CIRCULAR NO. 16/E

Direzione Centrale Normativa

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SUBJECT: ***Article 25 et seq. of Decree-Law no. 179 of 18 October 2012, approved, with amendments, by Law no. 221 of 17 December 2012 – Tax breaks in favour of innovative startups and certified incubators***

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INTRODUCTION

Decree-Law no. 179 of 18 October 2012, approved with amendments by Law no. 221 of 17 December 2012, also known as the "*decreto crescita-bis"* (*"growth decree bis"*), introduced an organic framework of rules concerning the setup and development of *innovative startup companies*, to which Section IX of the regulatory measure is dedicated in its entirety.

These provisions, aimed at creating favourable conditions and tools for the setup and development of *innovative startups*, are thought to introduce, as indicated in the report accompanying the *decreto crescita-bis*, "*for the first time in the Italian legislative scenario, a consistent national benchmark framework for startups"*.

Paragraph 1 of article 25 of Decree-Law no. 179 of 2012, which contains programmatic provisions, identifies, in particular, "*sustainable growth*", "*technological development*", "*new entrepreneurship*" and "*employment*" as the key objectives pursued by the entire *corpus* of norms, with the ultimate goal of "*contributing to the development of a new entrepreneurial culture and to the creation of a more favourable context for innovation, as well as promoting greater social mobility and attracting talents, innovative enterprises and foreign capital to Italy*.".

The original regulatory system was partially revised by the legislator, before its actual implementation.

Particular reference is made to paragraphs 16 and 16-*bis* of article 9 of Decree-Law no. 76 of 28 June 2013, converted with amendments by Law no. 99 of 9 August 2013. These sections, in accordance with paragraphs 2 and 3 of article 25 of Decree-Law no. 179 of 2012, introduced a number of amendments concerning the requirements for obtaining the status of "*innovative startup*", making these requirements less restrictive and so extending the number of newly-established

companies that fall within this definition and are thus able to benefit from its associated advantages.

Among the various provisions aimed at promoting and developing *innovative startups* and *certified incubators* – *i.e.* those companies, referred to in paragraph 5 of the above-mentioned article 25, which provide services to support the creation and growth of *innovative startups* – fiscal incentives play a major role, pursuing different aims.

With respect to *innovative startups*, article 26 of the *decreto crescita-bis* provides for the non-application of the rules to "*dummy companies*" and "*companies reporting systematic losses*" (paragraph 4), and the exemption from stamp duty and administration fees associated with registration in the Italian Business Register (paragraph 8).

Article 27, paragraphs 1 to 3, aims to provide *innovative startups* and *certified incubators* with a tool to incentivize and encourage loyalty among management and all employees in general. This article offers managers, employees and term-contract workers an exemption, both for tax purposes and pension contributions, on all earned income resulting from the allocation of financial instruments issued by said *innovative startups* or *certified incubators*.

In addition, pursuant to paragraph 4 of article 27, the shares and equity instruments issued in connection with the contribution of work and services rendered in favour of *innovative startups* or *certified incubators* do not concur to the total income of the subject making the contribution.

Article 27-*bis*, then, states that, for *innovative startups* and *certified incubators*, special conditions will be applied regarding the recruitment of highly qualified personnel, referred to in article 24 of Decree-Law no. 83 of 22 June 2012, converted into law with amendments by Law no. 134 of 7 August 2012, which is to take place according to simplified procedures.

Finally, article 29, in order to promote investment in *innovative startups*, introduces a reduction in income tax – resulting from tax credits or deductions – for those who invest in the capital of *innovative startups*.

With reference to this last tax incentive, the legislator specifically provided for the application of the so-called "standstill" clause, stated in article 108, paragraph 3, of the Treaty on the Functioning of the European Union, as the application of the provision is subordinated to the pre-emptive authorization of the European Commission, as requested by the Italian Ministry of Economic Development.

With the decision "*not to raise objections against this measure*" – C(2013) 8827 *final* of 5 December 2013, published in the OJEU no. 17 of 21 January 2014 – the EU executive has approved the measure, setting it as State aid "*compatible with the internal market under article 107, paragraph 3, letter c) of the TFEU"*, based on the *"Community guidelines on State aid aimed to promote risk capital investments in small and medium enterprises*"(2006/C 194/02), published in the OJEU C 194 of 18 August 2006, as modified by the Commission Communication 2010/C 329/05 (hereinafter, "*Guidelines on risk capital*").

Finally, the decree of 30 January 2014, issued pursuant to article 29, paragraph 8, by the Minister of Economy and Finance, in consultation with the Minister of Economic Development, and published in the Italian Official Journal no. 66 of 20 March 2014 (hereinafter also "*implementing decree*"), sets out the rules for the implementation of the aforementioned incentives.

The present circular – produced in conjunction with the Ministry of Economic Development (Ministero dello Sviluppo Economico, hereinafter also "MiSE") – will provide initial guidance on the interpretation of these incentives.

Regarding the non-tax related aspects of the provisions contained in Section IX of Decree-Law no. 179 of 2012, reference is made to the clarifications provided by MiSE and Unioncamere (the Italian public entity responsible for representing and

taking care of the general interests of all the Italian Chambers of Commerce), available on their respective websites.

1. THE CONCEPT OF INNOVATIVE STARTUPS AND CERTIFIED INCUBATORS

1.1 *Innovative startups*

Article 25, paragraph 2, of Decree-Law no. 179 of 2012, introduces the concept of the "*innovative startup* company" defining it as a "*limited company, also incorporated in the form of cooperative, under Italian law or a Societas Europaea, resident in Italy pursuant to article 73 of the Decree of the President of the Republic no. 917 of 22 December 1986, whose shares or stakes representing the share capital are not listed on a regulated market nor on a multilateral trading facility"* and which fulfils certain requirements.

Article 1, paragraph 2, of the Ministerial Decree of 30 January 2014, implementing the tax breaks covered by article 29 of Decree-Law no. 179 of 2012, states that companies which are "*... non-residents and who fulfil the same requirements, where compatible, provided that they are resident in Member States of the European Union or in States party to the Agreement on the European Economic Area and conduct business in Italy through a permanent establishment"* are also considered *innovative startups*.

Innovative startups may, therefore, take the legal status of limited companies, encompassing: *società per azioni, società a responsabilità limitata, società in accomandita per azioni*[1]*, società cooperativa* (cooperative company), *Societas Europaea* (European company) resident in Italy, or non-resident companies

[1] Italy recognizes three types of company limited by shares: the public limited company (società per azioni, or S.p.A.), the private limited company (società a responsabilità limitata, or S.r.l.), and the publicly traded partnership (società in accomandita per azioni, or S.a.p.a.). The latter is a hybrid of the limited partnership and public limited company, having two categories of shareholders, some with and some without limited liability, and is rarely used in practice.

fulfilling the same requirements as those resident in Italy, provided that they are resident in Member States of the European Union or in States party to the Agreement on the European Economic Area and conduct business in Italy through a permanent establishment.

Societas Europaea means a company constituted under Regulation (EC) 2157/2001, as well as a European cooperative governed by Regulation (EC) no. 1435/2003.

Innovative startups – in order to be defined as such and to access the support measures provided for this category of businesses – must meet the following "cumulative" requirements and certain "alternative" requirements.

Pursuant to article 25, paragraph 2, *innovative startups:*

- must have been established and have conducted their business activities for no longer than 48 months;
- must have as their sole or core business "*the development, production and marketing of innovative goods or services with high technological value*";
- from the second year of activity, must have a total value of annual revenue - stated in item A of the income statement according to article 2425 of the Italian Civil Code – as per the latest financial statements approved within six months from the end of the financial year, not exceeding 5 million euro;
- must not have distributed profits from the year of their incorporation and must not distribute them throughout the duration of the favourable treatment;
- must establish their main centre of business and affairs in Italy;
- must not originate from a merger or demerger, or the divestment of a company or company branch.

With reference to this last requirement, it should be preliminarily noted that the measures to support *innovative startups*, contained in Section IX of Decree-Law no. 179 of 2012, as reiterated in the explanatory memorandum to the regulation that

introduces them, are "*designed to promote the creation and growth of new innovative companies"*.

In order to promote only the "new" innovative companies, the forecasted timescale for the application of the *startup* regulation is forty-eight months from the date of the incorporation of the *innovative startup*, as such a term is deemed "*appropriate for the setup and growth of a new innovative company"*.

According to the same logic, which aims to facilitate the launch of new businesses with innovative content and to create a driving force for the growth of new business, it is considered that the reference to the operations of "mergers", "demergers" and "the divestment of a company or company branch", assumed to represent obstacles to the granting of the status of *innovative startup*, should be generally understood as a prohibition of incorporation of companies which could be facilitated as a result of corporate reorganisation, including the divestment of a company or company branch.

The operation of transformation (unlike demergers, mergers, and the divestment of a company or company branch) does not prevent however, the recognition of the regulation referred to in articles 25 et seq. of Decree-Law no. 179 of 2012, as has also been expressly clarified by the Ministry of Economic Development with note prot. no. 0164029 of 8 October 2013.

In particular, with the above-mentioned note, MiSE, in response to a specific question posed by the Chamber of Commerce of Rimini, recognised the possibility of access to the *innovative startup* system for a single member limited liability company incorporated due to the transfer of an individual company owning an industrial patent, in order to prevent the creation of "*a system of discrimination against those individual entrepreneurs who, despite being holders of the industrial patent, could not avail themselves of the regulatory provisions of article 25 et seq.*,

as they do not have a corporate form, and because (at the same time), they are prevented from converting into a company".

The abovementioned Ministry therefore considered that, in specific case of the question, a subject fulfilling all other requirements could be granted access to the support measures of Section IX of Decree-Law no. 179 of 2012.

It should also be noted – on the basis of the *ratio* behind the abovementioned requirement – that operations of business combinations entered into by *innovative startups* immediately after their incorporation, which would have been prohibitive to access the supporting measures, can be judged by the tax authorities, in the normal course of inspections, in order to avoid behaviours aimed at circumventing the prohibitions.

With Decree-Law no. 76 of 28 June 2013 has been deleted the provision requiring that at the time of incorporation, and for the next 24 months, the majority of shares or stakes in the capital and the majority of voting rights in the ordinary shareholders' meeting, would be held by natural persons. As a result of this revision, subsidiaries entirely controlled by shareholders other than natural persons may also assume the status of *innovative startups*, if compliant with all other requirements.

