

Legal 500

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Italy

Franchise & Licensing

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This country-specific Q&A provides an overview of franchise & licensing laws and regulations applicable in Italy.

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Italy: Franchise & Licensing

1. Is there a legal definition of a franchise and, if so, what is it?

In Italy, franchise contracts have a legal definition. The definition is given by Law No. 129/2004 (hereinafter referred to as the "Franchise Law") according to which a franchise contract is any agreement *"between two legally and financially independent parties, whereby one party grants the other party, in exchange for consideration, the right to use a set of industrial or intellectual property rights, related to trademarks, trade names, shop signs, utility models, industrial designs, copyright, know how, patents, technical and commercial support and assistance, in the view of having the Franchisee joining a system characterized by a group of franchisees operating in the territory for the purpose of distributing specific goods and services"*.

2. Are there any requirements that must be met prior to the offer and/or sale of a franchise? If so, please describe and include any potential consequences for failing to comply.

The franchisor, before starting its franchise network, must have tested its business concept on the market (Art. 3.2 of the Franchise Law). This rule is mandatory. In case of violation by the franchisor, the contract may be declared null and void and the franchisee may be entitled to claim for the related damages.

The testing period must last at least one fiscal year. A test carried out abroad by a foreign franchisor is considered suitable to fulfil the requirement.

3. Are there any registration requirements for franchisors and/or franchisees? If so, please describe them and include any potential consequences for failing to comply. Is there an obligation to update existing registrations? If so, please describe.

In Italy there are no registration requirements for franchisors and/or franchisees.

4. Are there any disclosure requirements (franchise specific or in general)? If so, please describe them (i.e. when and how must disclosure be made, is there a prescribed format, must it be in the local language, do they apply to sales to sub-franchisees) and include any potential consequences for failing to comply. Is there an obligation to update and/or repeat disclosure (for example in the event that the parties enter into an amendment to the franchise agreement or on renewal)?

Art. 4 of the Franchise Law requires the franchisor, at least 30 days before the execution of the contract, to hand over to the prospective franchisee "a full copy" of the agreement together with the following information:

- a. relevant information about the franchisor;
- b. details of the trademarks used in the concept;
- c. characteristics of the business;
- d. a list of the franchisees and of the franchisor's direct outlets, if any;
- e. the annual variations in the number of franchisees with their locations and addresses during the last three years;
- f. a short description of judicial or arbitral disputes concerning the franchising network concluded in the last three years.

An exception is made for the information requiring objective and specific confidentiality (for example the franchisor's Operating Manuals).

Franchisors who, before the execution of the franchise agreement in Italy, have only carried out their business abroad, must, in addition to the information set out in Art. 4, letters (a), (b) and (c), provide the prospective franchisee with the following information (see *Ministerial Regulation No 204 of 2 September 2005*):

- i. a numerical list of the franchisees currently operating in the network as well as a list of outlets directly run, country by country, and, if requested by the prospective franchisee, the details and location of at least 20 franchisees currently operating;
- ii. details of the variation, year by year and country by country, in the number of

franchisees, including their location, in the last three years;

- a description of judicial or arbitral disputes concerning the franchising network concluded in the last three years.

The Law does not require the use of a prescribed format for disclosure. The parties are therefore free to use a standard disclosure document, provided that all the items prescribed by the law are contained in such document.

According to art. 8 of the Franchise Law, if one of the parties to a franchise agreement provides false information, the other party may ask for the annulment of the agreement. Although the statute refers to false information only, it may be interpreted as applying also to insufficient disclosure.

Although not expressly addressed by the law, common practice indicates that there is no obligation to update/repeat disclosure in case of renewal of a franchise agreement or in case of extension of a franchise agreement, provided that the renewal or extension does not place new burdens on the franchisee.

5. If the franchisee intends to use a special purpose vehicle (SPV) to operate each franchised outlet, is it sufficient to make disclosure to the SPVs' parent company or must disclosure be made to each individual SPV franchisee?

In case the franchisee intends to use a special purpose vehicle (SPV) to operate each franchised outlet, then it will be advisable to request the SPV's parent company to sign a receipt also in name and on behalf of each SPV franchisee.

6. What actions can a franchisee take in the event of mis-selling by the franchisor? Would these still be available if there was a disclaimer in the franchise agreement, disclosure document or sales material?

If a misrepresentation is made by a franchisor to a franchisee which induces the franchisee to enter into a franchise agreement, this may constitute ground, at certain conditions, to claim for the annulment of the contract.

