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# A BRIEF GUIDE TO DOING BUSINESS IN ITALY

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## A BRIEF GUIDE TO DOING BUSINESS IN ITALY

### I. INTRODUCING THE ITALIAN MARKET

The Republic of Italy is a thriving manufacturing and trading nation located in the heart of Europe. With more than 60 million people, Italy is Europe's fourth-most populous country. A founding member of the European Union and the G8 group of nations, the Italian Republic is governed by an elected bicameral parliament (consisting of the Chamber of Deputies and the Senate), an executive branch (consisting of the Prime Minister and Council of Ministers), a President elected to a seven-year term, and an independent judiciary.

The northern province of Lombardy is the economic powerhouse of Italy, led by the industrial and financial centres of Milan, Bergamo, Brescia and Monza, and is a common point of entry for offshore companies interested in doing business in Italy. Key economic highlights of Italy and Lombardy include:

- ❖ Italy – World's 7<sup>th</sup>-largest economy (2008 GDP of US\$2.3 trillion)
- ❖ Italy – World's 6<sup>th</sup>-largest exporter of manufactured goods
- ❖ Lombardy – Largest regional economy in Europe (GDP of US\$400 billion)
- ❖ Lombardy – Per capita GDP higher than the United States or Switzerland
- ❖ Member of the European Union single market and the EMU (€ zone)

### II. ITALY AND THE EUROPEAN UNION

Italy is a founding member of the European Union, which was conceived with the signing of the Treaty of Rome in 1957. Today the EU has grown to include 27 Member States,<sup>1</sup> covering nearly all of Europe, and a Eurozone of 15 Member States<sup>2</sup> that have adopted the Euro (€) as their currency. The EU is far and away the world's largest market, accounting for about 31% of global economic output, and is the largest exporter and second-largest importer worldwide.

While gaining access to this enormous and dynamic free trade zone, companies doing business in Italy must be aware of the regulatory powers of the European Commission. In key areas such as Competition, Consumer Protection, Employment, Energy, the Environment, Transport, and others, the EU retains exclusive or overlapping jurisdiction, with the regulators of the European Commission in Brussels working independently or alongside domestic Italian regulators. Companies wishing to do business in Italy should always have a sound grasp of the "rules of the game" from both a local and EU perspective before entering the market.

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<sup>1</sup> As of the January 1, 2007 round of enlargement, the Member States of the European Union are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

<sup>2</sup> As of January 1, 2008, the Eurozone members are Austria, Belgium, Cyprus, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, and Spain.

### III. ESTABLISHING A LOCAL PRESENCE IN ITALY

Companies wishing to enter the Italian market by establishing a local presence will usually do so in one of four ways: (1) by establishing an Italian branch; (2) by forming an Italian subsidiary; (3) by acquiring an existing Italian company; or (4) by entering into a joint venture with an Italian company. Each of these alternatives is described briefly below.

#### (1) Establishing an Italian Branch

Companies may establish a branch operation in Italy provided that certain filing requirements are fulfilled, such as publishing the names of the legal representatives in Italy in the appropriate local Register of Enterprises. Failure to fulfil these obligations may result in joint and several liability for those acting on behalf of the company. Typically, branch operations will be regulated by the corporate law of their home jurisdiction, although where the branch maintains its administrative office in Italy, or carries on its main business object in Italy, Italian corporate law — in particular, as regards directors' liabilities — may apply. Establishing a branch may raise double taxation concerns, depending on the existence, and provisions of, any bilateral tax treaty between Italy and the company's home jurisdiction. Operating a branch operation also directly exposes a company to liability for acts taken in Italy, as there is no intervening local subsidiary.

#### (2) Forming an Italian Subsidiary

The most commonly-used vehicles for forming a subsidiary in Italy are the *società per azioni* (S.p.A.) and the *società a responsabilità limitata* (S.r.l.). These vehicles play the same role as the English joint stock company, the American corporation, the French *société anonyme*, the German *Aktiengesellschaft*, etc., in that they create an independent legal entity through which shareholders can carry on business, purchase and trade shares, and minimize personal liability.

