

**LAW No. 13.709/2018 AND APPLICABILITY IN AUCTIONS**

**LEI Nº 13.709/2018 E A APLICABILIDADE NOS LEILÕES**

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**ABSTRACT**

The LGPD brings its rules to data protection bases for the entire national territory, being an essential tool for security and transparency in business relationships in Brazil and the world. It is highly recommended that companies operating in the area of auctions analyze the particularities of their business, carry out a mapping of the flow and life cycle of the personal data existing in their bases, assess the risks existing in their processes and implement technical and organizations in relation to data protection. Because the current situation of the Leilões scenario, needs great attention and adaptations regarding the General Data Protection Law. Thus, we propose an urgent review of this jurisprudential paradigm, so that immediate changes can be implemented in our legal system in this sphere, to guarantee the protection of this data. As well as a position of the National Council for the Protection of Personal Data in relation to auction data, including because they serve the interests, or even to the detriment, of the incapable, no matter how much the Public Ministry intervenes.

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**Keywords:** LGPD; Data Protection; Principle of Transparency; Auctions.

## RESUMO

A LGPD traz em seu regramento as bases de proteção de dados para todo o território nacional, sendo ferramenta essencial para a segurança e transparência nas relações de negócios no Brasil e mundo. É altamente recomendável que as empresas que atuam na área de leilões analisem as particularidades do seu negócio, realizem um mapeamento do fluxo e ciclo de vida dos dados pessoais existentes em suas bases, avaliem os riscos existentes em seus processos e implementem medidas de segurança técnicas e organizacionais em relação a proteção de dados. Pois a atual conjuntura do cenário dos Leilões, necessita de grande atenção e adaptações no que tange a Lei Geral de Proteção de Dados. Assim, propomos uma urgente revisão nesse paradigma jurisprudencial, para que as mudanças imediatas possam ser implementadas no nosso ordenamento jurídico nessa esfera, para garantir a proteção desses dados. Bem como, um posicionamento do Conselho Nacional de Proteção de Dados Pessoais em relação aos dados de leilões, inclusive porque atendem aos interesses, ou até em desfavor, de incapazes, por mais que o Ministério Público intervenha.

**Palavras-chave:** LGPD; Proteção de Dados; Princípio da Transparência; Leilões

## 1 INTRODUCTION

With the advent of the General Law on Personal Data Protection (LGPD) - LawNo. 13,709/2018, the topic of privacy is on the rise. We currently see several study groups, norms and laws growing and diving into the protection of personal data.

The law provides for the processing of personal data, including in digital media, by natural persons or public or private legal entities, with the aim of protecting the fundamental rights of freedom and privacy and the free development of the personality of natural persons.

The LGPD, therefore, brings its data protection basics to the entire national territory, being an essential tool for security and transparency in business relations in Brazil and worldwide.

Furthermore, it brings greater credibility to Users (Data Holders), Companies, Liberal Professionals, and the self-employed, and punishment for those who do not adjust to its rules.

In the auction sector, the LGPD brings the possibility that, based on its strict regulation, it will be able to limit the clandestine market on the Internet, which, with its exponential growth, makes thousands of victims every day.

It is a fundamental legal framework built for the protection of one of the main and most valuable assets: the data of natural persons. Guiding its competence through the protection of human rights.

As far as auctions are concerned, they can take place in a physical space, or they can be held entirely online. They are, therefore, regardless of the medium, in essence public events in which any person or company can participate.

In organizing and carrying out the auctions, companies specialized in providing services of purchase and sale intermediation, the so-called Auctioneers, operate.

Among them are the auctioneers, who invariably register both the seller and the buyer, either to fulfill the purchase and sale contract, prevent fraud, check the identity and suitability of the parties, or even to send catalogs of upcoming auctions.

It is common that, in this registration, Auctioneers demand from both parties the provision of personal data, including full name, date of birth, CPF, RG, home and business addresses, e-mail; bank information. Even third-party data may be requested by the Auctioneers for the purpose of obtaining personal, professional and commercial references.

