

## **Questionnaire** **Predatory Pricing**

### **Answers from the National Economic Prosecutor's Office (NEPO)** **Republic of Chile**

<b><i>Analysis (elements and evidence)</i></b>
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- 1. Please provide the main relevant texts (in English if available) of your jurisdiction's laws and guidelines on predatory pricing.**

The Chilean Competition Law is the Decree Law (DL) No. 211 / 1973, amended by Law No.19.911. Its General Provisions establishes that:

Article 1: "This law is intended to promote and defend free market competition. Any attempt against free competition in business activities shall be corrected, prohibited or repressed in the manner prescribed by law."

General anticompetitive conducts are established as exemplary provisions, on Article 3, letters (a), (b) and (c). In matters related to predatory pricing, the law defines the Article 3.c) as follows:

Article 3: "He who enters into or executes, whether individually or collectively, any deed, act or contract that prevents, restricts or hinders free competition or tends to produce such effects shall be liable to the measures prescribes by article 26 of this law, without prejudice to the corrective or restrictive measures that may be decree in each case in respect of any such deed, act or contract.

Among other, the following deeds, acts or contracts, shall be regarded as preventing, restricting or hindering free competition:...

(c) Predatory or unfair competition practices in order to attain, keep or increase a dominant position."

There are not Guidelines for Predatory Pricing.

You can download the English version of the Chilean Competition Law on the institutional web site, linking [here](#).

Additionally, the existence of price distortions on imported goods (this is, foreign suppliers' pricing under domestic costs, i.e., dumping) belongs to the scope of Law No 18.525/1986, and the Commission in Charge of Investigating the existence of Price Distortions on Imported Goods (hereinafter, Distortions Commission) is the technical entity that investigates matters regarding the import of goods, at distorted prices whether these cause serious injury, present or imminent, to national production. The Distortions Commission is integrated by eight members representing public institutions of the economic sector: The National Economic Prosecutor is also the

chairman. You can read the Spanish's version of the relevant articles of the law, linking [here](#).

**2. Please list your jurisdiction's criteria for an abuse of dominance/ monopolization based on predatory pricing.**

On the criteria used for the analysis and resolution of causes, consults and complaints related to predatory pricing, it is necessary to do some reaches with respect to the institutions that, by law, have jurisdiction on matters that affect the competition in the markets and the exercise of the economic liberties of the agents.

From year 1973, and by the DL No. 211, the Chilean competition's authorities were: the Commission Anti-trust or Resolutive Commission (CR), the Central Preventive Commission (CPC) and the Regional Preventive Commissions.

From year 2004 to the date, with the promulgation of Law No .19.911, which amended DL No. 211/73, the organisms of defense and promotion of the free competition in the markets are conformed by the National Economic Prosecutor's Office (NEPO, [www.fne.cl](http://www.fne.cl)) and the Tribunal of Defense of the Free Competition (TDLC, by its Spanish's abbreviation, [www.tdlc.cl](http://www.tdlc.cl)).

In this sense, the criteria in this and other matters on competition are defined by the action of

- **From 2004 to the date:** The TDLC's dispositions, conformed by their Sentences, Resolutions and General Character's Instructions
- **From 1973 to 2004:** The dispositions contained in the Resolutions and that emanated from the Commissions that preceded to the TDLC; those that are effective totally to the date, except for instruction in opposite from this Tribunal.

The criteria used by the competition's authorities had been:

CRITERIA USED BY THE RESOLUTIVE COMISSION AND PREVENTIVE COMISSION		
CONDITIONS	JURISPRUDENCE	OBSERVATIONS
It is possible to presume that a firm is charging predatory prices in a market if, ceteris paribus other facts, the good's price charged is under the firm's short term's marginal cost of production of such good. Given difficulties in the determination of this function of costs, either by the existence of multiproduct firms or others, the use of other concepts of costs is feasible to approximate the marginal cost, like the average	Res. No. 505 / 1997 Res. No 294 / 1988 Res. No 168 / 1984 Res. No 143 / 1983 Dict. No 311 / 1982 Dict. No 374 / 1983	Necessary but no sufficient condition

