

# EPC+ legal template



**FinEERGo-Dom**  
GREY PAST 2 GREEN FUTURE

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## EXECUTIVE SUMMARY

The purpose of Task 4.2 is to adapt the basic EPC+ template first applied under the LABEEF Guidelines within the legal framework of each partner country. The overall objective is to maintain the structure of the Investment Policy Guidelines and adapt the documentation only where national law or regulations require.

This document has been structured in two parts. This first part summarises the analysis done on the adaptation of the EPC+ by each partner country. The second part is substantial set of annexes which contain the actual EPC adaptations and any legal opinions or other comments by the partner country.

Inspired by the Berlin Energy Agency's EPC experience combined with an earlier renovation methodology of the Truehand in renovating East Germany's apartments, Alternative Investment Fund Manager, Funding for Future B.V. "F3", with the support from KPMG Climate Office London, Bird&Bird, a leading City law firm and EPC experts, developed set of Investment Policy Guidelines for dEEp renovation of buildings. These were subsequently reviewed by bankers, engineering firms as well as a consumer protection agency, these documents and their supporting instructions, spreadsheets templates, deliver standardized documentation and promote scale through aggregation while increasing transparency.

The Policy Guidelines were first introduced in Latvia, where the pioneer private finance facility, LABEEF, was set up. This first facility was not 'tweaked' to fit expectations of the Latvian market, but to set a golden standard for financing performance based renovation of residential buildings. Therefore, any local market driven adaptations, as opposed to regulatory or legal, are detrimental to the original objective of the project to replicate the model in its entirety and create a homogenous, standardized benchmark across Europe: its not about E.E. but about Real Estate Guaranteed Energy Performance. Institutional multilateral financing institutions and investors, such as EBRD, the Latvian promotional bank, ALTUM and private sector investors found this financial instrument well suited to large scale financing of residential building sectors through the dedicated Building Energy Efficiency Facilities. The Commissions DG Regio thoroughly analysed the tool and see is a financing instrument supporting building owners.

Adapted EPC+ templates have been provided by Econoler (Bulgaria), Mattig Management Partners "MMP.SK" (Slovakia), Mattig Management Partners "MMP.RO" (Romania), The National Fund for Environmental Protection and Water Management "NFOSiGW" and Austrian Energy Agency ("AEA").

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Based on comparative analysis of the adapted EPC+ templates across countries, it can be concluded that there are no legal material differences. There are some country specific legal aspects, which need to be taken into consideration (for example in Slovakia the term “Latent conditions” is not recognised but the underlying proposed text addresses the same aspect), but major discrepancies in the proposed contracts are mainly due to current market practices and structures as opposed to differences in the legal framework. It should be highlighted that the BEEF contracts govern the relationship between two private entities (Homeowners Association and private fund) and therefore public procurement rules do not apply. In event there is co-financing with subsidies, public procurement rules apply. The scheme in its entirety is completely new for all the countries, especially in the multi-family sector. In Bulgaria, one major issue that has been highlighted is that the investment cost can be repaid only by the generated savings in public contracts (at time of writing revised version of the EE is to be approved by Parliament and in the revised act there is no such restrictions). This would defeat the objective of incorporating additional safety, health and comfort measures in the renovation process to deliver best value for customers and the revised EE Act will support this objective. Furthermore, the current transposition of the Energy Efficiency E.U. Directive<sup>1</sup> in Bulgaria is rather incorrect since the Directive does not specifically abides for the repayment to be done from energy savings but can also be repaid from “other agreed energy performance criterion, such as financial savings” (see individual country analyses).

In the Annexes of this report, summary of the legal opinion and main differences identified in the EPC+ templates is provided. For Bulgaria, there are two versions: one version as provided by Bulgarian partner, Econoler, and a second version, where F3 has adapted the submitted version to reflect the original template as much as possible for the use of an online platform. For Austria, the contract annexed herewith is a translation of the LABEEF contract into German and has been transformed to include all building standards, guidelines, and norms. The contract is ready to be used from technical and commercial perspective and only needs to be confirmed from legal perspective. Austrian partner will use the contract in their engagement with stakeholders and at the same time seek pilots for implementation. Once a pilot is confirmed and there is a project to be implemented, legal opinion will be sought. None of the partner countries have experience of using Energy Performance Contract for renovation of buildings in the multifamily sector, so introducing the EPC+ contract is an innovation which will require time for awareness and comfort with the concept.

