

## REFORM ON THE STRENGTHENING OF SERNAC IS ENACTED

On September 13th, 2018, a significant modification to Law No. 19,496 Consumer Protection Act (“CPA”) was enacted through its publication in the Official Gazette. This publication ends a process which lasted over four years.

### Timeline

This reform process commenced on June 2nd, 2014, when the Government filed a bill before the Congress which intended to modify the CPA, informally known as “Bill to strengthen the National Consumers Bureau (“SERNAC”)” (hereinafter, the “Bill”) since its main modifications introduced to the CPA are aimed to strengthen SERNAC’s institutionality, granting it more abilities.

On October 25th, 2017, the Bill was approved by Congress. After this approval, on January of 2018, the Bill was significantly altered by the Constitutional Court, in order to ensure its constitutionality. In particular, the Court rejected the proposed sanctioning abilities of SERNAC.

Afterwards, and following an extensive administrative procedure involving the Executive Branch, the General Comptrollership of the Republic, and the Constitutional Court (process which lasted almost a year), the reform to the CPA (hereinafter the “Reform”) was published in the Official Gazette on September 13th, 2018, thus officially becoming Law No. 21,081.

The Reform will enter into force progressively, depending on the provision and the region of the country in which it is implemented.

Hereunder is an outline on the Reform’s principal guidelines and main changes to the CPA.

### New abilities of SERNAC

The Reform significantly increases SERNAC’s abilities regarding supervision, interpretation of the law, and regulatory propositional

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abilities:

- Supervision: SERNAC has the ability to enter into facilities in which suppliers develop their activities in order to oversee the fulfillment of the law. This ability could be exercised with the assistance of the public force in case the supplier does not cooperate with the supervision process. Also, in this context, the authority has the ability to require any document, book or information necessary for the supervision process; and to subpoena the legal representatives, administrators, advisors and other dependents of the company regarding the facts subject to these proceedings.
- Interpreting: The National Director of SERNAC will be able, through the respective agency, to interpret regulation that protects consumers' rights.
- Regulatory propositional ability: The Reform grants SERNAC the ability of proposing, to the President, through the Ministry of Economy, the issuance, modification or elimination of legal or regulatory provision, in order to protect the rights of consumers.

### Increase and determination of fines

The Reform significantly increases the fines established in the CPA. Some of the most relevant modifications are:

Infringement	Prior fine	New fine
General sanction	Up to 50 UTM1	Up to 300 UTM
Misleading advertisement	Up to 750 UTM (USD 52... (USD 3,...	Up to 1,500 UTM (USD ... (USD 2,...
Suspension, stoppage o...	Up to 150 UTM (USD 10...	Up to 750 UTM (USD 52...
Infringement to special ...	Up to 750 UTM (USD 52...	Up to 1,500 UTM (USD ...
Lack of instructions and...	Up to 750 UTM (USD 52...	Up to 2,250 UTM (USD ...
Non-delivery of informa...	Up to 400 UTM	Up to 750 UTM (includi...
Overbooking of shows ...	From 100 to 300 UTM (USD 2,...	Up to 2,250 UTM

Additionally, the Reform establishes a system for determining the amount of the fines. This new determination system includes several mitigating and aggravating circumstances which, after being evaluated by the judge, must be indicated as a statement in the judicial ruling, at the moment of determining the applicable fine:

- Mitigating circumstances (reduction of the maximum amount of the

fine):

- Having adopted mitigating measurements before the judicial ruling (in case they effectively repair the damage caused).
- Self-report, providing information that allows commencing a sanctionatory proceeding.
- Substantial collaboration with SERNAC or the court, insofar as the supplier has a “compliance plan” previously approved by SERNAC, which includes the specific matters involved in the infringement, and proving its due implementation.
- Not having been sanctioned for the same infraction during the prior 36 months (or the prior 18 months in case of micro and small businesses).

• Aggravating circumstances (increase of the minimum amount of the fine):

- Having been previously sanctioned for the same infraction during the past 24 months (or the past 12 months in case of micro and small sized businesses).
- Having caused serious property damaged to consumers.
- Having damaged the physical and mental integrity of the consumers, or their dignity.
- Having put the safety of consumers or the community at risk, even when there was no particular damage.