Contrary to what is usually imagined, the Auction Houses' database does not only include Buyer and Seller information, but also that of their permanent employees and professionals hired to conduct the auction (auctioneer, etc.).

In addition, in auctions there is a need to publicize not only the bidding, but also the bidders in order to make sure that there has been no manipulation so that the highest bidder is the "winner".

This is relevant because this information is necessary to serve the public interest, including in judicial and extrajudicial auctions, where there is the expropriation of goods.

The counterpoint is anonymization, which is when the bidder chooses a nickname, when electronic means are used in the auction portal, in which the public does not necessarily need to have access to the data, because the possibility of association, direct or indirect, with an individual during the bidding phase is lost.

The intermediation activity, therefore, reveals itself as an intensive activity in the processing of personal data of a diverse range of holders. It is important to note that the word

"processing" in this context encompasses any operation performed with information relating to an identified or identifiable natural person, including, in this case, the collection, receipt, transmission, processing, filing, storage, deletion and evaluation.

With the entry into force of Law No. 13,709/2018, the General Law of Personal Data Protection (LGPD), those who carry out the processing of personal data of individuals must adapt to its legal discipline. The purpose of the LGPD is to confer greater protection to the holder of personal data, establishing rules, duties and rights regarding the processing of this information.

According to the LGPD, the processing of personal data may only be carried out based on at least one specific legal basis, among the ten legal bases listed in the standard, such as consent, contract enforcement, legitimate interest and compliance with legal or regulatory obligation. Thus, Auction Houses must promote their adaptation to the LGPD.

They must also respect, cumulatively, the guiding principles of the Law, among which are the principles of purpose, necessity, free access, and accountability.

In addition, they must observe, respect and communicate with the data subjects about their rights, such as, for example, the confirmation of the existence of the processing, the correction of inaccurate, incomplete or outdated data, the revocation of the consent given for the processing, if any, as well as, in this case, the right to information about the possibility of not giving consent and the consequences of not doing so.

One must bear in mind that not only data leakage, but the mere non-compliance with the principles of the Law or the non-compliance with a request from the holder of the personal data itself, may lead to sanctions, not to mention the reputational damage that the Auctioneer will suffer if its image in the market is linked to a case of violation of the LGPD.

The administrative penalties, to be applied by the National Data Protection Authority in case of violation of the LGPD, range from a warning to a simple fine of up to 2% of the company's or group's revenues, limited to a total of R\$50 million reais per violation, without prejudice to the publication of the violation.

Acting in compliance with the LGPD, using the best handling and security techniques available on the market, is therefore essential. By doing so, the controller may, in case of a leak, rely on an exclusion of causality to exempt itself from liability, by proving that it used its best efforts, even if it was not possible to prevent an attack on the system. In other words, the controller can plead absence of fault.

It is highly recommended that companies that operate in the auction area analyze the particularities of their business, map the flow and life cycle of the personal data in their databases, assess the risks existing in their processes, and implement technical and organizational security measures in relation to data protection.

In other words, a complete overhaul of data governance goes beyond adapting privacy policies and general terms and conditions of employment.

## **2 LGPD AND THE PRINCIPLE OF TRANSPARENCY IN AUCTIONS**

One of the main principles supporting the General Data Protection Law is the principle of Transparency, which is the guarantee given to data subjects that they will have clear, precise, and easily accessible information about the processing and the respective processing agents, observing commercial and industrial secrets.

This principle is intertwined with the principle of data quality already examined.

It means, in other words, that data subjects must be guaranteed and ensured clear, precise, and easily accessible information on the performance of the treatment and on the respective treatment agents, safeguarding industrial and commercial secrets.

The emphasis on transparency wishes to highlight the importance that the LGPD places on the flow of information to the data subject, after all, he, the data subject, together with your data, constitute the most important elements of the entire processing process.