variable cost of the firm.		
Also it is necessary that this diminishing in the price charged by a firm does not respond to changes in the conditions that determine the natural price or equilibrium price; this is, that the diminishing in prices is not an answer to a competitive reduction of prices	Res. No 418 / 1994 Res. No 479 / 1996	Plus requirements
The company must hold dominant position in the relevant market and must exert the conduct with the purpose of eliminating competitors or to prevent the entrance of new competitors	Res. No.642 / 2002	Plus requirements
It is required that some non-recoverable costs exists that make difficult the entrant of new competitors when the present ones have been eliminated	Res. No. 505 / 1997	Plus requirements
Promotions that consider charging prices under costs aren't considered as predatory pricing conduct in the case that these promotion activities are temporary, public and objective, and apply without discrimination between those who receives them.	Res. No 312 / 1989 Res. No 307 / 1989	Exceptions
<b>CRITERIA USED BY THE TRIBUNAL OF DEFENSE OF FREE COMPETITION</b>		
<b>CONDITIONS</b>	<b>JURISPRUDENCE</b>	<b>OBSERVATIONS</b>
A firm is charging predatory prices in a market if, ceteris paribus other facts, the good's price charged is under the firm' relevant average avoidable costs, this is, variables cost and non-sunk costs, if they exists.	Sentence No. 39 / 2006	Necessary but no sufficient condition
The existence of entry barriers is necessary to face a predatory pricing conduct. On the contrary, if there are not entry barriers, it wouldn't serve to eliminate the competitors to raise extremely the prices, because many other firms could enter to the market reducing the price.	Sentence No. 39 / 2006 Resol. No. 30,942 from the Supreme Court (Minority vote)	Necessary but no sufficient condition
A diminishing on the price charged by a firm can be a competitive reaction if the firm is facing a vigorous competitor's price reduction or if the natural clearing	Sentence No. 39 / 2006 Resol. No. 30,942 from the Supreme Court (Minority vote)	Exceptions

market price is also diminishing.		
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3. Please explain the circumstances under which a firm’s pricing is, or may be, considered “predatory” in your jurisdiction, by responding to the following questions:

a. As part of your analysis, does the price have to be below one or more measures of cost? Yes, it does.

i. If yes, please identify which of the following measures is/are used, as applicable:

We will use the latest jurisdictional competition criteria (2004 to the date)

Cost benchmark/measure	Used?		Comment
	Yes	No	
<u>Below marginal cost</u> (the cost of producing one more unit of output)		No	Incomplete concept because of the sunk costs
<u>Below average variable cost</u> (cost that varies with output)		No	Incomplete concept because of the sunk costs
<u>Below average avoidable cost</u> (all costs that can be avoided by not producing some or all output)	Yes		Price charged under the firm’ relevant average avoidable costs. Include variable costs and some fixes costs that it can be recovered (this is, non-sunk costs or quasi-fixed costs)
<u>Below average long run incremental cost</u> (average variable costs and product-specific fixed costs)		No	
<u>Below average total cost</u> (cost including variable, fixed and sunk – non-recoverable – costs)		No	
<u>Other measure of cost</u> (Please identify)		No	

b. For each cost measure employed, please provide the definition of the measure used in your jurisdiction.

**Below average avoidable cost:** Price charged under the firm’ relevant average avoidable costs. Include variable costs and some fixes costs that it can be recovered, this is, non-sunk costs. The operative definition of sunk costs or quasi – fixed costs is defined in each case.

c. Is the same cost measure applied in all cases? Yes/No

i. If different cost measures can be applied, for example on the basis of industry, please explain and provide examples, as available.

Yes, as we said before, the investigation of a case where it's supposed to be predatory pricing conduct by a firm imply to analyze its cost structure in detail. So, the operative definition of its variable and non-sunk costs its make case by case on the basis of the industry and the analysis of information the industry's firms added to the investigation as them are required by the competition's organisms.

Our answer to your question number 17 (...“Please provide a short English summary of the leading predatory pricing decisions/cases in your jurisdiction...”) presents an empirical example of our relevant costs' definition criteria.

- ii. **If more than one cost measure can be applied in any individual case, please explain why and whether, in practice, this has raised issues.**

No answers apply (NA).

- d. **If price must be shown to be below cost, for which of the dominant firm's sales must this be shown?**

- i. **Is the only relevant comparison between the cost measure and the dominant firm's average price for all of its sales in the relevant market? Yes/No**

The first case is a mono producer firm. The unique relevant comparison here is between income for sales and avoidable production costs from the good the firm it is supposed to charge a predatory price, and is a trivial one. By the other side, if the investigated firm produces more goods, the analysis has to consider the possible existence of cross - subsidies between goods produced. Here, less income received for the good which price is under the relevant cost can be compensated for the others income's sales the firm receives. If it is possible to separate completely the avoidable productions costs for every good the firm produces, the case is trivial again and you consider it as the first case we wrote above. But, if different good share the same product line, so it is possible to share costs among them, the analysis is quite complex, and it is necessary to considerer the comparison between the average avoidable costs and the average income the firm has, in all its sales in the relevant market.

