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of heat from renewable sources ". For this fulfillment Consip could have used ENEA's technical support. These contractual models are also made available by the GSE on its portal.

[15] ENEA published in September 2014 the "Guidelines for Energy Performance Contracts (EPC)", defining a standard, integrated contract (according to Article 14, paragraph 4, of Legislative Decree No. 102/2014) with minimum elements listed in Annex VIII to Decree No. 102. In March 2017, ENEA sent to the Ministry of Economic Development a new version of the guidelines, defining a standard reference framework (guidelines with more technical specifications) through which to elaborate a model of EPC contract that has as object One Service, the «Energy Performance Service». It is unique that in an ENEA publication (MG Landi, M. Matera, P. Telesca, C. Benanti, E. Valeriani, Energy Performance Contracts (EPC), op.cit., page 19-20) one complains inadequacy of the minimum elements" to provide the public and private operators with an easy-to-use tool that will allow the rapid spread of the contract in Italy over time" and invoke a "legislative provision that quickly leads to their typification " given that the Legislator has delegated ENEA precisely to provide for this purpose.

[16] Set by art. 18, let d) of Directive 27/2012/EU which states that Member States shall promote the energy services market and the access of SMEs to this market, inter alia, "d) supporting the public sector in examining energy service offers, in particular for building renovation interventions: i) offering standard contracts for energy performance contracts which contain at least the elements listed in Annex XIII; [...] ».

[17] See, on this point, F. Benatti, The energy performance contract (general profiles), in P. Biandrino, M. De Focatiis (edited by), Energy efficiency and efficiency of the energy system: a new model?, op.cit., page 139: "the stipulation the contract must be preceded by an energy audit that ascertains the current performance of the plant, foresees the consumption after the realization of the project and subsequently by an economic analysis that values current consumption and hypothesize future ones, the quantification of the necessary investments, the economic forecast of savings, the identification of possible forms of public support ". See also P. Piselli, S. Mazzantini, A. Stirpe, Energy performance contract, op.cit., which also underline the importance of the phase of drafting the contract, "because the variables (including executive ones) of the renovation interventions are so many and so, that have to be punctually defined in contractual regulation, which must be modulated as much as possible to the type of intervention to be carried out on the basis of the approved project ".

[18] See P. Biandrino, Energy efficiency contracts: civil law rules, in P. Biandrino, M. De Focatiis (edited by), Energy efficiency and efficiency of the energy system: a new model? op.cit., page 154, which stresses that "to ensure maximum efficiency, effectiveness and economy it is essential to "plan" all the agreements with a holistic view".

[19] F. Sciaudone, Access to credit for energy efficiency projects, in L. Carbone, G. Napolitano, A. Zoppini (edited by), Public policies and regulation of energy efficiency, op.cit., P. 140. See also M.G. LANDI - M. Matera, P. Telesca, C. Benanti, E. Valeriani, Energy Performance Contracts (EPC), op.cit., page 17, "the EPC contract is atypical contract, because it lacks a systematic legal discipline and is characterized by numerous peculiarities that make each contract different from any other".

[20] M. Pennasilico (edited by), Manual of civil right environmental, op.cit., page 247-248. The Author, moving from the consideration that energy efficiency is a "value that increasingly tends to impose itself in the Italian-European system", states that the EPC pursues a worthy interest in protecting *«in re ipsa»*. On

Others, on the other hand, speak of "weak typicality" [21] or "nominated contract, being defined by the legislator, but by the not typicalized content"[22].
And indeed, the minimum elements have the function of guaranteeing constant monitoring of the approximation process towards of energy efficiency objectives[23].
In fact, the essential elements of this contractual figure are the increase in the level of energy efficiency[24] (the performance) and the ratio between the performance and remuneration, which is commensurate with the results actually achieved[25] For the rest, the energy performance contract may also not correspond to the contractual model typified by Decree no. 102 of 2014, inclusive of all the "minimum elements" indicated in its Annex VIII provided that the flaw of the minimum requirements does not render null the contract due to the indeterminability of the object[26]. This except the case in which the contract has as a party a Public Administration or, even if concluded between individuals, they prefer not to access the thermal incentive scheme

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this point see also P. Piselli, A. Stirpe, The structure of the contract: the cause and the type, in P. Piselli, S. Mazzantini, A. Stirpe (ed.), The energy performance contract, op. cit., page 37. The authors note that the interests pursued by the EPC "are identified in the pursuit of energy efficiency and savings, in the use and development of renewable energy sources, in the increase and circulation of technologies, in the containment or in the elimination of investment costs and technical risks for the community wishing to access this particular mechanism for the modernization of existing plants and structures". See also S. Trino, the energy performance contract, in L. Carbone, G. Napolitano, A. Zoppini (edited by), Public policies and discipline of energy efficiency, op.cit., page 405, which qualifies the energy performance contract, an "instrument of private regulatory law", precisely for the general and system purposes to which is functional the particular type of contract governed by Legislative Decree no. 102/2014.

