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The Hyper Vulnerable Consumer as a Weak Party in Chilean Law: A Taxonomy and Scope of the Applicable Legal Protection

El consumidor hipervulnerable como débil jurídico en el derecho chileno: Una taxonomía y alcance de la tutela aplicable

PATRICIA VERÓNICA LÓPEZ DÍAZ*

Abstract

The purpose of this paper is to address the hyper vulnerable consumer as a weak party in Chilean law from a theoretical and legal perspective. For this purpose, the author examines the laws and regulations that directly or indirectly address this situation, for later formulating a taxonomy of this weakness in our legal system. The taxonomy is elaborated based on criteria shown in comparative regulations and in standards recently incorporated by the National Consumer Service (SERNAC) in the Interpretative Directive on the notion of vulnerable consumer of December 31st, 2021. Likewise, this work gives an account of the legal protection that must be delivered and its scope, supplementing the provision contained in the Directive described above and specifying the areas in which it should be intensified.

Keywords: *weak parties; hyper vulnerable consumer; contractual asymmetries; protection of the weak party*.

Resumen

El presente trabajo tiene por propósito abordar al consumidor hipervulnerable como débil jurídico en el derecho chileno desde una perspectiva dogmática y normativa, examinando los cuerpos legales que directa o indirectamente lo contemplan y formulando una taxonomía de esta debilidad en nuestro ordenamiento jurídico, a partir de diversos criterios formulados en regulaciones comparadas y acuñadas recientemente por el Servicio Nacional del Consumidor (SERNAC) en la Circular Interpretativa sobre la noción de

* Universidad Diego Portales, Santiago, Chile. Researcher at the Fernando Fueyo Laneri Foundation (patricia.lopez@udp.cl). ORCID: https://orcid.org/0000-0001-6716-0584. Article received on April 1, 2022 and accepted for publication on June 13, 2022. This work is part of the Regular FONDECYT Project No. 1220169 "La tutela de la parte débil frente a desequilibrios originarios en los contratos civiles y en los contratos de consumo: diagnóstico, problemas jurídicos y perspectivas de solución en el derecho chileno", the author being its Main Researcher. Translated by Fluent Traducciones.

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consumidor vulnerable de 31 de diciembre de 2021. Asimismo, da cuenta de la tutela que debe otorgársele y de su alcance, complementando dicha Circular en este aspecto y precisando los ámbitos en que ella debe intensificarse.

Palabras clave: *débil jurídico; consumidor hipervulnerable; asimetría contractual; tutela de la parte débil.*

INTRODUCTION

Upon examining comparative legal theory and some foreign regulations, it can be reasonable argued that the discussion surrounding the consumer concept is no longer an issue. Today, specialized literature on the matter has put it focus on its typology and has developed a classification that goes beyond the commonly known consumer concept. Hence, today the consumer concept has been broadened and it is characterized as a "normally informed, reasonably watchful and insightful individual, capable of correctly interpreting and processing the information received"[1] and has a specialized nature.[2]

Indeed, in addition to this category, other types of consumers have been identified,[3] without prejudice to the confusions that this type of characterization brings when analyzing them.

These categories address the following types of consumers: the fragmented consumer, the constitutionalized consumer, the digital consumer (especially vulnerable[4] as will be shown below), and the especially vulnerable consumer (i.e., the hyper vulnerable consumer which presents a double vulnerability, either

[1] A complete analysis in HUALDE (2016), pp. 11-54. This category has been accepted in national legal theory according to articles 20, 3 *bis* letter b) and 1 No. 1 and 2 (ISLER (2011), pp. 77-80), but it has been criticized in general (ROJAS (2015), pp. 413-431) and very particularly what relates to the financial consumer (2020), pp. 1-27.

[2] The non-specialized consumer is the consumer "characterized by a modest cognitive and evaluative capacity, with little dedication to the analysis of the product being purchased and its specific characteristics". This category occurs in the cases of mass consumption goods and goods for common use that are offered to a mass public that are not cataloged or differentiated and at a reasonable price (AGUILAR (2020), p. 70).

[3] AGUILAR (2020), pp. 65-75.

[4] A panoramic analysis of these type of consumer can be seen in HERNÁNDEZ (2016) and HUALDE (2016), pp. 31-54, BAROCELLI (2018), p. 11-15 and in Chilean Law, LÓPEZ (2020b), pp. 230-232

aggravated or qualified). Nonetheless, it should be noted that there are no differentiating criteria between the different categories described above.

In this light, reference has been made to the "fragmented consumer" category to show that it not only operates on physical platforms but also and with much greater intensity on electronic platforms, such as Spotify, eBay, Airbnb, or YouTube, whereby its consumer activity is diverse and moves away from the average consumer concept.

The expression "constitutionalized consumer" has also been coined in order to reflect the social dimension of consumer rights and the need to protect their rights constitutionally. Likewise, the existence of the "digital consumer" has been highlighted to describe those who contract different goods and services online on the different existing platforms.

However, it should also be noted that we find ourselves before a sophisticated consumer who does not present information asymmetries and is even more informed than the supplier itself regarding the goods to be acquired or the service to be contracted. In this regard, the structural vulnerability referred to above becomes presumed,[5] and eventually the relevant provider may prove that said vulnerability does not exist.

Yet, the hyper vulnerable consumer category is the segment that presents an additional layer of vulnerability (on top of the structural or inherent vulnerability to which consumers are subject to). Accordingly, this situation has attracted the attention of most recent comparative legal theory.[6]

In this regard, as Barocelli rightly points out, the homogenizing presumption of the average consumer makes differences, peculiarities, and situations invisible, which finally damages the most vulnerable consumers. This situation leaves consumers in a more vulnerable situation when having to prove their hyper vulnerable condition before courts of justice. However, this can be

[5] The presumption of vulnerability with respect to all consumers is certainly a consequence of the *pro consumatore* principle on which consumer law is built. Regarding this principle in Chilean law, see ISLER (2019), pp. 112-138

[6] HERNÁNDEZ (2015), BAROCELLI (2018), pp. 9-32, Ferrer *et al.* (2018), pp. 33-53, BONED & ORTIZ (2018), pp. 55- 80, SUÁREZ & PACEVICIUS (2018), pp. 82-95, SCHLOTTHAUER (2018), pp. 119-148, PARRA & TESTA (2018), pp. 149-170, MALICHIO (2018), pp. 171-185, ORDUNA & SANTANA (2018), pp. 187-204, BELTRANO & FALIERO (2018), pp. 205-225, RÍOS (2018), pp. 227-260, CASTAGNOLA *et al.* (2018), pp. 295-334, KALAFATICH (2018), pp. 335-369, RODRÍGUEZ (2018), pp. 371-397 and Mendieta *et al.* (2018), pp. 261-294) and VEIGA (2021).

mitigated if the hyper vulnerable consumer category is recognized in our legal system.[7]

Likewise, this has been the type of consumer that has been identified most profusely in European Directives and Resolutions and at a legislative level in certain legal systems.

Specifically, Directive 2005/29 of the European Parliament and of the Council of May 11th, 2005, stands out. This latter directive addresses unfair commercial practices of companies in their relations with consumers in the internal market.[8]

On a similar note, recital 34 of Directive 2011/83 of October 25th, 2011, of the Council and European Parliament on consumer rights can be highlighted. Said directive establishes that traders must provide the consumer with clear and understandable information before being bound by a contract executed at distance or outside the business premises or when entered into through different legal means or by a contractual offer.

In providing such precise information, the trader must consider the special needs of consumers who are particularly vulnerable due to mental, physical, or psychological illness, age, or credulity in any way. Nonetheless and without prejudice to the specific needs that each consumer may have, this latter directive does not provide statutory protection measures for the personal circumstances described above.

A more specific concern is noted in the European Parliament Resolution of May 22nd, 2012, on a Strategy to Strengthen Consumer Rights.[9]

The aforementioned Directive includes in article 5.3 a notion of a particularly vulnerable consumer, identifying it with someone who suffers from a physical ailment, mental disorder or who, due to their age or credibility, is especially sensitive to a commercial practice or a certain product and whose economic behavior is susceptible to distortions.

The Resolution, on the other hand, distinguishes between endogenous and permanent vulnerability, temporary vulnerability, and episodic vulnerability. The first one is caused by personal circumstances associated with a mental and psychological disability; the second refers to the *vulnerability* in which the consumer finds himself/herself and a personal situation that distances him/her from his/her

[7] BAROCELLI (2018), p. 21.

