

## ADVERTISING COUNTRY QUESTIONS: ITALY

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Italy-specific information concerning the key legal issues that need to be considered when designing an advertising campaign.

This Q&A provides country-specific commentary on *Advertising: international overview*, and forms part of our *international sales and marketing transaction guide*.

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### RESOURCE INFORMATION

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### ADVERTISING REGULATION

#### 1. How does national law regulate the advertising industry?

Advertising issues were traditionally dealt with under the unfair competition provisions of the Italian Civil Code. Such provisions have been supplemented and to some extent superseded by the implementation of the European directives concerning misleading and comparative advertising (*Directives 84/450/EEC and 97/55/EC, implemented by Italian Consumer Code, Legislative Decree no. 206 of 6 September 2005*), and further amended by the implementation of the recent amendments to the above European directives (section 14 of Directive 2005/29/EC amending Directive 84/450/EEC, implemented by Legislative Decree no. 145 of 2 August 2007), subsequently merged with the Consumers' Code (Legislative Decree no. 206 of 6 September 2005) (for the rest of this article, the above regulations are jointly referred to as the Advertising Law).

Apart from the above mentioned basic rules, specific legislation has been adopted in certain areas that require special attention to safeguard the interests of the public and customers, for example:

- Establishing advertising shares in radio and television broadcasting.
- Sponsoring products and services in radio and television shows.
- Restrictions on the advertising of certain products, for example, alcoholic drinks, tobacco, pharmaceutical products, gambling and the lottery, and so on.
- Restrictions on the advertising of activities for specific professions (the medical profession, lawyers and so on).

In addition to the Advertising Law, operators within the advertising media are also bound by the Italian advertising self-regulation rules that are issued and monitored by the IAP (*Istituto dell'Autodisciplina Pubblicitaria - IAP*).

#### 2. What obligations or standards do national codes of advertising impose upon advertisers?

Under the Italian self-regulatory Code of Advertising (Code) and the Advertising Law, all advertising must be clear, exact and fair. For this reason, the advertisement must be visibly distinct from other forms of communication. The Code states that advertising must, among other things:

- Avoid misleading statements and representations.
- Avoid violent, vulgar and indecent situations.
- Not offend moral, civil and religious beliefs of citizens, and respect human dignity.
- Not include statements and representations aimed at children and teenagers.
- Not denigrate other products, persons or bodies.
- Not exploit people's superstitions, credulity or, except in justifiable situations, fear.

In addition, the Code includes special provisions regarding:

- Sales systems (for example, sales on credit, distance selling, the unsolicited supply of goods, and so on).
- Product categories (for example, alcoholic drinks, cosmetics, pharmaceutical products, toys, games, package tours, food supplements and health foods, and so on).

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### 3. What procedures exist for complaining against an advertisement? What sanctions can be imposed for infringements of advertising codes or laws?

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Different options are available to competing undertakings, consumers, organisations representing consumers or other interested persons who want to file a complaint against an advertisement.

The Italian Antitrust Authority has the authority to resolve issues regarding misleading and comparative advertising issues. With specific reference to complaints related to the broadcasting and editing of an advertisement, the Antitrust Authority may request the Italian Communication Authority (ICA) to issue an opinion as to the extent that the advertisement is misleading. The ICA's opinion is not binding and the Antitrust Authority always has a final say on the issue.

The Antitrust Authority can prohibit or restrict the broadcasting and editing of an advertisement. Where the parties do not comply with an Antitrust Authority decision it can impose administrative fines and, in the case of continual non-compliance, prohibit the advertisement altogether. The Authority recently increased the upper limit of these fines to EUR5 million (as at 30 January 2015, US\$1 was about EURO.88). In urgent cases, the Authority can issue a reasoned measure ordering the provisional suspension of a misleading comparative advertisement.

Any interested party can also file a complaint with the IAP for any breach of the Code. The IAP itself has the right to commence proceedings against an advertiser. However, the IAP's authority is limited to injunctive measures to prohibit or restrict the broadcasting and editing of advertisements. Since 2005, the IAP has had the authority to fine infringements. The first fines were imposed by the IAP in November 2005.

