Fall 23

# INTERNATIONAL LAWYERS NETWORK

## EXP LEGAL – ITALIAN AND INTERNATIONAL LAW FIRM

## ESTABLISHING A BUSINESS ENTITY IN ITALY

**ILN CORPORATE GROUP**

This guide offers an overview of the legal aspects of establishing an entity and conducting business in the requisite jurisdictions. It is meant as an introduction to these marketplaces and does not offer specific legal advice. This information is not intended to create, and receipt or it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this guide in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may have been some time ago and the reader should bear in mind that statutes, regulations and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

## ESTABLISHING A BUSINESS ENTITY IN ITALY

***"Establishing a Business Entity in Italy"***
Mr. Antonello Corrado
Partner
EXPLegal – Italian & International Law Firm – Rome, Milan

### 1. Types of Business Entities

Italian law provides multiple forms of organizational structures to do business in Italy. They differ from one another due to the extent of liability undertaken by its members. In particular, certain business organizational forms do not limit the liability of its members (among which the "*società semplice*" and the "*società in nome collettivo*" that operate similar to a partnership) or which provide for limitations to the personal liability only for certain classes of stakeholders (i.e. the "*società in accomandita semplice*" and "*società in accomandita per azioni*"), as opposed to others which limit their personal liability (such as the S*ocietà a responsabilità limitata*" – similar to the Limited Liability Company or the "*Società per azioni*" similar to the Joint Stock Company).

Italy's legal framework offers a variety of business entities to suit the diverse needs of foreign investors. Governed by the Italian Civil Code, these entities are designed to provide flexibility and adaptability, while ensuring adherence to relevant rules and regulations. A brief overview of the main types of business entities in Italy is provided below:

1. **Sole Proprietorship** (*Impresa Individuale*): This is the simplest form of business entity, where a single individual owns and manages the business. The owner is personally responsible for all debts and liabilities and is subject to personal income tax.
2. **General Partnership** (*Società in Nome Collettivo, Snc*): An Snc is an unincorporated business entity formed by two or more partners, who share unlimited personal liability for the company's debts and obligations. Profits and losses are divided among partners according to their partnership agreement.
3. **Limited Partnership** (*Società in Accomandita Semplice, Sas*): Similar to a general partnership, a Sas has two types of partners: general partners with unlimited liability and limited partners with liability restricted to their capital contributions. Limited partners are not involved in the management of the company.
4. **Limited Liability Company** (*Società a Responsabilità Limitata, S.r.l.*): A S.r.l. is a popular choice for small and medium-sized businesses. It is made up of one or more shareholders whose liability is limited to their capital contributions. S.r.l. have a flexible management structure and are subject to corporate income tax.
5. **Joint Stock Company** (*Società per Azioni, S.p.A.*): A S.p.A. is suitable for larger businesses and is characterized by a more complex management structure. Shareholders' liability is limited to their capital contributions, and shares can be publicly traded. S.p.A.s are subject to corporate income tax and have more stringent reporting and disclosure requirements.

Understanding the various business entities available under the Italian Civil Code and their respective rules and regulations is essential for foreign investors seeking to establish a presence in the Italian market. Selecting the most suitable legal entity ca significantly impact the success and growth potential of a business venture in Italy.

**1. Sole Proprietorship (*Impresa individuale*)**

A sole proprietorship, or *Impresa Individuale* or *Ditta Individuale*, is the simplest form of business entity in Italy, designed for individuals who wish to operate a business on their own. In this structure, the owner has full control over the management and decision-making processes. There is no legal distinction between the owner and the business, meaning the proprietor is personally responsible for all debts and liabilities incurred by the company.

The main advantage of a sole proprietorship is its simplicity, as it requires minimal registration procedures and lower operating costs compared to other business entities. The owner's income from the business is treated as personal income and is subject to personal income tax, without any need for corporate taxation.

> ***Italian Civil Code, Article 2082 - Entrepreneur.***
>
> *The entrepreneur is a person who pursues, in a professional manner, an economic activity organized for the purpose of production or for the purpose of exchange of property or services.*

However, one significant drawback of a sole proprietorship is the unlimited personal liability of the owner, as they risk losing personal assets if the business faces financial difficulties. This level of risk may not be suitable for all investors, particularly those seeking to limit their exposure to financial liabilities.

A sole proprietorship can be an ideal choice for individuals who prefer simplicity and autonomy in their business operations, provided they are willing to assume personal responsibility for the company's debts and obligations.

In Italy, a variety of economic activities can be conducted under a sole proprietorship, particularly in sectors where individual expertise, craftsmanship, or personal services are at the forefront. Some examples of such activities include:

1. **Independent retail shops**: Small boutique stores, grocery shops, or specialized retailers selling products directly to customers.
2. **Artisanal craftsmanship**: Craftsmen specializing in handmade products such as ceramics, leather goods, or custom-made jewelry.
3. **Food and beverage businesses**: Small cafes, restaurants, or catering services operated by individual owners.
4. **Personal services**: Providers of services such as hairdressing, beauty treatments, or personal training.
5. **Freelance professionals**: Photographers, graphic designers, web developers, or copywriters working independently for various clients.
6. **Repair and maintenance services**: Independent technicians offering services like computer repair, appliance maintenance, or home improvement.
7. **Tour guides or travel consultants**: Individuals offering personalized travel planning, guided tours, or local experiences for tourists.
8. **Art and cultural activities**: Independent artists, writers, musicians, or performers showcasing and selling their creative works.

These examples represent just a few of the diverse economic activities that can be run under a sole proprietorship in Italy, illustrating the flexibility and adaptability of this business entity for individual entrepreneurs.

## 2. Partnerships

### a. General Partnership (*Società in nome collettivo*)

A general partnership, or *Società in nome collettivo* (Snc), is a type of business entity governed by Articles 2291 to 2312 of the Italian Civil Code. An Snc is formed by two or more partners who enter into a partnership agreement to jointly conduct a business activity. In this type of business structure, all partners share unlimited personal liability for the company's debts and obligations, making them jointly and severally liable for the actions of the partnership.