[8] Available at: https://www.boe.es/doue/2005/149/L00022-00039.pdf.

[9] Available at: https://www.europarl.europa.eu/doceo/document/TA-7-2012-0209_ES.html?redirect.

environment, such as education or social situation; and the third is the transitory one in which any consumer can find himself/herself during his/her life.[10]

A similar interest, but on more general terms, is noted in the United Nations Guidelines for Consumer Protection approved by the General Assembly in Resolution 70/186 of December 22nd, 2015, where within its principles it highlights the legitimate need to consider "the protection of consumers in a vulnerable and disadvantaged situation".

Moreover, one of the five key areas of the European Commission's new Consumer Agenda for the 2020-2025 period is the vulnerability of consumers, specifically the reinforcement of their awareness; it proposes addressing the needs of different groups in this regard and supporting those most vulnerable in consideration of the specific information they require. In this regard, said scope includes children, the elderly, or people with disabilities.

Regarding the legislative concern aimed at regulating the hyper vulnerable consumer category, article 39 of the Brazilian Consumer Protection Code stands out. It sets in general terms provisions regulating abusive practices; in paragraph IV of said Code, the Brazilian legislator prohibits the supplier of good and services from "taking advantage of the weakness or ignorance of the consumer, considering his/her age, health, knowledge or social condition, to convince him/her to acquire his/her products or services".

A more limited reference is noted in article IV, paragraph 4 of the Consumer Protection and Defense Code of Peru and in article 15 of the general Law of the rights of users and consumers, where they refer to "pregnant women, children and adolescents, the elderly, people with disabilities". This legal body also incorporates to this hyper vulnerable category "consumers in rural areas or in extreme poverty".

A similar idea can be seen in article 5-A of the Consumer Protection Law of El Salvador (Decree 776/2005), which refers to people with disabilities, and in articles 1 and 52 of the Colombian Consumer Statute (Law 1480/ 2011) that includes children and adolescents.

Other more recent legal initiatives can be added to the regulations described above. The first is Resolution 139/2020 of May 28th, 2020, of the Argentine Secretary of Domestic Trade[11] and article 3 of the preliminary draft of the Consumer Defense Law (whose purpose is to replace the current one). These articles hold: "Consumers with aggravated vulnerability. The principle of consumer protection is accentuated in the case of social groups with aggravated vulnerability. In such cases, within the

[10] A careful analysis in AGUILAR (2020), p. 73.

[11] Available on the website: https://www.boletinoficial.gob.ar/detalleAviso/primera/229875/20200528.

framework of the consumer relationship, education, health, information, fair and dignified treatment, and security must be specially guaranteed".

The second legislative initiative is the Spanish Royal Decree Law 1/2021 of January 19th, 2021 on the protection of consumers and users in situations of social and economic vulnerability[12] (issued as a consequence of the Communication of November 13th, 2020 of the European Commission on the New Consumer Agenda that warns about the increase in unfair practices due to the COVID-19 pandemic and that seeks to strengthen consumer resilience for a sustainable recovery), which introduced in article 3 of the Consolidated Text of the General Law for the Defense of Consumers and Users (TRLGDCU) the notion of vulnerable person, whereby its rights are provided for in article 8.[13]

As a general rule, every consumer will be the weak part of the consumer relationship, since it is assumed that he or she has a structural vulnerability that involves several and wide-ranging factors. These include technical aspects (he or she does not have knowledge regarding the good he/she acquires or the service he or she contracts), legal or scientific terms (adhesion contracts and general contracting conditions are imposed on him or her), socioeconomic, material or factual conditions (he or she holds a position of inferiority with respect to the supplier in these areas), psychological characteristics (he or she is the recipient of advertising, business practices and marketing), information elements (given the asymmetry with respect to the provider), access to justice (given that he or she frequently does not obtain effective, quick and fair answers), biological aspects (because the satisfaction of his or her basic needs requires him or her to consume goods and services), political (the supplier's organization power is ostensibly better)

[12] A similar attempt is noted in Royal Decree 897/2017, of October 6th, which regulates the figure of the vulnerable consumer, the social bonus and other protection measures for domestic consumers of electricity. Available at: https://www.boe.es/eli/es/rd/2017/10/06/897/con.

[13] The aforementioned article 3 in number 2 prescribes the following: "Furthermore, for the purposes of this law and without prejudice to the sectoral regulations that may be applicable in each case, they are considered vulnerable consumers with respect to specific consumer relations. This includes those individuals who, individually or collectively, due to their characteristics, needs or personal, economic, educational, or social circumstances or when limited by geographic, sectoral, or temporal situations find themselves subject to subordination, defenselessness or lack of protection that prevents them from exercising their rights as consumers under conditions of equality". For its part, article 8.2 provides that: "The rights of vulnerable consumers shall have special attention, which will be considered statutorily and by the sectoral regulations that are applicable in each case. Public authorities shall promote policies and actions aimed at guaranteeing their rights in equal conditions, in accordance with the specific situation of vulnerability in which they find themselves, trying to avoid, in any case, procedures that may hinder the exercise of the same".

and environmental (because it is frequently the recipient of offers that damage the atmosphere) conditions.[14]

However, this structural vulnerability may also be affected by other personal aspects that can derive from a personal situation, age, psychophysical, gender, socioeconomic or cultural condition or can be founded on other permanent or transitory circumstances, in which case the consumer will be deemed hyper vulnerable. Such is the case of infants, adolescents, women in certain cases, people with special dietary needs, the elderly, indigenous peoples, tourists, digital consumers, religious minorities[15] and financial consumers, some of which we will examine in the next section.

The truth is that this type of consumer has not been incorporated (in general terms) to any of the modifications of Law 19,496 on the Protection of Consumer Rights (LPC). Although the last reform carried out by Law 21,398 incorporated a paragraph to article 17 regarding the adaptation of adhesion contracts, its scope is only limited to consumers with visual or hearing disabilities[16]. This situation has neither attracted the attention of academia (with the intensity that one would like), since its analysis has only been restricted to certain aspects. Indeed, academia has examined the characteristics of hyper vulnerable consumers and their determining criteria[17], its legal grounds[18], and have even debated whether this category is really justified.[19] However, neither its typology nor the legal protection that should be delivered by the legal system has been explored in detail.

The lack of interest by both academia and the legislative branch led SERNAC to publish on December 31st, 2021, Exempt Resolution No. 001038 that approves the Interpretative Directive on the notion of hyper vulnerable consumer (CICH)[20] after a public consultation regarding its content.

[14] An analysis in BAROCELLI (2018), pp. 13-15.

[15] A detailed study of this category in BAROCELLI (2018), pp. 9-32. Within our legal theory, see (ISLER 2020), pp. 197-214

[16] In effect, this paragraph provides the following: "Likewise, the contracts referred to in this article must be adapted in order to guarantee their understanding for people with visual or hearing disabilities."

[17] ISLER (2021), pp. 117-214.

[18] CAMPOS (2021).

[19] Us in LÓPEZ (2020a).

[20] Available at: https://www.sernac.cl/portal/618/articles-64930_archivo_01.pdf. Even this Service has announced that it is currently developing a consumer vulnerability index.

This directive addresses the vulnerability of consumers, referring to international regulations and endogenous, circumstantial and situational criteria (Section 1); its regulatory framework includes the Political Constitution of the State, some special laws and binding international instruments (Section 2), SERNAC's actions through public policies that contemplate coordinated action with other public institutions, the establishment of prioritization criteria for the implementation of protection mechanisms (Section 3) and finally the specific duties of supplier before this type of consumers (Section 4).

This academic and regulatory outlook could lead us to think that it is unadvisable to return to this consumer category. However, in our opinion, it is necessary to revisit it considering at least three considerations.

In the first place, until now it has not been subject of a thorough theoretical analysis that considers the different layers of vulnerability from a statutory perspective (according to our law). Conversely, attention has been focused on its legal backgrounds[21] and on its determining criteria.[22]

Secondly, because its examination helps to identify a type of rather extreme legal weakness in consumer law. Historically, said weakness arose from the negotiating and/or information asymmetry between the parties to the consumer relationship, but was not shaped by personal qualities attributable to internal and external factors (which characterize this type of consumer).

Thirdly, because no safeguard measures have been duly described for this type of consumer (an issue that is fundamental in the absence of a statute that establishes this category) beyond the specific duties of care that the supplier must comply with, and the aggravating circumstance of the provider's conduct contemplated in article 24 of the LPC (referred to in the aforementioned Interpretative Directive[23]).

