Starting Up Business In Italy

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Introduction

Why Start a Business in Italy?

La dolce vita. The sweet life. The Italian way of living. We all know Italy does fashion, food and cultural finesse enviably well. You'd run out of fingers, limbs and any other anatomical features trying to count their brands and industries: Ferrari, Maserati, Alfa Romeo, Lamborghini, Armani, Versace, Gucci, D&G, Pirelli. The list goes on and on; brand is its middle name.

Italy may have refined the torture of bureaucracy to an art form, but it evidently gets things done. In fact, things get more than done. They get big. They get successful. They get exported. A salient propensity toward entrepreneurship is more than apparent. But where does the foreign investor come into all of this? Where do you fit in?

What are the key advantages to setting up a business in Italy?

The geographical position of Italy (at the center of the Mediterranean and the infrastructural links with the countries of Europe) allows it to form a crossroads for international trade, a natural bridge between Europe and the rest of the world.

Italy, particularly the prosperous north, has one of the highest per capita incomes in Europe. Italian consumers are sophisticated and demanding, particularly in terms of quality.

Starting a business

Foreign investors can set up a business activity in Italy by:

- Opening a representative office (ufficio di rappresentanza) of a foreign company
- Establishing as a one-man enterprise (ditta individuale)
- Establishing an Italian company
- Establishing a secondary registered office (sede secondaria) or branch (filiale) of a foreign company

Regulatory reference

Regardless of the method selected to start up a business activity in Italy, foreign framework investors will be supported by a legislative and regulatory framework acknowledged as one of the most advanced and dynamic in Europe, and primarily based on:

- The body of corporate law set out in the Italian Civil Code, extensively reformed in 2003;
- The Unified Text on Financial Intermediation - TUIF ("Testo Unico in materia di intermediazione finanziaria – namely Legislative Decree 58/1998 as amended and supplemented), which includes specific provisions for listed companies. The above Legislative Decree was repeatedly amended aimed at harmonising the national law with the legislations of Member States concerning financial markets and tender offers;
- Legislation on legal persons liability (Legislative Decree 231/2001, as amended);
- Legislation on personal information protection (Legislative Decree 196/2003 , as amended and supplemented);
- Legislation on workplace safety and hygiene (Legislative Decree 81/2008, as amended and supplemented);
- Legislation on fire prevention and electrical systems safety (Presidential Decree 577/1982, Legislative Decree 139/2006 and Law 46/1990, as amended and supplemented) as well as environmental legislation (Legislative Decree 152/2006, also known as the Environmental Code, as amended and supplemented).

Registering the business

- Companies established in Italy by natural persons or foreign legal persons, and/or
- Foreign company's secondary registered offices

shall be registered in the competent Register of Enterprises (Registro delle Imprese); whereas

- One-man enterprises established by a foreign investor
- Foreign company's branches
- Foreign company's representative offices

shall be registered with the competent Economic and Administrative Index (Repertorio Economico-Amministrativo (REA)).

The relevant Register of Enterprises and REA offices are set within the Chamber of Commerce, Industry, Crafts and Agriculture (CCIAA) relevant for the site where the company, secondary registered office, one-man enterprise, branch or representative office are located, respectively.

1. Starting a Business in Italy by establishing an Italian Company

Italy's corporate law primarily differentiates between:

Partnership, generally characterised by:

- Unlimited joint and several liability of partners for company obligations
- Each partner acts as a director of the company with managing powers
- Non-transferability, either inter vivos or mortis causa, of the partner status except whereby authorised by all other partners; and

Corporations, generally characterised by:

- Legal personality, autonomous from company owners' personality
- Limited liability for company owners, i.e. each owner's liability is limited to the cash or assets he/she has contributed to the company
- Separation of ownership and managing powers; hence company owners are not necessarily also company directors, and directors are not necessarily company owners
- Ownership as freely transferable, either inter vivos or mortis causa.

1. Starting a Business in Italy by establishing an Italian Company

The most widespread types of companies in Italy are: Società per Azioni – S.p.A. (companies with liability limited by shares) and Società a responsabilità limitata – S.r.l. (companies with liability limited by quotas).

Both types of companies are to be established via a Memorandum of Association (or Deed of Incorporation) – either a unilateral instrument (whereby there is one founder only) or a contract (in the case of multiple founders). The document is complemented with the Articles of Association (or By-Laws) of the company, i.e. the set of rules governing the company's operations through its existence. Whereby company's owners should decide to change one or more of such rules over the years, the Articles of Association shall be consistently amended, whilst the Memorandum of Association shall remain unchanged over time. Accordingly, consideration shall always be ensured to the Articles of Association currently in force.

