Growth decree and SiS: is it about something really new?

The Growth decree has provided for and regulated a new investment vehicle, the società di investimento semplice or SiS. The Decree tries to respond to the purpose of facilitating the collection of capital for small and medium-sized enterprises (SMEs), with particular attention to start-ups, revealing, by this way, a greater possibility of use. The legislator has attempted to reach a good balance between the simplification that are realized by lightening the rules applicable to this type of company and the need to protect investors: by what means?

The very recent Growth Decree (decree law no. 34 of 2019 or *decreto Crescita*), which came into force on May 1, 2019, among the numerous and heterogeneous other measures, has provided for and regulated a **new investment vehicle**, the *società di investimento semplice* or *SiS*. The actual Decree, overcoming some inaccuracies and misalignments that existed between the SiS' discipline provided by the previous formulation of the decree and the European discipline of collective management of savings, tries to respond to the purpose of facilitating the collection of capital for small and medium-sized enterprises (SMEs), with particular attention to start-ups, revealing, by this way, a greater possibility of use. In its new formulation, in fact, the connection to the European rules is made evident by the art. 27 of the Decree that brings the SiS back to the UE orbit, applying some of the simplifications provided for the "under-threshold" operators.
If we want to briefly but punctually describe the feature of *SiS*, we could talk about either a *light* fixed-capital investment company (s.c. *Sicaf*) or a *mini* fixed-capital investment company, to underline both its legal imputability to the scheme of the *Sicaf* and the **intense simplification** with respect to requirements provided and requested for the collective investment undertakings (s.c. *OICR*), so that it presents features capable to realize initiatives in private equity and venture capital sector.

The nature of collective investment undertakings is very suitable to the *SiS*, with the consequences relative to the applicable regulation, which presents more temperate forms with reference to its **original structure** (the one of the saving funds) because it is subject to reduced threshold in comparison with the one provided by the European regulation.
To outline in an incisive way the characteristic of the *SiS*, we could speak either of *Sicaf* light or mini-Sicaf, meaning, in this way, to underline both its legal traceability to the scheme of the **investment company with fixed capital** (s.c. *Sicaf*) and the considerable simplification with respect to the requisites foreseen and required for UCITS (Collective Investment Schemes). Therefore, the features recognisable in the *SiS* are such to make *SiS* particularly attractive for the implementation of initiatives in the private equity and venture capital sector.
The nature of collective savings undertakings is, therefore, the one that most fits with the *SiS*, with what follows in relation to the applicable discipline, which assumes, however, more temperate forms than the original reference structure (that of the savings undertakings, in fact) precisely because of the subjection to lower thresholds than those provided for by European legislation.
More specifically, the *SiS* are identifiable as a closed-ended UCITS which takes the form of a fixed capital investment company reserved for professional investors.
In this sense, then, art. 1, paragraph 1, lett. i-*quater*) *TUF*, which, in its new formulation, defines simple investment companies as “the Italian FIA (n.o.a., fondo di investimento alternativo o alternative investment fund), reserved for **professional investors**, set up as a Sicaf that directly manages its assets” and complies with certain conditions described therein.
In addition to the clear identification of the professional nature of the investors to whom the *SiS* relate and which is reflected in the rules of the information prospectus, conditioning, in negative terms, the application, additional characteristics are specified, such as 1. the limit of

25 million euros referred to the shareholders' equity of the company, 2. the object of the investment which is limited to "SMEs not listed on regulated markets pursuant to art. 2, par. 1, lett. f), first line of Regulation (EU) n. 2017/1129 of 14 June 2017, which are in the testing, establishment and start-up phase of the activity, notwithstanding the art. 35-bis, paragraph 1, lett. f)" of the *TUF* (or companies that, based on their most recent annual or consolidated financial statements, meet at least one of the **three requirements** among an average number of employees during the year of less than 250, a balance sheet total not exceeding forty-three million euros and annual net turnover not exceeding fifty million euros, or small and medium-sized enterprises defined by Article 4, paragraph 4, point 13, of Directive 2014/65 / EU).

The reference of those willing to SMEs that are in the "testing, establishment and start-up phase" allows to identify in qualitative terms the object of the investment and, by this way, the type of target companies of the *SiS*, regardless of the product sector, geographical area, etc. of primary reference.

It is expected, then, on the one hand, that the SiS cannot resort to leverage, and, on the other hand, that, by way of derogation from art. 35-bis, paragraph 1, lett. c) TUF, must have a share capital at least equal to that provided for by the company regulations (Article 2327 of the Civil Code).

The *SiS* regime, responding to the specific needs of a "sub-threshold" operator, which allows them to be classified as simplified undertakings for **collective investments** (UCI) in terms of requirements and applicable regime, presents simplified characteristics. More in details, due to the non-application of the provisions of art. 6, paragraphs 1, 2 and 2-*bis* of the TUF, they are identified especially with the non-application of most of the secondary ranking regulations issued by the Bank of Italy and *Consob* regarding collective management, such as those concerning capital requirements, criteria and on the prohibitions on investing in assets, on corporate governance, on the accounting statements, on the containment and spreading

of risk, on remuneration policies, on transparency and on correct conduct.
It is envisaged, however, that the SiS, in addition to being required to enter into "an insurance against professional civil liability adequate to the risks deriving from the activity carried out" (art. 27, paragraph 2, Growth Decree) and to apply the provisions dictated by *Consob* regarding the marketing of UCITS, are required to guarantee a **system of governance and control** adequate to ensure their "sound and prudent management". The latter profile, both when the company is set up and in the course of its activity, must be subject to specific assessment by the Bank of Italy and *Consob*.
As for the requirements of the participants in the capital, it is envisaged that, by way of derogation from art. 35-bis, paragraph 1, lett. e) *TUF*, must comply only with the requirements of integrity pursuant to art. 14 *TUF*, and not even those of competence and fairness, according to a logic that could be either simply omitting or aimed at highlighting the simplification needs that characterize this corporate form also in this respect.
The adoption of a quantitative criterion is then envisaged to determine the possibility to constitute one or more **simple investment companies** by the subjects that control a *SiS*, by the subjects directly or indirectly controlled or controlling by them, or subjected to common control also pursuant to shareholders' agreements or contractual obligations according to art. 2359 of the Italian Civil Code, as well as by people who perform administrative, management and control functions in one or more *SiS*, but in compliance with the overall limit of 25,000,000 euros. The formulation adopted by the legislator opting for this economic criterion does not resolve, in any case, the problem of assessing whether it is necessary to consider for it only the existing *SiS* – solution that appears preferable – or even those that, in the meantime, have ceased and possibly liquidated even in the past.
Apart from the **provisions of MiFID II** as implemented in Italy that remain applicable to the distribution of the *SiS*' shares, these companies are, more generally, subject to the legislation envisaged by the TUF, especially when it involves a prior authorization from the Bank of Italy

– after having consulted *Consob*, in accordance to the provisions of art. 35-*bis* TUF regarding the Sicaf – and its supervision.

Ultimately, if we want to summarize the regulatory framework outlined by *decreto Crescita* and just briefly described above, the *SiS* can be qualified as a **minor Sicaf** that is well suited both to the characteristics of SMEs and to the need to enhance initiatives in the private equity sector and the venture capital, with a target to simplifying the requisites referable to UCITS. Thus, the legislator has attempted to reach a good balance between the simplification that are realized by lightening the rules applicable to this type of company and the need to **protect investors** by means of internal (governance based on the principles of "healthy and prudent management") and external instruments (professional liability insurance).