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D1.5 – FISCAL AND LEGAL ASSESSMENTS OF THE SUPER-HEERO SCHEMES

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TERMS, DEFINITIONS AND ABBREVIATED TERMS

TABLE OF ACRONYMS	
Acronym	Definition
EPC	Energy Performance Contracting
EV	Electric Vehicle
LEC	Local Energy Community



1 EXECUTIVE SUMMARY

This document has been written in the frame of the European project Super-Heero, which has as its main aim to provide a set of replicable financial schemes for energy efficiency investment in small and medium supermarkets, based on stakeholder and community engagement.

The financial schemes are coupled to a portfolio of technological options and placed within a process that seeks to engage and create value between supermarket owners/operators, third party EE promoters (products and services), potentially energy suppliers, and private citizens/shoppers.

Underlying the project is the concept that small to medium supermarkets at large may lack the financial or technical expertise to realize energy efficiency measures that if realized would trigger a series of benefits – lower energy bills at the supermarket, increased sustainability within this energy intensive sector, and a strengthened linkage between supermarkets, the communities where they are located and shoppers.

To realize the project ambitions, the regulatory aspects of the envisioned schemes must be checked and documented. That is conducted in this report which includes an analysis at the EU, Spanish and Italian levels for EPCs, As a Service approaches (such as lighting as a service), and crowdfunding models (equity, lending, donation). Local energy communities and e-mobility (renewables/charging point/grid) are also detailed as scenarios of interest.

Regarding the EPCs and the EAS approaches it can be concluded that, due to their condition of private contracts, for the legal treatment they will be governed by the freedom of contract between the parties. As for the fiscal treatment, the norm IFRS 16, which applies to the accounting treatment for both finance leases and operating leases, has to be taken into consideration.

Concerning the crowdfunding schemes and their legal treatment, there is a renovated legislative framework since the Regulation (EU) 2020/1503 that will enter into force on 10 November 2021, applying directly across the EU. For the fiscal treatment it has been settled that, even though it does not exist yet an EU fiscal regulation for crowdfunding, some European countries, including Spain and Italy, do offer tax incentive schemes to investors and companies in crowdfunding.

After a compliance assessment of the Super-Heero schemes, it can be concluded that, in the most basic and structural aspects of the presented schemes there is no conflict with the existing legal and fiscal systems. However, it is important to keep in mind that for the application of each of the analysed models, the person responsible for the implementation of the Super-Heero scheme must take into consideration the provided legislation in order not to contravene any legal provision.

2 INTRODUCTION

2.1 Content and objectives of this study

The Super-Heero Horizon 2020 project has the ambitious objective of defining innovative financial instruments and business models to make supermarkets and their consumers realize energy efficiency renovation of buildings. The innovative financial schemes are coupled to a portfolio of technological options and placed within a holistic approach that engages supermarket governance structures, their technical staff, third party EE providers, financiers in their various forms and shoppers with the ambitious objective of creating value across each of these involved stakeholders. The project works with a select set of first implementations during the Super-Heero project and then communicates, disseminates, buildings capacity and sets in place the mechanisms for wider scale uptake of such measures by supermarkets and EE promoters at large. In this specific project report, the fiscal, legal and compliance aspects of the innovative financing schemes under development are considered.

2.2 Organization of this report

Super-Heero develops three primary innovative financing schemes for the implementation of energy efficiency measures in supermarkets: EPCs, As a Service Models and Crowdfunding approaches. The three schemes are detailed in Chapter 3. Although these schemes are innovative to this end, these solutions have already been used for other different purposes:

- In the case of EPCs, their use has become more widespread in the public sector, due to the facilities for balance sheet management they provide to public institutions.
- Partnership with technology providers schemes propose servitisation models that have been spread to many other sectors outside energy efficiency.
- Crowdfunding is an alternative for raising money with the aim of financing projects and businesses by involving a larger number of people that give their contributions via different platforms. With the aim of taking the energy efficiency actions up to a higher level and of reaching as much people as possible, the Super-Heero project has designed several financing schemes based on **crowdfunding or cooperative schemes**. These schemes are focussed on applying this idea for the financing of energy efficient actions in supermarkets. Supermarkets involve on the project and applying this financing schemes will offer different advantages for their clients, who can benefit from participating on the initiative.

The report then moves on to consider EU and National regulations in Chapter 4 and Chapter 5, as they apply to the various aspects and stakeholders of the envisioned approaches. To this end, an extensive research of existing legislation related to the three approaches has been performed. Specifically, strong attention will be paid to the assessment of the fiscal and legal aspects in order to increase the reliability of the model and its future replicability across other countries.

Finally, compliance of the Super-Heero schemes with the regulation is treated in Chapter 6, to see if these can fit in the current legal and fiscal systems.

3 SUPER-HEERO SCHEMES

In this chapter we will briefly present energy efficiency (EE) measures implementation schemes that have been previously developed in the project and that will be evaluated in this report from a fiscal and legal point of view.

3.1 EPC contract

3.1.1 Main characteristics

The Energy Performance Contracting (EPC) was first defined by EU Directive 2006/32/EC as “*a contractual arrangement between the beneficiary and the provider (normally an ESCo) of an energy efficiency improvement measure, where investments in that measure are paid for in relation to a contractually agreed level of energy efficiency improvement*”.

In other words, an EPC schemes involves an Energy Service Company (ESCo) which can provide various services for a client interested in achieving a higher degree of energy efficiency. The remuneration for these services depends on the achievement of specific savings that were calculated previously. The ESCo stays involved in the measurement and verification process of the energy savings in the repayment period.

This contractual model has been widely used in recent years for the energy renovation of public buildings in a public-private partnership scheme. In fact, one of the most important features of an EPC, is an optimal risk allocation that allows the Public Entity to consider *off-balance* the expenditure related to that contract. Many wide-scale projects have been carried out on public buildings adopting the EPC principles, also thanks to the strong support provided by the EIB-ELENA and the Horizon 2020 - PDA programs.

While Energy Performance Contracts, and the ESCo model in general, are widespread in the public sector (public buildings and public lighting in particular), they are still underused in the private sector. According to IEA (2018)¹, in the EU only 20% of the ESCo market activity is undertaken in the private sector, which is basically dominated by industry. Thus, the private commercial sector in the EU, which includes the supermarkets, is still not developed.

3.1.2 Application in the supermarket sector

The adaptation of the EPC model to meet with the supermarket sector requirements was studied previously in the Super-Heero project. The defined approach is based on 3 steps:

1. Make an energy assessment of the relevant case studies where energy efficiency measures will be implemented, based on pilot sites;
2. Analyse their energy bills/demand and the most remunerative and techno-economically viable interventions to be performed;

¹ IEA (2018), Energy Efficiency 2018, IEA, Paris <https://www.iea.org/reports/energy-efficiency-2018>

3. Study the ESCo model/EPC Contract more suitable considering the expected/targeted energy and economic savings.

One of the most important advantages of applying the EPC model to supermarkets is the wide variety of guarantees that offers to the clients. The contractual obligation to achieve the promised energy savings is assured by the ESCo, being responsible for any underperformance of the energy renovation measures affecting the achievement of the expected energy savings. Thus, if the guaranteed energy saving is not met, the payment to the ESCo gets reduced proportionally or even more than proportionally, according to the specific contract clauses. Besides the technical performance, the ESCo is also responsible of the Design and Construction, the Operation and Maintenance (O&M), the Measure and Verification (M&V) process and the First Aid in case of malfunctioning or failure of the installed equipment.

3.2 Partnership with technology providers

3.2.1 Main characteristics

One of the latest trends in the current global market is the servitization², it refers to industries using their products to sell “outcome as a service” rather than a one-off sale.

Through servitization companies can transform their value proposition from product oriented to performance oriented and better meet their clients’ needs. For example, a manufacturer can complement its product with a maintenance or repair service through a subscription model. Or instead of selling its product directly, the producer can offer it through a leasing or renting contract.

Several companies are moving towards the servitization of their products, offering their customers more complete and structured services than the classic product purchase. Servitization is a process that can be undertaken following many different paths, that may change due to industry specifications or other specific needs.

Product as a service (PAAS) is a business model that has rapidly gained popularity. It is a model used by manufacturing firms to offer their customers the possibility of receiving a performance instead of buying a product. PAAS can be performed under different schemes such as leasing. The end user does not buy the products but instead pays a periodic fee for the service received, which can be considered as the physical possession, not property, of a product.

This model implies a complete reconsideration of the way of doing business of both the provider company and the customer.

By following a PAAS scheme, the customer will be able to assess the benefits of a product not from the point of view of a buyer, someone who is taking full responsibility of the item from purchase onward, but as a mere utilizer, focused on the benefits that will be delivered. Decisions will then be

² Servitization is a new term that refers to the transformational processes whereby a company shifts from a product-centric to a service-centric business model and logic.

based mainly on the benefits and not on the feature of the product which sometimes may be seen as an impediment.

Some examples of the product as a service model are the Software as a service, where the client pays a regular subscription to use a specific software instead of owning it.

In the area of energy efficiency, this model could be applied in such a way that for certain products the performance is the most important aspect to consider. In this way the "product as a service" model could improve the efficiency of buildings in lighting or air conditioning, for example.

3.2.2 Application in the supermarket sector

As in many other sectors, supermarkets can benefit from this new market trend. In this case it is necessary to identify which products can be transformed into services in order to be more cost-efficient.

Cooling as a service (CAAS): in this case building owners pay for the cooling service instead of investing in the infrastructure that delivers cooling. The technology installed will be owned by the service company who is in charge of all operational costs, maintenance of the equipment and the electricity consumed. The provider will receive a payment based on the consumed units of cooling, measured through a dedicated metering system.

