

Client Alert

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Corporate Department

Boosting Innovative Start-Ups in Italy: The New Framework

On October 18, 2012, Italian Law Decree no. 179 on "Further urgent measures for Italy's economic growth", commonly known as "*Decreto Crescita bis*", introduced a comprehensive new framework regulating innovative start-ups. On December 13, 2012, the Law Decree no. 179 was modified by the Parliament and subsequently converted into law (the Start-Up Regulation)¹. The Start-Up Regulation provides a new set of rules promoting the creation and development of innovative start-ups (*start-up innovative*) with a view to encouraging innovation and strengthening of enterprises' competitiveness.

This *Alert* discusses the key provisions, features and advantages of the innovative start-ups as introduced by the Start-Up Regulation.

"The new framework approved by the Italian Government boosts innovative start-ups with several legal, tax, labour and corporate incentives."

Introduction

The Start-Up Regulation provides a new systematic approach in regulating innovative start-up companies. The new legal framework is directed to all players operating in such field and is contained in one comprehensive text aimed at targeting all phases of the life cycle of a start-up.

Creating incentives that are aimed at removing obstacles and costs for business start-ups and incubators are considered key for stimulating the labour market and the Italian economy in general, thus the Start-Up Regulation has introduced several exceptions to the general principles of law applicable to enterprises, namely: (i) the reduction of setting up costs, (ii) the possibility of providing work-for-equity instruments to remunerate directors, employees and consultants, and the introduction of significant tax incentives to the subscription of such instruments and (iii) facilitating the employment of fixed-time employees, derogating general labour law and therefore reducing the cost of labour. In addition, the Start-Up Regulation sets forth a significant set of rules aimed at encouraging investments in such businesses in order to allow their development.

Indeed, new rules now allow the public offering of quotas of innovative start-ups incorporated under the form of limited liability companies (otherwise forbidden under Italian law) and tax incentives are specifically introduced for both individuals and legal entities that subscribe such offerings. This new set of rules is meant to create a new segment of venture capital in the Italian market, fully dedicated to innovative businesses.

Additionally, the Start-Up Regulation also provides for exceptions to bankruptcy law provisions.

Requirements to Qualify as Innovative Start-Ups or Certified Incubators

Definition of Innovative Start-Ups

The Start-Up Regulation defines “innovative start-ups” (*start-up innovative*) the private so-called *società di capitali* as incorporated under Italian law², or the private *societas europaea* residing in Italy, which are not listed and which meet all following requirements:

- the share/quotaholders, that are individuals and not entities, shall hold on the date of incorporation and for the following 24 months the majority of quotas/shares and majority of voting rights of the ordinary share/quotaholders’ meeting;
- the company has been incorporated and has been active for a period no longer than 48 months;
- starting from the second year of activity, the total value of yearly turnover shall not exceed €5 million;
- the company does not distribute profits;
- the company shall not result from the merger, division or transfer of business from a going concern; and
- the exclusive or prevalent business scope of the company is the development and commercialization of innovative products or services with high technologic value.

While there is no legislative definition of “products or services with high technologic value”, the Start-Up Regulation specifies that a start-up is considered innovative when it meets at least one of the following requirements:

- research and development’s costs that are equal to, or more than, 20 percent of the greater of the company’s total costs and the total value of the production³;
- at least one-third of the workforce is composed by people who either hold a PhD or are PhD candidates at an Italian or foreign university or have conducted research for at least three years; and
- the start-up owns, or is the licensee of, or has filed an application for the registration of, industrial property rights related to the business activity of the company.

The Start-Up Regulation also introduces the sub-category of the innovative start-up with social purposes (*start-up innovative a vocazione sociale*). This particular type of start-up differs from the ordinary innovative start-up because the company’s activity is carried out exclusively in the sectors identified under Law Decree no. 155/2006⁴. The innovative start-up for social purposes is granted a more favourable tax regime.

Definition of Certified Incubator

The Start-Up Regulation defines “certified incubators of innovative enterprises” (*incubatore certificato di imprese innovative*) the private so-called (*società di capitali*) incorporated under Italian law⁵, or the private *societas europaea* residing in Italy, providing services and support for the creation and development of innovative start-ups.