- ii. **If no, over which of the dominant firm's sales can cost be compared?**

No answers apply (NA).

- e. **Could a firm's price above average total cost ever be found to be predatory? Yes/No**

It is no necessary.

- i. **If so, please explain the instances in which this might occur, and identify whether this has been the basis for actual enforcement. N.A.**

- f. **If prices do not have to be below a cost benchmark to be considered predatory, please explain the circumstances under which the firm's prices are considered predatory.**

In Chilean case, a price charged under a cost benchmark is always needed as a necessary but non sufficient condition to be facing a predatory pricing conduct, so no answers apply.

**4. To be unlawful, must the alleged predatory pricing occur in the market in which the firm holds a dominant position/substantial market power? Yes/No**

Yes. The Chilean Competition Law defines the illicit exists when a firm, by the conduct, pretends to “attain, keep or increase a dominant position”, so dominant position in relevant market is a necessary condition to configure or constitute a damage to free competition in markets, specially in the case of predatory pricing, because the firm must have market power enough i) to set a low price (under relevant costs) tending to eliminate competitors, and (ii) to be able allows a reasonable expectation to recover of short term losses in the future.

In the case of a multiproduct firm, it is necessary to highlight that the firm’s market share is defined for the relevant market; this is, considering only the product market for the one which price is charged in a predatory way.

**i. If no, please explain.**

NA

**5. Apart from the cost criteria referenced in question 3 above, must other objective criteria, such as the duration or continuity of the pricing behavior, be demonstrated for a finding of liability under a predatory pricing theory? Yes/No**

Yes. It was said previously that price-rule is a necessary but not sufficient condition to be facing a predatory pricing conduct. For example, a diminishing on the price charged by a firm can be a competitive reaction if the firm is facing a vigorous competitor’s price reduction or if the natural clearing market price is also diminishing. The duration of the pricing behavior is also considered to analyze the conduct. In this sense, promotions are not considered as predatory pricing conduct when these activities are temporary delimited, public and objective, and apply without discrimination between those who receives them.

**a. If so, please explain. For example, if the behavior must be sustained over a certain time period, why, and for what period?**

We don’t have any rule about time extension for the conduct, and the analysis must be consider industry’ characteristics for determine the time needed to damage / to eliminate other firms operating (because the illicit is configured in order to attain, keep or increase a dominant position).

**6. On what type of evidence do you rely to prove predatory pricing? Please explain, including examples as appropriate.**

First of all, Chilean proving standard on competitions issues is based mainly on the rule of reason's factual evaluation of business practices on a case by case analysis. So, to prove a predatory pricing conduct case is needed to obtain a wide set of relevant information to configure the conduct such that no other explanation for the observed facts can be economically rational or feasible.

**a. Are cost data used? Yes/No**

Yes, they are.

**i. If so, are cost data from the firm used? Yes/No**

Yes, it is used cost data from the firm but is also necessary to use cost information from other firms in the industry.

**b. Are there circumstances when cost data of other firms can be used? Yes/No.**

Yes, they are.

**i. If so, please specify the circumstances.**

It is always necessary to get information about the cost structure for the others firms in the industry, especially when the firm investigated argue economic efficiency as its base on charge a lower price.

**c. What other data or information is used, if any? Please provide examples as relevant.**

Mainly, information from the results of all the companies in the industry (detailed sales incomes, other incomes, net revenues, operating income, production cost, gross income margin, Operating expenses -detailed by Selling, General and Administrative Expenses, SG&A-, depreciation, financial expenses, amortization of goodwill, among others). Additionally, information about the monetary and quantitative physics sales of the industry and each company is required (to calculate the share of market of each firm).

**7. Does pricing below a particular cost benchmark create a presumption of predatory pricing? Yes/No**

Yes, it does. But as it said before, is a necessary but non sufficient condition for face a predatory pricing conduct, and the existence of another factors are required to configure the conduct.

**a. If yes, is this presumption rebuttable or irrebuttable? Please explain.**

The illicit is configured in order to attain, keep or increase a dominant position in the relevant market, so the hypothesis of predatory pricing conduct may be rebuttable if the firm can not attain, not keep or not increase its dominant position mean its set-price politics.