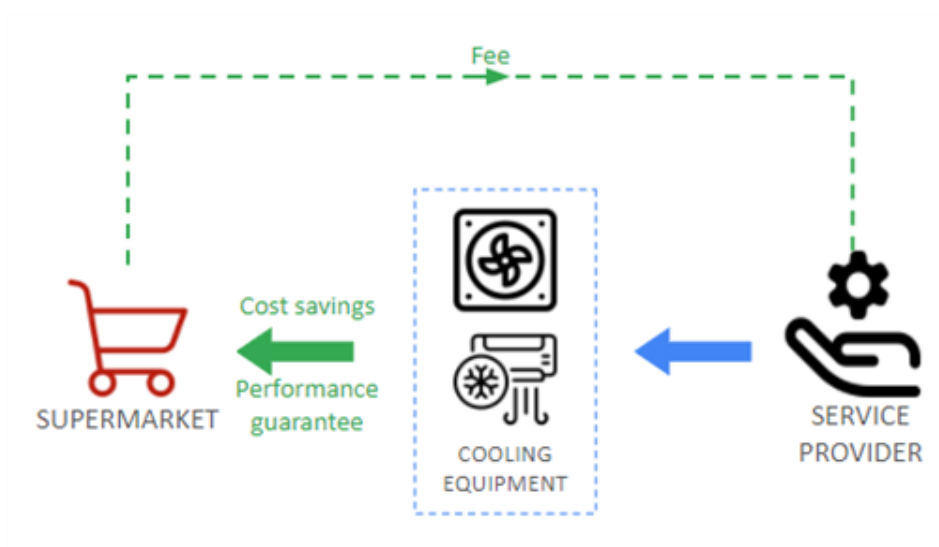


FIGURE 1. CAAS SCHEME

Lighting as a service (LAAS): the application of the servitization in the lighting sector is still in a primordial phase but has already demonstrated its potential. The main opportunity for improvement is the substitution of old light technologies by LED lighting and the installation of timers and movement sensors. Some technology providers are starting to offer lighting as a service like Philips.

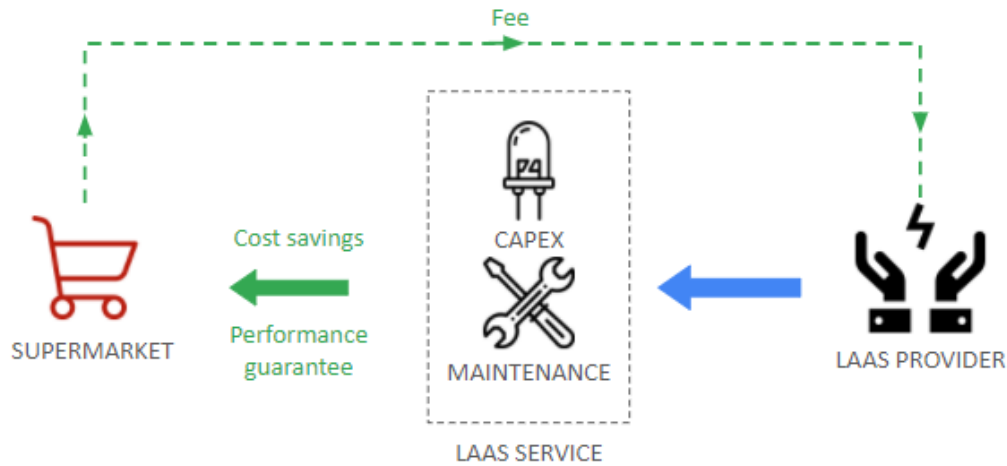


FIGURE 2. LAAS SCHEME

Energy as a service (EAAS): is a business model where a service provider, usually an Energy Service Provider (ESP), offers various energy related services instead of just supplying electricity. These services include energy advice, energy asset installation or energy management.

A common approach takes place when the ESP installs the energy production plant at the supermarket building site, keeping the ownership of the systems, while the supermarket can benefit from a lower price electric energy and/or heating and from potential energy savings and emission reduction.

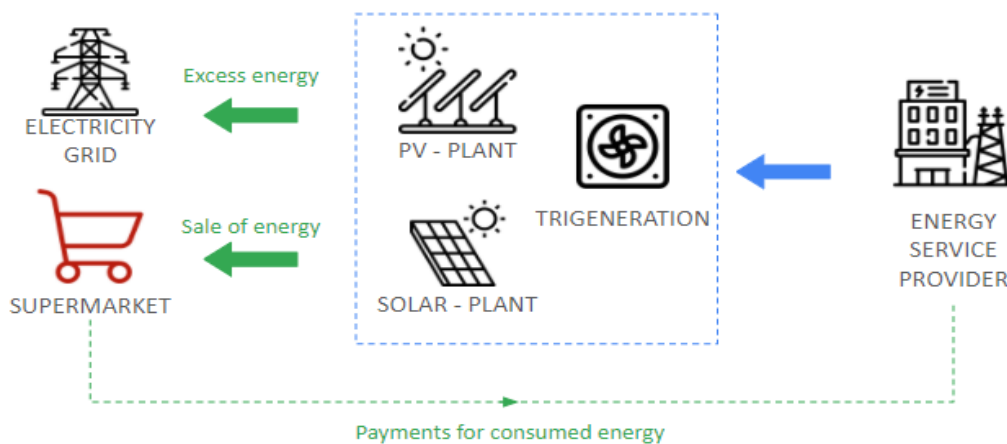


FIGURE 3. EAAS SCHEME

Technology leasing: this alternative to the purchase of equipment offers the possibility to spread the price of equipment over their lifespan, plus the possibility of upgrading the equipment more easily and avoiding the management of the product disposal. Furthermore, other services, like maintenance, are usually comprehended in the leasing fee.

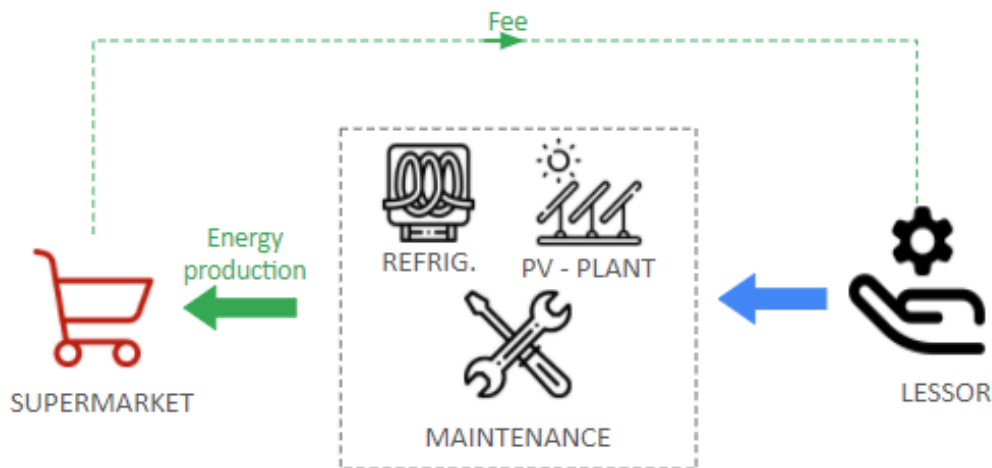


FIGURE 4. TECHNOLOGY LEASING SCHEME

3.3 Crowdfunding models

3.3.1 Main characteristics

Crowdfunding is defined as a capital collecting practice, which, thanks to the development of digital tools easing the operations, has been very successful in the last years.

By collecting a small amount of money from a large number of individuals it enables even small projects and start-ups to be financed. In return, investors can be rewarded with monetary or even non-monetary rewards. With Crowdfunding, entrepreneurs all over the world have been able to collect funds and submit their ideas to millions of individuals willing to invest. Moreover, financial risk is spread over a larger number of individuals compared to a more classical financing scheme.

The role of digital tools has dramatically facilitated the development of crowdfunding models, which, under different rules, allow the project owner to submit his idea. If the idea respects the selection criteria of the platform it is then posted online where it can be properly evaluated by potential investors. Moreover, crowdfunding campaigns can raise funds for not-for-profit and for-profit projects or organizations.

The most important characteristic of this type of financial approach is that it allows great flexibility in raising money from a variety of investor bases and for a wide range of purposes.

3.3.2 Application in the supermarket sector

The following paragraphs analyse the adaptability of the different crowdfunding schemes found in the market, from the most "classic" and widespread solutions to the more specific ones aimed at energy communities for example.

3.3.2.1 Classic crowdfunding model

This model has been defined as "classic" because it is derived from the classic forms of crowdfunding which can be lending-based, donation-based, reward-based or equity-based.

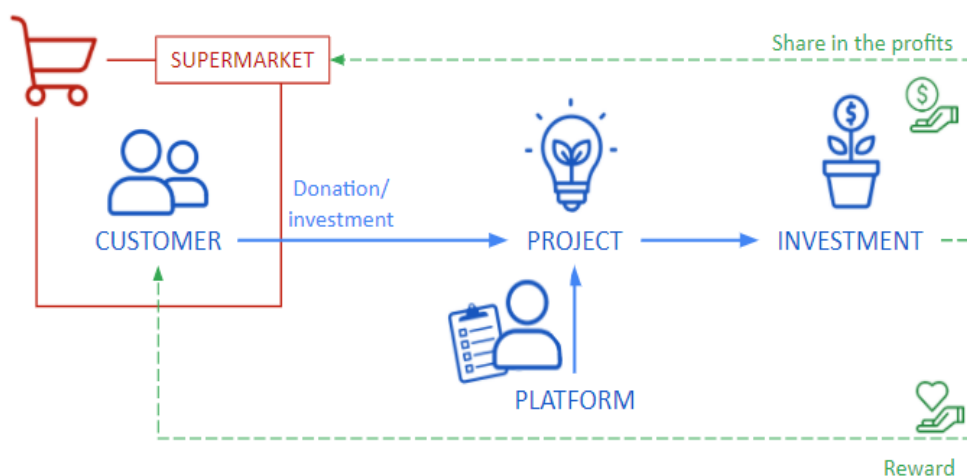


FIGURE 5. CLASSIC CROWDFUNDING MODEL

This classic scheme offers numerous possibilities for its implementation, it is flexible and can fit the different needs of each promoter since it can be based in the different classic forms mentioned. Individuals provide money to supermarkets to finance specific energy efficiency measures or projects.

The lending-based scheme

The lending-based crowdfunding scheme has as core mechanism the lending of capitals in returns for interests. In this type of crowdfunding, an energy efficiency project (for now onwards "project") is proposed to the crowd through an online platform, where investors can underwrite the bonds offered, which can be related to the supermarket own buildings or to a third-party location.

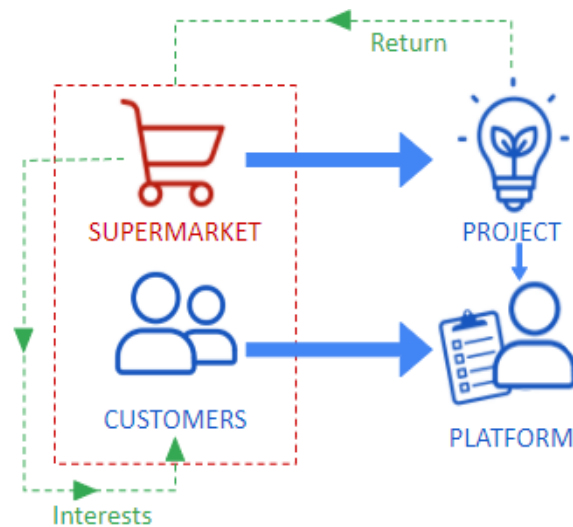


FIGURE 6. THE LENDING-BASED SCHEME

This scheme sees the supermarket as a source of investors, and promoter of the project. A percentage of the customers of the supermarket will be willing to become an investor of the scheme mainly because of two main drivers, the economic return and the perceived positive externalities of the project.