In 2011 the IAP Code introduced new rules regarding the publication of its decisions and any failure to observe such decisions, as well as in relation to advice provided by the IAP's Review Board. IAP decisions are binding on those media operators through which marketing communications are disseminated that have, directly or through their trade associations, accepted the IAP Code.

Finally, anyone can apply to the ordinary courts where an advertisement is claimed to have breached the common unfair competition rules or infringe copyrights, trade marks or other IP rights. The ordinary courts can impose provisional measures and grant compensation for damages caused by the advertising if it has breached these rules.

## CONTROLS ON ADVERTISING METHODS

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### 4. How does national law control product placement and editorial advertising?

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The Advertising Law requires that advertisements must be clearly recognisable as such. Press advertisements must be distinguishable from other forms of public notices and use easily detectable graphical forms.

In addition to the above general provision, the Radio and Television Broadcast Act (Legislative Decree no. 177 of 31 July 2005 – RTB Act, as amended in 2010) provides that the volume of advertising messages in radio or television programmes cannot exceed that of the ordinary programme (detailed percentage ratios are provided with regard to such advertising time limits depending on the public or private nature of the broadcasters). As a general rule, the public must be able to clearly distinguish the advertisement from the programme or editorial.

Advertising in television must be broadcasted with a clear mention of the words "advertising".

In addition, the RTB Act prohibits or strongly limits the advertising and placement on the market of specific categories of products, for example tobacco, alcoholic drinks and pharmaceutical products.

The RTB Act also regulates in detail the interruption of radio and television programmes with specific restrictions in relation to cultural, religious and sport programmes.

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### 5. Does national law permit subliminal advertising?

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No.

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### 6. How does national law regulate the use of billboards and other forms of outdoor advertising?

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The use of billboards and other forms of outdoor advertising is regulated in the Italian Road Regulations which provide for specific restrictions on outdoor advertising. In addition, outdoor advertising is subject to a prior authorisation issued by the local authorities.

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### 7. How does national law regulate the use of aerial advertising?

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Aerial advertising is subject to a prior authorisation by the Italian Civil Aviation Authority and is limited to particular areas.

## CONTROLS ON ADVERTISING CONTENT

### 8. How does national law regulate price advertising and display?

There are no specific statutory rules on price advertising and display, which are subject to the common regulations on misleading advertising. In this respect, one of the criteria applied to ascertain whether an advertisement is misleading is the price and/or the method by which the price is established.

The only exception concerns advertising by shipping companies operating in the Italian territory either directly or via code-sharing with other companies. In this case, a ticket's price cannot be advertised separately from any and all other relevant charges, taxes and port charges: only the final price, including all costs, can be promoted.

### 9. How does national law regulate the use of false information in advertising?

In order to avoid the use of false information, both the Advertising Law and the Code provide that:

- Disclosure of scientific and statistical results must be correct.
- The usage of testimonies must be authentic and reasonable.
- All warranties which exceed those established by law, must be explicitly mentioned.
- Financial advertising and tour packages are subject to specific information requirements.

The IAP has a special supervision board which can, upon request of any interested person, assess the completeness of the advertisement.

### 10. How does national law regulate misleading advertising?

Under Italian regulations, advertising is misleading where it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for these reasons, injures or is likely to injure a competitor. Misleading advertising is forbidden. In order to determine the misleading character of an advertisement, all its features, as well as all information included in it have to be taken into account.

The following advertisements are deemed to be misleading:

- Any advertisement for products which can endanger the health or security of the consumers due to lack of adequate information.

- Any advertisement which can reach children or teenagers, and which threatens their security or abuses their natural credulity or lack of experience.

In case of serious misrepresentation, the advertiser shall be liable and subject to criminal penalties.