To duly address these issues, we will divide this article into three sections. In the first place, we will provide our theoretical grounds regarding the aggravated legal weakness this type of consumer is facing considering internal and external criteria, as well as its applicability in Chilean law (I). Secondly, we will address its typology, examining its aggravated vulnerability and its regulatory situation in our law (II). Next, we will determine the scope of the statutory measures that must be regulated (III). Upon analyzing such topics, conclusions will follow.

[21] CAMPOS (2021) and CALAHORRANO (2021), pp. 5-30.

[22] ISLER (2021), pp. 117-214.

[23] LÓPEZ (2020a).

I. The Hyper Vulnerable Consumer as an Aggravated Legal Weakness: Theoretical Grounds

As has been said, the consumer is generally the weak party in the consumer relationship, a weakness that is associated with his/her structural vulnerability (understood as the inherent condition of a person that ultimately unbalances the consumer relationship[24]). In other words, it regards a simple weakness or *de primer grado*.

The question that arises is the following: what could be the other added vulnerability that determines that we are facing a hyper vulnerable consumer or with an aggravated vulnerability. Depending on the case, we could be facing a double or multiple weaknesses.

A first precedent to determine who are hyper vulnerable consumers is noted in the Resolution issued by the European Parliament on May 22nd, 2012. Said resolution refers to three criteria (endogenous, temporary, and episodic) that reveal that it is a category that can be permanent or temporary (depending on various factors), as well as simple or multiple (i.e., configured in a single layer or in more than one).

Indeed, said Resolution first describes the endogenous and permanent vulnerability when referring to a heterogeneous group of consumers (made up of people permanently affected by mental, physical, or psychological disability, or in disadvantageous positions by reason of their age, credulity, or gender).

On the other hand, it describes temporary vulnerability, i.e., one which occurs in those consumers who are in a state of temporary helplessness. This temporary vulnerability is derived from a gap that exist between their personal conditions and individual characteristics and their external environment (which includes their education, social and financial situation, or internet access).

Finally, said resolution mentions episodic vulnerability to show that all consumers, at some point in their lives, may be vulnerable due to external factors and in their interactions with the market or because they experience difficulties in accessing and understanding adequate information.

[24] Barocelli (2018), p. 11.

A similar terminology is used by SERNAC in the CICH, given that it follows the same reasoning as the resolution described above. Accordingly, SERNAC refers to an endogenous, circumstantial, and situational criterion.

The first of them coincides with the endogenous or permanent criterion included in the Resolution of the European Parliament described above, since it intends to graph a pre-existing social vulnerability in the consumer sphere. In this regard, it refers to the economic capacity of each individual, their educational level or power of negotiation (as occurs with people with limited resources, with little or no schooling, from isolated sectors, with some type of physical, psychological or mental disability).[25]

This description regards a vulnerability that is evident and that is predetermined by age, physical or intellectual conditions and health, which is why different international instruments contemplate it.

This is the case of the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities, the Inter-American Convention on the Protection of the Human Rights of Older Persons (CIPPM) and the Convention on the Elimination of all Forms of Discrimination against Women, all of which are signed by our country. Therefore, children and adolescents, the elderly, women in certain cases, the handicapped, the disabled and people with congenital food allergies and intolerances and tourists inevitably fall into this category. We will return to this point.

The circumstantial criterion, meanwhile, coincides with the temporary criterion (included in the Resolution of the European Parliament) and allows identifying the hypervulnerability of a group of consumers with certain markets based on their personal characteristics, such as sex, age, ethnicity, or type of education (which is the case of women in the pension system, of professionals without financial knowledge or of older adults in the technology market).[26] In this light, belonging to a specific group is not decisive, as occurs in endogenous vulnerability, but rather the conditions surrounding the consumer relationship in the specific case and the particular knowledge, skills and/or experiences of each consumer.

[25] CICH (2021), pp. 9-10.

[26] CICH (2021), pp. 10-11.

Finally, the so-called situational criterion is found (equivalent to the temporary criterion referred to above) according to which vulnerability does not arise by reason of psychological or biological factors or personal characteristics of the consumer, but rather due to certain circumstances or episodes in which they are more exposed to the violation of their rights.[27] Such is the case of people with eating disorders or unexpected special food needs, members of minority groups, inhabitants of rural or unfavorable areas, tourists or migrants or patients in the health system.[28]

In this regard, Barocelli (probably) maintains that hypervulnerability is not a category *per se* or that is permanent, but rather a dynamic, relational, and contextual one that is built through "layers".

In this sense, he argues that such expression illustrates the idea of something more "flexible", multiple, and different, that can mutate. In other words, there is not a "solid and unique vulnerability", but several of them, operating in different layers that can overlap. He adds that vulnerability should not be understood as a permanent and categorical condition (i.e., as a label that follows people according to their circumstances), because it is not a label that includes or excludes a particular group.[29]

Hence, in strict accordance with the criteria to which we have alluded, the authors who have researched on this consumer category indicate that hypervulnerability is not only determined by psychological-biological criteria or "internal factors", but also by social, psychological, cultural or "external factors". Accordingly, these aspects effectively contribute to the inequality of opportunities of people and limit or prevent the full exercise of their rights.[30]

Some of the internal factors such as age, gender and disability require special protection in response to the international treaties signed by our country referred to above. Others, such as the economic, financial, educational condition do not have explicit regulatory recognition, which requires analyzing the elements surrounding vulnerability case by case.

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[27] CICH (2021), p. 11.

[28] BAROCELLI (2018), p. 28 and CICH (2021), p. 11.

[29] BAROCELLI (2018), pp. 26-27.

[30] BAROCELLI (2018), p. 26, FERRER, TORRES & ORDUNA (2018), p. 34 and ISLER (2021), pp. 205-206.

This finding shows, as Erika Isler indicates,[31] that there are two criteria that determine hypervulnerability.

The first is the formal or automatic one, which upon fulfilling certain factual assumptions indicated by a specific provision, allow qualifying an individual as hyper vulnerable. Even though this criterion favors legal certainty, it propitiates an injustice, since said capacity can be attributed to subjects where said condition does not hinder the proper exercise of their rights.

This statutory situation is described in the Resolution of the European Parliament of 2012, in Directive 2011/83 of October 25th, 2011; in article 39 of the Brazilian Consumer Protection Code; in article IV, paragraph 4 of the Consumer Protection and Defense Code of Peru; in article 5-A of the Consumer Protection Law of El Salvador (Decree 776/2005); in articles 1 and 52 of the Colombian Consumer Statute and in article 3 No. 2 of TRLGDCU referred to above.

The same occurs in the *Estatuto de Personas Consumidoras de Extremadura* of 2019, whose article 5.1 qualifies as hyper vulnerable consumers those who are in the stage of childhood, adolescence, the elderly, women victims of gender-based violence, individuals with physical, mental, or sensory disabilities, food allergies and intolerances, vulnerable for economic reasons or at risk of social exclusion, immigrants and asylees. Accordingly, said statute provides that this category is to be applied to all individuals who are in a situation of inferiority, subordination, vulnerability, and a greater degree of lack of protection or when ordered by a regulatory statute.

The second criterion for determining hypervulnerability operates, instead, in the absence of a rule that contemplates a specific condition, and its advantage is that the existence of the vulnerability must be weighed case by case. Nonetheless, this criterion favors legal uncertainty since it is not known if the consumer will be classified as hyper vulnerable beforehand.

Nonetheless, our legal system in the absence of a rule that establishes this category of consumer, is ascribed to the second criterion. The problem lies in determining its statutory basis and in theoretically building this category in order to provide special regulatory protection.

The question that arises then is the following: is it possible to justify the existence of the hyper vulnerable category in our consumer law? The answer, as

[31] ISLER (2020), pp. 201-202.

legal theory[32] and SERNAC (in the CICH) have specified, is affirmative. This, given the scattered provisions in our legal system concerning the matter. In this line, some provisions relating to the hyper vulnerable category can be found in the LPC as well as the pro-consumer principle that was recently added to said law (which is a manifestation of *favor debilis* in consumer law).

In the first place, article 3, letter c) of the LPC stands out, which recognizes the inalienable right of the consumer not to be arbitrarily discriminated against by the supplier of goods and services. Such prerogative constitutes a manifestation of the principle of equality, according to which hyper vulnerable consumers that are not in the same situation as other consumers must receive special treatment.