Innovative startups, in order to be defined as such, must also meet at least one of the following additional "alternative" requirements:

1) to bear "*costs in research and development... greater than or equal to 15 per cent of the higher value between cost and total production value of the innovative startup*". By express provision of law, the costs of purchasing and leasing of real estates are excluded while, in addition to what is required by the accounting principles, have to be counted the expenses relating to pre-competitive and competitive development, such as: expenses relating to testing and to the development of prototypes and business plans, expenses relating to incubation services provided by *certified incubators*, gross costs for personnel and external consultants carrying out research and development

activities, including the company's shareholders and managers legal expenses for the registration and protection of intellectual property rights, their terms and conditions and licenses to use. The cost of research and development should be calculated on the basis of the last approved financial statements and should be described in the respective notes. In the absence of financial statements for the first year, the effectiveness of the expenses will result from a statement signed by the legal representative of the *innovative startup*. In this case, in order to determine the requirement in question, it is sufficient that, through his statement, the legal representative presents a detailed prediction of expenditure on research and development that the *innovative startup* intends to bear during the first year of business (in accordance with the principle of competence); in doing so, the legal representative is committed to report, in the first financial statement, the costs of expenditure on research and development actually incurred by the *innovative startup*, enabling the competent Authorities to verify the compliance with the requirement in question (concerning the 15% of the value);

2) to hire "*as employees or in any capacity*",

a) "*a percentage equal to or higher than one third of the overall workforce, ... personnel in possession of a PhD or doing a PhD at an Italian or foreign university, or having a degree and developing, for at least three years, a certified research activity at a public or private research Institute, in Italy or abroad*";

b) "*or, in a percentage equal to or higher than two thirds of the overall workforce, ... staff holding a master's degree according to article 3 of the Regulation referred to in Decree of the Minister of Education, University and Research no. 270 of 22 October 2004.";*

3) to be the "*owner, depositary or licensee of at least one industrial patent related to an industrial or biotechnological invention, or to a topography of a*

semiconductor product or of a new plant variety, or… the owner of rights relating to an original computer program recorded at the Special Public Register for Computer Programs, provided that such patents are directly related to the core business and activity of the company".

It should be noted, lastly, that, pursuant to paragraph 4 of article 25, *innovative startups*, exclusively operating in specific areas that the law considers to be of social value, are defined as "*startups with a social goal*".

These are the areas enlisted in article 2, paragraph 1, of legislative decree no. 155 of 24 March 2006, where social enterprises operate: social work, health care and social care, education and training, environmental protection, promotion of cultural heritage, social tourism, undergraduate and post-graduate education, cultural services, non-academic training, services for the social enterprises of entities of which 70 percent is composed of social enterprises.

In the case of investment in an *innovative startup with a social goal*, the tax incentive granted to investors is increased.

1.1.2 Non-resident innovative startups

The implementing decree, article 1, paragraph 2, letter b), makes it clear that the concept of *innovative startups* includes "*companies mentioned in article 25, paragraphs 2 and 3, of the Decree-Law of 18 October 2012, including non-residents who fulfil the same requirements, where compatible, provided that they are resident in Member States of the European Union or in States party to the Agreement on the European Economic Area and conduct business in Italy through a permanent establishment".*

Among the "compatibility" requirements, put forward in the explanatory memorandum to the implementing decree feature the period of activity, the limit on the value of annual production and the aim of the business concerned.

With specific reference to the requirement related to the obligation to have ”*the development, production and marketing of innovative goods or services with high technological value*” as a sole or core business, it is considered that this condition must be satisfied even with reference to permanent establishments in Italy, which, therefore, must carry out an activity eligible for the supporting measures of *innovative startups*, although not necessarily coincident with the activity carried out by the foreign company.

Similarly, the fulfilment of at least one of the requirements referred to in article 25, paragraph 2, letter h), of Decree-Law no. 179 of 2012, as well as the requirement that the *innovative startup* must not have been incorporated as an effect of a business combination, should be verified with reference to the permanent establishment.

It is not required, of course, that non-resident *innovative startups* have their main centre of business and affairs in Italy since they carry out the activities in Italy through a permanent establishment.

1.1.3 Existing innovative startups

By express provision of paragraph 3 of article 25 of the Decree-Law no. 179 of 2012 “*the companies already existing at the date of entry into force of the law of conversion of this decree which meet the requirements specified in paragraph 2, are considered innovative startups for the purposes of this Decree, providing they deposit at the Italian company register referred to in article 2188 of the Civil Code, a statement signed by the legal representative certifying the fulfilment of the requirements of paragraph 2”.*

Therefore, existing companies can also access the special support measures for *innovative startups*, provided that they meet the requirements of paragraph 2 of the said article.

In particular, in order to qualify themselves as *innovative startups*, existing companies shall deposit at the Italian company register, to which article 2188 of the Civil Code makes reference, a declaration signed by the legal representative stating that they fulfil the requirements of paragraph 2 of the aforementioned article 25.

With regard to the duration of application of the support measures, the abovementioned article 25, paragraph 3, states that: *"...the discipline set in this section is applied for a period of four years from the date of entry into force of this decree, if the innovative startup has been established in the previous two years; three years if it has been established in the previous three years; and two years, if it has been established in the previous four years".*

About this, with note prot. no. 0103425 dated 30 May 2014, MiSE has stated that "*considering the date of entry into force of Decree-Law no. 179/2012 (20 October 2012) and the date of entry into force of Law no. 221/2012 (18 December 2012)",* for *innovative startups* already established *"the duration of application of the rules of innovative startups is regulated according to the contents of the following diagram":*

Date of incorporation of the company	**Maximum duration of application to the support measures**
If established between 20 October 2010 and 18 December 2012	4 years (until 18 December 2016)
If established between 20 October 2009 and 19 October 2010	3 years (until 18 December 2015)
If established between 20 October 2008 and 19 October 2009	2 years (until 18 December 2014)

1.2 Certified incubators

Paragraph 5 of the above-mentioned article 25 defines the *"certified incubator of innovative startups"* as a limited company, also formed as a cooperative, under Italian law or as a *Societas Europaea*, resident in Italy pursuant to article 73 of the Decree of the President of the Republic no. 917 of 22 December

1986, which provides services, even on a non-exclusive basis, to support the creation and development of *innovative startups*.

As stated in the explanatory memorandum, "*the incubator of innovative startups is the subject that often accompanies the process of setup and growth, during the phase that spans from the creation of the business' idea until the early years of life of the business. The incubator works on the development of the innovative startup, working alongside and training the founders on the most important subjects regarding the management of a company and the business cycle, providing operational support, tools and office space as well as recommending the company to investors and possibly investing in the company itself"*.

In order to benefit from the support regulation outlined in Section IX of Decree-Law no.179 of 2012, the certified incubator must meet the following requirements, exhaustively listed in paragraph 5 of article 25:

a) to have available facilities, including real estate, adequate to accommodate *innovative startups*, such as spaces reserved to install testing equipment, hold tests, or conduct research;

b) to have adequate equipment for meeting the needs of *innovative startups*, such as ultra-wideband internet connection, meeting rooms, testing equipment, samples or prototypes;

c) to be administered or managed by persons of recognised competence in the fields of business and innovation and to have a permanent technical and management consulting structure;

d) to have ongoing relationships with universities, research centres, public institutions and financial partners that carry out activities and projects related to *innovative startup*s;

e) to have adequate and recognised experience in supporting *innovative startups*.

The fulfilment of these requirements must be self-certified by the incubator through a declaration signed by the legal representative at the time of registration in the special section of the Italian company register, on the basis of the indicators and their minimum values established by decree of the Minister of Economic Development (cf. decree of 21 February 2013, entitled "*Requirements for incubators for innovative startups*"; hereinafter "*Incubator decree*").

The certified incubator, to qualify as such, should enrol in the special section of the company register referred to in article 2188 of the Civil Code, by submitting the relevant electronic application form, available on the MiSE website under the section "*Innovative Startup*s" (see article 2 of the abovementioned *Incubator decree*). The application form must contain the information specified in paragraph 13 of article 25, which shall be updated at intervals not exceeding six months, pursuant to the following paragraph 14.

In addition, as for *innovative startups*, also for certified incubators the regulation requires that, within thirty days since the approval of the financial statement and, in any case, within six months after the end of each financial year, the legal representative certifies, with a statement filed in the Business Register, that all requirements of the regulation regarding qualification as a certified incubator for *innovative startups* continue to be met. The non-submission of the declaration means the requirements are no longer fulfilled (see paragraphs 15 and 16 of article 25).

1.3 Publicity regime and exemption from stamp duty and Chamber of Commerce membership fees

In order to qualify for the provisions contained in Section IX of Decree-Law no. 179 of 2012, *innovative startups* and the *certified incubators* are required to observe a special publicity regime, enrolling in the special section of the company register, in the local Chambers of Commerce, Industry, Handicraft and Agriculture,

pursuant to paragraph 8 of article 25. This registration is additional to the "customary and mandatory" registration in the ordinary section of the same register.

As required by paragraph 8 of article 26 of Decree-Law no. 179 of 2012, entitled "*Exemption from corporate law and reduction of the tax burden for startups*", since their registration in the abovementioned special section of the business register, *innovative startups* and *certified incubators* "*are exempt from the payment of stamp duty and fees due to the obligation of registering to the company register, as well as from the payment of the annual fee due to the Chambers of Commerce*".

With reference to the exemption from the payment of the fee, Unioncamere, as per explicit request by the MiSE, clarified that the exemption must be interpreted "*in its widest sense*".

Following this principle, it is considered that the exemption from the payment of stamp duty could be interpreted as a general exemption, covering all the actions carried out by the *innovative startups* after registration to the company register, such as increases of incentivized capital.

This exemption, specifies the regulation, "*is dependent on the maintenance of the requirements prescribed by law for the acquisition of the status of innovative startup and certified incubator, and lasts no later than the fourth year of registration*".

The non-fulfilment of the requirements for the qualification of *innovative startup* and *certified incubator*, which is equal to the non-submission of the declaration attesting the continued fulfilment of the aforementioned requirements, entails cancellation from the special section of the company register and, consequently - persisting the registration in the ordinary section of the Business Register – the payment of the amount due for stamp duty and administration fees.

2. THE NON-APPLICATION OF THE RULES ON DUMMY COMPANIES

Aiming to encourage the establishment of *innovative startups*, article 26, paragraph 4, of Decree-Law no. 179 of 2012, provides that to these companies are not applicable the regulations relating to so-called dummy companies, i.e. the so-called "*non-operating*" corporations, as referred to in article 30 of Law no. 724 of 23 December 1994, and the so-called "*companies reporting systematic losses*" as referred to in article 2, from paragraphs 36-*decies* to 36-*duodecies*, of Decree-Law no. 138 of 13 August 2011,converted into law, with amendments, by Law no. 148 of 14 September 2011.

As is well known, the regulations on non-operating companies and on their requirements, to which in 2011 were added the rules on companies reporting systematic losses, have been introduced with the clear aim of discouraging the use of a company as a screen to hide the real owner of the assets, taking advantage of the more favourable provisions regarding the companies and counteract companies which do not have an actual interest in the conduct of business operations.

The effect of the regulation on non-operating companies is to quantify, on a presumptive basis (depending on the company's assets and on predetermined coefficients), the taxable income for the period of the entity deemed to be a "*dummy company*" and to settle the taxes due on that income. Additionally, if the same entity takes the legal form of a company (*società per azioni, società a responsabilità limitata, società in accomandita per azioni*), an additional burden is included equal to an increase of the ordinary tax rate on corporate income of 10.5 percentage points.

Finally, for the purposes of regional tax on productive activities (IRAP), the legislator has provided that, for entities qualified as "*dummy companies*", the value of the net production, on which ordinary tax rates are levied, is to be determined presumptively.

Specifically, to check the status of a non-operating company, it is necessary to carry out the "*operativeness test*" referred to in paragraph 1 of article 30 of Law no. 724 of 1994, which aims to verify whether, in the last three years (including the year for which the abovementioned test is carried out), the average value of revenues and increases in inventories and incomes (excluding extraordinary income), resulting from the profit and loss account – the so-called actual revenues – is at least equal to the value determined by the application, to the three-year average value attributable to the assets specifically listed in paragraph 1 of article 30, of the percentages identified therein – the so-called presumed revenues.