To limit such a risk, quite often franchisors include in the agreement clauses or disclaimers to limit their liability (particularly in respect of financial information or in

respect of statements or promises made before the signing of the contract), but franchisor should consider that these clauses are not always enforceable (for example in case of gross negligence or fraud by the franchisor).

7. Would it be legal to issue a franchise agreement on a non-negotiable, "take it or leave it" basis?

Generally, franchising agreements are adhesion contracts. This means that they are designed to limit negotiations.

8. How are trademarks, know-how, trade secrets and copyright protected in your country?

Italian law grants protection to both registered and unregistered trademarks.

Registration confers to the owner the right to prevent third parties from using in the course of trade, without his consent:

- any sign which is identical to the trademark for goods or services which are identical to those for which the trademark is registered;
- any sign that is identical or similar to the registered trademark, for goods or services that are identical or similar, where due to the identity or similarity between signs and the identity or similarity between the goods or services, there exists likelihood of confusion on the part of the public, that can also consist of a likelihood of association of the two signs;
- any sign which is identical with or similar to the registered trademark in relation to goods or services which are not similar, where the registered trademark has a reputation in the Country and where use of that sign, also for other purposes different from the one to distinguish the goods and services, without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark (Article 20 of the Code of Industrial Property).

Unregistered trademarks are protected only if they are used, and only in the territorial area in which they are used.

Know-how and trade secrets are protected under Articles 98 and 99 of the Code of Industrial Property. The

provision refers to business information and technical-industrial experience, including the commercial ones, whether such information:

- a. are confidential;
- b. have an economic value
- c. appropriate measures have been taken to keep them secret.

Copyright is protected by the Copyright Act. The protection includes economics rights as well as moral rights (such as the right to be recognised as the authorship of the work). The moral rights are not subject to time limitation and cannot be waived or assigned.

9. Are there any franchise specific laws governing the ongoing relationship between franchisor and franchisee? If so, please describe them, including any terms that are required to be included within the franchise agreement.

Although mainly a disclosure legislation, the Franchise Law contains some mandatory rules governing the form and content of the franchise agreement as well as the ongoing relationship between franchisor and franchisee:

- Article 3.1 of the Franchise Law provides that franchise agreement must be in writing, if not it will be null and void and that its duration must not be less than three years.
- Article 3.4 of the Franchise Law sets forth a number of items which must be expressly contained in the agreement (the initial investment and costs; the terms of calculation of the royalties; the specification of the know-how and other services performed by franchisor in terms of technical and commercial assistance, outlet set-up and training; the terms for the renewal, termination and assignment of the agreement);
- Article 5 of the Franchise Law provides that the franchisee shall not change its registered office from the one stated in the agreement without the prior consent of the Franchisor. It also prescribes the franchisee to maintain the strict confidentiality on the content of the activity operated in the franchise.

Apart from the above, the ongoing relationships is regulated by the general provision of the Italian Civil Code.

10. Are there any aspects of competition law that apply to the franchise transaction (i.e. is it permissible to prohibit online sales, insist on exclusive supply or fix retail prices)? If applicable, provide an overview of the relevant competition laws.

Franchise agreements are subject to national and to EU competition law and in particular to Commission Regulation (EU) 2022/720 of 10 May 2022 (the "new Vertical Block Exemption" or the "new VBER"), replacing the Commission Regulation (EU) 330/2010 and to the related Guidelines (the "new vertical Guidelines").

According to the new VBER and to the new vertical Guidelines:

- i. Online sale cannot be prohibited. In general, every distributor must be allowed to use the internet to sell products. However, it is permissible to impose certain requirements relating to the manner in which the contract goods or services are to be sold (see Question 19);
- ii. Exclusive supply is generally permitted;
- iii. Agreements which, directly or indirectly, have the object of restricting the franchisee's ability to determine its sale price, including those which establish a fixed or minimum sale price to be observed by the franchisee are not permitted, unless it might be proven that may drive increases in efficiency (for example when a manufacturer introduces a new product or when it is necessary to organise a coordinated short-term low price campaign or to prevent a particular distributor from using the product of a supplier as a loss leader). On the contrary, the franchisor may impose a maximum sale price or recommend a sale price, provided that this do not amount to a fixed or minimum sale price.

On the contrary contractual restrictions which are necessary to protect know-how and goodwill, and to maintain the common identity of the franchise network are generally admitted.

11. Are in-term and post-term non-compete and non-solicitation clauses enforceable and are there any limitations on the franchisor's ability to impose and enforce them?