Clear information, by the way, is an expression that seeks to indicate that the use of excessively technical and even hermetic content is not compatible with the objective of this principle, because what we are trying to guarantee is that natural persons, whatever their cultural level, can understand what the corresponding information is about, especially because, for the entire procedure to take place, it is essential that they understand what will happen to their data after it has been processed.

The content of such transparency is based not only on the data, before and after it is processed, but also on the agents that took part in the procedure.

Note, in conclusion, that the legislator was careful to guarantee the protection of

of commercial and industrial secrets to their respective holders, so that such secrets constitute limits to be observed when using the transparency relative to the treatment performed with natural persons' data.

Note, Article 6 of the LGPD is interesting because the processing of bidders' personal data, and even the information of the judicial proceedings should observe good faith, in addition to other principles, since the purpose of the auction is to sell at the highest price in the interests of the selling principal or the execution. Therefore the processing of the bidder's and seller's data (or executed or bankrupt estate) serves legitimate purposes. As for the result of the auction, the further processing of the results is compatible with its purpose of transparency.

Art. 6 Personal data processing activities shall observe good faith and the following principles:

- I - purpose: carrying out of processing for legitimate, specific, explicit, and informed purposes to the data subject, without the possibility of further processing in a manner incompatible with these purposes;
- II - adequacy: compatibility of the processing with the purposes informed to the data subject, according to the context of the processing;
- III - necessity: limitation of the processing to the minimum necessary for the achievement of its purposes, with a scope of data that is pertinent, proportional, and not excessive in relation to the purposes of the data processing;
- IV - free access: guarantee to the data subjects of easy consultation, free of charge, about the form and duration of the processing, as well as about the completeness of their personal data;
- V - data quality: guarantee, to the owners, of the accuracy, clarity, relevance, and updating of the data, in accordance with the need and for the fulfillment of the purpose of its treatment;
- VI - transparency: guarantee, to the titleholders, of clear, precise, and easily accessible information about the processing and the respective processing agents, observing commercial and industrial secrets;
- VII - security: the use of technical and administrative measures to protect personal data from unauthorized access and accidental or illicit destruction, loss, alteration, communication, or diffusion;
- VIII - prevention: adoption of measures to prevent damages from occurring as a result of the processing of personal data;
- IX - non-discrimination: impossibility of performing the treatment for illicit or abusive discriminatory purposes;
- X - accountability and rendering of accounts: demonstration, by the agent, of the adoption of effective measures capable of proving the observance and fulfillment of the personal data protection norms and, inclusively, of the effectiveness of these measures.<sup>3</sup>
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<sup>3</sup> LAW NO. 13.709, OF AUGUST 14, 2018. General Law for the Protection of Personal Data (LGPD). Available at: <[http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2018/lei/113709.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/113709.htm)> Accessed on: 18 Feb 2022.

In other words, it is the auctioneer's duty to describe the situation of the asset to be sold at a judicial auction with full transparency, in respect for the principle of good faith and the duty of cooperation, under penalty of the auction's undoing.

SPECIAL COURTS. CIVIL. PRELIMINARY CLAIM OF ILLEGITIMACY OF LIABILITY. REJECTION. CONTRACT RESCISSION. AUCTION. VEHICLE IN JUNK CONDITION. OMISSION IN THE PUBLIC NOTICE. VIOLATION OF GOOD FAITH. DUTY OF COOPERATION. CIVIL LIABILITY CHARACTERIZED. DUE RESTITUTION OF THE VALUE OF THE AUCTION.

ALLOWANCE. 1. Preliminary claim of passive illegitimacy. Theory of Assertion. The conditions for the action are assessed in the abstract, considering the plaintiff's assertions in the initial petition and the suitability, in theory, of the desired jurisdictional provision. The analysis of the facts and documents in the case leads to an incursion into the merits. Preliminary claim of passive illegitimacy rejected. 2. It is clear from the case records that the auction notice, when describing the vehicle, provides only about the damaged key and non-original windshield, with regularization by the bidder, if necessary (ID 5565463, page 13), a situation capable of generating a legitimate expectation in the bidder that the car was at least roadworthy. However, the photos attached to the records (ID 5565465), show that the property sold, for the final amount of R\$ 10,150.00, was in a state of scrap, with various defects and even with the engine disassembled.