On the other hand, the seventh paragraph of article 24 can be found which, regarding the infringement fine alluded in said provision, contemplates two criteria that allow supporting the applicability of the hyper vulnerable consumer category in the LPC. The first criteria regards the duty of professionalism that the law demands from the supplier, and which requires it to comply with a level of diligence higher than that of any subject considering the expertise acquired as a result of the regularity of its activity or line of business. Therefore, suppliers must provide a special treatment to consumers subject to aggravated vulnerability.

The second criteria is the degree of information asymmetry that exists between the infringing party and the victim, since there may be different information imbalances between the parties to the consumer relationship. Thus, some consumers could suffer more intensely, as is the case of the hyper vulnerable consumer.

The same is noted regarding article 50H, which orders the judge to consider the availability and ease of evidence that each of the parties to the litigation has in order to distribute the burden of proof. This balances the asymmetry of the consumer-supplier relationship, especially in the case of hyper vulnerable consumers, whereby aggravated vulnerability can make it more difficult for these subjects to have access to the means of proof to accredit the procedural requirements of their legal actions[33].

Similarly, two articles incorporated by Law 21,398 (of December 24th, 2021) to the LPC must be considered. On the one hand, the final paragraph of article 17 can be found which, regarding adhesion contracts, provides that these must be

[32] CAMPOS (2021) and CALAHORRANO (2021), pp. 5-30.

[33] CALAHORRANO (2021), p. 12.

adapted in order to guarantee their understanding for people with visual or hearing disabilities. On the other hand, article 2 *ter* stands out regarding the *pro-consumer* principle - whose design has not been exempted from criticism - which prescribes that the rules contained in the LPC will always be interpreted in favor of consumers and, in a supplementary manner, according to the rules contained in paragraph 4 of the Preliminary Title of the Civil Code.

According to what has been identified so far it follows that the consumer category presenting more than one layer of vulnerability is fully admissible in the Chilean legal system. A different question involves determining which individuals have this nature, their hypervulnerability and the scope of the protection that must be delivered to them. This, in order to provide them with effective legal protection, which is a challenge that we will address in the lines that follow.

II. The Hyper Vulnerable Consumer in Chilean Law: A Systematization of his or her Legal Weakness in Contracting

Having identified the determining criteria of hypervulnerability and its legal grounds in our law system, it is worth asking who would be classified as hyper vulnerable consumers at the time of contracting. The answer, in accordance with the endogenous, temporary, and episodic criteria examined above, is that children and adolescents (NNA), the elderly, people with disabilities, the financial consumer, the digital consumer, people with allergies and food intolerances and tourists have this character.

In this section we will examine the aggravated weakness of some of these groups at the time of contracting; we will provide grounds for explaining said line of thought and we will explore their situation in different laws and/or regulations, as well as the pending theoretical and legislative challenges in this matter.

However, we will not address those individuals that are not subject to these regulations (people with physical, psychological, or mental disabilities), because it would exceed the purpose of this research. Nonetheless, we will address people with food allergies in the last section of this article (regarding the protection of these consumers and, specifically, the need to demand a warning duty from the supplier of the good or service).

On the other hand, we will exclude women in sexist advertising,[34] since said situations constitute abusive advertising, however, this circumstance does not condition women from executing any contract with an advertiser or with an advertising agency.

2.1 Boys, Girls, and Adolescents (NNA) as a Hyper Vulnerable Consumer

This type of consumer has attracted the attention of our national legal theory, but in very general terms without properly examining the vulnerabilities that it may present. Indeed, the nature of NNA as a type of consumer,[35] the advertising directed at them[36] and their hypervulnerability (caused from the lack of education and autonomy)[37] have been addressed by national legal theory, without however analyzing all the possible aspects that surround it.

A first aspect that is indisputably attributable to this type of consumer is the structural one, since it is evident that NNA have the capacity of a consumer (whether materially or legally speaking).

This consumer capacity can be inferred from the criterion provided for in article 3 of Law 19,419 (Law on the Regulation of Activities related to Tobacco), whereby the recipients of said advertising are vested with legal safeguards.

The same can be said with respect to Laws 20,606 and Law 20,869 regarding food advertising; Decree No. 114 that approves the Regulation on Toy Safety; Law of the National Television Council[38] and recently articles 40 *bis* and 40 *ter* of Law 19,925 on the sale and consumption of alcoholic beverages (incorporated by Law 21,363).[39]

The second identified aspect related to this type of consumer arises in connection with the CRC, which constitutes an international treaty that deals with the human rights of NNA. Accordingly, given that said treaty prevails over the Civil Code, this circumstance will allow NNA having progressive autonomy (in a broad

[34] RIZIK (2020), pp. 141-154 and LÓPEZ (2021a), pp. 639-650.

[35] ISLER (2018) and LÓPEZ (2022a), pp. 89-98

[36] LÓPEZ (2021b).

[37] MONDACA (2021), pp. 111-142.

[38] For an examination of these assumptions see LÓPEZ (2021d).

[39] An analysis in LÓPEZ (2021b), LÓPEZ (2021c) and LÓPEZ (2022a), pp. 89-98.

sense). Thus, this will eventually allow them to execute contracts related to goods and services without the need to request authorization or representation.[40]

Following this reasoning, article 53 of Law 21,430 on Guarantees and Comprehensive Protection of the Rights of Children and Adolescents of March 15th, 2022, expressly refers to NNA as consumers. This evidences that, although the legislator does not refer to them as consumers, they are in fact a hyper vulnerable consumer.

Accordingly, said law provides that their rights and interests must be protected by the State Administration bodies considering "their particular needs and characteristics" pursuant to the interpretation and application of the applicable regulations.

In this light, NNA are subject to information and negotiating asymmetries, which is an imbalance that becomes even more evident when they are the recipients of commercial advertising. This imbalance is explained because the recipients of said advertising involve children and adolescents. According to article 1 of said Law (on Guarantees and Comprehensive Protection of the Rights of Children and Adolescents) children shall be understood as any human no older than 14 years of age, and an adolescent shall mean those over 14 and under 18 years of age.

Think for example of misleading advertising in which there is an open violation of the minor's right to information, guaranteed in article 3, letter b), and specifically in article 17 of the CRC; or in abusive advertising that hypersexualizes them, violating their right to image provided for in article 34 of the aforementioned Law 21,430; or advertising that encourages them to consume tobacco and/or alcoholic beverages (where the lack of information is evident), which violates their right to safe consumption and to health pursuant to what is provided in article 3, letter d), of the LPC and in article 24 of the CRC.

The same happens in aggressive advertising by way of harassment, coercion and especially arising from undue influence, since there is no possibility of negotiation on the part of NNA. This clearly infringes their right to freely choose the good or service provided for in article 3, letter a), of the LPC. Said situation will occur in the case of undue influence if the publicity takes advantage of their credulity or uses trusted or fantasy characters, a technique expressly prohibited in

[40] Both types of legal capacities have been addressed with more attention in LÓPEZ (2022a), pp. 91-98.

articles 6 and 8 of Law 20,606 and in article 1 of Law 20,869, in addition to what is provided in article 21 of the Chilean Code of Advertising Ethics (CchEP).

Consequently, NNA indisputably suffer from structural vulnerability. The question that arises is which or which other vulnerabilities could be added to this consumer category and what legal protection should be delivered to them.

The answer to the question raised above is that endogenous vulnerability does affect NNA. Said vulnerability arises from their legal incapacity to execute contracts, i.e., *incapacidad absoluta* (in the case of boys or girls) and *capacidad relativa* (in the case of adolescents). One of the other vulnerabilities identified is a temporary one represented by their education and possibly one that refers to technology (episodic vulnerability).

Considering these circumstances, article 54 of Law 21,430 regulates the duty of information regarding the goods, products or services marketed for the use or consumption of children and adolescents and article 55 regulates, although incompletely, advertising directed at them.[41]

In other words, their legal weakness is increased due to their legal incapacity to execute contracts; by the lack of information because of poor education or wrongful advertising practices, and by the technological gap that, depending on their age, they may be unaware of.

As noted above, NNA do not have the legal capacity to act (*incapacidad de ejercicio*), as prescribed by article 1447 of the Civil Code. In the case of a boy or girl (or infant according to article 7 of said Code) they are subject to *incapacidad absoluta* given that the law does not recognize them as subjects capable of manifesting their will. Accordingly, they must act duly represented by his/her legal representative, otherwise his/her actions will be deemed null and void.