[21] F. Benatti, Energy performance contract (general profiles), in P. Biandrino, M. De Focatiis (edited by), Energy efficiency and efficiency of the energy system: a new model? op.cit., page 145. The author notes that if "one adheres to a rigorous conception of typicality, the energy performance contract must be configured as a typical contract, more precisely of weak typicality, because - once the object has been specified, its purpose and its function is connected to all the instruments and norms set up to achieve energy efficiency - it relies on a conventional typicality that cannot be replaced by code rules".

[22] L. Parola, T. Arnoni, S. Granata, Energy efficiency contracts. Regulatory profiles and practices, op.cit., page 526. See also P. Piselli, S. Mazzantini, A. Stirpe, Energy performance contract, op.cit., which states that "the legislator has intentionally entrusted the regulation of the relationship to the full contractual autonomy of the parties, with the aim to make it as congruous as possible to the set of interests concretely pursued by the parties, without prejudice, of course, to the application of the general principles concerning obligation and contracts ".

[23] See, on this point, M. Maugeri, The Energy Performance Contract and its "minimum elements", op.cit., page 425: "these elements are prescribed in order to characterize the type of contract that is deemed appropriate to achieve the objectives that the legislator intends to pursue."

[24] Article. 2, paragraph 1, lett. c) of Legislative Decree no. 115/2008, defines "improvement of energy efficiency": "an increase in the efficiency of end-use energy, resulting from technological, behavioral or economic changes".

[25] The obligation carried by the energy efficiency measure provider is a result obligation and not a means. See M. Maugeri, The Energy Performance Contract and its "minimum elements", op.cit., which identifies the characteristic element of the contract in the "bound relationship between the remuneration of the investment and the improvement of energy efficiency (where "energy efficiency" means the relationship between results in terms of performance, services, goods or energy, to be considered as supplied performance, and the injected of energy, and for the "improvement of energy efficiency" the increase of efficiency of end uses of energy, resulting from technological, behavioral or economic changes ».

[26] F. Benatti, Energy performance contract (general profiles), in P. BIANDRINO - M. DE FOCATIIS (edited by), Energy efficiency and efficiency of the energy system: a new model? op.cit., page 142-144, on the basis of the conclusions reached by the doctrine concerning the articles. 35, 85 and 86 of the Consumer Code, states that the essential requirement that make the contract null is also "the clarity and transparency of the dictate", since it is functional to the protection of the customer.

of the so called «Conto termico», referred to in decree of December 28 of 2012, according to art. 7, paragraph 6 of Legislative Decree no. 102/2014[27].
Essential parts of the contract are the supplier of the energy efficiency measure, usually an ESCO[28], and the beneficiary thereof. The energy performance contract can also have a trilateral structure: this happens when the investment is financed by a party other than the supplier of the energy efficiency measure, by the mechanism of financing through third parties (FTT) [29]. The contract's object is the energy service, defined by the art. 2, paragraph 1, let. mm), legislative decree n. 102/2014: «the material performance, utility or advantage deriving from the combination of energy with technologies or with operations that effectively use energy, which may include the management, maintenance and necessary control activities for the provision of the service, whose supply is made on the basis of a contract and which under normal circumstances has shown to lead to improvements in energy efficiency and to verifiable and measurable or estimable primary energy savings" [30].

**3. The National Agency for New Technologies, Energy and Sustainable Economic Development position regarding the possibility of configuring the Energy Performance Contract as a private public partnership contract**

It has been said that the Legislator has entitled ENEA to prepare a standard contract for the improvement of the energy performance of the building, similar to the European performance

[27] Article. 7, paragraph 6 of Legislative Decree no. 102/2014 establishes that, for the purposes of access to the incentive referred to the "conto termico" (for the thermal energy), energy performance contracts are considered only those that have the minimum elements listed in Annex VIII of the legislative decree. See L. Parola, T. Arnoli, S. Granata, Energy efficiency contracts. Regulatory profiles and practices, op.cit., page 528: "nothing prohibits, therefore, that the parties enter into a contract without the minimum elements set out in Annex 8, but aimed at improving the energy performance of buildings and facilities, with the consequence that the latter, while not being able to qualify as an energy performance contract and thus accessing the benefits of the "conto termico" it remains valid and effective anyway ».

[28] Acronym of Energy Service Company, defined by the art. 2, paragraph 1, lett. i), Legislative Decree no. 115/2008: "natural or legal person providing energy services or other measures to improve energy efficiency in installations or premises of the user and, doing so, accepts a certain amount of financial risk. The payment of the services provided is based, totally or partially, on the improvement of the energy efficiency achieved and on the achievement of the other established criteria ". P. Piselli, S. Mazzantini, A. Stirpe, Energy performance contract, op.cit., shows that the EPC is the contractual model that characterizes activities of the ESCO. If it is true, in fact, that these are operators of the energy services market able to have an overview of the customer's energy problem, managing and coordinating the various phases aimed at identifying, planning and implementing the intervention that best guarantees the achieving the energy efficiency of structures and plants, the EPC is undoubtedly the instrument that summarizes the operations of these subjects.