In this sense, if it is shown that relevant market operates in a competitive way, this is, there are no entry barriers, there are no sunk costs, or the entry of a new player can discipline the market –time and sufficiency in the entrance- such as none of the current suppliers can use a predatory pricing conduct to eliminate competitors or to expect obtaining additional profits more than offset profit sacrifices during the price politics is implemented, there is no economic rationality supporting a predatory pricing hypothesis. Additionally, if the firm investigated have no financial resources to face this offset profit sacrifice, the hypothesis can also be refutable.

**b. If the presumption is rebuttable, what must be shown to rebut the presumption?**

The following topics (non taxative) must be shown to rebut the predatory pricing hypothesis:

- The firm has no market power or dominant position in the relevant market;
- There are no entry barriers on the industry (so, over-competitive profits can not be sustainable over time such recoupment is possible);
- The conduct is explained as promotional activities (based on transitory and defined period, and objective and non discriminatory access conditions);
- The firm is cost-efficient, and the price charge is under the price charged by the competitors is explained on this base (so, the price is below the average industry costs, not below the firm avoidable costs);
- The firm is charging a lower price as a competitive answer to a diminishing in the clearing-market price.
- Others

**8. Is there a “safe harbor” from a finding of predatory pricing for pricing above a particular cost benchmark? Yes/No**

No, there is not.

**a. If yes, please explain, including the terms of the safe harbor.**

NA

**9. Is recoupment (obtaining additional profits that more than offset profit sacrifices stemming from predatory pricing) required for a finding of liability under predatory pricing rules in your jurisdiction? Yes/No.**

There is no written rule about recoupment, but is implicit when the analysis considers the firm that should be charging a predatory price needs to have power market or dominant position in the relevant market, and the existence of entry barriers (as sunk or non-recoverable costs) is also needed to configure the illicit. Additionally, it is needed to show how the firm is financially supporting losses while the conduct is applied.



- a. **Is this assessment conducted separately from the analysis of the firm's market power and the predation? Yes/No**

No, it isn't in Chilean competition' analysis

- b. **What factors are employed in assessing recoupment in your jurisdiction?**

In a general way, main factors are the firm's financial capability that makes able to implement the predatory pricing conduct and the elements that make feasible the industry entry deterrence.

- c. **Is there a specific recoupment calculation or amount to be shown? Yes/No**

No, there isn't.

i. **If so, what is this? NA**

- d. **Is there a relevant time period for recoupment? Yes/No**

No, there isn't.

i. **If so, what is it? NA**

- e. **What degree of likelihood of recoupment is required (e.g., possibility or probability)?**

The base of the rule of the reason is the conjunction of an economic and legal probability, so that is required a founded presumption that conduct intends to recover income in future such that revert present losses.

- f. **Please provide examples of the recoupment standard of likelihood employed as part of your recoupment assessment.**

We don't have defined a likelihood recoupment standard.

10. **In addition to proving below-cost pricing, must effects, such as market foreclosure or consumer harm, be demonstrated to establish liability? Yes/No**

Yes, it must be demonstrated effects on others agents in the market.

- i. **If yes, please explain the elements assessed (e.g., exit or delayed entry of competitors, price increases, prevention or delay of price decreases) and the types of evidence required to do so.**

Yes, as the Chilean Competition Law defines the predatory conduct as one made in order to attain, keep or increase a dominant position in the relevant market, it must be demonstrated the effects on this matter. To prove an increase in a firm' dominant position is needed, at least, to review the evolution in its market share and show the exit of market competitors (analyzing the reason of this exit) or delayed entry of new players to the market.

***Justifications and Defenses***

11. **What type of justifications or defenses, if any, is permitted for predatory pricing, e.g., efficiency, meeting competition or objective necessity defense? Please explain and provide examples, as relevant.**

Both theories are established by the defense in investigations in cases of predatory pricing. The following justifications were presented in the James Hardie's case (see question 17):

- Competitive strategies of market penetration
- Company do not hold power market to be able to fix price so the sales' price diminishing was only a strategic reaction forehead to diminishing established by the firm leader (model leader – following, in prices).

12. **What is the standard of proof applicable to these defenses? Who bears the burden of proof? What evidence is required to demonstrate that these defenses or justifications are met?**

All those needed when rules of reason is applies.

***Enforcement***

13. **Please provide the following information for the past ten years (as information is available):**

- a. **The number of predatory pricing cases your agency reviewed (investigated beyond a preliminary phase).**

The following are the number of cases reviewed by the Competition Authorities in the past ten years, not the complaints received by the NEPO (no statistical information by conduct about complaints received is available, only in the cases investigations were presented as NEPO complaints to the competition authorities):

**2004 to date : 7 cases**  
**1997 to 2004 : 18 cases**  
**Total : 25 cases**

The following tables present a more complete summary of these cases.

