JOURNAL OF LAW AND CORRUPTION REVIEW
16 PEACE, JUSTICE AND STRONG INSTITUTIONS
e-ISSN: 2965-3630
THE GLOBAL GOALS

OVERINDEBTEDNESS AND RESPONSIBLE CREDIT: THE BREACH OF BANKING COMPLIANCE DUTIES AND THE ENACTMENT OF LAW NO. 14.181/2021

Renata de Alcântara e Silva Terra[21]
Eduardo Adolfo Ferreira[22]

ABSTRACT

Compliance programmes are present in the Banking System through standards such as the Guide to Good Compliance Practices of the Brazilian Federation of Banks and the Resolutions of the Central Bank of Brazil No. 2.554/1998, 4.595/2017 and 4.557/2017 that financial and equivalent institutions authorised to operate in the country must establish responsible credit policies. However, such measures are not effective due to the broad scenario of overindebtedness of individuals borrowing credit, which are now protected by Law No. 14.181/2021, whose principle is the protection of overindebted consumers by establishing sanctions for financial institutions that irresponsibly grant credit.

Keywords: Compliance; Over indebtedness; Risk; Granting credit.

Data de aceite: 20/12/2022
DOI: https://doi.org/10.37497/CorruptionReview.4.2022.54
Organização: Dr. Fabrizio Bon Vecchio – Presidente do Instituto Ibero-americano de Compliance -IIA, em parceria com o Instituto Superior de Administração e Línguas —ISAL. Funchal (Portugal).
Artigo aprovado no 2nd *Ibero-American Congress on Compliance, Governance and Anti-Corruption* (CIACGA 2022), Funchal (Portugal).

[21]Specialist in Consumer Law and Civil and Business Law from Instituto Damásio. Email: renata.asterra@gmail.com.
[22]Specialist in Business Law from the University Estácio de Sá. Email: eduardo.ferreira2501@gmail.com

THE COMPLIANCE PROGRAMME IN THE BRAZILIAN BANKING SYSTEM AND RESPONSIBILITY IN CREDIT GRANTING

Although since the 1970s the international context has worked in a perspective of increasing and regulating the economic-financial activities, in order to avoid the commission of illicit acts against the Financial Systems, it was from the change in the directions of economic policies, also due to an increasingly globalized market, that arose, in the economy, the need to establish ethical standards and compliance with laws and regulatory standards of certain sectors, especially after the financial scandals of Wall Street in 2002 and the global economic crisis of 2007/2008, which was marked by the subprime crisis and the burst of the American real estate bubble.

It was in this scenario that the concept of corporate governance arose, developed with the purpose of gathering and concentrating good business practices and establishing an ethical standard self-regulated by corporations, based on a perspective of transparency (disclosure), accountability, fairness and compliance (SCHMIDT, 2018, p. 181).

From this process of strategic, organisational and technological restructuring, Compliance stands out as a fundamental instrument for the protection and improvement of values and reputation of a certain society (BLOK, 2020, p. 1).

However, this restructuring process occurs in parallel to a perception that the State has proved unable to supervise and promote the repression to the practice of criminal and extra criminal offenses, while it has transferred to private corporations these duties in relation to the practices adopted by its own agents and third parties, in a perspective known as regulated self-regulation, in which the State, in addition to transferring part of its responsibility, encourages or imposes on corporations the implementation of self-monitoring programmes in exchange for reducing or excluding the responsibilities of business organisations in any illicit practices practiced directly or indirectly (SCHMIDT, 2018, p. 181-182).

Within the business scope, Compliance is understood as corporate management that is based on the observance of internal and external regulations and the business organisation (SCHMIDT, 2018, p. 182), and the expression derives from the English verb *to comply*, which should be understood as compliance with/comply to, which means "to be in compliance", "in obedience" or "must comply" (BLOK, 2020, 19).

