

NEW PROVISIONS ON INNOVATIVE SMALL AND MEDIUM-SIZED ENTERPRISES

In order to give a substantial boost to the Italian eco-system, the Italian government has introduced¹ a new category of enterprises, the so called “innovative small and medium-sized enterprises”, extending to them most of the provisions already available to innovative startups².

Definition of small and medium-sized enterprises

In accordance with the relevant recommendation given by the European Commission³ (“**EC Recommendation**”), the definition of small and medium-sized enterprises is strictly related to the company’s staff headcount, as well as its yearly turnover or total balance-sheet. Specifically:

- a medium-sized enterprise is defined as an enterprise employing less than 250 people with an annual turnover not exceeding EUR50 million, or a total annual balance sheet not exceeding EUR43 million; while
- a small enterprise is defined as an enterprise employing less than 50 persons with an annual turnover or total annual balance sheet not exceeding EUR10 million.

Legal requirements of innovative small and medium-sized enterprises

Small and medium-sized enterprises, as defined above, can be considered as “*innovative*” only if they meet the following requirements:

- have their registered office in Italy, or a branch in Italy provided that their registered office is located in another State of the European Union or the European Economic Area;
- their last financial statements, even if consolidated, are drafted by a statutory auditor or external auditor/accounting company enrolled on the relevant register;
- are not listed in a regulated market;
- are not classified as innovative startups;
- meet at least two of the following prerequisites:
 - i. costs allocated to research and development on an annual basis shall be equal to or higher than 3% of the higher value between (i) the company’s production costs and (ii) the company’s production value, excluding costs incurred for the purchase or lease of real estate assets, as well as for the purchase of innovative technologies;

¹ Reference is made to Law Decree of January 24, 2015, no. 3 (“*Urgent measures for the banking system and investments*”, following the “**Decree**”), converted into Law of March 24, 2015, no. 33.

² Reference is made to Law Decree of October 18, 2012, no. 179 (“*Urgent measures for the Country’s development*”), converted into Law of December 17, 2012, no. 221 introducing the new regulation on innovative startups.

³ Reference is made to the European Commission Recommendation of May 6, 2003 no. 361.

- ii. one fifth of the company's work force shall be made up of individuals with a Ph.D., or who are in the process of obtaining a Ph.D., or who have completed a three-year research program at public or private research entities in Italy or abroad after having obtained a degree; alternatively, one third of the company's work force shall be represented by individuals with a degree;
- iii. the company shall be the owner or assignee of an industrial property right (e.g. a patent) related to its core business; as an alternative to the above, the company shall be the titleholder of the rights relating to an original piece of software duly registered with the special public register for software.

Main benefits and incentives

Except for incentives related to employment and financial distress, all the other corporate benefits and tax incentives provided for innovative startups also apply to innovative small and medium-sized enterprises.

Main corporate benefits

An innovative small and medium-sized enterprise incorporated as a limited liability company will be entitled to:

- create and issue categories of quota granting special patrimonial and management rights to its quotaholders;
- offer its quotas to the public, and also through online portals;
- issue financial instruments ('strumenti finanziari partecipativi') as compensation for the contribution of work and services by its quotaholders or third parties;
- perform transactions on its own quotas (e.g., purchase its own quotas or accept them as guarantees, etc.) provided that such transactions are aimed at implementing incentive plans in favor of employees, directors and consultants.

Furthermore, regardless of the type of company, any innovative small and medium-sized enterprise will have:

- in case of losses, more time to adopt the necessary remedies provided by applicable corporate law;
- the ability to raise public funds by using crowdfunding portals;
- the ability 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.

Main Tax Incentives

Special tax incentives will apply to innovative small and medium-sized enterprises operating in the marketplace for more than seven years from their first commercial sale, provided that they are able to show a development plan for new or better products, services or processes that can be defined as "state of the art" in the relevant business sector. Such a development plan must be assessed and approved by a public body or by an independent private body representing the business community.

