



Aggressive Practices and Consumer Protection: An Approach from Chilean Law

Las prácticas agresivas y la tutela del consumidor: Una aproximación desde el derecho chileno

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Abstract

The purpose of this article is to address aggressive practices directed at the consumer in Chilean law, formulating a notion of them, systematizing them from the harassment, coercion and undue influence that the provider exerts on the consumer and supporting the applicable protection. To achieve this purpose the dogmatic method and the examination of comparative legal systems that discipline them both in consumer and unfair competition, as well as Law N° 19.496 of the protection of consumer rights (LPC) has been used. The main result is to provide a notion of them, formulate a taxonomy and draw the scope of the protection that the consumer can activate against commercial practices that appear their right to freely choose a good and/or service.

Keywords: *Commercial practices; Aggressive practices; Consumer's freedom choice; Consumer protection.*

Resumen

El presente artículo tiene por propósito abordar las prácticas agresivas dirigidas al consumidor en el derecho chileno, formulando una noción de ellas, sistematizándolas a partir del acoso, coacción e influencia indebida que el proveedor ejerza contra éste y

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estableciendo la tutela aplicable. Para alcanzar dicho propósito se ha empleado el método dogmático y el examen de los ordenamientos jurídicos extranjeros que las disciplinan tanto en sede de consumo como de competencia desleal, así como la Ley N° 19.496 sobre protección de los derechos de los consumidores (LPC) y otras leyes especiales. El resultado principal es proporcionar una noción de ellas, formular una taxonomía y dibujar el alcance de la tutela que puede activar el consumidor frente a prácticas comerciales que afectan su derecho a elegir libremente un bien y/o servicio.

Palabras clave: *Prácticas comerciales; Prácticas agresivas; Libertad de elección; Tutela del Consumidor.*

INTRODUCTION

In recent decades, a prominent sector of national doctrine has focused its efforts on building a protective regime for consumers in various cases. Thus, its protection has been drawn against the violation of the rights set forth in articles 3 and 3 bis of the LPC,¹ its protection has been studied against the breach of pre-contractual duties of information,² the non-conformity through the configuration of the legal guarantee,³ pre-contractual anomalies,⁴ the violation of preventive duties,⁵ defective products,⁶ abusive clauses,⁷ Illegal advertising⁸ and exceptional events.⁹

¹ An analysis in BARRIENTOS ZAMORANO (2013a), pp. 87-93, BARRIENTOS ZAMORANO (2013b), pp. 94-103, BARRIENTOS ZAMORANO (2013c), pp. 104-108, CORRAL (2013a), pp. 104-108, CORRAL (2013b), pp. 109-116, CONTARDO (2013), pp. 117-132, ESPADA (2013), pp. 133-139, SAN MARTÍN (2013), pp. 140-150, PRADO (2013), pp. 151-165 and PINOCHET (2013), pp. 166-182 and BRANTT & MEJÍAS (2013), pp. 183-189.

² DE LA MAZA (2010), pp. 21-52.

³ BARRIENTOS (2016).

⁴ LÓPEZ (2019), pp. 399-425.

⁵ ISLER (2021).

⁶ CORRAL (2011) and ISLER (2013).

⁷ MORALES (2018) and CAMPOS (2019).

⁸ LÓPEZ & DE LA MAZA (2022)

⁹ ISLER (2022).

But nothing has been said, so far, in consumer law¹⁰ about aggressive commercial practices aimed at consumers, given that this is a serious attack on their freedom of choice of good or service enshrined in article 3 letter a) of the LPC as a right of consumers and that Law 21,320 of April 20th, 2021 - which amended the LPC in matters of judicial collection and other consumer rights - incorporated to article 37 a paragraph eleventh expressly repudiating them in the case of extrajudicial collection.

The only dogmatic approach has been in relation to a type of these practices, which is aggressive advertising, whose origin is based on the right to free choice of the good or service, on the *alterum non laedere* enshrined in article 2314 of the Civil Code, in articles 17F on unsolicited deliveries and 17H letter a) on tied sales of said law, in article 28B which rejects annoying or coercive advertising, in article 55 numeral 2 of Law 21,430 regarding advertising directed to children and adolescents and in the proscription of psychological force when entering into acts or contracts contained in articles 1456 and 1457 of the Civil Code.¹¹

SERNAC - although has not expressly repudiated these practices in the Interpretative Letter on Advertising and Commercial Practices of February the 28th, 2022¹²- implemented in 2013 the "DO NOT DISTURB" Platform aimed at denouncing annoying advertising, allowing consumers to request the blocking of calls, emails and whatsapp messages, whose normative recognition is found in the Regulation governing the Do Not Disturb or Antispam System, approved by Decree 62 of February 13th, 2020 and which replicates the so-called NO DISTURBING ROUTE, referred to in said platform.

However, as we will examine in this paper, aggressive commercial practices are not only found in commercial advertising, but also in other commercial activities where the supplier, through harassment, coercion and undue influence, violates the consumer's freedom of choice regarding the purchase of a certain good and/or the contracting of a specific service.

Our purpose is then to show that although the legislator does not expressly repudiate them in general terms, as it happens with abusive clauses or misleading advertising, but specifically in the case of extrajudicial collection, it is possible to organize them, systematize them and draw the protection that must be provided to the consumer when they occur based on an interpretation of certain rules contained in the LPC and in special laws.

To achieve this, we will divide this article into two sections. In the first, we will approach these commercial practices dogmatically, identifying their elements, drawing

¹⁰ Unlike what has happened in the case of unfair competition, in which the need to configure them and to build the protection of the injured competitor has become evident. (LÓPEZ (2022b).

¹¹ LÓPEZ (2022a), pp. 170-175.

¹² Approved by Exempt Resolution 176 and available at https://www.sernac.cl/portal/618/articulos-65391_archivo_01.pdf.

up a typology and arriving at a notion of them (I). In the second, we will analyze them in Chilean consumer law and establish the protection to be granted to the consumer according to the practice in question. (II) Once these topics have been examined, conclusions will be drawn.

Before we begin, just two clarifications. According to Article 2(d) of Directive 2005/29/EC of the European Parliament and of the Council of May 11th 2005 concerning unfair business-to-consumer commercial practices in the internal market, "commercial practices" means "any act, omission, conduct, statement or commercial communication, including advertising and marketing, by a trader, directly related to the promotion, sale or supply of a product to consumers", regardless of whether it is carried out before, during or after a commercial transaction", so that they can take place during the pre-contractual, contractual and post-contractual phase. And by "consumer" not only the physical and legal consumer but also the *prosumer*, that is, the individual who is both producer and consumer at the same time, since he not only creates goods and services for his own benefit, but also offers and shares them globally, without being a habitual consumer.¹³

I. AGGRESSIVE PRACTICES AIMED AT CONSUMERS: AN INFRINGEMENT ON THEIR FREEDOM OF CHOICE

A review of foreign legal systems reveals that the legislator has proscribed so-called aggressive practices by defining and systematizing them in terms of consumer law or unfair competition, since any infringement of the consumer's freedom of choice by a supplier will have a negative impact on its competitors, since it will constitute an illegitimate way of distracting their clientele.

The first legal precedent for these practices is Directive 2005/29/EC of the European Parliament and of the Council of May 11th 2005 concerning unfair business-to-consumer commercial practices in the internal market, whose Article 8 defines them as "those which, in their factual context, considering all their characteristics and circumstances, impair or are likely to impair the average consumer's freedom of choice, significantly - by harassment, coercion, including the use of force, or undue influence - in relation to the product and thereby causes or is likely to cause him to take a transactional decision that he would not have taken otherwise."¹⁴

¹³ Acronym formed by the word *consumer and producer*. A distinction is made between the *prosumer* proper is a consumer who is very active in social networks and forums; the *crossuser* is even more involved and his opinion is more critical; and, finally, the *fansuser* is a fan of the brand and does not have an objective opinion of it See BROWNA *et al.* (2019), KOTLER (1986), pp. 510-513, ISLAS (2010), pp. 43-64. The broad interpretation given by the national doctrine of the legal notion of consumer would allow to qualify the *prosumer* as such (For all, BARRIENTOS (2019), pp. 6-18).