On the other and in accordance with what is provided for in article 26 of the Civil Code, adolescents are deemed young adults. In this line, according to article 1447, girls over 12 years old and boys over 14 years of age, but under 18 years old are subject to *incapacidad relativa*. This, since the law recognizes them the capacity to manifest their will, but does not, however, recognize their capacity to

[41] Indeed, although the seven letters that regulate it are accurate, the specificity of each one of them does not allow to accurately subsume all wrongful advertising, specifically all types of abusive advertising or aggressive advertising arising from undue influence. As noted, this topic exceeds this investigation, but we hope to return to it later.

conveniently manage their assets. Therefore, they must act duly represented or authorized by their legal representative.

It could be argued that the protection that is intended to be given to NNA (by which they will be exempted from complying with the legal formalities required by the provisions of the Civil Code) has not been as effective. This, considering that children and adolescents commonly acquire goods or contract small-time services and are not required to act represented and/or authorized by their legal representative.

However, another approach for understanding why the acts performed by NNA should be legally recognized rests on the acknowledgment of their progressive autonomy pursuant to what is provided for in articles 5 and 12 of the CRC. In this regard, it should be noted that the rights thereby provided have a supra-legal and even constitutional hierarchy given that they are established in an International Convention that deals with human rights.

According to said autonomy, it follows that minors are subject to autonomous rights and have the legal capacity to exercise them by themselves, according to the evolution and development of their legal capacities. This circumstance allows parents or responsible adults to provide appropriate direction and guidance to minors with respect to their autonomy. Moreover, said autonomous rights are not conditioned to a fixed age in order to exercise them. Instead, their exercise is subject to an evaluation involving their maturity and knowledge of skills and comprehension of their rights.

According to this perspective, arguing that minors are legally incapable by reason of their age is equivalent to violating the purpose pursued by the principle of progressive autonomy (in broad terms).

Hence, other Civil Codes -such as that of Catalonia and ours- have extended minors' autonomy to carry out acts related to goods or services according to their age and social uses [articles 211-5 b),[42] 222-47.2b)[43] and 236-182b)].[44]

[42] This article prescribes that minors can execute, according to his/her age and legal capacity, contracts that regard goods or services relating to his/her age and in accordance with social uses.

[43] This provision indicates that minors are exempted from requesting legal authorization from their parents to act; provided, however, the contracts can be executed according to their legal capacity and regard goods or services relating to their age and are in line with social uses.

[44] Said provision indicates that minors are exempted from requesting legal authorization from their parents to act; provided, however, the contracts can be executed according to their legal capacity

Thus, legal systems including ours should recognize said autonomy as a constitutional obligation and accept minors (who acquire goods or contracts services relating to his/her age, for him or for another minor) as lawful consumers. As noted above, this statutory recognition should consider the degree of maturity and knowledge shown by the minors.

Following this argument, as Isaac Ravetllat has pointed out, "the revision of the legal capacity of consumers will not be required in those situations that do not present any risks to the parties involved".[45] In this specific scenario (to which we have referred to above) there is no personal or third-party risks.[46]

If we accept this interpretation, the endogenous vulnerability represented by their underage would be an obstacle for small-time acquisitions. In turn, for larger acquisitions, this endogenous vulnerability can be mitigated by complying with the respective procedural formalities.

On the other hand, the lack of education of NNA (in various matters) contributes to their temporary vulnerability and ultimately affects their consuming choices. This can be explained by their unfavorable socio-economic conditions or the lack of diligence of the respective educational establishment they are enrolled in or current educational programs.

Such circumstances evidence not only a violation of the right to education regarding consumer relations pursuant to what is provided in letter e), of article 3, of the LPC, but of the right to information and free choice of the good or service indicated in letters b) and a) of said article, respectively.

Such rights have recently been recognized by Law 21,430 as revealed in articles 35 (right to information) and 53 (right to education for sustainable and responsible consumption), whose precise purpose is to help mitigate and overcome this vulnerability.

On the other hand, an episodic vulnerability represented by new technologies can be added if the minor is an digital consumer and is unaware of the operation of electronic platforms and/or new technologies.

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and regard goods or services relating to their age and are in line with social uses. In the case of guardians *ad litem*, minors will be able to execute contracts according to the legal capacity recognized by law.

[45] RAVETLLAT (2017), p. 21.

[46] LÓPEZ (2022b), pp. 97-98.

In this regard, Law 21,430 expressly established in article 35, letter a), that the organs of the State administration must ensure that the NNA receive "critical and responsible literacy in the use of information and communication technologies."

This latter circumstance will occur more often among children and not so much with adolescents who are more familiar with digital platforms. However, in the latter case the endogenous vulnerability subsists, and it is possible that, given their age, they may be subject to undue influence on social networks through influencers who take advantage of their credulity or trust to divert their preferences towards the brand they advertise, thereby affecting their freedom of choice.

Hence, article 55, letter a), of Law 21,430 prescribes that advertising directed at them must be adapted "to the age and stage of development of the audience to which the message is directed".

2.2 Older Adults

This category, like the previous one, is determined based on an objective factor: age. These are not legally incompetent people but given their longevity (senior adults) present an additional layer of vulnerability that translates into the loss of their autonomy and decision making. This type of vulnerability includes their reduced mobility and access to certain locations.[47]

The category of older adult is expressly defined in article 1 of Law 19,828, which creates the National Service for Older Adults. Accordingly, an older adult is understood as any person who has reached sixty years of age, and by *adulto mayor de cuarta edad*, someone who has reached eighty years of age.

In response to this vulnerability, Ruperto Pinochet[48] has suggested modifying the notion of consumer to better protect the elderly (based on the expansion of the material consumer concept). This reasoning is constructed after overcoming certain legal interpretations in relation to consumer law (such as the need to accredit the existence of an onerous act to apply the LPC and the consumer's right not to be discriminated against).

[47] LATHROP (2009), p. 78 and ISLER (2020), pp. 145 and 149.

[48] PINOCHET (2019), pp. 63-89.

To this aim, Ruperto Pinochet argues that consumer law should be reinterpreted in light of the CIPPM to guarantee the elderly the differentiated and preferential treatment that their vulnerability demands.

The truth is that there has been no concern to protect this age group. Indeed, there is no law that expressly regulates the situation of the elderly in Chile or a set of laws that make up the "rights of the elderly"[49].

However, such legal gaps can be integrated (in part) based on the provisions of the CIPPM that was incorporated into our legal system on October 7th, 2017, through Decree No. 162 of the Ministry of Foreign Affairs, since it contemplates protective regulations for the elderly. Similarly, such legal gaps can also be remedied according to what is provided for in article 5 of the Constitution. Such article requires from the LPC,[50] especially regarding the principles of participation, integration, and inclusion in society (article 3 e) concerning older adults, the right to avoid isolation and dignity (article 6) and their independence and autonomy (article 7).

The most complete statutory approach, but nonetheless insufficient, is that contained in Law 19,828, whose purpose is to ensure the full integration of the elderly into society, their protection against abandonment and indigence, and the exercise of rights that the Constitution of the Republic and the laws recognize them.

The legal purpose described above is achieved through the creation of the National Service for the Elderly (SENAMA), as it promotes policies aimed at achieving effective family and social integration of the elderly.

Likewise, said law incorporates the *Fondo Nacional Concursable de Financiamiento (*national financing fund for older adults) for direct support to the elderly, which is made up of donations and bequests (in money) accepted by the Service and by the resources assigned annually by the Budget Law.

Nevertheless, the vulnerability sought by this investigation is that evidenced at the moment in which the older adult acquires goods or contracts services as a result of his/her advanced age, specifically the one he/she performs remotely through technological means of his/her own free will or as a consequence of provider inducement, as occurs in aggressive advertising.

[49] LATHROP (2009), p. 78.

[50] PINOCHET (2019), pp. 67-68.

In such a scenario, article 12A of the LPC applies, which provides that contracts executed by electronic means must provide the consumer with clear, understandable, and unequivocal access to the general conditions of the agreement and the possibility of storing or printing the respective contract, as well as providing protection mechanisms against aggressive advertising (which regard removal of advertising, corrective advertising, damages and *nulidad relativa* if a contract has been entered into because of it).[51]

From this perspective, another layer of vulnerability is clearly added to this type of consumer, represented by the technological gap that we will examine later (since this type of consumer later evolves to a digital consumer).

