

# THE CENTRAL BANK'S ROLE IN CONSUMER PROTECTION: A VIABLE MODEL FOR BRAZIL

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Resumo: Este artigo é resultado da pesquisa junto à Queen Mary University of London, no período de janeiro a março de 2014, no âmbito do Programa de Pós-Graduação do Banco Central do Brasil. Na esteira da crise de 2008, a oportunidade de revisão de modelos regulatórios, com especial ênfase à questão do consumidor bancário, se tornou tema em debate no mundo inteiro. No Brasil, o tema ganhou ênfase após o lançamento do Plano Nacional de Cidadania e Consumo (PLANDEC). O artigo traz uma análise sobre os diferentes modelos de supervisão da conduta, com foco na estruturação das instituições, adotados em alguns países como Inglaterra, Irlanda e Estados Unidos, revelando o modelo *Twin Peaks* como ideal. Avalia o papel de bancos centrais na esfera de defesa do consumidor bancário. Descreve algumas das ferramentas à disposição dos órgãos reguladores, com destaque para as medidas de cumprimento (enforcement) e de mudança de cultura, essenciais no êxito do trabalho. Na conclusão, propõe a adoção de um modelo que a autora acredita ser viável para o Brasil, tendo o Banco Central como protagonista das mudanças que poderão elevar o País a um novo patamar na condução de um sistema financeiro sólido, eficiente, inclusivo e sustentável.

Abstract: This article is the result of research carried out at Queen Mary University of London, between January and March 2014, within the Central Bank's Post-Graduation Programme. In the wake of the 2008 crisis, the review of regulato-

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ry models, with special emphasis on consumer banking, has become a subject of debate worldwide. In Brazil, the matter has gained in importance since the release of the National Plan for Citizenship and Consumption (PLANDEC). This article provides an analysis of different models for the supervision of conduct, with a focus on the institutional structures adopted in countries such as the UK, Ireland and the United States of America, which have shown that the “Twin Peaks” model is ideal for their economies. It also evaluates the role of central banks in consumer banking. It describes some of the tools available to regulators, highlighting the measures for compliance (enforcement) and cultural change essential to the success of the work. In the conclusion, the research proposes the adoption of a model that the author believes to be viable for Brazil, that is, that the Central Bank of Brazil should take an active role in making the changes that may enable the country to achieve a solid, efficient, inclusive and sustainable financial system.

Palavras-Chave: Supervisão de conduta – consumidor bancário – órgãos reguladores – estruturação – modelo *Twin Peaks* – papel de bancos centrais – ferramentas – enforcement – códigos de conduta.

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## 1. INTRODUCTION



The international crisis that began in 2008 uncovered grave deficiencies in existing models of financial supervision. There has since been a marked increase in the number of countries seeking to enhance the regulation and structural organisation of bodies involved in overseeing the market. The importance given to finding a new approach to protecting financial consumers is a common concern. In this respect, the separation between prudential supervision and the supervision of the conduct of business has become an important concern. Some countries have created new authorities to oversee non-prudential supervision, working in parallel and in co-ordination with the chief authority in prudential supervision. This model is referred to as “Twin Peaks”.

In the United Kingdom, the Financial Conduct Authority (FCA) supervises conduct and protects consumers; in the United States of America, the Consumer Financial Protection Bureau (CFPB) was created to deal with the matter. Similarly, other important economies, such as Australia, Canada and Singapore, have improved services in order to achieve best practice in consumer protection. In Brazil, such issues have been widely discussed not only due to concern regarding the origin of the crisis, but also in view of the expectations of society and the entities that comprise the National System of Consumer Defense through which the state, by means of regulating bodies, deals with complaints and reports that involve banking contracts. In recent years, financial inclusion has brought about an increase in problems regarding financial relations and the number of complaints. According to the National Bureau of Consumer Protection, based on the Portuguese *Secretaria Nacional de Defesa do Consumidor*, Senacon’s statistics show that banks are in third place in the top ten lists of complaints. In 2012, more than 73,000 complaints against banks were record-

ed.

Furthermore, financial consumers were the subject of a recent International Monetary Fund (IMF) recommendation. In the conclusion of its Report 12/206 entitled “*Brazil: Financial System Stability Assessment*”, published in 2012 as part of the World Bank’s Financial Sector Assessment Program (FSAP), the IMF recommends, in item 45,<sup>1</sup> that Brazil should improve the provision of protection to financial consumers, and suggests the creation of a department to deal exclusively with this issue and which should be made up of qualified personnel. In addition, in March 2013, the Brazilian government launched a programme called the *Plano Nacional do Consumo e Cidadania (Plandec)*.<sup>2</sup> This is a set of measures designed to improve the quality of products and services and encourage improvements in consumer relations. The Central Bank has been invited to participate in Regulating Committee initiatives.

Since then, the Central Bank of Brazil has begun to devote more time to considering new initiatives, such as the creation of a new department for the development of activities related to the consumer. Consequently, the Central Bank’s Board of Directors has a new member who will look after institutional relations and citizenship.<sup>3</sup> In the light of these developments, this article intends to enhance knowledge and understanding of this subject in Brazil. There are three main questions to be con-

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<sup>1</sup>“IMF Country Report No. 12/206. 45. *Financial consumer protection could be improved, including by creating a dedicated, adequately staffed unit. In banking, consumer protection is currently the responsibility of the Ministry of Justice. However, the relevant department is seriously understaffed, and needs to be strengthened and establish ties to the BCB and other members of COREMEC. Also, as a large number of first-time insurance buyers come into the market, further improvements of consumer education and protection will be needed, alongside the strengthening of broker oversight mentioned above.*”

<sup>2</sup> *National Consumption and Active Citizenship Plan.*

<sup>3</sup> *Diretor de Relacionamento Institucional e Cidadania (Direc), tendo na sua estrutura atual três departamentos: Departamento de Comunicação (Comun), Departamento de Atendimento Institucional (Deati) e Departamento de Educação Financeira (Depef), in www.bcb.gov.br.*

sidered: 1. What is the role of a central bank in the context of consumer protection? 2. Is the Twin Peaks model able to improve supervision? 3. Which tools are the most efficient for achieving consumer protection? This analysis will be based on research carried out on the models adopted in certain other countries, especially in the UK, which represents a model of best practice in consumer protection issues.

