

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Purchasing Power and Buyers' Cartels – Note by Chile**

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More documents related to this discussion can be found at  
<https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels.htm>

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### 1. Introduction

1. The ability to determine or influence the purchase price of a given good, by one or a few of its buyers, is commonly referred to as monopsony power or purchasing power, respectively.
2. It is common to observe purchasing power in the relationship among a few buyers in the downstream market, of an input that is provided by several suppliers or producers in the upstream market. For instance, suppliers of large supermarket chains or retailers; producers of sugar beet or sugar cane, which is subsequently transformed by refining companies into sugar; and suppliers of raw milk, product which is later purchased by companies that produce dairy products.
3. Significant purchasing power generates incentives to pay a lower purchase price to suppliers –including discounts unrelated to costs–, and to buy a smaller amount of the product than would be the case under competitive conditions. Hence, purchasing power can generate a social loss because these are resources that are positively valued and will not be available in the downstream market.
4. Furthermore, purchasing power or monopsony power increases when suppliers face higher barriers or obstacles to exit the market, or due to specific investments that entail sunk costs. In this context, suppliers may lose mobility and remain as captive customers of the only buyer or few buyers. In this sense, in Ruling No. 9/2004 the TDLC stated that the high dependence of many suppliers in their relationship with the largest supermarket chains can be called "*purchasing power*" and added that "*This purchasing power will be exploited with greater intensity as the exit barriers increase for suppliers. Exit barriers for a specific supplier are constituted by the existence of specific assets. An asset qualifies as specific or committed to a given business relationship when its value is reduced by using that asset in an alternative business relationship. The value of specific assets depends on the percentage that the supermarket represents of its sales for the supplier, and the amount of assets it has invested in that business relationship that would not be equally valuable in another. Thus, the market power or purchasing power of supermarkets is stronger over smaller suppliers or suppliers who allocate their entire production to only one supermarket chain*" (c. 16).

### 2. TDLC final judgments concerning purchasing power

#### 2.1. Boycott: Ruling No. 63/2008: TV plasma Case

5. This case is called "Plasma Case" because it involves sales of plasma televisions in Chile.
6. Banco de Chile and Fiscalía Nacional Económica (The National Economic Prosecutor, FNE) filed a complaint against retail companies Falabella and Almacenes Paris alleging an abuse of dominant position and collusion. According to the complainants, these companies coordinated to threaten suppliers of home electronics<sup>1</sup> (including TVs) to remove them from their distribution stores, if they participated in a technology event that

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<sup>1</sup> Including electronics, white goods, home appliances and computing products.

Banco de Chile was organizing (with Travel Club and Duty Free), hereinafter the “Tech Fair”. The first panel or plasma TVs in Chile were supposed to be announced and sold at this Tech Fair, just before the 2006 football world cup. The threat would have generated plasma TV suppliers to cease from participating, making the Tech Fair fail.

7. The TDLC accepted FNE's and Banco de Chile's complaint and ordered both companies to pay fines of US\$ 7.6 million and US\$ 4.8 million respectively<sup>2</sup>.

8. It should be noted that, as stated by the TDLC, *"an important part of the sales of home electronics, at least in the stores of the defendant parties, are financed with credit granted through their related cards and thus, the distribution of this type of products is closely related to the corresponding credit market"* (c.26).

9. On the other hand, the TDLC considered that the defendant companies represented an important distribution channel, difficult to substitute for suppliers of home electronics *"given that department stores have a set of characteristics that are difficult to replicate by other distribution channels, mainly due to the fact that: (i) they offer financing through their own cards; (ii) they have presence in a significant part of the national territory; and (iii) they have a significant flow of customers practically guaranteed being massive and multi-product distribution channels"* (c. 142).

10. As a result, the TDLC decided that the Tech Fair accounted for an alternative distribution channel. However, it stated that participation in the Tech Fair *"is profitable only if it does not threaten relationships with the most important channel for suppliers: the department stores"* (C. 150). This implies that, in the TDLC's view, suppliers of home electronics were in some way captive by these retail chains, which increased their purchasing power.

11. After a publication in the newspaper “El Mercurio” regarding the Tech Fair being organized by Banco de Chile, evidence provided in the trial demonstrated that Falabella and Almacenes Paris had called their suppliers to be informed of the Tech Fair, and that there were communications between them in which they agreed to threaten their suppliers to desist from participating thereof. In particular, according to the evidence, both retailers had threatened the suppliers to withdraw their products from the retail shelves and the suspension of future purchase scheduling.

12. Among documentation submitted to the trial, there were telephone records, e-mails, and statements of executives of the retailers and their suppliers, which proved that the former exerted pressure on the suppliers and therefore, both were sanctioned. Additionally, there was evidence of an attempt to involve a third department store (Ripley) in the agreement, which refused to participate.

