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The Italian Competition Authority on unfair contractual practices in the area of agricultural products. The case of the *Cappelli* wheat

On 12 November 2019, the Italian Competition Authority (I.C.A.) issued an interesting decision (no. 27991/2019) concerning unfair contractual practices in the area of wheat seeds.

The decision concerns the *Cappelli* wheat, a cultivar of durum wheat selected in Italy at the beginning of the XX century and extensively used in the south of Italy until the 1950's, as other cheaper cultivars took the place of that cultivar. Recently, the peculiar qualities of the *Cappelli* wheat led to a renewed commercial interest in these seeds.

The Italian Council for Agricultural Research and Analysis of the Agricultural Economy (**CREA**), is the subject responsible for this wheat variety and for more than 500 other varieties that are recorded in the national varietal registry, listing the varieties of plants and agricultural species that can be marketed in Italy. Variety registration is a precondition for the certification of seeds and is intended to allow the identification of those varieties and as a guarantee that the latter are distinct, stable and uniform and that they are of satisfactory value for cultivation and use, pursuant to national and EU applicable legislation. The latter include *inter alia* **Directive no. 2002/53/EC** of 13 June 2002, on the **common catalogue of varieties of agricultural plant species** and the **Italian seeds legislation** (most notably the s.c. *Legge Sementiera*, Law no. 1096/1971).

The production and sale of the *Cappelli* wheat is not free for anyone wishing to grow it. Until 2016, CREA had two licence agreements in place with two Italian seed companies, granting them the right to produce and sell the seeds to third parties in Italy.

In 2016, CREA concluded a new contract with a single entity, the company Società Italiana Sementi S.p.A. (SIS), granting the latter an exclusive licence for the production and sale of the seeds in the EU.

In 2018, further to several complaints on SIS' contractual practices, the I.C.A. started its investigations on this case, based on the breach of art. 62, § 2 of Legislative Decree no. 1/2012, prohibiting *inter alia*

- (a) To impose, directly or indirectly, unjustifiably onerous purchase, sale or other contractual terms and conditions
- (c) To make the conclusion, performance of contracts and the continuity and regularity of the same commercial relations subject to the performance of services by the contracting parties which, by their nature and according to commercial usage, have no connection with the object of either of them
- (d) To obtain undue unilateral services, which are not justified by the nature or content of the commercial relations
- (e) To adopt any further unfair commercial conduct, which appears to be such, even taking into account all the commercial relations characterising the conditions of supply.

The Authority scrutinized the company's contractual practices. This led to a first, important conclusion: the existence of a significant power imbalance in the contractual relationships between S.I.S. and its business partners.

Based on this premise, the Authority went on to analyse S.I.S.'s contracts on the *Cappelli* wheat, concluding that S.I.S. had indeed unlawfully:

- 1) Made the supply of the seeds subject to the prior stipulation of a s.c. "supply chain contract" (*contratto di filiera*), including among others, the obligation to hand over the harvest to S.I.S. itself
- 2) Unduly delayed or refused the supply the *Cappelli* seeds to the subjects legitimately requesting it
- 3) Increased the prices significantly, without a real economic reason.

The I.C.A. issued a 50,000 Euros fine to the company for each of these three conducts.

The decision at hand touches upon a rather peculiar aspect of nowadays' agricultural market, characterized by a keen interest for ancient and uncommon grains.

The case is certainly thought provoking from an IP and competition law perspective, as the *Cappelli wheat* is not subject to a plant variety right (i.e. pursuant to art. 100 *et seq.* of the Italian Industrial Property Code, or to Regulation EC 2100/94), but rather only included in the national seed registry – as seen above.

Indeed, the contractual practices scrutinized by the Italian Competition Authority were put in place by S.I.S. after the exclusive licence granted by CREA transformed the market structure - previously built upon the presence of two distinct subjects having the right to produce and sell the seeds to interested market players.