# Chile's contribution:
# What did we learn from 'The Plasma War'*

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This presentation is organized in two sections. The first one is a brief review of the Chilean legal framework for cartel combat and the main challenges that both the Chilean economy and its competition agency face in dealing with collusion, the most harmful anticompetitive illicit. The second section presents the latest Chilean cartel case, known as 'The Plasma War'. From this case the FNE learned that it is always possible to successfully prosecute a collusive infringement however weak the competition agency's power may be. This case is paramount because fines charged on the offenders are the highest ever imposed by the Chilean competition system.

## 1. The Chilean Competition System and the legal framework for fighting cartels

### a. The institutions

Chile has a long tradition in competition enforcement. The first statute on Competition and market access was enacted in 1959, although the current institutional framework was established by Decree Law N° 211 in 1973 and its subsequent amendments, passed in the 90s. Market efficiency has become the main concern of competition authorities.

The Chilean competition system is dual: First, the National Economic Prosecutor's Bureau – FNE, or competition agency, is in charge of keeping economic competition in domestic markets. This agency, part of the Executive, has (limited) investigative powers but no remedial ones, and its main function is to investigate all deeds, conducts or contracts which tend to restrict or hinder competition, and when necessary, to raise lawsuit in the specialized court.

The latter (Court of Defense of Free Competition, TDLC) is a special and independent jurisdictional body subject of the managerial, correctional and economic supervision of the Supreme Court, whose function is to assess claims and non-contentious presentations and consultations from the competition agency or any private or public entity. The TDLC has remedial powers in case of findings, empowered to impose fines or sanctions and to order to stop the behaviour, among other. Finally, and only in some cases in its appeal role, the Supreme Court reviews not merely the due process but also the merits of the Competition Court's rulings.

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## b. The law

The legal framework to enforce competition is the Decree Law N° 211/1973 (as amended by Law N° 19.911/2004), whose objective is to promote and defend competition in domestic markets. The legal body defines the scope of the anti-competitive illicit in its general provision as "*…any deed, act or contract that prevents, restricts or obstruct free competition or tends to produce such effects*" (Art. 3rd). Among others, collusion is mentioned as an exemplary provision (Art 3rd, a)) specifying that any competitors' agreement aiming at fixing prices, limiting output or allocating markets, may be subject to legal sanctions if it abuses the market power conferred upon them by such agreements.

The Chilean legal system does not consider market share presumptions, nor does it establish *per se* treatments of any conducts in competitive matters. In any case, including the cartel cases, the agreements' actual or potential effects on competition in the relevant market must be proved following the rule of reason. So there can be agreements among competitors, that analyzed under the rule of reason standard do not substantially affect competition in markets and have the purpose of generating efficiencies, might not be sanctioned even though 'broader competition goals' are infringed. In this context the legal provisions are flexible enough to allow the authority different analytical approaches and procedures for telling competitors' anticompetitive horizontal agreements from pro-competitive agreements.[1] On the contrary, 'naked' or 'hard core' anticompetitive horizontal agreements can deserve punitive actions such as fines -to the participating companies and executives; the order to amend or terminate acts or contracts, and the modification and even the dissolution of corporations, notwithstanding other corrective or restrictive measures that can remedy the effects of the agreement.

These decisions stem from an adversarial procedure conducted before the TDLC, where the FNE or the private plaintiff is responsible for proving, among other elements, the agreement's existence and its anticompetitive character. In such procedures the defendants, be they companies or managers, benefit from the constitutional guarantee of due process. As in any dual system, the FNE investigates and enforces the law by submitting proofs of the illicit to the decisional body -the Competition Court- which plays the role of ´weighting´ the proof. But fetching those proofs is most often hard for the FNE due to its restrictive investigative powers.

It must be noticed that our Competition Act considers no judicial exemptions, i.e. any private or public person could be targeted by the law. Finally, the FNE' s investigations are initiated ex-officio or on complaints, but the law allows any person to directly complain to, or consult, the Competition Court to initiate a judicial –contentious or not contentious- process, i.e., there is private enforcement of the competition law.