In Brazil, although the matter has gained another proportion as from the enactment of Law no. 12.846/2013 (Anticorruption Law), the Compliance duties acquired a legal relevance as from Law no. 9.613/1998 (Money Laundering Law), modified in 2012 by Law no. 12.683, and Resolution no. 2.554/1998 of the National Monetary Council (NMC), so that financial

institutions and publicly traded companies now have the duty to gradually establish internal controls to prevent the crimes of corruption, money laundering and other conducts that may affect the integrity of the National Financial System (SCHMIDT, 2018, p. 183-184).

Along these lines, in addition to the aforementioned Resolution, the National Financial System has other regulations aimed at financial institutions and similar institutions authorized to operate by the Central Bank of Brazil (CBB), which establish Compliance standards that implement policies of transparency, diligence and responsibility in the offer of products and services to consumers - highlighting CBB/NMC Resolutions No. 4.595/2017 and No. 4.557/2017.

While CBB/NMC Resolution No. 2.554/1998 provides, in a general context, on the need for financial and similar institutions to implement internal control standards in financial, operational and management information systems for compliance with legal and regulatory standards (1998), CBB/NMC Resolution No. 4.595/2017 establishes the guidelines that compliance policies must adopt. In summary, the normative in question lists a series of generic and minimum guidelines that must be observed by banks and other institutions of the National Financial System when implementing their Compliance programmes (BACEN, 2017).

CBB/NMC Resolution No. 4.557/2017 provides, in a broader way, about the structure of risk and capital management, establishing in Section IV (articles 21 to 24) the definition of the concept of credit risk and the criteria that financial institutions and equivalent must establish to evaluate the granting of credit. Thus, credit risk is understood as the possibility of non-compliance with the obligations assumed by the counterparty (BACEN, 2017).

However, although it deals with credit risk management, it was found that CBB/NMC Resolution No. 4.557/2017 does not have evaluation criteria for granting credit risk to individuals, specifically, a circumstance which, tends to relativize or weaken the risk assessment in this type of credit (BACEN, 2017).

In turn, the Brazilian Federation of Banks (BFB) - representative entity of the banking sector, which has 116-member financial institutions (FEBRABAN, 2022) - has guides that are intended to guide its members in relation to good practices.

The first of them is the "Guide | Good Practices of Compliance", which, in short, establishes that banking institutions must adopt proactive methodologies of identification, measurement and prioritization of Compliance risks, so that the credit is inserted as a risk to be identified and that the proactive performance may occur through the programme of relationship with customers to mitigate risks, ensuring, through internal rules, guidelines to assess the offer

of products and services and the conduct of employees before customers (FEBRABAN, 2018, p. 19-20).

The other guiding instrument made available by the entity is the "Guide of Good Practices of the Function: Internal Controls", which clarifies the performance and attributions of the Risk Management, Compliance and Internal Audit areas, as well as lists components and methodologies of internal controls and tools that can be used. In this document, Appendix II clarifies that the credit limit is the one that derives from margins to guarantee derivatives, minimum scoring/rating, overdraft limits, etc. (FEBRABAN, 2020).

However, once again, there is no specific guidance on procedures and guidelines for granting credit to individual clients, leaving it up to each financial institution to control policies for these operations.

Thus, although the National Financial System has established resolutions that established guidelines for the implementation of Compliance programmes, there is an absence of specific regulations establishing integrity policies for the concession of credit to individuals. This is because the resolutions under analysis established guidelines for the concession of credit to legal entities, leaving the establishment of policies and controls for the concession of credit to individuals to the exclusive responsibility of banks and qualified financial institutions, a circumstance that reveals a vulnerability on the part of financial institutions when evaluating and establishing responsible credit criteria and policies, whose non-compliant conduct has contributed to the scenario of consumer overindebtedness.

NON-COMPLIANCE AND OVERINDEBTEDNESS OF BORROWERS FOR LAW NO. 14.181/2021

Although there is a framework of Compliance rules for the national Banking System, especially the aforementioned Central Bank Resolutions and BFB Guides, such legal devices are still not effective regarding the credit available to individuals due to the lack of specification of guidelines for these clients in a centralized manner.

