BRIEF OVERVIEW ON THE NEW ITALIAN CROWDFUNDING REGULATION

1. Introduction

Crowdfunding is an innovative instrument to finance projects by using on-line portals as an alternative to traditional forms of financing. The public can support projects with a social purpose, as well as new entrepreneurial initiatives, by paying their contributions through on-line portals which usually operate as platforms for donation-based or social lending, or through reward based crowdfunding, depending on whether the contribution is made as a donation or loan between private individuals, or whether a reward is provided for each contributor when certain circumstances are met.

The main characteristic of crowdfunding is that each contribution is usually represented by a small amount of money. Accordingly, the more people making contributions, more the chances are that the relevant project will attract enough funds for its implementation.

The crowdfunding phenomenon is continuously evolving. Its latest form is equity crowdfunding, according to which the public can support a project by subscribing to equity securities and becoming shareholders/quotaholders in the relevant company.

In October 2012, the Italian legislator outlined some measures related to equity crowdfunding whose effectiveness has been subject to regulation by the authority responsible for the Italian securities market (Consob). The regulation was issued in July 2013; Italy is now the first country in Europe to regulate equity crowdfunding.

2. How equity-crowdfunding works under Italian law

2.1 Who are the parties involved?

According to Italian law, the equity crowdfunding mechanism is based on a four-sided relationship amongst: a) start-ups, b) investors, c) on-line portals and d) banks or investment companies.

- Start-ups: only start-ups qualifying as “innovative” or start-ups with a social utility purpose, according to the applicable law, can launch a public offer of their own equity securities through an on-line portal[1].
- Investors: the investors who can take part in the public offer by subscribing to the start-up's equity securities can be professional investors or the general public.
- On-line portals: only companies duly registered with a new register kept by Consob can operate as on-line portals. In order to be enrolled in this register, companies shall submit specific documents to Consob allowing the latter to verify that they meet the requirements provided by the new regulation. Companies admitted to

[1] *Please refer to the definition of “innovative” start-up reported in our alert on start-ups published in this newsletter.*

operate as on-line portals will be subject to ongoing monitoring activity by Consob and they will not be entitled to perform any investment services, nor to take care of any payment made by the investors to finalize their subscription.
Banks and investment companies intending to act as on-line portals will be automatically registered in a special section of the above registry without submitting any documentation to Consob.

- Banks/investment companies: in cases where the on-line portal is not represented by a bank or an investment company, the subscription to the equity securities and the payment of the related contributions shall be made by investors through the support of specific banks or investment companies. The on-line portal shall communicate the orders of subscription received by the investors to these institutions, and the start-up shall open its own bank account with them in order to collect the funding.

2.2 How does the operation of equity-based crowdfunding work?

The equity crowdfunding mechanism consists of the following steps:

- Selection of the on-line portal and definition of the relevant contractual terms: a start-up intending to launch a public offer of equity securities shall select an on-line portal enrolled with Consob's special registry. It shall then provide the portal with all information concerning the offer, as well as that concerning its business and organization, to allow the latter to make the relevant assessment. The on-line portal will host the public offer and publish it on its portal on condition that it agrees with the start-up on the terms and conditions of their business relationship, and that the start-up meets the requirements provided by law, such as: (i) the public offer does not exceed, in aggregate, the value of EUR 5 million; (ii) the by-laws of the start-up provide for specific way-out mechanisms (i.e. withdrawal or tag along rights) in favor of the investors in the event that, after the subscription of the entire offer, controlling quotaholders/shareholders sell their quotas/shares to a third party; (iii) the quotaholder/shareholder agreements have been communicated to the start-up and are published on its website.
- Launch of the public offer on the on-line portal: the on-line portal must provide investors with specific, detailed information about the start-up and the public offer (i.e. information on the project; the business plan and internal organization of the start-up; rights and duties concerning the equity securities subject to the public offer; existing provisions on the transfer limitations of such securities; information on the banks and investment companies which will take care of the payments related to each subscription; any costs to which the investors are liable; information on the professional investors already subscribed to a portion of the equity securities; information on any public offer already launched by the same start-up on other on-line portals, etc.) and such information shall be continuously updated as necessary. Such measures are designed to ensure that each investor is fully aware of the risks connected to their investment. The information reported in the public offer published on the on-line portal is not subject to any approval by Consob. Only the start-up will be liable for its completeness and truthfulness.
- Access to the public offer and subscription to equity securities by investors: the on-line portals will allow access and subscription to the public offer only to those non-professional investors who have (i) knowledge of the information on investor education provided on the Consob website, (ii) positively answered a questionnaire attesting that the investor is fully aware of the risks connected to the investment in the start-up, (ii) declared that they are in the position to support any economic loss

deriving from the investment. The non-professional investors who have subscribed to a portion of the offer will be entitled to withdraw within seven days following their subscription, or to revoke their subscription should an event occur, or an error in the information relating to the public offer appear before it is definitively closed which might have a negative impact on the decision of the non-professional investor to complete its investment.