Once the crowdfunding campaign is closed, the capital collected will be at disposal of the promoter who, following the project characteristics will develop it. The project could be undertaken internally, by the energy manager of the supermarket or externally through an ESCo. The project will generate value in terms of savings, which will be used for refunding the investors. In this case the reward of the program is clearly in the form of financial reward.

The equity-based scheme

The classic crowdfunding model for energy efficiency projects can be configured also in the form of an equity-based campaign. Through this type of scheme, investors are buying equity shares of the company. It is a widespread method used by start-ups seeking capital. Investors in equity crowdfunding are not looking for a financial return in the short term (12/24 months) but for the whole potentiality of the business in the long term. In the case of the supermarkets of this project, a special purpose vehicle (SPV) will be set up, since they are not looking for equity partners regarding their core business. Accordingly, the purpose of the SPV will be a specific energy efficiency project and investors will perceive their distributed equity but not shares of the supermarket.

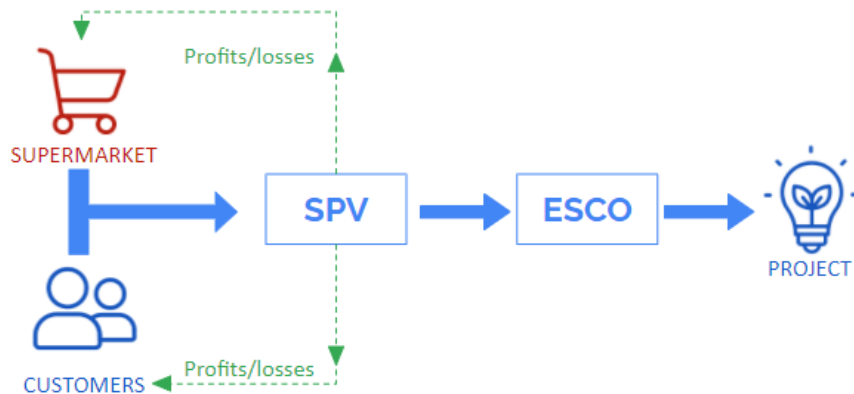


FIGURE 7. THE EQUITY-BASED CROWDFUNDING SCHEME

In this scheme potential investors accept a higher risk compared to the lending-based model. Their financial reward will be based in terms of the future uncertain, even if well forecasted, performance of the company. The reward of investors will be financial, in the form of dividends or surplus generated by the sell of the stock. In this configuration the energy efficiency project is usually undertaken by an ESCo.

The donation-based scheme

Finally, the classic crowdfunding scheme can be adopted also in the form of donation based. In this form, customers are donors instead of investors and may be rewarded by the perceived benefit of the project produced by accomplishing its goal and by the externalities it can produce.



FIGURE 8. THE DONATION-BASED CROWDFUNDING SCHEME

Supermarkets may act as promoters of the project and submit it to a platform that will be entitled to start a campaign to collect the donations. Once donations are collected and the campaign is over, the capitals are transferred to the project coordinator who will undertake the project.

3.3.2.2 Rounding technique

The rounding technique is an innovative crowdfunding scheme specifically developed for supermarkets. It literally implies to round-up bills and specifically allocate the extra cents to a previously disclosed project. However, this scheme still shares some common features with the classical ones. The key factor is always the participation of the crowd, represented by a large number of supermarket customers willing to participate in the program.

This scheme is activated by the supermarket who is willing to undertake an energy efficiency project and is based on the capital that can be collected through a voluntary round up of bills. Once the project is defined and publicly presented by the supermarket, customers have the possibility to invest.



FIGURE 9. ROUNDING TECHNIQUE CROWDFUNDING SCHEME

The major strength of this crowdfunding scheme is that is very easy to understand, does not require a financial commitment and customers have almost no entry barriers. On the drawbacks side, the amounts paid by the customers are so little that it requires a great adhesion rate.

An example of the application of this scheme in a supermarket is the campaign launched by the Sanchez Romero supermarkets, in Spain. The rounding technique was applied to collect money for charity causes. According to the campaign, all clients paying with credit card can round-up their bills and send that money to the social cause they choose from the ones available.

3.3.2.3 Sponsor products

The sponsor products scheme is an innovative crowdfunding method in which supermarkets can propose a specific energy efficiency project and get the financial resources from the sales of a specific product or a mix of products that has been properly identified by the supermarket. Once customers purchase this product, or products, part of the paid price is devoted to finance the energy efficiency project.

The nature of the sponsor products must be well advertised. The price of the product will be the usual and will not include any additional amount. It is up to the supermarket to renounce part of the margin and later deploy those amounts to the project, but suppliers may play a role too, by collaborating with the supermarket in the selection and in bearing the lack of marginality. In this way, customers are not asked to invest or donate any additional amount.

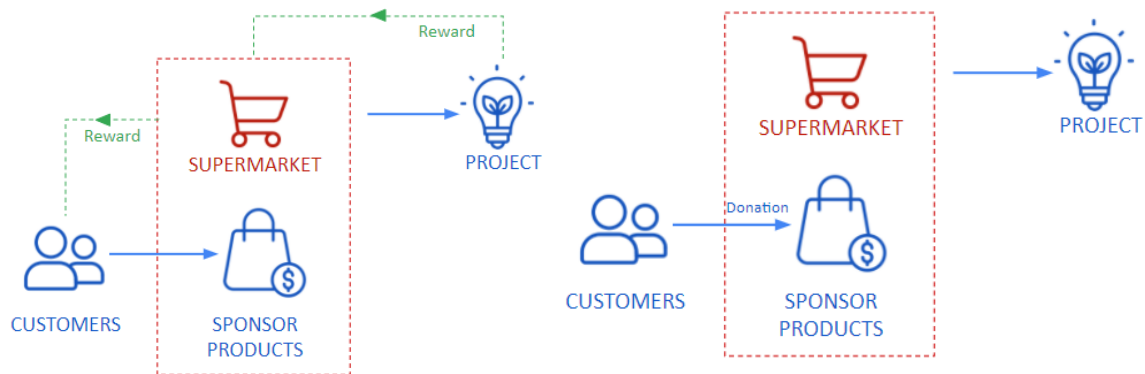


FIGURE 10. SPONSOR PRODUCTS CROWDFUNDING SCHEME

Once capital is collected the project can be undertaken. In this case as in the previous cases the project can be developed in the building of the supermarket or even in buildings owned by third parties but of public interest. The project may be developed by the supermarket itself or through an ESCo.

3.3.2.4 Energy community

Energy community is a terminology used to refer to a wide range of collective energy actions that involve the participation of citizens in the energy system.

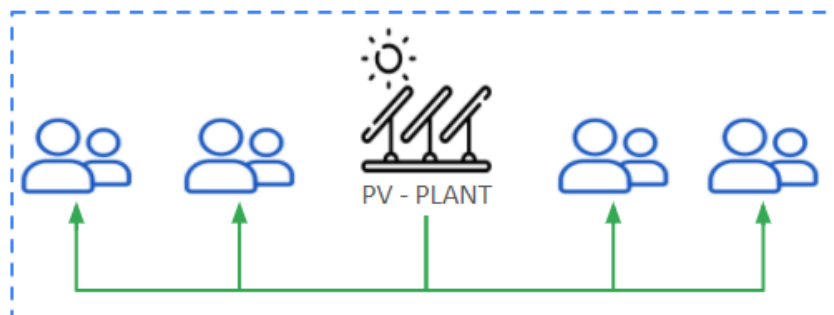


FIGURE 11. ENERGY COMMUNITY CROWDFUNDING SCHEME

Due to the community nature of this type of actions, their scheme can be implemented using as an anchor point the supermarket, where the renewable energy production system will be installed. Three different schemes have been developed in which an energy community scheme project is proposed with different focuses. The main drawback of this scheme is that even though the energy community is an effective tool for the engagement of individuals it may be harder to implement it following the crowdfunding principles due to physical and regulation limitations. However, the innovation compared to similar systems will be higher than with other proposed schemes.

Neighbourhood community

The neighbourhood community scheme is based on the establishment of an energy community among the supermarket and different landlords. There are two main options available, in the first one, the supermarket is located in a building containing other housing or commercial units and the condominium decides to invest together in the creation of the energy community, defining it as a self-consumption scheme. This is the most common scenario of the energy community due to the physical needs of electricity connection.

In the second option, the supermarket and the housing or commercial units can be placed in separate buildings and set up a virtual power plant. In this case, the renewable energy production system can be placed in a different location compared to the beneficiaries of the produced energy. In this configuration other elements are also necessary, such as a smart metering system and a bilateral agreement with an energy service operator.

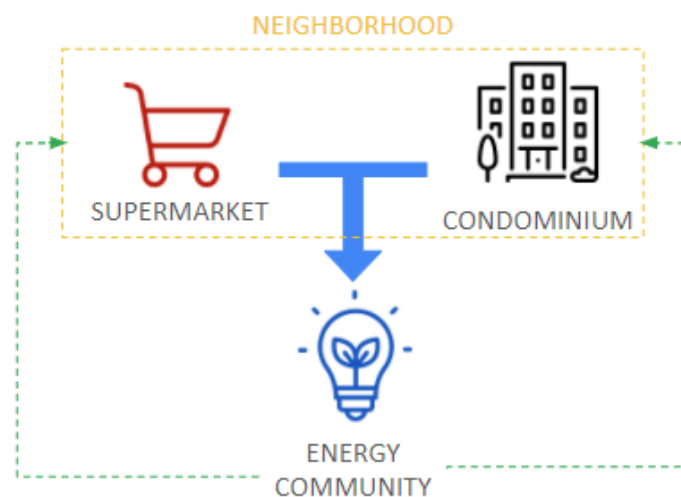


FIGURE 12. ENERGY COMMUNITY CROWDFUNDING SCHEME: NEIGHBOURHOOD

Both configurations will provide an economic benefit for the participants at the price of a high level of engagement. However, these schemes could also be developed from other structures outside crowdfunding.

