

AdC accuses Fidelidade SGOII of Gun-Jumping

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On September 22, 2020, the Competition Authority (AdC) accused Fidelidade SGOII of having acquired sole control of Fundo de Investimento Imobiliário Fechado Saudeinveste (Fundo Saudeinveste), without previously notifying the operation and, consequently, without having obtained the non-opposition from AdC¹.

As results from Law No. 19/2012, of May 8, which approves the new competition regime, in cases of companies concentration (of national dimension), companies are obligated to notify mergers when they reach certain thresholds related to the market share and / or the turnover of the companies involved, namely when:

(1) as a result of the merger, a share equal to or greater than 50% in the national market (or a substantial part of the national market) of a given good or service is created or strengthened;

(2) the turnover individually carried out in Portugal, in the last financial year, of at least two of the companies participating in the merger is more than five million euros, net of taxes, and as a result of the transaction there is a national market share (or a substantial part of the national market share) of a particular good or service equal to or greater than 30% and less than 50%;

(3) the group of companies participating in the merger has realized in Portugal, in the last financial year, an individual turnover of more than 100 million euros, net of taxes directly related to it, provided that at least two of those companies have individually achieved, in Portugal, a turnover of more than five million euros.

In case of doubts about whether a merger meets (or not) the requirements for notification, companies may resort to the prior assessment of AdC, a confidential procedure with no associated costs.

Once a merger is notified, pending on the obtention of the non-opposition from AdC, the operation must be suspended. The implementation of these operations, in breach

¹ According to Competition Authority Notice (AdC) No. 13/2020, of 22 September 2020, available in: http://www.concorrancia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202013.aspx, consulted on 11.05.2020.

of this “stand still” obligation, is called “gun-jumping”, punishable by a fine of up to 10% of the turnover achieved by the offending company(ies).

In this case, it was only up to Fidelidade SGOII to have notified the merger, which was only done on February 21, 2019, following a request for prior assessment to AdC, when the transaction took place on October 1, 2018.

When AdC, on July 5, 2019, considered that the operation was, considering the data collected at the date, liable to generate competition concerns, the operation was reversed. Fidelidade returned the management of the Saudeinveste Fund to the previous manager entity.

At issue was the fact that Fidelidade has control of Luz Saúde (which holds, among other assets, Hospital da Luz) and that Fundo Saudeinveste holds several properties leased to the hospital group Lusíadas (competitor of Luz Saúde).

To be noted that the administrative proceeding is still ongoing, with Fidelidade now having the opportunity to exercise its rights of hearing and defence regarding the offense and the sanctions it may incur.