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<sup>1</sup> 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

## ANNEXES

## Slovakia

### Legal Opinion

In Slovakia, MMP.SK used the service of *CLC advokátska kancelária s.r.o. ("CLC")* to provide legal opinion of the replicability of the LABEEF contracts, including the EPC+ template.

CLC noted that "European legislation shall apply within the scope of regulations, as well as **Act No. 321/2014 Coll.**, Energy Efficiency Act, and other legal regulations valid for the territory of the Slovak Republic". Most of the experience of applying EPC concept for renovation of buildings in Slovakia is in the public sector. The originally provided legal opinion deviated towards the experience gained from the public sector. Therefore "in accordance with the methodology of EPC contracts, such an analysis should include analysis of the Client's current energy system and the use / operation of the said system to the extent required by the Provider for the purpose of

- verification of the correctness of the documents provided by the Client;
- obtaining a more detailed picture and overview of the potential for energy savings; and
- preparation of project documentation for reconstruction.

In Slovakia, 70% of multifamily buildings in the residential sector have been renovated using national subsidies. However, the eligibility of measures under the subsidy programme excludes some of the additional measures that can be implemented under a BEEF type structure. There have also been numerous cases, where the renovation been of poor quality and maintenance has not been put in place. This leaves an opportunity for LABEEF type structure to address such market failure.

### EPC+ adaptation

In addition to the EEA, CLC points out:

"Section 6 of the Act on the Ownership of Apartments and Non-Residential Premises regulates the administration of an apartment house by owners of the apartments and non-residential premises. A community of the owners of the apartments and non-residential premises, being a legal entity, may be established for the administration of the apartment house, or the owners of the apartments and non-residential premises may enter into a contract for the administration of the apartment house with another legal entity or natural person, especially a housing cooperative."

"The administration of the apartment house shall mean the procurement of services and goods by which the administrator or community ensures, for the owners of the apartments and non-residential premises in the house, the operation, maintenance and

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repairs of common parts of the house, common facilities of the house, adjacent land and accessories, services related to the use of the apartments or non-residential premises, keeping a house account with a bank, recovering compensations for any damage or arrears in the fund for operation, maintenance and repairs, and other arrears, as well as other activities that are directly related to the use of the house as a whole by individual owners of the apartments and non-residential premises therein. The administration regime is therefore essentially the same, regardless of whether it is carried out by the community of the owners or by the administrator.

If the owners of the apartments and non-residential premises enter into a contract on the administration of the apartment house with the administrator, then the administrator shall be obliged, pursuant to Section 8b of Act No. 182/1993 Coll., to administer the house independently on behalf and at the expense of the owners of the apartments and non-residential premises in the house and shall be entitled to act, in the administration of the house, on behalf of the owners of the apartments and non-residential premises in the house and represent them before a court Pursuant to Section 69 paragraph 12 letter j) of the VAT Act, in the case of supply of construction works, including the supply of the building or part thereof under a contract for work or other similar contract falling within Section F of the CPA, and in the case of supply of goods together with installation or assembly if the installation or assembly falls within Section F of the CPA, a person obliged to pay tax shall be the taxpayer who is the recipient of the performance from another taxpayer, i.e. if the taxpayer delivers performances defined in Section 69 paragraph 12 letter j) of the VAT Act to another taxpayer to the place of delivery in the same country, the taxpayer receiving the performance shall be in the position of the recipient of the performance, and thus the person obliged to pay tax.

If, in ensuring construction works according to Section 8b paragraph 1 of Act No. 182/1993 Coll., the administrator of the apartment house acts on behalf and at the expense of the owners of the apartments and non-residential premises in the house, the administrator shall not be in the position of the recipient of the construction works, and thus he shall not be the person obliged to pay tax according to Section 69 paragraph 12 letter j) of the VAT Act, i.e. in such case, the supplier of the construction works shall issue the invoice with the application of VAT.

“If the administrator of the apartment house acts on behalf and at the expense of the owners of the apartments and non-residential premises, he should not act as a taxpayer when ordering any performance, if he is assigned VAT ID as a taxpayer due to the administration of apartments and non-residential premises, but only as the administrator representing the owners of the apartments and non-residential premises.”

Special attention has to be paid to the fact that if the subject of the renovation also includes major reconstruction of the building that is not intended to achieve energy

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savings, the rights and obligations of the parties to the contract need to be aligned with Act No. 513/1991 Coll., the Commercial Code.