The presence of energy communities is growing as the energy markets continue to decentralize and leverage low voltage renewable energy production. Incentives on energy sharing in LECs is currently available in Italy. Coupling supermarket shoppers, energy community members, utilities with innovative energy contracts and supermarket owners is an interesting combination for energy community promoters to consider.

Energy community and EV charging points

The main idea of this scheme foresees the installation of a photovoltaic plant in the supermarket area, the installation of electric vehicles charging points in the supermarket parking lot, and the exploitation of the electric vehicles' batteries in the form of smart grid. The PV plant can be installed on top of the roof or in the parking lot as a shadowing element.

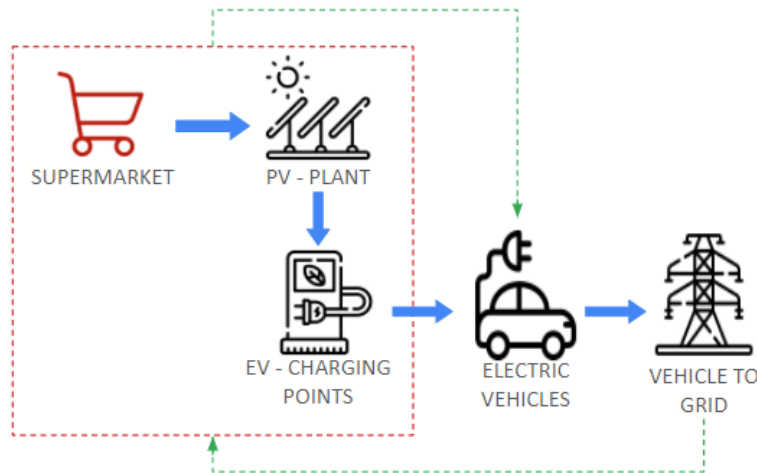


FIGURE 13. ENERGY COMMUNITY CROWDFUNDING SCHEME: EV CHARGING POINTS

This scheme involves different entities that can be arranged in different forms of relationships. The entities in object are the supermarket, the energy producer and a consumer.

This scheme may be particularly interesting for supermarkets due to the Directive 2018/844, of the European Parliament and of the Council of 30 May 2018. According to this Directive, the installation of a minimum number of electric vehicles recharging points for all non-residential buildings with more than twenty parking spaces will be mandatory by 2025.

Under this solution, if new generation smart assets are installed, they will be able to relieve pressure on the grid infrastructure in place. Furthermore, in terms of added service for customers, it would also make sense, as the average time for a consumer to make their grocery shopping (between 60-90 minutes) couples nicely to fast charging cycles.

Energy community among supermarkets

This scheme represents an energy community that has as members different buildings of the same supermarket chain.



FIGURE 14. ENERGY COMMUNITY CROWDFUNDING SCHEME: AMONG SUPERMARKETS

Within this configuration several buildings can act as producers and different buildings can act as consumers or prosumers. As in previous cases, it is necessary to set up a virtual power plant with a smart metering system in order to monitor energy production and consumption. Moreover, it is necessary a bilateral agreement with an energy service operator for managing the energy transfer among the different locations. Even if different supermarkets will produce electricity through PV plants the total production will be aggregated as a single production. Same technique will be used for the electricity demand. By doing so the whole network will figure to have a unique demand and a unique production of electricity.

4 EU regulation

In this chapter is going to be compiled the European legislative framework affecting the Super-Heero financial schemes already presented. First point will summarize the legal and fiscal aspects that can affect all the schemes in general terms and then, following points, will analyse the legal and fiscal aspects to take into account for each of the schemes in particular.

4.1 Common European legislative framework

The European Union is committed to the promotion of energy efficiency as one of the key issues for a sustainable future. To this end, regulations have been drawn up and research and development programmes have been funded.

The European regulation on energy efficiency took a step forward with the **Directive 2012/27/EU**³ of the European Parliament and of the Council of 25 October 2012 on energy efficiency. The purpose of this section is to summarize and bring together the aspects that have been found to be particularly interesting for the Super-Heero project. Accordingly, these considerations and articles have been compiled under the legal aspects listed below. It is important to mention that, for further and more precise information on the aspects here described, it is hardly recommendable to refer to the mentioned EU Directive.

Some of the preliminary considerations presented in the Directive have been found interesting in illustrating the path taken by the European authorities; consequently, the first legal aspects have been extracted from them and are listed below followed by the legal aspects extracted from the articles of the Directive that have been found especially relevant for the purposes of the current report.

4.1.1 Legal Treatment

Legal aspect 1: development of energy services.

The Directive presents as a necessity to continue developing the market for energy services to ensure the availability of both the demand for and the supply of energy services. Transparency, for example by means of lists of energy services providers, can contribute to this. Model contracts, exchange of best practice and guidelines, in particular for energy performance contracting, can also help stimulate demand. As in other forms of third-party financing arrangements, in an energy performance contract the beneficiary of the energy service avoids investment costs by using part of the financial value of energy savings to repay the investment fully or partially carried out by a third party.

Legal aspect 2: barriers.

Regarding the regulatory and non-regulatory barriers, the Directive underlines the importance of identifying and removing them, to contribute to the use of energy performance contracting

³ Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC Text with EEA relevance, and later amended by Directive 2018/2002

and other third-party financing arrangements for energy savings. These barriers include accounting rules and practices that prevent capital investments and annual financial savings resulting from energy efficiency improvement measures from being adequately reflected in the accounts for the whole life of the investment. Obstacles to the renovating of the existing building stock based on a split of incentives between the different actors concerned should also be tackled at national level.

[Legal aspect 3: financing facilities.](#)

As the Directive lays down, Member States and regions should be encouraged to make full use of the Structural Funds and the Cohesion Fund to trigger investments in energy efficiency improvement measures.

Furthermore, the financing facilities could be based, where applicable, on resources allocated to energy efficiency from Union project bonds; resources allocated to energy efficiency from the European Investment Bank (EIB) and other European financial institutions.

The financing facilities could in particular use those contributions, resources and revenues to, among others:

- Enable and encourage private capital investment, in particular drawing on institutional investors, while using criteria ensuring the achievement of both environmental and social objectives for the granting of funds;
- Make use of innovative financing mechanisms that reduce the risks of energy efficiency projects and allow for cost-effective renovations even among low and medium revenue households;
- Be linked to programmes or agencies which will aggregate and assess the quality of energy saving projects, provide technical assistance, promote the energy services market, and help to generate consumer demand for energy services.

[Legal aspect 4: building renovation.](#)

According to the Directive, Member States shall establish a long-term strategy for mobilising investment in the renovation of the national stock of residential and commercial buildings, both public and private. This strategy shall encompass a list of requisites regarding different aspects affecting buildings such as an overview of the building stock or an identification of renovations that can be relevant to the particular building type and climatic zone, among others.

[Legal aspect 5: energy audits and management systems.](#)

The Directive lays down that Member States shall develop programmes to encourage SMEs to undergo energy audits and the subsequent implementation of the recommendations from these audits.

Legal aspect 6: energy services.

About energy services, the Directive lists several actions Member States shall carry out to promote the energy services market and access for SMEs to this market. These initiatives go from disseminating clear and easily accessible information to providing qualitative review in the framework of the National Energy Efficiency Action Plan regarding the current and future development of the energy services market, passing through other actions in line with these ones that can be consulted directly in the Directive.

From the Directive 2012/27 that has been studied above, the EU's next step in energy efficiency regulation was taken in the Directive 2018/2002⁴ of the European Parliament and of the council of 11 December 2018. It builds on and amends the previous Directive 2012/27/EU and expands on its main objectives of combating climate change and promoting energy efficiency.

Despite not providing any specific regulation for supermarkets or the retail sector in general, there are measures aimed at improving the energy efficiency of all types of buildings, including of course supermarkets.

As it is customary in European directives, some general considerations are made in the first part of the document and it has been considered appropriate to include some of them in order to contextualize the following measures. As well as in the previous case, from these considerations and from the articles delivering specific measures, some legal aspects relevant for this project have been compiled and are listed below:

Legal aspect 8: long-term strategies

The obligation on Member States to establish long-term strategies for mobilising investment and facilitating the renovation of their national building stock and notify them to the Commission is removed from Directive 2012/27/EU and added to Directive 2010/31/EU of the European Parliament and of the Council where that obligation fits in with long-term plans for nearly zero energy buildings (NZEBs) and the decarbonisation of buildings.

Legal aspect 9: energy savings obligation extension

In view of the climate and energy framework for 2030, the energy savings obligation established by Directive 2012/27/EU should be extended beyond 2020. That extension would create greater stability for investors and thus encourage long-term investments and long-term energy efficiency measures, such as the deep renovation of buildings with the long-term objective of facilitating the cost-effective transformation of existing buildings into NZEBs.

The energy savings obligation has an important role in the creation of local growth and jobs and should be maintained to ensure that the EU can achieve its energy and climate objectives by creating further opportunities and to break the link between energy consumption and growth. Cooperation with the private sector is important to assess the conditions on which

⁴ Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency.

private investment for energy efficiency projects can be unlocked and to develop new revenue models for innovation in the field of energy efficiency.

Legal aspect 10: citizens awareness

It is crucial to raise the awareness of all Union citizens about the benefits of increased energy efficiency and to provide them with accurate information on the ways in which it can be achieved. Increased energy efficiency is also highly important for the security of energy supply of the EU through lowering its dependence on import of fuels from third countries.

4.2 EPC contracts

4.2.1 Legal treatment

As it was demonstrated in the previous chapter of Common European legislative framework, EPCs are held up as an example and promoted as one of the best ways to develop a high level of energy efficiency rapidly.

The EPCs are widely used in a public-private scheme, where the service provider is a private company and the client is a public body, like a municipality or a ministry. This approach is not only allowed by European regulation, but also recommended and encouraged by it. Even though the regulation in this area is not very extensive, the EU Directives 2012/27 and 2018/2001 give some mentions specifically about the EPC contracts, consequently the following legal aspects have been compiled:

Legal aspect 1: Promotion of energy services markets.

As already mentioned in previous chapter, Directive 2012/27 states that Member States shall promote the energy services market and access for SMEs to this market by carrying out a set of different actions, some of them referred to EPCs. In particular, the Directive lays down that Member states shall support the public sector in taking up energy service offers, especially for building refurbishment, by:

- Providing model contracts for energy performance contracting which include at least the items listed by the Directive;
- Providing information on best practices for energy performance contracting, including, if available, cost-benefit analysis using a life-cycle approach;

Legal aspect 2: Minimum items for an EPC within the public sector.