Similarly, it is very likely that the financial consumer vulnerability can be added to this type of consumer, which we will refer to below. Said circumstance caused SERNAC in October of 2018 to launch a financial education campaign for older adults, with the precise purpose of protecting them against this aggravated vulnerability.[52]

2.3 The Financial Consumer

This third category of consumer is represented by individuals or legal entities who, as final recipients of goods and services, execute credit services and insurance contracts and, in general, any financial product, whether with a bank, a financial institution, bank-supporting companies, a commercial establishment, an insurance company, a compensation fund, credit unions, or in general with any individual or legal entity that provides said services or products.[53]

Nonetheless, said consumer cannot be identified with the average consumer since, as Juan Luis Goldenberg has pointed out, it has strong cognitive biases and illiteracy that not only accentuate their vulnerability and receptiveness to persuasion but also reveal an imperfect rationality that leads it to adopt suboptimal decisions. This situation requires regulations that can not only address duties of

[51] On these last two mechanisms, see LÓPEZ (2021a), pp. 232-233.

[52] See https://www.sernac.cl/portal/604/w3-article-54661.html. A more detailed study in GOLDENBERG (2021), pp. 121-138.

[53] SAN MARTÍN (2013), pp. 141-143.

information, but also duties of advice and adequacy with the purpose of fostering a model of co-responsibility.[54]

This is a hyper vulnerable consumer given that unless it has perfect knowledge of the financial products and services that it intends to acquire or contract and can understand the financial instruments to which the advertising alludes, its structural vulnerability will be conditioned to other type of vulnerability that we will refer to below (and that will ultimately lead it to acquire financial products and credit services). Said vulnerability involves the socioeconomic situation in which it finds itself, which depending on the case and its level of education, will make it difficult for it to understand the details and complexity of the information that is provided, thereby distancing it from there reality or environment he/she is found.[55]

Visual or hearing disability could also be added, as expressly stated in the first paragraph of article 17 of the LPC (according to the amendment made by Law 21,398), which requires financial providers to adjust adhesion contracts to facilitate their understanding.

As noted, the hyper vulnerable consumer category is the one that has most attracted the attention of the legislator, as revealed by Laws 20,555 of December 5th, 2011, and Law 21,398 of December 24th, 2021, which expressly introduced protective regulations in their favor.

The first of them is intended to strengthen the protection of the financial consumer in various ways. On the one hand, it incorporates various letters to article 17 of the LPC to regulate the technical information that must be provided to them and adds a second paragraph to article 3 of said law that describes their rights; its purpose is to mitigate their vulnerability considering the information asymmetry they are exposed to (in the event article 3, letter a) of, the LPC was only applied).[56]

Similarly, article 17G regulates CAE advertising and article 17L misleading advertising; articles 17F and 17H establish the parameters for determining aggressive advertising performed by means of harassment and coercion; and article

[54] GOLDENBERG (2020a), pp. 5-11 and GOLDENBERG (2020b), pp. 818-838.

[55] LÓPEZ (2020b), p. 233.

[56] An analysis of these rights in SAN MARTÍN (2013), pp. 143-150

62[57] imposes the obligation to issue regulations that address, *inter alia*, advertising directed at them.

Law 21,398, meanwhile, modified articles 17A, 17D, 17H and 17N, incorporating new duties and prohibitions for financial providers, thus, expanding the content of their duty of professionalism, and establishing a sanction derived from their non-compliance. Similarly, it created rights for financial consumers not previously contemplated in the LPC.

Said duties are the following: i) inform in simple terms, the physical and technological means through which consumers may exercise their rights and the mechanisms and conditions for the termination of a contract, pursuant to what is contained therein and in the applicable regulations (article 17A first paragraph); ii) deliver to consumers who request it, within the terms established by the legislator, the certificates and records that are necessary to renegotiate the credits (article 17D paragraph nine); iii) return interests or adjustments in case of improper collection, within five days from the date of collection (article 17D, paragraph nine); iv) inform the consumer in advance of the total cost of the credit, in the event that he/she opts for more than one installment. This will apply in situations where providers offer discounts associated exclusively with the aforementioned payment method (article 17H, fifth paragraph); v) analyze, before the execution of a money credit operation, the economic solvency of the consumer so it can fulfill the obligations that arise thereof. This shall be performed according to the information obtained through official means destined for that purpose and must inform consumers of the result of said analysis. As a result of this statutory addition, the "responsible loan" figure was added to this law (article 17N first paragraph), vi) deliver to the consumer the specific information of the credit operation in question (article 17N first paragraph) and vii) express in advertising the price cash of the good or service according to the applicable size, visibility and in contrast to the offer or promotion, indicating if the price is equal or greater than the price thereof (article 17H, sixth paragraph).[58]

[57] These are the Regulations approved by the Supreme Decrees of the Ministry of Economy, Development and Tourism No. 42, No. 43, and No. 44, which contain, respectively, the Regulation on Information on Mortgage Loans, Consumer Loans and Banking and Non-Banking Credit Cards. Regarding these regulations, see LÓPEZ (2020b), pp. 225-259.

[58] The sanction for breach of the duty indicated in article 17A, first paragraph, consists in that the consumer will only be obliged to what was informed in the adhesion contract at the time of accepting the terms and conditions of the contracted goods or services. In case of non-compliance with the delivery of the aforementioned certificates and records, the debt will not generate interest or

With regard to this last obligation, the legislator should have required the financial provider to comply with the duties of advice, adequacy[59] and warning, since, on the one hand, it would strengthen the model of co-responsibility that legal theory has advised in recent times[60] and, on the other, it would neutralize the pernicious effects that the excess of technical information has caused in said consumers.[61]

The prohibitions imposed on suppliers, meanwhile, are four. The first is contained in article 17A, third paragraph, since it prohibits suppliers from conditioning the termination of the contract to the payment of amounts owed or to the restitution of goods. This article also established more burdensome conditions than those required for executing these types of contracts.

Any provisions contrary to these regulations will be deemed void, without prejudice to the provisions of the eighth paragraph of article 17D on financial products or services (which regulate the amount that must be paid to terminate the contract early).

The second prohibition is found in article 17 H, fourth paragraph, which provides that they may not restrict or condition the purchase of consumer goods or services. Accordingly, they cannot demand consumers to pay exclusively with the payment method administered or operated by the same supplier, by a related company or by bank-supporting companies.

The third prohibition is contained in the following paragraph, which consists in proscribing discounts associated exclusively with a payment method administered or operated by the same provider or by a related company, when the

adjustments of any type (article 17D, paragraph nine). In the event that interests, or adjustments are not returned, the consumer may resort to the Commission for the Financial Market for reimbursement, as well as collecting the costs for terminating the contract or advance payments thereof. Finally, if the consumer's solvency is not analyzed before the execution of a money credit operation, nor is he/she informed of the result of said analysis or the specific information regarding said operation is not delivered, the provider is exposed to a fine of up to 1,500 UTM (article 17N first paragraph).

[59] GOLDENBERG (2020a), pp. 14-20. Regarding the scope of such duties, see GOLDENBERG (2018), pp. 9-41 and LÓPEZ (2019), pp. 929-958.

[60] LÓPEZ (2020b), pp. 242-243.

[61] DE LA MAZA (2015), pp. 375-396.

application of the discount is conditioned to the credit operation of money in more than one installment.

Finally, article 17 N, final paragraph, states that higher education institutions may not offer money credit operation contracts that are not related to the financing of educational services.

With respect to the rights established in favor of consumers two stand out. The first is incorporated in article 17D, paragraph eight, which authorizes consumers to request, without expression of cause, the permanent blocking of the payment cards referred to in article 1 of Law No. 20,009, by giving notice through the communications channels or services established in article 2 of the aforementioned law.

In effect, the supplier will not be able to charge the administration, operation and/or maintenance costs against the consumer. The second right is linked to Law 18,010, expressly recognizing as financial consumer rights those established in said Law, specifying that the provisions of the second and third paragraphs of article 10 will be applicable to financial operations, i.e., the prepayment or right to pay in advance is established as an inalienable right, regardless of the amount owed. Said provision also indicates that payments that represent 10% of the balance (and not 20%) will always require the consent of the creditor.

2.4 The Digital Consumer

This last category of consumer has become more relevant in recent times; its protection has been limited to electronic commerce and advertising in digital, interactive media, social networks, and direct marketing, but it has not attracted, as one would like, the attention of our legal theory.[62]

This vulnerability derives from their capacity as users of electronic media. Thus, in addition to information asymmetries, this type of market fosters technical asymmetries that hinder their consuming choices.

As Beltrano and Faliero[63] have correctly pointed out, the digital consumer has three vulnerabilities of its own that differentiate it from other consumers with aggravated vulnerability: (i) the unnaturalness of the technological circumstances

[62] With the exception of Salas (2022), pp. 123-133.