- ❖ **The S.p.A.** In brief, an S.p.A. can be established by a single incorporator or by multiple investors (although if at any time 100% of the shares belong to a single shareholder, the shareholder's identity must be disclosed to the appropriate local Register of Enterprises). The minimum capital contribution required to form an S.p.A. is €120,000. Aspects of the governance of the company can be customized through the adoption of tailored by-laws, and Italy's 2005 corporate law reforms created a flexible corporate governance model offering investors three options based on common precedents: (a) the traditional model, governed by a board of directors and a board of auditors appointed by the shareholders at the annual meeting to approve the company financials; (b) the dualistic (or German) model, governed by a managing committee appointed by a monitoring committee that approves the company financials; or (c) the monistic (or American) model, governed by a board of directors, one-third of whom must be independent, which must include a monitoring committee. Unlike some jurisdictions (for example, Germany) there is no requirement for union representation on a company's board or managing committees. Directors need not hold Italian citizenship.
- ❖ **The S.r.l.** An S.r.l. is a somewhat simpler corporate vehicle with a lower minimum capital contribution (*i.e.*, €10,000). Investors in an S.r.l. do not receive physical, endorsable shares as shareholders in an S.p.A. do, but rather hold a "quota" or ownership interest in the company. The 2005 corporate law reforms have transformed the S.r.l. into a very flexible legal entity — incorporators may adopt a governance model similar to that used for partnerships, or the S.p.A. model, and may customize many other aspects of

corporate governance to achieve their corporate goals in the most efficient way. Such flexibility is matched with effective shareholders' rights to monitor the company management.

Both the S.p.A. and S.r.l. are easily created and maintained — at a minimum, an annual meeting of shareholders must be held to appoint/renew directorships and approve the company financials. Typically, shareholder agreements have a maximum validity of five years before they must be renewed. Most other governance requirements are similar to other Western regimes.

The 2005 corporate law reforms introduced express provisions regulating intra-corporate groups. Importantly, the parent or holding company that controls an Italian subsidiary may be liable to the subsidiary's shareholders or creditors where its behaviour violates the principles of "*fair corporate or entrepreneurial management*" and adversely affects the subsidiary's profitability. However, no damages will be owed if it can be proved that the advantages to the subsidiary in being part of the corporate group outweigh any such disadvantages. The holding company's name must be disclosed in the appropriate local Register of Enterprises, and in corporate acts and correspondence. Failure to disclose the relationship with the holding company may trigger directors' liability for any damages the non-disclosure may have caused.

### **(3) Acquiring an Italian Company**

Rather than forming a new subsidiary, companies interested in entering the Italian market may choose instead to acquire an existing Italian business (whether a competitor or not). M&A transactions in Italy follow the same general rules and process as in other Western regimes. Unlike some jurisdictions (for example, Canada), Italy does not employ a foreign investment review regime and, in general, does not limit the ownership of Italian companies by foreign purchasers.

The acquisition of a business whose Italian (not global) turnover exceeded a defined threshold — €46 million in 2009 — in the previous fiscal year must be pre-notified to the AGCM (*Autorità Garante della Concorrenza e del Mercato*), the domestic antitrust regulator, though unlike in many jurisdictions the transaction may be closed prior to receiving AGCM approval. Transactions involving companies whose combined Italian turnover exceeded €461 million (the 2009 threshold) are similarly notifiable, even if only one party to the transaction achieved turnover in Italy. Other, industry-specific, regulatory approvals may be required. Italian law also provides a right of consultation to the union of any takeover target with at least 15 employees, although the obligation upon the acquirer is simply to notify and consider in good faith any submissions made by the union concerning the transaction. No veto or other mandatory rights are provided to the union. Article 10 of the Italian Constitution and Article 16 of the General Provisions on the Law ("*Disposizioni sulla legge in generale*") also establish a principle of reciprocity, by which the nationals of countries that prohibit Italian citizens or companies from exercising certain rights such as acquiring property may be similarly prevented from exercising the same rights in Italy.