[29] Defined in art. 2, paragraph 1, lett. m), Legislative Decree no. 115/2008: "contractual agreement including a third party, in addition to the energy supplier and the beneficiary of the energy efficiency improvement measure, which provides the capital for this measure and charges the beneficiary a fee equal to part of the energy savings achieved using the measure itself. The third party can be an ESCO".

[30] M.G. Landi, M. Matera, P. Telesca, C. Benanti, E. Valeriani, Energy Performance Contracts (EPC), op.cit., page 20, believe that this definition is problematic for EPC that affect buildings, due to the difficulty of including, in the absence of an extensive interpretation of the term "operations", the works involving the envelope. More accurate for buildings the definition of energy service proposed by ENEA in the "Guidelines for energy performance contracts for buildings", drawn up pursuant to art. 14 of the legislative decree n. 102/2014, not yet in the public consultation phase: "the material performance, usefulness or advantage deriving from the use of energy combined with technologies, consisting in the supply and installation of products, components and systems for a building including management, maintenance and control actions, all aimed at improving the energy efficiency of the building itself and at verifiable and measurable primary energy savings, and regulated on the basis of a contract whose performance cannot be separated. The provision of energy carriers is also part of the energy performance service".

contract, EPC. The Agency fulfilled this task in 2014 and subsequently, in 2017, transmitted to the Ministry of Economic Development a new version of the guidelines, defining a standard reference framework (guidelines with more technical specifications) through which to draw up an EPC template contract having as object the «Energy Performance Service». The document, to date, has not yet been placed in public consultation. The position of ENEA on the possibility of configuring the EPC as an instrument of private public partnership is, however, deducted from a publication of the Agency which anticipates, on this point, the content of the guidelines sent to the Ministry, stating that these guiding specifications "were drafted considering the EPC as a service contract because, in accordance with the established case law, we did not recognize in it the typical elements of the concession[31]".

In essence, the Agency, by identifying the private public partnership with the sole concession, generally leads the EPC back to the "service contract", since in that contract "not only the classic elements of the concession are found, that is to say, a third party with respect to the Public Administration and the direct collection from users (necessary elements for the consolidated jurisprudence), but also if we analyse the doctrine which emphasizes the distinction based only on the element of "operational risk", full of substantive, the operational risk is not external i.e. it does not respond to the provision of art. 3 of Leg. Decree 50/2016 that states "under normal operating conditions, the recovery of investments made or costs incurred for the management of the works or services covered by the concession" is not guaranteed nor does it entail a "real exposure to market fluctuations[32]".

ENEA allows the EPC to qualify as a private public partnership operation only if the payment of the fee does not cover more than 50 percent of the initial cost of the investment, "due to the "risk component" being effectively present even if reduced[33]". So, by bulldozing over every opportunity of configuring as public private partnership because in this case the financial economic plan would be structurally in disequilibrium and could not be certified.

Indeed, the position of ENEA reflects the traditional difficulty in conceiving the concession for "cold" works and services: that is, they do not generate income through revenues from external users (such as the so called. hot and warm works and services) but are remunerated directly by the Public Administration through a fee. This possibility, already envisaged by the Legislator in the past[34], was in conflict with the European Union[35] and the Italian concept of concession[36]

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[31] M.G. Landi, M. Matera, P. Telesca, C. Benanti, E. Valeriani, Contracts of energy performance (EPC), op.cit., page 25.

[32] M.G. Landi, M. Matera, P. Telesca, C. Benanti, E. Valeriani, Contracts of energy performance (EPC), op.cit., page 30.

[33] *Ibidem*. On the same positions of ENEA also the foundation of the National Association of Italian Municipalities (IFEL). See, Municipal dimension of the Public Private Partnership, in www.fondazioneifel.it, 2018, page 255 and the ANAC in an opinion - however - old and to be considered outdated. See ANAC, Opinion No. 37 of the Meeting of 4 April 2012.

[34] Article. 142, paragraph 9 of Legislative Decree no. 163/2006 (which reproduced paragraph 2-ter of article 19 of law 109/1994, introduced by article 7, letter l), l. n. 166/2002) provided that "contracting authorities may entrust works intended for direct use of the public administration as functional to the management of public services, provided that the concession holder is responsible for the economic and financial management of the work".