- Payment of contributions by investors: the on-line portal must transmit the order of subscription received by each investor to the bank/investment company which will collect the relevant contributions. The latter shall carry out its tasks in compliance with the regulation on investment services, which includes a series of disclosure duties in favour of the investors, except in cases where the value of the contribution made by each investor falls under certain thresholds (i.e. in the case of contributions made by an individual, the value of a single subscription is less than EUR500 or the aggregate value of all subscriptions made in the same year by the same person with respect to the same securities is less than EUR1000; in the case of contributions made by a company, the value of a single subscription is less than EUR5000 or the aggregate value of all subscriptions made in the same year by the same investor with respect to the same securities is less than EUR10,000). This is because, in cases of small contributions, the need to protect non-professional investors from the risks connected to the investment is not so great.
- Closing of the public offer: to close the funding operation, at least 5% of the equity securities must be subscribed to by professional investors, banks or incubators of the start-up.

3. Some preliminary comments on the new regulation

We must highlight the missed opportunity to open equity-based crowdfunding up to any start-up, and not only to those defined as innovative or those with a social utility purpose. Indeed, during a time of crisis such as that which we are experiencing, equity crowdfunding could have been a tool for any type of start-up to raise financing from the market.

Moreover, although the main purpose of the equity crowdfunding regulation is to help newly incorporated companies to raise funds in an easy and informal way by allowing non-professional investors access to public offers, it seems to aim at protecting such investors more than simplifying and facilitating the entire process of investment.

In this respect, how can we not be critical of the provision stating that at least 5% of the shares/quotas subject to the public offer must be subscribed to by professional investors, banks or incubators of start-ups in order to finalize the funding? This is certainly a form of protection for non-professional investors but it could nevertheless risk compromising the finalization of the entire fund-raising operation.

Furthermore, according to the applicable regulation, the on-line portal is not obliged to accept any public offer submitted to its attention by any start-up even though such start-up complies with the requirements of law. Indeed, the choice made by the on-line portal is not only based on the verification that the start-up is compliant with the requirements of law, but also on discretional assessments. Consequently, it might happen that an innovative start-up does not find an on-line portal willing to public its offer. In this respect, we wonder whether it would not have been more appropriate, and in the interest of start-ups, to provide clear and express criteria of assessment to be followed by the on-line portal.

Pursuant to the new regulation, it might be argued that should a start-up reach an agreement with more than one on-line portal, the same offer will be published on different

platforms. In such a case, it is not clear how such platforms will communicate amongst themselves to periodically ascertain the number of subscribers and verify whether and when the offer can be considered closed.

4. Conclusions

Notwithstanding some preliminary critical remarks, we are of the opinion that the efforts made by the Italian legislator firstly, and later by Consob, to regulate for the first time a phenomenon that is under development and is becoming widespread are to be commended.

However, we should wait for the implementation of this regulation to verify whether gaps or inappropriate rules come to the light and whether some amendments need to be introduced to facilitate and improve the use of this new instrument, particularly in light of our first comments.

Consob has expressed its willingness to review the regulation in case it proves unsuitable. We hope that Consob will keep its promise and play an active role in monitoring the effects of the implementation of this new regulation and accepting suggestions by the relevant stakeholders, as already done during the drafting phase.

THE REGULATION ON "INNOVATIVE START-UPS" AFTER AUGUST 2013

In August 2013 the Italian legislator introduced some relevant amendments to the existing legal requirements on innovative start-ups by increasing the possibility for new companies to benefit from such a classification. In light of these amendments, as of today in order to be classified as "innovative" a start-up shall,

a) Develop, produce and trade innovative goods or services with a high technological value, such activities representing its exclusive or prevailing core business.

b) Meet at least one of the following requirements,

   1. Costs allocated to research and development must be equal to or higher than 15% (previously 20%) of the higher value between (i) the company's production costs and (ii) the company's production value.