In particular, a certified incubator must meet the following requirements:

- availability of facilities, including real estate, adequate to accommodate innovative start-ups, such as spaces reserved in order to install equipment for tests, analysis, research;

- availability of adequate equipment for the activity carried out by innovative start-ups, such as broadband access to Internet, meeting rooms, testing equipment, samplers or prototypes;
- direction or management by professionals of recognized competence and availability of a structure providing for ongoing technical and managerial consulting;
- ongoing relationships with universities, research centers, public institutions and financial partners that carry out activities and projects related to innovative start-ups; and
- adequate and proven experience in supporting innovative start-ups, the existence of which is assessed in accordance with the detailed criteria identified by the Start-Up Regulation.

Registration Duties and Timing

Innovative Start-Ups

An innovative start-up meeting all requirements listed above must register in a special section of the relevant Companies' Register which is the one where the registered office of the start-up is located.

Companies that were already incorporated before December 19, 2012 and that meet the requirements provided above, can qualify as innovative start-ups by filing an *affidavit* with the relevant Companies' Register within 60 days from December 19, 2012, certifying that the company meets all the applicable requirements.

The duration of the effects arising from the registration as an innovative start-up varies depending on the year on which the company has been incorporated.

Certified Incubators

In order to become a certified incubator, any company meeting the requirements listed above must register in a special section of the relevant Companies' Register.

Also in this case, the legal representative of the certified incubator will have to file an *affidavit* with the relevant Companies' Register certifying that the company meets all applicable requirements.

The Advantages

A company registered as an innovative start-up benefits from the following advantages⁶:

- **Exemption from Setting Up Costs:** starting from the date on which the innovative start-up and the certified incubator are registered in the relevant section of the Companies' Register, the following payment exemptions are applicable: (i) the stamp duty (*imposta di bollo*); (ii) the administrative fees (*diritti di segreteria*) and (iii) the annual fee for the registration at the relevant Chamber of Commerce (*diritto annuale*).
- **Exceptions to Certain General Provisions of Corporate Law:**
 - **Postponement of Re-Capitalization Obligations:** in the case of losses, innovative start-ups will have a longer period to recapitalize. In particular, the innovative start-ups have an extension of additional 12 months:
 - to carry-forward the losses (*rinvio a nuovo delle perdite*) and to reduce them at less than one-third of the capital, if the losses are higher than one-third of the capital;

- to decide, through a share/quotaholders' meeting resolution, to recapitalize the share capital up to the statutory minimum⁷ or to liquidate the company, in case the losses have reduced the share capital below the statutory minimum.
- **Special Categories of Quotas for Limited Liability Companies:** the by-laws of a limited liability company (*società a responsabilità limitata*) can provide special categories of quotas granting to the quotaholders special rights. In particular, the by-laws can provide (i) that the rights are granted to the quotaholders on a non-proportional basis and (ii) that specific quotaholders are granted with particular administrative or dividend rights. Moreover, the by-laws can also provide for categories of quotas with customized voting rights (e.g. conditional, limited to certain matters, veto rights, etc.).
- **Public Offerings of Quotas:** as an exception to the statutory prohibition provided under the Italian Civil Code, the quotas of innovative start-ups incorporated as limited liability companies (*società a responsabilità limitata*) can be offered to the public by means of a public offering of financial products (*offerta al pubblico di prodotti finanziari*). Such public offering can be made also through crowdfunding portals as described below.
- **Exceptions to the Start-Up Regulation for Shell and Dormant Companies:** the amount of investment does not necessarily have to be linked to a specific turnover as required by the provisions regulating shell and dormant companies⁸.
- **Transactions on Treasury Quotas:** as an exception to the statutory prohibition provided in the Italian Civil Code, the innovative start-ups incorporated as limited liability companies (*società a responsabilità limitata*) are allowed to perform transactions on their treasury quotas if such transactions aim at implementing incentive plans that provide for the allocation of quotas to employees, consultants, directors or providers of work or external services (stock options and work-for-equity structures)⁹.
- **Work-for-Equity Instruments (*strumenti finanziari partecipativi*):** innovative start-ups and certified incubators can decide to remunerate their directors, employees, or consultants, with work-for-equity instruments that allow the beneficiaries to obtain stocks, quotas or other similar interests in the company. Such equity instruments give right to an advantageous tax treatment for the holders: the shares, quotas or other interests granted in connection with these incentives schemes shall not be taken into account in determining the taxable income of the work supplier.
- **Crowdfunding:** Innovative start-ups can raise capital by using crowdfunding online portals¹⁰ through a simplified procedure in exemption from the public offer rules. The surveillance on the crowdfunding activity will be carried out by Consob (the public authority responsible for regulating the Italian securities market). The main features of the crowdfunding system are the following:
 - **Entities Eligible to Manage Crowdfunding Portals:** investment companies, banks authorized to carry out the investment services, or limited liability companies registered in a special registry kept by Consob, which must submit all orders regarding the underwriting and sale of financial instruments representing capital exclusively to banks and private companies.
 - **Guidelines for the Public Offering through Crowdfunding Portals:** the public offerings conducted exclusively through crowdfunding portals must have as exclusive purpose the underwriting of financial instruments issued by innovative start-ups for a total investment which is less than €5 million¹¹.