[35] The directives 89/440/CE, for works, and 2004/18/CE, for services, identify the distinctive element of the concession compare to the procurement contract in the fact that the compensation "consists solely in the right to manage the work" or services "or in this right accompanied by a price". Also the 2014/23/EU directive qualifies the concession as a contract under which the Administration entrusts one or more economic operators for the execution of works (works concession) or the supply and management of services (service concession), "where the compensation consists solely of managing the works [or services] which are the object of the contract or in that right accompanied by a price", with the further clarification that "the awarding of a works or service concession entails the transfer to the concession holder of an operational risk related to the management of the works or services, including a risk on the demand side or on the supply side, or both "(Article 5, point 1, paragraphs 1 and 2). The European

and the jurisprudential orientation according to which "the essence of the concession, whether related to public goods or services, lies in the fact that the concessionaire is remunerated by providing service to users [...] or by exploiting the state property for economic purposes[37]".
However, the new code of public contracts has solved the dilemma regulating- unlike what happens in the European Union[38] and as already done by other Member States[39] - the private

jurisprudence, before the entry into force of Directive 2014/23 / EU, has clarified that decisive element for the qualification of the assignment of a certain service as a concession resides in the transfer of risk (see EC Court of Justice, 13 November 2008, C-437/07, Commission v. Italy, in Town Planning and Procurement, 2009, 20), specifying that management risk must be understood as a risk of exposure to the market that occurs, in the first place, in the case in which, being the remuneration of the service guaranteed by third parties with respect to the Administration, the economic operator can find itself in the situation in which the proceeds of the activity carried out in favor of third parties do not allow full coverage of the costs incurred (see Court of Justice) EU, 10 March 2011, C-275/09, Strong Segurança SA, in EUR-Lex), while risks related to mismanagement or errors of assessment by the economic operator are not relevant o because it is inherent in any contract, regardless of whether the latter is due to the type of public service contract or to the service concession (cf. Court of Justice EU, 10 November 2011, C-348/10, Norma-A Sia, in EUR-Lex).

[36] Article. 30, par. 2, of the legislative decree n. 163/2006 provided that "in concession of services the compensation in favor of the concessionaire consists solely in the right to functionally manage and to exploit the service economically. The granting party also establishes a price at the time of the tender if the concessionaire is required to charge lower prices to users than the sum of the cost of the service and of ordinary business profit, or if it is necessary to ensure the concessionaire pursuing the economic-financial balance of investments and related management based on the quality of the provided service".

[37] State Council, sect. IV, March 13, 2014, n. 1243. See also State Council, ad. plen., 7 May 2013, n. 13, identifies the distinction between the service procurement and the concession of services in the structure of the relationship: bilateral in the first (the service is rendered by the contractor to the Administration), trilateral in the second (the service is offered to users).

[38] The European Parliament in the past stated its position against the creation of a specific legal regime for public private partnership (see European Parliament, Report on Public Private Partnerships and European Law on Procurement and Concessions, A6-0363 / 2006 - point 2 of the Remarks). Detect M.P. Chiti, Public private partnership and the new concessions directive, in G.F. Cartei, M. Ricchi (edited by), Project Finance and Public Private Partnership, Naples, 2015, p. 3, that "in the European Union law does not exist a general reference or a definition of the PPP, in spite of numerous proposals in this sense; but neither refers to it clearly in the recent concessions directive ". Speaking of "forging ahead of the Italian legislator compared to that of the EU Community" G. Fidone, The private public partnership and the concessions in the new code of public contracts: some proposals for the improvement of the current legislation, in The implementation of public contracts: problems, perspectives, verifications, in www.italiadecite.it, page. 65-66. The main documents of the European Union on the Public Private Partnership are: the Green Book on public-private partnerships and the EU community law of public procurement and concessions of 30 April 2004 COM (2004) 327 final; the Communication of the European Commission of 15 November 2005 on public-private partnerships and the law of public procurement and concessions COM (2005) 569 final; the Resolution of the European Parliament of 16 October 2006 n. 2043; the Commission Interpretative Communication on the application of EU law of public procurement and concessions to institutionalized public-private partnerships of 5 February 2008 COM (2007) 6661 final; the 2011 Green Paper on the modernization of the EU public procurement policy to improve the efficiency of the European procurement market COM (2011) 15 def. A. Massera, The framework for the transposition of European directives between harmonization obligations and opportunities for the reorganization of national legislation, with particular reference to the concessions of works and services, in A. Fioritto (edited by), New forms and new disciplines of public and private partnership, Turin, 2017, page 37 ss., highlights the contradiction between the reference to the PPP in numerous documents of the European institutions and the lack of a specific discipline. On the same topic see also M.A. Sandulli, The Public Private Partnership and the European law of procurements and concessions, Conference proceedings SPISA, 29 July 2005.

[39] France, with the *Contrat de partenariat* governed by the *Ordonnance* n. 559 of 17 June 2004, adopted by law no. 1343 of December 9, 2004; Spain with the *Contrat de colaboración entre el sector público y el sector privado* (Article 11 of Ley 30/2007). Although Germany did not codify a precise definition of the public-private partnership, it adopted a series of rules with the *ÖPP-Beschleunigungsgesetz*, which entered

public partnership contract[40] as a typology of contract including also the concession but does not really resolve itself into it[41]. In fact, the art. 180, paragraph 8, of the Code, states that in the partnership contract "fall the project finance, the construction and management concession, the concession of services, the financial leasing of public works, the availability contract and any other procedure for realization in partnership of works or services that show the characteristics referred to in the preceding paragraphs ». Now, beyond the improper reference to the project finance - which is not a contract but a procedure for the assignment of a contract - the rule clarifies how the public private partnership is such when it has the elements indicated by it and does not resolve itself into concession, which is only one of the possible types of the contract - even the most important[42] - attributable to this typology of contract[43]. As noted by the State Council, this is an "atypical contract, in which the parties fix the structure of their respective [interests] in the most appropriate and adequate manner, based on the achievement of the public interest identified exclusively by the public body. [...] a contractual type referable to

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into force on 7 September 2005, including a competitive dialogue aimed at making flexible the implementation of types of cooperation between public and private. See on the Gary Louis Pietrantonio, the Project Financing between public and private. Problems, scenarios and perspectives, Turin, 2018, page 53.