¹⁴ It amends Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European

This Directive has been transposed into certain European legal systems that have regulated these practices in the field of consumer law and unfair competition, in accordance with the obligation imposed on them by European Union law to carry out such transposition. The first group includes articles L121-6 and L121-7 of the *Code de la Consommation* and articles 20, 24, 25 and 26 of the *Codice de Consumo* (Consumer Code). In the second, meanwhile, is Law 3/1991 of January 10, 1991 on unfair competition in Spain, amended especially for this purpose in 2009.

A similar interest in regulating them can be seen exceptionally in certain Latin American legal systems. Such is the case of article 27 paragraph 10 of the Organic Law on Regulation and Control of Market Power of October 2011 in Ecuador, article 58 of the Peruvian Consumer Protection and Defense Code (Law 29,571) of 2010 and article 1099 of the Argentine Civil and Commercial Code, which we will examine in the next section. This reality contrasts with that of Brazil, Mexico, Colombia and Chile, notwithstanding that in these cases the regulatory basis of these practices can be traced back to constitutional provisions or to articles contained in the Law on Unfair Competition or Consumer Protection.¹⁵

A review and analysis of all these regulations will allow us to achieve the first objective of this research, i.e., to configure the aggressive practices aimed at the consumer, develop a notion of them, identify their elements, refer to a typology and establish consumer protection against them, a challenge that we take on in the following section.

1.1. Notion of aggressive practices directed at the consumer

It could be thought that the notion of aggressive practices contained in Directive 2005/29/EC has been reproduced in the same terms by the different regulations referred to above. But in fact, this notion has been perfected by subsequent regulations that added elements not contained in said Directive, a fact that makes it advisable to review it.

Article 8 of the Directive defines aggressive practices as those "which, in their factual context, taking into account all their characteristics and circumstances, significantly impair or are likely to significantly impair, by harassment, coercion - including the use of force, or undue influence - the average consumer's freedom of

Parliament and of the Council. This Directive considers as unfair practices those misleading practices that comply with the requirements of articles 6 and 7 that discipline misleading and aggressive actions and omissions that comply with the provisions of articles 8 and 9.

¹⁵ Indeed, in Argentine law, article 42 of the Constitution is relevant, which establishes the right to freedom of choice for consumers; in Brazil, article 195 III of Law 9,279 on Unfair Competition; in Mexico, articles 1 VII and 10 of the Federal Consumer Protection Law of 1992; and in Colombia, its proscription can be traced to article 7, which regulates the general prohibitive clause on unfair competition.

choice or conduct regarding the product and, thereby, cause or are likely to cause him to take a transactional decision that he would not have taken otherwise".

In line with this concept, Annex I of the Directive states that the following are aggressive commercial practices: (a) creating the impression that the consumer cannot leave the premises until the contract has been concluded; (b) making personal visits to the consumer's home, ignoring requests by the consumer that the trader leave or not return, except in the circumstances and to the extent justified under national law for the purpose of enforcing a contractual obligation; (c) make unrequested and persistent offers by telephone, fax, e-mail or other remote means, unless in the circumstances and to the extent justified, under national law, to enforce a contractual obligation; (d) requiring a consumer who wishes to claim compensation under an insurance policy to produce documents that cannot reasonably be considered relevant to determining the validity of the claim, or systematically leaving unanswered correspondence on the matter, in order to dissuade the consumer from exercising his contractual rights; (e) including in an advertisement a direct exhortation to children to buy or persuade their parents or other adults to buy the advertised products; (f) requiring immediate or deferred payment, return or safekeeping of products supplied by the trader, but not ordered by the consumer (unsolicited supply), except where the product in question is a replacement product supplied in accordance with Article 7(3) of Directive 97/7/EC; (g) expressly informing the consumer that the trader's job or living is at risk if the consumer does not purchase the product or service; (h) creating the false impression that the consumer has won, will win, or will get a prize or any other equivalent advantage, if he performs a certain act when in fact there is no such prize or equivalent advantage, or the performance of an action related to obtaining the prize or advantage is subject to the consumer's obligation to make a payment or incur an expense.

Article 8.1 of the Spanish Law 3/1991 of January 10th on Unfair Competition (LCD), amended to that effect in 2009, has also taken on the challenge of defining unfair competition, departing slightly from the notion of the Directive. Thus, it understands as such "any behavior that, considering its characteristics and circumstances, is likely to significantly impair, through harassment, coercion, including the use of force, or undue influence, the freedom of choice or conduct of the recipient in relation to the good or service and, consequently, affects or is likely to affect his economic behavior"¹⁶.

Following the legislative technique of Directive 2005/29, it reproduces the catalog of aggressive practices contained in Annex I between articles 28 and 31, adding in the latter article "unsolicited visits made by the entrepreneur to the consumer or user's home or excursions organized by him with the purpose or effect of promoting or selling goods or services, if they do not respect the terms of the restrictions established under

¹⁶ In effect, it replaces "practice" with "behavior", "average consumer" with "recipient", "good or service" with "product".

article 19.7 of the consolidated text of the General Law for the Defense of Consumers and Users and other complementary laws".

The same applies to article 24 of the Consumer *Codice*, which states that a commercial practice is considered aggressive if, in the specific case and considering all the characteristics and circumstances of the case, "by means of harassment, coercion, including the use of physical force or undue conditioning, it limits or is suitable to limit considerably the freedom of choice or behavior of the average consumer in relation to the product and, therefore, induces or is capable of inducing him to take a decision of a commercial nature that he would not otherwise have taken". Hence, Article 26 of the Italian Consumer Code reproduces as a list of aggressive practices the one set forth in Annex I of Directive 2005/29/EC, which we have reproduced above.

The definitions in Latin American regulations are similar. This is evidenced by the Ecuadorian Organic Law on Regulation and Control of Market Power, article 27, paragraph 10 of which qualifies as unfair aggressive practices of harassment, coercion and undue influence against consumers and considers as such: (a) taking advantage of the consumer's weakness or lack of knowledge; (b) harassment by practices aimed at exhausting the consumer; (c) hindering the termination of the contract by the end user by forcing him to follow long and/or complicated procedures; (d) threatening legal action when there is no basis for such action; and (e) the subscription of adhesion contracts that harm the rights of users and consumers, as mandated by law.

A similar notion is contained in Article 58 of the Peruvian Consumer Protection and Defense Code, since it establishes that the right of all consumers to protection against aggressive or misleading commercial methods implies that suppliers may not carry out "practices that significantly undermine the consumer's freedom of choice through figures such as harassment, coercion, undue influence or fraud". Likewise, it contemplates as such the practices indicated in paragraphs a), b) and c) of Annex I of Directive 2005/29 and adds (i) the change of the information originally provided to the consumer at the time of entering into the contract, without the express and informed consent of the consumer, (ii) the change of the conditions of the product or service prior to the conclusion of the contract, without the express and informed consent of the consumer, (iii) the provision of telemarketing services, (iii) providing telemarketing services to all those telephone numbers and e-mail addresses that have been included in the registry implemented by INDECOPI (National Institute for the Defense of Competition and Protection of Intellectual Property) to register consumers who do not wish to be subject to the modalities of telephone promotion and text messaging, and (iv) any practice involving fraud, violence or intimidation that has been a determining factor in the will to contract or in the consent of the consumer.

The case of article L121-6 of the Code de la *Consommation* is different, since it formulates a broader notion than the regulations we have reviewed, incorporating, on the one hand, the vice of the consumer's consent - given that this may be a consequence of the alteration of his freedom of choice - and, on the other hand, the restriction of the exercise of his contractual rights. Indeed, it provides that "a commercial practice is

aggressive when, as a result of repeated and insistent requests or the use of physical or moral restraints and having regard to the circumstances surrounding it: 1. it significantly alters or is likely to significantly alter a consumer's freedom of choice; 2. it vitiates or is likely to vitiate a consumer's consent; 3. it hinders the exercise of the consumer's contractual rights".

Article L121-7 reproduces almost entirely the catalog of practices of Directive 2005/29, excluding only that contained in paragraph f) above, i.e. requiring immediate or deferred payment, return or safekeeping of products supplied by the trader, but not requested by the consumer (unsolicited supply).

However, a closer analysis shows that the notion of the Code de la *Consommation* ratifies that these practices effectively take place when they impair or have the potential to impair the consumer's freedom of choice in any way -whether through coercion, harassment or undue influence- without necessarily vitiating his consent or hindering the exercise of his contractual rights, among which would be the free repair of the good, its replacement, the return of the amount paid and compensation for damages.