## 2. THE ROLE OF CENTRAL BANKS

The overriding objective for any central bank is to ensure the stability of the currency through the implementation of its monetary policy. Over the years, however, with the growth of global economies and the complexity of systems, the role played by the central monetary authority has increased, especially in relation to its capacity as the financial system regulator, responsible for market surveillance. Nevertheless, in recent times, a trend of outsourcing supervision to a body separate from the central bank has emerged. The main reason is to reduce any potential conflict of interests between activities. If we think about the supervision of conduct as an activity of a central bank, this concern increases. Accordingly, the model currently growing in popularity is one that proposes the separation of prudential supervision from business conduct supervision, and that is the model known as “Twin Peaks”. It is important to say, however, that this model does not necessarily presuppose different authorities for the execution of the two main roles.

The same concern leads to the view that the monitoring of the conduct of business focused on consumer protection should be carried out by an agent other than the central bank, as is the case in the majority of countries. Obviously, the optimal structure will not be the same for all economies. The ideal organisation is intrinsically linked to the degree of complexity of the systems, and the historical, political and legal framework

of each country. There is no single, perfect model — one size does not fit all. In reality, there are a number of ways to undertake this role, and this article focuses on the supervision of conduct.

In *The Organisational Structure of Banking Supervision*, Goodhart (2000) presents well-founded reasons for the separation of the two activities, but also recognises that there are advantages in maintaining supervision as one of the responsibilities of the central bank, as macro-prudential policy is increasingly linked with micro-prudential policy, since monetary stability requires the financial stability of the system. In short, they are two sides of the same coin.

In this sense, Lastra (2001) contends that central banks are often better suited than other public agencies to monitor banks' capital, asset quality, liquidity and those elements that comprise the supervision *stricto sensu*. Further, she states, the role of the central bank as 'lender of last resort' in a liquidity crisis or in the case of a payments system problem justifies the central bank's involvement in supervision.

Goodhart, however, claims that the main reason for separating the activities is the complexity of systems, noting that multiple intermediaries such as commercial banks, investment banks, or fund managers would require a multitude of supervisors to respond optimally to each, but acknowledges that the benefits would not offset the costs generated. As a result, he suggests as an alternative the adoption of an institutional structure based not on the specialisation of the market but on the purpose of supervision: prudential supervision and supervision of the conduct of business. As a result, the most appropriate way to organise institutional structures is to focus directly on the objectives of regulation, for the following reasons:

- Regulatory agencies are probably at their most effective and efficient when they have clearly defined and

precisely delineated objectives and when their mandate is clear

- Accountability is likely to be more effective and transparent when it is clear what regulatory agencies are responsible for
- A clear internal management focus is more likely to be created when the objectives of the agency are clear and precise
- There will be times when the objectives of regulation are in conflict and one merit on focusing institutional structure upon regulatory functions is that it requires significant conflicts between different objectives to be resolved at the political level
- Prudential, systemic and conduct of business dimensions to regulation require fundamentally different approaches and cultures and there may be doubt about whether a single regulator would, in practice, be able to encompass them effectively. A counterargument is that, in practice, a single agency would be structured internally for different functional responsibilities but this in itself would add to internal transactions costs

Despite the fact that with regard to institutional structures comparatively little attention has been paid to defining appropriate objectives for the conduct of regulation and supervision, it is instructive to note that since 1995 the Twin Peaks model has been studied as the model proposing the division of regulatory activity into two. Such a concept argues for a single prudential supervisory agency and a single conduct of business agency. In April 1997, the Wallis Committee of Inquiry in Australia recommended a similar approach. That Committee recommended that a single conduct of business regulator should cover issues such as disclosure requirements, consumer protection, financial advice, and integrity of market conduct.

In *A Regulatory Structure for the New Century*, Michael Taylor (1995) summarises Twin Peaks as follows:

The proposed structure would eliminate regulatory duplication and overlap. It would create regulatory bodies with a clear and precise remit; it would establish mechanisms for resolving conflicts between the objectives of financial services regulation; and it would encourage a regulatory process which is open, transparent and politically accountable.

On the other hand, the most important justification for the concentration of activities in the same authority has to do with information. Information obtained from the micro supervision level is increasingly relevant to decision-making at the macro level. When there are separate bodies for the two activities it becomes difficult to ensure synergy in the fulfilment of their missions. For this reason alone, conservatives recommend that both activities are overseen by the same authority, especially in countries still under development.

Moreover, this is one of the main concerns raised regarding the expectations of the new model adopted in the UK, that is, that prudential supervision comes under the wings of the Bank of England and supervision of conduct is among the responsibilities of the Financial Conduct Authority. This will be discussed in the next section.

After the crisis, institutional regulatory structures have become a topic of public policy debate in some countries, and international experience indicates a wide variety of institutional regulatory formats, which indicates that these are influenced by national characteristics, such as the structure of the financial system. It also suggests that there is no universal ideal model. A key issue is whether the structure has an impact on the overall effectiveness and efficiency of regulation and supervision. It would be dangerous to assume that changing the structure of regulatory institutions is a panacea, but it can certainly help towards guaranteeing a well-governed system. Particularly, I believe that regulatory success is ultimately about having well-

trained, well-paid and experienced regulatory staff who are capable of identifying problem institutions and who have the courage and support to act on what is found.

It is therefore necessary to rethink the role that the state, by means of the central banks, should perform in the supervision of the financial system in order to guarantee the maintenance of a solid and efficient system, but one which would also be inclusive and sustainable.

