

SUMMARY OF RESOLUTION S/0154/09 *MONTESA HONDA*

On 28 December 2011 the Council of Spain's antitrust authority, the Comisión Nacional de la Competencia (CNC), issued its resolution on infringement proceeding S/0154/09 MONTESA HONDA.

The case originated with a complaint filed by a motorcycle dealer in Madrid, Madrileña del Motor, S.A. (CAUCA), against its supplier, MONTESA HONDA, S.A. (HONDA), and six of its dealers located in the provinces of Madrid, Guadalajara and Toledo (BARRAL MOTO, S.L., ELITE RACING, S.L., EXTREMOTO SPORTCYCLE, S.L., MOTOR CITY, S.L., MOTOLEDO, S.L. and SOAL MOTOS, S.L.). According to the complaint, CAUCA's opposition to a collusive agreement between the accused for the sale of high cylinder capacity motorcycles of this brand in the provinces of Madrid, Guadalajara and Toledo, and its subsequent complaint against the HONDA parent companies, led to its expulsion from the official network of Honda dealers.

The Investigations Division of the CNC opened a confidential probe, which included inspections at the offices of HONDA and some of the dealers.

On 26 April 2010 the Investigations Division brought an infringement proceeding against HONDA; SOAL MOTOS S.L. and FESTER S.L. (collectively SOAL); MOTOR CITY S.L. and MOTOL S.A. (collectively MOTOR CITY); ELITE RACING, S.L. (O2 HONDA); BARRAL MOTO S.L. (BARRAL); MOTOLEDO S.L. (MOTOLEDO); and EXTREMOTO SPORTCYCLE, S.L. (EXTREMOTO), for alleged anti-competitive practices prohibited by article 1 of the Spanish Competition Act (LDC). It also granted status as interested party in the case to the complainant, CAUCA.

HONDA is a manufacturer and wholesale distributor of motorcycles at the global level. The rest of the interested parties, in turn, were or had been official retail distributors of HONDA motorcycles, selling motorcycles to end users directly or through agents.

The market affected by the anti-competitive practices is the retail distribution of motorcycles in the provinces of Madrid, Guadalajara and Toledo, where Honda was the brand with the largest share in the motorcycle market in the years 2008 and 2009.

The CNC Council has found that the evidence shows:

1. That HONDA and its main dealer in the province of Madrid, SOAL, maintained the following contacts in 2007:
 - they met to discuss sales via agents, with HONDA advocating a higher commercial margin for the agents;
 - SOAL sent a letter to HONDA saying it was in contact with competitors to "*unify the tariff so as to provide a higher margin*", that some dealers did not want to sell through agents and that EXTREMOTO was selling at cost to agents located in Madrid; and

- they held a meeting at which SOAL complained that HONDA had done nothing to bring the pricing situation in Madrid into line and that CAUCA was not respecting the prices, which was later repeated by SOAL in a letter.
2. On 4 June 2008 the Honda brand dealers in the province of Madrid (SOAL, BARRAL, ELITE RACING, MOTOL and CAUCA) held a meeting at which they agreed a list of prices for a number of models with cubic capacity of more than 300 cc, and, furthermore, specified the margin to be granted to the agent. SOAL made the list known to HONDA. This list was discussed and corrected by some of the participating dealers.
 3. HONDA, for its part, modified the price list and sent it, not only to the dealers in Madrid, but also to those in Guadalajara and Toledo (EXTREMOTO and MOTOLEDO). Furthermore, it implemented an arrangement for monitoring compliance with the agreement that consisted in requiring the dealers to submit the invoices sent to the end customers and agents, failing which no type of bonus would be paid to the dealer in question.
 4. On 9 July 2008 CAUCA contacted the European and Japanese parent companies of HONDA to denounce the existence of collusive behaviour supervised by HONDA. As a result, HONDA sent its dealers an e-mail with a list of suggested prices, eliminating the minimum prices and agent's margins, and a letter distancing itself from and disavowing the meeting of 4 June 2008 and its anti-competitive nature.
 5. Later on, in 2009, HONDA and its dealers O2 HONDA and MOTOR CITY continued pursuing the anti-competitive practices. Thus, in January 2009 O2 HONDA sent HONDA a list of the prices it was applying. In June 2009 MOTOR CITY complained to HONDA about the aggressive policy being pursued by O2 HONDA with the agents, forward to which HONDA asked both dealers to submit their tariffs for agents. It then resent those tariffs to both dealers. In July 2009 both dealers agreed the schedule of prices for sales to agents and HONDA also sent them a list of prices which included the agent's markup.

The CNC Council **assesses** the conduct examined in this case as an infringement of article 1 of the LDC both by object and by its effects.

In the contacts between HONDA and SOAL in 2007, the CNC Council holds that the matters discussed and intentions did not respect competition law, all the more because HONDA is only allowed to recommend maximum prices to its dealers. The facts on the case record demonstrate the existence of a pricing agreement of both a horizontal nature, as it stems from the coordination of competitors operating at the same level of the market (retailing), and vertical, because it was ultimately the manufacturer/importer who wielded the capacity to modify the proposed levels with power to impose them on other dealers who were not even present at the 4 June 2008 meeting and did not participate in the discussion of the changes to be made to the price list.