In addition, according to paragraphs 36-*decies* to 36-*duodecis* of the afore-mentioned article 2of Decree-Law no. 138 of 2011, companies which present tax losses for three consecutive tax periods, as well as companies which, in the same period, have "*for two tax periods, reported a tax loss and, for one tax period, declared an income lower than the amount determined pursuant to article 30, paragraph 3, of Law no. 724 of 1994"*are also considered to be "*dummy companies*".

Please note that, with respect to companies reporting systematic losses, the regulation on dummy companies operates from the fourth tax year following the three observation periods.

The non-application of the non-operating companies' regulation referred to in article 30 of Law no. 724 of 1994 – which is provided for in article 26, paragraph 4, of Decree-Law no. 179 of 2012 – implies, therefore, that throughout the period in which the company meets the conditions to qualify as *innovative startup*, the said company is not required to carry out the aforementioned "*operativeness test*".

In addition, pursuant to paragraph 4 of article 26, the regime of companies reporting systematic losses doesn't apply to *innovative startups* throughout the period in which these companies meet the requirements to qualify as such.

In the period following the date on which it ceases to qualify as an *innovative startup*, the company is, however, required to conduct the "*operativeness test*" referred to in article 30 of Law no. 724 of 1994, and, as clarified by Circular no. 25/E of 4 May 2007, for the determination of the presumed and actual income, it is necessary to consider the two tax years preceding the year under observation, even if these are affected by the causes of non-application of the regulation.

For the purposes of applying the rules relating to companies reporting systematic losses, it should be noted that the so-called "three-year period of observation" starts the tax year following the year in which the company ceases to qualify as an *innovative startup*.

Only in relation to this period, therefore, can the conditions required by article 2, paragraphs 36-*decies* and 36-*undecies*, of Decree-Law no. 138 of 2011 be verified, for the purposes of applying the regulation in question.

For example, in the case of a company incorporated on 16 April 2013 which will qualify as an *innovative startup* until 15 April 2017:

– the regulation regarding the so-called "*non-operating companies*" is not applicable for 2013, 2014, 2015, 2016 and 2017; this means that the first tax year of application of the regulation is 2018, provided that, for this period, there are no cases of exclusion or non-application;

– the regulation regarding so-called "*companies reporting systematic losses*" is not applicable for 2013, 2014, 2015, 2016 and 2017; the first period for the application of the regulation will be 2021, providing that, during the relevant "three-year period of observation" (that is, 2018, 2019 and 2020), the conditions set out in article 2, paragraphs 36-*decies* and 36-*undecies*, of Decree-Law no. 138 of 2011 are met and there are no possible cases of disapplication in one or more of the years of the aforementioned three-year period of observation nor cases of exclusion in the year 2021.

3. FINANCIAL INSTRUMENTS OF INNOVATIVE STARTUPS AND CERTIFIED INCUBATORS – TAX INCENTIVES

Among the measures planned in support of *innovative startups* and *certified incubators*, article 27 of Decree-Law no. 179 of 2012 includes tax and social security contribution incentives to be applied to the financial instruments which are used to pay professionals and qualified consultants (*work for equity*).

In particular, the envisaged measures aim to:

- motivate and retain employees, term-contract workers and managers of *innovative startups* and certified incubators by establishing the tax and social security irrelevance of the financial instruments entrusted to them, for the determination of the income of employees and staff in general (paragraphs 1 to 3);
- promote the acquisition of services rendered by qualified *innovative startups* and certified incubators by establishing the tax irrelevance of the financial instruments received for the provision of work and services, and of credits earned as a result of the provision of work and services rendered in support of *innovative startups* and certified incubators (paragraph 4).

3.1 Allocation of financial instruments and employment income

3.1.1 General aspects

Article 27, paragraphs 1 to 3, of Decree-Law no. 179 of 2012, determines the non-relevance for the purposes of income tax and social contributions of the income arising from the allocation of financial instruments by *innovative startups* or *certified incubators* in favour of their managers, employees and term-contract workers on a long term basis (collaboratori continuativi), or the income arising from the exercise of option rights on financial instruments by the aforementioned subjects.

The explanatory memorandum specifies that the favourable tax and contribution scheme for the incentive plans based on the allocation of financial instruments was introduced "*in order to provide innovative startups and certified incubators the necessary tool to foster loyalty and to incentivize management".*

The abovementioned incentive scheme, specifically for managers, employees and term-contract workers of *innovative startups* and *certified incubators*, goes alongside the general scheme, for the employees of all companies, stated in article 51, paragraph 2, letter g), of TUIR (the Italian Income Tax Code) .

Hereinafter, in order to illustrate the tax incentive scheme under consideration, the main differences between this scheme and the one provided by the TUIR are highlighted, in terms both of requirements and of application conditions.

3.1.2 The beneficiaries of the incentive

Article 27, paragraph 1, sentence 1, of Decree-Law no. 179 of 2012 identifies as beneficiaries of the incentive the "*managers, employees or term-contract workers*" of *innovative startups* and *certified incubators*.

The explanatory memorandum of the Decree-Law specifies that, among the subjects who qualify for the exemption in question, are included:

i) managers;

ii) employees bound by an employment relationship with the *innovative startup* or with the certified incubator, even if temporary or part-time;

iii) term-contract workers on a long term basis, namely all those other subjects, including the employees hired on a project-by-project basis, whose income is normally assimilated to the income of ordinary employees for tax purposes, but different from the providers of work and services referred to in paragraph 4 of the article.

Given that the incentive scheme concerns income from employment and from assimilated income, it is not considered applicable in cases where the director's role

falls within the objects of the profession exercised by the taxpayer and, therefore, his income falls into the category of income from self-employment, according to article 50, paragraph 1, let. c-*bis*), of TUIR. This situation may fall, if the requirements are met, within the IRPEF (personal income tax) exemption scheme designed for the provisions of work and services, including those rendered on a professional basis, according to paragraph 4 of article 27 (see reference in section 4).

Moreover, given the express limitation to "term-contract workers on a long term basis" (collaboratori continuativi), the incentive scheme does not apply to contractors employed on a simply occasional basis, whose income is part of "other income category" referred to in article 67, paragraph 1, let. l), of TUIR.

In the absence of specific limitations in this sense, the incentive scheme is applicable regardless of whether an incentive plan is addressed to all managers, employees and term-contract workers on a long term basis of the *innovative startup* or of the *certified incubator*, or only to some of them.

This component distinguishes the incentive scheme under consideration from the one referred to in article 51, paragraph 2, let. g), of TUIR, which is expressly limited to shares "*offered to all employees*", including, among them, term-contract workers on a long term basis (including managers) who earn incomes assimilated to those of employees (see Circular no. 207/E, 2000).

3.1.3 Financial instruments and stock rights that do not concur to the composition of employment income

Article 27, paragraph 1, of the aforementioned Decree-Law identifies as the object of the incentive the non-relevance of income "*arising from the allocation of... financial instruments or any other right or incentive that establishes the allocation of financial instruments or similar rights, as well as arising from the exercise of option rights allocated for the purchase of such financial instruments...*".

The explanatory memorandum to the draft of law that ratifies the Decree-Law clarifies that "*Among the exempted incomes must be considered to be included all incentives attributed to the grant, free of charge or not, of shares, financial instruments or rights by innovative startups, including incentive plans that include (i) the direct assignment of financial instruments (including those in the form of so-called restricted stock), (ii) the granting of options to subscribe or to purchase financial instruments, (iii) the promise to grant financial instruments in the future (the so-called restricted stock unit)*".

With reference to the identification of financial instruments that are eligible for incentives, as specified in paragraph 2 and in the explanatory memorandum, reference must be made to "participation" financial instruments, i.e. financial instruments similar to shares whose remuneration consists entirely of participation in the economic performance of the issuing company (see article 44, paragraph 2, let. a), of TUIR).

Paragraph 2 of article 27 under scrutiny provides a specific limitation for issuing entities, allowing the application of the scheme of exclusion from the composition of the income only with reference to "*allocation of shares or stakes, participatory financial instruments or rights issued by the innovative startup and certified incubator with which the above-mentioned subjects have their working relationship, as well as those issued by companies directly controlled by an innovative startup or certified incubator*".

The limitation relating to issuers is stricter than the one pursuant to article 51, paragraph 2, letter. g), of TUIR, as paragraph 2-*bis* of article 51 states that it is applicable "*to the shares issued by the enterprise with which the taxpayer has the working relationship, as well as those issued from companies that directly or indirectly control the said company, are controlled by this company or are controlled by the same company that controls the enterprise*" admitting also the parent company and related companies.

Finally, it should be noted that article 27 admits support without indicating any limitation on the non-taxable value of financial instruments, in contrast to the provisions set out by article 51, paragraph 2, let. g), of the Italian Income Tax Code, which restricts the exclusion from the composition of the income to the shares allocated to employees for an amount not exceeding a total of € 2,065.83 per employee in the tax year.

3.1.4 Effects on income

Article 27, paragraph 1, of Decree-Law no. 179 of 2012 states that the "*employment income*" arising from the allocation of shares or "participation" financial instruments by *innovative startups* and *certified incubators* to their managers, employees or term-contract workers, or from the exercise of option rights allocated for the purchase of such financial instruments "*does not concur to the taxable income of such persons, neither for tax purposes or for the purposes of social security contributions*".

This provision derogates from the ordinary rules of determination of income from employment that, pursuant to paragraph 1 of article 51 of the Italian Income Tax Code, consists of all general earnings and values received in the tax year, even those taking the form of donations, in relation to the employment relationship.

With regard to "*managers*" and "*term-contract workers "* it should be noted that, for the purposes of income tax, article 50, paragraph 1, let. c-*bis*), of TUIR treats employment income alongside "*all general earnings in the tax year, even those which take the form of donations, in relation to the duties of company managers... as well as those received in relation to other collaborations involving the performance of activities without subordination in favour of a particular subject within the framework of a unique and long-term relationship without the use of organised tools and with predetermined regular salary, provided that these duties... do not fall within the institutional tasks included in the activity of the employee... nor in the*

occupation or profession... held by the taxpayer". For the determination of employment income, article 52 of TUIR refers to the provisions contained in article 51 for determining the income of employees.

Therefore, if the conditions of the provision under examination are met, the allocation of shares or stakes or "participation" financial instruments, as well as the exercise of option rights for the purchase of financial instruments, are not relevant for income tax purposes during the tax period of allocation or exercise of the right.

However, the subsequent sale of such financial instruments shall have relevance.

In this regard, it is necessary to distinguish between:

– the transfers made to the *innovative startup*, to the certified incubator, to the issuing company, or to any subject who directly controls or is controlled by the *startup* or the certified incubator, or who is controlled by the same subject which controls the *innovative startup* or the certified incubator. This case gives grounds for the termination of the incentive and is further analysed in section 3.1.5;

– the sale to other parties.

In the latter case, the sale of financial instruments is treated as "other income" pursuant to article 67 of TUIR, as confirmed also from paragraph 5 of article 27 of Decree-Law no. 179 of 2012 which states that "a*ny capital gains realised through the sale for a fee of the financial instruments referred to in this article shall be subject to their ordinarily applicable regimes*".

For the determination of the taxable capital gains concerned, the provisions of article 68, paragraph 6, of the TUIR are applied. In accordance with these, the gains "*...are represented by the difference between the amount received… and the cost or the purchase value subject to taxation...*".

