

**E-COMMERCE IN CHILE:
BEST PRACTICES, SELF-REGULATION, AND INTEGRATION**

Juan Pablo Prieto Saldivia *

TABLE OF CONTENTS

I. INTRODUCTION	249
II. REGULATION IN CHILE	250
A. Electronic Payments	251
B. Delivery of the Product to the Consumer	253
C. Code of Good Practice for Electronic Commerce	253

I. INTRODUCTION

Today's society is characterized by the collection, transmission, and storage of information on the Internet. As the main technology we use in our everyday lives, the Internet affects social relations and our habits of consumption. E-commerce, understood broadly, is the exchange of goods and services, or the exchange of commercial information generated between transmissions of data, via communication networks like the Internet.

In Latin America, annual E-commerce transactions fall between \$60 and \$70 billion USD, much of which falls under the categories of travel and entertainment, electronics, and transnational operations. In one decade, the volume of transactions has increased by more than 40 times.¹

In Chile, E-commerce is showing similar growth rates. In the last three years, the number of online businesses has doubled, and the Chamber of Commerce of Santiago (CCS) estimates that 2015's annual sales in national E-commerce will increase by \$2 billion USD, with an expected annual growth rate between 20% and 30%.²

* Licenciado Prieto has been a Partner at Saldivia, Contreras, Inalaf, Würth & Verdugo Abogados since 2010. He specializes in labor matters ranging from corporate advising and consulting to litigation and defense in court and before regulators. He also has expertise in corporate law, real estate transactions, electronic commerce, IT issues, and personal data protection matters. Lic. Prieto has served as counsel for Sistema Nacional de Comunicaciones Financieras S.A. since 2005.

¹ *Estudios Descriptivo del E-Commerce en Chile y Análisis de Reclamos ante SERNAC, E-Commerce en Chile* [Descriptive Studies of E-Commerce in Chile and Analysis Complaints to SERNAC, E-Commerce in Chile], DEPARTAMENTO DE ESTUDIOS E INTELIGENCIA SERVICIO NACIONAL DEL CONSUMIDOR, 5-6 (Aug. 2014), http://www.sernac.cl/wp-content/uploads/2014/08/Reporte_E_Commerce_Reclamos-2013-2014.pdf.

² *Id.*

Like the majority of exchanges for goods and services, these transactions also have consequences for third parties to the transactions, whose participation gives them a relevant interest in the media, management, and conclusions of the exchanges of goods and services.

II. REGULATION IN CHILE

Currently, Chile does not have a law regarding E-commerce. However, it has been issuing numerous and diverse regulations that deal with various unique interests and issues related to E-commerce. For example, certain offenses related to the right to privacy are punished by imprisonment under Law No. 19.423, enacted in 1995.³ Additionally, Law No. 19.496, the Law on the Protection of Consumer Rights, enacted in 1997, regulates consumer/supplier relationships.⁴ This law has undergone various modifications, including those made in 2004, which established the right of consumers to withdraw from contracts executed by electronic means if they had not previously agreed to such a format.⁵ Procedures for the protection of personal information are in Law No. 19.628, enacted in 1998.⁶ This protection has also undergone several modifications and will soon be replaced by a new law currently being drafted.⁷ Meanwhile, matters concerning electronic documents and electronic signatures of said documents are dealt with in Law No. 19.799, which discusses electronic documents, electronic signatures, and certification services of said electronic signatures.⁸ This law, enacted in 2002, has much in common with the Model Law on Electronic Signatures with Guide to Enactment of the United Nations Commission on International Trade Law

³ Law No. 19.423, *Agrega Disposiciones que Indica en el Código Penal, en lo Relativo a Delitos contra el Respeto y Protección a la Vida Privada y Pública de la Persona y su Familia* [Incorporated Penal Code Provisions Concerning Crimes Against the Respect and Protection of Private and Public Life of the Person and His Family], Noviembre 20, 1995, *Diario Oficial* [D.O.] (Chile), <http://www.leychile.cl/Navegar?idNorma=30790>.

⁴ Law No. 19.496, *Ley sobre Protección de los Derechos de los Consumidores* [Protection of Consumer Rights], Marzo 7, 1997, *Diario Oficial* [D.O.] (Chile), <http://www.leychile.cl/Navegar?idNorma=61438>.