3. 3. thus, although the vehicle was available for verification before the auction, it was the auctioneer's duty to specify the situation of the vehicle with full transparency. It is essential, therefore, to state in the description of the property that it was being auctioned in the condition of scrap metal, allegation, inclusive, not contested in contestation by the defendant. 4. 4 Moreover, the obligation of the official auctioneer to proceed with transparency is not undermined by the provision in the notice that the buyer could examine the vehicle, since the principle of good faith and the duty of cooperation must be respected in any business relationship (STJ-REsp n. 1.035.373-MG. Reporting Justice MARCO BUZZI). 5) In effect, the contracting parties are obliged to observe the principles of probity and good faith in the conclusion and execution of the contract, pursuant to article 422 of the Civil Code. (...)? From this perspective, the appellant's civil liability has been characterized, for which reason the decision does not merit any review and must be upheld on its own legal grounds. 6. PRELIMINARY DENIED, APPEAL KNOWN and NOT PROVIDED. I order the appellant to pay procedural costs and attorney's fees, the latter set at 10% of the amount awarded, pursuant to art. 55 of Law 9099/95. 7. The decision will serve as a judgment, according to art. 46 of the referred law. <sup>4</sup>

It should be noted that the plaintiff, in the aforementioned case law, sought in court the rescission of a contract for the acquisition of a vehicle sold at auction. He argued that the public notice only pointed out defects in the key and windshield, but when he received the car, he found that it was not even roadworthy. In the first instance, the auctioneer was ordered to refund the amount paid by the applicant, who bought the car without having the state of repair specified in public auction. On appeal, the Class understood that the incomplete description of the vehicle generated the expectation that the property could at least be used. The judges stated that the car had several defects and that the engine was disassembled. They affirmed that it was up to the auctioneer to describe the situation of the property with full transparency, in respect for

the principle of good faith and the duty of collaboration. With this, the Magistrates confirmed, by majority vote, the defendant's liability and upheld the contract termination, as well as the duty to refund the amount paid for the car.

In the same vein, the auctioneer's site, which operates by commission contract, or by appointment of the court, must have the transparency of the information required from the bidder, therefore with the adequacy and compatibility of treatment with the purposes informed to the holder, according to the context of the treatment, having as a basic principle that some information may be deleted in view that would not affect the bidder's interest.

Most of the lawsuits are not kept under the secrecy of the courts, so they are public. Thus, the auctioneer does not necessarily need to present on the site the process data, the parties, but only the expropriated asset for sale, since the bidder is only interested in its acquisition.

In this respect, the expropriation proceedings in family courts in which the data of the parties must be suppressed, exactly because they are being held in judicial secrecy, the publicity must be only about the expropriated property.

<sup>4</sup> Judgment 1139988, 07029319120188070014, Rapporteur Designate Judge SONÍRIA ROCHA CAMPOS D'ASSUNÇÃO, 1st Appeal Panel of the Special Civil and Criminal Courts of the DF, judgment date: 11/27/2018, published in the DJe: 1/30/2019.

Note that in a real estate auction it is necessary to make available the registration of the property, which is public information, and even if the owner's data and the liens recorded in the registration are suppressed, there will certainly be information on the executed party (in alimony).

Even proceedings in which there is a breach of tax or bank secrecy, or of the interests of justice, such as administrative improbity, which are eventually kept secret, not for the preservation of the parties, but only because confidential information has been included in the records, or involving victims (such as the execution of a fine or a fine to compensate a rape victim), there is no need to preserve the expropriated party's data.

