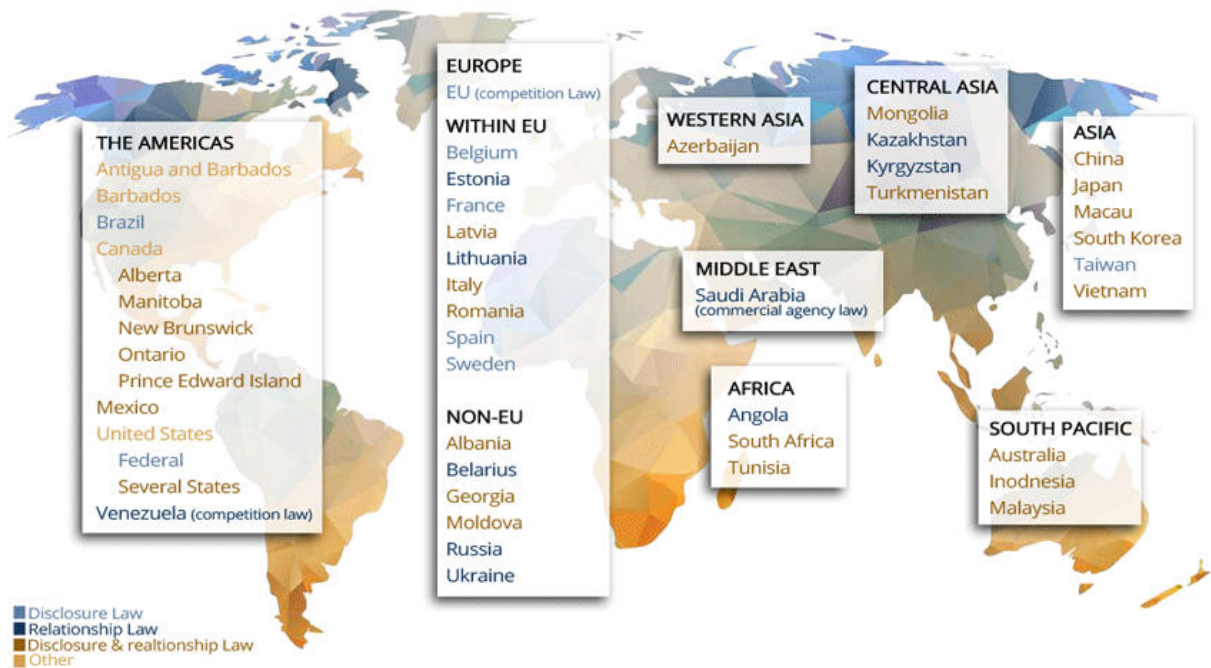




INTERNATIONAL RESOURCES ABSTRACT

Laws and agencies that regulate the offer and sale of franchises



ITALY



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Which laws and government agencies regulate the offer and sale of franchises?

Italy enacted a general law on franchising in 2004 and an implementing regulation thereto in 2005. The relevant laws are:

- ❧ Act No. 129 of 6 May 2004 (Rules on commercial franchising, the Franchising Act), which became effective on 25 May 2004;
- ❧ Ministerial Decree No. 204 of 2 September 2005 (Regulation on commercial franchising, the Franchising Regulation);
- ❧ Act No. 287 of 10 October 1990 (Rules on protection of competition and the market, the Italian Antitrust Law);
- ❧ Commission Regulation (EC) No. 330/2010, issued on 23 April 2010 by the EU Commission on the application of article 101/3 of the Treaty on the Functioning of the European Union to categories of vertical restraints (EU Block Exemption Regulation on vertical restraints), which is also directly applicable in Italy (previous Regulation No. 2790/1999 expired); and
- ❧ Act No. 192 of 18 June 1998 (Regulation of sub-supply within the production activities), in particular, article 9 on the abuse of economic dependence (the Anti-Economic Abuse Law).

Italian laws and regulations do not provide for any agency to regulate the offer and sale of franchises. However, a significant role is played by private organisations that may help in finding partners, namely the Italian Franchising Association and the Italian Federation of Franchising.

What are the exemptions and exclusions from any franchise laws and regulations?

The Franchising Act does not provide for any exemption or exclusion from its application. The Franchise Regulation, however, applies only to franchisors that have operated their franchise business exclusively outside Italy.

As per the interpretation of the majority of scholars, nor does the Franchise Act introduce any exception to the general international legal principles on conflict of laws. Hence, the parties are free to choose the law under which the contract will be governed. However, 'opting out' of Italian law will not apply with respect to those provisions set forth in the interest of the weakest party of the contract (namely the franchisee), such as, for instance, those concerning disclosure obligations (section 4 of the Franchising Act) and minimum content of the contract (section 3.4 of the Franchising Act).

Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

Neither the Franchise Act (applicable to franchise contracts governed by Italian law for franchisors that already operate in Italy) nor the Franchise Regulation (applicable exclusively to franchisors that operate only outside Italy where the agreement is subject to Italian law) set any minimum period for having been in business prior to operating in Italy.