There are no significant differences in the EPC+ template for Slovakia. Reference has been made to the applicability of corresponding laws & regulations of the Slovak Republic. In the implementation of a BEEF facility, separate tax advice should be sought to determine the payment obligations and possible scenarios under the agreement both for the energy efficiency supplier and owners. It has been suggested that an 'Operating Buildings Manual' for owners which includes a set of operating rules will enhance the entire concept. The Manual should contain information and advice on how to best use the building and remind owners of their obligations post implementation of measures as well as additional necessary 'care' for the building. Slovak legislation does not recognize the term "latent conditions" therefore the term has been defined in the contract. Also, liquidated damages are not a recognized term and has been replaced with 'contractual penalty'.

## Romania

### Legal Opinion

In Romania, MMP.RO used the service of *Cabinet de avocatura Fleischer Alina* to provide legal opinion of the replicability of the LABEEF contracts, including the EPC+ template.

Just like the other replicating countries, there are no projects in the multifamily sector in Romania using EPC and therefore the proposed scheme is new. Understandably much of the legal opinion deviates to the public sector and refers to requirements proposed by National Energy Regulator – ANRE.

However, the opinion also states that “We see this mechanism “(LABEEF)” as possible when it comes to concluding an Energy Performance Contract with a private entity where the legislation is much more permissive”. Furthermore, under Romanian legislation, article 32 and following of Law number 196/2018, “the owners are obliged to take measures for the consolidation and modernization of the condominium, modernization of the equipment, systems and related facilities, the installation of meters for separate consumption readings for each individual property, the thermal rehabilitation to increase energy performance, as well as for the structural and architectural rehabilitation of the condominium envelope to increase its architectural and environmental quality, according to the legal provisions, provided that harmonious and unitary appearance of the entire condominium is kept, regardless of the nature of the works”. The implementation of LABEEF type instrument aligns with the above requirements and can support owners in meeting their obligations. Whilst the presence of a building manager/maintenance company in the multifamily sector is not common in Romania, a building manager can be legally appointed by the Owners’ Association to this end and “only for employing the services regarding the common parts of the building”. Under law 196/2018 “the management, operation, maintenance, repair, rehabilitation and/or modernization, as the case may be, of the common property related to the condominium are the responsibility of the Owners’ Association”. The Owners’ Association is the legal form of organizing and representing the common interests of the owners of a building. Additionally, according to the legislation in force, “the owners members of the Association have the obligation to approve an annual repair fund, necessary for the repair and improvement of the common property”. The repair fund is used only for the consolidation of the condominium, the thermal rehabilitation, as well as for the repair and improvement of the common property.

Resources under such funds can be used to service the payments under the EPC, related to the common parts of the building.

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In conclusion, adaption of the model is possible, especially considering the new and innovative solution. Number of regulations in fact can provide incentives in support of the functioning of a BEEF type facility, such as requirement of annual repair fund and obligations for owners to take measures for modernization of condominiums.

### **EPC+ adaptation**

In summary “Analyzing the case of entering an EPC with a private entity, we modified the documents submitted by the client in accordance with Romanian legislation, but we would like to draw special attention to the fact that these changes were made in the conditions in which in Romania there is no dedicated Facility like LABEEF and also there is no EPC model yet and no set of financial and technical rules and guideline for energy efficiency measures officially developed by the Romanian authorities. (ANRE or the Ministry of Development), in addition to the applicable international ones”.

No major changes have been proposed in the adaptation of the EPC+ contract. Reference has been made to Romanian legislation where necessary.

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## Bulgaria

### Legal Opinion

In Bulgaria, Econoler used the services of M&P law firm to provide legal opinion of the replicability of the LABEEF contracts, including the EPC+ template.

The following Acts were considered in the analysis of the legal framework and replication of the documents:

- Energy Efficiency Act /EEA/
- Public Procurement Act /PPA/
- Spatial Development Act /SDA/
- Property Act /PA/
- Condominium Ownership Management Act /COMA/

Detailed overview of the framework and legal opinion is provided in a report under D4.1 'National Context, Legal and Regulatory Framework Analysis'.

