



International Distribution Institute

# **Panel on Franchise Disclaimers and Financial Performance Representations**

*Helping prospective franchisees make an informed investment decision, while protecting franchisors from claims of exaggerated FPRs. Can the interests of franchisors and franchisees be balanced, given recent developments in laws in countries which regulate franchising?*

**27 May 2021**

# Speakers

- **CHAIR: Carl Zwisler**



Washington, D.C. -- Senior Counsel and IDI franchising country expert for USA

- **Sara Citterio**

TRUSSARDI, Milan -- General Counsel

- **Tessa de Mönnink**



Amsterdam -- Partner and IDI franchising country expert for the Netherlands

# What is a Financial Performance Representation (FPR)?

- Any statement by a franchisor or its representative
- About historical or potential financial performance of a franchisor's franchised or franchisor-owned outlets
- Includes statements about:
 

<input type="checkbox"/> Sales	<input type="checkbox"/> Occupancy Rates
<input type="checkbox"/> Profits	<input type="checkbox"/> Breakeven Points
<input type="checkbox"/> # of Transactions	<input type="checkbox"/> Revenue per Available Room (REV PAR), etc.
<input type="checkbox"/> Average Customer Purchases	

# **FPR Issues Arise in Different Contexts**

1. Prospect: “How much can I make?”
2. Industry Standards: Sales or performance quotas set by franchisors
3. Regulatory Requirements



# Approaches to FPRs in Different Countries

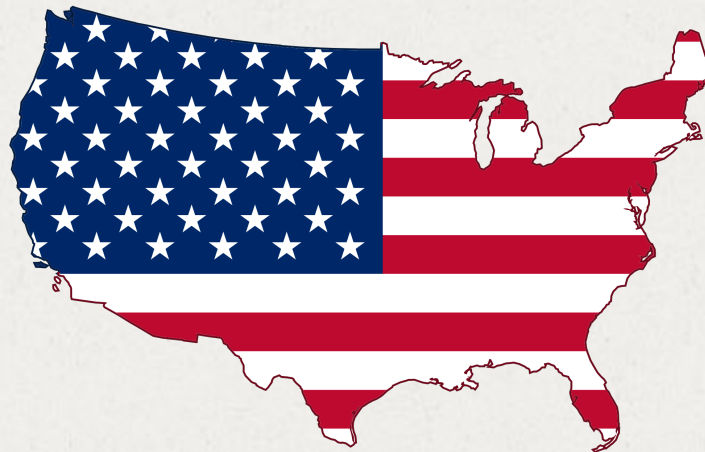
Italy






Netherlands



USA



# What Risks Do Franchisors Confront When Making FPRs?

- Claims of misrepresentation and fraud
- Claims of franchise law violations
- How are these addressed in:
  -  Italy
  -  Netherlands
  -  USA

# How to Mitigate Risk

**Explain**

clarify statements

**Admonish**

warn about risks

**Use  
Questionnaires**

make reader explain his/her understanding of statements

**Disclaim**

deny liability for statements

# Disclaimers

- If you rely on these claims, you do so at your own risk. We do not represent that these claims reflect your probable sales in Netherlands.
- We have presented this information to comply with local law, but we disclaim any knowledge of whether our experience in the U.S. is relevant to your likely experience in Netherlands.
- The franchise agreement contains the entire agreement of the parties. No representations or claims not specifically contained in the franchise agreement may be relied upon by you.



# Disclaimers

- You are responsible for preparing your own business plan and projections. We are not liable to you for relying upon the information that we provide.

Unlawful in U.S.

- When FPR is required by law in other jurisdictions, disclaimers may be unenforceable.

# Hypothetical

- IDISales operates 200 retail children's clothing stores in the U.S. They are located in major shopping malls in upper middleclass suburbs. In 2019, U.S. stores typically had 2500 sq. ft. of floor space and averaged \$1 million in gross sales.
- Same store sales dropped by 30% during the 2020 pandemic.
- In 2020, IDISales developed a robust online store which accounted for 50% of the chain's U.S. profits.
- IDISales does not yet have an online presence in the Netherlands.

# Hypothetical

- IDISales is negotiating an area development franchise agreement with Hans Brinker B.V. whereby Hans Brinker B.V. will commit to opening 10 IDISales stores in the Netherlands over 5 years. IDISales is not familiar with retail practices or the best locations for its stores in the Netherlands.
- No store leases have yet been negotiated by Hans Brinker B.V. Hans Brinker B.V. is considering opening stores in traditional shopping districts.
- When the area development agreement is signed, the parties will sign a franchise agreement for the first store, but will only sign franchise agreements for other stores after locations have been identified and approved by IDISales.