1-A. Società per Azioni (S.p.A.)

A Società per Azioni is the primary form of corporation, i.e. it best meets the needs of enterprises requiring significant capital.

Share Capital and Shares

S.p.A. share capital may not be lower than €. 50.000,00, and is divided into “shares”, which can be even dematerialized securities.

The share capital amount is determined at the moment the S.p.A. is incorporated and shall be subscribed by those establishing the company. In the event of a single founder, one subscription only will therefore exist; in the event of multiple founders, all shall subscribe (varying) portions of share capital until the whole capital has been subscribed.

Via capital subscription, each shareholder undertakes to pay the portion of capital subscribed upon execution of the Memorandum of Association. Payment can take place either by money contribution to the S.p.A. (to its cashier or onto a current account in the company’s name) or, whereby expressly provided in the Memorandum of Association, via in-kind contribution or contribution of receivables, whose value shall be equal to the amount of capital subscribed.

In the case of multiple founding shareholders, those paying the capital subscription in cash are not required to pay the entire amount of their share(s) up front. They are entitled to deposit at least 25% initially and agree to pay the remaining 75% at a subsequent date consistently with the managing body’s request.

Conversely, whereby paid in kind or via transfer of receivables, the share capital is to be paid in its entirety.

In the event of a single founder, he/she shall pay the entire share capital subscription up front, regardless of whether payment is in cash or in kind (i.e. goods or receivables).

Any share premium the founding shareholders might wish to pay for the shares shall be paid in its entirety upon S.p.A. establishment.

Once the Memorandum of Association has been filed with the competent Register of Enterprises and the S.p.A. company therefore has been incorporated, the company may issues shares representing its own share capital.

1-A. Società per Azioni (S.p.A.)

Corporate Bodies

Shareholders' Meeting

The Shareholders' Meeting is the S.p.A. sovereign corporate body, i.e. the forum within which its shareholders form their will as to the company, then implemented by the managing body. The shareholders pass resolutions collectively. Resolutions legitimately passed during the meeting are binding for all shareholders, including those absent and those who voted against the resolution passed; nevertheless, in some cases it is possible for such parties to withdraw from the company, following procedures established by law.

Managing Body

The managing body is responsible for company management. In performing ordinary and extraordinary management tasks, it is not bound to seek approval from shareholders for its actions, except for corporate administration acts expressly subject to shareholders' approval as by law.

In any event, the managing body composition depends on the corporate governance model adopted by the company, even if under the so-called "ordinary" model (which is the more common one) the company management is entrusted to a managing body, either composed of multiple directors (i.e. Board of Directors) or a single director (i.e. Sole Director). The Board of Directors may delegate some of its administrative powers to an executive committee or to a Managing Director. The Managing Body may be also a corporate body, unless further legal provisions setting forth restriction or requirements related to certain type of companies.

Control Body

The control body is responsible for overseeing company management and/or auditing its accounts, although the latter may also be entrusted to an independent auditing firm.

Within the so-called "ordinary" model of corporate governance management control is entrusted to a Board of Auditors composed of either 3 or 5 statutory auditors and 2 alternate statutory auditors, while accounts are audited by an external auditor or auditing firm enrolled in the Register of Auditors.

1-B. Società a responsabilità limitata (S.r.l.)

A Società a responsibilità limitata (S.r.l.) – i.e. company the liability of which is limited by quotas – has a much more streamlined corporate structure than an S.p.A., particularly due to the broader freedom that Italian law grants to the founding quotaholder(s) in establishing its functioning, organisation and other features and adapting them to their specific needs. Indeed, the Memorandum and Articles of Association may derogate from much of the legislation governing an S.r.l.

1-B. Società a responsabilità limitata (S.r.l.)

Capital and Quotas

S.r.l. capital can be lower than € 10,000.00 but not less than 1 €, and is divided into “quotas”. The amount of capital is determined at the time the S.r.l. is incorporated and (likewise S.p.A.s) shall be subscribed in its entirety by founding quotaholder(s). Quotas are dematerialized.