   2. At least one third of its work force shall be represented by individuals with a Ph.D., or in the process of obtaining a Ph. D., or with a degree and having completed a research program of three years at public or private research entities in Italy or abroad; alternatively (as introduced by the latest law) two third of its work force shall be composed of individuals with a degree.

   3. The start-up shall be the owner or assignee - or have applied for the registration with the relevant authorities - of an industrial property right (e.g. a patent) related to its core business; as an alternative to the above, pursuant to the latest modifications, the start-up shall be the titleholder of the rights relating to an original piece of software duly registered with the special public register for software.

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

a) It has to be a private stock company (such as a joint-stock company, a limited liability company or a cooperative) or a *societas europaea*, unlisted and with fiscal residence in Italy; the corporate capital can be owned by individuals or legal entities as the rule providing that the majority of the corporate capital and voting rights should be owned by individuals for the first 24 months following the company's incorporation has been removed.

b) It shall have existed for no more than 48 months.

c) The main place of business shall be in Italy.

d) It cannot distribute profits.

e) Starting from its second year, the total value of its activity shall not exceed EUR5 million, as resulting from its last annually approved balance sheets.

f) It shall not be the result of a merger, de-merger or transfer of a business or a part of one.

Finally, the registration of the start-up with the special register provided by the relevant companies' registry is no longer subject to a 60-day term.

M&A IN 2014? LUXURY BRANDS ON SALE OR SEEKING FOR FINANCIAL PARTNERS

The last quarter of 2013 saw a substantial M&A activity in the luxury and premium branded goods industry. According to the news circulating in the sector, many multinational brands as well as smaller brands are seeking for strategic financial partners that may help the brand to expand and support their business in the globalization era.

This interest of luxury companies in the collection of investment made by financial partners are aimed at collecting funds that may assist them in complex and expensive process of international growth and a consolidation in the high competitive luxury industry.

Among the possible transactions under the spotlight, the main and most known transaction is the selling of the minority participation in Versace. Versace's management assisted by Banca Imi and Goldman Sachs is currently carrying out the selection of financial partners competing for the acquisition of a participation ranging from 15% to 20% of Versace which will be accomplished by a capital increase. November 25, 2013 was the deadline for the offers by seven possible investors that have successfully passed a preliminary round of selection. According to the latest rumors, Fondo Strategico Italiano, FinvestCorp (the investment company based in Bahrain) and the private equity investment funds Ardian and Blackstone seem to be some of the offerors. The goal of Versace seems to launch an IPO within 3/4 years.

In addition to Versace, in the past months many other brands such as Stone Island, Harmont & Blaine, Chantecler, Peuterey and Fratelli Rossetti have appointed financial advisors in order to find a possible financial partners interested in the purchasing of at least a minority participation as shown in the following table from Sole24ore dated November 8, 2013.

If the research of a financial partner seems to be the main strategic option pursued by luxury and branded goods companies in the last month of 2013, however several luxury brands should be on sale (e.g. Arena, Bruno Magli, Jacob Cohen, etc.) making the luxury industry one of the hottest and active M&A sector for the 2013 and 2014.

ABA'S 2013 STUDY ON EUROPEAN PRIVATE TARGET M&A DEALS

The Merger & Acquisitions Market Trends Subcommittee, Merger & Acquisitions Committee of the American Bar Association's Business Law Section has just released the "2013 European Private Target M&A Deal Points Study" (American Bar Association members can download the study by clicking here) This study which updates the "2010 European Private Target M&A Deal Points Study," tracks commonly negotiated deal points in shares purchase agreements for the acquisition of private targets in Europe signed or closed in 2009, 2010 or 2011. Given the differences in deal structures and terms, the study does not cover the acquisitions of European targets whose shares are publicly traded. More than 20 lawyers from 16 countries have contributed to the 2013 study which is based on 101 sample private M&A deals meeting the following criteria: (i) transaction value was at least EUR20 million; (ii) transaction was structured as pure share deal (i.e. asset deal or mixed deals are not covered by the study); and (iii) the target or its assets/operations were located in Europe. The nature of the study is multi-sectorial, but the industry sectors better represented are: industrial goods and services, technology as food and beverage.