The experience and know-how of using EPC has been understandably drawn from the public sector, even though the LABEEF EPC+ is a contract between two private entities. Three key points need to be highlighted, based on the legal analysis provided:

- There is ambiguity in the repayment of the investment cost under an Energy Performance Contracting, based on the wording in the EEA in Bulgaria. Under the EEA "with the investments made being recouped and the remuneration due to the contractor being paid for from the energy savings obtained". The EU Energy Efficiency Directive, which governs EU member states Acts and laws, does not place such restriction and states that "measures are paid for in relation to a contractually agreed level of energy efficiency improvement or other agreed energy performance criterion, such as financial savings". Although the word "only" has not been explicitly used in the BG Act, market practice in the public sector has shown this to be the interpretation of the law. This places somewhat certain restrictions for the beneficiary himself to arrange some of the financing, for example in the form of grants, and therefore have blended financing. Under the BEEF scheme, the EPC+ also incorporates additional non EE measures in order to deliver comfort and wellbeing for owners, which can result in other non-energy savings. It should also be noted that the proposed EPC+ is a contract between two private entities, where both sides agree to the rights and obligations as specified in the contract.

- The second aspect of the legal framework, which has created some ambiguity in the market is the ability to transfer future receivables at a point when the amount of receivables is not fixed at time of transfer. As highlighted in the legal opinion According to Article 100 of the Contract and Obligations Act the receivables are transferred to the assignee to the extent in which the assignor has held them or to be more precise "If a

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transfer is for consideration, the creditor shall be liable for the existence of the claim at the time of the transfer”.

This ambiguity has led to a number of court cases involving the public sector. Although the majority of cases have been in favour of the public institution, there has been one case, as cited in the legal opinion, where the “legal qualification on the same contract” has been “an engineering contract” where “The contract is a simple commercial agreement between equal parties - two commercial companies”. Furthermore “the parties' will, when entering into the contract, was to entrust the contractor with the activities, including those not directly related to improving energy efficiency, by financing the investment himself, and then the investment to be paid by the client within a specified period in the manner agreed in the contract. The contract also does not contain stipulations exempting the client from its obligation to pay the contractor the investment, if there are no savings”. It has been concluded that “the legal definition of ESCO contracts does not oblige equal commercial companies such as the parties to enter into contracts which stipulate the payment of the full amount of the investment and the contractor's remuneration to be made solely at the expense of performed energy savings”. Therefore, the same conclusion can be reached given the BEEF contract is between two private entities. Practically, as one of the parties to the contract purchases saved energy, the contract in practical terms is Energy Efficiency Subscription contract.

- Under the legal opinion “The Condominium ownership does not represent a separate legal entity, i.e. there is no legal personality”. Therefore, in order “To utilize European Union funds and / or funds from the state or municipal budget, grants and subsidies and / or use of their own funds for major repairs and / or major renovation of condominium buildings, owners may establish an association”. It is also stated that “The association has a legally defined subject, which limits its activities” and under “Art. 25, para 2 allows the association to perform other activities in connection with the management of the common parts. As already stated, management in this case is the scope of rights under Article 8 of the COMA, and the assignment of services under an ESCO contract would hardly fall under the definition of managing common areas”. Now, this conclusion can be debatable since under the BEEF model, the maintenance company undertakes the obligations to maintain the measures, which complements its regular activities of managing the common areas. An additional specific clause in the Articles of the Association can also expand the activities of the Association and allow for full applicability of the model.

## **EPC+ adaptation**

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It is important to highlight that the summary of the differences between the EPC+ templates provided below is based on the adapted EPC+ template submitted by Econoler and subsequently modified by F3. Both versions have been provided in the annexes of this report. The submitted version had been provided in a different format, which made it slightly difficult to identify key differences to the original template and more importantly to be incorporated into the platform (keeping the same format as the original version and as per the contracts submitted by Slovakia & Romania). The objective of the project is to identify tangible differences in the applicability of the model based on local regulatory framework and where possible keep the concept the same as much as possible. Therefore, F3 performed line by line comparison of the differences (excel can be provided upon request).