> ***Italian Civil Code, Article 2291 - Definition.***
>
> *In general partnerships, all partners are jointly and severally liable and in an unlimited amount for the partnership's obligations. Any stipulation to the contrary has no effects with regard to third parties.*

The partnership agreement, which can be written or verbal, outlines the terms and conditions of the partnership, including the division of profits and losses, the roles and responsibilities of each partner, and the procedures for dispute resolution or dissolution of the partnership. It is recommended, however, to have a written agreement to avoid potential misunderstandings and conflicts in the future.

Under the Italian Civil Code, the management of an Snc is typically shared among all partners, unless otherwise specified in the partnership agreement. Each partner has the right to participate in the decision-making process and to bind the partnership through their actions. However, any partner can also delegate their management powers to one or more other partners or even to a third party, as long as the delegation is explicitly stated in the partnership agreement.

The profits and losses of a Snc are divided among the partners according to the terms of the partnership agreement. If the agreement does not specify the allocation, profits and losses are divided equally among the partners. Partners are subject to personal income tax on their respective shares of the partnership income.

In conclusion, a general partnership can be a suitable option for investors seeking to share management responsibilities, risks, and profits with other partners. However, it is essential to consider the potential implications of unlimited liability and to carefully draft a partnership agreement that outlines each partner's roles, responsibilities, and expectations within the partnership.

### b. Limited Partnership (*Società in accomandita semplice*)

A limited partnership, or *Società in Accomandita Semplice* (Sas), is a type of business entity governed by Articles 2313 to 2324 of the Italian Civil Code. A Sas is formed by two types of partners:

- general partners, who have unlimited personal liability for the company's debts and obligations, and
- limited partners, whose liability is restricted to their capital contributions. The main distinguishing feature of an Sas is this distinction between the two classes of partners, which creates a unique balance between liability and management control.

> ***Italian Civil Code, Article 2313 - Elements.***
>
> *In contracts of limited partnership, the liability of general partners for partnership obligations is joint, several and unlimited, and the liability of special partners is limited to the amount contributed by them. The shares in which the partners participate in the partnership may not be represented by stock.*

In an Sas, the management of the company is the responsibility of the general partners. Limited partners are not allowed to participate in the day-to-day management of the partnership, and their involvement is limited to their capital contributions and the exercise of their rights as

partners, such as voting on important partnership decisions. If limited partners engages in management activities, they risk losing their limited liability status and becoming personally liable for the partnership's debts and obligations.

The Italian Sas is comparable to the U.S. limited partnership, as both structures involve a mix of general partners with unlimited liability and limited partners with restricted liability. However, there may be differences in the specific rules and regulations governing the formation, operation, and taxation of limited partnerships in Italy and the United States.

In both jurisdictions, the profits and losses of the partnership are allocated among the partners according to the partnership agreement, and partners are subject to personal income tax on their respective shares of the partnership income. Additionally, both Italian and U.S. limited partnerships require a partnership agreement outlining the terms and conditions of the partnership, including the division of profits and losses, roles and responsibilities, and procedures for dispute resolution or dissolution.

In conclusion, a limited partnership (Sas) can be an attractive option for investors seeking to balance liability and management control, while leveraging the expertise and resources of multiple partners. Comparatively, the Italian Sas shares many similarities with its U.S. counterpart, though it is essential for investors to familiarize themselves with the specific rules and regulations governing these entities in their respective jurisdictions.

## 3. Corporations

Corporations in Italy are legal entities separate from their owners, offering a higher level of complexity, structure, and formality compared to partnerships and sole proprietorships. The two primary types of corporations in Italy are the Joint Stock Company (*Società per Azioni*, or S.p.A.) and the Limited Liability Company (*Società a Responsabilità Limitata*, or S.r.l.). These types of entities provide limited liability for their shareholders, meaning that the owners are only responsible for the company's debts and obligations up to the amount of their capital contributions.

### 3.1 Description of the types of business entities available in Italy.

#### 3.1.1 "Società per Azioni" (S.p.A.)

An S.p.A is suitable for larger businesses and is characterized by a more complex management structure and stricter reporting requirements than an S.r.l. Governed by Articles 2325 to 2451 of the Italian Civil Code.

The *S.p.A* represents the main corporate vehicle generally used for investments of significant value, either by foreign or domestic investors.

An S.p.A is suitable for larger businesses and is characterized by a more complex management structure and stricter reporting requirements than a S.r.l..

A minimum capital of Euro 50.000 (fifty thousand euros) is required to set up an S.p.A. The capital of the S.p.A. is subdivided into shares and is required to be fully subscribed, although – save for the one sole shareholder case - only 25% of its value may be paid at the time of incorporation. The remaining subscription price is to be paid upon request of the administrative body of the company, in one or more installments.

As mentioned above, the S.p.A. confirms the general principle of the limited liability of its shareholders in case of insolvency of the company, which will be limited to the maximum amount of the share capital actually subscribed by each shareholder. This principle is an exception if the S.p.A. is set up or is subsequently owned by a sole shareholder.

Both such cases require that the sole shareholder must pay the entire share capital and must fulfil certain publicity requirements by disclosing to the public the sole ownership in the company.

The main provisions regarding the governance and the capital of a S.p.A. are regulated by the articles of association, which are approved by the shareholders at the time of incorporation and may be amended only by a resolution of the extraordinary meeting of the shareholders, requiring enhanced voting majority.

The management of an S.p.A is typically managed by a board of directors, appointed by the shareholders. The board of directors is responsible for the daily operations and decision-making of the company. Their powers and duties are defined by the Italian Civil Code (Articles 2380 to 2396) and the company's bylaws.

In addition to the board of directors, an S.p.A must have a board of statutory auditors, which is responsible for overseeing the company's financial activities and ensuring compliance with relevant laws and regulations. The board of statutory auditors is governed by Articles 2397 to 2409 of the Italian Civil Code.

Shareholders exercise their rights and control over the company through general meetings, where they vote on various resolutions, such as appointing directors and auditors, approving financial statements, and amending the company's bylaws. Shareholders' meetings are regulated by Articles 2363 to 2379 - *ter* of the Italian Civil Code.