[1]As such, in relation to pro-competitive agreements among competitors, for example, the TDLC approved a project for the construction of five hydroelectric power stations in a joint venture of the two main enterprises in electricity generation. The approval was conditioned, however, to requirements assuring new entrants an open access to the transmission facility (TDLC, 10.19.2007, Decision N° 22/2007). This matter was brought up in a non-adversarial procedure. In these procedures the remedies are injunctions or recommendations with no punitive character, and their purpose is to decrease the risks of the agreement, as is in the analysis of horizontal mergers.

## c. Investigative powers for cartel prosecution

As has been said, the FNE's investigative powers for prosecuting cartels are restricted, especially if ICN recommendations are considered for the comparison (see ICN (2005), '*Building Blocks for Effective Anti-cartel regimes*', June). Simplifying the principles of Incentives Theory, a policy of cartel combat must be an adequate mix of high penalties and strong investigative powers for the prosecutor, so to diminish the expected value of the benefits from the cartel, due to the higher risk of being detected. A leniency program is helpful because the agreement can be broken (by Prisoner's Dilemma). Currently none of those recommendations are in course in Chile. Cartels are subject to administrative sanctions, there is no immunity program and the FNE is unable to run down raids, searching, intercept any kind of communications, among others**;** it is very difficult, then, not to say impossible, to get hard proofs during an investigation.

For all of that, in June 2006 the Government submitted to Congress a bill with a number of amendments to the competition law, granting the FNE additional investigative powers and limited remedial powers (consent agreements for mergers and antitrust enforcement requiring judicial approval). As to the TDLC, the bill aims at strengthening its independence and procedures and raises its maximum fines. The following sections area a summary of the main amendments being considered:

### (i) Augmentation of statutory fines for infringement

In the current statute, fines are up to nearly US$ 15 million. The amendment proposes them to be raised up to US$ 22.5 million.

### (ii) The possibility immunity or leniency

- As in other countries, in Chile the setting of an immunity/leniency program requires a statutory modification. When the modification will come into force, and in order to provide best incentives, the competition agencies will have to work together in more detailed guidelines about the access to benefits in practice.

- In its current writing the immunity/leniency provision is as follows: "Article 39 Bis. He who executes a conduct contemplated in letter a) of Article 3rd will obtain a fine reduction or a fine exemption once he provides the FNE with records leading to prove such conduct and determining responsible parties. In order to obtain one of these benefits the executor should fulfill the following:

1. To provide precise, truthful and ascertainable records representing a direct contribution for gathering sufficient evidence grounding a complaint before the Competition Tribunal;
2. To refrain from disclosing the petition of these benefits until after the complaint submission by the FNE or its filing order of such records, and
3. To cease participating in the conduct immediately after the request of benefits filing, unless the FNE considers the executor's participation as essential for preserving the investigation effectiveness"

With the purpose of obtain the fine exemption, and considering the requirements in last subsection, the executor should be the first one, among the responsible persons for the charged conduct in the group, to provide the FNE with records, and the fine reduction asked by the National Prosecutor should not exceed the 50% of the requested major fine for further executors unable to obtain the benefits of the article.

**(iii) New investigative powers of FNE in cartel investigations**

- The enforcement agency will have stronger powers for cartels detection and investigation, basically the power of making compulsory searches, raids and seizures and to wiretap and access to communication records.

In its current writing the new powers provisions state:
"Art. 39. 2nd sec. The powers and duties of the National Economic Prosecutor shall be as follows (new "p" section"): In serious and qualified investigating cases aimed at proving the conducts described in letter a) of Article 3rd, to petition, through a sound-based pleading, an authorization from the Justice member of Court of Appeals corresponding to the instant turn, for the Chilean Police Corps or the Criminal Investigation Department, under the orders of the empowered FNE's official, to proceed as follows:

> p. 1) To get into public or private areas and, if necessary, make a search or break off locks;
> p.2) To register and seize all sorts of objects and documents allowing to prove the infringement;
> p.3) To authorize the interception of any sort of communications, and
> p.4) To order any provider of communication services to supply copies and records of broadcasted or received communications by it."