In-term and post-term non-compete and non-solicitation

clauses are subject to competition law, as they restrict the franchisee's freedom of business activities.

In-term non-compete clauses are generally admitted where the obligation is necessary to maintain the common identity and reputation of the franchised network.

Post-term non-compete and non-solicitation clauses are admitted where the following conditions are fulfilled:

- a. the obligation relates to goods or services which compete with the contract goods or services;
- b. the obligation is limited to the premises and land from which the buyer has operated during the contract period;
- c. the obligation is indispensable to protect know-how transferred by the supplier to the buyer; and
- d. the duration of the obligation is limited to a period of one year after termination of the agreement.

Post term non-compete clauses that are not caught by anti-trust prohibitions must (Article 2596, Civil Code):

- a. be in writing;
- b. be limited to a given territory and a determined field of business;
- c. their duration cannot exceed the period of five years. Where a longer period is agreed by the parties, the duration of the agreement will be automatically reduced to five years.

Providing that the in-term and post-term non-compete and non-solicitation clauses comply with the above conditions, they are generally enforceable.

12. Is there an obligation (express or implied) to deal in good faith in franchise relationships?

Art. 6.1 of the Franchise Law, under the heading "*pre-contractual behaviour obligations*", states that "*the Franchisor shall exercise goodwill, fairness and good faith at all times in dealing with the prospective Franchisee and shall provide the prospective Franchisee with any information the Franchisee should consider necessary or useful for the purposes of the franchise agreement in a timely manner*".

Similarly, art. 6.3 of the Franchise Law, states that "*the prospective Franchisee shall exercise goodwill, fairness and good faith at all times in dealing with the Franchisor and shall provide the Franchisor with any information that*

is necessary or appropriate for the purposes of the franchise agreement, in a timely, correct and comprehensive way, even if such disclosure is not expressly requested by the Franchisor".

The provisions contained in art. 6 above are expression of the general principle contained in the Italian Civil Code, according to which parties must observe good faith during negotiations and in the performance of the contract (Articles 1337 and 1375 of the Italian Civil Code which also apply to franchise agreements).

The principle of good faith is often invoked by franchisees as a source of protection in case of unfair behaviour by the franchisor.

13. Are there any employment or labour law considerations that are relevant to the franchise relationship? Is there a risk that the staff of the franchisee could be deemed to be the employees of the franchisor? What steps can be taken to mitigate this risk?

In general, the existence of a franchise agreement does not affect the allocation of liabilities between the franchisor and the franchisee in respect of the labor relationships with their respective employees.

In fact, one of the conditions for the existence of a true franchise relationship is the independence of the parties. This means that franchisor and franchisee each maintains the exclusive employer's managerial power over their respective employees.

This does not exclude that, under certain circumstances, the franchisee's staff could be deemed to be the employees of the franchisor. To mitigate the risk, it remains important that franchisor does not interfere with the franchisee's employment decisions, such as hiring, firing, setting wages and establishing work hours and so on. In fact, while a certain degree of control by the franchisor over the franchisee is intrinsic to the nature of a franchise agreement, if such a control exceeds the purposes of a genuine franchise relationship it may be regarded as symptomatic of the existence of a joint employment status.

14. Is there a risk that a franchisee could be deemed to be the commercial agent of the franchisor? What steps can be taken to mitigate this risk?

The figure of the commercial agent differs from that of the franchisee, because the agent promotes the conclusion of contracts in a given territory on behalf of a principal, while the franchisee is an independent entrepreneur, who purchases and sells the franchisor's products on its own behalf, bearing entirely the so-called business risk.

This does not exclude that, under certain circumstances, a franchisee could be deemed to be the commercial agent of the franchisor. To mitigate such risk, it could be advisable that the franchise agreement includes a disclaimer, stating that the agreement shall not be construed as creating an agency relationship between the parties.

15. Are there any laws and regulations that affect the nature and payment of royalties to a foreign franchisor and/or how much interest can be charged? Are there any requirements for payments in connection with the franchise agreement to be made in the local currency?

There are no laws or regulations affecting the nature and payment of royalties to a foreign franchisor. Similarly, there are no requirements for payments in connection with the franchise agreement to be made in the local currency.

16. Is it possible to impose contractual penalties on franchisees for breaches of restrictive covenants etc.? If so, what requirements must be met in order for such penalties to be enforceable?

It is possible to impose contractual penalties on franchisees for breaches of restrictive covenants in form of a pre-liquidated damages (Article 1382, Italian Civil Code). These pre-liquidated damages must be paid regardless of whether an actual damage is proved by the damaged party.

