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**Challenges and Opportunities in International Franchising**

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**ITALIAN NEW DRAFT LAW ON INDEPENDENT COMMERCIAL NETWORKS**

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## Introduction

A draft law has been recently presented to the Italian Parliament that provides for new rules applicable to all independent commercial networks, for the distribution of products or services under a common name, brand, logo, trademark or sign (the “Draft Law”).

The main purpose of the Draft Law is to protect companies and individuals, that become part of an independent commercial network, mainly by imposing upon the grantor an obligation to provide them with detailed pre-contractual information. Hence the pre-contractual disclosure obligation, which at present is provided only for franchising contracts, would be extended to any contract involving a commercial network, not only in the retail sector, but also at the wholesale level, in Italy.

The procedure of approval of the draft law is still long and it is not sure that, in the end, it will be approved in its original version. However, it is important to examine its main contents, because it seems to confirm a recent trend, which is growing in Europe, consisting in extending the protective approach provided for consumers also to entrepreneurs and companies, that should rather be conscious of the risks and choices adopted when negotiating and executing commercial contracts.

### 1. Scope of application

The definition of “*grantor/ owner of the commercial network*” provided by the Draft Law is very wide and it is as follows:

*“Any person or legal entity which carries out a business activity (..) and negotiates and concludes with third parties any type of contract admitted by law, for granting in common use, either for free or against payment, a name, brand, trademark, sign, or, anyway, the identifying logo of the activity, in order to involve the members in a network composed by members being economically and legally independent and autonomous, within the national territory, at the aim of marketing specific goods or services and proposing to the members an exclusivity or semi-exclusivity agreement for the performance of their activities”.*

#### 1.1 Which type of contracts?

The Draft Law expressly excludes from its scope of application (i) franchising contracts falling within the scope of application of Italian Law 129/2004 (the Italian Franchise Law); (ii) commercial agency contracts, governed by Article 1742 *et seq.* of the Italian civil Code; (iii) contracts related to petrol stations; and (iv) other situations which are not relevant for the purposes of this paper (e.g. monopolies, fishers, farmers, etc.).

Therefore, the new rules will apply to all other possible contracts used for the creation or development of a commercial network, such as, for instance:

- distribution contracts (not only retail, but also wholesale);
- franchising contracts not falling within the scope of application of Law 129/2004 (e.g. not providing for payment of royalties);
- trademark licenses;
- area development and area representatives agreements (to the extent they do not fall under the application of the rules either on franchising or commercial agency); and

- contracts for the sale of products and services through the Internet (as it has been confirmed to the author by the senator who presented the Draft Law).

## **2. Contents of the Draft Law**

### **2.1 Pre-contractual disclosure**

In addition to a general obligation of the parties to the agreement to provide each other with all the main and relevant information (and, for the grantor to justify any possible omission of requested information), at least thirty days before the signature of the contract, the grantor must provide the applying member (who has to issue a receipt) with a document which must include the following pre-contractual information:

- a complete copy of the contract to be signed;
- an estimate of the investment and expenses required for starting that specific activity (until the parties will have drafted together a business or other investment plan);
- all the main legal and fiscal data of the grantor's company and its financial statements for the three preceding fiscal years;
- all the relevant information regarding the trademark and its registration;
- not only the key elements of the activity to be performed, but also the experience of the grantor, describing the evolution and development of its system; the description of the current structure of the grantor's company and its organization chart, with the indication of the professional experience of the employees indicated therein for the last three years;
- a list of the current members of the network and of the outlets owned by the grantor, also mentioning the expiration date of all contracts with members of the network;
- the indication, year per year, of any changes in the members (and their location) during the preceding three years (or as from the start of the grantor's if this has occurred before), with a detailed description of the members who ceased and indication of the reason for termination of their contracts (expiry of the term, withdrawal or cancellation);
- a short description of any judicial or arbitral proceeding initiated by any members, third parties, or public authorities against the grantor, the members of its board of directors, or the employees indicated in its organization chart, which have ended for the three preceding years, related to the system of membership, , subject to compliance with the applicable provisions on privacy; and
- the text of any other contractual relationships entered into by the grantor with the network members, which are or could be attached to the membership contract (e.g. general conditions of sale).

The abovementioned rules will apply to commercial networks operating within the Italian territory. A specific regulation should be approved in order to be applied to grantors who, at the moment of signature of the relevant agreement, have developed commercial networks only abroad.

## **2.2 Information to be published in a public registry**

Within 30 days following the execution of any contract, the grantor must file such information with a public registry (*Repertorio delle notizie economiche e amministrative - REA*), together with the information concerning the trademark used in the network (with details concerning its registration, possible licenses etc.) as well as the type of activity performed. Afterwards, any modification or termination of such contractual relationships shall be reported by the grantor to that registry, within thirty days as from its occurrence.