<b>Cases / Investigations by TDLC 2004 to date</b>			
<b>Rol No. / Year</b>	<b>Sector / Market</b>	<b>Name</b>	<b>State</b>
138 / 2007	Telecom	Complaint Telsur S.A. v/s VTR BA Chile S.A.	In process
125 / 2007	Telecom	Complaint CMET versus CTC Chile S.A.	In process

124 / 2007	Public sector	Complaint Helicópteros del Pacífico v/s Minister of Agriculture and CONAF	In process
111 / 2006	Telecom	GPS S.A. v/s Entel S.A. * Report from NEPO was required by the TDLC	In process
67 / 2005	Pharmaceutical industry	Complaint AFFI v/s Novasalud and other laboratories  * Report from NEPO was required by the TDLC	Closed Complaint was refused Sentence N° 51/2007 from TDLC
50 / 2004	Telecom	Complain NEPO against TV Cable Loncomilla and others	Closed Complaint was accepted by Sentence No. 28/2005
42 / 2004	Construction providers / fiber cement	Complaint QUIMEL and CEMENTA S.A. versus James Hardie  * Report from NEPO was required by the TDLC	Closed Complaint was refused Sentence N° 39 / 2006 from TDLC Revoked by Res. No. 30942 / 2006 from Supreme Court

<b>Resolutions dictated for the Resolutive Commission (1997 to 2004)</b>			
<b>Resol. No. / Year</b>	<b>Sector / Market</b>	<b>Actors those resolution was concerned</b>	<b>Main conclusion</b>
710 / 2003	Plumbing products market	Nibsa S.A. v/s Mosaico	It was rejected to initiate an investigation. Dumping is not matter of Competition Law
695 / 2003	Telecom	CTC v/s Smartcom	Promotions do not constitute predatory pricing, nevertheless these should be limited in time
692 / 2003	Passenger Transportation Market	Fenabus contra Aerocontinente airlines	Antecedents were filed but Resolution No. 591 was reiterated
689 / 2003	Passenger Transportation Market	NEPO contra Andibus Buses	Judgment accepted the complaint and the configuration of predatory pricing conduct.
688 / 2003	Public biddings	M&M v/s Secretary of Transportation	Reject the complaint. Biddings are independents each other, so a firm

			can compete without correspondence to the prices offered in another bidding
673 / 2002	Telecom	Entel v/s CTC Mundo	It was filled because of the dismissal of the parts.
659 / 2002	Passenger Transportation Market	NEPO v/s Adufax	It confirms agreement arranged not thus predatory pricing conduct. Sanctions on the first matter were set.
642 / 2002	Chemical and Pharmaceutical Industry	Kenifar v/s Roche	Conduct was not configured. Price below costs alone can not necessarily be considering predatory pricing conduct.
631 / 2001	Telecom	Telefónica del Sur v/s CTC	Judgment accepted the complaint and ordered to stop the conduct.
587 / 2000	Passenger Air - Transport Market	NEPO v/s Aerocontinente airlines	Preventive measures were set and prohibited to continue promotions that consider prices below costs.
568 / 2000	Tourism Services Market	Sociedad de Turismo Chi Gu Chon Kim Ltda v/s Sociedad Comercial y de Servicios Koriana Travel Ltda	Accept the complaint, ordered to stop the conduct and set penalties.
547 / 1999	Telecom	NEPO v/s Startel	Accept the complaint, ordered to stop the conduct and set penalties.
546 / 1999	Gas production	ENERSUR v/s COPEC	Reject the complaint. To diminish prices can be a legitimate answer to new competitors' entrance in a competitive market.
534 / 1998	Home sewing machines market	Austral v/s Brother	Instructed NEPO to develop a deeper investigation on this market
524 / 1998	Telecom	Entel v/s CTC Transmisiones Regionales	Reject the complaint but set preventive measures.
507 / 1998	Telecom	NEPO v/s Startel	Accept the complaint.
508 / 1998	Telecom	NEPO v/s Startel	Cautionary measures were set.
505 / 1997	Passenger Air -	National Airlines v/s Lloyd	Reject the complaint

	Transport Market	airlines	because was no possible to configure the illicit conduct.
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- b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief.

