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THE FRANCHISOR'S CIVIL LIABILITY UNDER THE GENERAL DATA PROTECTION LAW

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ABSTRACT

The objective of this work is to verify the effects of the contractual coalition specifically regarding the franchisor agreement and its consequences in case of non-compliance with the General Data Protection Law. To this end, the deductive method is used, using research techniques related to indirect documentation. In the text, the elements of the franchise agreement and the effect of the contractual coalition in this type of legal transaction are verified. From this, the work addresses the duties lateral to the contracts and, consequently, whether there is the possibility of imputing to the franchisor, the non-compliance with the General Data Protection Law by the franchisee.

Keywords: Franchising. Contractual Coalition. Data Protection. Liability.

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INTRODUCTION

The members of a society, since its inception, have had to relate to each other on a daily basis. In the beginning, the figure of exchange – not the one typified in the Civil Code – already existed. People exchanged food, products and inputs with each other. With human evolution, over time, the relationships between them have become increasingly complex.

Currently, the Brazilian legal system has some legal figures for the regulation of these relationships, granting due security to the parties involved. This is the case, for example, of the contract.

The classic figure above is derived from a certain legal transaction, which, in turn, is part of the category of legal facts (TEPEDINO, 2007). These are understood as "the human or natural event, capable of producing legal effects, causing the birth, modification or extinction of legal relations and the rights inherent to it". (TEPEDINO, 2007, p. 211)

In fact, the complexity of the legal relationships that took place in society caused other figures to be born. The insufficiency of the existing legal institutes, including figures related to corporate law, gave rise to the creation of more complex structures, such as related contracts.

Thus, in view of this social evolution, "it began to observe not only the phenomenon of the combination of different services and contractual elements in a single contract, said to be atypical, but also the execution of two or more contracts united by a bond, contracts referred to by the national doctrine, for the most part, as related contracts" (ENEI, 2003, p. 112).

Part of this phenomenon are those contracts intended for the distribution of a certain product or service. As warned by Walfrido Jorge Warde Jr., nowadays, it is not enough just to produce, the business community needs to sell (WADE JR., 2008).

Considering that the activity of product distribution (lato sensu) is complex and specific, many times the manufacturer of a certain product or supplier of a certain service does not have the expertise, the *know-how*, to achieve its social purpose, which is the sale of the merchandise in question.

Likewise, the distributor does not have the industrial secret, the structure or even the manufacturer's brand so that, without it, it can achieve its objectives. From then on, a symbiotic relationship was born between the companies that "entertain, percent, a clear and essential relationship of dependence, which is accentuated by the large number of manufacturers who do not distribute and distributors who do not manufacture" (WADE JR., 2008, p. 271).

Franchise agreements fall under the category of distribution agreements as well as the system of the modern market economy. As a consequence of the relationship of dependence between the franchisee and franchisor, the legal transaction that will be addressed below is considered as a true related contract.

And, due to the consequences of the contractual coalition, especially in the context of the civil liability of contractors, they have become an object of great concern, even more so when faced with the data society and the recent enactment of Law No. 13,853/2019, the so-called General Data Protection Law.

The protection and care regime that legal entities need when processing personal data has caught the attention of legal scholars. Thus, it is necessary to define and perhaps limit civil liability for personal data leaks within the scope of franchise agreements.

By defining the aforementioned legal institute and the types of coalition, this work will address the duty of diligence and inspection that the contracting parties have among themselves, in order to then define whether or not there will be a duty to indemnify on the part of the franchisor due to the data leakage carried out by the franchisee within the scope of the legal relationships protected by the regime established in Law No. 13,709/2019.

FRANCHISE AGREEMENT AND CONTRACTUAL COALITION

The franchise agreement was originally regulated by Law No. 9,855, of December 15, 1994. Although this legal rule has only come into force in the mid-90s, the franchise business model has been in force in Brazil since the 1910s, on the initiative of a footwear manufacturer Arthur de Almeida Sampaio, who determined that some of its commercial representatives should install stores to be identified as the brand *Stella Shoes* (SILVA, 2011).

