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### The Regional Administrative Court of Lazio confirms a fine imposed by the Italian NCA against the construction market leader for abuse of dominant position in the plasterboard market (Mercato del Cartongesso, Saint-Gobain)

**Italy, Unilateral practices, Abuse of dominance, Barriers to entry, Dominant position, Essential facility, Geographic market, Market definition, Market power, Relevant market, Remedies (antitrust), Construction, Heavy industry**

Regional Administrative Court of Lazio (Tribunale Amministrativo Regionale del Lazio), 24 December 2011, Sentenza N. 10180/2011, Saint-Gobain PPC Italia S.p.A. (ex BPB Italia S.p.A.), Autorit  Garante della Concorrenza e del Mercato (Italian Competition Authority), Fassa S.p.A.

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On the 24th of December 2011, the Regional Administrative Court of Lazio ('RAC') ( *Tribunale Amministrativo Regionale del Lazio*) [1] rejected the appeal from *Saint-Gobain PPC Italia S.p.A.* (' *Saint-Gobain*') [ 2], the Italian subsidiary of the multinational corporation leader worldwide in the construction industry, against a decision of the Italian Competition Authority ('ICA') ( *Autorit  Garante della Concorrenza e del Mercato* ) [3] sanctioning the abuse of dominant position held by *Saint-Gobain* in the plasterboard market during the period 2005-2010. In its ruling, the ICA stated that *Saint-Gobain* (ex *BPB Italia S.p.A.*, a subsidiary of a British company acquired by the French group in 2005) had unlawfully exploited its market power by adopting a complex exclusionary strategy aimed at preventing or at least hindering the entry in the plasterboard market of a new competitor, *Fassa S.p.A.* (' *Fassa*'), which was known among the several competitors for its aggressive pricing, renowned brand, strong technical assistance and widespread distribution network in other markets of the Italian construction material sector. According to the RAC, the plea through which the applicant requested the annulment of the decision issued by the ICA, "although based on suggestive complaints extensively claimed, was without foundation". On the contrary, the RAC found that the position of the ICA was based on a rigorous analysis of the conducts put in place by the dominant undertaking, as well as of the data evidence collected during the investigation. Hence, the Court of First Instance deemed that the decision of the Competition Authority was to be upheld and the sanction to the French group was to be confirmed.

In 2009, the ICA started an investigation for abuse of dominant position allegedly held by *Saint-Gobain* [4] in the plasterboard market, following a detailed complaint lodged by *Fassa* in 2007. According to the ICA assessment, the abusive behaviour undertaken by *Saint-Gobain* had obstructed the acquisition by *Fassa* of a gypsum quarry located in the north-west of Italy, where the new operator intended to build a new plasterboard plant. The gypsum source at issue was the only available on the Italian territory such as to satisfy the minimum requirements for a new plasterboard facility, and

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was located in a geographical area where the production of plasterboard was most profitable. In addition, *Saint-Gobain* had falsely shown interest in other plots of land rich of raw gypsum close to the quarry where *Fassa* intended to develop its manufacturing plant, interfering with the preliminary contractual negotiations between the landowners and *Fassa* itself. To this purpose, *Saint-Gobain* purchased at a very high price part of the land merely to deprive *Fassa* of it. In addition to that, *Saint-Gobain* lobbied some neighbouring farmers having preemption rights on the land to start legal actions against the construction of the new production plant, in order to make impossible for *Fassa* to realize any quarry or industrial activity on a land fragmented into many small parcels.

In the ICA view, therefore, *Saint-Gobain* undertook an exclusionary behaviour with the final aim to hamper the access by *Fassa* to an adequate amount of gypsum, the input whose availability represents the main barrier to the production and commercialization of plasterboard, due to its scarce availability. The complex exclusionary strategy implemented by *Saint-Gobain* caused a considerable deprivation of gypsum deposits and an increase in the level of costs borne by *Fassa*, triggering a significant delay of its market entry. As a matter of fact, the lack of alternative explanations of technical-productive nature able to justify the alleged abuse (basically the absence of plans by *Saint-Gobain* to develop a new plasterboard plant, as well as a strategic level of gypsum reserves much more than sufficient in the long-run) demonstrated the alarm raised by the potential entry of a new rival having a significant commercial power and production capacity such as *Fassa*. Indeed, *Fassa's* market entry could have undermined the oligopolistic structure of the plasterboard market, historically characterized, not only in Italy but in all the European national markets, by the presence of three multinational companies vertically-integrated (i.e., *BPB*, *Knauf*, *Lafarge*).