⁵ *Proyecto de Ley que Modifica las Leyes N°s 19.496 y 19.628, para regular la Protección de la Vida Privada en lo Relativo al Envío de Publicidad* [Bill Amending the Laws No. 19.496 and 19.628 to Regulate the Protection of Privacy with Regard to Sending Advertising], REPUBLICA DE CHILE SENADO, TRAMITACIÓN E PROYECTOS, (June 17, 2015), <http://www.senado.cl/appsenado/templates/tramitacion/index.php#>.

⁶ Law No. 19.628, *Ley sobre Protección de la Vida Privada* [Law on the Protection of Privacy], Agosto 28, 1998, *Diario Oficial* [D.O.] (Chile), <http://www.leychile.cl/Navegar?idNorma=141599>.

⁷ Bill Amending the Laws No. 19.496 and 19.628, *supra* note 5.

⁸ Law No. 19.799, *Ley sobre Documentos Electrónicos, Firma Electrónica y Servicios de Certificación de Dicha Firma* [Law on Electronic Documents, Electronic Signatures, and Certification Services], Marzo 25, 2002, *DIARIO OFICIAL* [D.O.] (Chile), <http://www.leychile.cl/Navegar?idNorma=196640>.

(UNCITRAL). Additionally, Law No. 20.727 from 2014 amends current tax legislation on electronic invoicing.⁹

Although there exist diversity and disparity of E-commerce regulations in Chile, many relevant issues surrounding the growth and development of E-commerce remain unaddressed. So, self-regulation looms large as a good normative alternative. In this sense, although E-commerce is a popular way to exchange goods and services between consumers and suppliers, it is important to fully address the two main concerns of each party: the supplier's interest in being paid the agreed upon price promptly, and the consumer's interest in receiving the agreed upon goods at the agreed upon time and place.

A. Electronic Payments

Chile has developed a system of payments based on a large interbank agreement that generates an efficient and safe system to protect participants' interest while maintaining the banking system's fiduciary responsibility. Although banks, mainly private banks, conceive, finance, and implement this system, it is also subject to the administrative authority of the Superintendents of Banks and Financial Institutions of Chile, which has issued mandatory administrative regulations for participating banks.¹⁰

Electronic transfers of funds are conducted or credited in various ways, including automated transfers of funds from one customer's account to another customer's account; money orders to accounts of third parties such as suppliers, employees, or shareholders; use of debit cards at points of sale; and money transfers via ATMs. These transactions involve the movement of money from one account to another.

According to the Chilean Superintendency of Banks and Financial Institutions and the aforementioned regulations, to enable and support this system of transfers, banks should comply with the following basic requisites:

- (1) When services are provided, there must be a contract between the bank and the customer that clearly sets out the rights and responsibilities of each party.¹¹

⁹ Law No. 20.727, Introduce Modificaciones A La Legislación Tributaria En Materia De Factura Electrónica Y Dispone Otras Medidas Que Indica [Introducing Amendments to Tax Legislation Regarding Electronic Billing], Enero 20, 2014, DIARIO OFICIAL [D.O.] (Chile), <http://www.leychile.cl/Navegar?idNorma=1058909>.

¹⁰ *Transferencia Electrónica de Información y Fondos* [Information and Electronic Funds Transfer], SUPERINTENDENCIA DE BANCOS E INSTITUCIONES FINANCIERAS DE CHILE, Capítulo 1-7, Hoja 1 (Aug. 21, 2008), http://www.sbif.cl/sbifweb/internet/archivos/norma_87_1.pdf.

¹¹ *Id.* at 1.

- (2) The systems used and registration, which allows for full monitoring of transactions, should generate backups of every operation necessary to carry out any investigation or subsequent certification.¹²
- (3) The system should provide a security profile that ensures that only authorized personnel carry out operations and protect the privacy of information transmitted or processed.¹³
- (4) The procedures must properly signal the authorship of transactions or messages, and the conformity of their receipt, by the originator and the recipient, using keys and access mechanisms that permit and ensure authenticity and integrity.¹⁴
- (5) Installations and configurations of computers and networks should ensure the continuity of operations against deliberate or accidental events.¹⁵
- (6) The systems used to transfer funds should ensure that the transferred amounts do not exceed the available balance or limit that has been fixed for the effect, and should recognize the validity of the user's operation.¹⁶
- (7) Electronic funds transfer systems must generate enough information for the customer to reconcile the transfers of money with her own or the bank's corresponding records.¹⁷
- (8) Institutions that hire the services of an electronic brokerage company must be in a position to verify compliance with the above basic requirements and other aspects that ensure the authenticity, integrity, and confidentiality of electronic documents and passwords.¹⁸
- (9) The banks must weigh the exposure to the above financial and operational systems of transfer and consider internal audits and prior authorizations when they are necessary.¹⁹