# Hypothetical

- What must IDISales disclose to Hans Brinker B.V. under Netherlands law?

“Article 913. 3. ...[T]he franchisor will provide the prospective franchisee with the following information in a timely manner, in so far as it is available to him, to a subsidiary.... or to a group company affiliated with him/it ..., and is reasonably relevant to conclusion of the franchise agreement:

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- financial data regarding the intended location of the franchise enterprise or,
- if such is lacking, financial data of one or more enterprises considered by the franchisor to be comparable,
- with the franchisor making clear the reasons why he/it considers them to be comparable.”



# How Should IDI Sales Comply with Applicable Laws?

- a. May IDI Sales reasonably provide no information to Hans Brinker, claiming that it lacks a “reasonable basis” for concluding that:
  - i. its U.S. store sales experience is not “comparable” to any locations in the Netherlands, and
  - ii. its financial information is not “reasonably relevant” to Hans Brinker’s franchise investment decision.

# How Should IDI Sales Comply with Applicable Laws?

- b. Based upon its lack of knowledge of financial data relating to stores operating in Netherlands, may IDISales condition granting a franchise to Hans Brinker on the franchisee's agreeing to minimum purchase requirements?
  - i. If yes, what else must IDISales disclose about the purchase requirements?

# Applying “Explain, Admonish and Use Questionnaire” to Hypothetical

- **How to avoid misrepresentation claims.**
- **Explain claim, basis, and limitations. Clarify**
  - The claim is based upon gross sales reports collected from our POS System from 150 of our 200 stores which had been in operation for at least one full year at the end of 2019 and 50 stores which had been in full and continuous operation throughout 2020.
  - These claims relate to stores of the same size and store mix as are customarily found in major U.S. shopping malls.
  - It does not reflect sales of any stores which closed for any period of time during the respective reporting periods.
  - The figures are averages/arithmetical means, and not median sales.

## Admonish

- You may not do as well.
- We have no experience operating in Netherlands.
- We have not yet established an online store servicing Netherlands.
- 2020 reported sales were generated during a Pandemic. We don't know if 2019's pre-pandemic sales will be replicated once it ends.
- Our minimum sales requirements are performance levels that we require for our franchisees to retain their franchises. They are not a representation that your store's sales will actually meet our minimum requirements.





# Questionnaire

## Sample Questionnaire Language:

1. Do you understand all of the information contained in the FDD?

Yes \_\_\_\_\_ No \_\_\_\_\_

If No, what parts of the FDD do you not understand? (Attach additional pages, as needed.)

2. Have you discussed with an attorney, accountant, or other professional advisor the benefits and risks of establishing and operating IDISales stores in Netherlands?

Yes \_\_\_\_\_ No \_\_\_\_\_

If No, do you wish to have more time to do so? Yes \_\_\_\_\_ No \_\_\_\_\_

3. Has anyone speaking on the Franchisor's behalf made any statement or promise to you concerning the revenues, profits or operating costs of a store operated by the Franchisor or its franchisees that is different from the information contained in the FDD?

Yes \_\_\_\_\_ No \_\_\_\_\_

4. Has anyone speaking on the Franchisor's behalf made any statement or promise to you about the amount of money you may earn in operating an IDISales store that is different from the information contained in the FDD?

Yes \_\_\_\_\_ No \_\_\_\_\_

5. Has anyone speaking on the Franchisor's behalf made any statement or promise concerning the total amount of revenue your stores will or may generate that is different from the information contained in the FDD?

Yes \_\_\_\_\_ No \_\_\_\_\_

# Conclusion

- Only present financial information **in writing**.
- Make sure FPRs are reviewed **by franchise counsel and accountants** in country where they will be used.
- Urge/require prospective franchisees to retain their own franchise counsel and accountants to review claims.
- **Explain** the claim, its bases and assumptions.

## Conclusion

- **Admonish** the reader to focus on the limitations of the claim and its limited relevance to the reader's future operational success.
- When feasible, use independent marketing firms to prepare FPRs.
- **Use questionnaires** to clarify potential misunderstanding.
- **Only rely upon disclaimers if enforceable where used.**





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