The absence of specific criteria in the rules issued by CBB regarding the concession of credit to individuals has created the alarming scenario of over-indebtedness. An overindebted consumer is one who cannot, with his/her income and assets, without compromising a minimum amount for his/her maintenance, pay off his/her current and future expenses in a reasonable period of time.

The absence of specific criteria in the norms issued by CBB regarding the concession of credit to individuals has created the alarming scenario of overindebtedness. An overindebted

consumer is one who cannot pay off his/her current and future expenses within a reasonable period of time with his/her income and assets, without compromising a minimum amount for his/her maintenance.

The increase in cases of overindebted consumers is due, in great part, to the facilities proposed by the market in granting credit, whether they are long-term hire purchases, consigned loans, loans for those who have been denied credit, use of more than one credit card to purchase goods, among others. Such facilities have always been freely offered, according to the internal credit policy of each establishment, which leads to the conclusion that the absence of specific Compliance rules and the non-observance of the existing ones - if we consider the scenario of indebted companies which are entitled to judicial, extrajudicial recoveries and bankruptcies, for example - helped to create this scenario of overindebtedness.

It is necessary to clarify that, although there is no law in Brazil that indicates the most correct way to verify data for credit granting, it is common market practice to adopt some criteria, such as (i) concession based on previously well-structured internal policies; (ii) the provision, prior to the contract, of adequate information about the charges and the impact of the new debt on the budget; and (iii) the risk analysis, based on the verification of the real and global economic and financial capacity of the credit consumer under penalty, including, of civil liability of the administrators for the concession of credit if it is proven that such concession exposed the financial institution to a risk of bankruptcy (BARROS, 2021, p. 104).

Therefore, one may consider that the non-observance of the Compliance rules already existing in Brazil, even if minimally, reflected directly on the inability to pay of several consumers of banking products and services, considering that at the time of the contracting they already had no conditions to contract the credit granted to them. This situation of credit being taken out by an individual or legal entity that was not in a position, at the time of contracting, to honour the payment is called irresponsible credit - or one can say that the credit was granted in an irresponsible manner.

Credit is granted irresponsibly when, based on the elements at its disposal (record systems, verification of income, verification of payment capacity, among others), the financial institution or similar entity agrees to make amounts available to the borrower of credit who is unable to pay the contractual instalments without compromising his or her subsistence or the financial health of his or her business.

Despite the disastrous scenario caused by irresponsible credit concessions, in the year 2021 there was a great advance for prevention and treatment of this alarming scenario of overindebtedness of individuals with the update of the Consumer Defence Code from the

effectiveness of Law No. 14.181/2021, called "Claudia Lima Marques Law". This law aims to protect the so-called overindebted consumer by establishing protection mechanisms against the harassment of credit offers by financial institutions and treatment measures for excessive debts.

With the advent of Law No. 14.181/2021, there is also in Brazil the establishment of the legal concept of overindebtedness - the global inability of the consumer to pay its current and future debts with their own income and assets (OLIVEIRA, 2014, p. 105) - a concept that allows verification, clearly, the actual ability to pay the consumer. It is also noted that, from the publication of the controversial Decree No. 11.150/2022, there was the conceptualization of the value corresponding to the "existential minimum".

Moreover, Law No. 14.181/2021, in order to present a viable solution to the problem of overindebtedness, brought specific jurisdictional procedure from Article 104-A of the CDC, starting with a consumer's request for the judge to initiate a process of repatriation of debts, allowing the over-indebted to present, in relation to all creditors, a payment plan in the long term in a conciliation hearing. Therefore, from the request and the listing of the debts, the creditors will be called to negotiate in a large pact with the debtor.