**(v) Changes in provisions describing infringements**

- The idea is to generalize to all infringements an alternative requirement: "the object or the effect" to harm competition; this allows the expectation that proving an anticompetitive violation will be easier;
- A second change introduces the collective dominance infringement;
- Not yet in the project, but the executive branch will soon include for discussion, the abrogation of the last part of agreements' provision which requires, for that kind of infringement, that violators abuse the power conferred by such agreements or practices

To be ready for these new investigative powers the agency had been working all this year through in building and strengthening its relationship with the Public Ministry (the national prosecutor institution) and Chilean Police Corps. In addition, a set of six FNE's professionals from the investigative and staff divisions[2] set up a ´cartel study group´ which had been collecting, reviewing and learning main experiences and practices in fighting cartels from other competition agencies. Among others, this group had been working on how to organize the FNE for the new investigative powers when they will be granted, and preparing guidelines for the future leniency program. One interesting

[2] The FNE is organized as follows: two investigative divisions –Economic and Legal Divisions- and one Research Division as staff. There is a Financial and Management Division acting as FNE support.

conclusion is the feasibility to increase the effectiveness (and results) of cartel investigations by introducing improvements while the FNE awaits the new situation.

The following sections present the most relevant information from a recent cartel case, known as The Plasma War, ruled by both the Competition Court and Supreme Court during this year successfully for the FNE interest.

## 2. The Plasma War case

### a. The Facts

One of the most important banks in Chile, Banco de Chile, invited approximately twenty electronic manufacturers (for example, Sony, Philips, Samsung among others), to take part in a trade event promoting the bank's credit cards. In that event the clients would purchase electronic household appliances (especially plasma TV sets, for it was to take place during the World Cup) in twelve monthly installments without interest. Furthermore, the bank would offer its clients up to a 30% discount. Its goals were to assure consumers loyalty and to increase the use of the bank's credit cards.

One week before the trade fair, April 1st and 2nd, Banco de Chile advertised it in the three main newspapers of the country. Thus the two largest department store retailers (Falabella and Paris) learned that Banco de Chile was to be selling the same products and in the same way they themselves did. The day after, April 3rd, the retailers reacted in the following way:

1. They called nearly twenty manufacturers and providers, threatening them with ceasing the distribution of their products if they participated in the exhibition.
2. With this, the manufacturers let the Bank know that did would not honor the participation contract they had signed, and abstained from taking part in the event.

### b. The investigative process:

Banco de Chile complained of this to the Economic Prosecutor's Bureau, which started the investigative process with these main steps and procedures:

1. The manufacturers were asked on the importance of the retailers for their total sale of the appliances.
2. The manufacturer's managers were interviewed asking them to inform us the facts (especially those related to the phone calls and all the pressure they received from the retailers).
3. The department store's managers were interviewed asking them about the same facts. We also interviewed Ripley, the 3rd largest department store of the country, asking them if they had received phone calls from Falabella and Paris and if they had contacted the providers.
4. Telecommunication companies were requested possible phone calls among the retailers and phone calls between retailers and manufacturers.

The results of the abovementioned steps were:

- In the morning of April 3rd there had been many phone calls between the retailers, not including Ripley,[3] and their providers.
- Around midday there had been one call from Falabella to Ripley and many calls between Falabella and Paris.
- Throughout the day the retailers increased the number of calls to its providers.

**c. Complaints:**

With all the information obtained the FNE submitted a complaint against Falabella and Paris to the Competition Tribunal. The anticompetitive conducts identified were Abuse of Market Power (dominant position) and Collusion.

