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Italian Competition Authority accepts McDonald's commitments related to restrictions on franchisees

The case

In July 2021, the Italian Competition Authority ('ICA') started proceedings against McDonald's Development Italy LLC ('MCDI') for allegedly abusing the economic dependence of its franchisees, in violation of Article 9 of Italian Law No. 192/1998. According to the statement of objections of the ICA, MCDI allegedly imposed various restrictive conditions. These included notably non-compete covenants, restrictive conditions relating to product prices and promotions and on supplies and purchase orders. MCDI also supposedly restricted the franchisees in their freedom of financial management, appointment of staff and the renovation of their premises.

In March 2022, MCDI submitted commitments which were published by the ICA on 17 March 2022, and subsequently underwent a market test (see also, DLC news article of 8 April 2022). These commitments mainly concerned the removal of a radius residence obligation for the franchisee, the amendment of the non-compete obligation, adding clarifying provisions on non-interference in the commercial policies set by the franchisees (including the franchisee's right not to apply MCDI'S recommended prices and promotions), and the extension of the possibility for the franchisees to appoint suppliers of their choice.

Three months later, on 30 June 2022, the ICA published its decision (available in Italian here) by which it accepted MCDI's commitments after they were partly modified in accordance with the feedback received during the market test.

The market test

MCDI's commitments were apparently subject to heavy criticism during the market test. According to ICA's decision, both consumers associations and former or denouncing franchisees themselves challenged almost all measures proposed by MCDI. The main points of criticism were:

i. the amendment to the non-compete clause was deemed not sufficient. The clause continued to include restaurant activities such as pizzerias, street food and kebab houses, poke restaurants and so on. These were considered too different from the "pure fast food" restaurant activity that the franchisees maintained.

ii. the commitment related to the non-interference of MCDI in the franchisees' commercial strategy regarding

recommended prices and promotions, was deemed inadequate. The market test revealed that, despite its commitment not to do so, MCDI had continued to impose its prices and promotions in the same way it had before. This non-contractual conduct (already was addressed in the ICA's statement of objections) involved the launch of national campaigns at fixed prices, financial support to franchisees conditional upon their pricing policy, and preventive price charging on the cash integrated management software.

The proposal of additional commitments by MCDI

After the market test, MCDI proposed certain amendments to its commitments. In particular regarding the (imposed) prices and promotional campaigns, MCDI committed to only set maximum prices in relation to a limited number of products and services offered to consumers. MCDI clarified that in any case, the indication of maximum prices would not be the main and prevailing instrument of its commercial policy. Additionally, MCDI would not apply incentives conditional on the application of compliant prices, with the sole exception of those linked to compliance with the maximum prices.

The ICA's decision

The market test did not seem to deeply influence the ICA' decision, as the authority finally and globally considered that MCDI's commitments (even before amendments and clarifications) properly addressed the issues highlighted in the statement of objections.

In particular, according to the ICA's decision accepting MCDI's commitments:

i. the removal of the obligation for the franchisee to reside within 50 km of the restaurant, and the clarification that the exploitation of the restaurant must only be a 'predominant' (and no longer full-time) activity for the restaurant manager, was sufficient to safeguard the franchisee's entrepreneurial and personal autonomy;
ii. the reformulation of the non-compete obligation suffices to restore the entrepreneurial autonomy of the franchisee, insofar as the amendment encompasses the entire period following the termination of the contractual relationship. Without neglecting a non-compete obligation's essential protective function for the franchisor, the obligation should, during the franchising relationship, be limited to the informal catering sector within which MCDI's franchise network operates.
iii. contractual clarifications and specific notices emphasizing the franchisee's freedom to join in on promotional campaigns or implement recommended prices, were found "*particularly suitable*". Decisions on this matter

should also have no influence on so-called expendability or contract renewal. This practice has the purpose of softening the franchisees' obligation to comply with MCDI's commercial policies.

On this matter, the ICA remarked that incentives to comply with a maximum price *for a limited number of products* would not likely "unduly hinder" the franchisees autonomy. As long as this price limit for "qualifying" or "iconic" products or services can be considered an indication and no obligation, it simply sustains a unified image of the MCDI franchise.

Commentary

This case is interesting as the ICA articulates and outlines the limits to several aspects of a franchising relationship.

The publication of this decision gives insight into the ICA's orientation regarding measures on *inter alia* price compliance obligations. It clearly welcomes practical, correcting conduct and clarifying communications or stipulations. It shows that the commercial freedom of the franchisee can be limited, but remains paramount as certain specific safeguards should remain in place.

For MCDI specifically, this is shown with the clarification of the non-relevance of compliance with pricing policies for the purposes of expandability, and the limitation on the range of products for which maximum sale prices can be indicated.