With respect to responsible credit, the law did not attempt to conceptualize it, but as a great differential with respect to all the rules that we already had in Brazil, it brought the possibility of applying a sanction for cases in which it is proven that the concession of credit occurred in an irresponsible manner, in addition to a sanction for the creditor's failure to appear at the conciliation hearing or for the refusal of an amicable composition.

The sanction provided for the non-attendance at the conciliation hearing or failure to reach an agreement is that, if the overindebtedness action continues, the contract will be reviewed *ex officio* and the debt renegotiated through a compulsory judicial plan, without the possibility of negotiation with the creditor. The penalties provided for cases in which irresponsible granting of credit is verified are related to the reduction of interest and charges, extension of the payment term and even indemnification for losses and damages, including moral, among others, according to the seriousness of the credit supplier's conduct.

Therefore, as of Law no. 14.181/2021, the Brazilian legislation took a leap in regard to the credit supplier's accountability for the value concessions it makes, giving effectiveness and putting into practice all the previous Compliance rules existing for the banking system and which, many times, were not complied with without generating any sanction for such non-compliance, as well as filling the gaps on good practices of credit concession to individuals.

THE RIGHT TO INFORMATION AS A BASIC PILLAR OF RESPONSIBLE CREDIT GRANTING AFTER LAW NO. 14.181/2021 AND THE CORRECTION OF THE HISTORICAL PROBLEM OF INDEBTEDNESS

The right to information - prior and adequate to the contracting process - to which credit consumers are entitled was already established in article 52 of the Consumer Defence Code (CDC). With the effectiveness of Law 14.181/2021, articles 54, 54-A and following were included in the code, which deal with the implementation of this right.

It should be noted that there are consumers who are hyper vulnerable: those who are not able, due to lack of schooling, to deal with the high complexity of credit agreements. This situation requires the supplier to comply not only with its duty to inform, but also the duty to advise or clarify (MIRAGEM, 2014, p. 135).

Such duty of clarification stems from goodwill, because it is not enough just to offer information about values, charges, terms and forms of payment, but it is necessary to make them understandable to the consumer. In addition to the basic information, the credit supplier has the duty to inform the borrower about the risks, such as what may happen in case of non-payment. The presentation of information on credit, its use, the risks and consequences of default will allow the consumer to be aware of the terms of the contract in order to decide or not for its pact.

It is clear that in a country whose basic education is insufficient and that financial education is the privilege of a few it is very difficult to make the matters of credit and banking operations understandable to the consumer, especially the hyper vulnerable. However, the existing legislation has rules that deal with the responsible concession of credit, including with the intention of mitigating the systemic risk, whose lack of care may lead to the responsibility of the administrator of the financial institution, and what we saw before the Law 14.181/2021, on the part of banks and financial institutions, was a total disrespect to the banking compliance and the lack of interest in correctly exercising the duty to inform.

With the amendment of the CDC, the rules to which financial institutions are subject to were specified and became tangible to the consumer, considering that before the duties of conduct for the concession of credit in a responsible manner were not codified, but were dispersed in internal regulatory rules, which not always, without the assistance of a professional specialist (lawyer, for example) were known by the laymen that contracted credit.

The requirement of compliance with the duty to inform, subject to sanctions in its absence, as provided by Law No. 14.181/2021, is reasonable to the extent that financial institutions already had, by force of Central Bank Resolutions, this obligation.

It is necessary to emphasize that, based on the correct credit analysis and the verification of the consumer's real payment capacity, the financial institution is not obligated to grant the requested credit, but if it does so, it must provide all information in a clear manner, making it understandable to the borrower, being aware of the consequences if in the future the consumer is overindebted.

Thus, by expressly bringing into the consumer protection codification the need to clearly inform the consumer about the characteristics of the credit made available and to advise on the consequences of its use, duly accompanied by a penalty for breach of this duty, it became possible to implement the already existing infra-legal rules of banking compliance and the correction of a legal gap that allowed the deliberately irresponsible concession of credit. Now, in cases of overindebtedness, it is up to the credit supplier to prove that it has taken all the necessary measures for the consumer's understanding of the contract.