They are subsumed, then, in a broader type of commercial practices expressly recognized in articles 1099 and 1099 of the Argentine Civil and Commercial Code, which are abusive practices, that is, those that affect the dignity of the consumer and, therefore, require that they be treated in a non-discriminatory and dignified manner, as well as guaranteeing their freedom of contract¹⁷, which are beyond the scope of this research, but which, like the species we are exploring, are illicit.

1.2. Requirements or factors that must constitute an aggressive consumer practice

Before examining the requirements that must be met for a practice to be aggressive towards the consumer, it should be noted that they can occur during the pre-contractual, contractual and post-contractual phase¹⁸. i.e. before, during or after a commercial transaction. Indeed, in the contract formation stage, the consumer may be exposed to aggressive advertising through harassment, coercion or undue influence by means of telephone calls, mailing and spamming¹⁹; in the contractual stage, the adhesion to an abusive clause, i.e. one containing a significant imbalance between the rights and obligations of the parties in breach of good faith or commercial practices²⁰, may sometimes be explained by an imposition resulting from coercion, harassment and

¹⁷ On such practices in the code, see KEMELMAJER (2015), pp. 105-134.

¹⁸ A detailed analysis in AGUILAR (2020), pp. 97-103.

¹⁹ On this topic LÓPEZ (2022a), pp. 163-191.

²⁰ This is the notion generally coined in the different legal systems. A review in MORALES (2022).

undue influence by the supplier;²¹ and finally, in the post-contractual phase, the consumer may be induced to take an economic decision that he would not have taken otherwise, such as, for example, a repair of durable goods that do not require repair.²²

The common requirements that can be seen in all the regulations reviewed are at least two that have been expressly included in articles 8.1 of the Spanish LCD, L121-7 of the *Code de la Consommation* and 58 of the Peruvian Code of Consumer Protection and Defense. These are: (i) the affectation of the consumer's freedom of choice that alters or may alter his economic behavior and (ii) harassment, coercion and undue influence as mechanisms for altering such behavior²³. In this order we will examine them in the following section.

1.2.1. The impairment of the consumer's freedom of choice that significantly alters or is likely to significantly alter his economic behavior.

This first element consists of impairing the consumer's right to freely choose the good or service that alters his *economic behavior* or has the potential to alter it significantly in any of the phases of his contractual relationship with the supplier.

Therefore, it includes the consumer's decision to select an offer or provider, the contracting of a good or service, the determination of the manner and conditions in which he will contract it, the payment of the total or partial price or other form of payment, the conservation of a good or service and the exercise of the contractual rights in relation to them.²⁴ Of particular relevance is the pre-contractual phase and aggressive advertising aimed at altering the consumer's economic behavior, particularly annoying or harassing advertising, a type of aggressive advertising to which we will return later.²⁵

The requirement of alteration of their economic behavior is contained in Article 2 e) of Directive 2005/29 and stated as "materially distort the economic behavior of consumers", meaning "to use a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not otherwise have taken".

What is required is that there is a decisive imbalance (significant alteration) in the rationality that should govern the autonomy of the consumer's will, modifying his discernment and his volitive capacity to make a decision in the market, affecting his

²¹ AGUILAR (2020), p. 101

²² Regarding the configuration of this phase BRANTT-MEJÍAS (2022), pp. 1-21.

²³ AGUILAR (2020), p. 91 and GONZÁLEZ (2019), p. 86. In unfair competition, the duty of care of the competitor is added (considered only in article 5 of the Directive and 20.2 of the Italian Consumer Code).

²⁴ AGUILAR (2020), pp. 93 and 94 and GONZÁLEZ (2019), p. 86.

²⁵ On this topic in our doctrine LÓPEZ (2022a), pp. 163-191.

motivation, perception, beliefs, attitudes and lifestyles.²⁶ In this way, a *de minimis* rule is established below which the supplier's conduct will not be relevant, since it is not objectively suitable to alter the consumer's economic decision and, therefore, the law should not correct it.²⁷

The consequence of the significant alteration of the consumer's economic behavior will be that the aggressive practice will eventually vitiate his consent or hinder the exercise of his contractual rights and the way to achieve this, as indicated in the regulations referred to above, is harassment, coercion and undue influence. It is convenient, then, to explore what they consist of in order to determine in which cases such alteration takes place.

1.2.2. Coercion, harassment and undue influence as mechanisms of alteration of the consumer's economic behavior.

This second element is inferred from the aforementioned Article 8 of Directive 2005/29, which defines aggressive practices and implies a certain action of the supplier on the consumer and, depending on the consumer's perception in the specific case, may be classified as coercion, harassment or undue influence.²⁸

A first issue to be clarified is that, as we mentioned at the beginning of this research, Directive 2005/29 in its Article 9, whose wording is replicated by Article 8.2 of the Spanish LCD and Article 25 of the *Codice de Consumo*, refers to several elements that must be considered when determining whether there has been harassment, coercion or undue influence. Such are: (a) the time and place in which it occurs, its nature and persistence; (b) the use of threatening or insulting language or behavior; (c) the exploitation by the entrepreneur or professional of any misfortune or circumstance of which he is aware, sufficiently serious to impair the recipient's capacity of discernment and influence his decision with respect to the good or service; d) any onerous or disproportionate non-contractual obstacle imposed by the entrepreneur or professional when the other party wishes to exercise legal or contractual rights, including any form of terminating the contract or changing the good or service; and e) the threat to exercise any action that cannot legally be challenged.

The different regulations that we have examined recognize these three modalities, establishing a list of practices that are considered aggressive which, given the notion that they coin of them, becomes exemplary. But they do not define them, to which is added the fact that, on occasions, such modalities of aggressiveness may be confused

²⁶ AGUILAR (2020), pp. 94 and 122.

²⁷ similar reflection in the unfair competition venue GONZÁLEZ (2019), pp. 86 and 87.

²⁸ This typology has been stated in doctrine by AGUILAR (2020), pp. 116-134 and GONZÁLEZ (2019), pp. 87-122.

or overlap, a finding that justifies examining them separately in order to arrive at a notion of harassment, coercion and undue influence and a catalog of each of these modalities of aggressiveness.

a. Coercion as a modality of aggressiveness.

Coercion consists of a threat or verbal pressure or physical coercion that generates in the consumer a psychological reaction that determines that he acquires a product or contracts a service that he would not have acquired, which may be exercised in a violent or intimidating manner. As Aguilar points out, physical or psychological pressure may develop in various degrees, but in all cases it reflects an alteration of the consumer's freedom, affecting the contractual balance and the prohibition of market abuse.²⁹ The use of threatening language or behavior and the threat of filing legally improper actions will be decisive in determining whether the coercion has been verified.

Hence, it is held that coercion will exist if a material or immaterial damage is caused or threatened to be caused to the consumer, through physical or any other kind of force, generating in the consumer the expectation that such celebration will lead to the cessation of such threat or the obtaining of a real benefit.³⁰

Think of the businessman who offers a childcare service to his customers while they shop at his business premises, preventing them from taking their children if they do not make a purchase; of the mechanic who threatens the owner of the car he has repaired not to deliver it to him if he does not pay the amount demanded for the repair, which exceeds the amount initially agreed; or of the businessman who provides the consumer with the means of transportation to reach his facilities, but refuses to return him to his place of origin if he does not buy the product he is offered.³¹

The same happens in the sale of apartments under the modality of time sharing if there is psychological pressure disguised as technical advice and consumers have been lured to the meeting under the promise of an attractive gift. A similar situation arises if a trader threatens a consumer to force his freedom of choice by creating in him the well-founded fear that if he does not give in to these commercial proposals he will have serious consequences on his private sphere or that other subjects linked to him by a kinship or other special bond will experience such consequences.

These last two cases are contemplated in Annex I of the 2005 Directive, in articles 26 of the Italian Consumer Code, 28 and 31 of the Spanish LCD, L121-7 of the French Consumer Code and 58 of the Peruvian Consumer Protection and Defense Code in the following terms: "creating the impression that the consumer cannot leave the premises

²⁹ AGUILAR (2020), pp. 116 and 120.

³⁰ MASSAGUER (2010), p. 28 and VILAJOANA (2011), p. 103.