### **Increase of statute of limitations**

The statute of limitations for consumers and SERNAC to file infringement actions (i.e. those that pursue the imposition of a fine) against suppliers for breaches to the CPA is increased from six months to **two years**. The new statute of limitations is counted from the moment the **infringement has ceased**.

Also, regarding the statute of limitations of civil actions (damages compensation), the Reform expressly establishes that the Civil Code’s general rules will be applicable (five years for contractual obligations and four years if there was no contract).

Hence, only the infringement action prescribes in two years and not the civil action (as was, sometimes, interpreted by courts). Thus, even when the infringement action is prescribed, a claim can still be filed pursuing damages reparation, instead of exercising both actions

jointly, as it is the general rule.

### **Modifications to the proceedings of the CPA**

#### **•Proceedings before Local Courthouses (Juzgados de Policía Local)**

Local Courthouses maintain their jurisdiction to rule on cases in which consumers file individual claims against the supplier.

Nevertheless, there is a new criterion under which these Local Courthouses will be competent. The previous general rule was that the competent Local Courthouse is the one corresponding to the place where the contract was executed, where the infraction took place or where it began, at the consumers' choice. With the Reform, there is a unique criterion, by which the competent Local Courthouse will be the one placed in the consumer's or supplier's commune, at the consumer's choice.

- Class actions

The Reform sets forth new provisions related to collective actions:

- Elimination of the discussion of the complaint's admissibility: the judge will analyze and verify that the class action is properly submitted by one of the claimants entitled by law for such purpose, and that it formally complies with the formal requirements provided by the Code of Civil Procedure. If all of the aforementioned is met in the complaint, the judge must declare its admissibility without further discussion.
- Injunctive measures: in qualified cases, and only once the claim has been declared admissible by the court, the judge may order the supplier to provisionally stop charging the amounts challenged in the trial.
- Presumption in favor of consumers in case suppliers do not provide the requested information: as defendants, suppliers are forced to deliver all the documents requested by the judge, insofar as such information is in possession of the supplier and is directly related with the claim. If the supplier declines to provide such documents and the judge deems such refusal as unjustified, the court is entitled to declare all the plaintiff's allegations related to the content of such documents as "proven".
- Consumers could appear as witnesses in the context of these collective procedures, without being affected by impartiality disqualifications.
- On the other hand, on indemnification, consumers are entitled to request payment of moral damages in collective procedures, which

was previously prohibited by the CPA. Moral damages reparations will be determined by the court as common minimum amount, which will correspond to the minimum affectation suffered by all consumers for the same infraction. In order to facilitate the judicial determination of this amount, SERNAC will be in charge of making available to consumers a fast and expeditious registration which will allow them to subscribe to this determination mechanism.

In case consumers consider their affection exceeds the common minimum amount set by the court, they can pursue the difference in a subsequent trial before the same court that ruled the class action or before the competent Local Courthouse, according to the general rules, at the consumer's choice. Notwithstanding the above the supplier has the ability to propose moral damages reparation during the entire procedure. In order to make such proposal, the supplier can divide consumers into groups and sub-groups.

The Reform also provides that the judge will have the ability to **increase the reparation amount by 25% in case of aggravating circumstances.**

Finally, regarding imposition of fines, the Reform provides the ability to **apply one fine for each affected consumer**, in case the nature of the infraction allows it, with the following limitations: the fine cannot exceed (i) 30% of the sales of the products and services subject to the infraction during the time period in which the infraction took place (this percentage is reduced to 10% in case the supplier is a SSBS), or (ii) the double of the economic profit obtained as a result of the infraction; as determined by the court. Further, the Reform sets forth an absolute limit to fines applicable on class actions of 45.000 UTA<sup>2</sup>, roughly USD 37.5 million.

- Voluntary new procedure for the protection of collective interests

This is a new procedure incorporated in the Reform, which is a special administrative proceeding regulated by an independent and specialized sub-direction of SERNAC, and is the legal recognition of what is currently known as "collective mediations".

The proceeding can only begin if no class actions have been filed related to the same facts and, once the proceeding has commenced, no class actions can be filed concerning the same facts until the voluntary proceeding ends. Also, this proceeding can be initiated by

SERNAC or through a complaint from a consumer association.