FINAL CONSIDERATIONS - SUFFICIENT STANDARDS, INSUFFICIENT APPLICATION AND SUPERVISION UNTIL THE ADVENT OF LAW NO. 14.181/2021

Despite the greater amplitude after the Anticorruption Law, the banking Compliance rules have been foreseen in the Brazilian legal system since 1998, when Resolution no. 2.554/1998 of CBB/NMC and the Law of Money Laundering were enacted.

However, it was verified that the Compliance rules for financial institutions and similar institutions authorized to operate by CBB, which are established by the regulatory agency and by private entities, such as BFB, do not have rules and criteria for the concession of responsible credit, especially for individuals who, many times, become victims of themselves, of the National Financial System and of a society that, many times, segregates individuals due to their possessions and financial conditions.

The overindebtedness scenario was, for a long time, object of study by the academy and institutions that work directly to protect consumer rights, since such circumstance makes the personal development of the individual unfeasible and, indirectly, brings systemic risk to the financial market, due to the high default rate.

With the advent of Law No. 14.181/2021, the consumer in a situation of extremely high default now enjoys state protection in order to regain a state of dignity, since sanctions were disciplined to stop irresponsible credit granting by financial institutions, which will certainly generate results in the long term.

According to the duty to inform, which already existed before the law, it is the role of the financial institution that grants credit to reduce the information asymmetry existing between it and the bank consumer, who is generally a layman in relation to the operations and their peculiarities and, eventually, is hyper vulnerable for not having enough training even to read the contract to be signed. With the advent of specific legislation that updated the CDC, the country now has a codified standard regarding the criteria for granting responsible credit aimed at the individual public.

Based on the conceptualization of overindebtedness, the criteria defined for adequate information and the sanctions imposed by Law no. 14.181/2021, the Compliance rules pertaining to the Banking System are now complete with regard to the responsible concession of credit and these rules, together with the now updated CDC, will guarantee the improvement of the overindebtedness scenario in Brazil. However, for this improvement to occur, the rules need to be applied by the financial institutions and closely monitored by the Central Bank, since a legal framework on paper is not enough, it is necessary to put the rights and duties into practice.

REFERENCES

Amaral, A. Jr. (2001) *As condições abusivas na concessão de crédito bancário*. São Paulo: Revista de Direito do Consumidor, n. 40, 35-45.

Barros, F. R. M. (2021) *Responsabilidade Civil dos Administradores de Bancos na Concessão de Crédito.* Porto Alegre: Livraria do Advogado.

Benacchio, M. (1997) *Responsabilidade civil do banco por concessão abusiva de crédito*. São Paulo: Revista dos Tribunais, v. 22.

Blok, M. (2020). *Compliance e Governança Corporativa* (3a. edição). Rio de Janeiro: Freitas Bastos.

Brão, N. (2018) *Direito Bancário*. (17a ed.). São Paulo: Saraiva.

Erling, M. L. G. (2015) *Regulação do sistema financeiro nacional: desafios e propostas de aprimoramento institucional*. São Paulo: Almedina.

Fabiani, E. R. (2011) *Direito e crédito bancário no Brasil.* São Paulo: Saraiva.

Federação Brasileira de Bancos. (2018). *Guia | Boas Práticas de Compliance*. Recuperado de https://cmsarquivos.febraban.org.br/Arquivos/documentos/PDF/febraban_manual_compliance_2018_2web.pdf

Federação Brasileira de Bancos. (2020). *Guia de Boas Práticas da Função: Controles Internos.* Recuperado de https://cmsarquivos.febraban.org.br/Arquivos/documentos/PDF/guia.pdf

Fontes, M. R. F., & Waisberg, I. (2006) *Contratos bancários*. São Paulo: Quartier Latin.