### 3. MODELS AROUND THE WORLD

Since the end of the 1990s, a debate concerning institutional structures has arisen in several countries. In the UK, one of the first major policy initiatives of the Labour government elected in 1997 was to announce plans to reorganise the institutional structure of financial regulation by sweeping away specialist agencies and vesting all regulation into a single agency. Now, twenty years later, the UK is making more changes. In Australia, questions related to the institutional structure of financial regulation were on the agenda of the Wallis Committee, which also recommends major changes. The same is being actively considered in South Africa, where changes were envisaged following a series of official reports and discussion papers. Other countries, including Brazil, are also now discussing the issue.

The debate in each country inevitably reflects country-specific factors and the nature of the current structures. Other reasons why the debate has been broadening include: the evolution of the structure of the financial system and the business of regulated firms; the need to review what has emerged from particular financial failures; the emergence of financial conglomerates; the increasing importance of issues surrounding the conduct of business; financial innovation and the emergence of new financial markets; and, finally, the increasing

internationalisation of financial operations.

There are three broad approaches to the structure of regulation: *institutional*, *functional* and *objective related*. The *institutional* approach is directed at financial institutions irrespective of the mix of business undertaken. Different regulation applies to different types of institutions (banks, insurance companies, and so on) and specialist regulatory agencies are responsible for different types of financial institution. This is the model adopted in Brazil. There are different agencies for each kind of institution. *Functional* regulation focuses on the business undertaken by institutions irrespective of which institutions are involved. The third approach is to focus regulation on the *objectives* being sought, with institutional structure following as a consequence.

A review of international experience indicates a variety of structures for financial regulation. Some countries have reduced the number of regulatory agencies and in some cases created a single mega-agency, as is the case in the UK. Others have opted for multiple agencies and in some cases have increased the number.

### 3.1 THE UK MODEL

The financial crisis has led to substantial changes in the way the UK financial services industry is regulated, with potentially significant consequences for its consumers. The most significant change is the current coalition government's plan to put in place a new financial regulation regime by creating the Financial Conduct Authority (FCA) as a separate agency. The government adopted the Twin Peaks model, deciding to disband the Financial Services Authority (FSA) and to divide its responsibilities between the Prudential Regulation Authority (PRA), as a subsidiary company of the Bank of England, and the FCA.

The strategic objective of the FCA is to ensure that financial markets function well. To this effect, it is responsible for consumer protection, market integrity and competition. Despite the distinction of statutory mandates, the objectives of the PRA and the FCA are not exclusive to the regulatory agency they are attached to. The FCA will also be expected, therefore, to contribute to financial stability, and will be required to act as the prudential regulator of non-PRA firms given that one of its operational objectives—with regards to market integrity—is explicitly defined as ‘soundness, stability and resilience’. While the PRA is identified as the prudential regulator, it will also be responsible for the protection of policy holders—a group of consumers which exceptionally falls under the PRA’s remit.

There were several reasons for dividing the powers of the FSA after the crisis. This does not mean that the FSA was an unmitigated disaster, however. Several commentators and academics have recognised that the FSA played its role well and that its results were creditable. Assessments have confirmed this. In 4–5 December 2003, at a conference entitled “Aligning Financial Supervisory Structures with Country Needs”, Howard Davies, Director of the London School of Economics and former Chairman of the FCA, stated that:

...the new regime, technically speaking, does work ... Successive surveys have shown that financial firms like integrated regulation. The most significant survey was carried out by an independent think tank, the Centre for the Study of Financial Innovation, in July 2003. A series of questions were put to 300 international firms located in Frankfurt, London, New York and Paris. In the summary of their conclusions, the authors noted “the high regard in which the FSA is held” and say they were “impressed with the FSA’s standing in the eyes of parishioners” and that “the FSA’s clearly doing something right”; it also appears to be right in putting regulatory competence ahead of a light regulatory touch.

On the other hand, some consumer groups do not like

the fact that an integrated regulator internalises decisions about the balance between consumer protection and financial stability. Some authors feel that this is because the goals of consumer protection were not achieved. According to Professor Eva Lomnicka,<sup>4</sup> the failure was due to a lack of focus: *when an institution has several goals to accomplish, it potentially loses between various assignments.*

The Bank of England's chief legal adviser, Mr. Graham Nicholson, stated<sup>5</sup> that the FSA came under heavy criticism for two main reasons:

Its architecture: because the approach effectively gave the securities regulator—the FSA was actually the re-badged Securities and Investments Board (SIB)—operating under a statute designed principally to deal with securities regulation, very broad responsibilities for other aspects of the financial system. And its climate, because the FSA was operating in a political and market environment favoring “light touch” regulation with statutory objectives that emphasised innovation and the desirability of maintaining the competitive position of the UK. These factors tended to de-emphasise the attention paid to the safety and soundness of financial institutions in favour of more emphasis on conduct of business and financial markets regulation.

In fact, separate mandates for the PRA and FCA for prudential and conduct regulation will allow both regulators to apply more focus to their respective areas, and this has received wide acceptance. The PRA is responsible for the prudential regulation of banks, building societies, credit unions,

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<sup>4</sup> Personal communication (10 February 2014). Eva Lomnicka has been a professor at King's College London School of Law since 1975. She was an expert on the UK's delegation to UNCITRAL's Convention on Receivables Financing (Vienna and New York, 1997–2001) and sat on the DTI's Consumer Credit Steering Group reviewing consumer credit law, which led to the Consumer Credit Bill of 2006. She is also a practising barrister (at 4 New Square Chambers) with an advisory practice in consumer credit and financial regulation.

<sup>55</sup> *Speech on the class, 17 January 2014: The role and responsibilities of the Bank of England under the post-crisis regulatory framework, in The Centre for Commercial Law Studies, Queen Mary, University of London*

insurers and major investment firms. As prudential regulator, the PRA promotes the safety and soundness of these firms, seeking to minimise the adverse effects they can have on the stability of the UK financial system. The FCA is responsible for ensuring that the relevant markets function well, and for regulation of the conduct of all financial services firms. It is also responsible for the prudential regulation of those financial services firms not supervised by the PRA. Indeed, no one can dispute the advantages of specialised regulatory agencies as long as extra care is taken to ensure that the erection of institutional boundaries does not pose a threat to the coherent implementation of their distinctive agendas.