³¹ Examples referred to by GONZÁLEZ (2019), p. 101.

until the contract is completed" and "the performance of an action related to obtaining the prize or advantage is subject to the obligation, on the part of the consumer, to make a payment or incur an expense".³²

But these are not the only cases. Such regulations also typify as aggressive practices by coercion, as the case may be, the following: (a) requiring a consumer who wishes to claim compensation under an insurance policy to submit documents that cannot reasonably be considered relevant to determine the validity of the claim or systematically leaving correspondence in this regard unanswered, in order to dissuade him from exercising his contractual rights; (b) expressly informing the consumer that the trader's job or livelihood is at risk if the consumer does not purchase the product or service and; (c) threatening legal action when there is no basis for legal action.³³

In our law, coercion of the consumer is not expressly established as a specific unlawful act, but this does not preclude that, if it occurs, it may be attempted to be configured as an attack on the freedom of choice of the consumer as defined in letter a) of article 3 of the LPC or if this is serious, unfair and determining, in the terms of articles 1456 and 1457 of the Civil Code, to be redirected to moral force as a vice of the consumer's consent and to challenge the nullity of the contract entered into because of it. We will return to this point.

b. Harassment as a form of aggressiveness

With regard to *harassment*, this takes place if the potential purchaser of a product is pressured, pursued, harassed or inconvenienced, in order to obtain the decision to purchase or the choice of a product or service, the latter agreeing to escape from the discomfort caused by the situation created by the offeror, without reflecting carefully on the need or convenience of such transaction.³⁴

The aim is to prevent the consumer from being forced to make an unthinking decision on a given commercial transaction, either through physical contact with the recipient or simply circumstantially in a hostile or humiliating scenario in which he has no alternative but to accept the commercial offer because of the physical or moral

³² This hypothesis is stated together with "creating the false impression that the consumer has won, will win, or will get if he performs a certain act, a prize or any other equivalent advantage, when in fact there is no such prize or equivalent advantage", intermingling a possible coercion with the supplier's fraudulent intent.

³³ An analysis of the regulation of these practices in Spanish and Italian law can be found at GONZÁLEZ (2019), pp. 101-111.

³⁴ MASSAGUER (2010), p. 27, VILAJOANA (2011), p. 100 and MARTÍNEZ et al. (2015), p. 148.

difficulty in which he finds himself in having to reject it or because of the lack of due reflection as a result of the harassment.³⁵

Annex I of Directive 2005/29 covers aggressive harassment practices, distinguishing between harassment in doorstep sales and harassment by unwanted and repeated telephone solicitations. It defines as such: a) making personal visits to the consumer's home (door-to-door sales), ignoring the consumer's requests for the trader to leave his home or not to return, except in the circumstances and to the extent justified under national law to enforce a contractual obligation and b) making unsolicited and persistent overtures by telephone, fax, e-mail or other means at a distance, except in the circumstances and to the extent justified under national law to enforce a contractual obligation.

In this last hypothesis can be verified the massive and repeated sending of unwanted commercial advertising, regardless of whether it is direct marketing, telemarketing or advertisements, which has come to be known as *nuisance or harassment advertising*, which becomes unlawful precisely because it has the ability to impair the consumer's freedom of choice, causing him to take a consumer decision that he would not otherwise have taken.³⁶ Cookies are particularly relevant for this purpose, since they involve the identification of computers that allow access to online information in order to define the profile of consumers and decide on the advertising that will be sent to them.

Annex I repudiates these practices in the first case because they are particularly invasive or annoying strategies; in the second, meanwhile, it rejects them because they enable the entrepreneur to significantly alter the economic behavior of the average consumer who accesses commercial offers without consciously assessing their relevance. The Spanish LCD replicates these assumptions in its article 29, adding that the businessman must use in these communications systems that allow the consumer to record his opposition to continue receiving commercial proposals and that if they are made by telephone, the calls must be made from an identifiable telephone number.³⁷

On the other hand, Annex I of Directive 2005/29 and Article 31.2 of the Spanish LCD consider as aggressive by harassment that practice which consists of "demanding immediate or deferred payment, return or custody of products supplied by the trader, but which have not been requested by the consumer (unsolicited supply), except when the product in question is a replacement product supplied in accordance with Article 7.3 of Directive 97/7/EC".

The Latin American regulations expand the catalog of aggressive practices provided for by the Directive and the Spanish LCD. Indeed, article 27 numeral 10 of the Organic Law of Regulation and Control of Market Power of Ecuador qualifies as

³⁵ GONZÁLEZ (2019), p. 89.

³⁶ About this unlawful advertising LÓPEZ (2022a), pp. 163-191.

³⁷ An analysis of this article in AGUILAR (2020), pp. 122-129 and GONZÁLEZ (2019), pp. 89-99.

aggressive a) harassment by practices aimed at consumer attrition and b) hindering the termination of the contract by the end user by forcing him to follow long and/or complicated procedures. For its part, Article 58 of the Peruvian Consumer Protection and Defense Code contemplates the practices indicated in paragraphs a), b) and c) of Annex I of the Directive and adds "any practice involving fraud, violence or intimidation that has been decisive in the will to contract or in the consent of the consumer".

Well, it is clear from all of them that the *persistence* of the aggressive practice despite the opposition expressed by the consumer, as well as the place, the time and the recipients of the harassment, will be decisive for it to be verified. Consider if the harassment occurs in the workplace or at home through frequent visits, late-night telephone calls or taking advantage of unfortunate situations (such as an accident, theft or death of a person) in which funeral services are offered and the recipient is not in a position to assess his decision with careful thought and/or is an elderly person, a child or adolescent (NNA, by its Spanish acronym) or a sick person.³⁸ The nature of the practice and the use of aggressive language or vulgar or strictly confidential expressions in the sense of sending unsolicited information or activating an unsolicited service, even if it is free of charge, shall also be considered as such.³⁹

c. *Undue influence as a form of aggressiveness*

The last type of aggressiveness is *undue influence*, which has been expressly defined by Directive 2005/29/EC and by the Spanish LCD. The first of these regulations defines it in Article 2 letter j) as "use of a position of power in relation to the consumer to exert pressure, even without using physical force or threatening to use it, in a way that significantly limits the consumer's ability to make an informed decision". The second, meanwhile, in its article 8.2 understands as such "the use of a position of power in relation to the recipient of the practice to exert pressure, even without using physical force or threatening to use it".

It consists, then, of an abuse by the professional who takes advantage of his position of power in relation to the consumer and of the economic or psychological dependence in which the latter finds himself. Hence Gonzalez⁴⁰ states that for undue influence to be established, it is required, on the one hand, the position of power of the agent of the commercial practice with respect to the consumer and, on the other hand, the exploitation of that situation of subordination or vulnerability by such agent. In a similar direction, Barros has held that for it to be verified it is required that (i) the victim is in a physical or psychological situation that makes it susceptible to influence, (ii)

³⁸ MASSAGUER (2010), p. 27 and GONZÁLEZ (2019), p. 91.

³⁹ AGUILAR (2020), p. 125.

⁴⁰ GONZÁLEZ (2019), pp. 114-120.

opportunity to exercise such influence, (iii) there is an intention to influence the counterparty and (ii) what is consented to in such circumstances reveals an abnormal or suspicious agreement.⁴¹

The basis of this figure of Anglo-Saxon origin⁴² has been based on the repudiation of malicious exploitation, on the protection of the victim against fraud, on the principle of public policy that ensures that the contracting party acts spontaneously and on the protection of the relationship between the contracting parties. A distinction has also been made between *undue influence* and *presumed influence*. The former requires the plaintiff to prove that the agent used undue influence over him for the purpose of concluding the legal transaction being challenged; the latter, on the other hand, only exists if it is proven that there is a relationship of influence between the contracting parties and the transaction carried out requires an explanation,⁴³ unless the alleged beneficiary proves that the other contracting party entered into the business after free and informed reflection. But, whatever the type of undue influence, it differs from *duress* (illegitimate pressure), in at least two aspects: a) it does not require pressure or threats, since a relationship between two persons in which one of them acquires a notable influence or ascendancy over the other is sufficient, and b) if there is pressure, it is not required that it be unlawful but intolerable or disproportionate.⁴⁴

Therefore, it may be a relationship of subordination, dependence or of another extraordinary nature that places the recipient of the aggressive practice in a special position of vulnerability or allegiance with the agent, beyond an employment relationship (worker-employer), family (parents with their children and older siblings with the younger ones) or teaching relationship (teacher-pupil), adding, in addition, that in which there is a marked asymmetry between them. Think of the supplier who markets a financial product contrary to the interests of the consumer in need of financing; of the doctor who recommends a very expensive drug to a patient motivated by the incentives promised by the pharmaceutical company when he can prescribe another of lesser value; of the locksmith who, taking advantage of a recent theft from the consumer and of his expertise in installing a new lock, demands an exorbitant amount of money for the provision of his services; in the *influencer* who takes advantage of his position of power to illegitimately divert the consumer's economic preferences for the benefit of the brand he advertises; or in advertising directed at children and adolescents if trustworthy

⁴¹ BARROS (2017), pp. 300-302.