In consequence, in case of free allocation of shares, stakes or "participation" financial instruments, or in case of free exercise of the option rights allocated for the purchase of such financial instruments, the cost that can have fiscal relevance is

equal to zero and the entire amount is considered as a capital gain, taxable as "other income".

3.1.5 Causes for the revocation of the incentive

Paragraph 1 of article 27 of the Decree-Law provides a cause of revocation of the support measures with the purpose, highlighted in the explanatory memorandum, of avoiding the use of the exemption for purely elusive reasons.

In particular, the tax incentive operates "*on condition that such financial instruments or rights are not re-purchased by the innovative startup or by the certified incubator, by the issuing company or by any subject which directly controls or is controlled by the innovative startup or by the certified incubator, or is controlled by the party that controls the innovative startup or the certified incubator*".

In the explanatory memorandum, it is stated that, due to such provision, the financial instruments and the rights granted shall not be assigned to *innovative startup*s or to certified incubators with which the managers, employees and term-contract workers have their working relationship or collaboration with or to the issuing companies, if different from the *innovative startup* or *certified incubator* in question, or to the subjects that are, in any capacity, part of the latter's group, i.e., the companies that directly control or are controlled by the said *innovative startup* or *certified incubator*, the shareholders (natural persons) of the same *innovative startup*, and the companies that are controlled by the subject (natural person or corporate body) that controls the *innovative startup* or *certified incubator*.

In the event that this condition is not met, the last sentence of paragraph 1 of article 27 of the Decree-Law provides that "...*the employment income that has not previously contributed to the formation of the taxable income of these entities is subject to tax in the fiscal period in which the sale occurs*".

In such cases, the explanatory memorandum makes it clear that "*the full value of the financial instruments or rights, which was not subject to taxation when they were granted or when the right was exercised, will be taxed as employment income in the tax period in which the sale occurs. For this purpose, therefore, it shall be considered the value that the financial instruments and the relevant rights had at the time of the allocation or of the exercise [of the right] and not the different value that these financial instruments and rights had at the time of the sale*".

The practical application of the last-mentioned provision must also take into consideration the provisions of paragraph 5 of article 27, which states that "*Any capital gains realised through transfers against payment of the financial instruments referred to in this article shall be subject to their ordinarily applicable regimes".*

Essentially, in the event that the financial instruments or rights are transferred in a manner not complying with the conditions stated in paragraph 1 of article 27, the amount corresponding to the value of financial instruments and rights at the time of the allocation or of the exercise of the right shall constitute employment income, while any difference between the amount paid and the amount subject to taxation as employment income shall be, if positive, a gain, and if negative, a loss, and shall be treated as "other income" in accordance with article 67 of TUIR, to be determined pursuant to the following article 68.

The article 27 under scrutiny, however, does not provide any revocation of the incentive if the financial instruments granted to managers, employees or term-contract workers are purchased by subjects other than those previously indicated, regardless of the date on which the re-purchase occurred.

3.1.6 Effective date of the incentive allocation regime

Article 27, paragraph 3, of Decree-Law no. 179 of 2012provides that "*The exemption referred to in paragraph 1 applies in relation to employment income arising from the financial instruments and from the rights granted and assigned, or*

to options granted and exercised, after the date of entry into force of the law of conversion of this decree".

Law no. 221 of 2012, which converted the Decree-Law, came into force on 19 December 2012. It follows that, if all conditions are met, the value of the financial instruments, and the rights assigned and allocated, or any options granted and exercised, will not concur in the formation of employment income with effect from December 19, 2012.

The specified effective date, stated in paragraph 3 of article 27, takes precedence over the effective date of other provisions regarding existing *innovative startups* and *certified incubators*, established in a general way on 19 October 2012, date of entry into force of the Decree-Law.

For *innovative startups* and *certified incubators* incorporated from 19 December 2012 onwards, the possibility of allocating financial instruments and option rights within the tax incentive regime will obviously start from the date of their incorporation.

3.1.7 Termination of the incentive allocation scheme

For *innovative startups* the opportunity to assign financial instruments and option rights under the tax incentive regime, pursuant to paragraph 4 of article 31 of the Decree-Law, shall be terminated:

- in case of loss of one of the requirements referred to in paragraph 2 of article 25 of the Decree-Law (cf. section 1.1);
- in any case, after four years from the date of incorporation or after the period indicated in paragraph 3 of article 25 of the Decree-Law for *innovative startups* already in existence on the date of 19 October 2012, date of entry into force of the Decree-Law (cf. section 1.1.3), as indicated below for better comprehension:

Date of incorporation of the company	**Terms regarding the issue of the incentivized financial instruments, safe case of loss of requirements**
between 20 October 2008 and 19 October 2009	from 19 December 2012 to 18 December 2014
between 20 October 2009 and 19 October 2010	from 19 December 2012 to 18 December 2015
between 20 October 2010 and 18 December 2012	from 19 December 2012 to 18 December 2016
from 19 December 2012	after four years from incorporation

About certified incubators, although there are no regulations similar to those provided for *innovative startups* in paragraph 4 of article 31 of the Decree-Law, it is considered that the possibility to assign financial instruments and option rights under the incentive scheme should cease in the case of loss of any of the requirements necessary for being considered a certified incubator as stated in paragraph 5 of article 25 of the Decree-Law (see section 1.2).

It is considered that the termination of the possibility to assign financial instruments and option rights under the tax incentive scheme (for time-limits or loss of the requirements for *innovative startups*, for loss of the requirements for certified incubators) does not cancel the possibility to apply the incentive regime to those already assigned.

In other words, financial instruments and option rights already assigned on the date of termination of the application of the provisions on *innovative startups* will continue to benefit from the favourable tax regime, even in the case of option rights for which the *"vesting*" period for the exercise of the right is subsequent to that date.

It stands unchanged the application of paragraph 1 of article 27 of the Decree-Law that sets the loss of tax benefits, without any time limit, in the event of re-purchase of the financial instruments by the *innovative startup* or by the *certified*

incubator, by the issuing company or by any entity that directly controls or is controlled by the *innovative startup* or *certified incubator*, or is controlled by the same subject that controls the *innovative startup* or *certified incubator*.

This also applies in the event that the re-purchase is made by subjects who have lost the qualification of *innovative startups* or *certified incubators* for the above-mentioned reasons.

Differences between the *innovative startup* regime and TUIR tax breaks regime

	***Innovative startup* regime**	**TUIR tax breaks regime**
Beneficiaries	- Employees - Managers - Term-contract workers (including offers destined only to a part of them)	- Employees - Managers - Term-contract workers (only for offers destined to all of them)
Non-taxable amount limit	None	€ 2,065.83 per tax year
Financial securities	Shares and stakes, "participation" financial instruments	Shares
Issuers	- *Innovative startup* - Certified incubator (with which the beneficiaries have their working relationship): - Directly controlled companies	- Employers - Parent companies - Subsidiaries - Related companies
Issuing time limit	For *innovative startup*, 4 years from incorporation or loss of requirements For certified incubator, loss of requirements	None
Restrictions on transfer	No time limits for: - *Innovative startup*s - Certified incubators - Issuing companies - Parent companies - Subsidiaries - Sister companies	No time limits for the issuing company or the employer 3 years for third parties

4. ISSUE OF FINANCIAL INSTRUMENTS AGAINST SUPPLY OF WORK AND SERVICES

Article 27, paragraph 4, of the Decree-Law states that "*The shares or stakes and participatory financial instruments issued against the supply of work and services in favour of innovative startups or certified incubators, or against credits earned as a result of the supply of work and services, including professional ones, in favour of said subjects, do not concur to the formation of the total income of the subject who makes the supply, also in derogation of article 9 of the Decree of the President of the Republic no. 917 of 22 December 1986,at the time of their issue or at the time when the compensation which replaces the payment is made".*

In order to ensure that *innovative startup* companies have access to highly-qualified consultancy services, including professional ones, the explanatory memorandum clarifies that this provision outlines the regime of non-taxability of supply of work and services already covered by the Italian Revenue Agency (Circ. 10/E of 16/3/2005) and also extends it to cases in which the contributions relate to credits arisen from the work and services rendered in favour of these companies. Therefore, as the explanatory memorandum continues, these contributions are exempt from any tax, as they do not have tax relevance for the parties who perform them, neither at the moment of completion of the work, nor at the moment of issue of the shares or stakes or financial instruments.

In contrast, the favourable tax regime does not extend to the subsequent allocation of the financial instruments received. The effect of paragraph 5 of article 27 is that "*any capital gains realised through a transfer for a fee of the financial instruments referred to in this article shall be subject to their ordinarily applicable regimes*".

In this regard, it shall be highlighted that, unlike what is provided for in paragraph 1, this provision does not set any restriction on the sale of financial instruments issued in connection with supply of work and services or related credits.

Thus, if such financial instruments are sold to an *innovative startup* or *certified incubator* it has no consequence on the application of the favourable tax regime, without., however, affecting the application of the ordinary taxation stated in article 67 of the TUIR for "other incomes".

Also fall within the scope of paragraph 4 of article 27 the professional services rendered by the managers of *innovative startup*s or *certified incubators*, or the related credits, whose income could be qualified as a self-employment income. This does not include, however, the services rendered by subjects whose remuneration falls within the category of income from employment or assimilated incomes.

The application of the ordinary VAT regime on the performance of the services covered by this provision shall not be affected.

5. SIMPLIFICATION PROCEDURES FOR ACCESS TO TAX CREDIT AVAILABLE TO INNOVATIVE STARTUPS AND CERTIFIED INCUBATORS FOR HIRING STAFF

Article 27 bis of Decree-Law no. 179 of 2012, included in the law of conversion, contains provisions *about innovative startup*s and certified incubators aimed at regulating, with "*simplified procedures*", the application of special conditions for the recruitment of highly qualified personnel introduced by article 24 of Decree-Law no. 83 of 22 June 2012, converted, with amendments, by Law no. 134 of 7 August 2012.

This is a contribution available as a tax credit for enterprises that hire new permanent, highly qualified employees in possession of a PhD degree or of a master's degree with technical or scientific orientation, involved in research and development activities.

The tax credit, equal to 35 per cent of the cost incurred by the company for hiring such personnel, cannot exceed € 200,000 per year for each company and it is

available on the condition that the new work positions created are kept for at least three years, or two years in case of small and medium-sized enterprises.

The methods of application of the disposition in question were governed by Decree of the Minister of Economic Development of 23 October 2013, issued jointly with the Minister of Economy and Finance, implementing the provisions of paragraph 11 of the abovementioned article 24 of Decree-Law no. 83 of 2012.

With specific reference to *innovative startup*s and *certified incubators* article 27-*bis* states:

- as per letter *a)*:
  - the inclusion in the objective of the incentive application of permanent hiring of highly qualified personnel made in the form of "*apprenticeships*" (first sentence);
  - the non-applicability of the provisions referred to in paragraphs 8, 9 and 10 of the said article 24, about the necessity of arranging appropriate accounting documentation, certified by a professional and registered auditor or by the Board of Auditors, for the purposes of accessing the tax credit (second sentence);
- as per letter *b)*:
  - the attribution of the tax credit "*as a priority over other companies*", with the exception of the portion of funds reserved for companies with headquarters or local units in the areas affected by the earthquake on 20 and 29 May 2012 (first sentence);
  - the submission of the application for admission to the tax credit written in a simplified form (second sentence).

In accordance with the provisions referred to in the abovementioned letter a), sentence 1, the Interministerial Decree of 23 October 2013 states that, for *innovative*

*startup*s and *certified incubators* "*tax breaks cover also the costs related to permanent hiring made in the form of apprenticeships*" (see article 2, paragraph 2).

