

during the arbitration procedure nor did he use any annulment means under French law, refused the complaints because the Court concluded that the arbitration proceedings had been adequately substantiated since the opponent had the opportunity to appear and his failure to do so was totally voluntary.

- Another interesting issue was raised in decision 97/ 2012 on the grounds of an alleged 'extra petitum' based on Article V 2 (b) NYC in relation with Article 24 of the Constitution. The Court confirmed the distinction between 'extra petitum' or excess of the award with respect to the arbitration agreement and the 'extra petitum' or excess

of the award with respect to the statement of claim. Finally, the Court accepted the application and granted the recognition because it considered that the award had granted even less than what was claimed. We can conclude that the Superior Courts' activity is plausible because the different grounds for the opposition to the recognition of foreign awards have been dealt with exquisite rigor at the light of the LA, the NYC and the jurisprudence, showing admirable competence and practical and flexible criteria.

#### Note

- \* This is a summary of a longer article to appear at Anuario de Justicia Alternativa.

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## The new regulation on 'innovative' start-ups in Italy

The Italian government has recently enacted a new regulation<sup>1</sup> (the 'Regulation') aimed at encouraging innovation through the creation and development of new companies qualified as 'innovative start-ups'.

Several incentives as well as exceptions to the general rules applicable to enterprises are provided by the Regulation to stimulate investments in innovative start-ups.

The key provisions concern:

- the assignment of equity participations or other work for equity instruments to employees, directors and consultants as their remuneration;
- tax incentives for the start-ups, the investors and the employees and consultants who subscribe equity participations or other work for equity instruments;
- public offerings of quotas of start-ups incorporated under the form of limited liabilities companies, also through crowdfunding online portals;
- corporate benefits and exceptions to bankruptcy law provisions;
- cost reduction for the setting up of a new company; and
- the definition of a fixed-term employment contract departing from general labour law.

The provisions on crowdfunding and investors' tax benefits are still not effective as they are subject to the issuance of specific decrees from the Italian public authorities and, with respect to the tax provisions, the authorisation of the EU Commission.

### Definition of 'innovative' start-up

To be 'innovative', a start-up shall:

- develop, produce and trade innovative goods or services having a high technological value and such activities should represent its exclusive or prevailing core business; and
- meet at least one of the following alternate requirements:
  - the costs allocated to research and development must be equal to or higher than 20 per cent of the higher value between (i) the company's production costs and (ii) the company's production value;
  - at least one-third of its work force shall be represented by individuals having a PHD or carrying out a PHD or having a degree and having completed a research programme of three years at public or private research entities in Italy or abroad; or

- the start-up shall be the owner or assignee, or have applied for the registration with the relevant authorities, of an industrial property right (eg, a patent) related to its core business.

In addition to the above, the innovative start-up shall also satisfy the following requirements:

- it has to be a private stock company (such as a joint-stock company or a limited liability company<sup>2</sup> or a cooperative) or a *societas europaea*, not listed and with fiscal residence in Italy;
- it shall have existed for no more than 48 months;
- the majority of the corporate capital and voting rights shall be owned by individuals for the first 24 months following its incorporation;
- the main place of business shall be in Italy;
- it cannot distribute profits;
- starting from its second year, the total value of its activity shall not exceed €5m resulting from its last yearly approved balance sheets; and
- it shall not result from a merger, de-merger or transfer of business or a part thereof.

Generally speaking, the age, nationality or residence or domicile of the founders and investors is not relevant. A start-up will be qualified as 'innovative' upon its enrolment with the special sector of the companies' register of the place where it has its registered office.

On the assumption that all the above law requirements remain unchanged, a start-up is considered 'innovative' only for the first four years following its incorporation. A different term, not exceeding six years, will apply in case the start-up has been incorporated before the enactment of the Regulation.

### Main corporate benefits

Special advantages are provided for start-ups incorporated under the form of limited liability companies. Such companies will be entitled to:

- create and issue categories of quotas granting special patrimonial and management rights to its quota-holders;
- offer its quotas to the public, also through crowdfunding online portals;
- issue financial instruments ('*strumenti finanziari partecipativi*') also against the contribution of work and services from its quota-holders or third parties;
- perform transactions on its own quotas (eg, purchase its own quotas or accept

them as guarantee, etc) provided that such transactions are aimed at implementing incentive plans in favour of employees, directors and consultants.

Regardless of the type of company, any innovative start-up will have:

- in case of losses, the company will have longer to adopt the necessary remedies departing from the general corporate law;
- the possibility to raise funds by using crowdfunding portals under a specific and simplified procedure that the public authority responsible for the Italian securities market will implement in the next few months;
- the possibility to remunerate its directors, employees or consultants by assigning work for equity instruments which shall not be taken into account in determining the taxable income of the assignees; and
- the opportunity to save some costs, such as the stamp duty ('*imposta di bollo*'), the administration fees ('*diritti di segreteria*') and the annual fee for the enrolment with the relevant chamber of commerce ('*diritto annuale*').