17. What tax considerations are relevant to franchisors and franchisees? Are franchise royalties subject to withholding tax?

A foreign franchisor should consider the tax implications resulting from the setting up in Italy of a so-called "permanent establishment", which creates a tax liability on business income from activities carried out in Italy.

Royalties paid to a foreign franchisor are subject to a

withholding tax at a standard rate, subject to any applicable bilateral tax treaty (which may provide for a more favourable rate).

18. How is e-commerce regulated and does this have any specific implications on the relationship between franchisor and franchisee? For example, can franchisees be prohibited or restricted in any way from using e-commerce in their franchise businesses?

According to the new Guidelines (see Question 10), franchisees must be free to use the internet to sell products as they do in their brick and mortar shops.

In general, restrictions of the use of the Internet by franchisees are considered hard-core restrictions of competition. For example, any obligation requiring the franchisee (i) to prevent customers located in another territory from viewing its website or online store or to re-route customers to the online store of the franchisor or of another seller or (ii) to automatically reroute customers located outside their territory, or to terminate consumers' transactions over the Internet if their credit card data reveal an address that is not within the franchisee's territory are hard-core restrictions. Any obligation prohibiting the franchisee from using an entire online advertising channel, such as search engines or price comparison services, or restrictions which indirectly prohibit the use of an entire online advertising channel, such as an obligation not to use the franchisor's trademarks or brand names for bidding to be referenced in search engines, or restriction on providing price-related information to price comparison services, are also considered hard-core restrictions.

Contrary to the restrictions referred above, certain requirements imposed by franchisor relating to the manner in which the contract goods or services are to be sold on line are generally permitted, provided that they do not, indirectly, have the object of preventing the effective use of the internet by the franchisee to sell the contract goods or services. Such requirements include:

- a. requirements that are intended to ensure the quality or a particular appearance of the buyer's online store;
- b. requirements regarding the display of the contract goods or services in the online store (such as the minimum number of items displayed, the way the supplier's trademarks or brands are displayed);
- c. a direct or indirect ban on the use of online

- marketplaces;
- d. a requirement that the franchisee operates one or more brick and mortar shops or showrooms, for instance as a condition for becoming a member of the supplier's selective distribution system;
- e. a requirement that the franchisee sells a minimum absolute amount of the contract goods or services offline (in value or volume, but not as a proportion of its total sales) to ensure the efficient operation of its brick-and-mortar shop.

It is also possible to require the buyer to pay a different wholesale price for products sold online than for products sold offline (dual pricing), to the extent that it incentivises or rewards an appropriate level of investments in online or offline sales, provided that it does not have the object of restricting sales to particular territories or customers.

19. What are the applicable data protection laws and do they have any specific implications for the franchisor/franchisee relationship? Does this have any specific implications in the franchising context? Is the franchisor permitted to restrict the transfer of (a) the franchisee's rights and obligations under the franchise agreement or (b) the ownership interests in the franchisee?

Like in any other business, also franchisors and franchisees are obliged to comply with the data protection law [i.e. Legislative Decree No. 101 of 10 August 2018, implementing the Regulation (EU) 2016/679] ('GDPR'), in particular when collecting and handling data related to the customers. This is especially true when the data of the customers are transferred within the franchise network, for example for advertising purposes or within the context of loyalty scheme programs.

In general, the franchisor must be able to choose its franchisees, *"on whose business qualifications the establishment and maintenance of the network 's reputation depend"* (as stated by the European Court of Justice in the case of Pronuptia de Paris GmbH v. Pronuptia De Paris Irmgard Schilligallis). To this aim, franchisor is generally permitted to restrict the transfer of (a) the franchisee's rights and obligations under the franchise agreement or (b) the ownership interests in the franchisee.

20. Does a franchisee have a right to request a renewal on expiration of the initial term? In what circumstances can a franchisor refuse to renew a franchise agreement? If the franchise agreement is not renewed or it if it terminates or expires, is the franchisee entitled to compensation? If so, under what circumstances and how is the compensation payment calculated?

The general rule is that a franchisee has no right to the renewal of the contract when it has come to an end, if not expressly provided in the agreement. This means that at the expiration the agreement simply ceases to be in effect and the franchisee has no right to request a renewal and/or to receive compensation.

On the contrary, if the franchise agreement provides a right of renewal, and the franchisor refuses the renewal without a justified reason, then the franchisee might be entitled to compensation.

21. Are there any mandatory termination rights which may override any contractual termination rights? Is there a minimum notice period that the parties must adhere to?