[40] In fact, even the previous code (Legislative Decree 12 April 2006, No. 163) defined in art. 3, paragraph 15-ter (introduced by the third corrective decree of Legislative Decree No. 152/2008 and amended by Article 44, paragraph 1, letter b), l. 27/2012), the "public private partnership contracts" (in the plural) as "contracts having as object one or more services such as the design, construction, management or maintenance of a public work or public utility, or the supply of a service, including in any case the total or partial financing by private individuals, even in different forms, of these services, with allocation of risks in accordance with the provisions and the EU guidelines ". The law, however, did not define the distinctive features of the public-private partnership contract nor did it contain a typical regulation of the same. On the evolution of the private public partnership in the EU and national law, see F. Mastragostino (edited by), The private public collaboration and the administrative system. Dynamics and models of partnership based on recent reforms, Turin, 2011 and M. Cafagno, A. Botto, G. Fidone, G. Bottino (ed.), Public negotiations. Writings on concessions and public-private partnerships, Milan, 2013.

[41] G. Fidone, Public private partnership and the concessions in the new code of public contracts: some proposals for improvement of the current discipline; in The implementation of public contracts: problems, perspectives, verifications, op.cit., page 67, states that "the PPP is an autonomous category that includes concessions and is different from procurement, thus preserving independent legal importance". According to the author of this paper, "for European law there would be two typified contracts (i.e. procurements and concessions, subject to two specific directives) and subject to specific disciplines, while PPP contracts would remain atypical contracts, as they were neither foreseen nor regulated from any directive. Apart from the two contracts typified by directives 24 (procurements) and 23 (concessions) we would be in the presence of a EU law principle of not-typified of the other forms of bargaining between public administration and private individuals and, in this context, could exist (in national laws) other PPP contracts different from concessions".

[42] So, G. Fidone, Private public partnership and the concessions in the new code of public contracts: some proposals for the improvement of the current discipline, in The implementation of public contracts: problems, perspectives, verifications, op.cit., page. 68, who speaks of the PPP as "a contractual category (open), in which different instruments and institutes can be included. The first and most important of these is without a doubt the Concession". See also Gary Louis Pietrantonio, Project Financing between public and private. Problems, scenarios and perspectives, op.cit., page 49, according to him, the European Commission, while acknowledging the heterogeneity of the PPP and the lack of uniform legislation on the subject at EU level, "sees in the concession model the structural DNA of the PPP contract".

[43] The Council of State, in giving the opinion on the draft legislative decree of the new code of public contracts (Council of State, Comm. Spec, opinion of 1 April 2016, No. 855) found that "articles 180, 181 and 182 contain a general archetype of the contract on private public partnership which is the concrete declination of the project finance, the leasing of public works, the construction and management concession, the availability contract, as well as the figures of minor economic importance, but certainly of social impact, of administrative barter (exchange) and of horizontal subsidiarity interventions such as forms of social partnership".

several specific models[44]". With reference to private public partnership contracts, art. 180 of the code specifies that the operating revenues of the economic operator "come from the fee recognized by the grantor and/or any other form of economic consideration received from the same economic operator, also in the form of direct revenue from the management of the service by external users" (paragraph 2). Therefore, the object of the partnership operations can be both the works and the services so called "cold", remunerated through a fee, both "hot and warm" works and services, in which the compensation is represented, respectively, by the right to manage the work or service and by the same right accompanied by a price, paid by the Administration to the only objective to ensure ex ante the economic and financial management balance[45]. It is evident, however, that while the right to manage the work or service is indeed the remuneration of the concession, as defined by art. 3, paragraph 1, lett. vv) and uu) [46], the fee (unless it is paid by the Administration according to the actual service, based on the shadow toll mechanism[47]) is proper to other categories of contract referable to the private public partnership type [48].

[44] State Council, ad. of the comm. spec. of 22 February 2017, n. 775, "Opinion on the outline of guidelines on" Monitoring of contracting authorities on the activity of the economic operator in public-private partnership contracts". See also the same Guidelines no. 9 of the ANAC, according to which the «PPP represents a complex legal phenomenon that emerges as a *genus* of contract referable to several specific models in which the economic-financial nature prevails». It seems instead to reverse the relationship between *genus* and *species* M. Ricchi, "The architecture of concession contracts and PPP in the new code of public contracts Decree 50/2016", in www.giustizia-amministrativa.it, 29 July 2016, which states that the PPP contracts, as indicated in art. 180, paragraph 8 of the Code, are *species of the genus* wider than the European concession contract. The author believes that in fact "in the *genus* of European concession, expressed by the Directive, are included, but not distinctly named, both types of contracts (concession contracts and public partnership contracts) in relation to the forms that operational risk can take".