In addition to the above, it should be noted that stricter legal provisions have been established by the Italian Civil Code with respect to those particular S.p.A. whose stock is traded on one of the official regulated markets or is highly capitalized and diffused on the market.

### 3.1.2 "Società a Responsabilità Limitata" (S.r.l.)

An S.r.l. is a popular choice for small and medium-sized businesses in Italy, as it offers a flexible management structure and limited liability protection for its shareholders. Governed by Articles 2462 to 2483 of the Italian Civil Code, a S.r.l. can be established with one or more shareholders, and the company's capital is divided into quotas, which represent the ownership interests of the shareholders. The minimum share capital for a S.r.l. is €1, with no maximum limit.

The equity participation in the S.r.l.'s capital is not represented by shares, but by quotas. Such quotas are "immaterial," i.e., they cannot be incorporated into certificates, with the result that the circulation and the transfer of the same are subject to more strictly formal requirements.

In general terms, the S.r.l. is characterized by a greater freedom granted in favor of the quotaholders to establish the internal organizational rules of the company, and to create a flexible structure adapted to their peculiar needs.

The flexibility of its structure, along with the lower costs required for the incorporation and management of the S.r.l., as opposed to the S.p.A., makes the former the most suitable and commonly used corporate form to start and run small/medium size businesses.

The management of an S.r.l. can be overseen by one or more directors, who may or may not be shareholders. Directors are appointed by the shareholders and are responsible for the daily operations and decision-making of

the company. The powers and duties of directors in an S.r.l. are defined by Articles 2475 to 2479 - ter of the Italian Civil Code.

An S.r.l. does not require a board of statutory auditors unless certain conditions are met, such as exceeding specific thresholds in assets, revenues, or employees. In such cases, the company must appoint a board of statutory auditors or a single auditor, as governed by Article 2477 of the Italian Civil Code.

### 3.1.2.1 S.p.A.'s and S.r.l.'s Pros and Cons.

| | SPAs | SRLs |
|---|---|---|
| **PROS** | • **Limited liability**: Shareholders have limited liability, meaning they are responsible for the company's debts and obligations only up to the amount of their capital contributions.<br>• **Access to capital markets**: SPAs can issue shares that can be publicly traded if the company is listed on a stock exchange, offering greater access to capital markets and funding opportunities.<br>• **Prestige and credibility**: SPAs are often considered more prestigious and credible due to their complex management structure and stricter reporting requirements, which can help attract investors and partners.<br>• **Transferability of shares**: Shares in an S.p.A can be easily transferred, facilitating changes in ownership and attracting potential investors.<br>• **Clear corporate governance**: The corporate governance structure of an S.p.A is well-defined and regulated by the Italian Civil Code, providing clarity and stability for shareholders and management. | • **Limited liability**: Shareholders have limited liability, meaning they are responsible for the company's debts and obligations only up to the amount of their capital contributions.<br>• **Flexible management structure**: SRLs offer a more flexible management structure compared to SPAs, with fewer formal requirements, making them more suitable for small and medium-sized businesses.<br>• **Lower costs**: SRLs have a lower minimum share capital requirement (€1) and generally lower operational costs due to their simpler management structure and reporting requirements.<br>• **Simplified reporting requirements**: SRLs have less stringent reporting requirements compared to SPAs, reducing the administrative burden for the company.<br>• **Greater shareholder control**: In an S.r.l., shareholders can have a more direct influence on the management and decision-making process, allowing for more control over the company's operations. |
| **CONS** | • **Complex management structure**: The management structure of an S.p.A, including the board of directors and the board of statutory auditors, can be more complex and formal compared to an S.r.l..<br>• **Higher costs**: SPAs have a higher minimum share capital requirement (€50,000), and their more complex management and reporting requirements can lead to higher operational costs.<br>• **Stricter reporting requirements**: SPAs must maintain more extensive accounting records and submit additional reports and disclosures to the relevant authorities, which can be time-consuming and resource intensive. | • **Limited access to capital markets**: SRLs cannot issue publicly traded shares, which may limit their access to capital markets and funding opportunities.<br>• **Less transferability of ownership**: Ownership interests in an S.r.l. (quotas) can be less easily transferred compared to shares in an S.p.A, which may be a disadvantage for attracting potential investors.<br>• **Lower prestige and credibility**: SRLs may be perceived as less prestigious and credible compared to SPAs, which could impact the company's ability to attract investors and partners.<br>• **Limited scalability**: The simpler management structure and lower capitalization of an S.r.l. may |

| | | |
|---|---|---|
| | • **More extensive regulation**: SPAs are subject to a greater degree of regulation and oversight by the Italian Civil Code, which can create additional compliance burdens. | make it less suitable for larger businesses or those with significant growth aspirations. |

### 3.1.3 "Società a Responsabilità Limitata Semplificata" (S.r.l.s.)

The S*ocietà a responsabilità limitata semplificata* is a particular kind of S.r.l. that has been introduced by Legislative Decree n. 1/2012, under article 2463 bis of the Italian Civil Code.

The purpose of the introduction of such a company is to foster new enterprises and small business, by simplifying the incorporation procedure and by reducing the capital requirement.

The act of incorporation must be drafted in compliance with the standard model approved by Decree of Justice and the equity contribution can be limited to the minimum amount of Euro 1,00, that must be completely subscribed and directly paid, in cash to the administrative body at the time of incorporation.

Further limitations regarding the ordinary S.r.l. structure are: (a) the founder quota holder(s) must be individual(s), (b) the sale of quotas can only be executed with other individuals, and (c) the capital can only be raised up to the maximum limit of Euro 9.999,00.

### 3.1.4 The Simple Investment Company

The Italian "*Simple Investment Company*" (SIS – *Società investimento semplice*) represents a new type of company, introduced by Law Decree of 30 April 2019 n. 34, so called "*Growth Decree*" (*Decreto Crescita*).

This is a new investment vehicle targeted at facilitating the raising of capital for Small and Medium Enterprises – SME (*Piccole Medie imprese* - PMI).