13. Consequently, in the trial it was proven that both companies pressured and threatened their suppliers with the refusal of future purchases, and that there was collusion among them.

## 2.2. Purchasing Power: Dairy Products Cases

### 2.2.1. Ruling No. 7/2006

14. This ruling originates from a complaint filed by the FNE against milk processing companies Nestle (Lechera del Sur), Parmalat, Watt's (Loncoleche), Colun and Dos Alamos. They were accused of abuse of dominance due to a market sharing and a non-aggression agreement; refusal to buy from those who were not their suppliers; reduction in

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<sup>2</sup> Exchange rate (dollars) in April 2008: \$435 Chilean pesos (CLP).

purchase prices for those who bought smaller volumes –which would constitute an arbitrary price discrimination–; and opacity in the milk sampling process.

15. Later in the trial, Colun was excluded from the lawsuit because it was a cooperative that only bought raw milk from its own members and it did not have incentives to deny or discriminate against them, given that they were its associates.

16. The TDLC did not sanction the defendants for market sharing agreements, refusal to purchase and price agreements, since these conducts were not proven. However, the TDLC imposed a fine on Nestlé (500 UTM ((monthly tax unit)), successor of Lechera del Sur, for arbitrary price discrimination.

17. Most importantly, Ruling No. 7/2006 acknowledged that there was purchasing power in the market. In particular, it stated that *"Practically 100% of raw milk which is destined to processing plants is produced in the Metropolitan, Eighth, Ninth and Tenth regions, the latter being the most important, accounting for more than 60% of the milk supply received by processing plants, situation that has maintained over time. Meanwhile, milk received by processing plants represents around 70% of total production, the rest being used for on-farm consumption and for sale to small cheese producers or similar purposes. In the period referred to in this proceeding, there is a significant concentration of purchasing power by dairy companies, while the supply of raw milk is made by multiple producers of different sizes and with a low degree of organization"* (c. 23).

18. In addition, the TDLC identified certain characteristics of the market that subsequently lead it to include an obligation for milk processing companies to publish price guidelines. These characteristics are high concentration and regional distribution of the few buyers of raw milk, and the existence of multiple suppliers. Also, there was no market for long-term contracts regarding the commercialization of raw milk. On the contrary, at that time negotiations were all bilateral between suppliers and processing companies, and unknown to the rest of the market actors.

19. The ruling concluded that in the market for the reception of raw milk there were relevant problems in price determination and mobility of producers. In fact, it stated that *"[...] the producers seemed to be unaware of the method used to determine the price they would receive for the milk delivered [...]"* and that *"[...] there are sustained complaints regarding the difficulty producers would face by changing processing plants and the lack of guarantees in the sampling process"* (c. 47).

20. This lack of transparency, and the need to prevent possible agreements between processing companies regarding market sharing and purchase prices, led to the TDLC's decision to impose a series of measures on Nestle, Soprole and Watt's, such as: (i) to maintain a list of purchase prices, indicating the different parameters involved in the price, with appropriate information to interested parties; (ii) to announce, at least a month in advance, any change in the conditions of raw milk purchasing; (iii) to justify, in writing, their refusal to purchase from farmers who made them offers; (iv) to keep a record of the offers they will decline, and inform the FNE every six months of significant changes in the purchases of old clients as well as the incorporation of new ones; (v) to refrain from using the historical ratio between winter and summer deliveries for price determination; and (vi) to design a sampling system that would provide guarantees to all parties involved (6 months), which had to be approved by the FNE.

21. The obligation to publish price guidelines and their application to commercial relationships with milk producers was not limited only to Regions VIII, IX and X, since the ruling stipulated that this measures *"shall be considered in the acts or contracts executed or celebrated in this market, as well as in the rest of the regions of the country"* (fourth rule).

### 2.2.2. Decision No. 57/2019

22. In June 2018, the company Watt's SA submitted a consultation process (non-contentious procedure) concerning the conditions that must be fulfilled in the facts, acts or contracts regarding the sale and purchase of raw milk, in particular, the obligation imposed in Ruling No. 7/2006 for milk processing companies (Watt's, Soprole and Nestle) to publish their raw milk purchase price guidelines. The main query was as to whether such obligation was still necessary to maintain, and whether its application should be extended to all the actors of the market, such as Colun, Surlat and Quillayes.

23. The TDLC decided to maintain the obligation for Watt's, Soprole and Nestle to publish their price guidelines, and ruled on bonuses or prizes (incentives) offered to suppliers and their potential effects on competition. On the other hand, it didn't extend the obligation to all participants in the raw milk processing market since the case emerged from a lawsuit against those three specific companies, and therefore it was not appropriate, through a consultation process, to extend the obligations to those who were not sued before.