Which powers and responsibilities are assigned to each authority is an important determining factor in the success of the new model. Additionally, each authority must have awareness of the necessity of working in co-operation. The key principle underlying this co-operation will be that each authority should focus on the key risks to its own objectives, while being aware of the concerns of the other. The successful implementation of both programmes depends to a large extent on the ability of the new regulators to attend to matters of their expertise while at the same time being mindful of how the entire system fits and works together. In this light, a Memorandum of Understanding (MOU) regarding the co-ordination between the FCA and the PRA was drawn up.

Expectations for the new structure are high, especially for the FCA and the introduction of consumer protection as one of its operational objectives. This is why the FCA changed its approach to one that is more interventionist, intrusive and proactive, a move which involved some changes in its philosophy and its approach to supervision. The idea of principles-based regulation has been replaced by outcomes-focused regulation. Although the principles have been left intact, the approach towards their application is slightly different. Outcomes-focused

regulation is centred on active intervention, and on judging future decisions of firms based on their business model and other modes of analysis. It is arguably a better way to protect consumers.

Regarding this changing approach to supervision, the specialists believe it could be good for consumer protection. Hector Sants (2009) states<sup>6</sup> that:

The intensive supervision involves greater attention to consumer outcomes, as well as more intrusive inspections and mitigation of the risks inherent in firms' business models. It also involves a greater willingness to take a tougher stance with firms and to take enforcement action against them where appropriate.

Such intensive and interventionist supervision is beneficial to consumers because it puts their interests high on the regulatory agenda.

### 3.2 THE IRELAND MODEL

In Ireland, the Central Bank was restructured on 1 May 2003 to incorporate all of the regulatory activities and consumer protection functions for the financial services sector in Ireland. The Central Bank and Financial Services Authority of Ireland Act 2003 led to the establishment of the new financial services regulator, the Irish Financial Services Regulatory Authority, which is a separate but constituent part of the Central Bank. It is referred to by its acronym 'IFSRA' or as the 'Financial Authority' or 'Regulatory Authority'. It discharges many functions of the Central Bank and is subject to control by the board of the Central Bank.

The IFSRA comprises a chairman and nine members. Its divisions include: a prudential division dealing with financial institutions and funds authorisation, banking supervision,

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[http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/1109\\_hs.shtml](http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/1109_hs.shtml)

insurance supervision, investment services providers' supervision and markets supervision; a consumer division dealing with consumer protection codes and consumer information; a register of credit unions division; and a legal and enforcement division. The IFSRA is responsible for the regulation of all financial services firms in Ireland. It also has a role in the protection of the consumers of those firms' services. Its main aims are to help consumers make informed decisions about their financial affairs in a safe and fair market, and to foster sound, growing and solvent financial institutions which give consumers confidence that their deposits and investments are secure. According to the 2012 Annual Report, besides the 10 members of the Board, the current staff numbers 622. There are 13,000 firms and entities that come under the IFSRA's direct supervision. Moreover, the IFSRA contributes to the work of the Central Bank in discharging its responsibility in relation to the maintenance of the overall financial stability of the state.

The Central Bank is tasked with the statutory objective of ensuring the proper and effective regulation of financial service providers and the markets within which they operate. Compliance with key prudential requirements is paramount in ensuring the financial soundness of regulated financial service providers. Breaches of these requirements are viewed as unacceptable as they constitute a significant threat to the customers and creditors of regulated financial service providers and the markets in which they operate.

The IFSRA has a key responsibility in increasing consumer confidence regarding the safety of their deposits and investments and the likelihood that their claims can be met. This overarching aim in consumer protection is underpinned in the 5Cs framework: *Confidence, Compliance, Challenge, Culture* and *Consumers*. In this regard, the IFSRA is also responsible for the development of codes of conduct and other requirements applicable to regulated entities authorised by or

registered with the financial regulator. This drives the Bank's consumer protection work to ensure that it continues to prioritise the interests of consumers of financial services. In order to achieve this, work is focused on setting standards for firms and monitoring and enforcing those standards.

The IFSRA is also engaged in public consultations on another consumer protection matters, namely Minimum Competency Requirements. The Requirements, published on 25 July 2006, introduced a competency framework designed to establish minimum standards for regulated entities. Firms are required to ensure that individuals who provide advice or sell retail financial products or who undertake certain specified activities on their behalf acquire the competencies set out in the Requirements. In addition, individuals are required to undertake a continual Programme of Continuing Professional Development.

Finally, the Central Bank and Financial Services Authority of Ireland Act 2004 created a statutory financial services ombudsman for consumers. Consultative consumer and industry panels have also been appointed where matters of policy and practice can be discussed. In addition, this legislation created new enforcement powers for the IFSRA, including fining and public censure powers.

### 3.3 THE USA MODEL

One of the most controversial elements of banking reform in the United States of America was the Dodd-Frank Act of 2010 and the creation of the Consumer Financial Protection Bureau (CFPB). The new agency was created with wide powers regarding supervision and the imposition of procedures, and is a stand-alone entity housed in the Federal Reserve apparatus but without any subordination to it. The US president appoints its chairman and its decisions are final, except for the possibil-

ity of appeal by other regulatory institutions to the Systemic Stability Council, created by the same law.

The CFPB was created with the purpose of bringing together the responsibilities of a number of other regulators, including the Federal Reserve (FED), the Federal Trade Commission (FTC), the Federal Deposit Insurance Corporation (FDIC) and even the US Department of Housing and Urban Development (HUD), which had differentiated forms, and some responsibility for consumer financial protection. The bureau is subject to financial audit by the US Government Accountability Office (GAO) and is accountable to the Senate Banking Committee and the House Committee of financial services, twice a year.