The CNC Council holds that those facts not only show that HONDA was aware of the anti-competitive agreement of 4 June 2008 between the Madrid dealers, but also that it participated in that agreement by modifying the prices its dealers had proposed to it, modifying the agent markups the dealers had proposed, and including new elements

such as (1) a new level of minimum retail prices to be applied by the dealers and agents alike, and (2) a new maximum price level for the dealer's sales to the agent. Moreover, it set up a mechanism for supervising and monitoring the agreement that required dealers to submit their sales invoices to the manufacturer/importer.

Despite HONDA's attempts in July 2008 to distance itself from the anti-competitive agreement, the CNC Council has concluded that the evidence shows that in 2009 the relations between HONDA and its dealers continued to be of a decidedly anti-competitive nature. This follows from the fact that a dealer would justify to the manufacturer the prices it charged, that another dealer would report to the manufacturer another agent's breach of the policy on subagents, that the manufacturer would intervene to request both of them to submit their respective price lists, that it would exchange those lists between them and that the dealers involved would then reach an agreement on the selling price to subagents that the manufacturer knew as well.

HONDA's involvement in this case, mediating so that some of its dealers would arrange the margins for their agents, and even giving its final 'go-ahead' for margin, is viewed by the CNC Council as anti-competitive conduct, because the agent's margin forms part of the final retail price and unification of those components contributes to unifying the final sale prices, thereby constraining and distorting intrabrand competition between those dealers at the least.

For all of the foregoing, the CNC Council concludes that the conduct examined in this case, from mid-2008 to the end of 2009, must be classified as a complex, single and continuing infringement of article 1 of the LDC, stemming from the fixing of (1) a minimum retail price and a maximum selling price for the dealers to the agents/subagents in 2008 for certain models of motorcycles with capacity of more than 300 cc, and (2) a fixed margin for agents in 2009.

The CNC Council notes that this conduct is illicit by **object**, given its objective capacity to disturb the conditions of competition in the market within the meaning of article 1 LDC, which is sufficient to declare it unlawful and punishable by law. But, what is more, the CNC Council points out that the conduct has had **effects**, at least in 2008, on the final retail selling prices, increasing those prices, as seen in the evidence obtained during the resolution phase.

The CNC Council indicates that even though not all units were sold above the minimum price, the establishment of a minimum price is not an objective in and of itself, but rather a mere instrument for pushing the prices of a product above the levels at which those units would be sold in the market in the absence of the agreement. In this case the units sold in the market after the agreement were clearly higher than those for the units sold before then, even if some were sold at below the minimum price. It therefore holds that in this case the instrument had the desired effect: to increase the prices of the products covered by the anti-competitive agreement.

The liability of each of the companies that participated in the infringement is different and varied in time, in the judgment of the CNC Council, except for MONTESA HONDA, which from the very outset sought to coordinate and structure its network of dealers and the dealers' network with their agents.

The CNC Council finds that the conduct of HONDA and SOAL during 2007 was pivotal for finally arranging the agreement adopted on 4 June 2008 between the Madrid dealers, and that HONDA's involvement was fundamental for making it viable and extending it to the provinces of Toledo and Guadalajara, such that both bear greater responsibility for the anti-competitive conduct.

It likewise indicates that the evidence on record shows that HONDA together with MOTOR CITY and O2 HONDA maintained the same anti-competitive stance over time, at least until the end of 2009. In this regard it bears noting that in 2009 the two dealers had become the top two in the Honda network for the province of Madrid.

With respect to the dealers MOTOLEDO and EXTREMOTO, although they did not participate in the 4 June 2008 meeting at which the collusive agreement was made, the CNC Council believes they must be held liable for their participation in the conduct because they implemented the agreement, albeit not very or less effectively than the others, as shown by an analysis of the invoices.

Lastly, the CNC Council holds that there is not sufficient evidence to instruct the Investigations Division to open an infringement proceeding against CAUCA (the complainant). The facts on record show that in 2007 CAUCA was the prime obstacle for reaching a pricing agreement between the Honda dealers in the province of Madrid. Later on, although it attended the meeting of dealers on 4 June 2008, it publicly distanced itself from the anti-competitive agreement when it denounced the agreement to the parent companies of HONDA barely one month later.

Taking into account all of the above, the CNC Council levied the following fines:

- MONTESA HONDA, S.A. €1,282,183;
- ELITE RACING, S.L. €274,844;
- MOTOR CITY, S.L. and MOTOL S.A., jointly and severally, €191,955;
- FESTER S.L. and SOAL MOTOS, S.L., jointly and severally, €69,861;
- BARRAL MOTO S.L. €5,736;
- MOTOLEDO S.L. €3,781;
- EXTREMOTO OFF ROAD, S.L. and EXTREMOTO SPORTCYCLE, S.L., jointly and severally, €1,887.