24. The analysis made by the TDLC focused on examining the evolution of the market for the reception or purchase of raw milk from 2005 until the date of the decision. The most significant change was not in structural conditions –on the contrary, the three companies still accounted for the highest percentage of raw milk purchasing (in 2004-2005 they concentrated 74% and in 2016-2018, 80%)–, but in the way producers and processing companies are related. Indeed, by 2018, the market of milk purchasing through written contracts had acquired more relevance, at least in the case of two of the processing companies. The spot market, not subject to written contracts, but only to price guidelines, continued to be relevant. For this reason, the TDLC decided to maintain the obligation to have public price guidelines in the same terms indicated in Ruling No. 7/2006. In fact, in the TDLC's opinion, the guidelines would have allowed to effectively comply with the objectives of transparency and uniformity for raw or raw milk purchasing conditions.

25. However, the TDLC found, when studying in detail the contracts for the commercialization of raw milk, that the lack of mobility of producers stemmed mainly from incentives given by processing companies through certain bonuses or penalties that were anticompetitive. These bonuses and penalties were not only present in contracts, but some of them also in price guidelines. Therefore, in the TDLC's opinion, both price guidelines and contracts required changes improve competition in the market.

26. Some examples of bonuses present in price guidelines were "annual production increase bonuses", which rewarded the increase in volume delivered (present in Soprole's price guidelines); and "small producer bonuses", which rewarded the permanence of small producers (present in Nestle's price guidelines).

27. On the other hand, long-term contracts of the three milk processing companies with their suppliers included bonuses and penalties in addition to those established in their respective price guidelines, and some included exclusivity clauses (such as obligations to sell all raw milk, and commitment not to supply milk to third parties).

28. Examples of these are: "permanence bonuses", which rewarded permanence as a supplier with an additional payment per liter of milk; "volume increase bonuses", which consisted of an additional payment (in Chilean pesos per liter) if the production of the previous period was exceeded (last 12 months since the contract signature date), and "scheduled delivery bonuses", which rewarded delivery under pre-established conditions. Penalties included a fine for non-compliance with the terms of the contract.

29. The TDLC pointed out that bonuses, whether established in the price guidelines or not, could affect the producer's mobility since they increased their switching costs, all of

which raised the purchasing power of processing companies. It concluded that, although not all bonuses or loyalty clauses are anti-competitive per se, they could be, when their effect is similar to an exclusive supply clause and when they lack objective justification.

### 2.2.3. *Subsequent lawsuits and settlements*

30. Following the publication of Decision No. 57/2019, the FNE and Fedeleche filed a series of lawsuits against Nestle, Soprole and Watt's for abuse of dominant position as buyers of raw milk (Case C N°387-20 "*FNE's injunction against Contra de Nestlé Chile S.A.*", Case C N° 397-20 "*Complaint of Fedeleche A.G. against Nestlé Chile S.A.*", Case C N° 398-20 "*Complaint of Fedeleche A.G. against Soprole S.A.*", and Case C N° 407-20 "*Complaint of Fedeleche A.G. against Watt's S.A.*"). These lawsuits and the FNE's injunction concluded during 2021 in settlements, in which the processing companies committed to remove from their price guidelines and contracts the bonuses and penalties questioned by the TDLC.

### 2.2.4. *Out-of-court settlements between the FNE and dairy product processors*

31. The FNE investigated the compliance with the behavioural remedies set forth in Decision No. 57/2019 and, to safeguard competition in the raw milk procurement market, reached out-of-court settlements with the processing companies:

- AE-18-2020 "Acuerdo extrajudicial entre la FNE y Soprole S.A. y otra".
- AE-19-2020 "Acuerdo extrajudicial entre la FNE y Watt's S.A.".
- AE-20-2020 "Acuerdo extrajudicial entre la FNE y Nestlé Chile S.A.".
- AE-22-2020 "Acuerdo extrajudicial entre la FNE y Soprole S.A. y Prolesur S.A.".

## 3. Conclusions

32. The TDLC ruled through Decision No. 57/2019 on the anticompetitive effects involved in bonuses and penalties, set forth in contracts and price guidelines for the purchase of raw milk. This is because some of these bonuses and penalties act like loyalty rebates since they increase the purchasing power of milk processing companies by reducing the mobility of suppliers, increasing their switching costs. In the TDLC's opinion, this could generate exclusionary effects for other milk processing companies whose market entry decisions could be influenced if they have no one to supply with raw milk.

33. This decision generated positive responses from market participants, encouraging them to modify contracts and remove clauses that operated as exclusivity restrictions.

34. Therefore, Chilean Competition Authorities (TDLC and FNE) have taken enforcement actions with positive outcomes.