The bureau was established within the Federal Reserve but operates in complete independence; the Fed may not interfere in matters assigned to it, give an order to any of its employees, make changes to its roles and responsibilities. The bureau has six departments:



An advisory board, created by the same Act, assists the bureau by keeping it informed of emerging market trends. The members of the Advisory Board are appointed by the director of the CFPB and include at least six members recommended by presidents of regional central banks. The CFPB was created to ensure that the products and services that US citizens use frequently, including credit cards, mortgages and loans, are being provided. This function includes helping consumers understand

the terms of their contracts with financial institutions, and that they are issued with clear and simple guidelines. Until the creation of the CFPB, different federal agencies were responsible for various aspects of consumer financial protection in the USA. None of them, however, had tools effective enough for defining rules or supervising the entire market. The CFPB is now the only authority for consumer regulation, and has consolidated the existing authorities, formerly scattered throughout the federal government, under a single command.

The bureau now supervises the big banks and credit unions whose activities have never before been regulated. This means that for the first time the USA is able to regulate the activities of independent lenders, private mortgage lenders, debt collectors and private student loan companies. The United States Congress therefore created the CFPB to protect all types of consumers, through the addition of and compliance to laws on financial market consumption throughout the country. The principal activities of the bureau are to:

- √ Create standards and supervise the activities of the institutions
- √ Restrict deceptive practices or abuses
- √ Receive and handle consumer complaints
- √ Promote financial education
- √ Study consumer financial behaviour
- √ Monitor the financial markets in terms of new risks to consumers
- √ Enforce laws preventing discrimination and unequal treatment of consumers

As it turns out, the reform of Wall Street gave the CFPB a wide range of tools for promoting fair, transparent and competitive markets and only four years after its foundation it seems to be achieving its goals.

#### 4. A VIABLE MODEL FOR BRAZIL

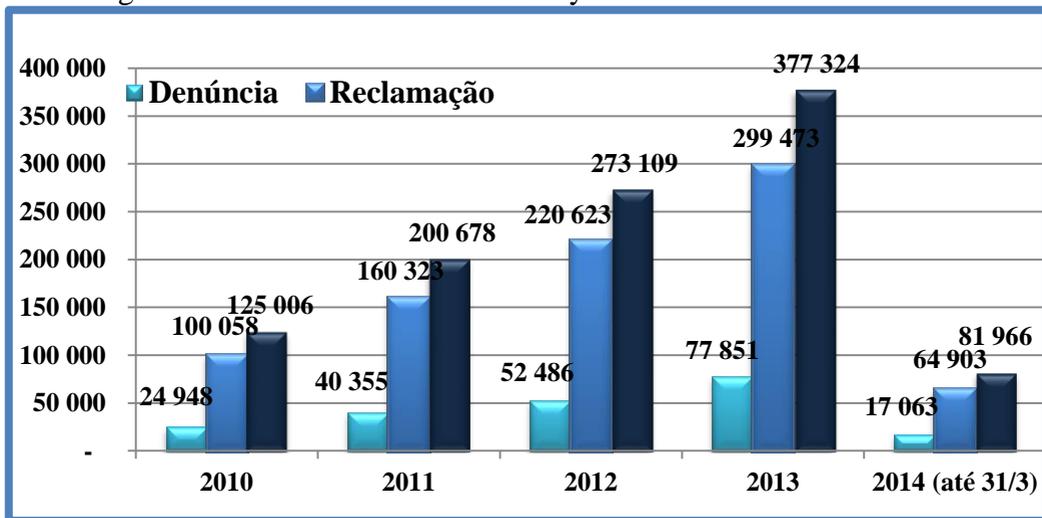
As seen throughout the study, there is no single model for organising the structure of regulatory bodies and the supervision of the financial system. Each country must identify its

needs for change according to the dynamics of its own national system, while taking into account the historical, political and legal framework within governments. Brazil, besides being, according to the IMF, a developing country, has a thriving and complex economy, especially when considering the participation of various institutions and the variety of instruments and products created under the financial system. The Brazilian banking sector is one of the most complexes in Latin America. According to the Central Bank's annual report on the banking industry (December 2013), there were 1,995 authorised institutions of 17 different types, ranging from commercial and universal banks to co-operatives and credit union to micro entrepreneurs and societies. The number of clients holding deposit accounts is almost 100 million, and savings deposits around 110 million. The number of customers with active credit operations is nearly 53 million, of which individuals represent about 51 million. Across the country, an average of 15,720 credit or debit transactions are carried out every minute.

Over the last decade, Brazil has experienced the phenomenon of increased social mobility, based on greater formalisation of the labour market and falling unemployment, the expansion of income transfer programmes and an improving credit process. This context of social mobility and income growth favours greater integration of families in the consumer market. There is thus a remarkable growth problem involving relationships, contractual or otherwise, in the financial market. It is causing a steady increase in the number of complaints to consumer protection agencies and also in the demands on the judiciary.

According to a survey conducted by the Department of Judicial Research of the National Council of Justice (CNJ), banks are in second place in the top one hundred litigants in the Brazilian justice system. Cases involving financial institutions represented 10.88% of all new cases registered in 2011, and

38% of the total outstanding shares of judgment throughout the country. On the other hand, according to statistics issued by Senacon<sup>7</sup>, the financial services are at the top of the list of complaints with 231,824 records in 2012. As shown in the chart below, Central Bank data for the same year, 2012, shows dramatic growth to 273,109 complaints. It also shows that the number is steadily rising. Last year, the number of complaints grew almost 30% in relation to the year before.



Source: Departamento de Atendimento ao Cidadão do Banco Central do Brasil (DEATI)

Besides the physical inability to meet all these demands within a reasonable time, the rules enacted in this market are singular and highly complex. These rules are difficult to interpret and apply for agents operating in all areas of consumer protection agencies, mainly Procons, which are in charge of all types of consumer claiming demands in Brazil, as well the judiciary. This can lead to a worse situation in which the claimant has to wait longer for a just resolution. From this perspective, there is no doubt that for consumer banking it represents a

<sup>7</sup> [www.portal.mj.gov.br/Sindec/Indicadorespublicos](http://www.portal.mj.gov.br/Sindec/Indicadorespublicos)

necessary and effective change in the Brazilian system.