Individuals or legal entities investing in such companies in the years 2013–2016 will be entitled to get some tax relief under the following 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 small and medium-sized enterprises; the tax credit shall not exceed EUR500,000 for each fiscal year and 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 small and medium-sized enterprises, are entitled to a deduction ('deduzione') from the corporate taxable base equal to 20% of the amount they have invested (either directly or indirectly, for example through an investment fund or through other companies investing mainly in such companies) in the corporate capital of innovative small and medium-sized enterprises; the tax deduction shall not exceed EUR1,800,000 for each fiscal year.

Investors shall maintain their equity participation in the innovative small or medium-sized enterprise for at least three consecutive fiscal years, otherwise they will lose any tax benefit.

SHORT NEWS

Lock-in: A clause, two possible wordings, two different restrictions to the quota transfer

The Notarial Council of Milan (maxim no. 92) stated that there are two ways to draft the clause at hand:

- 1) by imposing an absolute prohibition on the transfer; **or**
- 2) by conditioning the transferability of quotas to exceptions (e.g. approval from the quota holders, certain contractual cases or specific beneficiaries of the transfer).

In the first case, only a quota holder's meeting can overcome the limitation, by resolving upon the removal of the clause from the by-laws.

For more information, please refer to the following [link](#).

Temporary lock-in of S.r.l. quotas is no longer cause for withdrawal

In the case of temporary non-transferability of S.r.l. quotas, even for a period longer than two years, a statutory clause ruling out the right of withdrawal for the entire duration is effective and lawful, provided that the same duration is not such as to make the non-transferability absolute and not temporary.

The Notarial Council of Milan (Maxim no. 152) interprets Article 2469, paragraph 2 of the Italian Civil Code in a systematic and functional manner, allowing the introduction in the by-laws of elements bringing the S.r.l. closer to partnerships whose legal regime provides for the non-transferability of quotas, subject to the other partners' consent.

Therefore, the option to introduce prohibitions for even longer than two years, ruling out the right of withdrawal *ad nutum* (except for the need to evaluate case by case compliance of the prohibition with the duration of the company and its corporate purpose) serves the cases when the *intuitus personae* is required to retain its initial membership structure for a certain period of time.

The same applies to other non-absolute clauses of non-transferability, e.g. provisions requiring the necessary transfer of the entire quota, a transfer in favor of certain beneficiaries or those prohibiting transfers for a compensation different from money.

For more information, please refer to the following [link](#).

Equity-holder's loan: is the right of reimbursement deferred only during the winding-up process?

The deferment's rule related to the loan made by an equity-holder applies even outside the winding-up process. In particular, the company that is the beneficiary of such a loan shall prove its situation of crisis/economic difficulties:

- (i) when the equity-holder has made the loan; **and**
- (ii) when such equity-holder requires the reimbursement of the relevant amount.

This rule has been clarified by the Court of Milan by means of the decision no. 7265 of June 13, 2016.

For more information, please refer to the following [link](#).

May the by-laws of a limited liability company reserve management to the directors only?

The by-laws of a limited liability company (*società a responsabilità limitata*) may preclude – in whole or in part - the possibility for equity-holders to take decisions related to the management of the company upon themselves. In such cases, such decisions shall be taken exclusively by the managing body (e.g. board of directors, sole director etc.).

A similar clause would have the effect of bringing the limited liability company closer to the concept of a stock company, where there is a clear separation between the management and ownership of the company.

The equity-holders can introduce this clause into the initial incorporation deed or, after the incorporation, by amending the by-laws with the majority required to vote within special quota holders' meetings.

Nevertheless, the Italian civil code reserves – without any exceptions - specific matters for the equity-holders, regardless of any limitation provided by the by-laws of the company. For example, only the equity-holders (and not the managing body) are able to resolve, upon the approval of the financial statement, the amendments related to by-laws, decisions that may have an impact on the corporate purpose of the company, etc. This list provided by Article 2479, second paragraph of the Italian civil code, may not be restricted by the by-laws.

For more information, please refer to the following [link](#).



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