About the purely procedural aspects of the incentive scheme - indicated in the abovementioned letter *b)* - reserved for *innovative startup*s and certified incubators, article 3 of the Interministerial Decree states, in particular, that:

- the request for access to tax breaks, the contents of which are determined with a special MiSE Directorial Decree, shall be written "*in a simplified form*", pursuant to article 27-*bis* of Decree-Law no. 179 of 2012 (paragraph 3);
- within the spending limits referred to in paragraph 13 of article 24 of Decree-Law no. 83 of 2012, a reserve of € 2 million is established in favour of *innovative startup*s and certified incubators, to be managed separately under the "*de minimis*" regime, net of the portion reserved for companies with headquarters or local units in the territories affected by the earthquake on 20 and 29 May 2012, referred to in paragraph 13bis of article 24. Furthermore, in the case of depletion of this reserve, the same subjects have access, still under the "*de minimis*" rules, to the remaining available resources (paragraph 6).

It does not affect the opportunity, pursuant to article 6 of the Decree, for both *innovative startup*s and certified incubators to participate in the general measure without asserting their prerogatives.

With reference to the application of the limits stated in the guidelines on the so-called "*de minimis*" State aid, it should be noted that, as of 1 January 2014, the new Commission Regulation (EU) No. 1407/2013 of 18 December 2013 has been in force and that it has replaced the former Commission Regulation (EC) No. 1998/2006 of 15 December 2006, in force until 31 December 2013.

6. INVESTMENT INCENTIVES IN INNOVATIVE STARTUPS

As part of the measures to support *innovative startups*, contained in Section IX of Decree-Law no. 179 of 2012, article 29 introduces a tax benefit on income tax in favour of subjects who make investments in the share capital of *innovative startup*s.

In the explanatory memorandum to Decree-Law no. 179 of 2012, it is emphasised that, in order to enhance the growth of, and the propensity to invest in, *innovative startups*, it is "*a priority to try to create an environment favourable to their development, increasing their ability to attract private capital, also thanks to tax benefits*".

In order to encourage the incorporation and development of new *innovative* companies, the said provision states that entities who invest in the share capital of one or more *innovative startup*s – either directly or indirectly through undertaking a collective investment or through other companies that invest primarily in the aforementioned *innovative startups* – can have their tax burden reduced of an amount equal to a certain percentage of the investment.

In particular, paragraphs 1 to 3 of article 29 regulate the methods by which the tax break takes the form of a tax credit , in favour of investors "subject to personal income tax" ("IRPEF subjects"); while the following paragraphs 4, 5 and 6 recognise a deduction for investors "subject to corporate income tax" ("IRES subjects"). The tax break operates, therefore, solely for the purposes of income tax and does not apply with regards to regional tax on productive activities (IRAP).

Paragraph 7 establishes particularly favourable conditions for the application of the tax breaks for investments in *startup*s *with a social goal* and in *startup*s that develop and commercialize exclusively innovative high tech products or services in the energy sector.

6.1 Subjective limits. How to realize the incentivized investment

In putting into effect the provisions of paragraphs 1 and 4 of article 29, article 2, paragraph 1of the *implementing decree* states that tax benefits shall apply to persons subject to personal income tax (IRPEF) referred to in Title I, of TUIR, approved by Presidential Decree no. 917 of 22 December 1986, and to entities subject to corporate income tax (IRES), referred to in Title II of the same TUIR, who make a incentivized investment during an eligible tax period.

The investment in one or more *innovative startups* can be made directly by the investor or, as mentioned in article 2, paragraph 2, of the *implementing decree*, indirectly through "qualified" intermediaries: collective investment undertakings or other limited companies that invest primarily in *innovative startup*s, as defined, respectively, in letters e) and f) of paragraph 2 of article 1 of the *implementing decree*.

Pursuant to the aforementioned letter e), the term "collective investment undertakings that invest primarily in *innovative startup*s" (organismi di investimento collettivo del risparmio, OICR) is understood to mean those entities referred to in article 1, paragraph 1, letter m), of Decree-Law no. 58 of 24 February 1998, that "*at the end of the tax period in progress on 31 December of the year in which the incentivized investment is made, hold shares or stakes in innovative startups for a value at least equal to 70 per cent of the total value of investments in financial instruments resulting from the management report or from the financial statements for the aforementioned tax period*".

Therefore, can be considered as "qualified OICR" entities as the "investment *mutual funds*" and the "*investment companies with variable capital*" (società di investimento a capitale variabile, SICAV), which, at the end of the tax period during which the investment is made, hold shares or stakes for *innovative startups* for a value equal to at least 70 per cent of the total value of investments in financial

instruments resulting from the management report or the financial statements for the same tax period.

With reference to the identification of "*other limited companies that invest primarily in innovative startups*" (hereinafter "intermediary companies"), pursuant to letter f) of paragraph 2 of article 1 of the *implementing decree*, it must be also be verified that, at the end of the tax period during which the investment is made, the limited company holds shares or stakesfor *innovative startups*, classified in the category of financial assets, for a value equal to at least 70 per cent of the total value of financial assets recorded in the financial statements for the same period.

Lastly, it shall be pointed out that, in order to calculate the relevant percentage necessary for considering an intermediary as "qualified", the "value" of the shares orstakesheld in *innovative startups*, as well as the total amount of investment in financial instruments and in other financial assets, has to be considered as the cost paid by the intermediary for the purchase of the securities, before any depreciation.

6.1.1 Reasons for non-application of the incentive

In accordance with paragraph 3, letter a), of article 2 of the *implementing decree*, benefits do not apply in the case of investments made by collective investment undertakings (OICR) or companies that are "*directly or indirectly publically owned"*.

Moreover – in compliance with the *Guidelines on Risk Capital* – the following investments are not eligible for the incentive, pursuant to the following letter b), investments in *innovative startups* that are qualified as "firms in difficulty" in accordance with the "*Community Guidelines on State aid for rescuing and restructuring firms in difficulty*" (2004/C 244/02), and investments in companies operating in the ship building sector or in coal and steel sectors.

Letter c) excludes *innovative startups*, certified incubators, OICR and intermediary companies from access to the incentive for investments in the share capital of *innovative startups*. This exclusion, which is derived from the combined provisions of paragraphs 4 and 6 of article 29 of Decree-Law no. 179 of 2012, has the purpose, as shown in the memorandum attached to the *implementing decree*, of "*avoiding fictitious duplicated investments and of ensuring, at the same time, the injection of new capital into innovative startups".*

With respect to the exclusion, established in letter d), of entities who exercise significant influence over the *innovative startups* - either directly, indirectly through subsidiaries, or jointly with family members - the explanatory memorandum to the *implementing decree* refers to the constant orientation assumed in this direction by European case law in cases similar to the one in consideration.

Specifically, pursuant to abovementioned letter d), the incentives do not apply "*in the case of investments made either directly or indirectly through other limited companies that invest primarily in innovative startups, to the entities which... have participations, securities or rights in the innovative startup object of the investment, representing an overall percentage of the voting rights exercisable at an Ordinary Shareholders' Meeting or an interest in the capital or assets of the innovative startup greater than 30 per cent".*

The exclusion from the incentive of investors who are not independent, as defined above, has been suggested, during the process of notification of the measure, by the European Commission that has long aimed to enforce this limitation on State aids for investment in risk capital: for example, a very similar clause has been introduced to the Enterprise Investment Scheme (EIS) of the United Kingdom [State Aid NN 42/a/2007 and NN 42/b/2007 (ex N 300/2007) - United Kingdom].

Therefore, in line with the terms specified above, are eligible for the incentive only the investments made by entities which, before making it, do not have an already existing share holdings greater than 30 per cent.

The calculation of the limit of 30 per cent, by express provision, must also take into consideration the investments, securities or rights held by family members of such subjects, identified in accordance with article 230-*bis*, paragraph 3, of the Italian Civil Code, or by subsidiaries pursuant to article 2359, paragraph 1, number 1), of the Civil Code.

6.2 Term of validity of the incentive

About the periods eligible for the implementation of the incentive, article 29 of Decree-Law no. 179 of 2012, as amended by article 9, paragraph 16-*ter* of Decree-Law no. 76 of 28 June 2013, converted with amendments by Law no. 99 of 9 August 2013, states that it shall apply "*for the years 2013, 2014, 2015 and 2016*" for IRPEF subjects (paragraph 1) and, "*for tax years 2013, 2014, 2015 and 2016*" for IRES subjects (paragraph 4).

The already quoted paragraph 16-*ter* of article 9, in compliance with article 29 of Decree-Law no. 179 of 2012, has extended the tax benefits, already provided for the years 2013, 2014 and 2015, to 2016 as well, in favour of investors in the capital of *innovative startups.*

Article 2 of the *implementing decree* establishes that the tax benefits shall be applied to investments made in one or more *innovative startups* "*during the three tax years following the year in progress on 31 December 2012*".

The authorisation decision of the European Commission *C(2013)8827final* authorised the tax incentives referred to in article 29 of Decree-Law no. 179 of 2012 "*for eligible investments made in the tax years 2013, 2014 and 2015*, specifying that any amendment made to the measure shall be notified to the Commission.

The inclusion of the tax year 2016, introduced by the modifications to Decree-Law no. 179 of 2012 made by the law of conversion of Decree-Law no. 76 of 2013, was not subject to evaluation at Community level and so will require a specific authorization in order to be considered a incentivized period.

With reference to the so-called "standstill" clause, referred to in paragraph 9 of article 29, by which the implementation of the notified measure depends on the preventive authorization of the Community, the aforementioned Decision C(2013) 8827*final* states that "*the measure will not be applied before its full text has been published on the internet, in particular on the websites of the Italian Official Journal and the Ministry of Economic Development, in the section devoted to news on innovative startups, respectively: http://www.sviluppoeconomico.gov.it and http://www.gazzettaufficiale.it".*

The publication on the abovementioned websites of the full set of measures and, in particular, of the *implementing decree* referred to in paragraph 8 of article 29 took place on 20 March 2014.

Given that this incentivized measure consists of a deduction from the gross tax (tax credit) for IRPEF subjects and of a deduction from the total income for IRES subject, and that it shall be carried out in the tax return related to each incentivized period, the first eligible period for IRPEF subjects is 2013, while for IRES subjects is the tax period following the one in progress on 31 December 2012.

Investors will be able to receive the tax benefits starting from the tax return for the fiscal year 2013 by means of the 730/2014 Model or the *Unico/*2014 Model.

Pending a further approval by the European Commission regarding the applicability of the incentive for 2016, the following investments are currently eligible: for IRPEF subjects, investments made directly or indirectly in the share capital of *innovative startups* in the tax years 2013, 2014 and 2015; for IRES subjects, investments made during the tax years following the year in progress on 31 December 2012 and up to the year underway on 31 December 2015 (so-called "eligible periods"), with respect to the tax year of the investor.

The explanatory memorandum to the *implementing decree* clarifies that, to verify whether the investment is made in one of the eligible tax periods, it is necessary to identify the tax period during which the transfer is relevant, in

accordance with the provisions contained in article 3, paragraphs 3 and 4, of the said *implementing decree*, about which clarifications are provided in section 6.4.

6.3 Definition of facilitated investment

The investment in the registered capital of one or more *innovative startups* must have the characteristics specified in the *implementing decree* to guarantee to the investors the right to the tax benefits referred to in article 29 of Decree-Law no. 179 of 2012.