The details of the crowdfunding system will be set forth in a specific Consob's regulation, which must be adopted within 90 days from December 19, 2012. In

particular, the Start-Up Regulation requires that the rules implemented by Consob must take into account the following: (i) if the offering is not reserved exclusively to professional investors or to particular categories of investors, then at least a quota of the financial instruments shall be underwritten by such professional investors and (ii) non-professional investors must be protected in case the quotas of the controlling share/quotaholders of the innovative start-ups are transferred to third parties following the offering.

- **Easier Access to Financing:** innovative start-ups and certified incubators have access to the services of the Central Fund of Guarantee for Small and Medium-Sized Enterprises (*Fondo centrale di garanzia per le piccole e medie imprese*) free of charge and with a simplified process, which will be implemented by the Ministry of Finance and the Ministry of Economic Development within 60 days from December 19, 2012.
- **Exceptions to Ordinary Insolvency Procedures:** in the event of an insolvency crisis of the innovative start-up, the ordinary pre-insolvency and insolvency procedures are not applicable. The Start-Up Regulation opts for a "fresh start" approach by providing that innovative start-ups are subject only to the procedures so-called "over-indebtedness procedures". Pursuant to such procedures, the entrepreneur will have a fast track to liquidate the assets of the innovative start-up and restart other business activities reducing the damage to reputation that could arise from the ordinary insolvency procedures.
- **Special Provisions of Labour Law:** innovative start-ups can enter into fixed-term labour agreements which last from six to 36 months, save as to any other case in which the duration is permitted to be less than six months under Italian law. As an exception to the standard statutory provisions, innovative start-ups are not required to provide any justification (*causale*) for entering into fixed-term agreements. Within the 36-months limitation, the agreements can also be renewed more than once. Following the 36-months period, the agreements can be renewed one more time for a period of no longer than 12 months¹². The continuation of such fixed-term agreements beyond their maximum duration or the continuation of the working relationship with any other form of fixed-term agreement that has not met the requirements for being an agreement for the provision of work or services (*contratto per la prestazione d'opera o professionale*) are transformed into open-ended employment agreements. The compensation structure of a fixed-term employee of an innovative start-up must include a fixed component and a variable component. In respect of the fixed component, the amount must not be lower than the minimum set forth by the relevant collective bargaining agreements. The variable component must be linked to the performance and profitability of the company, the productivity of the employee or the staff, or other performance parameters or targets agreed between the parties, including granting of stock options for the purchase of quotas or shares of the company.
- **Tax Incentives:** the Start-Up Regulation introduces tax incentives for corporate and private investments in innovative start-ups for the years 2013, 2014 and 2015. In particular, (i) personal income taxpayers investing directly or indirectly in innovative start-ups through collective investment schemes (*organismi di investimento collettivo*) that specialize in investments into innovative start-ups, may benefit from a tax credit (*detrazione*) equal to 19 percent of the amount invested up to a maximum of €500,000 and (ii) corporate income taxpayers investing directly or indirectly through collective investment schemes (*organismi di investimento collettivo*) or other companies, which specialize in investments into innovative start-ups, may benefit from a tax allowance (*deduzione*) equal to 20 percent of the amount invested in the innovative start-up's share capital, up to a maximum of €1.8 million. Tax incentives are granted upon condition that the investor maintains an amount at least equal to the tax incentive in the innovative