The new type of company stands as an innovative Collective Investment Scheme (*OICR – Organismo di Investimento Collettivo del Risparmio*), which has to be in the form of an Investment Company with fixed capital, which is necessarily a Joint Stock Company (*S.p.A. – Società per Azioni*) and must comply with the following conditions:

(i) The company name has to contain the name of "*simple investment company for fixed capital shares*";

(ii) The registered office and general management of the company have to be located in the territory of the Italian Republic.

(iii) Recourse to financial leverage is not permitted. This means that the company must not buy or sell financial assets for an amount greater than the capital held.

(iv) The share capital has to be at least equal to that provided for by article 2327 of the Italian civil code, i.e., at least 50.000,00 Euros, notwithstanding the provisions of article 35-bis, paragraph 1, letter c of the Consolidated Law on Financial Intermediation (TUF);

(v) The net worth cannot exceed € 25 million euros.

Furthermore, the legislator, with a view to guaranteeing functionality and internal stability, and the solvency of the *Simple Investment Company* (SIS); prescribes:

(i) The mandatory conclusion of insurance policy on professional civil liability appropriate to the risks related to the activity conducted.

(ii) That the SIS has an adequate system of governance and control to ensure the safe and prudent management and compliance with the provisions provided.

Thanks to the requirements the SISs must have, they present themselves as a particularly lean investment vehicle with less operational complexity and for this reason, take advantage of some simplification compared to the rest of the companies whose activity consists of raising financial capital.

In fact, the Growth Decree establishes that the implementing provisions under article 6, paragraphs 1, 2 and 2-bis of the TUF, which contain a series of restrictive and binding obligations in terms of transparency, publicity and controls by the supervisory bodies (Bank of Italy and CONSOB), do not apply to SIS. This means that an important part of the second legislation issued by the Bank of Italy and the CONSOB, to which the Investment Companies are normally subjected, will not be applied to the SISs, with the consequence that their activity and their management will be simplified.

There is further simplification regarding requirements pertaining to the subjects who participate in a SIS. In fact, this subject, pursuant to the new art. 35*undecies* TUF, must possess exclusively the requisites prescribed by art. 14, with the exclusion of the requirements to demonstrate competence in the financial industry.

Finally, the legislator provided one more limitation to the SISs. Subjects that control a SIS directly or indirectly through subsidiaries or parent companies or are subject to common control also by virtue of shareholders' agreements or contractual obligations pursuant to Article 2359 of the Italian Civil Code, may constitute a new SIS only within the overall limit of twenty-five million Euros. A similar limit is also set for subjects who perform administrative, managerial and control functions in one or more SIS.

The above has been established because, in the opinion of experts, this new type of company could favor concealing large investment projects, which with the new legal entity would be fragmented through the "serial" establishment of SISs.

### 3.2 Groups of Companies

Since the reform of the Company law approved by Legislative Decree January 17, 2003, n.6, (“Reform”), the Italian legal system now regulates certain aspects connected to the customary practice of organizing business activities through the establishment of groups of companies.

While the law does not directly define the term “group of companies,” it refers to the concept of “activity of direction and co-ordination of companies,” of “coordinating company” (i.e., the mother company) and of “coordinated company” (i.e., the controlled company or subsidiary). Furthermore, the law does not indicate or list the actual cases in which the activity of direction and coordination of companies is deemed to exist, but it establishes only a few general rebuttable presumptions of its existence. More precisely, the activity of coordination and direction is presumed to be exercised towards those companies subject to consolidation in the balance sheet of another company or subject to the control of another company pursuant to the definition of “control” indicated by the Italian Civil Code. Accordingly, a similar presumption of law applies when the

actual direction and coordination of companies is exercised by virtue of specific contractual provisions among companies (i.e., commercial contracts, shareholders agreements), as well as clauses that are in the respective articles of association.

The approach of the legislator has been practical. Instead of construing a fixed definition of group of companies, it has taken into consideration the most typical effects connected to the coordination and direction of one company over another and has left to the case law and the scholars the task of interpreting and updating from time to time the actual definition of such activity. At the same time, the new provisions of law have had the merit to finally recognize the definition of groups and to finally confirm that the activity of coordination and direction is lawful so long as it is practiced properly. Prior to the Reform, the legality of such practice was highly debated among Italian scholars and case law.

It should be noted that the new provisions of law have restricted and sanctioned only any possible abuse of such activity, providing a specific duty for the directors of the coordinated company to supervise and control the proper conduct of such practice. Specifically, the Italian Civil Code now provides, inter alia, for: (i) a specific liability of the coordinating company; (ii) the introduction of a specific "duty of transparency" for the coordinated companies; (iii) specific cases in which the shareholders of the coordinated companies are entitled to withdraw from such companies; and (iv) new dispositions concerning the practice of shareholders' financing.

### 3.2.1 Liability of the Co-Coordinating Company

The coordinating company may be held liable vis-à-vis the (minority) shareholders or the creditors of the coordinated companies whenever: (i) the coordinating company, while exercising the activity of direction and coordination, acts in its own interests and in violation of any criteria of correct and proper management; and (ii) such acts cause damages to the value of the shareholding of the coordinated company or to its profitability, or otherwise cause damage to the integrity of the equity and of the overall assets of the coordinated company representing the main guarantee for such company's creditors.

The aforementioned liability is excluded when: (i) said acts, and the prejudices caused to the single coordinated company, are outweighed by the overall practical advantages arising from such acts in favor of the entire group of companies; (ii) the damages to the shareholders or the creditors of the coordinated company is fully eliminated by the coordinating company, by means of instruments or measures adopted with this specific purpose (e.g. cash injections in the coordinated company for an amount equal to the - presumed - damage only in order to exclude the aforementioned liability).

The importance of the above provisions may be better appreciated considering that, in the event that the coordinating company is found liable according to the above, such liability shall not be limited to the value of the equity interest owned by the coordinating company in the coordinated company but will follow the ordinary liability rules. Moreover, such liability may be extended to any person who participates in the performance of the harmful act or otherwise obtains advantages by such act (within the limit of the actual benefit obtained). This latter provision further extends the number of individuals/entities that could be found liable (e.g.,

coordinated company's directors, auditors, other shareholders, creditors, and the like).