### Main tax incentives

Individuals or legal entities investing in innovative start-ups in the years 2013–2015 will be entitled to get some tax relief under certain terms and conditions.

Individuals subject to personal tax ('IRPEF') may benefit from a tax credit ('*detrazione d'imposta*') equal to 19 per cent of the amount they have invested (either directly or indirectly, for example through an investment fund) in the corporate capital of innovative start-ups. The tax credit may not exceed €500,000 for each fiscal year. The amount in excess may be carried forward in the subsequent three fiscal years.

Companies and other entities subject to corporate tax ('IRES'), other than innovative start-ups, are entitled to a deduction ('*deduzione*') from the corporate taxable base equal to 20 per cent of the amount they have invested (either directly or indirectly, for example through an investment fund or other companies investing mainly in innovative start-ups) in the corporate capital of innovative start-ups. The tax deduction may not exceed €1.8m for each fiscal year.

Investors shall keep their equity participation in the innovative start-up for at least for two consecutive fiscal years, otherwise they will lose any tax benefit.

As already said, such incentives are not currently effective since they are subject to (i) the authorisation of the EU Commission aimed at ascertaining that they are not 'state aids' in breach of the EU law and (ii) the issuance of a decree by the Ministry of Economy and Finance. We hope that such a decree will also clarify several doubts that have been raised regarding the scope and perimeter of the above tax incentives, absent any official interpretation of the Regulation.<sup>3</sup>

In addition to the above, under certain terms and conditions, innovative start-ups might benefit from a tax credit equal to 35 per cent of the costs incurred in case of hiring highly qualified employees through open-ended employment contracts.<sup>4</sup>

Finally, innovative start-ups will not be subject to the tax treatment provided for the so-called 'shell and dormant companies' which have to pay taxes on a minimum taxable income which is determined on a presumptive basis without taking into account the income or losses effectively reported by the company.<sup>5</sup>

#### Notes

- 1 Legislative Decree No 179 of 18 October 2012, converted in Law No 221 of 13 December 2012.
- 2 The category of the limited liability company also includes the simplified limited liability company ('*società a responsabilità limitata semplificata*') and the limited liability company with reduced share capital ('*società a responsabilità limitata a capitale ridotto*') which could be set up with a symbolic corporate capital of €1.
- 3 By way of example, according to a literal interpretation of the Regulation, tax incentives should apply only to investment made by cash contributions. It seems that contributions in kind ('*conferimenti in natura*') and contribution of work or services ('*conferimento di opera e servizio*') would not be eligible for tax incentives. It is also doubtful whether cash payments made by investors as share/quota premium ('*versamenti a titolo di sovrapprezzo*') or allocated to any other capital reserve, as well as credits waived by share/quota-holders ('*rinuncia dei soci ai crediti*') vis-à-vis the start-up would entitle investors to obtain the relevant tax reliefs. It remains also unclear whether investments made in innovative start-ups by third parties other than share/quota-holders through the subscription of financial instruments could benefit from tax incentives on the assumption that such instruments are recorded as equity.
- 4 Reference is made to Article 27-bis of Law Decree No 179 of 18 October 2012 (converted into Law No 221 of 17 December 2012), Article 24 of Law Decree No 83 of 22 June 2012 (converted into Law No 134 of 7 August 2012) and the Ministerial Decree issues on 22 February 2013.
- 5 Reference is made to the provisions under Law No 724 of 23 December 1994 and Law No 148 of 14 September 2011.

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# Tax considerations of the new Dutch company law rules on private companies ('Flex BV Act')

## Introduction

As per 1 October 2012, new Dutch Company Law on limited liability companies ('*Besloten Vennootschap*' or 'BV') has entered into force (the so-called 'Flex BV Act'). Under these new rules, the incorporation process of Dutch limited liability companies is simplified and many of the existing restrictions and formalities in respect of voting rights, capital contributions, distribution, issuances, repurchases of shares, capital reductions and financial assistance will no longer apply.

Although the introduction of the new Flex BV Act has not led to a direct change in Dutch tax law, the new Flex BV Act has various

implications for the existing Dutch tax rules. From a tax perspective, the most significant change is the possibility of creating different types of shares. More specifically, the Flex BV rules now make it possible to create shares to which only voting or profit rights are attached, and the articles of association may provide for multiple votes on specific shares. These changes may be of particular interest for joint venture structures, business successions and employee participation schemes.

In this article, we will discuss the key aspects of the new Flex BV Act from a Dutch tax perspective. Furthermore, we will discuss the tax opportunities that may arise under these new rules.