Later, in the 1970s, franchising began to develop systematically, due to the emergence of large business networks, such as, in Curitiba, *O Boticário* (SILVA, 2011).element.

As can be seen from the analysis of the above-mentioned phenomenon, the legislator sought to enact a specific law on the franchise agreement as a measure to grant legal certainty to the contracting parties.

In a clear movement to follow the economic relations of society, as well as due to the existence of a previous business model, the Brazilian legislation did not seek to regulate the content of a franchise agreement, but only the duties imposed on the contracting parties, mainly the information and transparency of the relationship, granting greater freedom to the

contracting parties. so that the franchise agreement is not considered typical, thus prevailing the manifestation of the will of the parties (COELHO, 2016).

Twenty-nine years after the enactment of the aforementioned legal diploma, in its replacement, the recent Law No. 13,966/2019 was enacted, which did not substantially change its legal regime, especially with regard to the system used by the previous rule, but only brought subtle changes.

As usual, the definition of the legal business was in charge of the first article of the new Law, which provides that the business franchise system is that business model by which:

> a franchisor authorizes by contract a franchisee to use trademarks and other intellectual property objects, always associated with the right of exclusive or non-exclusive production or distribution of products or services and also the right to use methods and systems for the implementation and administration of a business or operating system developed or owned by the franchisor, through direct or indirect remuneration, without characterizing a consumer relationship or employment relationship in relation to the franchisee or its employees, even during the training period.[4]

It is, therefore, a combination of two types of contracts: "on the one hand, the license to use a trademark, and, on the other, the provision of business organization services" (COELHO, 2016, p. 159).

The relationship of interdependence of the contracting parties, especially on the part of the franchisee, is the keynote of the contractual coalition within the scope of franchising. The complexity of economic and social relations demand the execution of contracts that are interconnected (ENEI, 2003) and that have a causal and systematic nexus that unites them, in view of the insufficiency of the typical model of single contract – or even of the available corporate forms themselves.

This "link", as well highlighted by José Virgílio Lopes Enei, supported by Rodrigo Xavier Leonardo, demonstrates a "systematic coordination of contracts, structurally differentiated, but interconnected by an articulated and stable economic, functional and systematic nexus" (ENEI, 2003, p. 113).

Distribution contracts in general, including *franchising*, are related due to the nature of their relationship; that is, they have a horizontal connection, which occurs in the hypothesis that "all contracts are on an equal footing, even if they produce effects at different times in the chain of operation (e.g., product distribution chain)" (ENEI, 2003, p. 117).

[4] BRAZIL. Plateau. Law No. 13,966/2019. Available at: http://www.planalto.gov.br/ccivil_03/_ato20192022/2019/lei/L13966.htm. Accessed on 22 Jun 2021.

The recognition of the effects of the coalition in the distribution contracts, which form true Contractual Networks[5], is the existence of the protective norms of Consumer Law themselves.

As an example of the result of the contractual coalition, which will be duly addressed below, we can cite article 12 of the Consumer Protection Code, which is very clear in determining that the entire production chain or, in this case, the contractual network, is responsible for the damages caused to the hyposufficient party of the consumer legal relationship.

Therefore, it is due to the coalition of franchise agreements that the contractual effects can no longer be seen in the light of the principle of relativity of the contract, insofar as the liability of the contracting parties is not restricted to those obligations contained in the private instruments signed by them (ENEI, 2003).

This also arises from the imposition of lateral duties on the contracting parties, such as the social function of the contract and objective good faith.

Hence the importance of identifying the existing contractual coalition in order to subsequently limit the obligations and liability arising not only from the contractual clauses provided for in the particular instrument, but also from those considered ancillary and lateral imposed by the effects produced in relation to third parties, as will be discussed below.