With these regulations, the Chilean banking system has taken the initiative and the responsibility to generate some of the conditions necessary to facilitate the expansion of E-commerce. The regulations establish an electronic system of payment or transfer that guarantees that the paying party complies with all reasonable requirements of authentication. The regulations also ensure real

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Transferencia Electrónica de Información y Fondos* [Information and Electronic Funds Transfer], SUPERINTENDENCIA DE BANCOS E INSTITUCIONES FINANCIERAS DE CHILE, Capítulo 1-7, 2 (Aug. 21, 2008), http://www.sbif.cl/sbifweb/internet/archivos/norma_87_1.pdf.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ *Transferencia Electrónica de Información y Fondos*, *supra* note 14, at 3.

authorization from the holder of the account to carry out the transaction. Finally, they ensure the availability of funds for the payment of that transaction.

B. Delivery of the Product to the Consumer

E-traders are aware of the economic importance, quickness, informality, and risks of E-commerce, especially between strangers. It is a form of trade that ultimately depends almost exclusively on the full observance of the principle of good faith. As mentioned before, Chile does not have an E-commerce law, so it must solve E-commerce issues with the rules and general principles of civil and commercial law and the other aforementioned laws. For this reason, the Chamber of Commerce of Santiago has developed a Code of Good Practice for Electronic Commerce.²⁰

C. Code of Good Practice for Electronic Commerce

The objective of this Code of Good Practice is to serve as a guide for the ethical conduct for electronic suppliers and for the benefit of consumers or users who contract with them over electronic systems. To achieve this objective, the code proposes principles and standards to which providers must aim, adjusting them as necessary to meet the particularities of their own businesses.²¹ This thus installs a system of uniform self-regulation in the industry, creating bonds of credibility and trust with consumers on the basis of legal certainty.

The Code applies to all the E-commerce transactions of the companies that adopt it. Companies generate a form of E-commerce by using the Internet for activities such as advertising and commercial communications, pre-contractual negotiations, hosting electronic auctions or virtual markets, purchasing management networks by groups of persons, offering discount coupons, providing search tools, and accessing and retrieving data.

In order to be bound by the Code, companies must voluntarily adopt it as a regulatory instrument. Companies that do not adopt it are not bound by it. They adopt the Code by joining the Electronic Commerce Committee of the CCS, or by manifesting an unconditional promise to be bound by the Code through its legal representative.²² Thus, restricted or conditional adoptions are deemed as non-binding even if they are formulated as reservations or exclusions.

The adopting company loses its status as an adopting company by resignation of its legal representative, or if the Board of the Chamber of

²⁰ *Código de Buenas Prácticas para el Comercio Electrónico* [Code of Good Practice for Electronic Commerce], [hereinafter *Code of Good Practice*] CÁMARA DE COMERCIO DE SANTIAGO, http://www.ccs.cl/html/rse/codigo_buenas_practicas.pdf (last visited Dec. 16, 2015).

²¹ *Id.* at Preámbulo, 5.

²² *Id.* at Título VII. Validez y Eficacia de este Código, Artículo 33.

Commerce removes said representative because of a history of business conduct inconsistent with the principles and standards of the Code.²³

The Code regulates matters such as advertising, E-procurement, data protection, protection of minors, and special rules for distance communications by means other than the Internet. Each is subject to its own set of principles. The principles of truthfulness, good faith, fair treatment, sufficiency, integration to the contract, and free navigation govern advertising. Truthfulness requires that the advertising be clear and true regarding both products and services.²⁴ Good faith requires advertising to be prepared honestly because of the perceived need to avoid public distrust.²⁵ Fair treatment requires, for example, that advertising not undermine the dignity of a person, or be arbitrarily discriminatory. Sufficiency requires advertising to contain enough details to inform the public about the essential and relevant aspects offered on goods or services.²⁶ Integration to the contract means that all information about goods or services in an advertisement is part of a contract that the supplier and the consumer will eventually sign.²⁷ Finally, free navigation prohibits any electronic publicity from preventing users' free browsing.²⁸

The principles of legality, informed consent, and binding force of the contract control electronic procurement. Legality requires that the offer and procurement of goods or services, and after-sales care, must respect the rules of the applicable jurisdiction. Informed consent obligates electronic suppliers to report on the general and special conditions of their contracts, goods, and services, so that consumers can have adequate knowledge of the nature of the contracts they sign.²⁹ Binding force of the contract requires providers to provide accurate and timely compliance with a signed contract.³⁰ The principles of professionalism and good faith guide the application of this principle. Electronic providers must observe what is generally regarded as professional conduct in E-commerce, and must act honestly and transparently.