On the other hand, in some situations information about the expropriator may be decisive for the acquisition of an asset, and its omission may go against the interests of the bidder. Perhaps a luxury vehicle from a criminal seizure for the crime of international drug trafficking, whose auction proceeds by anticipated alienation (art 144 of the Code of Criminal Procedure), the bidder is not interested, no matter how good the price and the conditions of the bidding, if the vehicle belonged to a drug trafficker.



Article 144-A. The judge will order the anticipated disposal to preserve the value of the assets whenever they are subject to any degree of deterioration or depreciation, or when there is difficulty in maintaining them.<sup>5</sup>

Note, the difficulty in having free access to information, the public interest, the violation of intimacy, when the subject is judicial or extrajudicial expropriation (such as auctions for the seizure of vehicles for traffic violations or for fiduciary alienation, condominium quotas, among others).

We have yet another relevant issue, which is discrimination. Can the auctioneer admit that only people qualified for access to his site can check

DECREE-LAW NO. 3,689, OF OCTOBER 3, 1941. Code of Criminal Procedure.  
Available at:

<[http://www.planalto.gov.br/ccivil\\_03/decreto-lei/del3689.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm)> Accessed on: 17 Feb. 2022.

the auction results and participate in them, or should anyone have access, accessing them anonymously? And is consent to participate by registering, making it mandatory, vitiated by vitiated consent?

This issue has been discussed, but in order to exercise the right of first refusal the bidder must necessarily manifest itself for analysis by the court if it is among the list of those who can exercise it. And, therefore, the only form of manifestation is if he is duly registered and exercises the right at the end of the auction under the same conditions as the winning bidder. And even if he does not, the auctioneer must treat such data, in line with the art 11 I, d) of LGPD

It should be noted that there are many attempts at fraud in auctions, which is a bidding process, so there must be the possibility of treatment of sensitive data to suit the principle of transparency, impersonality, morality, economy, but especially to ensure the prevention of fraud and security of the holder, in the identification and authentication processes of registration in electronic systems. As stated in art. 10, § 2 of the LGPD.

The legitimate interest of the controller may only justify processing of personal data for legitimate purposes, considered from concrete situations, which include, but are not limited to:

...

§ The controller shall adopt measures to ensure the transparency of data processing based on its legitimate interest.

It is necessary to have a position of the National Council for Personal Data Protection in relation to auction data, also because they serve the interests, or even to the disadvantage, of incapacitated people, no matter how much the Public Prosecutor intervenes.

When it comes to the holder's right, in this vein, an executed party may request that there not be public exposure of his expropriation, which he considers vexatious. Can the publicity required in a judicial expropriation make use of the expropriator's data to better identify the property being sold in court?

We believe that the intelligence of art. 17, in its caput and in art. 18, § 1, the holder of the personal data has the right not to feel defamed by the expropriation, however judicial, therefore at his request the court may (in our opinion SHOULD) order that the exposure be minimized, or even not exploited and not disclosed, if possible, and in case of impossibility, he must present the factual or legal reasons that prevent the immediate adoption of the measure.

In this sense, art. 23 of LGPD deals with personal data by public legal entities referred to in the sole paragraph of art. 1 of Law No. 12,527 of November 18, 2011 (Access to Information Law).

The processing of personal data by legal entities of public law referred to in the sole paragraph of art. 1 of Law No. 12.527, of November 18, 2011 (Access to Information Law), shall be performed for the fulfillment of its public purpose, in the pursuit of public interest, with the aim of performing the legal powers or fulfill the legal attributions of the public service, provided that:

I - be informed of the cases in which, in the exercise of their competencies, they process personal data, providing clear and updated information about the legal provision, the purpose, the procedures and the practices used for the execution of these activities, in easily accessible vehicles, preferably on their electronic sites;

II - (VETOED); and

III - an administrator is appointed when they perform personal data processing operations, pursuant to art. 39 of this Law.

III - a person in charge is appointed when they perform personal data processing operations, pursuant to art. 39 of this Law; and (Redaction given by Law No. 13,853, of 2019) Effective Date

IV - (VETOED). (Included by Law No. 13,853, of 2019) Effective Date

§ 1. The national authority may determine the forms of publicity of the processing operations.

