

SUMMARY OF RESOLUTION S/0237/10 SUZUKI

On 27 March 2012, the Council of Spain's antitrust authority, the Comisión Nacional de la Competencia (CNC), issued its resolution on infringement proceeding S/0237/10 SUZUKI.

The case originated with a confidential fact-finding procedure initiated ex officio by the CNC's Investigations Division acting on information concerning possible anti-competitive practices in the market for the distribution and sale of motorcycles.

As part of the confidential probe, on 24 March 2010 the Investigations Division of the CNC carried out an inspection at the premises of SUZUKI MOTOR ESPAÑA, S.A. (SUZUKI).

As a result, on 21 July 2010 the CNC's Investigations Division opened an infringement proceeding against SUZUKI and a number of its dealers in the provinces of Madrid and Granada: MOTORBIKE WORLD GRANADA, S.L. (JMOTO); MOTOS ANDRÉS, S.L. (MOTOS ANDRÉS); DYTE MOVIL, S.L. (DYTEMÓVIL); MOTOFUNCIÓN, S.L. (MOTOFUNCIÓN); MOTORECAMBIOS Y ACCESORIOS, S.L. (MOTOREAC); SAIMOTO MOTOR, S.L. (SAIMOTO); MOTORRAD CENTRO, S.L. (MOTORRAD); MOTOSPORT VILLALBA, S.A. (MOTOSPORT VILLALBA); CODISMOTO S.L. (CODISMOTO); and GESTIÓN MOTOMERCADO, S.L. (GESTIÓN MOTOMERCADO) for alleged anti-competitive practices of the kind prohibited by article 1 of the Spanish Competition Act 15/2007 of 3 July 2007 (Ley de Defensa de la Competencia or LDC).

SUZUKI 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 Suzuki motorcycles, selling motorcycles to end users directly or through agents (mainly repair workshops).

The markets affected by the anti-competitive practices are

- the retail distribution of motorcycles in the provinces of Madrid and Granada, where Suzuki was the brand with the third largest share in the national motorcycle market in 2008 and 2009, and
- the wholesale distribution of original spare parts for Suzuki motorcycles in the province of Madrid.

The CNC Council has found that the evidence shows that:

In the province of Granada

1. In January 2008, JMOTO and MOTOS ANDRÉS met to agree on the commission to be paid to agents for sales made by the latter during the first quarter of 2008;
2. In May 2008, SUZUKI, JMOTO and MOTOS ANDRÉS reached an agreement on resale prices for Suzuki motorcycles, promotions and the commission payable to agents for sales made by them;

3. In April 2009, SUZUKI and its Granada dealers (who had recently been joined by DYYTEMÓVIL) held a meeting at which they modified certain details of the above agreement.

In the province of Madrid

4. In November 2008, SUZUKI contacted the dealer SAIMOTO "*to discuss the price problem we have Madrid*" and to inquire about the commission paid to agents;
5. On 2 December 2008, SUZUKI and the dealers SAIMOTO, MOTOFUNCIÓN, MOTORRAD, MOTOSPORT VILLALBA and CODISMOTO attended a meeting at which they agreed on prices for Suzuki motorcycles, complimentary extras upon sale and the commission payable to agents for sales made by them;
6. The following day, CODISMOTO sent an email to several unidentified dealers attaching a file containing two price lists for Suzuki motorcycles, one for final sales and the other for agents, stating "*I expect them to come into force this afternoon, as agreed*".
7. Between December 2008 and March 2009, Suzuki and MOTOFUNCIÓN, at least, held fortnightly meetings to try and keep track of the extent to which this agreement was applied;
8. On 26 March 2009, SUZUKI and the dealers MOTOREAC, MOTORRAD, SAIMOTO and MOTOFUNCIÓN attended a meeting at which they modified the content of the above agreement by
 - boycotting GESTIÓN MOTOMERCADO,
 - distributing specific agents between the dealers,
 - including an agreement on prices for the sale of original Suzuki spare parts by dealers,
 - including an agreement on the prices to be charged for motorcycle registration services, and
 - modifying the commission payable to agents.
9. In October 2009, the above agreement was being implemented, although CODISMOTO, then a sales agent, was destabilising it.