### 3.2.2 Duty of Transparency

The groups of companies are subject to a special legal regime of publicity. In particular, it is required to fully disclose to third parties the status of the coordinated company, by mentioning such status on any document and correspondence of the coordinated company. Furthermore, both the coordinating and the coordinated companies are required to be registered in a specific section of the Registrar of Companies.

Directors not complying with the aforementioned duties can be held personally liable for the damages that the lack of knowledge of the coordinated status has caused to the shareholders or to any third parties (primarily the company's creditors). Moreover, the directors of the coordinated company are further obliged to: (i) report the main financial data of the coordinating company on the balance sheet of the coordinated company; (ii) indicate in the directors' report (to be attached to the balance sheet) all the relationships and transactions (and their relevant business and economic effects) undertaken with the coordinating company and/or any other company belonging to its group; (iii) justify the decisions taken by the managing body of the coordinated company every time the same group is influenced by the coordinating company.

### 3.2.3 Rights of Withdrawal

Minority shareholders of coordinated companies are granted a protection from prevailing resolutions passed by the majority shareholder expressing the will of the coordinating company and which may be prejudicial for the interest of the former, consisting in specific provisions entitling such minority shareholders to withdraw from the coordinated company. Such rights may be exercised when resolutions are passed changing the corporate purpose of the coordinated company or the actual business (and consequent financial risk) connected to its activities, or when the direction and coordination activity starts or ceases, and such circumstances determine a change of such risk.

The above-mentioned causes of withdrawal cannot be excluded by the by-laws (which in turn may provide for further causes of withdrawal). The terms and conditions of the exercise of withdrawal are regulated by the general rules for withdrawal in the S.p.A. and the S.r.l.

### 3.2.4 Provisions Concerning the Financing from Shareholders

One of the most sensitive aspects of groups of companies which may lead to abusive and fraudulent practices against creditors and third parties relate to the financial relationships among the companies belonging to such groups.

The inherent risk registered in this case is the attempt to abuse the corporate veil and to resort to recourse to financing methods instead of adequately capitalizing the coordinated company in order for the mother-company to limit its direct liability.

With the aim of limiting this practice, the Reform has introduced general provisions aimed at guaranteeing higher protection of third parties' credit rights. The general rule introduced by the Reform states that: (i) any reimbursements of financing made available by the shareholder(s) to the participated company are subordinated to the actual payment of any other debt of the company, and that (ii) any reimbursement of such financing occurred in the year preceding the declara-

tion of bankruptcy of the participated company shall be revoked (by the trustee of the bankruptcy proceeding). However, it should be pointed out that this general rule applies only for those loans and financing granted to the company at a time in which there was an excessive difference between the net equity of the company and its indebtedness (i.e., equity/debt ratio), or it would have been more reasonable to execute a direct equity contribution rather than granting loans.

### 3.3 Branches – Permanent establishment

Unlike a representative office, a foreign branch in Italy operates as an extension of the parent company and conducts commercial activities. It does not have a separate legal identity, meaning that the parent company assumes complete responsibility for the branch's activities and liabilities.

Foreign companies that establish one or more branch offices with permanent representation within the Italian territory are subject – for each of such branch offices – to file in the Corporate Register legalized copies, furnished with sworn translations of (i) the Foreign Company's incorporation deed and articles of association (in case of an EU foreign company, the articles of association can be substituted by a certificate issued by the competent register of companies); (ii) a notarized copy of the minutes of the Foreign Company's competent body that has resolved to establish the branch office(s), filed with an Italian Public Notary; (iii) the name, place and date of birth, residence in Italy of the person(s) who permanently represent(s) the company and the power assigned to such person(s).

Until the above-mentioned formalities have been fulfilled, the person(s) who act in the name and on behalf of the company have unlimited liability, jointly and severally with the company for its obligations, despite the limited liability of the company in the country of residence.

The ongoing activity of the branch implies the duties of filing the annual financial statements of the foreign company, and the profit and loss account of the branch. The branch must file with the Italian tax authority the tax return pertaining to the income produced in Italy.

The branch has no minimum capital requirement, rather it is generally provided by the foreign company with an endowment fund.

## 4. Steps and Timing to Establish

### 4.1 Brief overview of steps to incorporate/constitute each.

#### 4.1.1 S.p.A.

To incorporate a S.p.A., the shareholders – either in person or by proxy – shall appear before a Notary Public who is required to draft the public deed of incorporation, which must contain the following main information (i) name of the founding shareholders and their respective equity; (ii) name of the company and municipality where the headquarter is located; (iii) company's objective; (iv) amount of subscribed and paid capital; (v) number and type of shares issued; (vi) value of contributions; (vii) criteria for distribution of profits; (viii) governance rules and the setup of the administrative body and powers to represent the company; (ix) the setup of the statutory auditor board and appointment of its members; (x) the duration of the company.

The Notary Public shall verify, inter alia, that (i) the company's capital has been fully subscribed; (ii) at least 25% of the capital has been paid (unless it has been subscribed by a single-shareholder, in which case the capital is to be entirely paid) ; and (iii) any governmental authorization or other condition,

required by any applicable law in order for the company to validly carry out its activities, have been obtained or met.

The documents attesting the incorporation of the company shall then be filed with the competent Registrar of Companies within 20 days from incorporation and, once it is filed, the company shall acquire full legal personality.

#### 4.1.2 S.r.l.

The procedure for the incorporation of an S.r.l. is similar to the procedure described for the S.p.A. Likewise, the same rules apply in cases where a company is incorporated, or is subsequently owned, by a single quota holder.

#### 4.1.3 S.r.l.s.

The incorporation procedure of S.r.l.s. differs from other companies only for the reason that the incorporation deed must meet the minimum standard content required according to Chart A of the Ministry of Justice Decree no. 138/2012.

Moreover, the incorporation deed of S.r.l.s. is exempt from stamp and registry duties, including notary fees.