ITALY

Laws and agencies that regulate the offer and sale of franchises

However, the Franchise Act requires the franchisor to provide the franchisee, as part of its pre-contractual information duties, with complete list of affiliated franchisees and changes to affiliated franchisees in the past three years, or at least as of the date of the start of business.

This pre-contractual obligation implies that there must be a minimum level of activity and franchisees for a franchisor to start a franchise business in Italy. The exact determination of the business must be examined on a case-by-case basis.

The Franchise Regulation, however, sets a more stringent requirement for the pre-contractual information duties of franchisors that have operated exclusively outside Italy. They need to provide the prospective franchisee with a list of franchisees divided per country of operation. Upon the request of the franchisee, the franchisor must provide a list of at least 20 affiliated franchisees or, if the number is below 20, the complete list of franchisees. Therefore, similar to the Franchise Act, for foreign franchisors the minimum business requirements must be evaluated on a case-by-case basis.

In conclusion, although there is no minimum period to have been in business, the pre-contractual information duties require the franchisor to provide information on an existing business to the prospective franchisor, the content of which must be evaluated on a case-by-case basis.

Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

Neither the Franchise Act (applicable to franchise contracts governed by Italian law for franchisors that already operate in Italy) nor the Franchise Regulation (applicable exclusively to franchisors that operate only outside Italy, where the agreement is subject to Italian law) set any policies that restrict the manner in which a franchisor recruits franchisees or selects its own or its franchisees' suppliers.

In particular, there are no specific restrictions on or requirements as to:

- the number of franchises or franchisees that form the franchise network, and their characteristics;
 - the number of franchising agreements executed, or shops held, by a single franchisee, or their locations;
 - the local content of goods and services purchased by franchisors or franchisees;
 - the effect of the entry of a franchised system upon local companies;
- and
- the yearly growth of the franchised system by a specified percentage.

Aside from the provisions set forth under the Franchise Act and the Franchise Regulation (in the case of a franchisor originally operating outside Italy), any other commercial provisions are left to the contracting parties, franchisor and franchisees. All parties should act in good faith while respecting the general contract and commercial laws, always balancing the interest of the franchisor in developing his



ITALY

Laws and agencies that regulate the offer and sale of franchises

uniform franchise network, with the interests of the franchisee who should be protected by the franchisor with respect to their rights as part of the network itself.

In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the subfranchisor?

Section 2 of the Franchise Act also applies to sub-franchising. The Franchise Act, however, does not provide any rule as to who must make pre-disclosures to the sub-franchisees. This being said, given the fact that the sub-franchisor is delegated to manage the entire franchise structure of the franchisor in a given territory, such presale disclosure must in practice be made by the sub-franchisor. Given that the pre-sale disclosure rules regarding the franchisor apply as such to the sub-franchisor, it must therefore disclose at least what is provided for in article 4 of the Franchising Act .

The sub-franchisor is obliged to act with regard to the sub-franchisees according to good faith, fair dealing and loyalty (article 6 of the Franchise Act) in the pre-sale phase (and also after); as to its relationship with the franchisor, it must in principle disclose any further information requested by the sub-franchisee that is reasonably relevant to the franchise business, unless such information can be regarded as confidential or the communication of the information would violate third parties' rights.

Is there any obligation for continuing disclosure?

Pursuant to section 6 of the Franchise Act, the typical franchisor's disclosure obligation is particularly strong in the pre-contractual phase. However, according to section 1,375 of the Italian Civil Code, during the performance of the contract both parties are subject to a general duty to behave in good faith. Therefore, included in such general duty is the duty for each party to disclose to the other any information or document that may be relevant for the franchise contract and franchising activity in general. In particular, the relevant case law defines this good faith duty as the duty to maintain a close and fair collaboration between franchisor and franchisee during the performance of the franchise contract.

How do the relevant government agencies enforce the disclosure requirements?

From a contractual point of view, violation of the disclosure obligations by the franchisor allows the franchisee to claim annulment of the agreement pursuant to section 1,439 of the Italian Civil Code, together with compensation for damages, if due, as per section 8 of the Franchising Act.

On the other hand, violation of said obligation does not lead to any criminal consequences or involve any government agencies.



ITALY

Laws and agencies that regulate the offer and sale of franchises

In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

In addition to the already mentioned Franchising Act and Franchise Regulation, private organisations that may have an influence on the franchise activity include the Italian Franchising Association and the Italian Federation of Franchising, which have issued specific codes of conduct that all their members have to comply with.

Do other laws affect the franchise relationship?

In principle, the Italian Civil Code affects the franchise relationship, as it contains the general contract law. Both domestic and EU antitrust laws affect the franchise relationship; industrial (trademark, patents and industrial secrets) and other intellectual property laws also apply, mainly regarding the regulation of intellectual property rights in the absence of contractual regulations. Labour and employment laws and practices, consumer protection laws, data protection laws and bankruptcy laws may all also be relevant.