Decision of the Competition Authority (Ref. PRC/2019/4)

Leniency Requests in the Security Sector

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I. The case

§1. Pursuant to Article 17 of Law no. 19/2012, the Competition Authority (hereinafter "AdC") initiated an investigation into prohibited practices under articles 9, 11, and 12 of Law no. 19/2012 and articles 101, 102 of the Treaty on the Functioning of the European Union (hereinafter "TFEU")[1] on October 23^{rd}, 2019. The investigation was launched following a complaint[2]. Having properly recorded the complaints, the AdC initiated an administrative procedure (Article 8/1 of Law no. 19/2012) against 2045, 2045-Gália, Comansegur, Esegur, Gália, Grupo 8, Prestibel, Prosegur, Ronsegur, Securitas, Strong Charon, and Vigiexpert[3], based on the elements present in Article 7/2 of Law no. 19/2012. In order to establish the facts, proof-gathering measures were taken in accordance with Article 18 of Law no. 19/2012, including searches (Articles 20 and 21 of Law no. 19/2012)[4], collection and seizure of copies of documents (Article 18/1, paragraph c) and Article 20 of Law no. 19/2012), and requests for information from the companies involved and third parties (Article 18/1, paragraph a), of Law no. 19/2012)[5]. The AdC issued a decision imposing a total fine of €41,297,000 (Group 2045, €5,960,000, Comansegur, €1,175,000, Group 8, €5,008,000, Prestibel, €6,028,000, Prosegur, €8,127,000, Securitas, €10,331,000, Strong Charon, €4,668,000).

II. The prohibition of horizontal agreements

§2. Considering that the undertakings referred to in §1 are on the same level of the economic process, then, if it exists, we will be facing a horizontal agreement[6]/[7], as opposed, for example, to a vertical agreement (an agreement between companies that are inserted in different instances of the economic circuit[8]). However, although there are numerous cases where sanctions are applied to companies that carry

[1] It should be noted that the AdC is endowed with broad powers of investigation and enquiry, reinforced by Regulation no. 1/2003, *see,* SILVA, Miguel Moura e (2020). *Competition Law*. AAFDL Publisher, reprint, p. 326.
[2] Decision PRC/2019/4, non-confidential version, Competition Authority, pp. 12-15, §9-23.
[3] Decision PRC/2019/4, non-confidential version, Competition Authority, p. 15, §24.
[4] About this due diligences, *see,* SILVA, Miguel Moura e (2020). *Competition Law*. AAFDL Publisher, reprint, p. 333.
[5] Decision PRC/2019/4, non-confidential version, Competition Authority, p. 16, §28-30.
[6] About this definition, Judgment from 6 January 2004, *Bayer C. Commission*, C-2 and C3/01 P, I:C:2004:2, nº. 97.
[7] Decision PRC/2019/4, non-confidential version, Competition Authority, p. 280, §1036.
[8] GORJÃO-HENRIQUES, Miguel (2020). *Union Law - History, Law, Citizenship, Internal Market and Competition*. Almedina, 9th edition, pp. 652-653. Just as Acórdão do TCL de 02 de maio de 2007, Vatel, Salexpor, Aveirense e Salema c. AdC e Acórdão do TCL de 21 de maio de 2008 Aeronorte e Helisul c. AdC.

out horizontal agreements, the truth is that these are not necessarily anti-competitive[9]. It would not make sense to go as far as to absolutely restrict horizontal agreements. In fact, they may, to a certain extent, be beneficial to economic efficiency and integration[10]. I would even dare to say that it would be naive to think that companies would not group together to reduce risks, increase their influence in the market and financing capacity[11]. One must consider that an extremely restrictive prohibition would inevitably lead to the exponential appearance of monopolies in the market, since it would reduce the initiative of entrepreneurs[12]. It becomes clear, in the current situation, that without investment and inter-company cooperation, companies would have greater difficulty in growing. An exemplary case of this is the *Vaccum Interrupters* decision[13]. In this context, although the Commission considered that companies AEI and REYROLLE could individually research, produce and market the product, the truth is that both companies had not done so because the cost of investigation and commercialization was too high for each of them to bear alone[14].

§3. Having said that, we could investigate whether the agreement practiced by the aforementioned companies, although having restrictive effects, has positive effects on the market that outweigh those[15]. Group 2045 even states that: "*even if there was (an agreement) and it had some kind of anti-competitive effects, those effects would be absolutely compensated by the pro-competitive effects.*". However, I disagree with the fulfillment of Articles 10 of the LDC and 101/3 of the TFEU in the case at hand. It is extremely important to point out that the burden of proof of the justifications conditions falls on the targeted companies[16] (cf., above, §1) and they, at no time, provide evidence that supports the application of the aforementioned provisions (they merely state the right to which they claim[17]). Moreover, although all types of agreements may be justified under Article 101/3 of the TFEU[18], it will be extremely unlikely