## 5. Corporate Governance.

### 5.1 Brief summary of regulation of each type and reporting requirements

#### 5.1.1 S.p.A.

##### a) Shareholders' meetings

The main decisions regarding the activities of S.p.A., its structure and governance, are generally passed by resolution of the shareholders' meeting, which is the highest corporate body in company structure.

The shareholders' meetings are classified as either (i) ordinary or (ii) extraordinary, depending on the resolution adopted and on the relevant matter.

With the exception of companies adopting the dualistic system of governance, which is discussed below, the ordinary meeting decides , inter alia, on the:

1. approval of the yearly financial statements and the decision on profits/losses.
2. appointment and revocation of the directors and management.
3. appointment and revocation of the auditors and of the chairperson of the board of auditors. Should this be the case, the appointment and revocation of the individual or the entity entitled to exercise accounting control.
4. compensation of directors and auditors (unless this has already been set out in the incorporation deed).
5. liability action against directors and against the auditors.

The ordinary shareholders' meeting of a S.p.A must be held at least once a year (in order to approve the balance sheet of the company). The extraordinary meeting decides on matters of higher significance and relevance for the existence of the S.p.A., as are the amendments to the articles of association or the appointment (and determination of powers) of the liquidators of the corporation. Extraordinary meetings shall be held before a notary public and require higher majority quorums than those required for ordinary meetings in order to validly pass the relevant resolutions.

The right to vote is regulated under Article 2351 of the Italian Civil Code, which states the general principle "one share, one vote".

However, the Bylaws may derogate to this principle and provide for the creation of non-voting shares, as well as limited voting shares according to particular topics, or subject to not merely potestative conditions. The value of these "different" shares may not exceed half of the share capital.

Following the amendments introduced by Law Decree no. 91 of June 24, 2014, the Bylaws may provide for the creation of shares with multiple voting rights also limited to particular topics or subject to not merely potestative conditions (s.c. "*azioni a voto plurimo*"). Each multiple voting share may entitle the holder to express up to a maximum of three votes.

The new provisions about multiple voting shares do not apply in the case of special laws applicable to the Company and in any case of listed companies.

**b) Administrative Body**

The governance of an S.p.A. can be exercised through three different systems: (i) the "traditional" system, composed of a board of directors, or a sole director, and a board of auditors; (ii) the "monistic" system, composed of a board of directors and its internal body named control committee; or (iii) the "dualistic" system, made of an administrative board and a surveillance board.

**b.1) The Traditional System**

The traditional system of corporate governance of a S.p.A. is based on the simultaneous presence of two separate bodies, i.e. (i) the administrative body (board of directors or a single director), which oversees the management of the company, and (ii) the board of statutory auditors, which is mainly in charge of controlling the management of the company and the compliance of the company's activities with law and the by- laws.

Directors are appointed by a shareholders' meeting for a term of three years. The appointment can be renewed. The directors are neither required to be Italian citizens or permanent residents in Italy. Furthermore, individuals who have been declared legally incapable or bankrupt, as well as those who have been sentenced to a penalty entailing a ban from public office, even if temporary, or the inability to exercise managerial functions, may not be appointed as directors.

The board of directors may delegate part of its own powers either to an executive committee, made up of some of its members, or to one or more of its members (managing directors), or both. The directors that are delegated so are held to a periodic and broad duty of information towards the board of directors and the board of statutory auditors, regarding the typical performance and prospects of the company, including the most relevant transactions entered on behalf of the company and of any subsidiary controlled by the latter. Finally, it should be specified that the delegation of powers to the managing director/s or to the executive committee does not imply that the board of directors renounces such delegated powers, but only that the principle of the collegial exercise of said powers is waived. Thus, the board of directors will always retain power in addition to those granted to the managing director/executive committee.

Concerning the board of statutory auditors, it is composed of three or five statutory auditors, plus two alternate auditors. The statutory auditors are appointed by the shareholders' meeting

and remain in office for a term of three years. They cannot be revoked, except for just cause.

The main duties of the statutory auditors consist in the control of the company's activities and their compliance with the law and the by-laws, including the control that the company is properly managed, and that the organizational, administrative, and accounting system of the company is adequate to its actual needs. With this aim, the statutory auditors are entitled to proceed, also on an individual basis, with inspections and controls on the management of the company, and they are also entitled to require information from the directors with respect to specific transactions or to the actual performance of the company.

The statutory auditors are jointly liable with the directors for the facts or omissions conducted by directors, provided that the adverse effect or damage caused by such facts or omissions would have not occurred, had they supervised the directors' activities in compliance with their duties.

According to law, the control on the accounts and on the financial statements of the company, is performed by an external auditor (either a professional individual or a company), with the exception of those cases where a company is not obliged to consolidate its balance sheets. In such cases, in fact, the by-laws of the company may assign such duties to the board of statutory auditors.

**b.2) The Dualistic System**

In the dualistic system, a relevant part of the corporate governance passes from the shareholders to an independent professional body, namely the surveillance board. On the other hand, the management of the company is entrusted to an administrative board, which is made of at least two members, appointed by the surveillance board. The administrative board is the only body ultimately liable for pursuing the company's purpose and, apart from only a few exceptions, it is governed by the same provisions set out for the board of directors in the traditional system.

The surveillance board is made of at least three members (among which at least one effective and one substitute member must be enrolled in the professional registrars of auditors), to be appointed upon resolution of the shareholders' meeting. The surveillance board is entitled, on one side, to supervise and control the management of the company (function that is granted in the traditional system to the board of auditors), and, on the other side, to exercise most of the functions which in the traditional system are granted to the competence of the shareholders' meeting.

Therefore, the surveillance board shall, inter alia, appoint and revoke the administrative board, determine its compensation, approve the balance sheets and exercise on behalf of the company any liability actions against the administrative board, or any of its members.

As to the shareholders, the dualistic system substantially limits the extent of their power to the appointment of the surveillance board, including the resolution upon the main guidelines and the general objectives of the company's activities and the major material amendments to the company's by-laws or the major events regarding the structure and the term of the company (e.g. dissolution,

mergers, de-mergers, change of corporate form or the company's stock capital).