The EPC scheme is usually used in public/private partnerships. Due to the principle of contractual freedom that applies to private contracts of this type, they can be very variable. For this reason, this legal aspect collects, as a guidance what the Directive 2012/27 lays down about the EPCs within the public sector, for which it includes a list of the minimum items to be included in them or in the associated tender specifications. This list is presented in the Annex XIII of the Directive and includes the following requisites:

- Clear and transparent list of the efficiency measures to be implemented or the efficiency results to be obtained.

- Guaranteed savings to be achieved by implementing the measures of the contract.
- Duration and milestones of the contract, terms and period of notice.
- Clear and transparent list of the obligations of each contracting party.
- Reference date(s) to establish achieved savings.
- Clear and transparent list of steps to be performed to implement a measure or package of measures and, where relevant, associated costs.
- Obligation to fully implement the measures in the contract and documentation of all changes made during the project.
- Regulations specifying the inclusion of equivalent requirements in any subcontracting with third parties.
- Clear and transparent display of financial implications of the project and distribution of the share of both parties in the monetary savings achieved (i.e. remuneration of the service provider).
- Clear and transparent provisions on measurement and verification of the guaranteed savings achieved, quality checks and guarantees.
- Provisions clarifying the procedure to deal with changing framework conditions that affect the content and the outcome of the contract (i.e. changing energy prices, use intensity of an installation).
- Detailed information on the obligations of each of the contracting party and of the penalties for their breach.

Legal aspect 3: Barriers and Eurostat.

The Directive 2018/2002 states that reaching an ambitious energy efficiency target requires barriers to be removed in order to facilitate investment in energy efficiency measures. In this way, the Directive recognises that the clarification provided by Eurostat on 19 September 2017 on how to record energy performance contracts in national accounts, takes one step on that direction since, it removes uncertainties and facilitates the use of such contracts.

Due to this identification made by the Directive of the Eurostat clarification as a useful guide to refer to when dealing with EPCs, some fiscal aspects extracted from this paper will be displayed below too.

Another European directive was later enacted extending certain measures related to EPCs. This was the Directive 2006/32/EC⁵. The content of this directive related to EPCs is collected below:

Legal aspect 4: Activities for the enhancement of energy end-use efficiency.

Directive 2006/32 presents as its main porpoise enhancing the cost-effective improvement of energy end-use efficiency in the Member States by:

⁵ Directive 2006/32/EC⁵ of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC

(j) 'energy performance contracting': a contractual arrangement between the beneficiary and the provider (normally an ESCO) of an energy efficiency improvement measure, where investments in that measure are paid for in relation to a contractually agreed level of energy efficiency improvement;

(m) 'financial instruments for energy savings': all financial instruments such as funds, subsidies, tax rebates, loans, third-party financing, energy performance contracting, guarantee of energy savings contracts, energy outsourcing and other related contracts that are made available to the marketplace by public or private bodies in order to cover partly or totally the initial project cost for implementing energy efficiency improvement measures;

All these legal aspects, although mostly addressed to the public sector, are not limited to it, and can be assimilated for the private sector, specifically by the supermarket sector.

4.2.2 Fiscal treatment

As anticipated above, the Eurostat⁶ guide also underlines some aspects that are interesting for the aim of this chapter and have been compiled in form of fiscal aspects. As a reminder, it is important to mention that the Eurostat sets guidelines only for the public sector and that private contracts will not be necessarily affected by it, but it can be useful to use it as a guide.

Fiscal aspect 1: Eurostat's position.

Regarding the Eurostat guide, it is important to mention that the Eurostat's definition of an EPC requires that the Authority is, for statistical purposes, classified inside the general government sector. Examples of entities classified inside the general government sector for statistical purposes include central government ministries or departments, regional or local government entities.

Eurostat released its first communication on the statistical treatment of EPCs in a guidance note dated August 2015. That guidance is now superseded by the 2017 Guidance Note, which aligns with the Excessive Deficit Procedure Statistics Working Group's most recent interpretation of the relevant European System of Accounts (ESA) 2010 provisions.

The Rules are therefore drawn from ESA 2010, the Manual on Government Deficit and Debt (MGDD) 2016 and the 2017 Guidance Note.

Fiscal aspect 2: Recording of the EPCs assets.

Regarding the balance sheet for government, the Eurostat states that if the assessment of risks and rewards, as explained in the Guide, indicates that government is the economic owner of the EPC assets, then the EPC must be recorded on balance sheet for government. If, however, the assessment of risks and rewards indicates that government is not the economic owner of the EPC assets, then the EPC can be recorded off balance sheet for government.

⁶ A Guide to the Statistical Treatment of Energy Performance Contracts. 2018. Eurostat.

In either case, it is for the national statistical authority to determine the recording of the EPC assets in accordance with the relevant ESA10 rules.

Another important thing to mention in this section is the fact that the European Commission promotes projects that establish a framework with the guidelines to elaborating quality contracts. On these regards, an interesting project to refer to is QualitEE (QEE) which lays down a set of technical quality criteria for this type of contracts. Among the different publications developed within the QEE project, the Guidelines of European technical quality criteria for energy efficiency services⁷ compiles the following list of quality criteria that can be further studied within the mentioned publication:

- Adequate Analysis
- Quality of implementation of technical energy efficiency improvement measures
- Savings guarantee
- Verification of energy savings
- Value retention and maintenance
- Communication between the EES provider and the client
- Compliance with users' comfort requirements
- Information and motivation of users
- Comprehensible contractual stipulations for the definition of specific regulatory requirements

To summarize, regarding the fiscal treatment, the mentioned guide of the Eurostat on how to treat this type of contracts is interesting for countries when developing the fiscal incentives because it lays out a number of guidelines for the accounting treatment of EPC and so, it has made it possible to eliminate one of the main barriers that made it difficult for Public Administrations to make investments for the energy renovation of their buildings (among other energy efficiency improvements possible) in a scenario characterized by the need to maintain control of the public deficit.

In this scenario, for fiscal treatment of EPCs is also applicable the IFRS 16 which is a new International Financial Reporting Standard for lease accounting which came into force on 1 January 2019. It replaced the existing IAS 17 accounting standard and was introduced by the International Accounting Standards Board (IASB).

The IFRS16 norm applies to the accounting treatment for both finance leases and operating leases that are now compiled under the title lease agreements.

Fiscal aspect 3: 'Right of use' model.

According to the IFRS16 norm, from now on, most leased items must be included as an asset in the company books, following the new 'right-of-use' model which says: *"A contract is, or contains, a lease if it conveys the right to control the use of an identified asset for a period of time in exchange for consideration"*.

⁷ Guidelines of European technical quality criteria for energy efficiency services. QualitEE. 2020.

Fiscal aspect 4: Lease payments.

The lease payments made on the agreement have to be reported on the balance sheet as a lease liability. Furthermore, according to the new standards, costs of maintenance or cleaning, among other, must be separated from the main lease payments, if they are included in them, and reported separately.

Fiscal aspect 5: Profit and loss accounts.

Profit and loss accounts must include the depreciation of the asset and interest on the lease liability.

Fiscal aspect 6: Exclusions to the norm.

There are some circumstances in which this IFRS16 norm is not applicable, specifically the following types of lease do not have to be recorded as an asset:

- A lease where the value of the item when new is low value, currently indicated as less than USD 5,000.
- A lease with a shorter than 12-month term and which does not have an option to buy the leased item at the end of the lease.

For further information on these aspects is recommendable to refer to the actual norm.

4.3 Partnership with technology providers

4.3.1 Legal treatment

European regulation is also not very exhaustive in this aspect since it mostly belongs to private law. However, some studies on this business model have been carried out, its application is highly recommendable due to the competitiveness and efficiency generated with respect to the traditional direct sales model⁸.

In the specific Energy as a service (EAAS) scheme, the EU **Directive 2018/2002** indirectly contributes to the promotion of this scheme. This is due to the support for domestic self-consumption through renewable energy sources provided by this regulation.

Currently, one of the most commonly used schemes for domestic and non-domestic energy self-consumption installations is an agreement with an ESCO or a technology provider, given that the customer is reluctant to take on the initial investment. Normally it is a lease type contract, where the technology provider recovers the investment through the sale of the energy units generated by the provided installation, plus a commission.

⁸ Servitization, Business Innovation Observatory, European Commission April 2016
<https://ec.europa.eu/docsroom/documents/16595/attachments/1/translations/en/renditions/native>

Legal aspect 1: Energy consumption.

Directive 2018/2002 states in one of its considerations that energy generated on or in buildings from renewable energy technologies reduces the amount of energy supplied from fossil fuels.

The reduction of energy consumption and the use of energy from renewable sources in the buildings sector are important measures to reduce the EU's energy dependence and greenhouse gas emissions, especially in view of ambitious climate and energy objectives set for 2030 as well as the global commitment made in the context of the Paris Agreement. For the purposes of their cumulative energy savings obligation Member States may take into account, where applicable, energy savings from renewable energy generated on or in buildings for own use to meet their energy savings requirements.

4.3.2 Fiscal treatment

Broadly, it can be said that the norm IFRS16 presented for the fiscal treatment of EPCs is also applicable for the scheme of partnership with technology providers. Anyway, the actual applicability of the norm will depend on the conditions of the specific contract, and in this way, it is important to distinguish the contracts dealing with companies that offer a product from the ones that affect companies offering a service.

With regards to this scheme, it is important to distinguish between the offering of a product or of a service, since they will have a different fiscal treatment. In the case of a product, the norm IFRS16 will have to be applied. However, if the scheme includes EAAS, it can be considered as an expense and therefore can be deducted. Thus, since it is an expense, it can be accounted for as off-balance sheet.

4.4 Crowdfunding models

During all these years crowdfunding platforms that wanted to offer their services across borders have faced a main problem, which had to do with the lack of common regulation and the existence of diverging licensing requirements across the European Union. This situation led to high compliance and operational costs that made these crowdfunding platforms unable to scale the provision of their services efficiently.

Due to the increasingly establishment of crowdfunding as an alternative form of finance for small and medium-sized enterprises (SMEs) and the fact that several Member States had already introduced regimes to legislate this form of financing, the UE has presented the Regulation (EU) 2020/1503 on European crowdfunding service providers for business and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937.

The (EU) 2020/1503 regulation entered into force on 10 November 2020 and, after a transition period of 12 months, the rules will enter into application on 10 November 2021, applying directly across the EU.

As the mentioned regulation states, the different regimes promoted by the Member States tailored to the characteristics and needs of local markets and investors and, as a result, the existing national

rules diverge across the EU as regards the conditions of operation of crowdfunding platforms, the scope of permitted activities and the authorization requirements.