After the statement of objections, the dominant undertaking presented some commitments to lessen the anti-competitive impact of its alleged conducts, which had been taken into account by the ICA for the quantification of the fine. In particular, the initiatives proposed by *Saint-Gobain* included the offer to sell to *Fassa* a plot of land rich of raw gypsum at a reasonable price and to compensate the farmers that started legal actions against *Fassa* in exchange for dropping the case. As a result, on the 30th June of 2010, the ICA condemned *Saint-Gobain* for violation of EU and national competition rules imposing, in light of the gravity and duration of the infringement and of the mitigating commitments undertaken by the dominant firm, an administrative sanction of €2,165,787 [ 5].

*Saint-Gobain* appealed the decision, mainly contesting the definition of the geographical relevant market made by the ICA. Considering that, as for other construction products, one of the most significant component of the price of a plasterboard panel is given by the transportation costs, a key-aspect of the investigation realized by the ICA was to define the maximum extension of the area of supply, represented by a concentric circle with a radius determined by the economically viable transport distance from a given production plant to the place of delivery of a plasterboard panel. On the base of an empirical analysis, the ICA set a maximum distance of 500 km. Given the location of the quarry and the land affected by the alleged abuse, the zone delimited by such a radius broadly corresponded to the geographical macro-area including approximately the center-north of Italy, the south of France and to a lesser extent, part of Austria and Switzerland. This definition was strongly contested by *Saint-Gobain*, according to which the dimension of the geographical market was to be deemed national, as assumed by the ICA itself in its statement of objections. Moreover, the fact of drawing a radius from the area concerned by the alleged abuse was flawed by a sort of vicious circle fallacy. In *Saint-Gobain's* view, the ICA had excluded from the market definition several foreign and national production plants, estimating incorrectly the market shares held by the competitors and thus the dominant position assigned to *Saint-Gobain*. Consequently, according to *Saint-Gobain*, its market share was lower or at most close to the threshold for dominance.

The RAC entirely confirmed the evaluation made by the ICA, judging it as perfectly logic and well-supported by empirical data. According to the Court of First Instance, the mere observation of the presence in each country of productions plants serving specific geographical areas further substantiated the reasoning based on the radius of distribution (only *Saint-Gobain* owned two production plants, one supplying the center-north and the other the center-south of Italy, reason why it could rely on lower transports costs and larger delivery areas). Furthermore, partial overlaps with other areas of

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distribution could not substantially alter the market structure. As for the argument related to the broader dimension of the geographical market assumed in the statement of objections by the ICA, the RAC recalled a judgment of the Supreme Administrative Court (*Consiglio di Stato*) [em], according to which the definition of the relevant market delineated in the statement of objections is not binding, allowing a different evaluation by the ICA in its final decision provided that it does not constitute a substantial variation of what originally contested. Indeed, the characteristics of the relevant market outlined in the statement of objections are only the result of a preliminary assessment, which may be better defined in the course of the investigation. Moreover, in order to reply to the appellant's counter-argument, the RAC reminded that the ICA had estimated a dominant position by *Saint-Gobain* even assuming a national dimension of the geographical market, as it would have in this case a market share higher than 40%.

As a result, although the entire assessment realized by the ICA and validated by the RAC seems to follow a progressive logic, the main remaining doubt is whether the passage from a relevant market initially defined as national (*inter alia*, in accordance with the EU case-law delivered so far) [6] to a regional one complies with the rules of fair hearing, in particular in a proceeding like the present one, where national dimension of the relevant market would imply that the market share held by the alleged dominant firm is close to the limit of dominance, and that it would be constrained by two other strong multinational operators.

[1] Regional Administrative Court of Lazio (*Tribunale Amministrativo Regionale del Lazio*), 24 December 2011, Decision No. 10180/2011.

[2] Regional Administrative Court of Lazio (*Tribunale Amministrativo Regionale del Lazio*), 5 November 2010, Decision No. 9470/2010.

[3] Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*), 30 June 2010, A/383 - *Mercato del Cartongesso*, Decision No. 21297, Bulletin No. 26/2010.

[4] Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*), 5 March 2009, A/383 - *Mercato del Cartongesso*, Decision No. 19596, Bulletin No. 9/2009.

[5] See [Article from European Competition Network Brief, \*The Italian Competition Authority imposes fine against construction market leader for abuse of dominant position in the plasterboard market \(Saint-Gobain Italia\)\*, 30 June 2010, e-Competitions, n33491](#) .

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Italian Supreme Administrative Court (*Consiglio di Stato*), 29 September 2009, Decision No. 5864/2009.

[6] European Commission, 5 December 1988, Case IV/31.900, *BPB Industries plc*, Official Journal of the European Communities, L 10, 13 January 1989, para. 110-113; European Commission, 27 November 2002, [Case COMP/E-1/37.152, \*Plasterboard\*](#), C(2002)4570, para. 542.

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