The duration of this voluntary proceeding cannot exceed three months, renewable once for another three months. If, within this term, no agreement is reached, the voluntary proceeding will be understood as “failed”. Additionally, both parties, at any moment of the proceeding, can manifest their intention to no longer continue participating in it.

In case the proceeding fails, SERNAC will not be able to file, in a later class action, the documents that were provided by the supplier in the context of the voluntary proceeding, unless such documents could be accessed in a different way.

#### [Strengthening](#) consumer associations\*\*\*\*

The Reform strengthens the role of Consumer Associations in the enforcement of the CPA. Among the measures included for such purpose, it is possible to highlight:

- Consumer Associations will be able to represent consumers on individual proceedings, which prior to the Reform, was only possible in class actions;
- Consumer Associations may also participate in the new collective voluntary proceedings before SERNAC; and
- Consumer Associations will be able to perform, at the request of a consumer, individual mediations, ability that was reserved for SERNAC.

Moreover, the Reform grants Consumer Associations with more financing mechanisms, which also tends to [strengthen](#) them.

#### **Direct and automatic reparation for suspension of basic services**

In case of **suspension, stoppage or unjustified lack of provision of a contracted service** (such as water services, gas, sewage, electricity, telecommunications, phone services, removal of garbage, residues or toxic elements) the Reform sets forth the obligation of the supplier to compensate the affected consumers, for each day the contracted service was not provided, with an amount of 10 times the average of the daily turnover of the monthly billing of the month prior to the suspension. This compensation will be materialized as a discount in the respective amount on the next billing.

In order to calculate the compensation, every time the provision of the service stops for four continuous hours or more within a 24 hours period, it will be understood there was an entire day without service. In other cases (basic services supplied periodically, such as the removal of garbage) the calculation will be performed in proportion to the period of time in which the service was not supplied.

This direct and automatic compensation will **only take place** when special regulation does not include compensation on this basis, notwithstanding the consumer's right to seek payment for all material and moral damages caused by this situation.

### **Prohibition of "tied" sales in telecommunication services**

The Reform includes a new Article 12 B to the CPA which sets forth the prohibition for suppliers of telecommunication services to make "joint offers", which will have to be made individually for each service and plan. This means that such providers "may not tie, colligate, or condition, in any manner, contracting any service to contracting another".

Therefore, the prohibition of "tied sales", that was limited to financial products and services, is extended to telecommunication services.

### **Benefits for SSBs**

The Reform grants a series of benefits to SSBs<sup>3</sup> in case of potential breaches of the law:

- Determination of fines: The first imposed fine will be reduced by 70%. Also, in collective trials, in case the fine is applied for each affected consumer, the limit of 30% of the sales of products or services subject to the infraction is reduced to 10%.
- Alternative sanction in individual procedures: The fine may be replaced by the obligation to attend courses on the rights and duties of consumers, instructed by SERNAC.
- Grace period in SERNAC's supervision proceeding: SSBs have a 10 days grace period for solving the infringements determined by SERNAC in the context of a supervision proceeding.

### **Entry into force**

While the Reform is currently official Law, its entry into force will be progressive and differed.

- Within the next six months since the publication of the Reform:

Mainly, the increase of fines, determination of the fines in collective procedures, direct and automatic reparation for suspension of basic services, increase of the statute of limitations, inclusion of moral damage in collective procedures, and voluntary new procedure before SERNAC, among others.

- Entry into force depending on each region of the country in which the Reform will be applicable:

For all the other provisions of the Reform, and depending on each region of the country, its entry into force will be as follows:

**Within 12 months:** Antofagasta, Atacama, Valparaíso, Maule, Aysén del General Carlos Ibáñez del Campo, and Magallanes y Antártica Chilena.

**Within 18 months:** Arica y Parinacota, Tarapacá, Coquimbo, Libertador General Bernardo O'Higgins, Ñuble, Bío Bío, La Araucanía, Los Ríos, and Los Lagos.

**Within 24 months:** Región Metropolitana de Santiago.

To read the full text of the reform (available in Spanish), please [click here](#).

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1 UTM: Monthly Tax Unit. The value of one UTM for September 2018 is USD 70 app.

2 UTA: Annual Tax Unit. The value of one UTA for September 2018 is USD 830 app.

3 According to Article 2 of Law No. 20,416 those companies with annual sales that do not exceed USD 990,000 app.

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