Herewith provided is a summary of the main changes proposed in the adapted contract:

- The BG version includes the concept of Efficiency Coefficient, being the ratio between the guaranteed energy savings and the actual energy savings, which determines over/under delivery on the guarantee (less or greater than 1). This determines the compensation due to the final beneficiary in case of non performance. In the LABEEF version, 'the Balance' is calculated as the difference between the actual and guaranteed savings, which in turn determines the compensation (negative/positive). The underlying calculations however are the same. The monetary value of the over/under performance in the BG version is based on a "price determined in the contract for thermal energy consumption for the Building", whilst in the LABEEF version it is based on the average tariff price over the settlement period.
  - In the BG version a 'monitoring fee' is also incorporated, which is not in the LV version. Monitoring should be compulsory as part of the services and necessary for the purpose of savings verification.
  - The IPMVP protocol is not recognized in Bulgaria, but the revised version allows for both the IPMVP and locally approved M&V to be applied.
  - Clients can be both authorized legal persons or entities (Housing Association/cooperative) as in both contracts.
  - Additional clarification has been added under the BG contract added to allow for contractors to remedy defaults in 10 days upon advice by client. This ties in with the obligations as listed under the Contractor.
  - Building Operating Manual ("BOM") to be included separately, in addition to Maintenance Manual. BOM falls outside the scope of the project, but partners will acknowledge this.
  - The BG contract refers and provides some clarification of the fees under each owner, but from a 'fee' paying perspective final amount due by each owner is governed by the obligation of owners as part of the Housing Association and the Manager. The fee is based on the total fee due from 'the building'.
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- Additional articles added to strengthen the obligations of the owner and underline in case of breach of obligations, the guarantee will fall away. This is also covered under obligations of the client.
  - Under Assignment of Claims, reference has been made to the Obligations and Contract act, which stipulates that 'transfer of claims can happen only if the creditor has possession of them at time of transfer'. By upfronted this in the contract, the parties acknowledge the regulations but yet agree to the fact that receivables can be transferred as defined in the contract.
  - Additional clause undermining the fact that if the client does not 'co-operate' for delivery of obligations on part of the contractor, the guarantee will be recognized as being achieved.
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## Poland

### Legal Opinion

On 18th December 2020 an agreement was officially signed between the Polish Development Fund S.A. (“PFR”) and the National Fund for Environmental Protection and Water Management (“NFEP&WM”) with the participation of the Polish Minister of Climate and Environment, Mr. Michał Kurtyka. The objective of NFEP&WM & PFR is to create and implement the priority program in Poland, including documentation, rules and procedures to be completed by end of March 2021.

At the end of December 2020, NFEP&WM provided the first template of the EPC+ in Polish and recommended changes in the LABEEF English version. The proposed changes are to ensure that the contractual arrangements are in line with the Polish legal framework and market practice. Although the template provided is not the final version, herewith are the proposed changes:

- Flat owners will not be party to the EPC+ agreement. The agreement will be between NFEP&WM and the Housing Association (“HoA”) or Housing Cooperative (“HoC”), determined by legal circumstances. Depending on the specific circumstances of each building, obligations of the owners might differ and should be assessed on a case-by-case basis. The lawyers confirmed that there is joint and several liability by owners, and this is standard practice in Poland.
  - Payments of hot water and heating fee will be done by individual owners directly. The HoA/HoC will request payments for hot water, heating of the common parts only and for the renovation cost (individual payment based on individual flat sq.m. ownership). Exact payment structure to be finalized.
  - There are some multifamily residential buildings in Poland where the HoA/HoC undertakes the maintenance of the building itself (if the skills and experience is present) and others where maintenance is outsourced.
  - Energy service verification protocol definition will be included in the EPC+ and reference made to forfeiting by PFR upon delivery of the protocol. NFEP&WM would like to make the process transparent and outline the entire structure to all stakeholders upfront. The forfeiting agreement will also be signed together with the EPC+.
  - IPMVP is not recognized and therefore Polish specific measurement & verification methods will be used.
  - The ‘Guarantee’ requirements will be made less stringent. NFEP&WM is of the opinion that some of the requirements are very stringent and their main purpose is to ensure the mechanism is widely applied. The requirement of 5% guarantee for 36 months after confirmation of results is likely to be removed. F3 proposed to NFEP&WM for the guarantees during the construction period to remain as this is where the most risk lies.
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- Insurance requirements will also be loosened but be perfectly in line with Polish requirements. Assignment of claims will refer explicitly to PFR.
- Confidentiality & Amendment rules will be tailored towards Polish requirements and made less stringent.

Considering the more technical nature of the EPC Specific T&C, NFEP&WM is continuing discussions internally with the technical team and the Polish version will be provided at a later stage.

## EPC+ Templates

The EPC+ templates developed for the above-mentioned countries are available at the SUNSHINE website. Please register and log in at <https://sunshine.stageai.tech/> to access.

For Austria and Poland, the templates are being finalized and will be available soon.

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