The governing principles of the protection of personal data are purpose and ownership of personal data. Suppliers must maintain and use personal data in existing databases, exclusively in their own business activities and marketing of goods and services.³¹ The principles of protection and superior interest also govern data protection when minors are involved.³² Thus, electronic suppliers should take particular care when targeting advertising to minors. Protection mandates that the goods and services must not attempt or encourage them to

²³ *Id.* at Título VII. Validez y Eficacia de este Código, Artículo 34.

²⁴ *Code of Good Practice* at Título II, Publicidad, Artículo 3-Principios, N° 1.

²⁵ *Id.* at Título II, Publicidad, Artículo 3-Principios, N° 2.

²⁶ *Id.* at Título II, Publicidad, Artículo 3-Principios, N° 4.

²⁷ *Id.* at Título II, Publicidad, Artículo 3-Principios, N° 5.

²⁸ *Id.* at Título II, Publicidad, Artículo 3-Principios, N° 6.

²⁹ *Code of Good Practice* at Título III, Contratación Electrónica, Artículo 10, N° 1.

³⁰ *Id.* at Título III, Contratación Electrónica, Artículo 10, N° 4-5.

³¹ *Id.* at Título IV, Protección de Datos Personales, Artículo 19, N° 1-2.

³² *Id.* at Título V, Protección de Datos Personales, Artículo 26, N° 1-2.

undermine their dignity or their physical, spiritual, emotional, or intellectual well-being. In the case of the superior interest principle, before there is any conflict, difficulty, or dispute that involves advertisement aimed at minors; to the electronic commerce in which they participate; or treatment of their data, the member companies should deploy their best efforts to choose the solution that best benefits the child, or produces least harm.

These principles thus ensure that companies adhering to the Code must comply with minimum standards that establish and assure their clients the fulfillment of all contract obligations. In Chile, the National Consumer Service (SERNAC) conducted a study of E-commerce companies, including discount sites, retail, technology, telecommunications, and ticket sales.³³ The study evaluated the presence of information to certain criteria. The study's goal was to promote good business practices, market transparency, and respect for the rights of consumers in their information in E-commerce in Chile. The study's results indicate that between 2012 and 2015, during which SERNAC has made a permanent monitoring of information on the E-commerce, suppliers have worked through the CCS, and taken action to protect consumers so that companies can adjust their information. Though, complaints have been presented in courts when necessary. Thus, there has been a substantial increase in the presence of information on the identities of companies, transactions, privacy, and security policies on web sites, reaching 89% of the presence of information.³⁴ This finding reveals that there is clarity on the obligations of providing information to consumers.

However, providing a given amount of information does not guarantee high-quality information. Indeed, the study observed that the information was not always accessible because it was at times stated unclearly or ambiguously.³⁵ Companies have full knowledge of the information that must be available to consumers on their websites. Therefore, the next step is to improve the quality of the information displayed. It not only should be available, it should also meet a minimum quality requirement based on the specifics of the business. This would create bonds of trust and confidence with consumers.

These studies are motivated by the increase E-commerce has presented in the past years and to determine the effects this growth has had in Chile and other Latin American countries. As previously mentioned, Chile does not have a specific law that regulates E-commerce, therefore, there is the need to search for improvements and updates in the regulations that already exist and address it. An example of this is what has been mentioned in relation to the regulations in the

³³ *Estudio sobre la Información que Proporcionan los Proveedores de Comercio Electrónico en Chile Desde la Perspectiva de la Protección del Consumidor* [Study on the Information Provided by E-Commerce Providers in Chile from the Perspective of Consumer Protection], DEPARTAMENTO DE ESTUDIOS E INTELIGENCIA OBSERVATORIO DE PUBLICIDAD Y PRÁCTICAS COMERCIALES (Apr. 2015), http://www.sernac.cl/wp-content/uploads/2015/05/Informe-Comercio-Electrónico_Abril-2015.pdf.

³⁴ *Id.* at 19.

³⁵ *Id.* at 21.

banking systems that generate the necessary conditions to facilitate the expansion of E-commerce. The need to improve and update regulations also results in the use of self-regulation. This is a practice that should be understood as a complement or alternative to the legislation, in which regulatory strategies are used to improve the participation and responsibility of the companies and individuals.