§ Paragraph 2 The provisions of this Law do not exempt the legal entities mentioned in the caption of this article from instituting the authorities referred to in Law No. 12,527, of November 18, 2011 (Access to Information Law).

§ The deadlines and procedures for exercising the holder's rights before the Public Power will observe the provisions of specific legislation, especially the provisions of Law No. 9.507 of November 12, 1997 (Habeas Data Law), Law No. 9.784 of January 29, 1999 (General Law of Administrative Procedure) and Law No. 12.527

of November 18, 2011 (Access to Information Law).

§ Notary and registry services performed privately, by delegation of the Public Power, will have the same treatment given to the legal entities referred to in the caput of this article, under the terms of this Law.

§ 5º The notary and registry agencies must provide access to data by electronic means to the public administration, with the purposes mentioned in the caput of this article in mind.

Therefore, when it comes to the Judiciary, whose public purpose is social pacification through decisions, and in pecuniary convictions in which there is no payment and the pursuit of the executed party's assets and the consequent expropriation in conversion into currency is of public interest because the objective is the recomposition of the creditor's assets to the executed party's disadvantage,

therefore the non-exposure of the executed party is a secondary issue because, by his or her option, he or she did not comply as sentenced.

We also bring another polemic subject that deserves our attention, which is the AUCTION CRIBES. Because the vehicles auctioned in judicial or extrajudicial auctions end up being "investigated" by autonomous companies, which in tracking systems and information availability of cars, motorcycles or trucks (vehicle queries).

Obviously the information that the buyer can have is whether it comes from an accident, be it a low, medium or high accident.

But not all vehicles come from insurance company auctions, they can be from finance companies or banks, recovered through search and seizure or spontaneous delivery, which are auctioned once the financial institution needs to convert into currency in a transparent way, in the interest of the shareholder and its social purpose.

But even vehicles recovered by insurance companies may not have been involved in an accident and compromise the bodywork, engine, parts, pieces, and components, as in the case of location by theft or robbery.

The "vehicle consultation" companies that provide relevant information (and charge for it), "CRIVALIZE" the vehicle as coming from an auction.

Now, without specifying the type of auction, it devalues the vehicle and brings a real loss to its bidder, because it will be penalized in the sale, and the insurance companies end up not accepting the risk for not having the history of the eventual damage, extending to not be victimized to compensate irreparable or redibiting damage by previous loss.

The screening companies in our view are not in tune with LGPD, as they bring a

disservice to society in that they characterize all auctioned vehicles without specifying why they were auctioned. An owner may understand that auctioning could be the best way to sell. And does not do so for fear that the property will be sifted.

The vehicles expropriated in execution proceedings, or collected in bankruptcy estates, which is nothing more than a collective execution proceeding against the bankrupt company, for payment in the form of apportionment to creditors in their various classes, when "screened", do not meet their main objective, which is to maximize the purchase price, since the bidders offer lower values than those practiced in the market, since the devaluation by the screening is certain.

Let's see that specifically in relation to auctions, we need to think about the necessary adaptations in their various fields with regard to the Data Protection Law and its applicability.

## **CONCLUSION**

Therefore, in the end we conclude that the current situation of the Lelons scenario needs a great deal of attention and adaptation with regard to the General Data Protection Law.

The LGPD brings its data protection bases to the entire national territory, being an essential tool for security and transparency in business relations in Brazil and worldwide.

Thus, we propose an urgent review of this jurisprudential paradigm, so that immediate changes can be implemented in our legal system in this sphere, to ensure the protection of this data. As well as, a positioning of the National Council for the Protection of Personal Data in relation to auction data, including because they serve the interests, or even to the disadvantage, of incapacitated persons, no matter how much the Public Ministry intervenes.

Therefore, these findings open the way for further discussions about other understandings of auctions and data protection.

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