[45] See art. 165, paragraph 2 of the Code in which, for the sole purpose of achieving the economic and financial balance of management, to be assessed ex ante in the tender the contracting authority can also establish a price consisting of a public contribution or in the sale of real estate. In any case, any recognition of the price, added to the value of any public guarantees or other financing mechanisms to be borne by the Public Administration, may not exceed forty-nine percent of the total investment cost, including any financial charges. The maximum share of public participation in the financing of the work or service has been increased from 30% to the current threshold from the first corrective to the contract code (Article 101, paragraph 1, letter a) of Legislative Decree no. 19 April 2017, n. 56). The Council of State in giving an opinion on the draft decree has found that such innovation "is in clear contradiction with the risk-sharing criteria only recently decided with a view to reducing public partnership (and therefore the burden on public funds) ». On the other hand, there is no cap to the limitation of management risk borne by the concessionaire in the European area. Detects G.F. Cartei, Risk and negotiation discipline in concession contracts and public-private partnerships, in Riv. Trim. Public law 2018, page 599 et seq., that the criterion identified by the Court of Justice is based on an empirical parameter: in order to maintain, in fact, a concession "it is necessary that the contracting authority transfers the management risk that it carries to full load or, at least, significant to the concessionaire "(Court of Justice EC, III, 10 September 2009, case C-206/08, Eurawasser, in www.dirittodeiservizipubblici.it), since the risk may also be" very small" (Court of Justice EU, 10 March 2011, case C-274/09, Stadler, Court of Justice EU, 10 November 2011, case C-348-10, in Urb. And app., 2012, pp. 287 ss., with note by R. Caranta, The Court of Justice downsizes the importance of management risk). See also the Commission Staff Working Document Impact Assessment of an Initiative on Concessions, Brussels, 20 December 2011, SEC (2011) 1588 final, which states that the concept of operational risk *"is still not sufficiently clear, in particular regarding the level of operating risk to be transferred to the economic operator so that contract can qualify as concession*".

[46] See also art. 165, paragraph 1 based on which, in concession contracts, most of the concessionaire's revenue derives from the sale of services offered on the market.

[47]It is controversial in doctrine whether "warm or tepid" partnerships remunerated with a fee by the Administration with the shadow toll system are attributable to the concession or to PPP. G.F. Cartei, Risk and negotiation discipline in concession contracts and public-private partnership, op.cit., page. 599 ss., frames these cases in the partnership contract, but moving from the thesis - as you will see, in the opinion

Article. 3, paragraph 1, let. eee) of the public procurement code, in defining the private public partnership contract[49], indicates the typical cause identifying it in the agreement between Administration and an economic operator, for a limited period and commensurate with the duration of the investment's amortization or with fixed financing modalities, as a result of which the Administration confers activities to which it would be required to achieve its institutional purposes, in exchange of economic benefits for the private operator with assumption of risks on the same.

The central theme, for the purposes of the issue addressed in this paper is whether, as ENEA believes, why an operation qualified as a public private partnership must transfer also the "operational risk" to the private sector. Indeed, the assumption by the private operator of the "operational risk" linked to the management of the works or service is an essential features - and distinctive - of the concession, not also of the other types of contract referable to the public private partnership, nor of the "general archetype" as outlined in article 180[50].

In fact, the national regulation of public-private partnership requires that the risk of the construction and - in fact - the risk of availability or, in the case of profitable external activities, the risk of demand for services rendered, encumber on the economical operator for the period of management of the work (Article 180, paragraph 3), not also the "operational risk" [51], which remains a feature of the sole concession of works or services[52].

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of the author who does not agree - that the operational risk is proper of all PPP contracts and not just of the concession. Instead, it seems preferable to the thesis that, where the operator is exposed to market fluctuations and bears the operational risk of management, the remuneration by the Administration in place of the users is compatible with the concession. In this sense, as we have seen, also the concessions directive rules (see point 44).

[48] On this point see Government Deficit and Debt (Implementation of ESA 2010) of 4 March 2016, 332: «in a concession contract, government makes no regular payments to the partner, or such payments, if they exist, do not constitute a majority of fees received by the partner (see chapter VI.3 of this Manual). In a PPP contract, as covered by this chapter, the final users do not pay directly (i.e. in a way proportional to the use of the asset and clearly identified only for this use), or only for a minor part (and generally for some specific uses of the asset), for the use of the assets for which a service will be provided».