In this respect, it seemed at first that the creation of a new and autonomous public entity with power equal to that of the Central Bank would be the best solution. Adopting the Twin Peaks model, according to which a new agency could be responsible for supervising the conduct of all market players, would mean including investors and insurance policy holders in the protection of consumer banking. This model could reduce any potential risk of a conflict between consumer protection and the other activities of the Central Bank.

However, reflecting on the characteristics of Brazil, the government's policy of issuing binding and legal barriers across the respectability already consolidated in the Central Bank, leads to the conclusion that the best way forward, at least in the short term, will be to assign this task to the existing authority, the Brazilian Central Bank (BCB). It would be possible until a legal and constitutional reform aimed at creating a new agency with responsibility for monitoring the conduct of banks and other institutions, but this would be a long-term project. According to the experience of other countries, changing the structure of supervision is a long and difficult process. Brazil cannot wait indefinitely. In addition, a super-agency responsible for various sectors of the market would concentrate too much power in one body, which could further hinder the approval of reform in Congress. Beside that, the choice of a single agency for the banking sector would require effort and costs that could outweigh the desired benefits.

Furthermore, Brazil and the Central Bank are going through a time conducive to this change. In the words of Isaac Sidney (the General Counsel of the Central Bank) during a presentation about conduct supervision held in late 2013:

In an internal perspective, the regulation-time stability in the country, after the conquest of economic and financial stability, paved the way for new social demands in relation to the National Financial System (SFN) were accepted by the legal

system, contemplating interests related to combating crime, consumer protection, reducing inequality and antitrust. From the external perspective, learning the 2008 crisis threw lights, in the form of the twin peaks model, the importance of ensuring not only the solvency itself, but also the fidelity of the financial system to the normative and regulatory schemes, through adequate supervision of conduct.

The recent setting up of the Conduct Department from the Portuguese *Departamento de Conduta (Decon)*,<sup>8</sup> whose duties are yet to be consolidated, is the first step towards the inclusion of consumer protection in the strategic objectives of the Central Bank. It seems there is no legal reason preventing this from taking place. There are two competencies listed for the Brazilian Central Bank in Act 4595, including the regulation and supervision of financial institutions, which are sufficient to enable the implementation of a policy regarding not only the stability of the system but also effective consumer protection. It represents the embodiment of the constitutional commitment (art. 192 of the Constitution) regarding the structuring of the National Finance System (SFN) to promoting "the balanced development of the country and [serving] the interests of the whole population." This is in compliance with the principle of consumer protection provided in various passages of the Brazilian Constitution.

Much has been said about the fact that the Central Bank of Brazil would not have legal authority to act according to a defence and consumer protection mandate. Such ideas gained momentum when the Federal Supreme Court (STF) gave the judgment of the trial ADIn 2591. A lawsuit was filed by the National Confederation of the Financial System, which made a formal declaration of unconstitutionality and material expression "including banking, financial, credit and insurance" con-

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<sup>8</sup> *The Conduct Department was set up in December 2012 with only 120 employees to cover the whole country, in charge of 16 different subjects, ranging from preventing money laundering and the funding of terrorism, to correspondent banking, banking fees and the ombudsman scheme.*

tained in art.3, § 2º of Law 8.078, the Código de Defesa do Consumidor (CDC). Contrary to the plaintiff, the final decision in 2001 held that the Code applies to banking relationships. In the same decision, the court also ordered the revocation of standards previously edited by the Central Bank (Resolution No. 2878, 2001), which sought to establish itself as the “Bank Client Code” (*Código do Cliente Bancário*). The basis for this determination is that the rule was “plainly illegal” because it contains “matter that exceeds the operation of financial institutions,” as the National Monetary Council (CMN) has no power over consumer matters.

Realistically, the National Monetary Council and the Central Bank have no legal power to regulate consumer relations directly. But re-reading the votes of the trial at the Federal Supreme Court set out in the cited case and the long and controversial debates that preceded this, it is quite clear that ministers faced great difficulties when defining the concept of banking services, which was essential in building the decision-making limits. They have not managed to find a consensus. Furthermore, this understanding was from July 2006, more than seven years ago and before the 2008 crisis. After all these seismic events and further development of the market, it can be reasonably assumed that a retrial of the case would lead to a different decision.

Notwithstanding, one cannot forget that regulatory power to discipline the financial market ultimately sits within the CMN and the BCB. Therefore, since that does not conflict with the rules in force on the subject, especially the *Código de Defesa do Consumidor*, the BCB can—and should—issue rules demanding correct conduct among institutions. Otherwise, the authority could not adequately fulfil its role in this field. Indeed, it is already happening. A set of rules has been issued in order to ensure reliable and suitable conduct of financial institutions, including: Resolution 3694/2009, which addresses

risks in contracting operations and service delivery; Resolution 3849/2010 on the establishment of an ombudsman for financial institutions; Resolution 3919/2010, which deals with the collection of bank fees; and Resolutions 4196/2013 and 4197/2013, which establish measures for attaining transparency in the recruitment of loans and package services.

Moreover, recently, the federal government launched a state policy for consumer protection named *Plano Nacional de Consumo e Cidadania (PLANDEC)*. This is a set of measures aimed at ensuring a higher quality of products and services, and encouraging improvements in consumer relations in the country, to which the Central Bank is committed. It represents the conformation of standards of the supervision of conduct in the context of an expansion of the duties and powers of the BCB.