Within the same term of thirty days following the signature of the agreement, the party who has joined the network must publish in the above mentioned registry the detailed information concerning the network and the contract signed, as well.

## **2.3 Information to be provided in the contract**

The contract between the grantor and the prospective member of the network must include a number of items of information specifically listed in the Draft Law, most of which is already provided for in the Italian Franchise Law (amount of investments, expenses, possible exclusivity, conditions for termination of the agreement, etc.).

In addition to those rules, the Draft Law requires to include in the text of the agreement a detailed program (regarding contents, duration and organization) of the initial training to be provided by the grantor (what if it is not contemplated?).

## **2.4 Information to be provided by the member**

Following the signature of the agreement, the member of the network must provide all customers with information regarding its independent and autonomous position towards the grantor and some other specific information as provided by the Draft Law.

The Draft Law also provides for a general obligation of the member of the network (also extended to his collaborators and employees) to keep strictly confidential the contents of the activity which is the subject-matter of the agreement, even after the end of the contract.

## **2.5 Pre-contractual agreements**

Preliminary agreements are also governed in this text.

Any pre-contractual agreement must be executed in writing; otherwise, it is null and void.

Moreover, all the provisions indicated in the Draft Law as applicable to the final contract, shall also apply to such pre-contractual agreements, and the grantor shall provide the prospective member with all information concerning the purpose of the agreement and concerning any payment or deposit requested for whatever reason.

If the final contract is executed, any deposit that does not consist in a refund of expenses shall be paid back by the grantor or deducted from any eventual further costs borne by the member of the network.

Finally, the preliminary contract must specify its duration and provide for a termination clause.

## **2.6 Compulsory mediation**

Before commencing any court proceeding or applying for arbitration in connection with the contract, the parties thereto must try to solve their disputes through a compulsory mediation procedure.

## **3. Consequence of violation of the rules**

As it is also the case for the Italian Franchise Law currently in force (Law 129/2004), the Draft Law does not provide for any sanctions in case of violation of its rules. For instance, the Draft Law provides for a specific obligation of the grantor to provide commercial and technical assistance for the whole duration of the agreement; however no consequences are specified in the case in which such assistance is not provided.

In any case, since the Draft Law requires the written form *ad substantiam* both for the contract and for possible pre-contractual agreements, contracts not fulfilling such formality (or not including all the information that must be indicated in the relevant contracts, in writing) will be null and void.

Moreover, should a party provide false information, the other party would be entitled to claim the annulment of the contract (and possible damages, where due).

## **4. Conclusions**

This Draft Law represents an attempt to overcome some of the deficiencies of the Italian Franchise Law and this effort could be appreciated (apart from the excess of bureaucratization and save possible improvements to be made with the help of companies and professionals more specifically involved in this field), if it was limited only to franchising contracts.

However, the decision to apply it to any possible contract used for joining commercial networks (including, for instance, contracts with distributors at the wholesale level or with e-tailers) is in the author's view strongly criticisable.

In fact, it is certainly important to protect individuals who do not have a specific commercial experience from possible unlawful behaviours and abuses of grantors/franchisors: for instance, there are several court decisions in Italy regarding cases of franchisors who induced individuals without previous commercial experience to join a network that, in the end, resulted to be non existent, or not supported by the necessary assistance by the franchisor.

On the contrary, such protection would not be justified when dealing with companies or entrepreneurs having a solid experience and a contractual strength that in some cases could even be stronger than that of the grantor. In those cases, the contractual relationship may become excessively unbalanced in favour of the party joining the network, which could take advantage, or even abuse, of its position.

This tendency to extend a specific protection created for very unbalanced situations (such as those with consumers) to commercial agreements that should be governed by the general principle of freedom of contracts was recently followed also by the European Commission in the draft European Contract Law and was strongly criticized by business, for the same reasons as mentioned above.

Now, it seems that, at least at the European level, such strong protection will be limited to contracts entered into with consumers within the framework of on-line sales (the European Commission has recently taken such decision). It would be desirable that also the Italian Parliament will reconsider such restrictive approach and possibly limit the scope of application of this Draft Law (provided that it will continue its process for approval) only to franchising contracts.

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### **Biography of the author**

Silvia Bortolotti is a partner at the law firm Buffa, Bortolotti & Mathis (Turin, Italy). She is specialized in international commercial transactions and cross border litigation. Her extrajudicial practice covers domestic and international commercial contracts. Ms Bortolotti is a founding member and Secretary General of the International Distribution Institute (IDI), member of several international associations - the International Bar Association (IBA), the Commission on Commercial Law and Practice (CLP) of the International Chamber of Commerce (ICC) - and advisor to several Italian associations. Acknowledged by *Who's Who Legal* as one of the Italian leading experts in franchising, she often lectures in several conferences and training courses - and publishes articles - on international commercial contracts.