[49] The "contract for pecuniary interest stipulated in writing by which one or more contracting confer one or more economic operators for a fixed period according to the duration of the amortization of the investment or the financing modalities established, a complex of activities consisting of in construction, transformation, maintenance and operational management of a work in exchange for its availability, or its economic exploitation, or the supply of a service related to the use of the work itself, carrying risks by the operator according to modalities identified in the contract».

[50] Instead, they believe that the transfer of "operational risk" characterizes all partnership contracts and not just the concession: M. Ricchi, The architecture of concession contracts and PPP in the new code of public contracts Decree 50/2016, op.cit., And GF Cartei, Risk and negotiation discipline in concession contracts and public-private partnership, op.cit., page 599 ss.

[51] Article. 3, paragraph 1, lett. zz) of the code in defining the operational risk, substantially reproduces the art. 5, par. 2, of Directive 2014/23/EU. This is in fact defined by the code "the risk related to the management of works or services on demand or on supply side or both". The economic operator is considered to carry operational risk if, under normal operating conditions i.e. not affected by unforeseeable events, the recovery of the investments made or the costs incurred for the management of the works or services object of the concession is not guaranteed. Finally, the law specifies that the part of risk transferred to the economic operator "must involve a real exposure to market fluctuations such that each potential estimated loss suffered by the economic operator is not merely nominal or negligible".

[52] See regional administrative court (TAR) Lombardia, section IV, 9 February 2018, n. 386, in www.giustizia-amministrativa.it, where the distinction between concession, characterized by the transfer of operational risk and the partnership, for which is necessary the transfer on the economic operator the risk of construction and one of the risks of demand and availability. See also State Council, ad. plen., 27 July 2016, n. 22 and State Council, sect. V, March 21, 2018, n. 1811, both in www.giustizia-amministrativa.it., which identify the transfer of operational risk of the management and in the direction of service to user and not of the granting authority, the elements characterizing the concession. F. Goisis,

In other words, the concession of works or services is a private public partnership contract that is characterized by the remuneration of the economic operator - in whole or in part - through the management of the work or service[53], having as consequent the exposure of these to market fluctuations and therefore with the transfer to the same of the operational risk[54], or the possibility that, under normal operating conditions[55], the changes related to the costs and revenues involved in the concession affect the balance of the economic and financial plan[56].
Instead, the model of private public partnership contract outlined by art. 180 of the code - to which the concession is also attributable - essentially involves the transfer to the private operator of the construction risk and the risk of availability or - (only) in the case of profitable external activity - of the risk of demand related to the management of services offered. In essence, the art. 180 of the code outlines the essential regulation of each private public partnership contract[57], including the concession (to which the risk of demand is inherent), which however, according to art. 165, is also characterized by the transfer of operational risk[58] to the operator.

**4. Conclusions: Energy Performance Contract as a (possible) private public partnership contract**

Having regard to the illustrated characteristics of the energy performance contract, it does seem very clear that, if it is involved in the investment borne by the supplier of the energy efficiency measure (the ESCo) and in remuneration according to the performance achieved, qualifies - if stipulated with a Public Administration - as a contract for private public partnership[59], burdening the economic operator with both the risk of construction and the risk

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"The economic risk as *proprium* of the concept of concession in Directive 2014/23/EU: economic approach versus traditional visions", op.cit., page. 743, indicates in the operational risk "the *proprium* of the concession institute". B. Raganelli, The concession contract as a model of public-private partnership and the new code of contracts, in Administration on the way, page. 21, indicates in the permanence of the operational risk of the private entity the *ubi consistam* of the concession. M. Macchia, Concession contracts, in Giorn. dir. adm., 2016, page. 478, notes that, unlike the previous legislation, which already provided for the transfer of the economic-financial management of the work to the concessionaire, in the new directive the operational risk turns from an accessory factor to the concession in a qualifying element of this contract and is an obligation of the parties to precisely map this economic size.

[53] See art. 165, paragraph 1 of the Code, according to which in concession contracts most of the concessionaire's revenue derives from the sale of services offered on the market.

[54] See Directive 2014/23/EU, recital 20: "operational risk should be understood as a risk of exposure to market fluctuations which may arise from a demand or supply side risk or a simultaneous risk on the demand side or on the supply side".

[55] The clause, implemented by art. 5, paragraph 1 of the directive would refer to exceptional cases related to the so called systemic financial risk. See on this point M. Ricchi, The new Community directive on concessions and the impact on the Code of public contracts, op.cit., page 747.

[56] Not qualified as concessions, but services contracts, those contracts - as the case of entrusting the management of integrated water service - in which the contractor is remunerated on the basis of regulated tariffs calculated in such a way as to cover the total costs and investments. See also G.F. Cartei, Risk and negotiation discipline in concession contracts and public-private partnership, op.cit., page 599 ss.

[57] See State Council, comm. spec., opinion 855/2016, cit.: the code introduces "a framework discipline valid, for the standard as well as atypical figures, defined [...] as "any other procedure of realization of partnership in the field of works or services […]".