Finally, as opposed to the traditional system, any S.p.A. adopting the dualistic system must be subject, without exception, to the accounting surveillance of an external auditor.

Based on the above, it can be concluded that, among the three governance systems under consideration, the dualistic system achieves the most significant separation between the competence of the beneficial owners of the company and that of its governance bodies. For these reasons, the dualistic system seems to be particularly suitable for those companies where the administration of the company is granted to independent and professional managers with no (or very little) interference from shareholders. On the other side, the dualistic system does not seem to be advisable for small-medium-sized companies, where a strong participation of shareholders in the day-to-day management of the company is generally registered.

**b.3) The Monistic System**

The monistic system does not provide for a clear distinction between an administrative body and a surveillance body with duties of control of the management of the company. In fact, both functions are conducted by the board of directors, although through different bodies established with such a board. In fact, the monistic system assigns the management of the company to the board of directors, while the supervision over such management is granted to a different corporate body named the audit committee, to be appointed by the board of directors itself, among its members.

The audit committee is entrusted with all powers and duties typically assigned to the board of statutory auditors in the traditional system, such as the control of management of the company and the control of compliance with the laws and the company's by-laws. Furthermore, as to accounting control, also in the monistic system such control is not qualified as a duty of the audit committee, and it shall be exercised by an external auditor.

It is worth mentioning that, in case of adoption of the monistic system, at least half of the members of the board of directors must meet the independence requirements provided for statutory auditors by the Italian Civil Code or by the codes of conduct issued by trade associations or by the relevant market management companies.

**5.1.2 S.r.l. and S.r.l.s.**

The articles of association can establish the precise limits of the competence of each corporate body, with significant difference from company to company. More precisely, the quota holders shall resolve any matter referred to them by the law or by the articles of association, including on any matter referred to them by the administrative body or by part of the quotaholders. The matters reserved by the law to the exclusive decision of the quota holders are: (i) the yearly approval of the financial statements and the related decision on profits/losses; (ii) the appointment and revocation of the members of the administrative body; and (iii) the amendments of the articles of association (for which a quotaholders' meeting before a notary public is mandatory).

The voting right in S.r.l. and S.r.l.s. is attributed to each member in proportion to

their participation in the company. Such general rule may be derogated by the Bylaws, which may attribute to certain quotaholders an increase of their voting rights (e.g., multiple vote, casting vote), or a limitation to the same (i.e., limited or conditional vote).

The administrative body is the competent body for the ordinary and extraordinary management of the company and can be made of (i) a single director, (ii) a plurality of directors, with managing powers that can be exercised either jointly, severally, or both, or alternatively (iii) of a board of directors.

No restrictions to the duration and renewal of the office of directors are provided by law.

Furthermore, the S.r.l. structure grants flexibility also regarding the appointment of the controlling body. The appointment of, alternatively, a single statutory auditor, a board of statutory auditors, or of an external auditor is not mandatory, unless: (A) the company must consolidate its financial statements; (B) the company controls a company obligated to external audit control; (C) the company exceeds, for two subsequent financial years, at least two of the following minimum financial thresholds: (i) the total assets in the assets and liabilities statement exceed Euro 4.400.000; (ii) the total earnings from sales of goods and services exceed Euro 8.800.000; (iii) the average human resource employed during each financial year exceeds 50 units.

### 5.2 Requirements for local shareholding/directors

As a preliminary remark, it should be noted that no restriction and/or limitation exists in Italy on foreign investment including equity ownership of Italian companies by foreign investors and business operators.

The same applies to foreign directors.

### 5.3 Rights of minority shareholders and protection

The rights of minority shareholders and their protection are represented by the following instruments.

#### 5.3.1 Right of inspection and control

**i) S.p.A.**

In the S.p.A. the rights and duties of inspection and control are generally reserved to the controlling body.

In addition, the shareholders have the right to report all the facts deemed to be in breach of the company and /or shareholders' interests to the Board of Auditors that will have to take such facts in consideration in its inspection. If the facts are reported to the Board of auditors by several shareholders representing 1/20 of the company's equity, or 1/50 in case of company admitted to the risk capital market, the Board will have to investigate such facts, and present its conclusions and proposals to the shareholders' meeting, without delay.

Moreover, the shareholders representing 1/10 of the company's equity, or 1/20 in case of company admitted to the risk capital market, may ask for a judicial inspection and control on the management of the company, in case of grounded suspect of serious irregularity conducted by the administrative body, which may damage the company or one or more controlled companies.

**ii) S.r.l.**

Each quota holder of the S.r.l. has a personal and direct control of the management activity, as to them are conferred the rights to: (a) obtain from the directors' information on the management,

and (b) examine, also by means of consultants of trust, the corporate books and the documents relating to the management of the company. In case of rejection to grant the right of control or in case such right is thwarted by the directors, Minority shareholders can obtain appropriate court orders issued as a matter of urgency.

#### 5.3.2 Right to appeal against shareholders' resolutions.

Absent, dissenting, or abstained shareholders – representing 5/100 of the company's equity, or 1/1000 in case of company admitted to the risk capital market for S.p.A. or without thresholds for the S.r.l. (or the different percentage set forth by the company's by-laws) – can appeal before the Court against assembly resolutions and request their cancellation, in case of non-compliance with the law or the articles of association/by-laws. The same right of appeal is granted in case of (a) missing the meeting, (b) missing minutes of the meeting, (c) impossible or illegal resolution, (d) resolution modifying the company's objective to an impossible or illicit activity.

The shareholders that do not reach the above-mentioned thresholds, or that do not have the right to vote, can claim reimbursement for damages suffered as a result of the illegitimate resolution.

## 6. Foreign Investment, marginal Capital, Residency, and Material Visa Restrictions

### 6.1 Any significant barriers to entry for an offshore party

No specific restrictions or barriers are generally provided under Italian law for offshore business and investments.

Therefore, all the requirements generally provided for both Italian and foreign investments are applicable to offshore parties, such as compliance with the company's purpose with Italian law provisions, compliance with regulations provided for specific activities such as, for example, banking, insurance, gold trading, military and defense activities and the preliminary issuance of any necessary clearance and administrative authorization.