Specifically, article 3 of the *implementing decree* establishes that the benefits apply only to cash investments, carried out either at the incorporation of the *innovative startup* or when the registered capital of an already established *startup* is increased.

As clarified by the explanatory memorandum, the exclusion from tax benefit of investments different than cash can be justified by the need "*to preserve the effectiveness of the share capital which would be secured by investments in cash as well as to prevent that the difficulties inherent to the evaluation of any contribution of a different nature may lead to uncertainties and disputes in determining the benefit"*.

In addition, by express provision of law, can be incentivized only the investments made in the share capital and in the share premium reserve of the shares or stakes of the *innovative startup*.

Therefore, cannot be incentivized non-refundable cash investments recorded in other items of the equity, different than share capital and share premium reserve.

In case of indirect investment through other limited companies, it should be pointed out that can be incentivized only cash investments that determine an effective capitalisation of the intermediary company as well.

Therefore, shall be eligible cash investments through which both the *innovative startup* and the intermediary company shall remark an increase of their

share capital and of the share premium reserve, both when they are incorporated and when the share capital is increased

Considering that under law provision is eligible "*the amount invested in the share capital of one or more innovative startups"* (paragraphs 1 and 4 of article 29) and that, only after the authorizing decision of the European Commission, article 3, paragraph 1, of the *implementing decree*, has introduced the condition that the investments shall be recorded in the share capital and the share premium reserve of the intermediary companies, it should be noted that, if the latters - pending the publication of the *implementing decree* - have registered the sums received from investors in other capital reserves, they must proceed to increase their share capital by recording such reserves by 31 December 2014, in order to allow the investor to claim the benefit on the sums invested.

In this case as well, in accordance with article 3, paragraph 3, of the *implementing decree*, the right for the investor to receive the benefit takes relevance in the tax period in progress on the date when the capital increase of the *innovative startup* is completed.

In order to promote a neutral choice on procedures for the realization of the investment, is also eligible the capitalisation of *innovative startups* using the instrument of convertible bonds.

By express provision of article 3, paragraph 1, the penultimate sentence of the *implementation decree* established that, among the eligible investments, there are also those arising from the conversion of convertible bonds into newly issued shares in *innovative startups*.

The last sentence of the abovementioned paragraph 1, also states that the tax breaks apply to *"investments in the shares of collective investment undertakings referred to in article 1, paragraph 2, letter e)"*.

In the case of indirect investments made through a qualified OICR, the subscription of shares in mutual investment funds and of shares representing the capital of SICAV , in particular, is considered eligible for the incentive.

In addition, under article 3, paragraph 2, of the *implementing decree*, the subscription of a capital increase through claim compensation is also treated as a cash investment and, consequently, constitutes an incentivized investment, except when it arises from the sale of goods or provision of services.

However, this last preclusion does not apply for claims resulting from the performance of work and services provided for in article 27 of Decree-Law no. 179 of 2012.

As clarified by the explanatory memorandum to the *implementing decree*, the subscription of a capital increase of an *innovative startup* resulting from the waiver of their claims by the parties benefitting from the provisions referred to in the article 27 is eligible for the incentive since it prevents the outflow of capital from the *innovative startup*.

Finally, with regard to non-resident *innovative startups* who exercise business activities in Italy through a permanent establishment, paragraph 5 of article 3 of the *implementing decree* states that the incentives are granted in relation to the increases of the endowment fund of the said establishments.

In this regard, it needs to be clarified that the endowment fund and the related increases to take into consideration are those resulting from the tax return for the tax year in which the investment is made; they should be judged fiscally “adequate”, taking into account internationally-shared principles.

In all cases, only investments recorded in the share capital or in a reserve similar to the share premium of the non-resident *innovative startup* are eligible for incentive, as is further specified in the following paragraph.

Finally, it should be noted that investments with the above-described characteristics shall be eligible for the incentive, provided that the total amount of

the investments received by each *innovative startup* in each tax period is not more than € 2,500,000.

In this regard, paragraph 8 of article 4 of the *implementing decree*, in accordance with the provision contained in paragraph 24 of the decision of the European Commission and with regards to the *Guidelines on Risk Capital*,[2] introduces the abovementioned quantitative limit and states that, with reference to the tax year of the *innovative startup*, the relevant investments are eligible for incentive if the aggregate amount of cash investments received by the *startup* does not exceed the sum of € 2,500,000.

This condition implies, as clarified by the explanatory memorandum to the *implementing decree*, that if a *startup* were to receive cash investments for a total amount above € 2,500,000 during a tax period, the shareholders who have made significant investments and are, therefore, potentially eligible for the incentive, would not be entitled to any tax credits or deductions, not even for the proportion corresponding to the investment up to € 2,500,000.

6.4 Date of the investment

Paragraphs 3 and 4 of article 3 of the *implementing decree* identify the tax period in which the investment is deemed to be made.

The tax period identified normally coincides with the period in which the investor is entitled to receive the tax credit, for IRPEF subjects, or the deduction from the total income, for IRES subjects.

In case of subscription to shares or stakes in the share capital of an *innovative startup* at the time of its incorporation, pursuant to the abovementioned paragraph 3

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[2] The Guidelines, in section 4.3.1 (*Maximum level of investment tranches*), ensure that the measures in favour of risk capital must take into consideration tranches of investment, financed in whole or in part through State aid, not exceeding EUR 2.5 million over a period of twelve months.

of article 3 of the *implementing decree*, the filing date of the certificate of incorporation in the Italian business register of the *innovative startup* is relevant.

In case of capital increases, again in accordance with paragraph 3, the investment is deemed to be made on the date on which the resolution to increase the share capital of the *innovative startup* is submitted to the Italian business register or – if subsequent – on the date on which is filed in the Italian business register the declaration of share capital increase by directors, pursuant to article 2444 of the Italian Civil Code for limited companies and article 2481-*bis*, last paragraph, for limited liability companies.

The legislation has thus tried to guarantee that, for preserving *"the effectiveness of the share capital"* only the investments resulting in an actual capital increase are eligible for the incentive..

With regards, then, to the possibility of eligible investments resulting from the conversion of convertible bonds, paragraph 4 of article 3 of the *implementing decree* makes it clear that the investment shall be considered as carried out on the effective date of the conversion.

Since this case is similar to a capital increase through cash investment or by credits compensation, it is considered that, even in the case of an investment resulting from the conversion of convertible bonds in shares or stakes of an *innovative startup*, share subscribers have the right to receive the incentive for the tax year in progress on the date when the directors submit to the Italian business register a declaration stating that the capital increase took place for an amount corresponding to the nominal value of the shares issued, pursuant to article 2420-*bis*, paragraph 3, of the Civil Code. Actually, only this requirement guarantees the effectiveness of the share capital increase, as determined at the time of the issue of the convertible bond.

Regarding investments which increase the endowment fund of the permanent establishments of non-resident *innovative startups*, it should be pointed out that the

investment is deemed to be made in the tax period during which the increase of the endowment fund occurs, as it is shown in the tax return of the permanent establishment and provided that an increase of the share capital of the non-resident *innovative startup* is reported.

Also with regards to indirect investments in *innovative startups*, the relevant investments are eligible for the incentive in the tax period during which the share capital increase in the *innovative startup* takes place.

In the case of indirect investment through intermediary companies, it should be noted that, in order to consider the investment as eligible, it is necessary that also the intermediary has previously recorded an increase of its share capital or of its share premium reserve, filing the written resolution to increase the capital or, if subsequent, the declaration referred to in articles 2444 and 2481-*bis* of the Italian Civil Code, in case of an existing intermediary company, or the articles of incorporation that shall be registered in the Italian business register, in case of a newly-established company.

6.5 Application procedures and effects of incentives

Given the large number of entities eligible for the incentives for investing in *innovative startups*, article 29 of Decree-Law no. 179 of 2012 establishes different ways to receive the benefit, depending on the type of investor, distinguishing between those "*liable to pay personal income tax*" - who receive a "tax tax credit " - and those "*liable to pay tax on corporate income*"- for which the incentive operates through a "deduction" from the total income.

The provisions concerning the actual mechanism for the implementation of the tax breaks are contained in article 4 of the *implementing decree*.

As for the effects of the application of the incentive, and regardless of the specific mechanism of implementation, it should be noted that the tax reduction that constitutes the incentive is not relevant for the purpose of determining the income,

as it does not constitute a positive component of income. The benefit, therefore, does not influence the application of articles 56, paragraph 2, 61, paragraph 1, and 84 and 109, paragraph 5, of TUIR.

6.5.1 Tax Credit for persons liable to pay personal income tax (IRPEF)

Paragraph 1 of article 29 of Decree-Law no. 179 of 2012 states that "...*an amount equal to 19 per cent of the amount invested by the taxpayer in the share capital of one or more innovative startups shall be deducted from the gross tax of income" of IRPEF subjects.*

The following paragraph 3 states that *"The maximum investment detractible ... shall not exceed the amount of € 500,000 in any tax period, and must be maintained for at least two years".*

In addition to this, pursuant to paragraph 7, in the case of investments in *innovative startups* "*with a social goal*" or in *innovative startups* "*which develop and commercialize exclusively innovative products and services with high technological value in the energy sector*", the percentage of the tax credit is increased to 25 per cent.

It should be noted in this regard that, in accordance with article 25, paragraph 4, of the said Decree-Law, *innovative startups* that operate exclusively in areas of so-called "social utility" are considered *startups* "*with a social goal",* as stated in article 2, paragraph 1, of legislative Decree no. 155 of 24 March 2006. These areas include, *inter alia*, social work, health care and social care, education and training, the protection of the environment and ecosystem, the development of cultural heritage, social tourism, undergraduate and postgraduate training, the research and provision of cultural services, extra-curricular training, aimed at the prevention of early school leaving and at success in education and training, and services supporting social enterprises.

On the other hand, in order to identify *startups* that "*develop and commercialize exclusively innovative products or services with a high technological value in the energy sector*", paragraph 7 of article 4 of the *implementing decree* refers to the list of codes from the *ATECO* 2007 chart, referred to in the chart annexed to the *implementing decree*.

In accordance with the above provisions, article 2, paragraph 1, of the *implementing decree*, with regards to the range of beneficiaries, makes explicit reference to "*subjects liable to pay the personal income tax referred to in Title I*" of TUIR.

Beneficiaries of the incentive are, therefore, the subjects identified in article 2 of the TUIR, i.e., natural persons resident and non-resident in the territory of the Italian State carrying out an investment eligible for incentive in the terms specified in sections 6.2 and 6.3.

The measure, therefore, includes individuals, such as professionals and individual entrepreneurs, as well as entities referred to in article 5 of TUIR , residing in the territory of the Italian State, who produce income in an associated form.

In this regard, although article 4, paragraph 1, sentence 2, of the *implementing decree*, expressly states that the incentive appertains to the shareholders of general partnerships and limited partnerships, it is considered that also partnerships, companies equated with partnerships (shipping companies, de facto corporations, unincorporated associations between natural persons for the exercise of arts and professions), and family businesses are eligible for the incentive.

Sentence 1 of the aforementioned paragraph 1 of article 4 of the *implementing decree*, also states that IRPEF subjects "*can deduct from their gross tax an amount equal to 19 per cent of the relevant investments made, for an amount not exceeding € 500,000 in each tax period".*

In other words, against an eligible investment of a maximum amount of € 500,000 for each tax period, the IRPEF subjects will receive a tax benefit equal to € 95,000, corresponding to 19 per cent of the eligible investment.

