Distribution Law Center
DRIVEN BY CONTRAST

PAVIA e ANSALDO
STUDIO LEGALE
PeA

NEWS | 28 April 2022

Italian Competition Authority launches market test on Original Marines' commitments

The case

In December 2021, the Italian Competition Authority ('ICA') started a proceeding against Original Marines S.p.A. (OM), an important Italian clothing brand counting a presence of over 400 stores in the country, for alleged abuse of economic dependence, in violation of Article 9 of Italian Law No. 192/1998, carried out to the detriment of its franchisees.

According to the ICA, OM allegedly imposed a set of particularly onerous contractual conditions on its franchisees. It also prescribed a specific strategy whereby, once a franchisee would have launched its business, it would be confronted with a system that sacrificed the franchisees' profit in favor of OM, centralized all important business choices, passed OM's business risks on to the franchisees and affected the franchisee's ability to operate effectively in the market.

Furthermore, OM allegedly determined the value and composition of orders through a computerized control system installed at the point of sale, imposed promotions and resale prices on its franchisees, and prevented promotional sales campaigns from taking place unless expressly authorized in advance, in order to "avoid competition with other Original Marines stores".

The conducts and the ICA's objections

According to the statement of objections, OM allegedly abused the economic dependence of its franchisees by imposing various restrictive conditions. In particular, the ICA contested the legitimacy of the following conditions:

i. First, the ICA reported that, according to some contractual provisions relating to the design and set-up of the store, the economic burden rested entirely on the franchisees. The contractual imbalance also resulted from the fact that, according to the contractual provisions, the store had to be built according to OM's format and with the materials supplied by the companies appointed by OM. Where a franchisee refused to align its shop to the set-up conceived by OM, express termination of the contract was envisaged;

ii. OM allegedly determined the value and composition of the orders through a computerized control system and would impose automatic restocking mechanisms. The franchisee was in fact obliged to install, maintain and update, at his own expense, an IT system compliant with the information provided by OM and was obliged to

transfer the sales data of its business. This obligation was related to the obligation to purchase a minimum quantity of products in order to be granted the 'standard assortment', as well as to purchase 'best seller' products. In this context, the IT system allowed the monitoring of sales (and therefore stocks) and the automatic replenishment of these categories of products;

iii. As regards prices, OM allegedly prevented promotional sales campaigns without prior authorization in order to avoid competition with the other members within the OM network. In particular, a specific clause of the franchising contract stated that "*In order to avoid competition with other stores* […] *the Franchisee undertakes not to carry out promotional sales campaigns unless expressly authorised in advance in writing by the Franchisor*".

In the statement of objections the ICA considers that the contractual provisions as a whole provide an overall picture of OM establishing all essential commercial variables for the stores, through pervasive (IT) monitoring and by setting all key parameters, i.e. quantities and composition of orders, purchase and retail prices and promotions.

Given that OM holds a prominent position in the national market, as one of the leading companies in the clothing industry in Italy whose brand has strong commercial attractiveness, the conduct is likely, according to the ICA, to have an impact not only on individual contractual relationships and OM's intra-brand competition, but also on the wider competition dynamics in the national market.

OM's commitments

Following the start of the investigation, OM submitted commitments, which were published by the ICA on 7 April 2022. These commitments are currently undergoing a market test.

The commitments mainly have as their object:

i. The removal of contractual provisions imposing purchasing constraints in relation to minimum quantities and type of products to be purchased;

ii. The introduction of a new contractual provision clarifying that the stock will be replenished on the franchisee's request and that no minimum purchase obligation has to be met. The system of automatic replenishment of stock will be offered as an option for the franchisees to choose;

iii. The amendment of the relevant contractual provisions on prices, clarifying that franchisees are free to set the resale price, without prejudice to OM's possibility to communicate recommended price lists (the original clause "*The Franchisee shall be free to determine the retail price of the Products, although, the Franchisor suggests to adhere to the official price list of the Franchisor […]*" has been amended into "*The Franchisee*

shall be free to determine the retail price of the Products. Provided the foregoing, the Franchisor suggests to adhere to the recommended price list of the Franchisor […]").

iv. The amendment of the relevant contractual provisions on promotional campaigns, highlighting the decision-making autonomy of franchisees with regard to the implementation of OM's promotional campaigns (the original clause "*In order to avoid competition with the other stores participating in the ORIGINAL MARINES programme, the Franchisee undertakes not to carry out promotional sales campaigns unless expressly authorised in advance in writing by the Franchisor"* has been amended into: "*In view of the need to take into account the unified commercial strategy of the ORIGINAL MARINES programme, the Franchisee undertakes to consult the Franchisor in advance if he intends to carry out promotional sales campaigns or not to take part to the promotional campaigns recommended by the Franchisor").*

Commentary

The ICA has launched a market test on OM's commitments, which will continue until 9 May 2022 – i.e., the deadline for submitting observations. The commitments submitted by OM address the most relevant aspects of the contractual relationship on which the ICA raised concerns.

However, as OM also made clear in its commitments communication, the problems, reported by the franchisees and included in the ICA's statement of objections, with regard to the obligations related to the design and set-up of the stores have not been addressed. Given the importance of the company on the national market, and considering this last point, a challenge of the commitments in the context of the market test can not be excluded. To be continued!