Like S.p.A.s, in the case of multiple founders, those paying the subscription of capital in cash are not required to pay the entire amount of their quota; they may deposit 25% initially and agree to pay the remaining 75% at a subsequent date upon the managing body’s request. Conversely, sole quotaholder is required to pay its capital contribution in its entirety, likewise multiple quotaholders intending to make in-kind contributions or contributions of receivables.

Any premium on quotas shall always be fully paid up front.

Unlike S.p.A.s, quotaholders may also contribute the value of services to be provided to an S.r.l. by one or more of them. The subscribed capital shall be paid in its entirety by those quotaholders electing to contribute the value of their services; such contribution shall take the guise of a formal undertaking by the quotaholders to provide such services to the S.r.l.

Each S.r.l. quotaholder holds only one quota, which represents a varying portion of subscribed capital. In the case of sole quotaholder, his/her quota represents the whole capital.

Unless otherwise specified in the Memorandum of Association, the value of each quota is calculated proportionately to the value of the quotaholder’s contribution to the company, and his/her rights (e.g. voting rights, and the right to share in profits) are also proportionate. For instance, if a quotaholder holds 60% of an S.r.l. capital, he/she is the owner of a quota equal to 60% of total capital, is entitled to 60% of the company’s earnings, and his/her vote represents 60% of the quorum required for passing quotaholders’ resolutions.

Nevertheless, quotaholders may establish – either in the Memorandum of Association or, subsequently, in the Articles of Association – quotas not proportionate to the value of the contribution to the company, and may also establish special rights for specific quotaholders.

1-B. Società a responsabilità limitata (S.r.l.)

Quotaholders' Meeting

Corporate Bodies and Governance Quotaholders' Meeting

Quotaholders may take decisions provided for by law or company's Articles of Association in the collegial manner typical of Shareholders' Meetings. However, the Articles of Association may also provide for such resolutions (unless related to specified matters) to be taken through more streamlined procedures, such as written consultation or written consent.

Management Body

Unless otherwise specified in the Articles of Association, S.r.l. management is entrusted to one or more shareholders appointed by the quotaholders themselves.

As such, an S.r.l. may be managed by a Sole Director or by multiple Directors. In the latter case, the company may adopt one of the following administration systems: (i) Board of Directors; (ii) Several Management; (iii) Joint Management.

The Managing Body may be also a corporate body, unless further legal provisions setting forth restriction or requirements related to certain type of companies.

The Articles of Association may establish that multiple administration systems be used, each for a specific set of issues for which the managing body is called upon to decide. In any event, all directors' decisions shall be documented in a dedicated corporate book.

1-B. Società a responsabilità limitata (S.r.l.)

Control Body

In S.r.l., management control and accounts auditing are entrusted to a Board of Auditors or a Sole Auditor.

Control Body is not mandatory, except if certain circumstances occur, that is if the company:

- has got a capital equal or more than Euro 50.000,00; or
- must keep a consolidated balance; or
- controls a company obliged to statutory audit; or
- for two years has exceeded the following limits: (i) total assets of the balance sheet: Euro 4,400 millions; (ii) revenues from sales and services: Euro 8,800 millions Euros; (iii) workers employed on average during theear: 50 units.

Whenever the company may got an income or a net worth equal or higher than Euro one million, the Control Body must be a Board of Auditors, not a sole Auditor.

The Statutory Audit will be carried out by the Control Body, unless the Quotaholders's Meeting deliberate to entrust it to an Auditor or an Auditor Firm; any revocation must be approved only by the resolution of quotaholders, according by the law.

1-C. Società a responsabilità limitata semplificata (S.r.l.s.)

Recently, in addition to the ordinary model, a new types of S.r.l. has been introduced:

Simplified S.r.l. (Società a responsabilità limitata semplificata) – "S.r.l.s."

The main differences among ordinary S.r.l. and a S.r.l.s. are the following:

(i) S.r.l.s can be only incorporated by individuals (a wholly-owned S.r.l.s. is allowed); therefore, legal entities (such as companies) are excluded. Quotaholders of a S.r.l.s. can be only individuals and not corporations. Conversely, an ordinary S.r.l. can be incorporated by individuals as well as legal entities;

(ii) S.r.l.s. capital contributions can be carried out in cash only. Conversely, in the event of ordinary S.r.l., in-kind contributions, contributions of receivables, and contributions of services may be also made. In particular, in cash contributions of the S.r.l.s. have to be paid directly to the Managing Body when the company is being incorporated. It implies that the Managing Body must attend the company's incorporation before the Notary Public in order to immediately accept its charge and it has to formally state, before the Notary, that the corporate capital has been paid-in.