As a preliminary issue, the CNC Council evaluates the arguments adduced by some of the defendants on the **proceeding** to the effect that their due process rights were denied.

Thus, as to the claim that the proceeding is null and void, it must be underlined that the CNC's actions are governed by the LDC, as supplemented by Act 30/1992 of 26 November 1992 on the Legal Framework of Public Administrations and Common Administrative Procedure and the existing case law in point. Accordingly, the CNC is not subject to rules falling outside the ambit of the foregoing, such as criminal law rules, in contrast to the defendants' arguments. In this connection, it is to be noted that the inspection of SUZUKI's headquarters was guided by article 40 of the LDC. Furthermore,

the actions of the Investigations Division during the inspection were in accordance with the Investigation Order authorising its intervention.

As to the nullity of the proposed resolution, it must be recalled that the defendants did not qualify as interested parties at the confidential probe stage, as supported by the CNC's Resolution of 4 May 2009 (proceeding R/011/09 COLGATE PALMOLIVE) and, therefore, DTYEMÓVIL cannot argue that its due process rights were denied because it did not participate in that stage. Even though the CNC's Investigations Division considered that DYTEMÓVIL's reply to the Statement of Objections was filed late, the fact that the investigating body took that reply into account in its Proposed Resolution means that the defendant's due process rights were not denied either, in line with the 4 May 2010 judgement of the Spanish National Court (Audiencia Nacional) in the appeal against CNC Resolution 2805/07 EMPRESAS ESTIBADORAS of 24 November 2009.

The CNC Council then **assesses** the conduct examined in this case as an infringement of article 1 of the LDC by its **object**, in view of the facts on record and the submissions of the parties. In particular, it finds that the Madrid and Granada dealers (except GESTIÓN MOTOMERCADO) adopted collusive agreements with SUZUKI's explicit knowledge and its express consent and support.

The CNC Council is of the view that the agreements adopted are capable of seriously restricting intrabrand competition as they affect the resale price and other fundamental criteria on the basis of which such competition thrives: commission paid to agents as well as discounts and promotions, which are usually part of individual dealer-customer negotiations on the sale of motorcycles. In the case of Madrid, the agreement covered another important element of competition between distributors for sales agent services: the price for the sale of original spare parts to repair workshops.

The CNC Council then goes on to rebut a number of arguments advanced by the defendants:

- The dealers contend that internal SUZUKI documents cannot be used to prove the existence of the agreements because there is no record of it having approved such documents. In response, the CNC Council stresses that in view of the content and authors (Suzuki regional representatives with knowledge of what goes on in their areas of responsibility) of the documents, there can be no doubt as to their validity unless the parties can adduce evidence otherwise, which they did not. The other possible explanations submitted by the parties on the content of these documents do not disprove their collusive content either, because they do not tally with the documents' literal wording or with their full chronological reading.
- Even though the dealers who received CODISMOTO's email of 3 December 2008 containing the collusive price lists are unidentified, CODISMOTO itself recognises in its submissions that it sent the email to the other defendant dealers in Madrid, but not with the intention to collude. MOTOREAC, who did not attend the meeting of 2 December 2008, was among the recipients too because CODISMOTO further admits in its submissions that the attached price lists had first been approved by someone working for MOTOREAC, a company that also spoke out about the purpose and content of the lists in its submissions.

- As to the argument that the price lists exchanged were recommended, the CNC Council notes that the dealers' independence of action disappeared in view of the facts on record, since
 - o in the province of Granada, unified prices and coordinated promotions can be observed, instigated by SUZUKI, and
 - o in the province of Madrid, there was an initial exchange of detailed strategic commercial information on prices and costs, sanctioned by the supplier, which virtually eliminated any uncertainty as to competitors' conduct since the price of purchase from the supplier and the recommended price were the same across all dealers. Moreover, this exchange of information was followed by an exchange of price lists for sales to customers and agents "*as agreed*" and which were to "*come into force*", which somewhat contradicts the argument that these prices were recommended by the brand.

Furthermore, the CNC Council finds that the similarities between the implementation of the agreements on motorcycle resale prices and commission payable to agents, as well as the proof of the role of SUZUKI's executives (and, in particular, of the regional representative for both provinces) in the establishment and evolution of these agreements, confirms the existence of a **single unlawful conduct** by SUZUKI and its dealers in both provinces.