The study contains a review of most common points negotiated in M&A deals by European practitioners, including comparisons with data from the 2011 US Deal Points Study as well as from the previous European study which covered deals completed in 2008.

In particular the analysis covers financial provisions, pervasive qualifiers, most common representations and warranties, conditions to closing, indemnification and dispute resolution provisions.

Even if the sample base of the study is limited to the 101 shares purchase agreements provided by the working group members, the study could be an useful tool for transactional lawyers as well as strategic buyers and their advisors as it could help them in better understanding some of the current trends of the M&A practice in Europe as well as to learn more on the differences with respect to the US practice which is generally more advanced than the EU one.

Portolano Cavallo is proud to be one of the firms contributing to the “2013 European Private Target M&A Deal Points Study”

THE SO-CALLED “BLANK” COMPOSITION WITH CREDITORS

The Italian bankruptcy law has been modified in order to improve the efficiency of the composition with creditors (a restructuring proceeding aimed at re-launching the companies in crisis under the supervision of the competent insolvency court) by article 33 of the Legislative Decree 83/2012.

According to the new regulation the debtor is entitled to file the petition for the admission to the above mentioned composition without the submission of the documents required by law. Therefore, the debtor can file the documents supporting the petition on a later stage (i.e. within a deadline scheduled by the judge and having a range from 60 to 180 days from the date of the filing of the petition).

Thanks to this reform, the debtor can anticipate the protective effects arising from the admission to composition with creditors (such as the freezing of the enforcement and interim lawsuits brought by its creditors). Vice-versa, before the reform at hand the protective effects occurred only once all the documentation was filed and consequently the debtor was admitted to the composition with creditors.

Due to this modification, in the 2013 first trimester 3,500 applications for bankruptcy were filed, +12% compared with the same period of the previous year, with a boom of the compositions with creditors (+76% according to Cerved), boosted by the increase in number of this new composition procedure.

Nevertheless, this new instrument has often been used for fraudulent purposes by debtors having the target to benefit the dilatory effect of the rule and to procrastinate their declaration of bankruptcy.

In light of above, through article 82 of the Legislative Decree 82/2013 the legislator introduced some correctives in order to make the process more transparent and to avoid possible abuses. In particular, the latest modifications provided as follows:

a) the debtor must register a list with the names of the creditors and their respective receivables so to disclose the overall amount of its debts from the beginning of the procedure;

b) the judge can appoint a judicial commission through the decree scheduling the deadline by which the debtor must submit the further documents required by bankruptcy law. At this stage, the receiver can examine the accounting books and verify the existence of facts that make the debtor’s petition untenable (e.g. fraudulent concealing of credits) ;

c) At the stage preceding the admission to the composition with creditors, the judge has to obtain the legal opinion of the judicial commissioner before allowing the performance by the debtor of acts of extraordinary administration.

Furthermore, the legislator introduced various recurring informative duties to be acquitted in the period between the filing of the “blank” petition and decree admitting the debtor to

the composition with creditors (e.g. the debtor has to draft a monthly financial report to be checked by the judicial commissioner).

The non-compliance of these obligations leads to the reject of the debtor's petition.

THE MINIMUM CORPORATE CAPITAL IS NO LONGER REQUIRED FOR THE INCORPORATION OF S.R.Ls.

According to the recent reform of the Italian regulation on limited liability company ("*Società a responsabilità limitata*" or "*S.r.l.*") the minimum corporate capital equal to EUR10,000 is no longer required for the incorporation of S.r.l.

According to Law Decree No. 76/2013, the limited liability company can now be incorporated with a corporate capital lower than EUR10,000.00 but higher than EUR1.00. Should the incorporators decide to incorporate a S.r.l. with a corporate capital lower than EUR10,000, the following special provisions shall apply:

- 100% of the corporate capital shall be paid by monetary contribution to the director(s) also in case of two or more incorporators (while in case of S.r.l. with a minimum corporate capital of EUR10,000.00, such corporate capital can be paid also by contribution in kind and in case of two or more incorporators at least 25% of contributions in cash shall be paid by the incorporators);
- 1/5 of annual net profits, if any, must be allocated to a special reserve to cover future loss up to the amount of EUR10,000.00, including the amount of the corporate capital (while in case of S.r.l. with a minimum corporate capital of EUR10,000.00, 1/20 of annual net profits must be allocated to such reserve up to 1/5 of the corporate capital).

Previous numbers
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