

Competition considerations between entities of same corporate group during bidding process

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COFECE investigation

In September 2014 the Federal Economic Competition Commission (COFECE) investigative authority launched an investigation into two polyethylene glove providers for absolute monopolistic practices relating to the Mexican Social Security Institute's acquisition of polyethylene healing materials (specifically, gloves).

The companies, Productos Galeno and Holiday de México, were the only bidders that participated in a bidding process between August 2011 and October 2013; however, they were allegedly fixing prices and coordinating their offers.

After years of research, in early 2017 the investigative authority advised COFECE's board of commissioners to close the file on the grounds that Galeno and Holiday did not qualify as competitors because both companies were part of the same economic interest group (ie, their CEOs were blood relatives and both directors had a majority ownership interest in both companies). Therefore, in June 2017 COFECE's board of commissioners resolved that the investigated parties could not be held responsible for committing absolute monopolistic practices since the two companies could not be considered competitors.

Collegiate tribunal evaluation

In July 2017 COFECE's resolution was challenged through an *amparo* trial before a district court specialised in economic competition. (1) The *amparo* trial confirmed COFECE's original resolution, but on appeal COFECE's resolution was overruled in April 2019. According to the tribunal that resolved the appeal, even though both Holiday and Galeno belonged to the same economic interest group, the fact that they had submitted separate offers in the same bidding process conveyed that they were competitors.

The tribunal reached this conclusion due to the following considerations:

- The fact that two entities submit separate bids, regardless of whether they belong to the same economic group, obliges them to respect the principles that govern bidding processes – namely, secrecy, competition, equality, publicity, opposition, contradiction, single proposal and competition.
- The purpose of public bids is for the government to obtain the best market prices. This is achieved only when bidders compete between each other instead of coordinating their bids.
- To exclude a potential collusion based on only the concept of an economic interest group may foster the manipulation of bidding processes when bidders know that the same contract will be split between more than one entity.
- The prohibition on coordinating offers in bidding processes seeks to eliminate agreements that aim to raise prices, regardless of which party coordinates those offers. Thus, it is irrelevant if the coordination is done by an economic interest group in those cases in which there are elements to consider that the conduct existed.
- To interpret that two entities which submitted separate bids are not competitors on the basis that they have a joint controller would seem to accept that a bidder can bid against itself.

The tribunal applied these considerations in its resolution after analysing the experience of European tribunals in similar cases. Those precedents found that, allowing a bidder to submit more than one offer in the bidding process would grant them an undue advantage over other bidders.

AUTHORS

[Lucía Ojeda Cárdenas](#)



[Mariana Carrion](#)



However, instead of prohibiting the simultaneous participation of two entities linked together by the same controller, their participation is allowed up to the extent that said relationship has not influenced their behaviour during the bidding process. In this context, in the presence of offers by multiple bidders that are related to each other, it is important to identify whether there are objective elements that compromise their autonomy and the independence of their offers in such a way that would vitiate the bidding process. For that reason, the competition assessment for this type of case should not be limited to the fact that the involved entities belong to the same economic interest group, but whether they engaged in conduct that could constitute a collusive agreement.

Final outcome

In early 2020, **(2)** COFECE's board of commissioners issued a new resolution which supported the tribunal's order. The board imposed a total fine of Ps28.79 million (approximately \$1.1 million) on Galeno and Holiday, as well as on two individuals who had acted on their behalf, for price fixing and bid rigging in the health sector.

According to COFECE's resolution, the lack of competition in the bids for polyethylene gloves prevented lower acquisition prices. In fact, as these bids had increased 103.8% between 2010 and 2013, it is estimated that the overpricing in the acquisition of this product for the health sector was 32.8% for large gloves and 31.5% for medium gloves, which affected the Mexican budget by approximately Ps42.28 million (approximately \$1.7 million).

Notably, this is the fourth penalty imposed on Holiday and Galeno for committing absolute monopolistic practices in public bidding processes. In the past three years, they were also fined for practices relating to:

- latex surgical gloves; **(3)**
- condoms and latex probes; **(4)** and
- toothbrushes. **(5)**

For further information on this topic please contact [Lucía Ojeda Cardenas](#) or [Mariana Carrión Valencia](#) at SAI Consultores SC by telephone (+52 55 59 85 6618) or email (loc@sai.com.mx or mcv@sai.com.mx). The SAI Consultores website can be accessed at www.sai.com.mx.

Endnotes

(1) An *amparo* trial is a federal trial in which the complainant alleges a violation of their constitutional rights by an authority.

(2) COFECE press release of February 2020, available in Spanish [here](#).

(3) COFECE press release of December 2017, available in Spanish [here](#).

(4) COFECE press release of March 2018, available in Spanish [here](#).

(5) COFECE press release of June 2019, available in Spanish [here](#).

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