The CNC Council considers that the collusive conduct analysed cannot benefit from any exemption whatsoever from the prohibition under Spanish competition law pursuant to

- article 4(a) of EU Regulation 330/2010 on vertical restraints, as read with article 1.4 of the LDC, since what is involved is a vertical agreement in the area of recommended prices,
- article 1.3 of the LDC, as the defendants have not proved that the requirements established in that article have been met,
- the Guidelines on the above EU Regulation, given that no efficiencies have been evidenced, and
- article 3 of the Spanish Competition Regulations, having regard to the legal and economic context in which the conduct occurred, in view of
 - o the existing concentration in the national market for retail motorcycle distribution,
 - o SUZUKI's position as the third largest brand in this market,
 - o SUZUKI's bargaining power with respect to its dealers, and
 - o the potential harm to intrabrand competition caused by anti-competitive agreements, given that it is driven by the brands' parallel retail distribution networks. In this connection, it must be pointed out that the Guidelines on the application of the EU Regulation on vertical restraints emphasise that

- the market position of the supplier and its competitors is of central importance in assessing possible anti-competitive effects of the loss of intrabrand competition (paragraph 177), and
- in certain circumstances where interbrand competition is restricted, a significant loss of intrabrand competition can give rise to an increased risk of collusion between major suppliers (paragraph 178).

The CNC Council stresses how difficult it is to quantify the **effects** of the unlawful conduct in this case due to the documentation submitted by the dealers (the first 10 invoices of each month). This prevents it from making enough common observations on the sale prices to be able to properly assess the extent to which the agreements were complied with. However, if the comparison is limited to the models with low cylinder capacity appearing most often in the invoices (UH 125 and UH 200), the CNC Council notes a striking price uniformity in the provinces of both Granada and Madrid.

Based on all of the foregoing, the CNC Council harbours no doubts that the collusive agreement was applied in practice, in view of the supervision work carried out by SUZUKI and MOTOFUNCIÓN, which is evidenced by the facts on record.

The **liability** of each of the companies that participated in the infringement is different, in the judgement of the CNC Council, depending on their involvement.

Thus, the CNC Council finds that SUZUKI 's involvement was crucial and pivotal to the genesis and application of the collusive agreements in the provinces of Granada and Madrid, since they occurred in the context of SUZUKI's selective distribution system for its motorcycles in Spain and, therefore, could not have been implemented without its knowledge, explicit consent and support, as demonstrated by the facts on record in the case and proven by the information originating from the investigations at SUZUKI's headquarters.

In the CNC Council's view, the liability of the dealers varies depending on the competition variables surrounding the collusive agreement. Thus, with respect to dealers in the province of Madrid, where the collusive agreements were broader than in the province of Granada, intrabrand competition was eliminated to a greater extent, except in the case of CODISMOTO, as it left the network of official Suzuki dealers before the meeting of 26 March 2009.

As for GESTIÓN MOTOMERCADO, the CNC Council shares the Investigations Division's opinion that its involvement in collusive agreements is not proven.

In view of all of the foregoing, the CNC Council finds that the conduct described above constitutes a **very serious infringement** of article 1 of the LDC and, therefore, levies the following **finés**, based on motorcycle sales turnover for the period during which the defendants participated in the infringement (plus, with respect to dealers in the province of Madrid —except for CODISMOTO— turnover for sales of original Suzuki spare parts) and on their different levels of liability for the infringement:

- SUZUKI MOTOR ESPAÑA, S.A.: €816,817
- MOTORBIKE WORLD GRANADA, S.L. (JMOTO): €77,963

- MOTOS ANDRÉS, S.L.: €123,658
- DYTE MOVIL, S.L.: €11,504
- MOTOFUNCIÓN, S.L.: €131,318
- MOTORECAMBIOS Y ACCESORIOS, S.L. (MOTOREAC): €119,359
- SAIMOTO MOTOR, S.L.: €103,056
- MOTORRAD CENTRO, S.L.: €38,614
- MOTOSPORT VILLALBA, S.A.: €12,848
- CODISMOTO S.L.: €22,322