[9] JONES, Alison; SURFIN, Brenda (2016). *EU Competition Law - Text, Cases, and Material*. Oxford, 6th edition, p. 715.
[10] In this sense, SILVA, Miguel Moura and (2020). *Competition Law*. AAFDL Publisher, reprint, p. 753. | JONES, Alison; SURFIN, Brenda (2016). *EU Competition Law - Text, Cases, and Material*. Oxford 6th edition, p. 715. | BRODLEY, Joseph (1982). *Joint Ventures and Antitrust Policy*. *In* Harvard Law Review, vol. 95, p. 1521. | HOVENKAMP, Herbert (2005). *Antitrust*. Aspen Publishers, vol. XIII, 2nd edition, p. 3.
[11] With this understanding, JONES, Alison, SURFIN, Brenda (2016). *EU Competition Law - Text, Cases, and Material*. Oxford, 6th edition, p. 715.
[12] On the link between free competition and competition law, *see*, AA. VV. (2020). *Current Competition Law Themes*. UCP Publisher, pp. 193 es.
[13] Decision *Vaccum Interrupters* COMP/27,442, (1977) OJ L48/32.
[14] With this understanding, JONES, Alison; SURFIN, Brenda (2016). *EU Competition Law - Text, Cases, and Material*. Oxford, 6th edition, p. 719.
[15] AA. VV. (2012). *Treaty of Lisbon - Annotated and Commented*. Almedina, p. 499. Also, Commission Notice 2004/C 101/08, paragraphs 48, 49, 59, 84.
[16] Commission Notice 2004/C 101/08, paragraph 46.
[17] Decision PRC/2019/4, non-confidential version, Competition Authority, p. 282, §1046.
[18] In this sense, Judgment of 15 July 1994, *Matra*, T-17/93, ECLI:EU:T:1994:89, p. II-595, paragraph 85.

that agreements classified as "severe" can be justified[19], and Commission Notice 2004/C 101/08 clearly states that a horizontal agreement aimed at fixing prices will be classified as "severe"[20]. Given that the offending companies have adopted a restrictive market practice (horizontal restriction of the "cartel" type) through a setting of the price level and market allocation, the conditions of Article 10 of the LDC and Article 101 TFEU are not satisfied[21]. It should also be noted that we are facing a restriction by object[22], so it is not necessary to demonstrate that this agreement produces negative effects on the market (it is up to the targeted companies to rebut this presumption)[23], and its justification is extremely difficult[24]. Therefore, the AdC considers that the burden of proof, according to Article 10/2 of the LDC, has not been fulfilled[25].

III. About Strong Charon

§4. Strong Charon submits an application for a waiver or reduction of the fine, under Article 75 of the LDC and Article 2 of Regulation nº. 1/2013[26]. These possibilities are rooted in the well-known leniency programs[27], which appeared, in Europe, with the European Commission's Communications of 1996, 2002 and 2006[28] and, in Portuguese national law, with Law 38/2006, seeking to "*guarantee immunity (...) to the company participating in a cartel that, first and foremost, and before any of the others, provides the EC*

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[19] For instance, Judgment of 21 February 1995, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid* (SPO), T-29/92, p. II-289. *See*, also, Commission Notice on small-scale agreements importance which do not significantly restrict competition pursuant to paragraph 1 of the art. 81 of the Treaty establishing the European Community (*de minimis*), OJ C 368/13, of 22/11/2001, note 89, §11. Also, FERRO, Miguel Sousa. *Restrictive practices of competition: a summary oriented towards judicial practice*. *In* Institute of Financial and Fiscal Economic Law FDL, p. 22.

[20] Commission Notice, Guidelines relating to the application paragraph 3 of the art. 81 of the Treaty [current art. 101 TFEU], 27.4.2004, OJ 2004/C 101/08, paragraph 46. In the same sense, "*cartels are anti-competitive agreements or practices between competitors aimed at fixing and increasing prices, restricting supply and dividing or sharing markets*".

[21] About this, Recommendation of OECD council on effective action against unjustifiable cartels (1998).

[22] By inserting horizontal pricing agreements cartelized under a restriction by object, *see*: Judgment TJ (First Chamber), 14/03/2013, C-32/11, *Allianz Hungaria*, EU:C:2013:160, paragraph 45; Judgment IN COURT, 03/07/1985, C-243/83, *Binon C. Messageries de la presse*, ECLI:EU:C:1985:284, paragraph 45; Judgment TJ (Fifth Chamber), 19/04/1988, P-27/87, *Erauw-Jacquery*, ECLI:EU:C:1988:183, paragraph 13; SILVA, Miguel Moura and (2020). *Competition Law*. AAFDL Publisher, reprint, p. 633; Commission Notice "Guidelines on the implementation of Article 81(3) of the Treaty", Joue No C 101, 27/04/2004 ("General Guidelines"), paragraph 23.

[23] Commission Notice "Guidelines on the implementation of Article 81(3) of the Treaty", Joue No C 101, 27/04/2004 ("General Guidelines"), paragraph 21.

[24] Although they may, of course, be justified, *see*, SAD, Novi; SVETLICINII, Alexandr (2011). *Objective Justifications of Restrictions by Object*. *In* European Law Reporter, no. 11, pp. 348-353.

[25] Decision PRC/2019/4, non-confidential version, Competition Authority, p. 282, §1046.