Competition System as a whole

	Conduct violates Competition Law	Settlement with relief
2004 to date	: 1 case	-
1997 to 2004	: <u>5 cases</u>	<u>3 cases</u>
Total	: <b>6 cases</b>	<b>3 cases</b>

NEPO as complainant

	Conduct violates Competition Law	Settlement with relief	Total cases NEPO as complainant
2004 to date	: 1 case	-	1 case
1997 to 2004	: <u>2 cases</u>	<u>2 cases</u>	<u>5 cases</u>
Total	: <b>6 cases</b>	<b>2 cases</b>	<b>6 cases</b>

- c. The number of agency decisions issued, if any, that held that the practice did not violate your jurisdiction's predatory pricing rules (i.e., "clearance decisions").

Competition System as a whole

2004 to date : 2 cases (reports by NEPO sent to the TDLC)

- d. Each of the number of agency decisions or settlements that were (i) challenged in court and, of those, either (ii) overturned by court decision or (iii) confirmed by court decision.

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14. Does your jurisdiction allow private cases challenging predatory pricing? Yes/No.

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- a. Please provide a short description of representative examples, as available.

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- 15. As relevant, please provide a short English summary of the leading predatory pricing decisions/cases in your jurisdiction, including information on the method used to calculate costs, to the extent applicable, and, if possible, a link to the English translation, an executive summary or press release of the case.**

The more important recent Chilean case in predatory pricing matters is Quimel S.A. and Cementa S.A. against James Hardie Ltda. These three firms produce smooth fiber cement panels for siding, among other products utilized as supplies at the building market, so belong to this as suppliers. Quimel and Cementa complaint James Hardie to set predatory prices on the market arguing this firm sold smooth fiber cement panels charged prices total below costs, mainly supporting financial losses with the income' sales received for roofing fiber cement tiles, other product James Hardie' sold in the foreign market as exporter.

NEPO elaborated a report to the TDLC about the case. To prepare it, NEPO required information -about normalized prices (prices by different measures unit by different products), market share and financial statement annual report- to the main companies in the market (Grau and Pudahuel-Pizarreño, adding to Quimel, Cementa and James Hardie information required).

The final report established that James Hardie didn't realize a predatory pricing conduct although set its prices under the total cost of production due the following:

- Its prices were over their average variable costs during all the time the firm operated in our country (2001 to 2004), and the relevant costs considered by NEPO in this report was the avoidable ones, this is, the variable costs plus the non-sunk costs that the firm faced;
- James Hardie increased its market share permanently during the period analyzed, reaching a participation of 32,5% in the year 2004, but wasn't the dominant player in the market (the main firm was Pudahuel-Pizarreño, with a market share near to 60%);
- When James Hardie entered to the market (year 2001), the dominant incumbent firm Pizarreño applied a prices reduction politics as a strategy to block the entrance (diminished its price under complained firm' price). The same strategy was followed by other players in the industry, as Quimel (who set this price politics till 2004), and that also applied James Hardie as a way of to enter to the market and to win share market on this.
- A firm that begins its operations in a market does it without use completely its installed capacity, by which its prices perfectly can be lower to the average total costs, this is variable plus fixed costs, since these are very high at the beginning of the operation due the initial investment required. This situation was reverting in time by James Hardie, since the difference between its price for the smooth fiber cement panels and its average total cost was smaller each time (so, the deficit was decreasing in time as James Hardie was increasing the operation volume).
- The market hadn't natural entry barriers (amount of investment required do not configure entry barriers to any industry).

You can read the final NEPO report (only Spanish version is available) linking [here](#).

Based on this report among other evidence added by the complainant and complained firms, the TDLC rejected the compliant in its Sentence No 39 on June, 2006, arguing that the complained firm didn't satisfied none of the necessary requirements to configure the conduct, to know, first, who potentially develop the conduct must enough have market share to make reasonable its expectation to recover in future short term losses faced; and, in second place, in the case first requirement was complied, clear evidence that firm charged prices under the relevant costs (variable costs plus some quasi-fixed avoidable costs). You can review TDLC Sentence' full text (only Spanish version is available) linking [here](#).

On November, 2006, the Supreme Court revoked the Sentence No. 39, by its Resolution No. 30942 / 2006, arguing total costs are the relevant one and that wasn't relevant if James Hardie had or not dominant position in the market, but its conduct had the intention to increase its market share by eliminating other competitors of this one. This result had a minority vote, which share TDLC sentence in all its parts. You can review Supreme Court Resolution' full text (only Spanish version is available) linking [here](#).