The Franchise Law does not foresee any specific provisions governing the termination of franchise agreements (it only requires that the terms for the termination should be expressly indicated in the agreement). Reference is therefore to be made to the general provisions of the Civil Code and to the contractual provisions.

22. Are there any intangible assets in the franchisee's business which the franchisee can claim ownership of on expiry or termination, e.g. customer data, local goodwill, etc.

A franchisee has no statutory right to any compensation or indemnity for the loss of goodwill upon expiration or termination of the franchise agreement. This right only exists for commercial agents (Article 1751 of the Italian Civil Code) and there is no case law that applies this provision by analogy to franchisees. To reinforce this principle, very often franchise agreements contain a provision according to which the franchisee acknowledges that since local goodwill is generated from the use or exploitation of the franchisor's trademark and system, such goodwill belongs to the franchisor.

23. Is there a national franchising association? Is membership required? If not, is membership commercially advisable? What are the additional obligations of the national franchising association?

The main Italian franchise Association are:

Associazione Italiana del Franchising (also called *Assofranchising* or AIF), whose purpose is to spread a wider knowledge of franchising in the business community, to offer members proper information and advice, to promulgate specific studies concerning general or specific matters involving franchising and to monitor any statutory or case law development. Member of such association can be franchisor or prospective franchisor.

Federazione italiana del franchising (also called *Federfranchising*), which represents both franchisors and franchisees.

Confimpresa, which is a retail association, open to industrial, commercial and service enterprises that produce and/or market branded consumer goods and/or services (and thus not only to franchisors).

Membership is not mandatory but it is commercially advisable.

Members of the association are usually requested to observe the association's rules and policies.

24. Are foreign franchisors treated differently to domestic franchisors? Does national law/regulation impose any debt/equity restrictions? Are there any restrictions on the capital structure of a company incorporated in your country with a foreign parent (thin capitalisation rules)?

In general, foreign franchisors are not treated differently to domestic franchisors. However, most franchisors usually prefer, when expanding in a foreign country, to enter into a master franchise agreement instead of entered into direct franchise agreements themselves.

Although there are not thin capitalization rules under Italian law, there are some limits in the company's ability to deduct interest expenses.

25. Must the franchise agreement be governed by

local law?

Parties are free to choose the law applicable to franchise agreement, but Italian mandatory rules (*id est* public policy rules) shall prevail. This means that contractual provisions which conflicts with mandatory rules will be replaced by Italian mandatory rules. This is the case – for example – of the disclosure provisions.

26. What dispute resolution procedures are available to franchisors and franchisees? Are there any advantages to out of court procedures such as arbitration, in particular if the franchise agreement is subject to a foreign governing law?

Franchise disputes in Italy may be resolved either before the ordinary courts or by arbitration. Arbitration typically provides a speedier resolution than court proceedings but the costs could be considerably higher.

Starting from June 2023, it becomes mandatory, before starting a claim in franchise matters, to try to settle the disputes through a mediation procedure. The mediation procedure is a condition precedent to bring the dispute in Court.

If the franchise agreement is subject to a foreign governing law, international arbitration may be an alternative. Italy is in fact party of most international conventions on commercial arbitration (for example, New York on the recognition and enforcement of foreign arbitral awards).

27. Must the franchise agreement and disclosure documents be in the local language?

The only language requirement is contained in Article 3 of the Ministerial Regulation No 204 of 2 September 2005. According to said regulation, which applies to international franchise agreements, the franchisor, upon request by the prospective franchisee, must provide the information concerning the agreement and the related annex in Italian language.

Nonetheless foreign franchisors should consider that if one of the parties does not fully understand the meaning of a contract written in a foreign language, said party may ask for the annulment of the agreement.

28. Is it possible to sign the franchise agreement using an electronic signature (rather than a wet

ink signature)?

Italy was among the first Countries to grant electronic signatures the same legal status of wet ink signatures.

The requirements that the electronic signature must meet in order to be considered valid under Italian law are contained in art. 24 of Legislative Decree 82/2005 (the Digital Administration Code), as recently amended.

29. Do you foresee any significant commercial or legal developments that might impact on**franchise relationships over the next year or so?**

Environmental, social, and governance issues (ESG) are becoming increasingly important for every business, including franchise business.

Therefore, in next years also small and medium franchisors, to remain competitive and to meet the expectation of consumers and stakeholders, will be required to rethink their strategies so to design and implement ESG programs, also by inserting in their franchise agreement and/or in the operation manuals specific ESG obligations and policies.

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