[58] The transfer of operational risk on the concessionaire is also the reason why, as we shall see, only for the assignment of concession, art. 166 of the code allows the Administration to freely organize the procedure for the selection of the concession holder.

[59] In the form of the "contractual PPP", since the relations between Public Administration and private sector and the reciprocal activities of competence of a contractual nature. When, on the other hand, the realization of the partnership involves the creation of an entity in which the public administration and the private economic operator participate jointly, we refer to an "institutionalized" PPP.

of availability[60]. In fact, the essential requirements established by the general regulation of the partnership contract, introduced by the art. 180 of the Code, and the four elements characterizing the public private partnership operations identified in the Green Paper (2004), relating to the duration of the contract[61], the methods of project financing[62] , the role of the parties[63] and the distribution of risks[64].
Indeed, as authoritative doctrine emphasizes[65], private public partnership is a privileged instrument for guaranteeing energy efficiency, particularly in the renovation of public property assets, where important investments and rapidly changing technical knowledge are required. Actually, a contractual scheme that allows, during the awarding phase, the private initiative, which can propose to the Administration with the feasibility project the best viable solutions (with the possibility that the tender will allow it to identify other preferable) and, in the execution phase, the taking on by the private investor of both the investment and the guarantee of the agreed result, seems to be the classic "Colombo egg" for an administration committed to renovate annually the 3% of its own real estate asset, squeezed between limits of public finance and lack of necessary knowledge.
Applying to the public private partnership, due to public finance protection, the contents of the Eurostat decisions (article 3, paragraph 1, letter ee), also the energy performance contracts stipulated with the Public Administration should not have public debt to comply with the Stability Pact.
On the other hand, one of the obstacles to the diffusion of EPCs for the improvement of the energy efficiency of public real estate came from the Eurostat guidelines published on 7 August 2016[66], which required the qualification of the energy performance contract as an off-balance operation, which cost of the investment had to be at least equal to half the value of the

[60]In doctrine, the energy performance contract is signed with a Public Administration to the PPP, among others, F. Sciaudone, Access to credit for energy efficiency projects, in L. Carbone, G. Napolitano, A. Zoppini (edited by), Public policies and discipline of energy efficiency, op.cit., page. 145 ss.; M. Pennasilico (edited by), Manual of civil right environmental, op.cit., page. 248-249.
[61]See the Green Paper on public-private partnerships and European law on public procurement and concessions, COM (2004) 0327 final, point 2:" relatively long duration of collaboration which implies cooperation between the public and private partners in relation to various aspects of a project to be implemented ".
[62] *Ibidem*: "the way of financing the project, guaranteed by the private sector, sometimes through complex relationships between different subjects. Often, however, shares of public funding, sometimes very substantial, can be added to private financing ".
[63] *Ibidem*: "the important role of the economic operator, participating in various phases of the project (design, implementation, implementation, financing). The public partner focuses mainly on defining objectives to be achieved in terms of public interest, quality of services offered, pricing policy, and ensures control of compliance with these objectives."
[64] *Ibidem*: "risk-sharing between the public partner and the private partner, on which risks are transferred usually to the public sector. However, PPPs do not necessarily imply that the private partner assumes all the risks, or the most relevant part of the risks associated to the operation. The precise distribution of risks is made on a case-by-case basis, depending on the ability of the concerned parties to evaluate, control and manage them".
[65] R. Villata, The public private partnership in the energy sector, in E. Bruti Liberati, M. De Focatiis, A. Travi (ed.), Aspects of the transition in the energy sector: procurement in special sectors, the market design and governance structure, op.cit., pp. 37 ss., Spec. page 44 ss.
[66] EUROSTAT, The impact of energy performance contracts on government accounts. The other two conditions laid down by the guidelines are the public contribution eventually granted to the economic operator not exceeding 50% of the expenses incurred and the presence in the contract of a growing system of penalties on the economic operator as the achievement of the performance requirements is reduced established by the contract and such as, to cancel the fee due by the Administration in case of absence of energy savings.

properties subject to requalification, as the outcome of the latter[67]: a very difficult condition to be met for measures to improve the energy efficiency of a building. On 19th September 2017, Eurostat published new guidelines[68] that do not allow investment costs of an EPC to be recorded on the balance sheet under the following conditions: the risks of the intervention (performance, maintenance, requalification and management) all fall on the supplier of energy efficiency measure; that the fee to the supplier is linked to the intervention's performance and in the case of factoring, the supplier does not assign to the factor the credit *pro soluto*, so does not transfer the risk of performance to the Administration. Basically, according to the new Eurostat guidelines, if the energy performance contract meets the requirements of the public-private partnership contract, as defined in the procurement code, investment costs are not included in the financial statements and therefore are not relevant for the purposes of compliance with the stability pact.

[67] Another condition laid down in the Eurostat guidelines of 7th August 2015 was related to the public contribution eventually received by ESCo would not exceed 50% of the expenses incurred and that the risk of "availability" was correctly allocated.

[68] Eurostat, *The Recording of Energy Performance Contracts in Governments Account*, 19th September 2017.