Moreover, the regulation also mentions that these differences between the existing national rules are such that they obstruct the cross-border provision of crowdfunding services and thus have a direct effect on the functioning of the internal market in such services. In particular, the fact that the legal framework is fragmented along national borders creates substantial legal costs for retail investors who often face difficulties in determining the rules applicable to cross-border crowdfunding services. Therefore, such investors are often discouraged from investing cross-border by means of crowdfunding platforms. For the same reasons, crowdfunding service providers operating such platforms are discouraged from offering their services in Member States other than the one in which they are established. As a result, crowdfunding services have remained hitherto largely national, to the detriment of a Union-wide crowdfunding market, thus depriving businesses of access to crowdfunding services, especially in cases where those businesses operate in smaller national markets.

Considering this, the new EU regulation has the aim of fostering cross-border funding of business by addressing the obstacles to the functioning of the internal market in crowdfunding services. With this purpose and as it is presented on the European Commission webpage, the regulation lays down uniform rules across the EU. It allows platforms to apply for an EU passport based on a single set of rules, which makes it easier for them to offer their services across the EU with a single authorization.

They also state that the new rules are expected to increase the availability of this innovative form of finance, which will help companies seeking alternatives to bank financing. Investors on crowdfunding platforms, meanwhile, will benefit from an aligned and enhanced investor protection framework, based on

- Clear rules on information disclosures for project owners and crowdfunding platforms;
- Rules on governance and risk management for crowdfunding platforms;
- Strong and harmonized supervisory powers for national authorities overseeing the functioning of crowdfunding platform.

4.4.1 Legal treatment

In this section have been compiled the points extracted from the (EU) 2020/1503 regulation that have been found to be especially relevant or clarifying for the Super-Heero project. For further information on some of the aspects it would be necessary to direct to the actual regulation⁹.

Legal aspect 1: crowdfunding services requirements

The mentioned Regulation lays down uniform requirements for the provision of crowdfunding services, for the organization, authorization and supervision of crowdfunding service

⁹ Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R1503&from=EN>

providers, for the operation of crowdfunding platforms as well as for transparency and marketing communications in relation to the provision of crowdfunding services and does not apply to:

(a) crowdfunding services that are provided to project owners that are consumers, as defined in point (a) of Article 3 of Directive 2008/48/EC;

(b) other services related to those defined in point (a) of Article 2(1) and that are provided in accordance with national law;

(c) crowdfunding offers with a consideration of more than EUR 5 000 000, which are to be calculated over a period of 12 months as the sum of:

(i) the total consideration of offers of transferable securities and admitted instruments for crowdfunding purposes as defined in points (m) and (n) of Article 2(1) of this Regulation and amounts raised by means of loans through a crowdfunding platform by a particular project owner; and

(ii) the total consideration of offers to the public of transferable securities made by the project owner referred to in point (i) of this point in its capacity as an offeror pursuant to the exemption under Article 1(3), or Article 3(2), of Regulation (EU) 2017/1129.

Legal aspect 2: crowdfunding service definition

‘Crowdfunding service’ means the matching of business funding interests of investors and project owners through the use of a crowdfunding platform and which consists of any of the following activities:

(i) the facilitation of granting of loans;

(ii) the placing without a firm commitment basis, as referred to in point (7) of Section A of Annex I to Directive 2014/65/EU, of transferable securities and admitted instruments for crowdfunding purposes issued by project owners or a special purpose vehicle, and the reception and transmission of client orders, as referred to in point (1) of that Section, in relation to those transferable securities and admitted instruments for crowdfunding purposes.

Legal aspect 3: provision of crowdfunding services

Crowdfunding services shall only be provided by legal persons that are established in the Union and that have been authorized as crowdfunding service providers in accordance with Article 12 of the (EU) 2020/1503 regulation.

Legal aspect 4: effective management

The management body of a crowdfunding service provider shall establish, and oversee the implementation of, adequate policies and procedures to ensure effective and prudent management. At the same time, the management body shall also establish, and oversee the

implementation of, appropriate systems and controls to assess the risks related to the loans intermediated on the crowdfunding platform.

Legal aspect 5: diligence

A crowdfunding service provider shall undertake at least a minimum level of due diligence in respect of project owners that propose their projects to be funded through the crowdfunding platform of the crowdfunding service provider.

Legal aspect 6: handling of complaints

Crowdfunding service providers shall have in place effective and transparent procedures for the prompt, fair and consistent handling of complaints received from clients and shall publish descriptions of those procedures.

Legal aspect 7: crowdfunding service providers participation

Crowdfunding service providers shall not have any participation in any crowdfunding offer on their crowdfunding platforms. Moreover, crowdfunding service providers shall not accept as project owners in relation to the crowdfunding services offered on their crowdfunding platform any of the following:

- (a) their shareholders holding 20 %, or more, of share capital or voting rights;
- (b) their managers or employees;
- (c) any natural or legal person linked to those shareholders, managers or employees by control as defined in point (35)(b) of Article 4(1) of Directive 2014/65/EU.

At the same time, crowdfunding service providers shall take all appropriate steps to prevent, identify, manage and disclose conflicts of interest between the crowdfunding service providers themselves, their shareholders, their managers or employees, or any natural or legal person linked to them by control, as defined in point (35)(b) of Article 4(1) of Directive 2014/65/EU, and their clients, or between one client and another client.

Legal aspect 8: avoidance operational risk

Crowdfunding service providers shall, when relying on a third party for the performance of operational functions, take all reasonable steps to avoid additional operational risk.

Legal aspect 9: safeguards

Crowdfunding service providers shall, at all times, have in place prudential safeguards equal to an amount of at least the higher of the one established by the regulation.

Legal aspect 10: authorization for crowdfunding service provider.

A legal person who intends to provide crowdfunding services shall apply to the competent authority of the Member State where it is established for authorization as a crowdfunding service provider.

Legal aspect 11: providing services in another Member State

Where a crowdfunding service provider authorised in accordance with Article 12 intends to provide crowdfunding services in a Member State other than the Member State whose competent authority granted authorisation in accordance with Article 12, it shall submit to the competent authority designated as a single point of contact in accordance with Article 29(2), by the Member State where authorisation was granted, the information established by the regulation.

Again, it is important to lay down that what has been presented above is only a brief compilation of the legal aspects found to be more relevant for the matter of this paper, but the actual EU Regulation covers a wider list of topics and legal aspects and it can be consulted to deepen in some points here presented or to get information of others.

4.4.2 Fiscal treatment

Up to this date there is not an EU fiscal regulation for crowdfunding, but some European countries do offer tax incentive schemes to investors and companies in crowdfunding. The current legislation for Italy and Spain will be presented below.

5 Regulation at national level

5.1 EPC contracts

5.1.1 Spain

5.1.1.1 Legal treatment

This type of contract is fully accepted in the Spanish legal system and is in fact widely used in the public sector.

Most of the regulation deals with the management of these contracts in the public sector. However, it is not limited to public clients; between an ESCo and a private client this type of contract can also be executed, but in this case, it is governed by private law and the principle of contractual freedom between the parties signing the contract.

In Spain, regulations have been established to sustain and support the development of EPC schemes. The first step was to incorporate the figure of the energy service company (ESCO) into the Spanish legal system by means of the Royal decree-law 6/2010.

[Legal aspect 1: energy services company](#)

Since this Royal decree-law, an energy services company is understood to be any natural or legal person who can provide energy services in the installations of a user and who faces a certain degree of economic risk in doing so. This applies in the cases where the payment for the services provided is based, either in part or in full, on the achievement of energy savings through the introduction of energy efficiency improvements and the fulfilment of other agreed performance requirements.

Through the Royal decree 56/2016 the European directive 2012/27/EU is adopted in the Spanish legal system. This regulation sets out an accreditation system for energy service providers and energy auditors so that they can legally operate in the energy sector. Concretely, the Spanish UNE standard (UNE 21601:2018) classifies the ESCos according to the type of actions they carry out, setting minimum requirements and a categorisation of functions.

[Legal aspect 2: transposed aspect from EU Directive.](#)

One of the first clauses of this Spanish regulation states that through this royal decree, the regulation of aspects related to energy audits, the accreditation system of energy service providers and energy auditors, and the promotion of heat and cooling efficiency, provided in the Directive 2012/27/EU that has been presented in the section of EU legislative framework of this report, are incorporated into Spanish law.

Over the last decade, barriers to the public contracting of these companies have been removed through various national and European regulations and recommendations.

The latest mayor initiative related to Energy Efficiency from the national government of Spain is the National Integrated Energy and Climate Plan (PNIEC¹⁰). This ambitious plan aims for a 23% reduction in greenhouse gases from 2021 to 2030. One of the approaches to achieve this goal is to encourage energy efficiency contracts in the private sector for the energy retrofitting of all kinds of buildings.

5.1.1.2 Fiscal treatment

Regarding the fiscal treatment of EPC, the presented IFRS16 international norm is applicable in Spain, and the legal aspects presented on section 3.2.2 can be considered also for the current section.

5.1.2 Italy

5.1.2.1 Legal treatment

Only in 2008 the Italian legislator has implemented the Directive EC/ 32/06, through Legislative Decree 115/2008, which introduces (or better translates) the normative notion of the EPC contract.

Legal aspect 1: EPCs definition.

The mentioned Italian regulation defines the EPCs as a "contractual agreement between the beneficiary and the supplier regarding an energy efficiency improvement measure, in which the payments for investments in this measure are made according to the level of improvement of the energy efficiency established contractually".

The EPC is a contract named in the Italian legal system, as required by the legislator; however, it is an atypical contract, as it lacks a complete legislative discipline.

Legal aspect 2: phases when signing the contract.

The preparatory phase to the signing of the contract, or the design phase, takes on central importance, as the success of the redevelopment depends on the goodness of the project; but the phase of stipulation, or rather, of the drafting of the contract is equally important, as the variables (including executive) of the requalification interventions are many and such that they must be punctually defined in the contractual regulation, which must be as much as possible modulated to the type of intervention to be carried out on the basis of the approved project.

The EPC is normally implemented using and combining the Third-Party Financing (FTT) mechanism. It is appropriate to highlight from now on how the FTT essentially postulates the provision by a third party of the resources necessary for the realization of the project.

Legal aspect 3: FTT definition.