Some limitations may derive from the application of the state-to-state reciprocity principle.

### 6.2 Any capital obligations

The minimum capital requirement has been described above under the incorporation proceedings paragraph.

Specific rules are provided by law with regard to the compulsory actions to be taken in case the financial statement reports losses that absorb the company's equity over a fixed debt/equity ratio.

If, as a result of losses, the company's capital has diminished by more than one-third, the shareholders' meeting must be convened to take the right actions.

If the company is not recapitalized, or the loss is not reduced to less than one-third in the following fiscal year, the company's capital must be reduced in proportion to the losses that have been ascertained.

If, as a result of losses accruing, the capital is reduced below the minimum required, the shareholders' meeting must be immediately convened in order to resolve either the reduction of the capital for losses, and the immediate increase of the capital to an amount not lower than the minimum required, or the conversion of the company into a structure that is consistent with the existing capital, or the winding up of the company.

**6.3 Any special business or investment visa issues**

Art. 26 of Law July 25, 1998, nr. 286 provides that an individual who either establishes a commercial, industrial, professional or artisan business in Italy, or is a shareholder of a commercial company or partnership or is appointed as member of the administrative body of a commercial company, is entitled to a VISA for independent work.

The visa is issued by the consular authorities competent for the residence of the applicant, provided that; (i) the business activity or the company is duly registered with the competent Corporate Register, is active and in good standing; (ii) the individual has a yearly income higher than the income that qualifies for exemption to the social security contribution (as of today Euro 8.400,00); (iii) the individual has a suitable and long term residential accommodation in Italy; (iv) a police clearance is granted.

**6.4 Any restrictions on remitting funds out of the jurisdictions (withholdings, etc.)**

Fiscal earnings treatment on outgoing capital: Art 27 of the Presidential Decree nr. 600 of 1973 provides that, except for any different provision contained inapplicable international conventions to avoid double taxation, profits distributed by companies having their offices in Italy, to nonresident shareholders are subject to a withholding tax equal to 20%.

Italy has signed double taxation conventions with eighty-four countries, pursuant to which the payment of dividends to a receiver resident in one of those countries (and subject to the receiver of the dividends is the actual beneficial owner) is subject to the maximum withholding tax indicated in the applicable convention, that, on a case-by-case basis, varies from 5% to 15%.

The provisions mentioned above do not apply to dividends paid to receivers that are income taxpayers in the EU white-listed member states (or in the European Economic Area - EEA). Such receivers, according to Art. 3 of Presidential Decree nr. 600 of 1973, are in fact subject to a 1.375% withholding tax.

With the so called "Mother-Daughter Directive" (i.e. 435/90/CEE), the distribution of dividends is not subject to any withholding tax, unless the following conditions are met: (i) both payer and receiver are resident in two EU member states; (ii) the stockholding is not lower than 25%; (iii) the Italian company is a S.p.A or an S.r.l. (plus other minor and less used types of company listed in the Directive); (iv) the companies are subject to income taxation; (v) the stockholding belongs to the Mother Company for not less than twelve months.

Specific anti-elusive provisions exist in order to avoid the mother company constitutes a fictitious entity that hides the ultimate stockholding of a non-resident entity.

**7. Startups**

By Law no. 221/2012, Italy is one of the first European countries to adopt a special regulation for startups , aimed to support and facilitate economic activities with a high scientific and technological value.

To benefit from the special startup regulation, a company must meet the following mandatory requirements:

- it needs to be in the form of a S.p.a., S.r.l., s.a.p.a., cooperative company, European company.
- It must not derive from the sale of a business entity or a branch of the same.
- it needs to have as exclusive or prevalent corporate purpose the development, the

production and the marketing of innovative products or services of high technological value;

- to have its headquarters in Italy;
- not be quoted on a regulated market;
- prohibiting the distribution of profits for a period of four years from the incorporation of the startup.
- to maintain an annual value of production not exceeding five million Euros.

The above-mentioned company must also have one of the alternative requirements listed below:

- to incur research & development expenditures equal to or greater than 15% of the higher value between cost and total value of the production;
- to have at least one-third of the workforce holding a PhD or a degree with a 3-year certified research activity or, alternatively, two-thirds of the workforce holding a master's degree.
- to hold as owner or as licensee an industrial patent title (patent, trademark, model, copyright, etc.) relating to the sectors of industry, biotechnology, semiconductors, plant varieties and recorded software.

All companies that meet these requirements may apply for the registration in the special section of the Italian Corporate Register dedicated to startup companies. In this way, they will benefit from the favorable regulation provided for losses of the share capital under the legal minimum as well as non-submission to insolvency proceedings (except for the composition of the over-indebtedness crisis).

Furthermore, by way of derogation from the general corporate law, the following advantages are extended to startup structured in the form of S.r.l.:

- Shareholdings: It is possible to provide for categories of shareholdings with additional rights for the member, also derogating from the principle of proportionality, including categories of shareholdings with limited voting rights, excluded or subject to particular conditions.
- Public offers: shareholdings may be offered to the public in the form of financial products, including through the use of online fundraising portals.
- Operations on participations: the related prohibition does not apply, provided that the transaction is conducted for the purpose of incentive plans involving the assignment of shareholdings to employees, directors, service providers - including professional ones.
- Financial instruments: it is possible to issue financial instruments bearing equity or administrative rights (excluding voting rights) following services by the members or third parties (including professional consultants).

Additional advantages are provided for tax and contribution purposes, in favor of the company and other individuals involved in the startup:

- For the Company: exemption from paying stamp duty, the costs of registration to the Corporate Register and the annual right to the Chamber of Commerce; tax credit for the hiring of highly qualified staff.
- For directors, employees, and associates: under certain conditions, employee's income arising from the assignment of participating financial instruments is exempted from direct taxes and contribution duties.
- For external employees or consultants: incomes from the assignment of financial instruments issued in relation to work or ser-

vices provided – even of a professional nature – are not included in the taxable income.

- For investors: natural persons or companies who invest in the startup's capital will benefit from an IRPEF deduction or a deduction from the taxable income of the IRES.