Finally, Brazilian society generally seeks greater effectiveness of consumer rights, especially those regarding banking matters. The Central Bank, as the competent disciplinary authority of the market, in all its capacity and experienced staff as well as the recognition of its excellence, could have an increasingly active role in this arena. And this role is framed within the goal of promoting stability in, and the improvement of, the financial system. Therefore, in legal terms, it does not seem necessary to alter the legislative base in order for the Central Bank, through its powers to normalise and supervise the financial market, to discipline them and also ensure consumer rights. The recent changes in the organisational structure of the Central Bank make this scenario favourable, perhaps leaving room for some minor adjustments to avoid any potential conflict of interests with other duties with respect to supervision and to ensure a better synergy of the actions developed by different areas. In this sense, it would be important to transfer the new Department of Conduct to the area of the Director of Citizen Relationships, due to the alignment of its current and future

activities with the Department of Citizen Attention Service and the Department of Financial Education.

Therefore, the responsibility for the handling, and outcome, of questions involving relations between bank consumers and financial institutions must come under the Central Bank. However, the many forms of intervention in dealing with the subject and mainly the provision of competence given to the other bodies (*Senacon*, at the Federal level, and *Procon* at the State level) to handle these demands administratively—where any lack of knowledge about banking would be significant—will require a clear and well-designed framework in order to extend this competence to the financial authority. Such a change would represent a significant step forward for Brazilian society but is currently lacking in terms of planning and other arrangements. It should therefore, for now, be left for a second phase.

## 5. THE MAIN TOOLS FOR ACHIEVING CONSUMER PROTECTION

This study has shown that more important than reorganising the structure of the regulatory system in accordance with a country's main characteristics, is giving the competent authority the right tools for exercising and fulfilling its role in providing effective support for the consumer. It is not enough to impose structural reform within the established organisation if the regulating agency has not been equipped with the correct tools for exercising its remit. These tools change from country to country in order to guarantee the appropriate level of performance by the regulating agency. Some tools are more efficient than others, and depend on the intensity of their application and the culture within each country. However, they all form an important set of measures directed to protect the consumer: enforcement, financial education, information, an Om-

budsman scheme, mediation, research, and banking codes. These measures will be looked at in detail in the following sections.

## 5.1. ENFORCEMENT

The British agency, the FCA, has an extensive range of powers for achieving its goals, including disciplinary, criminal and civil powers for taking action against regulated and non-regulated firms and individuals who are failing or have failed to meet the standards required. Below are some of the measures that the FCA can activate under the Financial Services and Markets Act 2000:

- a) Withdraw a firm's authorisation
- b) Prohibit an individual from operating in financial services
- c) Prevent an individual from undertaking specific regulated activities
- d) Suspend a firm for up to 12 months from undertaking specific regulated activities
- e) Suspend an individual for up to two years from undertaking specific controlled functions
- f) Censure firms and individuals through public statements
- g) Impose financial penalties
- h) Seek injunctions
- i) Apply to the court to freeze assets
- j) Seek restitution orders
- k) Prosecute firms and individuals who undertake regulated activities without authorisation

The adoption of any of these measures is generally a rigorous process, in order to ensure the observance and legitimacy of its application. The FCA does not normally comment on whether it is investigating an issue. However, the agency may publish, if appropriate, information about certain Warning Notices. They also publish when issuing a Decision Notice or a Final Notice.

In Ireland, there is a continuing enforcement focus on certain areas across almost all banking sectors, most notably

prudential requirements and systems and controls. As well as being consistently highlighted as enforcement priority areas, a large proportion of the settlements reached by the Central Bank concern breaches of requirements in these areas.

Enforcement by the financial regulator in Ireland can be civil or criminal. In general, enforcement can happen by way of a complaint being made or by way of the regulator investigating matters on its own initiative. The complaints to the Financial Services Ombudsman have to be solved giving reasons for any findings. Such findings can be concise. In cases of making adjudication under the Central Bank Act, there is a right of appeal to the High Court in the event of there being dissatisfaction with the decision of the Ombudsman, who is required to stipulate what part of the Act and what legal basis constitutes his findings.

A notable feature of financial services regulation in Ireland is the possibility of overseeing the relevant institutions through inspection by authorised officers appointed by either the governor of the Central Bank or the chief executive of the financial regulator. A number of provisions in various banking Acts provide for regulation of the industry by appointing persons to inspect and investigate the business of financial institutions. They can be either a member of staff of the Central Bank or the financial regulator or another suitably qualified person.

Authorised officers apply the provisions of the Acts within which their powers are expressed. They may, at any reasonable time, on production of evidence of the person's authorisation, enter business premises for the purpose of carrying out such an investigation. The authorised officer can: a) inspect the premises; b) request any person on the premises who apparently has control of, or access to, documents or material relating to the business of the body concerned to produce the documents or material for inspection; c) inspect documents and material so produced, or found in the course of inspecting the

premises, and, in the case of documents, take copies of them or of any parts of them: and d) request any person who appears to the authorised person to have access to information relating to the documents or material, or to the business of the body, to provide that information or to answer questions with respect to the documents or material or that business.

The IFSRA is unique in Ireland in that it may impose administrative sanctions under civil law. The document ‘Outline of the Administrative Sanctions Procedure’ outlines guidelines on administrative sanction procedures, which can be followed on the website. In information released about Enforcement Priorities in 2014,<sup>9</sup> the Central Bank of Ireland stated that during 2013 they entered into 16 enforcement settlements with regulated entities, with fines totalling €6,348,215 being imposed. In 2014, the Central Bank aims to build upon the work carried out in these priority areas.

However, in some cases no further action will be appropriate if the matter giving rise for concern is minor and where immediate remedial action has been taken and full cooperation has been provided. In such cases, the financial regulator may issue a supervisory warning where there are reasonable grounds to suspect that a breach of statutory or regulatory requirements has occurred. Supervisory warnings may be issued where full co-operation is received and the problem was rectified immediately and other considerations supporting enforcement do not apply. Where a supervisory warning is taken into account by the financial regulator in determining whether enforcement action should take place, the period of the warning shall be taken into account. Supervisory warnings will not be considered when deciding whether a breach has occurred or deciding the level of sanctions to apply.