Also for the S.r.l. the capital has to be paid directly to the Managing Body.

(iii) The incorporation costs are different: S.r.l. is around 2.500 € and S.r.l.s. is 1.000 €.

2. Opening an Italian Branch

Foreign company branches are separate – though not legally autonomous – units of the company itself; as a matter of fact, with regard to the company head office, branches enjoy both organisational and decision-making autonomy.

An Italian branch of foreign company enables the company to operate in Italy with a more streamlined, cost-effective structure than if a full subsidiary were established in the Country. Furthermore, a foreign company can utilise a branch to conduct the same business in Italy as abroad – impossible whereby the foreign company were merely to open a representative office, unable to conduct any direct production-related activities.

As far as internal organisation is concerned, we need differentiate between a branch proper and a secondary (registered) office.

A foreign company's secondary office is usually managed and represented by a permanent company representative having general power of attorney (known as an "institore", as invested with a "procura institoria"), who conducts business for the secondary office on behalf of the company and handles its external relations in the Country.

Conversely, a branch proper – at least in principle – is managed and legally represented by the managing body and legal representative of the foreign company, although, in practice, companies frequently appoint a local manager (institore) to run the branch.

For tax purposes, both secondary offices and branches are considered as permanent establishments and are therefore subject to taxation. They shall thus keep their own books, submit VAT and income tax returns to tax authorities (Revenue Agency) each year, and file the annual report of the foreign company with the relevant Chamber of Commerce.

3. Opening a Representative Office

Whereby a foreign company wishes to get a feel for the Italian market before locating a business or aims to promote its business, a representative office may be opened in Italy.

Current Italian legislation does not provide an official definition of “representative office”. It is therefore standard practice to refer to the OECD Model Convention to avoid double taxation and prevent tax evasion (affecting Article 162 of the Italian so-called Revenue Tax Consolidated Act, Presidential Decree no. 917/1986).

And it is always standard interpretative practice to distinguish between a “mere” representative office and a representative office that does not merely perform representation functions.

What is a “mere” representative office?

It is the fixed place of business of a foreign company in Italy engaged only and exclusively in marketing and promotional activities, or scientific or market research, or other information gathering activities. In other words, a “mere” representative office merely plays an auxiliary or preparatory role for the foreign company to enter the Italian market, and may not conduct production-related or commercial activities.

As such, for tax purposes, a “mere” representative office is not considered a “permanent establishment” of the foreign company and is therefore not subject to taxation. Accordingly, such an office is not required to keep books, publish financial statements or file income tax or VAT returns. It is, however, required to maintain ordinary accounts in order to document expenses (e.g. personnel costs, office equipment, etc.) to be covered by the foreign company’s head office.

The establishment of a “mere” representative office shall be simply reported to the relevant REA based on the location where the concerned office is to be started. The filing shall be carried out by the legal representative of the foreign company, endowed with an Italian Fiscal Code (or by an attorney-in-fact with special power of attorney and Italian Fiscal Code), through Single Notification. Upon receipt by REA, the Revenue Agency will provide the “mere” representative office with ad-hoc Fiscal Code.

3. Opening a Representative Office

What distinguishes a "representative office that does not merely perform representation functions"?

First, while such an office may not engage in production-related or commercial activities, it, unlike a mere representative office, may provide third parties with non-commercial or preparatory services to the company's business (i.e. display, purchasing and storing goods, gathering information, advertising, research, and other ancillary or preparatory activities). Of course, governance of the relationship between this kind of representative office and third parties shall be agreed between the third party and the foreign company establishing the office.

Consequently, it is standard interpretative practice to consider such a non-mere representative office as a permanent establishment and thus subject to taxation. As such, in addition to being registered with the competent REA and possessing a Fiscal Code, the office shall also obtain a VAT number from the competent Revenue Agency office. The filing shall be carried out by the legal representative of the foreign company endowed with an Italian Fiscal Code (or by an attorney-in-fact with special power of attorney and Italian Fiscal Code) through Single Notification. Upon receipt by REA, the Revenue Agency will provide the "non-mere" representative office with ad-hoc Fiscal Code.

Unlike a "mere" representative office, it shall also keep separate books, file VAT and income tax returns each year and file the foreign company annual report with the relevant Chamber of Commerce.