### **(4) Establishing a Joint Venture With an Italian Company**

Offshore companies not interested in forming a local subsidiary or acquiring an Italian company may instead choose to access the Italian market through a joint venture with a local company. Doing so may be as simple as identifying a suitable (and interested) local partner and preparing the necessary joint venture agreements. Generally speaking, where the combined assets of the joint venture business generated turnover exceeding the €46/461 million thresholds in the previous year, AGCM notification and approval will again be required.

## IV. ESTABLISHING AN INDIRECT PRESENCE IN ITALY

For a variety of reasons, some companies may consider entering the Italian market without establishing a local presence. For these firms, it may be more advantageous to sell their products into Italy via an established local distributor, through a franchise, or by appointing a local agent.

### (1) Sales Via Distributor

A distributor is an individual or company that buys and resells a supplier's products. The distributor will purchase from the supplier, taking title to (and risk for) the goods and resell them under its own name. A good distributor offers a supplier access to an established local sales, marketing and distribution network for the supplier's goods, without incurring the costs involved in establishing a direct local presence.

Unlike many other jurisdictions (for example, the treatment of automobile dealers in the United States, or exclusive distributors in Belgium), Italian law does not provide specific rules for the formation and governance of distributorships, which are treated under the same general rules as all supply contracts. Distribution relationships are thus principally governed by the distribution agreement between the parties, making an effective distribution agreement essential for protecting a supplier's interests. A good distribution agreement will cover key issues such as the distributor's territory, any exclusivity arrangements, confidentiality obligations, the use and protection of the supplier's brands, trademarks and other intellectual property, any joint/co-operative advertising and marketing, periodic reports on market trends and intelligence, *etc.*

Control of resale prices, exclusivity clauses, territorial designations, and any loyalty-inducing aspects of the distribution relationship may raise concerns under domestic Italian and EU competition laws, and should be reviewed by experienced antitrust advisors in advance.

### (2) Franchising

Italy has adopted detailed franchising regulations. The law defines franchising as a contract between two independent parties by which, in return for payment, a franchisor licenses to a franchisee the use of a bundle of rights such as patents, trademarks, brand names, or know-how, provides technical or commercial assistance, and introduces the franchisee into a franchising network. A franchising contract may be used in any sector or industry, must be in writing, and has other required contents. At least 30 days before signing a final agreement, the franchisor must provide the franchisee with a contract proposal and information about its business and the object of the franchise. Failure to fulfil these obligations may result in the contract being held void.

### (3) Agency Sales

As the name implies, an agent is not an independent operator, but acts on behalf of and in the name of the principal. The agent typically operates in a defined territory, promoting sales of the principal's products or services in return for a commission.

Unlike the case with distributorships, Italian legislation governs many aspects of the agency relationship. It is in both parties' interests to enter into a clear and specific written agreement. In particular, the agent's territory and product portfolio should be clearly identified, as well as any modification of the default agency rules that otherwise apply under Italian law (see below).

Some of the key aspects of the agency relationship that are regulated by Italian law include:

- ❖ **Exclusivity.** A principal may appoint only one agent for a given product in a given territory. Similarly, an agent cannot represent more than one principal (or himself compete directly) in respect of the same products in the same territory.
- ❖ **Agent's Duties.** The agent must represent the principal in good faith, and follow the principal's instructions as to pricing and other terms of sale. The agent has a duty to keep the principal informed of market developments in his defined territory.
- ❖ **Commissions.** The agent has a right to commissions on sales or partial sales made in his territory, even where the sale is negotiated directly between the principal and the customer. The principal must provide the agent with a written account showing all commissions due to the agent and the method used to calculate them, and provide the agent with access to any information reasonably required to confirm these figures.
- ❖ **Termination.** Importantly, Italian (and EU) law provides for the payment of an indemnity (in addition to any other damages that may arise) where: (1) the principal terminates the agency contract; and (2) the agent has brought the principal new customers, or significantly increased the volume of business with existing customers, or where it would otherwise be equitable for an indemnity to be paid. The amount of the indemnity is not fixed by law, other than a maximum cap equivalent to the average annual commission received by the agent in the preceding five years.