[26] Decision PRC/2019/4, non-confidential version, Competition Authority, p. 315, §1205.

[27] About these, *see*, more recently, article 2/1, paragraph 16, of EU Directive 2019/1.

[28] Commission Communication on the non-imposition or reduction of fines in cases relating to agreements, decisions and concerted practices (JOCE C 207/4 of 18/7/1996); Commission Communication on immunity from fines and the reduction of its amount in cartel proceedings (text relevant for EEA purposes) (JOCE 45/3, 19/2/2002) and Commission Communication on immunity from fines and the reduction of their amount in cartel proceedings (relevant text for EEA purposes) (JOUE C 298/17, 8/12/2006). On this evolution, still, AA. VV. (2016). *Annotated Competition Law.* Almedina, p. 700.

with relevant information and evidence, which may allow the identification and subsequent punishment of the material authors of a particular restrictive practice"[29]. In the case at hand, the AdC decides that only a reduction of the fine will be applied[30] and, as such, it must be assessed whether it should have opted for the waiver, or whether it correctly applied the LDC by only reducing its amount.

§5. Firstly, taking into account that this is a case of price fixing, market sharing and bid rigging, we can state that we fall within the scope of Article 75, *in fine*, of the LDC[31] . *Secondly*, since Strong Charon is, for all intents and purposes, a *company*[32], the conditions of Article 76, paragraph a), of the LDC are fulfilled. Thirdly, we could consider applying Article 77 of the LDC (waiver of the fine), however, it becomes clear throughout the AdC's decision that it already had enough elements to conduct the search and prove an infringement[33] (in fact, it should be noted that Strong Charon intends to use this program on 11/05/2019, but the search and seizure had already taken place on previous dates[34]). Therefore, although Strong Charon was the first company to provide information and evidence revealing its participation in a horizontal agreement, the truth is that, as per the provisions of Article 78/1 of the LDC, the conditions of Article 77/1 were not met, for the reasons above.

§6. As for the issue of the reduction of the amount, in order for the hypothesis of Article 78 of the LDC to apply, it is necessary, among other things, that the elements brought to the investigation by Strong Charon comprise a significant additional value to the elements already in the possession of the AdC[35]. Considering that, and according to paragraph 17 of the Informative Note on the Regime of Exemption or Reduction of the Fine in Administrative Proceedings for Breach of Competition Rules, the significant additional value is measured according to the evidence in the possession of the AdC at the time when the significant evidence is brought to the proceedings by Strong Charon[36]. The AdC considers that Strong Charon "*brought to the file evidence of the infringement in question with an additional value in relation to the evidence already in the possession of the AdC and allowed a better identification of the practice of the infringement and the companies that participated in it*"[37]. As such, the AdC's decision was diligent in

[29] PIRES, Marta Teixeira (2020). *Civil liability inherent in algorithm-mediated cartelization*. *In* Yearbook 2020, UCP, vol. 3, p. 1254.
[30] Decision PRC/2019/4, non-confidential version, Competition Authority, p. 316, §1211.
[31] Including the agreements in question under Article 75, *see*, ALVES, Liliana (2015). *The Leniency Regime in the defence of competition from the European Union and Portugal.* Master's thesis. University of Porto.
[32] This Decision follows the understanding of the *Hofner* Decision (see, Decision PRC/2019/4, non-confidential version, Competition Authority, p. 76, §407-418).
[33] Decision PRC/2019/4, non-confidential version, Competition Authority, p. 315, §1208-1209.
[34] Decision PRC/2019/4, non-confidential version, Competition Authority, pp. 17 and ss., §33-55.
[35] Decision PRC/2019/4, non-confidential version, Competition Authority, p. 315., §1208.
[36] On this topic, BARROSO, Rita (2018). *Combating Cartels: A Reflection on the Effectiveness of the Leniency Regime*. Master's thesis. Portuguese Catholic University, p. 32.
[37] Decision PRC/2019/4, non-confidential version, Competition Authority, p. 315, §1208.

applying only the regime of Article 78/2, paragraph a), of the LDC, reducing the fine imposed on Strong Charon[38] by 45%, which would have been, without this reduction, €8,588,003.

§7. In conclusion, and given the seriousness and difficulty in identifying cartels, the leniency programs, as incentives to detect and report cartel activities (often with a secretive note), are fundamental to the AdC's activity[39] and the creations of these programs has become one of the main pillars of the AdC in the fight against cartelization[40].

[38] Decision PRC/2019/4, non-confidential version, Competition Authority, p. 316, §1211.

[39] AA. VV. (2016). *Annotated Competition Law.* Almedina, p. 701.

[40] However, with private enforcement and the possibility of access to leniency related documents by private litigants, there has been an exponential decrease in the use of these programs by cartelists. Thus, one of the most important mechanisms to prevent cartels has been losing the power it once had. So, it makes sense to discuss whether there is a way to revitalize these old and imported programs to make them as attractive as they were before the birth of private enforcement. About this, see, for example, CLAIRE, Casey; KNIGHT, Thomas (2018). *Reconciling The Conflict: Antitrust Leniency Programs And Private Enforcement*. University of Florida, p. 9.