### 11. How does national law regulate comparative advertising?

Comparative advertising is permitted where it meets the following conditions:

- It is not misleading.
- It compares goods or services meeting the same needs or intended for the same purposes.
- It objectively compares one or more material, relevant, verifiable and representative features of those goods or services and those of a competitor.
- It does not create confusion on the market between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.
- It does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor.
- For products with designation of origin, when it relates in each case to products with the same designation.
- It does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products.
- It does not present goods or services as imitations or replicas of other goods or services bearing a protected trade mark or trade name.

### 12. Can an advertisement create a contract between the advertiser and the buyer of the product advertised?

In principle, the same legal rules governing the traditional formation and performance of contracts apply to advertising.

It is important to examine the rules applied to contracts performed through an offer addressed to a non-identified potential buyer (*ad incertam personam*). In this respect, an offer included in an advertisement may qualify as a "public offer". When such an offer includes the essential terms of a contract (price, delivery, payments, and so on), it is considered a contractual offer from a legal point of view. A public offer is legally binding from the moment it has been made public. Upon acceptance of such a

public offer by a third party and, more particularly, when such acceptance is communicated, the agreement is deemed to be entered into. The withdrawal of the public offer must be made according to the same terms of the offer.

A special offer must indicate in a clear and unequivocal way the date after which the offer lapses or, where appropriate, that the special offer is subject to the availability of the goods and services, and, where the special offer has not yet begun, the starting date from which the special price or other specific conditions shall apply.

## 13. How does national law regulate the use of obscene or indecent material in advertisements?

Italian criminal law provides for different criminal penalties in case of indecent advertisements or those which conflict with the general sense of decency.

The criminal law is mainly relevant in cases of nudity in advertising, although it is generally accepted that nudity itself is not prohibited. However, the way it is represented to the public may be prohibited.

The Code includes other requirements to avoid the use of indecent material which make unjustified use of superstition or religion as well as excessive violence in an advertisement.

## INDUSTRY-SPECIFIC REGULATION

## 14. Does national law legislate or regulate advertising in any specific industry sectors?

Besides the common advertising rules, different products and sectors are subject to specific and more detailed regulations, for example:

- Food and beverage products.
- Alcoholic drinks.
- Diet products and baby food.
- Pharmaceutical products. Only advertising for over-the-counter products is admitted. The latter is subject to prior authorisation requirements.
- Cosmetics. Such regulation includes, amongst other things, a prohibition to advertise cosmetics as having healing properties.
- Tobacco.
- Tourism.
- Education.
- Toys for children.
- Price contests.
- Gambling and lotteries.

- Operations in the financial and real estate sector.
- Insurance.
- Sale promotions.

## RESTRICTIONS ON ADVERTISING TO CHILDREN

### 15. Does national law regulate advertisements directed at children?

Italian legislation and case law applies strict standards for advertisements addressed to children since they are considered more vulnerable to possible manipulation by advertisers. As already mentioned in *Country Question 10*, any advertisement which can reach children or teenagers, and which threaten their security or abuse their natural credulity or lack of experience, is deemed misleading. Advertisements that use children and teenagers to exploit the normal feelings of adults towards children are also deemed misleading.

The Code prohibits advertising which may induce children and teenagers to:

- Infringe the common standards of social behaviour.
- Act dangerously or expose themselves to dangerous situations.
- Believe that not having the advertised products means either inferiority or parents' failure to fulfil their duties.
- Ask other people to purchase the advertised product.

## PROTECTION AND USE OF INTELLECTUAL PROPERTY RIGHTS

### 16. How is copyright protected under national law? Are advertising slogans protected by copyright under national law?

Copyright is protected under Law no. 633 of 1941 (as amended) as well as under Articles 2575 to 2583 of the Italian Civil Code.

In the copyright regulations, advertising is not explicitly mentioned as an activity which is worthy of protection. However, advertisements may be protected where the advert is original and of independent value, that is, where the advertisement itself can be distinguished from its mere advertising purpose.