LATERAL OBLIGATIONS IN THE FRANCHISE AGREEMENT: SOCIAL FUNCTION, OBJECTIVE GOOD FAITH AND DUTY OF SUPERVISION REGARDING DATA PROTECTION

Title IV of the Civil Code, intended to regulate Contracts in General, begins with the existence of two general and open clauses: the social function of the contract and objective good faith.

With this, the provisions of article 421 of the Civil Code, as amended by Law No. 13,874/2019, are clear in determining that "contractual freedom shall be exercised within the limits of the social function of the contract"[6]. Going forward, the civil rule determines that "the contracting parties are obliged to keep, both in the conclusion of the contract and in its execution, the principles of probity and good faith"[7].

Such principles, deriving, in part, from the constitutionalization of Civil Law (mainly due to article 3, item III of the Federal Constitution) and under the influence of the German

[5] NDO: Expression adopted by Rodrigo Xavier Leonardo.
[6] BRAZIL. Plateau. Civil code. Available at: http://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm. Accessed on 07 Oct. 2021.
[7] Ditto.

doctrine, unfortunately, began to be used as peripheral and accessory arguments in legal disputes, removing their originally conceived value.

As Judith Martins-Costa points out, "it is necessary to remove old prejudices, to follow paths covered by uncertainties and to rehearse new answers to old doubts, because as useless as just proclaiming the importance of the principle is repeating sonorous platitudes" (MARTINS-COSTA, 2005, p. 42).

In this way, the Social Function of the contract must be analyzed from its functional and structural perspective, so that this principle is intrinsically linked to the freedom to contract, acting at the same time as a true limit and foundation of this freedom (MARTINS-COSTA, 2005)

Márcia Carla Pereira Ribeiro, supported by Fábio Konder Comparato, defines social function as "a power to link an object or a right to a certain objective, provided for by the legal order, which is related to the collective interest and not to that of the parties" (RIBEIRO, 2009).

It is from this premise that it can be concluded that the social function is linked to the limit of contractual freedom. The contracting parties cannot close their eyes to the effects arising from the legal transaction signed, starting from the (outdated) premise that "paper accepts everything".

Nowadays, as Judith Martins-Costa points out, it is not a question of a "consented freedom", nor of a freedom exercised in a vacuum, but of a situated freedom, the freedom that is exercised in community life, that is, the place where civil laws prevail" (MARTINS-COSTA, 2005, p. 43).

And, as a general and open clause, in order to arrive at a definition of what would be the social function of the contract and the freedom exercised by virtue of it, it is necessary to enter the context in which this function is inserted. This means that the sociocultural contour of a given society is what will grant the correct parameters for the application of the principle discussed here.

Contractual freedom, therefore, must be exercised based on the purposes provided for in the Federal Constitution. That is: the social function of the contract must always be guided by the fundamental principles of the Brazilian Republic, set forth not only in article 1 of the Magna Carta, but also in the preamble of the Federal Constitution itself.

It is no wonder that this paradigm shift in the autonomy of the parties' will implies "saying that the contract must meet (concrete final cause or concrete purpose) the requirements of the legal system and be in accordance with the basic values of the Federal

Constitution, especially the dignity of the human person (Article 1, item III) and solidarity (Articles 3, I, and 170, "caput")" (BACARIM and MAFFEIS, 2013, p. 123).

Consequently, there is an expansion of the idea of liability of the contracting parties, which is linked both to the inter-party treatment and to those indeterminate subjects who are not participants in the legal transaction.

This affection takes on even more substance when it is combined with the social function of the company. This principle is:

> The main guide of the 'external regulation' of the interests involved by the large company (....) is the conviction of the influence of the large company on the environment in which it operates, which derives from the recognition of the need to impose positive obligations on the company. Precisely in the imposition of positive duties lies its characteristic trait, distinguishing it from the general principle *neminem laedere.* This is the interventionist social conception, of a rebalancing influence of unequal social relations (SALOMÃO, 2002)

From this it is possible to perceive that there are true positive and negative duties imposed on the contracting parties due to the social function of the contract and the company, even more so when it is a contract of *franchising* in which both are present.

