

## **SERNAC'S NEW INTERPRETATIVE CIRCULAR ON DISTANCE CONTRACTS DURING THE COVID-19 PANDEMIC**

On April 6, 2020, the National Consumer Service (**SERNAC**) published the "**Interpretative Circular on distance contracts during the COVID-19 pandemic**", which seeks to set general guidelines regarding distance contracting with consumers during the constitutional state of catastrophe due to public calamity.

To safeguard the basic rights embodied in Law No. 19,496 Consumer Protection Act (CPA), the Circular pays special attention to (i) pre-contractual information duties; (ii) the principle of transparency in the provision of information; (iii) formation of consent, and (iv) consumer rights.

### **Pre-contractual information duties**

According to the Circular, suppliers must inform consumers, in a clear, easily accessible manner and prior to the conclusion of a distance contract: (i) the basic commercial information; (ii) the information for the conclusion of the contract, and; (iii) their contact information.

When contracting financial products or services, the obligation to provide a sheet with a standardized summary of the main clauses of the contract must be adapted to the mechanism apply to distance contracts. It is considered a good practice to have pop-up screens that make the summary sheet visible before the financial consumer accepts the electronic contract.

SERNAC considers that the pre-contractual duties may be fulfilled by any technological means or form of remote communication that allows the identity of the consumer to be previously authenticated.

### **Principle of transparency in the provision of information**

This principle is intended to provide the consumer with the necessary tools to make an informed decision when contracting. To this end, it

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requires the supplier to provide truthful and timely information, drafting the terms of the contract in an understandable and legible manner.

### **Formation of consent**

Since the CPA does not provide unified rules on the formation of consent, it is necessary to resort to the rules of the Commercial Code (Articles 97 to 106), always ensuring that the rights of consumers are safeguarded.

On one hand, there must be a serious and complete offer from the supplier and, on the other hand, the consumer's acceptance which must be backed by an adequate provision of information, communicated in a transparent manner. Silence, in accordance to the CPA rules, does not constitute acceptance in acts of consumption.

SERNAC considers that the following technological means or forms of distance communication, among others, are suitable for consumers to express their acceptance:

- Web pages or electronic websites with access through secure secret passwords;
- Telephone communications, prior authentication through secret passwords or other security mechanisms, as long as the consumer consents to their recording;
- E-mails previously granted by the consumer;
- Electronic messaging in general, such as SMS, telephone text messages, Whatsapp or others to the extent that it allows to save and obtain a permanent electronic record, sent to phones previously indicated by the consumer himself;
- Operations through automatic teller machines after entering secure secret passwords;
- Other remote forms using simple or advanced electronic signatures obtained in accordance with Law No. 19,799 and its Regulations and;
- Apps or programs in mobile devices or others that allow to digitally record all the information previously delivered, the unequivocal consent of the consumer and his identity via biometric authentication.

If any of these means are used, the provider needs to have mechanisms in place to support obtaining consent.

A particular situation arises in cases where the legislator has required

formalities for the conclusion of a contract. SERNAC considers it necessary to adopt different criteria according to the particularities of electronic contracting:

•**In the case of contracts requiring a written record**, this requirement shall be deemed to be satisfied if the contract or the information to which it relates is contained and delivered to the consumer in an electronic medium capable of being stored and printed, unless special rules require additional documentary evidence.

•**In the case of contracts requiring a public deed**, this requirement cannot be replaced by any means, despite the limitations on freedom of transit and assembly. This does not preclude the granting of instruments of representation or power of attorney to carry out transactions for the consumer.

Finally, once the contract has been concluded, written confirmation must be sent to the consumer by any means which ensures that he/she is duly and adequately informed.

### **Consumers' rights in electronic contracting**

The Circular refers to various institutions that protect the rights of consumers in the area of electronic contracting, such as:

**4.1 Right of withdrawal:** This allows the consumer to unilaterally terminate contracts concluded by electronic means. Though it is a right which can be expressly excluded by the supplier in advance, its inclusion by suppliers constitutes good practice.

**4.2 Processing of information:** The rules on the protection of personal data set out in Law No. 19.628 must be respected.

**4.3 Prevention of risks of damage to the consumer:** It is required to adopt necessary and appropriate measures to prevent risks, in order to ensure consumer safety in contracting.

**4.4 Unwanted advertising:** Through the "Do Not Disturb" platform consumers can express their wish to be removed from the lists of companies in order not to receive promotions and advertising.

This Circular is already available on SERNAC's website, and can be reviewed at the following [link](#).

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