The FTT was also recently defined in the aforementioned Legislative Decree 115/2008 (transposing Directive EC / 32/2006) as a contractual agreement that includes a third party, in addition to the energy supplier and the beneficiary of the improvement measure energy efficiency, which provides the capital for this measure and charges the beneficiary a fee equal to a part of the energy savings achieved using the measure. The third party can be an ESCO.

¹⁰ Spanish acronym PNIEC: Plan Nacional Integrado de Energía y Clima

From the same legislative definition, it is clear that the FTT agreement it actually overlaps with those same variants of the EPC in which the ESCO takes on itself the financial risk of the proposed intervention.

Legal aspect 4: contract types.

There are different types of arrangements (or contracts) involving the different risks of the project:

- *First Out* (duration: 3-5 years): the ESCO invests its own capital or capital from third parties (FTT). After the end of the contract the savings goes entirely to the customer. The ESCO assumes the technical risk in case of incompliance of the performance.
- *Shared savings* (duration: 5-10 years): the ESCO invests its own capital or capital from third parties (FTT). The savings during the contract duration are shared with the client, and therefore the amortization time (and contractual time) is longer. The ESCO assumes the technical and financial risk in case of performance incompliance.
- *Guarantee Savings* (duration: 4-8 years): The lender is a third party other than the ESCO and the customer but in this model, it is the customer who signs the loan, while the ESCO normally assumes the role of finding and organizing the loan, as well as guaranteeing a certain level of return based on the which receives the compensation from the customer. The ESCO has therefore only the technical risk, while the customer assumes the financial risk.

5.1.2.2 Fiscal treatment

The Italian National Energy Plan (PAE) gives an overview of the energy efficiency targets set by Italy and the measures planned to reach them. One of the topics presented by the plan is the current regulation applicable to EPCs for public bodies.

The PAE states that the guidelines for preparing the Energy Performance Contract (EPC) can be found on the New Public Procurement Code. As the PAE says, the EPC contractual model proposed for public authorities encourages the involvement of private operators to create economies of scale. The intention is that this will ensure that the results achieved are transparent and reliable, in compliance both with the procedures for awarding contracts under existing laws, and with the new legislation on energy efficiency in buildings.

Furthermore, the proposed EPC includes, in addition to the legal clauses, financial content and engineering content.

Fiscal aspect 1: Triple-win approach

The PAE states that to foster the development and uptake in the residential sector of energy efficiency projects delivered by ESCOs, the EPC model must offer solutions for sharing the costs and benefits between the user, the building owner and the ESCO, with a triple-win approach that satisfies all stakeholders.

Fiscal aspect 2: Solutions

The tax relief mechanism for energy efficiency renovation available in Italy allows tenants to take advantage of this incentive. Some solutions under revision, regarding split incentives, are presented by the PAE and involve the following cases.

- Owner and tenant sign a contract with the ESCO (option for public bodies in rented facilities, commercial properties and the residential sector);
- Owner signs the contract with the ESCO:
 - EPC with the transfer of the savings (option for residential and commercial office buildings);
 - EPC with the owner covering the costs (option for residential and commercial office buildings);
 - Progressive redevelopment of neighbourhoods (option for social housing in large neighbourhoods);
- User/tenant signs the contract with the ESCO: EPC with the owner's consent (option for government departments and long-term leases).

5.2 Partnership with technology providers

5.2.1 Spain

5.2.1.1 Legal treatment

The trend towards *servitization* is common to many sectors. Companies have found in this scheme a solution to get closer to their customers and generate continuous and sustainable revenues while the customer only pays for the services he uses.

As in the case of EPCs, this type of contract, in which the company commits to provide an ongoing service to a customer rather than selling its product, is governed by private law. Therefore, depending on the service offered, the terms of the contract will vary accordingly.

One of the most widespread applications of this scheme in Spain in recent years is photovoltaic self-consumption. Through the Royal decree 244/2019, the Spanish government regulated the administrative, technical and economic conditions for the self-consumption of electricity.

Thanks to this measure, self-consumption of energy was facilitated, and many companies began to offer a comprehensive service for the design, installation, monitoring and maintenance of self-consumption photovoltaic installations.

5.2.1.2 Fiscal treatment

As well as for EPCs, the mentioned norm IFRS16 for the European framework is also applicable in Spain for this business model and the presented legal aspects compiled in section 3.2.2. together with the clarification presented in section 3.3.2. can be referred to for the Spanish fiscal treatment of these type of business models.

5.2.2 Italy

5.2.2.1 Legal treatment

Concerning the legal treatment of partnerships with technology providers, as well as with the Spanish case, these types of contracts are governed by private law, therefore, depending on the service offered, the terms of the contract will vary accordingly.

As a guidance, it could be interesting to refer to the Legislative Decree 73 of 2020 which concerns to the implementation of EU Directive 2018/2002 that has been presented for this business model in the section of European framework of this report. Concerning this, is important to keep in mind, that these regulations apply directly to the public sector, however it can give some useful guidelines also for private contracts.

5.2.2.2 Fiscal treatment

In the same line as the Spanish fiscal treatment of partnerships with technology providers, the mentioned norm IFRS16 for the European framework is also applicable in Italy and the presented legal aspects compiled in section 3.2.2. together with the clarification presented in section 3.3.2. can be referred to for the Italian fiscal treatment of these type of business models.

5.3 Crowdfunding models

5.3.1 Spain

5.3.1.1 Legal treatment

Until now, in the absence of European regulation, crowdfunding has been regulated in Spain by the Law 5/2015. However, the EU 2020/1503 Regulation, which enters into application in November 2021, will be the main legal framework of crowdfunding in Spain.

The European regulation on this subject is much more extensive in content than the Spanish one, and therefore much more specific in the details of crowdfunding regulation, the main aspects of the Spanish law that differ from the European one are:

Legal aspect 1: Investment limit.

Spanish and EU legislation governing crowdfunding platforms establishes a distinction between potential investors, who can be divided into accredited and non-accredited investors. Non-accredited investors include all investors that do not meet certain requirements such as being authorised by the state to operate in financial markets, being a public body, or meeting certain limits in terms of assets held or annual turnover, among others.

The legislation includes this distinction in order to protect and inform small or inexperienced investors of the risks associated with participating in these types of crowdfunding platforms.

In this respect, European legislation is less restrictive than Spanish legislation, as it only requires crowdfunding platforms to provide detailed information on the risks and carry out

simulations on the potential losses that non-accredited investors could suffer, if the investment is superior to EUR 1,000.

On the contrary, Spanish legislation, apart from the reporting duties, it does include certain investment limits for non-accredited investors. These limits stipulate that this type of investor cannot invest more than 3,000 euros in a single project published by a platform or more than 10,000 euros per year in all the projects published on all the crowdfunding platforms available.

These regulations must be supervised and enforced by participatory investment platforms.

[Legal aspect 2: Complaints and claims.](#)

The (EU) 2020/1503 Regulation adds a procedure for investor complaints and claims.

[Legal aspect 3: Entry conditions.](#)

The (EU) 2020/1503 Regulation also establishes entry conditions for non-accredited investors that must be evaluated by the platform and, every two years, review the investor profiles (including a calculation of expected loss under certain conditions that must be reviewed every year).

[Legal aspect 4: Internal compliance.](#)

Regarding the internal compliance by crowdfunding companies or platforms, the EU regulation gives specific conditions in case the activity incorporates the individual management of loan portfolios (in relation to the parameters set by the client, but also for internal organization purposes such as the registration of mandates and of each loan or the accreditation of processes and robust methodologies)

[Legal aspect 5: Conflicts of interest.](#)

In relation with the conflicts of interest the community regulation establishes a higher percentage with which the platform (or any of the linked persons) can participate in any of the projects that it advertises. Law 5/2015 establishes a 10 % while the EU Regulation establishes a 20 %.

[Legal aspect 6: Prudential requirements.](#)

In terms of prudential requirements, the Spanish law is the stricter one since it settles 60 thousand euros as the initial capital while the EU Regulation sets EUR 25,000.

5.3.1.2 Fiscal treatment

For the analysis of the national fiscal treatments the study entitled “Crowdfunding tax incentives in Europe: A comparative analysis”¹¹ has been used as a guide.

¹¹ European Journal of Financing. Crowdfunding tax incentives in Europe: a comparative analysis (2019)

Fiscal aspect 1: National incentives.

The model 100 for the IRPF¹² Declaration establishes that the Spain regulation has available some tax breaks to investors¹³. For companies that are less than three years old, their investors are entitled to a deduction of 20% of their investment on the income tax (IRPF) as long as the established requisites are met which include, among others, the limitation on the direct or indirect participation of the taxpayer together with the participation of any relative of first or second degree. The sum of this participations cannot be greater than 40 percent of the capital stock of the entity or of its voting rights.

Second, if the invested company fails, the investment can be recovered by writing off your capital gains tax for up to four years.

Fiscal aspect 2: Regional incentives.

In addition to this deduction available at national level, some autonomous communities present additional incentives which are complementary to the state tax reliefs and increase the deductible limit. These incentives are available for their residents and companies and the company and the investor have to be residents in the same region to be able to benefit from this regional aids.

Fiscal aspect 3: Non-profit organizations.

Moreover, in regards with the donation-based crowdfunding, is important to lay down the Law 49/2002 on the tax regime of non-profit entities and tax incentives for patronage¹⁴. This law recognises the contribution of individuals to the purposes of general interest and establishes which entities can be considered non-profit organizations including, among others, foundations or associations declared of public utility. The law also compiles a number of requirements that the non-profits entities have to meet to be able to benefit of the tax incentives proposed.

There can be done different types of contributions such as, donations of money, goods or rights, membership fees to associations that do not correspond to the right to receive a present or future benefit or the constitution of a real right of usufruct over goods, rights or securities, carried out without consideration.

According to the law, the taxpayers of the IRPF will have the right to deduct from the full tax the result of applying to the base of the deduction corresponding to the set of donations and contributions with the right to deduction, determined according to the provisions of article 18 of the same law, in this way, for a donation of 150 euros the percentage of deduction will be 80 % and the remainder base deduction will be the 35 %.

¹² *Impuesto sobre la Renta de las Personas Físicas*,

¹³ Model 100. Personal Income Tax Declaration. Deduction for investment in newly or recently created companies.

¹⁴ Law 49/2003, of 23 December, on the tax regime of non-profit entities and tax incentives for patronage.
<https://www.boe.es/buscar/act.php?id=BOE-A-2002-25039>

Table 1 summarizes the current tax incentives for Spain that apply to specific crowdfunding models, even though they have not been specifically tailored for crowdfunding.

