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Italian Competition Authority launches market test on McDonald's commitments related to restrictions on franchisees

The case

In July 2021, the Italian Competition Authority ('ICA') started a proceeding against McDonald's Development Italy LLC ('MCDI') for alleged abuse of economic dependence, in violation of Article 9 of Italian Law No. 192/1998 (on the abuse of economic dependence), carried out to the detriment of MCDI's franchisees. MCDI allegedly imposed on its franchisees a commercial and management organization designed to suit only MCDI's needs, through the application of clauses and pervasive and binding operational indications, likely to stiffen the business structure of the franchisees and to prevent them from independently run their business.

The conducts and the ICA's objections

According to the statement of objections, MCDI allegedly abused the economic dependence of its franchisees by imposing various restrictive conditions. In particular, MCDI imposed on its franchisees non-compete covenants, but also restrictive conditions relating to product prices and promotions, procurement, supplies and purchase orders, financial management, definition of staff, and the renovation of their premises.

Among the most relevant provisions denounced by the franchisees are:

i. an obligation to maintain their residence within a radius of 50 km from the premises and to devote all their time exclusively to the management of McDonald's premises?

ii. a non-compete obligation according to which the franchisees, for the entire duration of the franchise contract and for one year after the termination, cannot exercise in any form, on the entire national territory, activities in competition with MCDI;

iii. an obligation to comply with decisions taken by the McCoop Executive Committee (i.e. a consortium set up at national level to manage promotions, advertising and public relations) on sales prices. Such decisions were regularly communicated by MCDI to its franchisees as the pricing policy "*must be as homogeneous as possible throughout the chain of McDonald's restaurants*". Hence, the franchisees had to take into account the prices recommended by MCDI, which however turned out to be imposed prices, beyond the provisions of the

contract. The ICA stressed the existence of tools to impose the "recommended prices", such as specific software for the cash register price list management, which is centrally governed by MCDI.

In the statement of objections the ICA preliminary considered the practices likely to (i) substantially affect *intrabrand* competition between restaurants, due to the uniformity of the commercial policy imposed on the franchisees under several aspects; (ii) also affect *interbrand* competition, given that MCDI's conduct essentially aimed at transferring the returns on the investments made by the licensees to the grantor, what would entail an unlawful advantage to MCDI compared to its competitors, considering its market position.

MCDI's commitments

Following the start of the investigation, MCDI submitted commitments, which were published by the ICA on 17 March 2022, currently undergoing a market test.

The commitments mainly have as their object:

i. the removal of the 50km radius residence obligation;
ii. the amendment of the non-compete obligation, removing the prohibition of carrying out competing activities for the duration of the franchise contract, and limiting the scope of application to informal catering activities;
iii. the addition of provisions clarifying the non-interference by MCDI in the commercial policies set by the franchisees, including the franchisee's right not to apply MCDI'S recommended prices and promotions and not to the adhere to promotional campaigns, plus the adoption, during the contractual relationship, of further initiatives aimed at reaffirming the franchisee's autonomy in relation to pricing and promotions (such as antitrust compliance trainings to MCDI's employees and specific communications to the franchisees clarifying that their pricing policies are not relevant for the purposes of access to the so-called expandability, (i.e. the ability to negotiate a new contract with MCDI));
iv. the extension of the possibility for the franchisees to appoint suppliers of their choice for the purchase of services, products, equipment and materials, especially with reference to "non-core" and not identifying goods and services, as well as ancillary goods and services (such as cleaning, security, and gardening services).

Commentary

The ICA has launched a market test on MCDI'S commitments, which will continue until 18 April 2022 – i.e., the deadline for submitting observations. The commitments submitted by MCDI, by having a broad scope and apparently covering all relevant aspects of the contractual relationship (prices, promotions, management, contract

renewal, expenses, etc.), seem to be aimed at addressing the competitive concerns raised by the ICA. It remains to be seen whether MCDI will have to amend its commitments as a result of possible observations filed in the course of the market test. To be continued!