⁴² BIRKS (1995), pp. 72-79.

⁴³ This is the case when the vulnerable contracting party is exposed to an unreasonable risk as a consequence of the transaction; when the benefit granted to the benefited contracting party is disproportionate, even though there is a reason for the conclusion of the transaction; when the disadvantage extends to the vulnerable party; and when the advantage for the benefited contracting party is not substantial. (INFANTE (2022), pp. 82-84).

⁴⁴ An analysis of these topics in INFANTE (2022), pp. 45-46, 55-64 y 72-91. Some of these examples have been cited by BARROS (2017), pp. 300-302.

characters are used, taking advantage of their credulity or if they are directly exhorted through advertising to purchase goods, use services or convince their parents or other adults to hire them.⁴⁵

The only normative allusions to undue influence as a modality of aggressiveness are found, on the one hand, in Annex I of Directive 2005/29 and in article 30 of the Spanish LCD and, on the other hand, in article 27 numeral 10 of the Organic Law of Regulation and Control of Market Power of Ecuador.

The first hypothesis is more specific and is contemplated in paragraph e) of Annex I of the Directive, which refers to "including in an advertisement a direct exhortation to children to buy or convince their parents or other adults to buy the advertised products". The prohibition is twofold, since, on the one hand, it refers to the use of characters, idols, prescribers or *influencers* who constitute a reference for minors and arouse their confidence and, on the other, to their harassing parents or adults for the purchase of products. Therefore, "advertising with NNA" and "advertising directed to NNA" are repudiated.⁴⁶

For its part, Article 27, paragraph 10 of the Organic Law of Regulation and Control of Market Power of Ecuador contemplates a more general assumption, which is the taking advantage of the weakness or ignorance of the consumer. This formula is broad, since it includes not only ignorance but also abuse of weakness, trust or dependence.

Comparative doctrine has added two practices that are not found in these regulations, namely *bundling and tying*⁴⁷, to the extent that the offer includes a product that has little outlet, unnecessary for the buyer and that if the offer did not include the better conditions of the joint purchase with respect to the separate one, it would not have taken place.

Bundling or joint sales occur when two or more products are packaged together (a car with accessories, a vacation package including airfare, hotel and car, or cable TV including flat rate and specialized channels) at a certain price, cheaper than the cost of buying the products separately.

Tying consists of making the sale of one product conditional on the purchase of another without there being any objective link between the products by their nature or commercial use. This practice is used in the case of staple products, since the consumer is guided by the price of the products and not by their quality. We will return to this case when examining the cases of aggressive practices in the CPL.

⁴⁵ GONZÁLEZ (2019), pp. 116-117.

⁴⁶ About both advertisements LÓPEZ (2019), LÓPEZ (2022c), pp. 157-161 and LÓPEZ (2023).

⁴⁷ AGUILAR (2020), pp. 132-135.

2. Consumer protection against aggressive practices

A review of the laws regulating aggressive practices reveals, as noted above, that they are regulated in the field of consumption and unfair competition, so that their repudiation is intended to protect the consumer directly or as a reflex consequence of the protection of the competitor.

The protection of the competitor is limited to the possibility of filing an action for the cessation of the act or prohibition of its future repetition, the action for the removal of the effects of the unfair conduct and the compensation for damages. This plurality of civil actions is evident in those legal systems that regulate these practices in terms of unfair competition. Such is the case of article 32 of the Spanish LCD and articles 72 and 73 of the Ecuadorian Organic Law of Regulation and Control of Market Power.

It is clear that through such actions the competitor is protected, avoiding the illegitimate distraction of its clientele, but they also guarantee the freedom of choice of the good or service of the consumer, since the latter is the addressee of the aggressive practices of the supplier. Hence, it can be argued that such mechanisms integrate the protection of the consumer in a broad sense and operate obliquely with respect to him.

The direct protection of the consumer, on the other hand, must be sought in the consumer statutes. Article 27, paragraph 8 of the *Codice* de Consumo provides for the cessation of the act or the prohibition of the act and correction, while paragraph 15 bis provides for compensation for the damage caused and, where appropriate, a reduction of the price and termination of the contract. In the case of the Code de la *Consommation*, article L132-10 states that the contract concluded as a consequence of the aggressive practices mentioned in articles L 121-6 and L 121-7 is null and void.

The wording of this rule is curious if one considers that it is a consumer statute that should refer to the general system of consumer protection, which certainly includes nullity - as in the case of unfair terms - especially in the case we have been reviewing in which coercion or undue influence (if it is attributable to force and fraud) vitiate the consumer's consent. But it should not be exhausted in it. In fact, systems of protection such as ours, contemplated in the second paragraph of article 50 of the LPC, allude to the possibility of obtaining the performance of the unfulfilled obligation, to make the act that affects the exercise of the consumer's rights cease and to obtain the due compensation or the corresponding reparation, the latter being understood as the species of reparation in natura, such as the removal of the effects of the act or correction. We will return to this point when addressing consumer protection in Chilean law.

II. AGGRESSIVE PRACTICES IN CHILEAN LAW: DOGMATIC FORMULATION AND CONSUMER PROTECTION

Once the notion, typology and modalities of aggressive practices have been established, it is worth asking whether the repudiation of them finds any normative

support in Chilean law and, if so, what would be the protection that the consumer could activate against them.

Well, as we anticipated, they are not disciplined either in the LPC, in the Commercial Code or in a special law designed for this purpose, as is the case with the legal systems we examined in the previous section. Consequently, it could be thought that, in the absence of express regulation, our legislator does not proscribe these practices.

However, a careful review of the LPC, of Laws No. 19.925 on the sale and consumption of alcoholic beverages, 20.606 on the nutritional composition of food and its advertising, 20.869 on food advertising and 21.430 on guarantees and comprehensive protection of the rights of children and adolescents shows, as we will see in the following lines, two issues. The first is that it is possible to repudiate these practices in the consumer venue, even in the case of undue influence. The second is that the protection that the consumer can activate against them can be articulated on the basis of such normative bodies, approaching that which is contemplated in the foreign regulations examined.

2.1 The basis of the prohibition of aggressive practices in Chilean consumer law: The consumer's freedom of choice and its normative manifestations

As is widely known, one of the rights enshrined in Article 3 of the LPC in its paragraph a) is the free choice of goods and services of the consumer. This right, as we have referred to in the preceding sections, is violated when the supplier carries out aggressive practices with respect to the consumer, since they, through harassment, coercion and undue influence, alter or have the potential to alter his freedom and lead him to adopt an economic decision that otherwise he would not have adopted.

Therefore, the normative basis for the repudiation of these practices in our legal system can be found in this consumer right and in its specific normative manifestations contained in the LPC with respect to coercion and harassment and in Laws 19.925, 20.606, 20.189 and 21.430 with respect to undue influence.

In the first group are the rules relating to tied sales, unsolicited shipments, and extrajudicial collection regulated, respectively, in articles 17F, 17H, 28 and 37 of the LPC. In the second group are articles 40 Ter of Law 19.925, 6 and 8 of Law 20.606, 1 of Law 20.189 and 55 numeral 6 and 7 of Law 21.430, which contemplate cases of undue influence. We shall examine them in the same order.

2.1.1. Article 3 a) of the CPL: the consumer's right to freedom of choice

This right of the consumer to "free choice of the good or service" emanates from the principle of contractual freedom that is based on articles 19 No. 21 (freedom to

develop any economic activity) and No. 23 (freedom to acquire all types of goods) of the Political Constitution of the Republic.