[63] Beltrano & Faliero (2018), pp. 206-207 and 212 and Veiga (2021), pp. 350-358.

(new technologies are new to it), (ii) the impossibility of the provider to comply with the duty of technological information in an adequate manner (it will never have effective control over the electronic medium) and (iii) the chance of irreparable damage (the damage may become uncontrollable and reproduce itself indefinitely, since it may remain latent, hidden or reproduced in some unexplored place and only a single cycle may be repaired with respect to the affected digital consumer).

In other words, the digital consumer needs to fully know what the normal use conditions of this technology involve, master its use, be instructed for it, and informed of the risks that its safety may suffer, as well as the preventive mechanisms that must be adopted to avoid them. Similarly, the risks involving protection, privacy and security of personal data and the possible processing that the provider may make of them must be added[64].

This circumstance led to the issuance of an Electronic Commerce Regulation that came into force on March 24th, 2022, which aims to strengthen the transparency and quality of the information that is delivered to consumers on electronic commerce platforms. Accordingly, this provision regulates the characteristics, essential benefits, price of the products and services that are offered and all other relevant information to encourage duly informed decision making (in relation to the acquisition of products or contracting of services).

Hence, this provision regulates the consent of the consumer, banking information, delivery of online information, information on the role of the platform, stock and availability, the right of withdrawal, terms and conditions, advertising integration, advertising, and business practices.

The same statutory interest can be seen in the bills that are currently being discussed in the National Congress contained in Bulletin 14,561-19, which regulates electronic platforms, and Bulletin 14,785-24, which regulates the dissemination of content, information and services on digital platforms and social networks.[65]

There has also been interest in self-regulation matters related to advertising activities. Indeed, article 33 of the CcHEP requires that: i) the use of electronic techniques and means be especially considerate to guarantee honor, personal and family privacy, the protection of personal data and in general the full exercise of their rights, ii) the advertiser or the operator responsible for the communication is

[64] BELTRANO & FALIERO (2018), pp. 213-217.

[65] Both available at https://www.senado.cl/appsenado/templates/tramitacion/index.php.

clearly identifiable in the advertisement, iii) the commercial content of a social network site or profile under the control or influence of an advertiser is clearly indicated, iv) the software or other technical devices are not used to mislead consumers about the nature of the product or service or hide any factors that influence consumer decisions; v) advertising sent through electronic means provides a clear and transparent mechanism through which consumers can express their desire not to receive future messages.

Regarding native advertising (i.e., that which is integrated into the natural content of a page or the functionality of the medium in which it is published allowing the advertiser to be present in the publication in a more harmonious and integrated way with the content and medium in which it appears, without interrupting the user's navigation or appearing intrusive while reading a newspaper or magazine)[66] the article requires that it be sufficiently clearly identifiable on all devices and platforms that consumers may use to view native advertisements.

Article 33 also refers to the use of influencers, bloggers or other types of spokespersons or representatives of a brand or company that refer a product, service, or experience. The articles in question indicate that they must do so in a responsible manner, following the rules and principles contained in the CchEP, always trying to maintain consumer confidence, and observing the principles of honesty, integrity, and transparency that the Code itself refers to.[67]

Said articles also address advertising aimed at minors through digital media, specifying that advertisers should not encourage them to engage in online commercial activities without the supervision of their parents or guardians, nor promote or encourage minors to enter sites that are restricted or directed at adults or that may reasonably be considered inappropriate, nor encourage them to communicate with strangers or engage in any practice that may be unsafe.

Some of these guidelines have been included in article 55 of Law 21,430, therefore, they are binding on all advertisers and not only to those affiliated to the CchEP. This can be inferred from numbers 4, 5 and 6, which require that advertising aimed at children and adolescents must inform on the risks or dangers to health in relation to consumption or use of goods, products, and services.

[66] SERNAC (2018), p. 15, 17 and 18. An examination in LÓPEZ (2022c).

[67] Regarding the protection of the followers of influencers as digital consumers, LÓPEZ (2022c).

Similarly, it requires informing on the ecological sustainability of the goods and services offered and must not encourage excessive consumption, without the supervision of responsible adults.

III. The Protection that Should be Provided to the Hyper Vulnerable Consumer: Determination of its Scope

According to what has been argued here so far, it seems evident that this aggravated legal weakness requires reinforcing the legal protection for this type of consumer. The question is how this purpose can be achieved. Prior to the provisions contained in the CICH of SERNAC, our legal scholarship had already suggested the need to reinforce the legal protection for this type of consumer and had suggested the scope thereof.

Indeed, it has been argued that it must unfold in two directions.[68] On the one hand, by demanding greater diligence from the supplier in terms of the duties of information (legal theory has suggested strengthening the duties of warning[69] and adequacy),[70] a dignified treatment and safety towards the consumer. Indeed, all these statutory measures imply developing adequate legal infrastructures, specific information, a specific language, adapting business practices or behaviors and varying the methods by which goods or services[71] are provided.

And, on the other hand, these additional measures require foreseeing the adverse legal consequences if such provisions are not complied with.

Accordingly, in the event of noncompliance, suppliers are subject to the sanctions provided for in article 3, letters b), c) and d) of the LPC. Said article allows applying the protection measures contained in article 50 of the LPC and allows consumers to demand the performance of the obligation, the right to terminate the contract that affects the exercise of their rights and the right to claim damages.

Moreover, in the event of noncompliance, other aggravating circumstances of article 24 of the LPC could come into play-specifically those indicated in letters c) ("having caused harm to the physical or mental integrity of consumers or when having affected their dignity in a serious manner") and d) ("having put the safety of consumers or the community at risk, even though no damage had been caused").

[68] López (2020a).

[69] Regarding this duty, see López (2019), pp. 929-958.

[70] A study of this duty in Goldenberg (2019), pp. 5-32 and Goldenberg (2020b), pp. 818-838.

[71] Barocelli (2020), p. 35.

In this light, according to article 53C, letter c), these aggravating circumstances could increase the amount of the corresponding damages by 25%.[72]

This latter provision leads us back to the already classic discussion regarding the origin of punitive damage in Chilean law that has resurfaced since the incorporation of this compensation formula and the introduction of article 25A to the LPC (by means of Law 21,081).[73]

These ideas have recently been collected and supplemented by the CICH of SERNAC; in its Section 4, it contemplates specific duties of providers *vis-à-vis* hyper vulnerable consumers. Is should be noted, however, that said duties are derived from what is established in the LPC. These include the duty of professionalism, the duty of information and the duty of adequacy (regarding advertising).

Nonetheless, the CICH does not allude to the duty of warning that is particularly relevant in the case of commercial advertising.

Instead, the CICH confusingly described the "the supplier's aggravating conduct" without any consideration of the duty to not harm and/or not arbitrarily discriminate against consumers. We believe the CICH should have treated the aggravating circumstance described above as a specific consequence of non-complying with the duty to not harm.

The "duty of professionalism" expressly alluded to in article 24 of the LPC as a criterion to establish an infringement fine and provided for in SERNAC's CICH (s*obre el derecho a la calidad e idoneidad en el Régimen de Garantías*) of March 21st, 2019, indicate that the supplier may not be subject to the same diligence standard as that of the consumer. Accordingly, the *diligence demanded* from the supplier shall be *greater* than that required from consumers given the information it holds and its expertise in the field.

Its legal basis is found in articles 1 (No. 2) and article 23 (first paragraph) of the LPC that define what a supplier is and establish its responsibility, and in article 7 of the Code of Commerce that describes the notion of trader (derived from the regularity of its activity or line of business).

Hence, it can be affirmed that the capacity of the supplier as an *expert* on the matter determines the consumer's information asymmetry and justifies the

[72] LÓPEZ (2020a).

[73] An analysis of this last precept in PINO (2021), pp. 299-312.

information duties arising thereof. This is also founded on economic rationality and good faith reasons. Therefore, this higher duty of diligence demanded by law is founded on the *regularity* with which the supplier performs its activities, and which directly relate to its skill or expertise in the matter.[74]

In the case of the hyper vulnerable consumer, this diligence standard must be increased since its condition as such exacerbates its disadvantaged position against that of the supplier. Consequently, the supplier will be able to comply with said duty if it delivers universal access to its premises, allowing or facilitating its access to consumers that present physical disabilities; or by providing an adequate distribution of dressing rooms that includes sexual diversities[75] or broadcasts lawful advertising, i.e., that which does not violate current legislation or the rights of consumers (in the event said advertisement were abusive, aggressive, deceptive, or disloyal).[76]

Although this duty of professionalism could include information in a broad sense, the CICH treats it separately, probably to make it visible. It is evident that, given the aggravated vulnerability of the consumer, this duty is intensified with respect to the supplier. Thus, the latter must ensure not only that truthful and timely information be provided regarding the goods and services offered, their price, contracting conditions and other relevant characteristics, but it also must comply with the basic commercial information referred to in the third paragraph of article 1, No. 3, of the LPC, delivering it in a clear, expeditious and timely manner.