It is in this context that the necessary observance of the obligations imposed by Law No. 13,709/2018, called the General Data Protection Law, and the liability for its violation to both parties to the Franchise agreement is inserted, even if the unlawful act is committed by only one of the parties.

In the era *Big Data* the protection of privacy and personal data has been elevated to the category of Fundamental Rights, since it is intrinsically linked to the dignity of the human person, mainly because it is a decisive factor for the self-determination of the person.

As Ana Frazão asserts:

> Therefore, whether due to the broad scope of the LGPD, or due to its concern with the protection of the existential situations of data subjects, it can be said that a conception convergent with that of those who, like Rodotá, maintain that data protection corresponds to a true autonomous fundamental right, an expression of freedom and human dignity, which is intrinsically related to the impossibility of transforming individuals into objects of constant surveillance (FRAZÃO, 2019, p. 103)

The coating of privacy and the protection of personal data as fundamental rights has as its keynote the power of self-determination of the human person to grant or not consent to the processing of their data, as well as the necessary consideration and protection of the fundamental rights mentioned above (freedom and human dignity) (FRAZÃO, 2019).

And this is present in the very objectives of the General Data Protection Law, which, in its article 1, determines as its purpose the protection of the "fundamental rights of freedom and privacy and the free development of the personality of the natural person"[8].

In fact, Law No. 13,709/2018 has as its expressly listed foundations (article 2, items I, II and VII): respect for privacy, informational self-determination, human rights, the free development of personality, the dignity of the human person and the exercise of citizenship by natural persons.

It is clear that the current context in which Brazilian – and world – society is inserted points to the necessary protection of the personal data of natural persons. Thus, the social function of the contract and the company must be seen and interpreted for this purpose, which creates positive and negative duties between the contracting parties in order to respect the dictates imposed by the General Data Protection Law.

As a result, in the franchise agreement, in which there is a clear subordination of the franchisee in relation to the franchisor and an interference by the latter in the activity of the former, it is possible to conclude that there is a positive duty to monitor compliance with the legal obligations contained in Law No. 13,709/2018, which, if not observed, may culminate in the franchisor's liability in case of leakage of personal data by the franchisee. especially when we are faced with a contractual coalition that is so present in this product distribution contract.

Such a perspective is reinforced when analyzed together with the objective good faith of the contracting parties. In its hermeneutic and integrative bias, objective good faith, which produces duties attached to the legal transaction, "is tied to the concrete economic and social function of the contract" (MARTINS-COSTA, 2008, p. 406).

It should be noted that the duty of collaboration to achieve the purpose of the business does not refer only to its economic purpose, that is, for the circulation of wealth, but also to the social purpose of the contract, already addressed above.

It is from the effects of the contractual coalition, the social function of the contract and objective good faith that a true duty of inspection by the franchisor over the franchisee can be glimpsed.

Such obligation may be more or less present depending on the degree of subordination, dependence and interference of the contractor in the contractor's activity (in this case, the franchisor and franchisee).

[8] BRAZIL. Plateau. General Data Protection Law. Available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. Accessed on 26 Oct 2021

The economic dependence of one of the contracting parties is already known by the specialized doctrine. As Paula A. Forgioni asserts, "some contracts have the situation of economic dependence as a typical appanage, and it is impossible for the party to ignore it at the time of binding" (FORGIONI, 2018, p. 169).

In a similar sense, William Eustaquio de Carvalho states that dependence can occur due to a trademark or even the *Know How* of the contractor (CARVALHO, 2018, p. 160).