- In the lawsuit we demonstrated that the retailers have buyer power regarding the manufacturers. In tables 1 and 2 you can see that Falabella and Paris together buy a 37% of Sony's sales, while for Falabella and Paris Sony accounts only for around 7% of their sales.
- We showed to the Competition Court, using testimonies, that the only reason for the manufacturers to desist of participating in the event were the threats that they received by the phone calls made by Falabella and Paris.
- We also demonstrated that the phone calls that tried to boycott the event were coordinated between Falabella and Paris (see Figure 1). You can see that on April 3rd we have an intense amount of phone calls between Falabella and Paris, much higher than usual, which demonstrates that the coincidence of behavior is related to the coordinated reaction.
- We defended the position that the boycott caused two main damages:

    1. **For the Competition**: They built a strategic barrier for the development of a new competitor for both credit and electrical household appliances markets.
    2. **For consumers**: They couldn't have the benefit of buying electronic products using twelve monthly installments and extra discounts.

[3] Ripley is the third department store retailer, and a closer competitor to Paris and Falabella.

**Table 1.**
**Share of electronic providers sales by retailer** (in %)

| Proveedor | Falabella | Paris | Falabella + Paris | Ripley | ABC–DIN | La Polar | Hites | Johnson | D&S | Jumbo |
|---|---|---|---|---|---|---|---|---|---|---|
| Sony | 23,0 | 14,0 | 37,0 | 16,0 | 9,0 | 6,0 | 1,3 | 3,3 | 3,0 | 1,0 |
| Samsung | 22,1 | 13,9 | 36,0 | 20,0 | 8,9 | 9,0 | 3,9 | 3,2 | 6,0 | 1,3 |
| Philips | 17,0 | 14,0 | 31,0 | 14,0 | 14,0 | 8,0 | 3,2 | 3,4 | 6,6 | 4,0 |
| LG | 22,0 | 18,0 | 40,0 | 20,0 | 11,0 | 8,0 | 2,0 | 4,0 | 5,0 | 0,0 |
| Panasonic | 15,8 | 13,9 | 29,7 | 17,3 | 8,2 | 4,3 | 3,3 | 2,1 | 4,0 | 0,0 |
| Black & Decker | 26,0 | 11,6 | 37,6 | 12,2 | 4,6 | 3,3 | 2,0 | 2,0 | 10,3 | 6,8 |
| Ester | 35,5 | 7,9 | 43,4 | 23,6 | 4,7 | 5,2 | 1,4 | 0,0 | 10,0 | 0,0 |
| Somela | 13,8 | 8,7 | 22,5 | 14,0 | 10,7 | 5,2 | 2,4 | 1,9 | 10,5 | 0,0 |
| Sindelen | 13,3 | 10,9 | 24,2 | 9,1 | 16,8 | 6,6 | 4,7 | 3,4 | 1,2 | 0,0 |
| Braun | 30,0 | 19,0 | 49,0 | 17,0 | 4,0 | 8,0 | 2,0 | 2,0 | 3,0 | 4,0 |
| CTI | 12,2 | 9,6 | 21,8 | 9,3 | 16,5 | 7,9 | 2,6 | 3,3 | 7,1 | 0,0 |
| Packard Bell | 37,0 | 0,0 | 37,0 | 31,0 | 14,0 | n.d. | 6,0 | 0,0 | 1,5 | 0,0 |
| Hewlett Packard | 31,0 | 28,0 | 59,0 | 0,0 | n.d. | 8,0 | n.d. | n.d. | 3,0 | 0,0 |
| Olidata | 15,0 | 15,0 | 30,0 | 33,0 | 4,0 | 20,0 | 8,0 | 1,0 | 3,0 | 0,0 |
| Epson | 24,0 | 23,0 | 47,0 | 29,0 | 4,0 | 6,0 | 3,0 | 6,0 | 2,0 | 2,0 |
| ENTEL | 17,7 | 15,0 | 32,7 | 16,4 | 15,6 | 16,3 | 5,2 | 5,1 | 4,0 | 1,5 |
| Promedio Simple | 22,2 | 13,9 | 36,1 | 17,6 | 9,7 | 8,1 | 3,4 | 2,7 | 5,0 | 1,3 |