Until now, Italian case law shows that the courts are quite reluctant to give advertisements copyright protection, for their lack of material form. Where the courts have acknowledged copyright protection in an advertisement, the works were mostly pictures and filmed sequences. Advertising slogans generally do not comply with the required criteria to obtain copyright

protection, that is, originality and significantly independent from the commercial content of the advertising slogan.

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**17. How are trade marks protected under national law? Is there any form of protection for unregistered trade marks, for example, under unfair competition or passing off laws?**

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The legal protection of trade marks is governed by the Italian Civil Code under the unfair competition rules and by Legislative Decree no. 30 of 2005 (Intellectual Property Code). Holders of registered trade marks have an exclusive right to use the trade mark to distinguish their products and services. They have the right to preclude the use of a trade mark (or similar signs to the trade mark) by third parties for similar products and services.

Unregistered trade marks have less legal protection than registered trade marks. Indeed, they will only be protected in an area where they are sufficiently well known. Where the unregistered trade mark is applied in a restricted area, others may register the same trade mark at national level, but the former may nonetheless continue to use the trade mark at local level. The holder of an unregistered trade mark can only bring claims based on the unfair competition rules.

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**18. Can a trade mark registered in the name of a third party be used in comparative advertising? Where such use is permitted, will there be any copyright issues?**

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Third parties may not use a trade mark in comparative advertising to take unfair advantage of its reputation and must avoid confusion. In any case, the use of trade marks in comparative advertising is a delicate issue. It is however possible to use the trade marks to identify the products and services.

If a trade mark can also be classified as a copyright protected work an action based on copyright can also be commenced against the advertiser.

## ENDORSEMENTS AND THE USE OF PEOPLE IN ADVERTISEMENTS

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**19. What action lies for using an individual's name or image without consent?**

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The Italian Copyright Statute provides that the image of an individual can only be used with the individual's express consent. The Italian statutory rules provide for some exceptions, but in case of commercial use of the image, consent is always required.

The use of a person's name also requires the approval of that person.

In addition, the trade mark regulations grant an exclusive right for any undertaking to use its own trade name to distinguish its products or services. Hence, the trade name cannot be used by third parties without its consent.

## CONTRIBUTOR DETAILS



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### Professional qualifications.

Italian Bar.

### Areas of practice.

Dispute resolution; Commercial law; Intellectual property; Life sciences.

### Recent transactions.

- Assisting a leading international cruise company in relation to a claim made by a competitor against their Italian branch following the broadcast of an advertisement on Italian national television. The advert was alleged to be misleading and in breach of the Italian Consumer Code.
- Advising a major international producer of fire barriers on misleading advertising.

### Languages.

Italian, English, French.

### Professional associations/memberships.

- International Bar Association (IBA).
- IBA - Officer of the International Sales Committee, Chair of the Agency and Distribution Subcommittee.

### Publications.

- Wrote for the Ipsos Francis Lefebvre Publisher (Memento). Her contributions included, among others, "Trade Contracts" (relating to distribution, franchising and merchandising agreements).
- Distribution & Marketing of Drugs: Italy (The European Lawyer - Thomson Reuters).
- Getting the Deal Through - Licensing 2011, 2012, 2013.

### Professional qualifications.

Italian Bar.

### Areas of practice.

Consumer products; Dispute resolution; Insurance and funds; IP; Life sciences.

### Recent transactions.

- Assisting a leading international cruise company in relation to a claim made by a competitor against their Italian branch following the broadcast of an advertisement on Italian national television. The advert was alleged to be misleading and in breach of the Italian Consumer Code.
- Advising a primary alcoholic beverages manufacturer on drafting commercial contracts, marketing issues and advertising campaigns, labelling, sales agency issues, labour and employment law, corporate, antitrust and tax law.
- Advising a company operating in the field of processing and storage of cord blood on the review of the conditions of a possible giveaway in Italy.

### Languages.

Italian, English.

### Professional associations/memberships.

- International Bar Association (IBA).

### Publications.

- Distribution & Marketing of Drugs: Italy (The European Lawyer - Thomson Reuters).