The maximum limit of € 500,000 on which the IRPEF creditis to be calculated concerns the amount invested in the share capital of one or more *innovative startups*; therefore, in order to verify the abovementioned limit, if, for example, the subject invests in two *innovative startups*, it will be necessary to sum together the investments made in each company.

If the investment is made by partnerships, the amount on which members shall calculate the credit is determined – in accordance with the principle of tax transparency set out in article 5 of the TUIR – proportionally to the respective portion of profit-sharing, and the limit of € 500,000 is not related to the individual members, but to the cash investment made by the partnership in the *innovative startup*. Therefore, two members who owns each 50 per cent of the shares in a partnership that makes an investment of € 600,000 in an *innovative startup* shall each benefit from a tax credit of 19 per cent on a maximum amount of € 250,000.

If the investment is made by a family business, the tax credit shall appertain to the entrepreneur and family workers, taking into account the provisions referred to in article 5, paragraph 4, of TUIR for the imputation of income produced by the family business.

In this regard, it shall be noted that, in order to receive the tax credit, each participant in the family business shall complete the box related to tax credits for investments in *innovative startups*, as it were a direct investment, indicating the tax code of the *innovative startup* in which the investment was made, as well as the amount on which the tax credit is to be calculated, in proportion to the said individual's portion of the family business.

For instance, in case of an investment made in 2013, each participant must fill in the box RP 80 of the Unico PF 2014 form, qualifying the type of investment with

code 1 in column 2 (direct investment) and indicating the tax code of the *innovative startup* and the amount of the investment related to his portion in the family business.

Regarding the application procedures for the investment, paragraph 2 of article 29 of Decree-Law no. 179 of 2012 states that, with reference to cases of both direct and indirect investments, "*For the purposes of this test, other tax credits that may appertain to the taxpayer are not relevant"* and that*" the amount, in whole or in part, non-deductible in the relevant tax period can be deducted from the income tax in the subsequent tax periods, but not later than the third*".

In this regard, article 4, paragraph 2, of the *implementing decree* provides that "*...If the tax credit is more than the gross tax, the excess can be deducted from the gross tax due in subsequent tax periods, but not later than the third, up to its full amount".*

Where the amount of tax credit in question exceeds the gross tax – possibly minus the other tax credit payable – the abovementioned provisions give the opportunity to "bring forward" the unused tax credit in subsequent tax periods, but not later than the third, up to its full amount.

For example:

- Gross tax year 2014, € 2,000;
- Tax credit for charges, € 1,200;
- *Startup* tax credit pertaining, € 1,500;
- *Startup* tax credit usable in the year 2014, € 800;
- *Startup* tax credit usable in 2015, € 700, which can be carried forward, in case of insufficiency, into 2016 and 2017.

In this case, the tax credit accrued for each eligible year can be used for up to a maximum of four tax periods, starting from that of the accrual.

This provision constitutes a derogation from the general regulation of tax credits, according to which they are usable only in the relevant tax year up to the correlated amount of taxes – except in the case of specific exceptions by law.

6.5.2 Tax deductions for entities liable to pay corporate income tax (IRES)

Paragraph 4 of article 29 of Decree-Law no. 179 of 2012 states that "*20 per cent of the amount invested in the share capital of one or more innovative startups…does not contribute to the formation of taxable income for entities subject to tax on corporate income".*

The following paragraph 5 states that "*the maximum investment that is deductible... must not exceed the amount of € 1,800,000 in each tax year, and must be maintained for at least two years".*

According to paragraph 7, in the case of investments in *innovative startups* "*with a social goal*" or in *innovative startups* "*who develop and commercialise exclusively innovative products and services with high technological value in the energy sector*", the percentage is increased to 27 per cent.

In accordance with these provisions, article 4, paragraph 3, of the *implementing decree* states that entities subject to tax on corporate income "*May deduct from their total income an amount equal to 20 per cent of the eligible investments made for an amount not exceeding € 1,800,000, for each tax period".*

Summing up, against an eligible investment – as defined by article 3 of the *implementing decree* – of maximum amount of € 1,800,000 for each tax period, IRES-taxable investors shall receive a deduction of € 360,000 from their taxable income, corresponding to 20 per cent of the eligible investment, and, consequently, a tax saving equal to € 99,000, as the IRES rate applied is 27.5 per cent.

As for the application procedure of the incentive, paragraph 4 of article 4 of the *implementing decree* states that, in cases where the amount deductible as a result of the incentive is greater than the amount of total declared income, "*the surplus can*

be summed to the amount deductible from the total income of the following tax years, but no later than the third tax year, up to the full amount".

As explained in the accompanying memorandum, considering that this incentive cannot create or increase a tax loss which can be carried forward in subsequent years – as typically occurs with incentives that operate by decreasing taxable corporate income – the *implementing decree* sets the possibility of "carrying forward" the deduction unused as a result of insufficiency of the overall income into subsequent tax periods – but not later than the third – up to its full amount.

Therefore, similarly to IRPEF subjects, for IRES-taxable entities as well the deductions accrued in each eligible tax period are usable up to a maximum of four years, starting from the year of accrual..

6.5.3 Indirect investments through intermediary companies

Pursuant to article 2, paragraph 2, of the *implementing decree*, in the case of investments made through "*other limited companies that invest mainly in innovative startups*", tax benefits are proportional to the investment made by these companies in *innovative startups*.

For this purpose, in relation to every single investment received, the intermediary company must certify to the investor the amount of the effective investment made in the share capital of one or more *innovative startups*; only this portion of the initial investment made in the share capital of the intermediary company shall qualify as a "eligible investment" in the share capital of one or more *innovative startup*, in relation to which it is possible to receive the incentives.

6.5.4 Calculation of the incentive in the case of consolidated financial statements and fiscal transparency

The *implementing decree*, in paragraphs 5 and 6 of article 4, governs the procedures for receiving the incentive where the beneficiaries have exercised the consolidation option, national or global, or for the fiscal transparency regime.

With reference to companies and entities which participate in the national consolidation fiscal system referred to in articles 117 to 129 of the TUIR, the *implementing decree* provides that, in case of insufficiency of the total income of each participating company, the surplus is transferable to the fiscal unit, and is deductible from the total net income of the Group, up to its full amount. Any amount that exceeds the total global income remains available to each company as an excess deductible from its total income in subsequent tax periods, but no later than the third period, up to its full amount, and the part that exceeds this amount can again be transferred to the fiscal unit.

With regards to the surplus generated prior to participation in the consolidation, paragraph 5, sentence 2, states that this shall be deducted only from the total income of each individual company, as it is not transferable to the consolidated financial statements.

The tax benefit is applicable through the same procedures also to companies or beneficiary entities which opt for worldwide consolidation, as referred to in articles 130 to 142 of the TUIR.

Finally, as stated in paragraph 6 of article 4, in case of option for tax transparency, referred to in articles 115 and 116 of the TUIR, the “transparent” subsidiary attributes definitively the surplus to each shareholder, who shall deduct it from his total income in proportion to its share in the profits, even if he is an IRPEF subject.

In consequence any excess that is not deductible as the result of partial or total insufficiency of the total income of the shareholder is deductible in subsequent

tax periods, but no later than the third, from the total income declared by the shareholder, up to its full amount.

The regulation also provides, in this case as well, that the surplus generated by the subsidiary company prior to the option for transparency is not attributable to the shareholders, but deducted from the total income declared by the company.

6.6. Conditions to benefit from the incentives

As a result of the combined provisions of sections 4.3.1[3] and 4.3.5[4] of the *Guidelines on risk capital*, the abovementioned decision of 5 December 2013 whereby the European Commission authorised the facilitations in question, specifies:

– in paragraph 33, that *"the tax benefits apply only on condition that either the private investors, or the financial collective investment undertakings and other capital companies receive and retain"* the documentation specified in subparagraphs (a), (b) and (c) of the quoted paragraph 33;

– in paragraph 74, that "in order to benefit of the tax incentive, the private investors... *have to receive and retain the business plan of the innovative startup, containing detailed information ... . Moreover, ... it can be assumed that each investment will be based on an adequate business plan and an exit mechanism that allows the investors to realise a profit or make a timely exit from a loss-making venture".*

In accordance with the requirements set out by the EU Executive, article 5 of the *implementing decree* sets the conditions necessary to obtain the incentive

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[3] See footnote number 1.

[4] In particular, the Guidelines, in section 4.3.5 (*Investment decisions oriented towards the realization of a profit*), letter b), require the existence for each investment of "*an investment plan with detailed product information, sales trends and profitability in order to establish in advance the return on the investment*"; letter c) also requires the existence of "*a strategy of clear and realistic exit for each investment*".

through provisions designed to ensure each party the acquisition of the documentation appropriate to prove the operations to which the benefits are reconnected.

In particular, paragraph 1 of the abovementioned article 5, letter a), states that the incentives shall be granted if investors or intermediaries (in the case of indirect investment) "*receive and retain*" a certification of the *innovative startup* confirming compliance with the limit set out in paragraph 8 of the preceding article 4, and, therefore, that the total amount of the cash investments received from the *innovative startup* in each tax year in which the eligible investment is relevant does not exceed € 2.5 million.

In this regard, it shall be pointed out that the *startup*, in addition to the confirmation of compliance with the upper limit of the investments received, must also certify the amount of the investment made in the tax period, compared to which the benefit must be proportionally calculated.

Again with regard to the documentation required to obtain the incentive, letter b) of paragraph 1 of article 5 of the *implementing decree* states that the investors or intermediaries (in the case of indirect investment) shall *"receive and retain"* a copy of the business plan of the *innovative startup*, containing detailed information on the activities carried out by the *innovative* startup, its products, expected or actual performance, sales and profits.

About this, as is also specified by the European Commission in the abovementioned paragraph 74 of the decision (i.e. *allows the investors to realise a profit or make a timely exit from a loss-making venture*), the explanatory memorandum to the *implementing decree* states that, in accordance with the *Community guidelines on capital risk*, a description of the exit strategy must be present among the information contained in the business plan in order to ensure the investor, at the very time of acquisition of the participation, a plan for the final phase of the operation.

In the case of an investment made in a *startup* "*with a social goal*" or in an *innovative startup* in the energy sector, letter c) of paragraph 1 of article 5 of the *implementing decree* states that the investor or intermediary (in the case of indirect investment) must receive and retain, in addition to the documents referred to the abovementioned letters a) and b), a certification by the *startup* attesting the objects of its activity.

In terms of the documentation required to obtain the incentives, paragraph 2 of article 5 of the *implementing decree* provides – in case of indirect investment - that "*upon request of the investor*" OICR and other limited companies must certify that they meet the requirements to be "*intermediary*" and disclose the amount of the eligible investment "*within the deadline for the submission of the income tax return relating to the tax period during which the investment has been effectively made ".*

Therefore, in case of indirect investment, the beneficiary entity must ask the intermediary for the certification referred to in article 5, paragraph 2, on time for obtaining the incentive in the tax period during which the relative right has accrued. In cases where the tax periods of the parties involved in the investment do not coincide, if the beneficiary does not receive the certification in time for the submission of the income tax return relating to the tax period when the investment is made, paragraph 3 of the abovementioned article 5, provides that taxpayers shall be entitled to benefit from the tax credit or the deduction during the tax period following the one in which they have made the investment.