EQUITY CROWDFUNDING	Deduction due to investments in newly formed companies	Deduction from the income tax of 20% of the amount invested in Spanish companies that are less than three years old
DONATION CROWDFUNDING	Regional income tax relief	Supplemental tax breaks by autonomous communities.

Table 1. Summary of tax incentives for existing crowdfunding models in Spain

5.3.2 Italy

5.3.2.1 Legal treatment

As well as with the Spanish case and with all the Member States, the (EU) 2020/1503 Regulation will enter directly into application in Italy and will be the most important regime for crowdfunding at national level. At the same time, Italy has already some national legislation regarding crowdfunding that, up to now, has regulated alone this activity in Italy and that will, from now on, complement the new EU regulation, among this regulation, it is possible to distinguish the following ones:

- Diritto24, Il Sole 24 Ore, 03/06/2015
- Banking Law, 12/19/2016
- Innovations of the Consob regulation

Legal aspects 1: LEC (Local Energy Communities).

The association of electricity consumers to produce locally through renewable sources only to meet their needs is allowed in Italy due to Law 162/19 (art.42 bis) and its implementing measures, such as Resolution 318/2020/R/ee of ARERA and Ministerial Decree 16/09/2020 of MISE (Ministry of Economic Development).

Through this legislation, LECs are defined within the legislation as a legal entity that:

- is based on open and voluntary participation, is autonomous and is effectively controlled by shareholders or members who are located in the proximity of the production facilities held by the renewable energy community;
- whose shareholders or members are individuals, small and medium-sized enterprises (SMEs), territorial entities or local authorities, including municipal governments, provided that, for private companies, participation in the renewable energy community is not the main commercial and/or industrial activity;
- whose primary objective is to provide community-based environmental, economic, or social benefits to its shareholders or members or to the local areas in which it operates, rather than financial profits.

The access requirements are that the installed power cannot exceed 200 kW and that only newly built plants or upgrades of existing plants are permitted.

5.3.2.2 Fiscal treatment

In the same way as the fiscal treatments available in Spain, the ones for Italy have also been extracted from the mentioned study that gives an overview of the fiscal situation regarding crowdfunding for some countries of Europe.

Fiscal aspect 1: Tax benefits.

In Italy, as a result of the application of the Order of 30 January 2014 of The Ministry of Economy and Finance (MEF), the Italian tax regulators have been offering tax benefits for innovative start-ups and SMEs. In January 2018, these benefits were extended to equity crowdfunding by the Budget Law. According to this, natural persons can benefit from a tax deduction on income tax (IRPEF¹⁵) of 30% of the invested amount. The deduction is limited to €1 million per year.

In the same way, legal entities can obtain a tax credit on corporate tax (IRES¹⁶) of 30% of the invested amount up to a maximum of €1.8 million per year. Tax reductions apply for direct investments made through start-ups, SMEs and social enterprises, and also for indirect investments made through mutual investment bodies or other joint stock companies that invest mainly in small and medium-sized businesses.

Fiscal aspect 2: Tax deduction documentation.

To benefit from the tax deduction, the participation instruments must be held for a minimum of three years (two years previously) and must submit as part of the tax filing a set of documents and certifications, which include:

- 1) the certification attesting the compliance with the maximum limits for contributions about the tax period in which the investment was made; and
- 2) the company investment plan, containing detailed information on the subject of its activity, on the products and the current or expected performance of sales and profits.

Fiscal aspect 3: P2P¹⁷ lending.

Law n.205 of the 27 December 2017 (2018 Budget Law) regulates the P2P lending by including income from loans granted through P2P lending platforms within the incomes from capital. It states that such platforms must be managed by payment institutions or by companies authorized by the Bank of Italy, according to Article 106 of the Consolidated Law on Banking.

¹⁵ Imposta sul reddito delle persone fisiche

¹⁶ Imposta sul reddito delle società

¹⁷ Peer to Peer

For non-professional lenders, the income from P2P lending is subject to a 26% withholding tax to be levied by the authorised platforms' managers.

Following the Budget Law 2018 (Law no. 205 of 27 December 2017), P2Plending, originated through crowdfunding platforms, have been included within the eligible investments for the Individual Long-term Savings Plans (PIR). Like the UK's IFISAs, Italian PIRs receive tax-free interest and capital gains on their investments.

Table 2 summarizes the current tax incentives for Italy that apply to specific crowdfunding models, even though they have not been specifically tailored for crowdfunding.

EQUITY CROWDFUNDING	Tax incentives for investing in innovative start-ups and SMEs	Deduction from the income tax of 30% of the invested amount, for natural persons; Credit on the corporate tax of 30% of the invested amount, for legal persons.
LENDING CROWDFUNDING	PIR	Tax exemption on the income from loans granted through P2P lending platforms.

Table 2. Summary of the tax incentives for existing crowdfunding models in Italy

Fiscal aspects 4: LEC incentive programme.

The Italian government has created an incentive programme to promote LECs. The economic contributions are recognized for 20 years from the date of registration of the plant, recognized by the GSE (Gestore dei Servizi Elettrici).

For each kWh produced of shared electricity the GSE recognizes:

- a unitary fee, identified as the sum of the transmission tariff for low voltage users and the highest value of the variable component of the distribution tariff for other low voltage users;
- a premium tariff equal to 110 €/MWh for energy communities.

At the end of the 20-year period, the contract may be extended on an annual basis, tacitly renewable, only in relation to the parts relating to the unit fee.

6 Compliance assessment

This section will define whether the approaches proposed in this part of the project are appropriate to the European and national legislation of each case study.

6.1 EPC model

EPC models are not new on the European energy efficiency scene. These models have been applied for several years with satisfactory results, especially in public-private contracts.

The only novelty that can be extracted from this project is the use of this model with private customers in the retail sector. Although this specific case is not very well developed, it is not due to regulatory barriers or legal or fiscal impediments.

The barriers faced by the EPC model contracted by private clients are more related to the existence of other more advantageous models to achieve the same objectives or the complexity of the EPC model.

Therefore, it can be stated that the EPC model is suitable with the European, Spanish and Italian legal and fiscal systems.

6.2 Partnership with technology providers

The case of partnerships with technology providers is even more widespread than EPCs. These types of contracts (leasing, PAAS, etc.) are becoming progressively more common in all types of sectors, seeking a higher level of competitiveness, continuity of income and greater customer loyalty.

With regards to the European or national regulation of this type of contract, no relevant legal or fiscal aspect has been identified. This type of contract is governed by private law and its legal and fiscal management is therefore the responsibility of the parties to the contract.

Therefore, the legal and fiscal suitability for the development of partnership with technology providers models at European, Spanish and Italian level can also be affirmed.

6.3 Crowdfunding models

This section pretended to give a compliance assessment for each of the crowdfunding models presented within this project but, to evaluate the compliance of each of the legal and fiscal aspects presented in previous points it is necessary to have several information of the specific case of crowdfunding object of evaluation such as the promotor, the investment or the potential consumers, among others.

6.3.1 Classic crowdfunding scheme

As it has been presented, this model is referred to as “classic” because it is derived from the classic’s forms of crowdfunding. For this reason, this scheme is presumably the less problematic one in the sense of regulation compliance. Under this model have been presented the main forms of crowdfunding in which the schemes can be based. These forms have been typically applied over the last years in different projects along the world and specifically around Europe and it is to expect that

this classic crowdfunding scheme can be easily adjusted to meet the requirements settled by the legislation presented in this report, always considering that the compliance of the specific legal and fiscal aspects has to be evaluated for each specific case since many particularities and factors have to be examined (promotor, total investment, investors...).

6.3.2 Rounding technique

The rounding technique is, as it has been explained in previous sections, an innovative crowdfunding scheme and this could lead to initial doubts on whether it is applicable in compliance of the current legislation or not. On these terms, it has been contrasted that this technique is being successfully applied in different supermarkets of Spain under the donation form. Specifically, during 2019 more than 5.3 million euros were donated on behalf of this technique. The fact that the technique is already put into practice, even if it were not applied for energy efficiency projects, helps verify that it is a viable option that can be furtherly developed and implemented in more projects. Again, and as in the other schemes, the compliance of the specific legal and fiscal aspects has to be evaluated for each case in which the rounding technique is going to be performed.

6.3.3 Sponsor products

The sponsor products model is another crowdfunding method that, together with the rounding technique, was designed specifically for supermarkets. In this case, the applicability of the sponsor products model is more obvious than the rounding technique, mainly because all supermarkets around the world are already applying this methodology for their loyalty campaigns. For this reason, it is easy to see the applicability of this method to another type of projects such as the ones that concern the Super-Heero approach. The only thing left to do would be to adapt the methodology used for existing campaigns to others focused on energy efficiency. This task is by far much easier than having to implement a crowdfunding method that has never been applied before from the beginning. As with the other schemes, it is important to lay down the fact that for a compliance evaluation it is necessary to examine each specific case on which the sponsor products model is to be applied, but the fact that is being already widely used in supermarkets for their loyalty campaigns gives an idea that it would not be very problematic for the compliance of the legislation.

6.3.4 Energy community

Apart from the legislation on crowdfunding compiled in previous sections of this report, energy communities are defined in two separate laws of the Clean Energy Package. The revised Renewable Energy Directive (EU) 2018/2001 which sets the framework for 'renewable energy communities' covering renewable energy and the revised Internal Electricity Market Directive (EU) 2019/944 which introduces new roles and responsibilities for 'citizen energy communities' in the energy system covering all types of electricity. However, and in despite of being contemplated in these two laws, the main drawback of this model is the fact that the regulatory framework is still incomplete and that is complicated to structure an energy community from the legal and contractual point of view. Another fact that difficulties the task of evaluating if this scheme follows the current legislation is that, frequently it is difficult to understand what it is an energy community, how it works and what are its

advantages. Furthermore, there are also very few existing examples, mostly pilots. All these factors make it difficult to say if this model will easily comply with the current legislation when applied to energy efficiency projects on supermarkets and, again, the specific cases will have to be studied to give a final assessment of this.

6.4 Conclusion

The overall conclusion of this report is that **all the models presented comply in their basic structure with the legislation in force at European and national level.**

It can therefore be stated that in its most basic and structural aspects there is no conflict with the existing legal and fiscal systems. However, when implementing each of the analysed models, the person responsible for the implementation of the Super-Heero scheme must take into account the aforementioned legislation in order not to contravene any legal provision.

	Compliance
EPC model	✓
Rounding technique	✓
Crowdfunding models	✓
Classic crowdfunding scheme	✓
Rounding technique	✓
Sponsor products	✓
Energy community	✓

Table 3 - Conclusion of the compliance assessment