The reliable history of the establishment of article 3 letter a) of the LPC reveals that in the original message this right was contained in article 4 letter a) as the "right to a free choice of the good or service to be consumed among the goods and services existing in the market". It also states that its incorporation was justified on the grounds that "free choice is the most effective, lasting and transparent means of consumer protection, and the most effective sanctions available to consumers are precisely those of not consuming again the products or services of a bad supplier or favoring a closer competitor"⁴⁸.

On the few occasions that the Supreme Court has alluded to this right, such as in the eleventh recital of the judgment handed down in SERNAC with Créditos Organización y Finanzas S.A., it has indicated that Article 3 letter a) is a "rule that enshrines the principle of contractual freedom, which implies that the consumer may freely choose any type of good or service, from the simplest to the most complex and sophisticated. It is then, the concrete and real possibility that the consumer has to influence the consumer relationship; an act that should not be imposed by the supplier. Linked to freedom of choice is transparency, a basic prerequisite for the consumer's free choice, especially in the case of adhesion contracts."⁴⁹

This same reasoning was reproduced in the twelfth recital of the judgment handed down by the Supreme Court in SERNAC with Inmobiliaria Las Encinas de Peñalolén, adding that "the means of advertising and promotion of products must be adjusted to reality, otherwise this basic consumer right, freedom of choice, is violated."⁵⁰

Marcelo Barrientos has expressed the same opinión,⁵¹ since he considers that the right to free choice of good or service consists of the possibility for the consumer to choose among several products the one that suits him best, for which it is necessary that there is competition among suppliers that allows a price difference and a varied offer. It has also specified that this right derives from the principle of freedom of contract and this, in turn, from the principle of free will.

⁴⁸ At

https://www.bcn.cl/historiadelaley/fileadmin/file_ley/6746/HLD_6746_37a6259cc0c1dae299a7866489dff0bd.pdf

⁴⁹ SERNAC vs. Créditos Organización y Finanzas S.A. (2016).

⁵⁰ SERNAC vs. Inmobiliaria Las Encinas de Peñalolén (2015).

⁵¹ BARRIENTOS (2013), p. 91.

This notion has been coined by the Supreme Court in SERNAC with *Deporte Sparta Ltda.*⁵² and in SERNAC with Latin American Wings S.A.⁵³ For in both cases has sustained the following:

The free choice of the good or service, has been understood as a manifestation of the general principle inspiring our civil system called contractual freedom, and basically consists in that the consumer can freely choose to contractually bind himself with any supplier of goods or services, determine the content of such link and finally decide on the permanence of the same.

However, neither the Supreme Court nor the national doctrine have referred to the normative manifestations of article 3 letter a) of the LPC nor have they linked them to aggressive practices directed at consumers, in circumstances in which there are norms contained in the LPC and others contained in special laws that interpreted harmoniously would allow sustaining the repudiation of these practices in what refers to the modalities of harassment, coercion and undue influence.

2.1.2. First manifestation of the consumer's freedom of choice in the CPL: Article 17 F concerning unsolicited shipment of products or contracts representing them.

Article 17 F provides that "providers of financial and insurance services or products to the general public may not send products or contracts representing them that have not been requested to the consumer's home or place of work".

The authors who have referred to the basis of this rule have referred precisely to article 3 letter a) of the LPC and have pointed out as an example of violation of the rule the issuance of a credit card sent to the consumer's home or workplace, with his name printed on it and without his authorization, for his use. They have also specified that the existence of a physical medium is not an essential element of the representation of financial or insurance services or products, since the suppliers may send the communication by computer means with the indication of a user and identification code, allowing the exercise of the rights associated with the financial or insurance product or service.⁵⁴

The aforementioned provision constitutes, as far as we are concerned, a form of harassment in the configuration of which one of the elements referred to in Article 9 of Directive 2009/25 is decisive, which is "the time and place where it occurs, its nature or its persistence". In other words, the sending of unsolicited products or contracts representing "financial and insurance services or products to the general public"

⁵² SERNAC vs. Deporte Sparta Ltda. (2022).

⁵³ SERNAC vs. Latin American Wings S.A. (2022)

⁵⁴ For all CABALLERO (2013), pp. 455-446.

constitutes, although the LPC does not qualify it as such, an aggressive practice. The absence of solicitation by the consumer reveals that there has been no will or intention to receive and acquire them and, therefore, evidences a practice aimed at altering the consumer's freedom of choice in order to acquire them or to motivate such acquisition. Hence, this rule has served at the time to formulate the origin of aggressive advertising by harassment or annoying advertising in relation to the consumer in general and specifically in relation to the financial consumer.⁵⁵

2.1.3. Second manifestation of the consumer's freedom of choice in the CPL: Article 17 H and the repudiation of tied sales

Article 17 H, incorporated into the LPC by Law 20,555 of December 5th, 2011, not only repudiates the tied sales⁵⁶ but defines them.

Indeed, in addition to stipulating that suppliers of financial products or services may not offer or sell products or services in a tied manner, it understands that this occurs in two cases. The first occurs if the supplier "imposes or makes it conditional upon the consumer contracting other additional, special or related products or services". The second occurs if the supplier "does not have it available to be contracted separately when it can be contracted in this way with other suppliers, or having it available in this way, this means acquiring it under arbitrarily discriminatory conditions".

The one that interests here is the first one, since it evidences a form of coercion to the consumer (the supplier "imposes or conditions") that is more frequent than one would think. Hence, SERNAC, through Exempt Resolution 188 of March 21st, 2019, has approved an Interpretative Circular on tied sales and joint sales⁵⁷ in which he makes three clarifications that are relevant to this investigation.

The first is that it expressly admits that this type of sale violates article 3 letter a) of the LPC. The second consists in differentiating it from joint sale, the latter being understood as that in which a product is offered jointly with the contracting of a different one, but the contracting of one of them is not conditioned to the contracting of the other. In other words, joint sale implies the offer of several products both together and separately, while tied sale only contemplates the packaged sale of several products. And, thirdly, it states that if the bundled sale is imposed in a contractual clause, it suffers from a nullity defect and must be declared null and void in accordance with article 17E of the LPC, in addition to the relevant compensation.

⁵⁵ LÓPEZ (2020), pp. 249-252.

⁵⁶ Prohibition applicable to offers, promotions, free acts and acts accessory to an onerous one. (BARRIENTOS CAMUS (2013), p. 470).

⁵⁷ At https://www.sernac.cl/portal/618/articles-9201_archivo_01.pdf.

As is known, said Law does not specify the type of nullity that it establishes, which has given rise to discussion in our doctrine as to its absolute or relative nature and its operation as a matter of law or by judicial decision.⁵⁸ In our opinion, as Jorge Baraona has rightly pointed out, such nullity should operate as of right, otherwise the consumer would be harmed by understanding that the nullity is subject to a statute of limitations, given that if it is not denounced within this period it could survive.⁵⁹ But what is certain is that in the case of the tied sale we are discussing, a defect of consent is verified, which is the serious, unjust and determining moral force, so that in such a case the relative nullity could be claimed. We shall return to this point.

As of Law 21.398 of December 31, 2021, which amended the LPC, known as the Pro-Consumer Law, two cases of tied sales were incorporated that are of interest here, as revealed by the new fourth and fifth paragraphs of Article 17H, which aim to reinforce the consumer's freedom of choice, proscribing the coercion of the consumer to adopt a consumer decision. The first provides that the supplier of financial products or services may not restrict or condition that the purchase of consumer goods or services be made exclusively with a means of payment managed or operated by the same supplier, by a related company or by a business support company. The second one, meanwhile, states that the referred supplier may not offer discounts exclusively associated to a means of payment managed or operated by the same supplier or by a related company, if the access to such discount is conditioned to the execution of a money credit operation in more than one installment. It also adds that when these suppliers offer discounts associated exclusively with the aforementioned means of payment, they must previously inform the consumer of the total cost of the credit, in the event that the consumer freely chooses this credit alternative in more than one installment.

2.1.4. Third manifestation of the consumer's freedom of choice in the CPL: Article 28B on the suspension of the sending of unsolicited promotional or advertising communications

This article was incorporated by Law No. 19,955 of July 14th, 2004 and provides as follows: "Any promotional or advertising communication sent by electronic mail must indicate the subject or matter on which it is based, the identity of the sender and contain a valid address to which the addressee may request the suspension of the mailings, which shall be prohibited from that moment onwards.