This is intended to preserve the right to receive the tax credit or deduction where – for lack of coincidence between the tax period of the investor and the tax period of the invested-upon *startup* or of the intermediary – the investor receives the required certifications, necessary to be eligible for the incentives, after the deadline for the submission of the income tax return relating to the tax period during which the right to the incentive has accrued.

6.7 Causes for the revocation of the incentives

Article 29, paragraphs 3 and 5 of Decree-Law no. 179 of 2012, and article 6 of the *implementing decree* govern the causes for the termination of the right to obtain the incentives.

In this regard, it shall be explained, in general terms, that the principle underlying the identification of the different causes that lead to the revocation of the right to the tax benefits aims to ensure a minimum period of duration of the investment, i.e. two years from the date on which the eligible investment is made.

Moreover, this approach is consistent with the Community authorization that, in paragraph 25 of the decision, expressly states that "*eligible investments must be maintained for at least two years, otherwise the investor loses its right to the tax benefit*".

Therefore, the right to tax benefits terminates if any of the circumstances set out below occur before the expiration of the abovementioned minimum period.

6.7.1 Divestiture of shareholdings

Paragraphs 3 and 5 of article 29 of Decree-Law no. 179 of 2012 state that the investment *"must be maintained for at least two years; any sale, even partial, of the investment before the expiration of that period, shall result in the loss of the benefit..."*.

As mentioned above, this cause of termination, confirmed by article 6 paragraph 1, letter a), of the *implementing decree*, aims to protect the necessity to comply with a minimum period of hold of the shares received against the incentivized investment and comes into play where the shareholdings of the *innovative startup* are transferred to third parties before the expiration of the two-year monitoring period.

According to the regulation, even a partial transfer of the shares held penalises the beneficiary for the entire amount (i.e., the tax savings) of tax credits or

deductions, including the portion related to the shares that continue to remain in the legal sphere of the beneficiary.

In view of this, letter a) of paragraph 1 of the abovementioned article 6, establishes the revocation of the right to obtain the incentives if - within two years from the date on which the investment is relevant – occurs "*the sale, even partial, for a fee*" of the shares received in exchange for eligible investments under article 3 of the *implementing decree*.

It follows that, in cases of direct investment, the beneficiary is required to keep the shares received in exchange for the investment in the *innovative startup* for two years; in cases of indirect investment, it is understood that this obligation refers to the maintenance of the shares in mutual funds or of shares representing the share capital of SICAV or of shares in the capital of intermediary companies.

By express provision of letter a) of paragraph 1 of article 6, the transfer against payment of shareholdings includes "*actions for a fee which result in the creation or transfer of secured rights to dividends and contributions in the company, safe for cases accounted for in paragraph 3, letters a) and b), as well as the sale of rights or securities through which such holdings may be acquired".*

In this respect, letter a) of paragraph 3 of article 6 states that transfers of shares free of charge or *mortis causa* as well as those resulting from extraordinary operations referred to in articles 170 to 181 of TUIR, shall not be considered causes for revocation of the incentive.

The said provision states that "*in such cases, with the exception of transfers due to death, the conditions provided for in this Decree shall be verified from the date on which the incentivized investment is made by the assignor".*

In other words, only in cases of a transfer made free of charge and when it results from extraordinary operations, the respect of the condition of maintaining the shareholdings for two years is confirmed.

In such cases, in order to fulfil this condition, the date on which the assignor has made the investment is the significant one.

The same condition, however, should not be verified in case of *mortis causa transfers*, since these are not voluntary acts.

As stated in the explanatory memorandum, in cases of extraordinary operations, there still remains the possibility for the Italian Revenue Agency to inspect, under tax avoidance regulation provided for in article 37-*bis* of the Decree of the President of the Republic no. 600 of 29 September 1973, any transactions entered into for the sole purpose of benefiting from the incentives, for example where, following extraordinary "aggregative" transactions, there is a resulting "confusion" between the transferring company (which has benefited from the deduction) and the transferee start- up.

6.7.2 Other causes of revocation

Paragraph 1 of article 6 of the *implementing decree* recognises, in letters b), c) and d), other circumstances which entail the loss of entitlement to the benefits.

In particular, according to letter b), constitute a cause of revocation "*any reduction of share capital and any distribution of reserves or other funds established with share premiums of the shares of innovative startups or of companies that invest primarily in innovative startups"* that occurred before the expiration of the established minimum period.

As previously noted, this legislation has the purpose of incentivize investments in *innovative startups* through the introduction of new capitals that constitute an actual increase of the share capital. To ensure the share capital's effectiveness, the introduction is limited to the investments indicated in section 6.3, which must be held for two years from the date on which they qualify as eligible investments.

As a consequence, the voluntary reduction of share capital or the repayment of share premium reserves are among the causes of revocation, if they occur before the expiry of the two-year period.

The requirement contained in letter b) is clearly an anti-avoidance measure and its aim, to which is reconnected the revocation of the benefits, is grounded on the necessity of avoiding fictitious increases of capital, carried out for the sole purpose of being eligible for the incentives.

It is understood that investments in companies and distribution to shareholders of sums taken from equity's items different from those eligible for the incentive, if characterised by tax avoidance profiles, are subject to application of the regulation laid down in article 37-*bis* of Presidential Decree no. 600 of 29 September 1973.

Furthermore, in accordance with letter c) of paragraph 1 of article 6 of the *implementing decree*, the right to incentive is void if , during the two-year period of surveillance, it occurs "*the withdrawal or exclusion of the investors mentioned article 2, paragraph 1"*, i.e., IRPEF and IRES subjects who carry out direct investment in *innovative startups*.

Finally, letter d) of the abovementioned paragraph 1 states as a further cause of revocation "*the loss of one of the requirements of article 25, paragraph 2, of Decree-Law no. 179 of 18 October 2012,by the innovative startup, according to the periodic updating of the section of the Italian Business Register"* in which the *innovative startup* must be registered to benefit from the favourable regulation as per Section IX of the Decree-Law.

Revocation due to the loss of one of the requirements set out in article 25, paragraph 2, of the Decree-Law (described in section 1.1) by the *innovative startup*, according to results from the periodic updating of the special section of the Italian Business Register, will be carried out only if it occurs within two years from the date on which the incentivized investment is made.

Pursuant to letter b) of paragraph 3 of article 6, however, "*the loss of the requirements of article 25, paragraph 2, ..., by the innovative startup due to the expiration of a period of four years from the date of incorporation or of a different deadline otherwise stated in the second sentence of paragraph 3 of article 25,"* is not considered as a cause for the revocation of the benefits.

The exception provided for in the aforementioned paragraph 3 derives from the natural expiration of the requirements of an *innovative startup*. In this context, it is not a cause of revocation of the benefits neither the expiration of the status of *innovative startup* after the 48 months fixed by article 25, paragraph 2, letter b), of Decree-Law no. 179 of 2012, or the expiration of a different period established by paragraph 3 of article 25 for *innovative startups* already incorporated , as is exemplified in the chart shown in section 1.1.3.

However, it remains compulsory for the beneficiaries to comply with the minimum period of detention, even if the requirements for the *innovative startup* are terminated, in order to avoid that investments would be made just before the expiration of the qualification for the *innovative startup*, with the sole purpose of benefiting from the incentives, thus avoiding the limitation of holding the investment for at least two years.

6.7.3 Indirect investments through other companies

Paragraph 2 of article 6 of the *implementing decree* states that "*in the case of investments made... through other companies that invest mainly in innovative startups, the condition referred to in paragraph 1 shall be verified in relation to the company through which the investment is made".*

Investment made through other limited companies, effectively allowing investors to become shareholders of the latter, usually imply a mixture between the shareholder and intermediary company, which allows the investment to be considered equivalent to a direct investment.

Therefore, the conditions relating to the maintenance of the investment during the two-year monitoring period, in the terms specified above, shall be checked not only upon the investor, but also upon the intermediary company.

Where this condition is not met, paragraph 2 of the abovementioned article 6 states that "*investors must receive notification within the deadline for filing the tax return related to the tax period in which the cause of termination occurs*".

The abovementioned provision aims to ensure that the beneficiaries comply with all requirements established in the following paragraph 4 of article 6, that are consequent to the occurrence of the causes of revocation.

6.8 Effects of revocation

In the event of the sale, even partial, of the investment during the monitoring period, article 29 of Decree-Law no. 179 of 2012 requires, in paragraph 3, that IRPEF subjects"...*repay the tax credit , together with legal interest*" and, in paragraph 5, that IRES-taxable beneficiaries *"recover the amount deducted for tax, plus legal interest".*

With reference to this and to the other causes of revocation identified in paragraphs 1 and 2 of article 6 of the *implementing decree*, paragraph 4 provides that "*in the tax period in which the termination of the facilitation occurs, the investor: a) if they are an IRPEF subjects, must increase the tax on personal income due for said tax year by an amount equal to the tax credit actually benefited in previous tax periods... plus the legal interest. The payment shall be made within the period during which IRPEF settlement payment occurs; b) if they are an IRES-taxable entities must increase the income of the tax period by the amount that did not contribute to the composition of income in the preceding tax periods.... The amount of legal interest to be determined on the income tax not paid for the previous tax periods as a result of the provisions of this decree is also due by the deadline for IRES settlement payment".*

The revocation, therefore, takes its effect in the tax period during which any of the causes described in the preceding paragraphs is verified, and entails the obligation to return the total tax savings received as a result of tax credit or deductions previously granted. This also applies in the case of the transfer of part of the investment before the expiry of the two-year period.

For the purpose of the refund of the tax benefit, paragraph 4 of article 6 distinguishes between IRPEF subjects and IRES subjects.

In particular, in accordance with letter a) of paragraph 4, the IRPEF-taxable investor must calculate the tax due for the tax year in which the revocation occurs and then add the amount actually deducted in the previous tax periods. Interests, calculated at the rate set out by law, must be added to this amount, accrued from the date on which the tax would have had to be paid.

The payment must be made within the deadline set for the payment of the income tax related to the taxable period in which the termination occurs.

Regarding IRES-taxable entities, letter b) of paragraph 4 states that the return of the tax benefit, equal to the amount deducted in the previous tax periods, shall be implemented through an upward adjustment of the tax base to be recorded in the tax return for the tax period in which the revocation occurs.

Legal interest is due on the difference between the tax payable and tax paid for previous tax periods as a result of the deduction from the date when the tax should have been paid, and shall be paid within the deadline for the payment of corporate income tax.

Consequently, once the revocation occurs, the possibility to carry forward any surplus to subsequent tax periods, in the event of a tax credit or deduction, that cannot be used during the tax period of accrual also terminates.

In this regard it is worth mentioning the following example.

Assume that the tax payable by a natural person who is a beneficiary for 2013 is € 30,000; the tax credit for the *startup* is equal to € 20,000 and other credits are

equal to € 12,000. If the IRPEF subject deducts €18,000 as tax credits for the *startups*, bringing forward the excess credit not used for an amount of € 2,000 (receivable until 2016), in the case of divesture during the tax year 2014, the amount to be repaid, with interest, will amount to € 18,000 (to be added to the tax due for 2014), subject to the complete cancellation of the tax credit excess, equal to € 2,000, which is carried forward.

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The Regional Directorates shall ensure that the principles enunciated and instructions provided with this circular be duly observed by the Provincial Offices and the related offices.

THE VICE-DIRECTOR