## V. IMPORTING GOODS INTO ITALY

There are no duties on any goods moving between Italy and other Member States of the EU. Moreover, the EU applies a common tariff framework for all goods imported into a Member State from outside the Union. Goods imported into Italy are subject to VAT, generally applied at a rate of 20%. Certain products, mainly agricultural or hazardous items, may require an import permit.

## VI. LABOUR RELATIONS

Labour and employment relations are an important aspect of doing business in Italy. In addition to the general provisions of Italian labour laws, most aspects of labour relations will be governed directly by collective agreements entered into between unions and employers. Often, such collective agreements will be negotiated on a national basis in particular industries or sectors. Employees may only be terminated for just cause, on notice given in writing. According to Italian law, dismissed employees may be entitled to severance pay (*trattamento di fine rapporto*), as well as payments in lieu of unused holidays and in lieu of a reasonable notice period preceding their dismissal.

Recent changes to Italian labour law, introduced by Law L.196/97 (the "Treu Law") and Decree 276/2003 (the "Biagi Law"), have introduced much greater flexibility in employment relationships by creating new forms of employment such as project jobs and by extending the use of *stages*, part-time employment, apprenticeship contracts, and fixed-term contracts, all of which may reduce labour costs for employers and allow them to create temporary, flexible positions to respond to market trends or seasonal demand. At the outset of the employment relationship, employers may also take advantage of a certification procedure which confirms the nature of the position offered

and may thus reduce any post-dismissal litigation over the nature of the employment relationship and any recovery to which the employee is entitled.

## VII. COMPETITION LAWS

Both Italy and the European Union have adopted competition legislation which governs the conduct of companies in the marketplace. These competition rules are vigorously enforced by the European Commission and the AGCM, and backed up by behavioural orders and fines of up to 10% of a company's turnover (although unlike jurisdictions such as the United States, Canada or the UK, there is no prospect of imprisonment for anti-competitive practices in Italy.)

- ❖ **Multi-firm conduct.** Article 81 of the EC Treaty and the corresponding Italian provisions prohibit agreements between firms which “*have as their object or effect the prevention, restriction or distortion of competition.*” Practically speaking, agreements between competitors influencing prices or other conditions of trade, limiting or restricting output, or allocating customers or territories, are prohibited. While cartels are the most obvious example of illegal horizontal agreements, other agreements between competitors, including the activities of trade or industry associations, may be at risk. Vertical agreements — such as those between manufacturers and their distributors — influencing prices or allocating customers or territories may qualify for exemption from the prohibitions, and should be reviewed in advance by experienced antitrust advisors.
- ❖ **Single-firm conduct.** Article 82 and its Italian equivalent prohibit the “*abuse of a dominant position*”. These provisions prohibit “dominant” (*i.e.*, high market share) firms from certain types of behaviour, including predatory (*i.e.*, below-cost) pricing, tied selling, exclusive dealing, applying certain discounting/rebating or other loyalty-inducing policies, charging excessive prices, or imposing other unfair terms of trade.

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This brochure has been prepared for reference purposes only, and does not constitute legal advice or establish an attorney-client relationship between the reader and the authors. For more information or advice concerning the issues discussed herein, or indeed on any other aspect of doing business in Italy, please contact:

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Studio Legale Amorese are business law advisors admitted to practice in Italy, England and Wales, the United States (New York), and Canada (Ontario).

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