Suppliers who send promotional or advertising communications to consumers by mail, fax, phone calls or telephone messaging services, must indicate an expeditious way in which the addressees may request the suspension thereof. Once this is requested, the sending of new communications will be prohibited".

⁵⁸ A summary in CAMPOS (2019), pp. 255-278.

⁵⁹ BARAONA (2014), p. 235.

As Iñigo de la Maza warns, it is based on the identification of the message and the suspension requirements. The first is not only a manifestation of the principle of authenticity or advertising self-identification, but also has the purpose of making consumers aware that they have received a commercial communication in their inbox, so that they do not need to open it to know that it is unwanted advertising and can delete it directly.⁶⁰ The second, in addition to its consistency with article 12, third paragraph, of Law No. 19, 628 on the Protection of Private Life -which allows the owner of a personal data to demand from the responsible of the database in which it appears the elimination or blocking of its data-, reveals that the *opt-out* modality (which authorizes the sending unless the addressee informs that he/she does not wish to continue receiving it) has been consecrated and the *opt-in* modality (which requires the prior and express authorization of the addressee to send mails) has been rejected, whose legal implementation has been materialized through the NO MOLESTAR Platform of SERNAC, which we will address later on.

The shortcomings of this provision are substantive and procedural. The former refer to its meaning and scope on the occasion of the "expeditious manner" in which consumers may request the suspension of commercial or advertising communications, given that the mere indication of the telephone number does not comply with this requirement and that it is even introduced to require further background information that increases the intrusion. The second ones refer to the exercise of the right to suspend the promotional or advertising communication and have been tried to be mitigated through the implementation of the "DO NOT DISTURB" platform.

Of course, Article 28B is intended to ensure respect for and protection of privacy, access to and use of telephone numbers or e-mail addresses and the exercise of the consumer's right to consent or refuse to receive such communications,⁶¹ but what has not been sufficiently emphasized so far is that the right enshrined in this article constitutes a normative manifestation of the consumer's right to freely choose goods or services and the proscription of an aggressive practice.

And the fact is that the advertising harassment that it typifies will ultimately affect the consumer's freedom of choice and will make him adopt a consumer decision that otherwise he would not have adopted, approaching the *modus operandi* described in the eleventh paragraph of article 37 of the LPC that we will examine below and in which the determining element for this to be configured, as was the case with article 17F, is the "time and place in which it occurs, its nature and persistence".

⁶⁰ DE LA MAZA (2013b), p. 684.

⁶¹ LÓPEZ (2022a), p. 177.

2.1.5. Fourth manifestation of the consumer's freedom of choice in the CPL: Article 37 on limits to out-of-court collections

Law 21,320 of April 20th, 2021 on extrajudicial collection, which amended the LPC and introduced to article 37 of the LPC the tenth to fifteenth paragraphs, not only established the limits of such collection, but also consecrated, although it does not use such denomination, aggressive practices on the occasion of such collection.

In effect, the tenth paragraph established the principles to which out-of-court collections must conform, regardless of their nature, means of communication or the time at which they are made. These are proportionality, reasonableness, justification, transparency, truthfulness, respect for the dignity and physical and psychological integrity of the consumer and the privacy of the home.⁶²

The following paragraph, which is the one that is useful for this investigation, specifies that it will be understood that such principles are not complied with if the credit provider or the collection company makes more than one telephone contact or visit per week, with the purpose of informing the debtor of the information referred to in the sixth paragraph.⁶³ It also establishes that it will be understood that these principles are not complied with when, with respect to other extrajudicial collection actions carried out through other means, such as correspondence by mail, text messages, e-mails or instant messaging applications, more than two actions are carried out per week, which must be separated by at least two days.

It also adds, in its twelfth paragraph, that the extrajudicial collection actions may not consider the sending to the consumer of any kind of document, message or communication that is, appears to be or makes reference to a writing, resolution or judicial action of any kind, communications to third parties unrelated to the obligation in which the delinquency is reported, visits to the debtor's home or telephone calls during days and hours other than those declared as working days and hours by Article 59 of the Code of Civil Procedure, and, in general, conduct that affects the privacy of the home, the normal coexistence of its members or the debtor's work situation.

As can be seen, the precept refers, like articles 28B and 17F of the LPC, to a hypothesis of harassment of the consumer represented by an undue intrusion in his privacy either by remote or face-to-face communication that alters his freedom of choice or has the potential to alter it in which the "time and place in which it occurs, its nature and persistence" is decisive to configure it.

⁶² An analysis of these principles in ISLER (2023), pp. 404-411.

⁶³ That is, the modalities and procedures for extrajudicial collection may be changed annually in the case of consumer transactions whose payment term exceeds one year if it does not result more burdensome or onerous for consumers or discriminate among them and provided that such changes are notified at least two payment periods in advance.

But the difference with the legislative technique used by such articles lies in the fact that it is conceived as a violation of the principles of respect for the dignity, the psychic integrity of the consumer and the privacy of the home, and can also be subsumed in a more general category, which is that of abusive practices against the consumer, since it contravenes his fundamental rights.

2.1.6. Fifth manifestation of the consumer's freedom of choice: the repudiation of undue influence typified in articles 40 ter of Law 19,925, 1 of Law 20,869, 6 and 8 of Law 20,606 and 55 numbers 6 and 7 of Law 21,430.

A first normative reference to undue influence on consumption is found in Article 40 Ter of Law 19.925 on the sale and consumption of alcoholic beverages, incorporated by Law 21.363 of August 6, 2021. Said precept states that "minors may not be induced to consume alcoholic beverages, nor use means that take advantage of their credulity", specifying that "the sale of these products may not be made through commercial hooks, such as gifts, contests, games and other elements of child attraction".

The formula is similar to that coined in the third paragraph of article 6 and article 8 of Law 20,606. In effect, the third paragraph indicates that the consumption of food "HIGH IN" (calories, fats, sugars and salt) by minors may not be induced or use means that take advantage of the credulity of minors. It also specifies that the sale of food specially intended for minors may not be made through commercial hooks unrelated to the actual production of the product, such as gifts, contests, games or any other element of child traction.

Likewise, Article 8 states that the promotion of such food may not be carried out using commercial hooks unrelated to the promotion of the product itself when it is aimed at children under 14 years of age, adding that in no case may commercial hooks such as toys, accessories, stickers, incentives or other similar items be used.

The same premise is included in the first paragraph of article 1 of Law 20,869 on Food Advertising, since it prohibits advertising that induces the consumption of "ALTOS EN" food that due to its graphic presentation, symbols and characters used is directed to minors under fourteen years of age, preferably capturing their attention.

Lastly, paragraphs 6 and 7 of Article 55 of Law 21,430, which refer to advertising directed at children and adolescents, although they do not use this denomination, refer to undue influence, but exclusively circumscribed to "excessive consumption without adult supervision" and "irresponsible use of credit or financial responsibility". This last assumption is somewhat difficult to imagine, since it assumes that the child has credit or financial products, which is rather unusual in our financial system.

Well, all these assumptions constitute cases of *aggressive advertising by undue influence*, since the advertiser uses its position of power to take advantage of or exploit the vulnerability, naivety, immaturity, inexperience or natural credulity of minors and/or abuse their sense of loyalty. In fact, in all these articles it is possible to notice the position of power of the supplier or advertiser and the special situation of endogenous

vulnerability of the consumer represented by age, in view of the fact that he/she is a child.

2.2. Consumer protection against aggressive practices in Chilean law: A systematic approach

The determination of the protection that the consumer can activate against these practices will depend on the type of aggressiveness in question and whether a contract has actually been entered into because of them, since, as the case may be, the consumer may resort to the consumer protection system in Article 50 of the LPC, to the suspension of unsolicited advertising or promotional messages referred to in Article 28B or to the relative nullity for coercion and undue influence if the requirements of Articles 1456 and 1457 of the Civil Code relating to psychological force are actually met.

And if the contract has not yet been concluded, the consumer will not attack its validity but, invoking article 50 referred to above, will claim that such practices cease and/or that he be compensated for the damages caused by them, which will be redirected to moral damage, the amount of which may be aggravated by the affectation of his "psychological integrity", as provided in article 24 letter c) of the LPC.⁶⁴ In addition, the fine provided for in article 24 of the LPC, which is triggered by the violation of article 3 letter a) and amounts to 300 UTM, considering the concurrence of aggravating and extenuating circumstances referred to in the same article.