This characteristic is even more accentuated in the franchising agreement, mainly because it necessarily involves the transfer of *Know How* from the franchisor to the franchisee in the *Business Format Franchising*.

In this business model, in addition to the subordination of the franchisee and the intervention in the activity by the franchisor, "after the start of operations of the franchised unit until the termination of the contract, the franchisor must take care and supervise so that the franchisee receives continuous support to conduct its business successfully" (SILVA and TUSA, 2011, p. 90), including subsidies for compliance with the General Data Protection Law, especially because the franchise agreement presupposes a replica of the franchisor's economic operation, which must also respect the dictates of Law No. 13,709/2020.

Thus, as mentioned:

> The periodic monitoring of the franchised establishment is an indispensable instrument for the franchisor to monitor the development of its operation, and may even identify failures in the management and administration of the business.
> (...)
> It is up to the franchisor to continuously seek to improve its know-how and technology. It is Martin Mendelsohn who explains the importance of introducing new methods and ideas to improve the business and, consequently, the network as a whole. Thus, he says, "the franchisor must have the means of research and development in relation to the products, services, system and projected market image (SILVA and TUSA, 2011, p. 90)

Therefore, in franchise agreements, due to their particularities (with regard to subordination, interference and dependence between the contracting parties), their social function and objective good faith in their hermeneutic and integrative attribution, it is possible to conclude that a true duty attached to the franchisee's activity inspection contract, included here, is compliance with the legal obligations provided for in the General Data Protection Law, especially when it is a contract that instrumentalizes a formatted business (also because the franchisor may require minimum data protection security parameters through the COF itself, that is, that in the first place this care is a prerequisite for contracting).

CONCLUSION

For a long time, associative forms have been limited to contracts of a corporate nature. Over the years, social and economic relations have become increasingly complex, demonstrating a true insufficiency of corporate forms for the flow of products.

It was in this context that distribution contracts began to spread in the market. With the franchise agreement it was no different. Originally governed by Law No. 9,855/94 and currently by Law No. 13,966/2019, *franchising* is not considered a typical contract, with its definition set forth in article 1 of the aforementioned legal diploma, being the combination of two contractual types (license to use a trademark and provision of services for the organization of a company).

Distribution contracts in general, including the franchise, are related by the nature of their relationship (horizontal coalition). The recognition of this contractual coalition has a relevant impact on the obligations of the contracting parties and their responsibilities, including the relationship with third parties outside the legal business, such as, for example, their consumers.

From this premise, the social function of the contract and the company, aligned with objective good faith in its integrative and hermeneutic function, creates true positive and negative duties to the contracting parties, which are annexes and sides to the private instrument signed.

Because it depends on the socioeconomic context in which the company is inserted, the social function of the contract and the company may vary according to the time experienced. In the era of *Big Data,* the protection of privacy and personal data has risen to the category of Fundamental Rights and, therefore, integral to the social function of the contract and the company.

With this, there is the creation of a positive obligation determining compliance with the General Data Protection Law. However, not only to the contractor itself, but to the counterparty as well. Thus, it can be seen that objective good faith, in its integrative function, imposes the duty of cooperation between the contracting parties for the fulfillment of not only the economic purpose of the contract, but also its social function.

This characteristic is even more present in the *franchising agreement,* in which there is a clear subordination and dependence of the franchisee, as well as a great interference by the franchisor in the contractor's activity, enabling the requirement of minimum parameters for data protection even before the instrumentalization of the business, through an obligation previously listed in the Franchise Offer Circular (COF).

Finally, in view of the particularities of this legal business, in which there is the necessary transfer of Know-How between companies and a true formatting of a business of – relative – success, it is the franchisor's obligation to take care of and supervise the activities performed by the franchisee, including, here, compliance with the General Data Protection Law.

Therefore, if this positive duty of inspection is imposed on the franchisor, its non-observance may lead to its civil liability in case of leakage of data due to a conduct (active or passive) of its franchisee.

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