**Table 2. Share of Falabella and Paris sales by electronic providers** (in %)

| | 2005 (%) | | 2006 (%) | |
|---|---|---|---|---|
| | Falabella | Paris | Falabella | Paris |
| Autobahn | n.d. | n.d. | n.d. | n.d. |
| Belson | n.d. | n.d. | n.d. | n.d. |
| Bosch | n.d. | n.d. | n.d. | n.d. |
| Bose | 0,051 | 0,020 | 0,046 | 0,000 |
| Canon | 1,035 | 0,827 | 1,410 | 1,870 |
| Digital | n.d. | n.d. | n.d. | n.d. |
| Ecogar | 0,001 | 0,001 | 0,000 | 0,000 |
| GE | 0,289 | 0,336 | 0,522 | 0,549 |
| GPS | n.d. | n.d. | n.d. | n.d. |
| HP | 0,009 | 0,009 | 0,010 | 0,015 |
| Intcomex | n.d. | n.d. | n.d. | n.d. |
| Kodak | 0,078 | n.d. | n.d. | 0,197 |
| LG | 5,120 | 6,498 | 3,520 | 5,878 |
| Nikon | 0,721 | 0,967 | 0,676 | 1,206 |
| Oster | 0,544 | 0,222 | 0,422 | 0,162 |
| Packard Bell | 6,792 | 2,401 | 7,141 | 0,000 |
| Philips | 2,639 | 3,417 | 1,158 | 1,356 |
| Quintec | 0,529 | 0,416 | 0,254 | 0,207 |
| Reifschneider | n.d. | n.d. | n.d. | n.d. |
| Samsung | 5,146 | 7,582 | 2,402 | 3,614 |
| Sharp | n.d. | n.d. | n.d. | n.d. |
| Sony | 7,562 | 8,106 | 3,836 | 4,316 |
| Trotter | n.d. | 0,331 | n.d. | 0,312 |
| Victorinox | n.d. | n.d. | n.d. | n.d. |
| Yamaimport | 0,072 | 0,254 | 0,011 | 0,255 |