In the event that harassment is verified through promotional or advertising communications in terms 28B, that is, through e-mail, mail, fax, phone calls or telephone services may request the suspension of such mailings, which from that moment will be prohibited, without prejudice to resorting to the DO NOT DISTURB Platform. Consequently, if such mailings continue, the protection provided for in Article 50 may be activated for breach of Article 28B.

On the other hand, if the contract was entered into as a result of coercion, undue influence and/or harassment, it will seek annulment in the first two cases, given that harassment does not constitute a defect of consent under our law. To this effect, it will urge for the relative nullity of the contract if it is a matter of a serious unjust and determining moral force and if the undue influence can be traced to it or to fraudulent intent.⁶⁵ However, as SERNAC has pointed out in the Interpretative Circular on tied sales and joint sales, if a tied sale is imposed in a contractual clause, it suffers from a nullity defect and must be declared null and void in accordance with article 17E of the LPC, a nullity that in consumer matters, as we have already mentioned, would be null

⁶⁴ On the moral damage of the consumer, see GONZÁLEZ (2019) and DOMÍNGUEZ (2020), pp. 885-900.

⁶⁵ INFANTE (2022), pp. 162-180.

and void by operation of the law. This would seem to be a case of the consumer's right of choice, since he could choose between one regime or the other.⁶⁶

However, it could be thought that the cases of undue influence referred to above do not trigger the protection provided for in the LPC or in the Civil Code, since the laws in which they are typified contemplate, as the case may be, an infringement fine and a judicial and administrative protection.

In fact, such fine is provided for violation of article 40 ter of Law 19.925 and, in accordance with article 47 thereof, ranges between 20 and 200 UTM -in addition to the confiscation of the beverages. In the case of violation of articles 6 and 8 of Law 20,606, by provision of Article 10 of said law, violations will be sanctioned in accordance with Book Ten of the Sanitary Code, that is, with inspection and search, sanitary summary, fine of up to 100 UTM, closure of the establishment, premises, local, house or workplace where the violation was committed, cancellation of the operating authorization, stoppage of works or tasks, suspension and distribution of use of the products in question, withdrawal, seizure, destruction or denaturation of the products.

In the event of a violation of Law 21,430, judicial and administrative protection is provided for.⁶⁷ Judicial protection is provided for in Article 57, point 5, as that specific protection of a specialized nature that corresponds to the courts of justice in cases of children and adolescents whose fundamental rights have been violated, with the purpose of restoring the exercise of their rights and repairing the consequences of the violations. It is exceptional and is carried out through the exercise of the specialized jurisdictional function established in Law No. 19.968 that creates the Family Courts, which have an original and a derived competence.⁶⁸

Administrative guardianship, on the other hand, belongs to the Local Children's Offices and includes universal protection (aimed at allowing access to the social benefits necessary for the due protection of the rights of the child) as well as specialized protection (aimed at addressing the violation of one or more rights), which is the one of interest here. Its processing is provided for in Article 72 of the Law, which foresees its initiation *ex officio* or at the request of a party by anyone with an interest. Particularly relevant is article 68 letter e) and g) of the Law, which establishes as protection measures that may be adopted by such offices -in what concerns the affectation of rights through commercial advertising- to refer to medical, psychological or psychiatric treatment or to

⁶⁶ For this right LÓPEZ (2019), pp. 417-421.

⁶⁷ ILLANES- CONTRERAS (2022), pp. 331-356.

⁶⁸ The original is given by the violation of rights that requires the adoption of the limitation or suspension of the right to maintain direct and regular relations with their relatives or caregivers, the suspension of their right to live with their family, the determination of alternative care, the termination of parental authority and adoption. The derivative arises from any of the hypotheses of Article 71 which establishes the derivation from the administrative to the judicial venue. See ILLANES- CONTRERAS (2022), pp. 332-349.

arrange for internment, in any public or private health center, of the child who requires it or of his or her father, mother, representatives or guardians, as well as any other suitable measure, duly founded in order to preserve or restore the rights within the limits of competence of the *Oficinas Locales de la Niñez*.

However, in the case of paragraphs 6 and 7 of article 55 of Law 21.430, the consumer's freedom of choice enshrined in paragraph a) of article 3 of the LPC has been altered, so that the protection contemplated in article 50 of said law can be activated. On the other hand, as we have stated above, undue influence can be attributed to force that vitiates consent or possibly to fraud.

Well, in addition to the protection contained in section 50 of the LPC and the nullity of the contract, the implementation of the DO NOT DISTURB platform is also possible⁶⁹ which is aimed at discouraging harassing or annoying advertising, becoming a preventive measure. Its regulatory support is found in Article 28B of the LPC, that is, in the right to request the suspension of sending unwanted promotional or advertising communications, and was implemented by SERNAC in 2013 for consumers to request the blocking of calls and emails from different companies and that, as of May 7, 2019, was extended to *whatsapp*s.

In its old version, the deadline to register the will not to receive it could take up to two months, since SERNAC received the consumer's request and sent an official notice to the companies to remove them from the records; in the new version, the referred deadline is reduced to 24 business hours and companies have one business day to remove those who request it from the records. In addition, consumers can make requests on the same portal where they file their claims and queries and differentiate the channel they wish to block (telephone, text message, *whatsapp* or email), leaving the possibility of not receiving telephone calls, but receiving promotional messages through emails. They can also manage their requests, accessing the historical list of blocked phone numbers and emails and cancel the suspension request at any time, which does not prevent them from exercising the right of suspension when they deem it convenient. They are also entitled to review the status of their requests, edit them and delete them.

The procedure, currently contained in the DO NOT DISTURB ROUTE⁷⁰ and contained in Regulation No. 62 of February 13th, 2020 issued by the Ministry of Economy, Development and Tourism, is as follows: the consumer enters it through the

⁶⁹ Available at <https://www.sernac.cl/portal/618/w3-propertyvalue-62998.html>. The platform is equivalent to the opt-out files known as Robinson Lists which consist of a self-regulatory tool implemented in Spain, Belgium and France so that consumers and users can express their opposition to the forwarding of commercial communications, similar to the American National *Do Not Call Registry* and the "Do Not Call" Registry created in Argentina by Law No. 26,951, of 2014 regarding telephone calls.

⁷⁰ Available at <https://www.sernac.cl/portal/618/w3-propertyvalue-62998.html> [visitado el 23 de mayo de 2023].

Consumer Portal and selects the company(ies) he/she wishes to block, indicating the telephone number or email that needs to be removed from the database of mass mailings of promotions or advertising. Such request will be received by the company that within 24 business hours must remove the consumer from its database and, in the event that this does not happen, the consumer can activate the icon "Report non-compliance" to report the fact to SERNAC. For this purpose, the relevant means of evidence, such as screenshots, photos or videos, may be provided so that the SERNAC may inspect and sanction the offender with a fine that, as of the entry into force of Law No. 21,081, may reach 300 U.T.M., since in the absence of a special rule that disciplines the violation of Article 28B, the fine provided for in Article 24 of the LPC is applicable.

CONCLUSIONS

The following conclusions may be drawn from the foregoing paragraphs:

1. Aggressive practices are those that significantly alter or may significantly alter the consumer's freedom of choice through harassment, coercion or undue influence, thus causing him to make a decision that he would not otherwise have made.
2. The regulation of these practices in foreign law is found in unfair competition and consumer law and the protection provided to the consumer against them includes, as the case may be, the cessation, the removal of the effects of the act, compensation, price reduction and termination of the contract.
3. Such practices have not been typified in our legal system neither in the LPC nor in any other special law, but they can be derived from article 3 letter a) of said Law which establishes as a right the free choice of the good or service of the consumer and its normative manifestations contained in articles 17F, 17H, 28 and 37 of the LPC and in articles 40 Ter of Law 19,925, 6 and 8 of Law 20,606 and 55 numeral 6 and 7 of Law 21,430.
4. The protection against aggressive practices directed at the consumer in Chilean law comprises different means of protection, depending on whether or not a contract has been entered into as a result of such practices. If the contract does not exist, a request will be made for the cessation of the practice and/or for compensation for damages, in addition to requesting the suspension of unsolicited shipments. If the contract does exist, the nullity of the contract may be requested in the terms referred to in this research.

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