Think, for example, of the older adult, the tourist, the NNA who can buy goods or contract small-time services or the financial consumer whose cognitive biases are more severe, and the digital consumer who is exposed to new technologies and virtual spaces that are not always known or understandable.

Another duty contemplated by the CICH and that is absolutely relevant is the "adequacy of advertising"[77] which, as we already anticipated, could have been subsumed under the duty of professionalism.

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[74] MORALES & GATICA (2022).

[75] CICH (2021), p. 25.

[76] Regarding these wrongful acts, see LÓPEZ (2021a), pp. 215-236, LÓPEZ (2021b), pp. 59-101 and DE LA MAZA & LÓPEZ (2021), pp. 27-51.

[77] CICH (2021), pp. 26-28.

This requires the provider to adjust the advertising to its target audience, which may include consumers who, in special circumstances, become hyper vulnerable in the face of certain advertising and that causes them to enter into a contract because of it.

For example, the advertiser must refrain from carrying out wrongful advertising, because it does not conform or adapt to the LPC. In other words, it cannot carry out advertising that violates constitutional guarantees or consumer rights, because it would contravene the Constitution and article 3 of the LPC (abusive advertising); nor perform advertising that coerces, harasses, or unduly influences the consumer, as it would violate the consumer's freedom of choice (aggressive advertising).

The same will happen if the advertising induces or may mislead the consumer regarding relevant characteristics of the good or service that it acquires or contracts, since it violates the right to truthful and timely information (misleading advertising); or violates the duty to rectify (*deber de corrección*) that must prevail among market agents, given that this affects their right to information and the freedom of choice of consumers (unfair advertising).

However, the truth is that the protection of the hyper vulnerable consumer would not be complete if the duty of warning in commercial advertising was not required. It could be argued that it would be ineffective because it would be a reiteration of the duty of information. However, this is not the case because, as our most recent legal theory has specified, the duty of warning (founded in advice and recommendation reasons) would correspond to a variation of the duty of information; its differences relate to the *legal formalities, content, functionality, and consequences* derived from its infringement.[78]

Accordingly, the duty of warning constitutes a *special variation* of the duty of information in the sense that is disposed in a prohibitive way. Similarly, this duty is communicated *in advance* of the use of the product, which entails a *strong call for attention* to the recipient who in turn demands being informed of the particular *risk* that its use or consumption represents. In other words, its purpose is to protect the safety in consumption, the health and integrity of the consumer, its goods and itself (*principio de conservación*)[79].

[78] BARROS & RIOSECO (2014), p. 633 and LÓPEZ (2019), pp. 936-940.

[79] LÓPEZ (2019), pp. 935-936.

The problem is that it is only foreseen for special cases, such as the commercialization and sale of alcoholic beverages and tobacco and with respect to the NNA, but not regarding other hyper vulnerable consumers, such as the financial consumer and the digital consumer. The inclusion of these type of consumers would serve to intensify their protection, since the lack of warning violates the consumer's right to truthful and timely information and consumer safety.

Indeed, regarding the advertising of alcoholic beverages, Law 21,363 stands out, which introduced article 40 *bis* to Law 19,925. Said article regulates the advertising warnings applicable to all beverages with an alcohol content equal to or greater than 0.5 degrees intended to be marketed in Chile.

In this regard, it provides that it be displayed in the container that contains it, in boxes or promotional packaging and it must be clear and visible. It also specifies the consequences of its harmful consumption, especially in populations at risk, such as minors, and requires graphics that show a number 18 surrounded by a circle or what is indicated in the respective Regulations.

The same can be said in the case of tobacco-derived products, where Article 6 of Law 19,419 (which regulates the activities related to tobacco) requires that all packaging intended for distribution within the national territory contain a clear and precise warning of the damages, diseases or effects on people derived from their consumption or exposure to tobacco smoke. These types of warning must be printed on the cigarette packs or on any non-removable container.

It also adds that in the case of cigarette or cigar packages, bags, or packages of tobacco products, said warning must appear on the two main faces and occupy 50% of each of them, and must be placed in the lower part of each face of the applicable packaging.

In the case of children and adolescents, the warning requirement is not only necessary regarding advertising of tobacco or alcoholic beverages, but also regarding food, toys, and cosmetics.

Indeed, article 5 of Law 20,606 and article 120 of the Sanitary Food Regulations (Decree 977/96 of the Ministry of Health) *require labeling with warning stamps* -which take the form of black octagonal shapes and bear the following phrase: "*ALTO EN* (HIGH IN)"- foods *whose nutritional composition is high in calories, saturated fats, sugar, and salt*.

A similar phenomenon can be seen with regard to "gluten-free" foods since, in accordance with the new article 5 *bis* of Law 20,606,[80] such foods must be labeled with the expression "gluten-free". Said labeling must be accompanied by a logo or symbol of a crossed-out spike and must be located on the front of the container to ensure its visibility to the extent that it meets the nutritional requirements of article 518 of the aforementioned Regulations.

With regard to children's toys, Decree No. 114 of June 17th, 2005, which approves the Regulations on Toy Safety stands out, since it requires warnings labels in toys that are not appropriate for children under 3 years of age and that contain small parts (article 26); the same applies for scientific toys that are dangerous (article 28, letters e, and f) and in toys that due to their characteristics require special precautions due to the risk of catching fire (article 29).

The same reasoning is applied in article 40 of Decree 239, of June 20th, 2003, of the Ministry of Health that approves the Regulations of the National Cosmetics Control System. According to article 5, letter d), this duty of warning is applicable to children's cosmetics (understood by such those intended for children under 6 years of age). In this regard, letter h), of said article requires that the labeling of containers of such cosmetics contain "the instructions for use, indications, warnings and precautions regarding their use, as appropriate".

As noted, the duty of warning allows to intensify the protection of the hyper vulnerable consumer given that it delivers the latter with truthful and timely information, it allows the supplier to not discriminate arbitrarily against consumers and ensures their safe consumption.

However, said duty of warning must be formulated in general terms and must be demanded from the supplier according to the solid legal grounds that support its applicability. In fact, its applicability can be founded on the right/duty of information contemplated in letter b), of article 3, of the LPC; in the right to safety in consumption provided for in letter d) of said article and in the principle of consumer protection that is currently found in article 2 *ter* (after the reform introduced to said law by Law 21,398 on December 24th, 2021).[81]

[80] Introduced by Law 21,362 of August 18th, 2021, which modifies various bodies of law to regulate the labeling, advertising and sale of gluten-free foods and other matters indicated therein.

[81] Also recognized in civil proceedings based on the principle of contractual good faith, as well as in certain rules contained in the Civil Code (that refer to the duty of warning or notice); and also

CONCLUSIONS

According to what has been stated in the preceding paragraphs, it is possible to arrive at the following conclusions:

1. There is no doubt that consumers may have one or more layers of vulnerability represented by age, psychophysical condition, gender, socioeconomic or cultural level or other permanent or transitory circumstances that affect the exercise of their inalienable rights and place them in a disadvantaged position compared to other consumers. As described above, this finding requires intensifying their legal protection.

2. Despite this reality, the legislator does not establish protective regulations for hyper vulnerable consumers in general or specific terms, however, there are particular laws that incompletely and insufficiently regulate the protection of some of said consumers. This is why our legal theory has supported its applicability in certain regulations of the LPC and in turn SERNAC has issued a CICH with the same purpose.

3. In the absence of an express regulation involving the hyper vulnerable consumer, it is necessary to design and implement a reinforced legal protection to try to leave the former in an equal situation with respect to those consumers who do not have such characteristics. This legal protection is achieved preventively, requiring suppliers to comply with the duty of professionalism in a broad sense, specially requiring them to respect the duty of information, the duty of adequacy (of advertising) and the duty of warning. To the contrary, its noncompliance is subject to an increase in damages as provided for in article 24 of the LPC (25% increase in damages by application of the aggravating circumstances contemplated in paragraphs c) and d) of this article).

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founded on the need to determine the subject matter of service contracts. (LÓPEZ (2019), pp. 937-954).

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