**Figure 1-a. Frequency of Falabella and Paris calls**

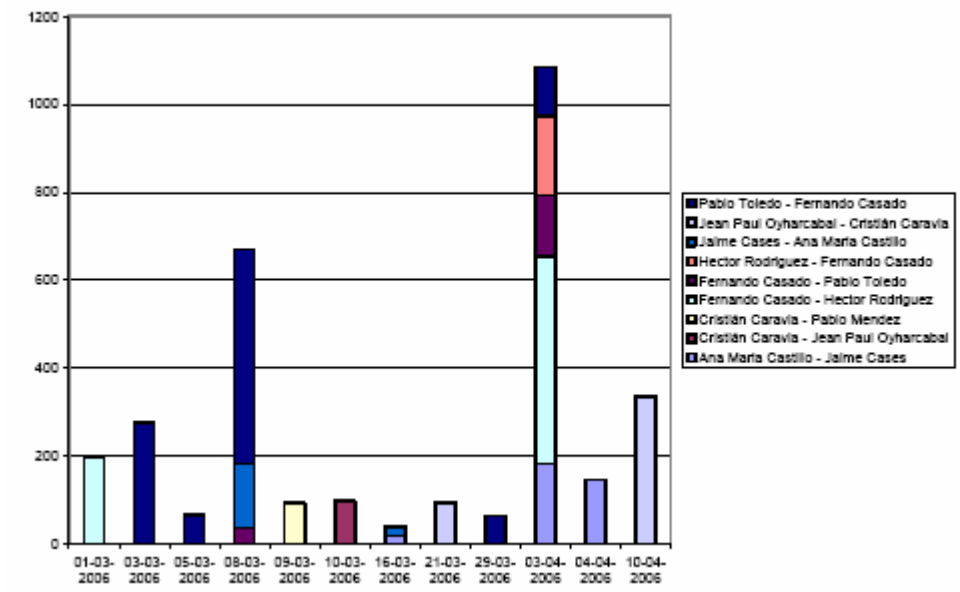
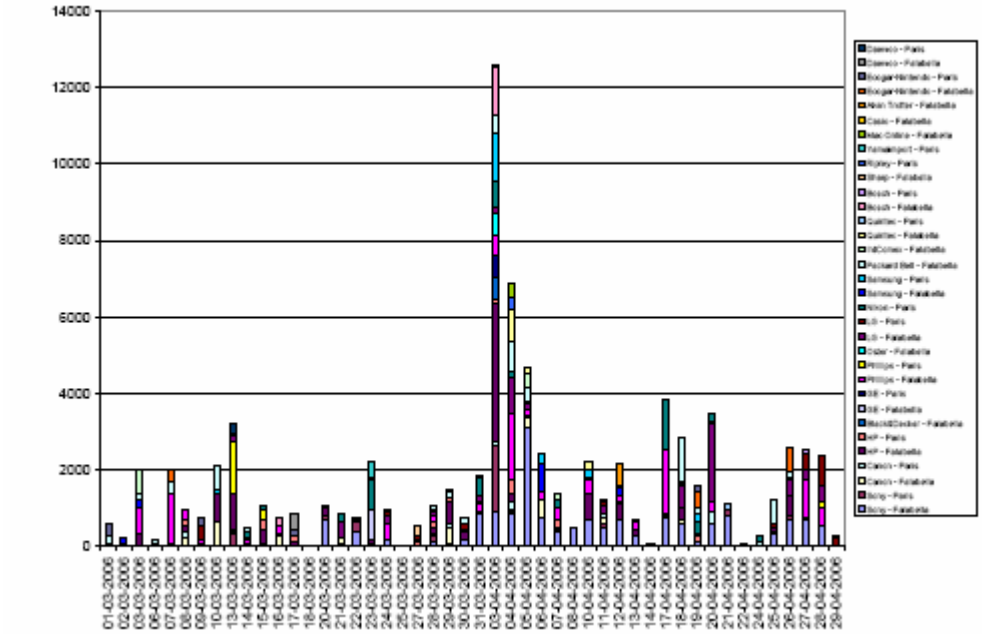



**Figure 1-b. Frequency of Falabella/Paris calls to electronic providers**




## d. Rulings

On April 2008 the Competition Court issued its Sentence No. 63 condemning Falabella and Paris for abuse of market power and collusion. The Competition Court concluded that manufacturers refused participating in the trade event because of economic dependence, since they could not afford to sever their ties with Falabella and Paris.

The Competition Court also accepted the 'parallel behaviour plus' theory as an explanation for the manufacturers' decision to give up participating and for the phone calls, and admitting both these as evidence that retailers colluded in boycotting the exhibition. They concluded that the boycott was not only against Banco de Chile but also against potential competitors. The Court fined Falabella US$ 8 million and Paris US$ 5 million — the highest fines ever applied in Chile so far. The Court's criteria were the economic benefit, the seriousness of the conduct (exclusion and collusion), recidivism (Falabella & Paris) and Falabella's leadership. The retailers appealed to the Supreme Court, which upheld the Sentence while reducing the fine in 25%.

It is worth mentioning that this is the first time the Supreme Court endorses the Competition Tribunal in cartel cases: Fines have been also imposed in two other cartel cases by the TDLC in recent years (on gas oxygen corporations[4] and on shipping companies[5]) but these decisions were overturned by the Supreme Court which held the insufficiency of the evidence on which the TDLC grounded its decisions.

**e. Lessons:**

The main lesson learned is that limited investigative powers do not mean that the competition authority can't prove a collusion case in Court. It is hard, but is feasible.

When the agency holds limited investigative powers, fetching direct evidence is not possible, yet under the rule of reason indirect evidence could be enough, particularly when Parallelism Plus Theory is used. Everything depends on the quality of the additional elements presented.

[4] TDLC, 09.07.2006, Ruling N° 43/2006, overturned by Supreme Court, 01.22.2007
[5] TDLC, 06.07.2006, Ruling N° 38/2006, overturned by Supreme Court, 12.28.2006