start-up for at least two years. Tax incentives are greater if the investment concerns startups with a social purpose or those operating in the energy sector. Moreover, innovative start-ups and certified incubators, under certain conditions of the Start-Up Regulation, may benefit from a tax credit equal to 35 percent of the costs incurred for hiring highly qualified personnel with open-ended agreements, up to a maximum of €200,000.

Endnotes

- ¹ Publication of the Start-Up Regulation on the Italian Official Gazette (*Gazzetta Ufficiale*) occurred on December 18, 2012. The Start-Up Regulation entered into force on December 19, 2012.
- ² Namely, joint stock companies (*società per azioni*), the share partnership companies (*società in accomandita per azioni*), the limited liability companies (*società a responsabilità limitata*), the cooperative companies (*società cooperative*). The category of limited liabilities companies also includes the recently introduced simplified limited liability company (*società a responsabilità limitata semplificata*) and the limited liability companies with reduced share capital (*società a responsabilità limitata a capitale ridotto*).
- ³ Research and development costs also include: (i) costs relating to the pre-competitive and competitive development, such as costs of experimentation, prototyping and development of the business plan; (ii) costs of incubation services provided by certified incubators; (iii) gross costs of internal staff and external consultants involved in research and development activities, including the shareholders and directors and (iv) attorneys' fees for the registration and protection of intellectual property, terms and licenses of use.
- ⁴ The sectors considered under Law Decree no. 155/2006 are: social assistance, health care, health and social care, education, instruction and training, protection of the environment and the ecosystem, promotion of cultural heritage, social tourism, university and post-graduate education, research and provision of cultural services, training outside school, operating services of social enterprises.
- ⁵ The form of limited liability companies which are eligible to become certified incubators are the same as those for innovative start-ups. See footnote 2.
- ⁶ The advantages for certified incubators are: (i) the possibility of issuing financial instruments; (ii) the incentives relating to work-for-equity incentive plans and (iii) the support for gaining easier access to credit.
- ⁷ For joint stock companies (*società per azioni*) and share partnership companies (*società in accomandita per azioni*) the statutory minimum capital is of €120,000. For limited liability companies (*società a responsabilità limitata*) the statutory minimum capital is of €10,000. The category of the limited liabilities companies also includes the recently introduced simplified limited liability company (*società a responsabilità limitata semplificata*) and the limited liability companies with reduced share capital (*società a responsabilità limitata a capitale ridotto*) which require a symbolic minimum capital of €1.
- ⁸ In general, the provisions under Law no. 724 of December 23rd, 1994 and Law no. 148 of September 14th, 2011, provide that dormant and shell companies have a minimum taxable income, which is determined on a presumptive basis and is not relating to the income or losses that have been effectively reported by the company.
- ⁹ The tax system applicable to these instruments is advantageous and is tailored on the most common needs of a start-up. Certified incubators can also make use of these instruments.
- ¹⁰ The provisions of the Start-Up Regulation introducing the crowdfunding portals follows up the recent equity crowdfunding provisions governed by Title III of the JOBS Act in the United States.
- ¹¹ Under Article 100, letter c), of Italian Legislative Decree No. 58, February 24, 1998, any public offerings of financial instruments for a total consideration of less than €5 million is eligible for an exemption to the Italian rules on public offerings which require the registration of the offer with Consob.
- ¹² The total duration of the work relationship in this type of fixed term agreements cannot last longer than 48 months.

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