Gaulia, C. T. (2009) *O abuso de direito na concessão de crédito: o risco do empreendimento financeiro na era do hiperconsumo*. São Paulo: Revista de Direito do Consumidor, São Paulo, v. 71.

Giglio, E. M. (2010) *O comportamento do consumidor*. (4a ed.). São Paulo: Cengage Learning. Lastra, R. M.

(2000) *Banco central e regulamentação bancária*. Trad. Dan Markus Kraft. Belo Horizonte: Del Rey.

Lima, C. C. (2014) *O tratamento do superendividamento e o direito de recomeçar dos consumidores*. São Paulo: Revista dos Tribunais.

Lima, C. C.; & Bertoncello, K. R. D. (2010) *Superendividamento aplicado: doutrina e experiência no Poder Judiciário*. Rio de Janeiro: GZ.

Marques, C. L.; & Cavallazzi, R. L. (2006) *Direitos do consumidor endividado: superendividamento e crédito*. São Paulo: Revista dos Tribunais.

Marques, C. L.; & Miragem, B. (2014) *O novo direito privado e a proteção dos vulneráveis* (2a ed.). São Paulo: Revista dos Tribunais.

Martinez, A. A. R.; & Lima, C. F. S. (2018) *Compliance bancário: um manual descomplicado*. São Paulo: Quartier Latin.

Miragem, B. (2019). *Direito bancário*. (3a ed.). São Paulo: Thomson Reuters Brasil.

Nabut, L. C. (2013). *A proteção do consumidor nos contratos de crédit*o. Rio de Janeiro: Lumen Juris.

Oliveira, A. J. G. (2014) *Defesa judicial do consumidor bancário*. Curitiba: Rede do Consumidor.

Pinto, G. M. A. (2015) *Regulação sistêmica e prudencial no setor bancário brasileiro*. São Paulo: Almedina.

Resolução nº 2.554 de 24 de setembro de 1998 (1998). Dispõe sobre a implantação e implementação de controles internos. Diário Oficial da União. Brasília, DF: Banco Central do Brasil/Conselho Monetário Nacional. Recuperado de https://www.bcb.gov.br/pre/normativos/res/1998/pdf/res_2554_v3_P.pdf

Resolução nº 4.557 de 23 de fevereiro de 2017. (2017). Dispõe sobre a implantação e implementação de controles internos. Diário Oficial da União. Brasília, DF: Banco Central do Brasil/Conselho Monetário Nacional. Recuperado de https://www.bcb.gov.br/pre/normativos/busca/downloadNormativo.asp?arquivo=/Lists/Normativos/Attachments/50344/Res_4557_v1_O.pdf

Resolução nº 4.595 de 28 de agosto de 2017. (2017). Dispõe sobre a implantação e implementação de controles internos. Diário Oficial da União. Brasília, DF: Banco Central do Brasil/Conselho Monetário Nacional. Recuperado de https://www.bcb.gov.br/pre/normativos/busca/downloadNormativo.asp?arquivo=/Lists/Normativos/Attachments/50427/Res_4595_v1_O.pdf

Salomão, E. N. (2014) *Direito bancário* (2a ed.). São Paulo: Atlas.

Santana, H. V. (2014) *Dano Moral no Direito do Consumidor*. (2a ed.). São Paulo: Revista dos Tribunais.

Schmidt, A. P. N. (2016) *Contratos na sociedade de consumo: vontade e confiança*. São Paulo: Revista dos Tribunais.

Schmidt, A. Z. (2018). *Direito Penal Econômico: Parte Geral* (2a ed.). Livraria do Advogado. Silva, J. P. (2008)

Gestão e análise de risco de crédito. (6a ed.). São Paulo: Atlas.

Sullivan, T. A. (2010) Superendividamento aplicado: *aspectos doutrinários e experiência no Poder Judiciário*. Rio de Janeiro: GZ.

Waisberg, I.; & Gornati, G. (2016) *Direito bancário: contratos e operações bancárias*. (2a ed). São Paulo: Saraiva.