If it is determined that there are reasonable grounds to suspect that a prescribed contravention is being or has been

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<sup>9</sup> [http://www.centralbank.ie/ Home > Press Area > Press Releases](http://www.centralbank.ie/Home > Press Area > Press Releases).

committed, the case may be referred to an inquiry held pursuant to the Administrative Sanctions Procedure and, if appropriate, sanctions may be imposed. The purpose is to determine whether a prescribed contravention is being or has been committed and to determine the appropriate sanctions to apply.

The financial regulator has the power to caution or to reprimand. It can also direct to refund or withhold all or part of an amount of money charged or paid, or to be charged or paid, for the provision of a financial service. It can impose a monetary penalty or it can issue a direction disqualifying the person concerned from being a manager within a regulated financial services provider. Furthermore, it can issue directions to cease the contravention if it is found that the contravention is continuing. The financial regulator also has powers of criminal enforcement. It will be given discretion for prosecuting summary offences, which are heard by a judge without a jury in the District Court. In more serious cases, indictable offences are heard by a judge and jury in a Circuit Criminal Court. In some circumstances, the regulator may impose a sanction via the Administrative Sanctions Procedure, in addition to bringing a criminal prosecution itself or if a prosecution is brought by another body or agency.

With respect to regulating and putting into practice the tools of enforcement, these tools must be constantly monitored so that they do not lose their effectiveness. The key to the success of all agencies in achieving consumer protection relies on continuous, rigorous and systematic re-evaluation of its programmes. The regulators must collect data on the effects of their ongoing regulatory efforts, and conduct and evaluate pilot programmes for new products and markets or new efforts and practices in existing fields.

## 5.2 FINANCIAL EDUCATION AND INFORMATION

Along with enforcement, it is important to empower consumers to protect themselves. Financial education is no substitute for consumer protection regulation, but the two are complementary and should be combined in a reform programme of financial consumer protection. It is essential to help consumers understand and use relevant information. Many consumers are not sufficiently financially literate to assess financial products and are likely to make misguided decisions.

In the USA, it seems there has been a great deal of success in this respect. The BCFP has become well known for its “Know before You Owe” initiative, which aims to help people understand the consequences of any debt they may take on. It is a campaign which could have its greatest impact in the long term. Financial literacy requires a sustained long-term effort. Clear guidelines are also needed on the types of information and personnel resources that should be provided by financial service providers, the government, and consumer organisations. Industry associations within the financial system, such as banking associations, often take a keen interest in providing financial education and training for consumers. This should be encouraged as part of a national strategy for improving financial education. Consideration should also be given to ways of strengthening consumer organisations and ensuring that they have a long-term and stable funding source that will allow them to play a vital role in protecting and educating financial consumers.

A well-educated consumer should be able to understand consumer disclosures, the risks and rewards, and the legal rights and obligations that are involved. In short, a financially-literate consumer should be able to make informed decisions about financial products and services. Financial education for consumers should focus on the appropriate use of financial products and services. Particularly complex financial products and services, such as long-term residential mortgages with ad-

justable rates of interest, require more in-depth understanding than simple products such as bank savings accounts. Financial education programmes should be adjusted accordingly.

In a World Bank consultative draft published in 2011, ‘Good Practices for Financial Consumer Protection’ concluded that: “General programs of financial education should teach households how to prepare family budgets and how to plan to meet their financial needs and goals. However, despite the importance of these skills in establishing and maintaining financial well-being, general financial education programs should not be part of targeted financial consumer protection initiatives.” The research also points to the need for surveys of financial literacy and consumer spending habits as essential background for designing financial programmes. Psychological biases may influence consumers to make choices that are neither rational nor optimal. These biases include mistaken beliefs. Consumers may, for example, assume that interest rate charges or penalties will not apply to them or that they may be over-optimistic about their financial futures and, thus, unable to forecast their future financial status accurately. Consumers also fall victim to projection bias, that is, the prediction of personal preferences into the future.

In Brazil, many actions have been carried out in the last few years. The National Strategy for Financial Education from the Portuguese *Estratégia Nacional de Educação Financeira* (ENEF) was instituted in 2010 by Decree 7.397 and its main objectives are: to promote and foster the culture of financial education; to broaden citizens’ understanding in making choices related to their own funds; and to contribute to the efficiency and solidity of financial markets in terms of capital, insurance, welfare and capitalisation. In order to define the actions of the ENEF, the National Committee of Financial Education (CONEF) was formed from among representatives of the Central Bank, the Securities and Exchange Commission (CVM),

the National Complementary Welfare Superintendence (PREVIC), the Superintendence of Private Insurance (SUSEP), the Ministry of the Treasury, the Ministry of Education, the Ministry of Social Security, the Ministry of Justice, and representatives from civil society.

Besides being part of CONEF, the Central Bank takes its own actions. The developing programme is aimed at Brazilian society as a whole, focusing on clients and product users and financial services. While promoting financial education within an integrated programme, the Central Bank seeks to engage both cognitive and behavioural dimensions. In the cognitive arena the Central Bank's Program of Financial Education aims to provide knowledge about the currency, to increase public access to the resources of the SFN, and to publicise the role of the Central Bank. In the behavioural dimension, the goals are to encourage the opening of savings accounts, to increase the responsible use of credit, and to promote behavioural changes based on sound personal financial practice.

Further, the Central Bank has made available several publications in order to help the public understand topics of interest. In partnership with the Ministry of Justice, they published seven editions of a Finance and Consumption newsletter,<sup>10</sup> which explained, among other things, how the consortium works and the purpose of the Credit Information System (SCR). In 2013, the BCB also launched the Excellent Education Guide to Financial Service Provision,<sup>11</sup> the objective of which is to introduce to financial institutions practices that contribute to consumers' financial education. The first module discussed credit supply and outlined the stages of publicity, employment and after-sales; another chapter was dedicated to the use of credit cards.

As a result, it should be acknowledged that Brazil is

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<sup>10</sup> See [www.bcb.gov.br/?CONSUMOFIN](http://www.bcb.gov.br/?CONSUMOFIN)

<sup>11</sup> See [www.bc.gov.br/pre/pef/port/guia\\_de\\_excelencia\\_internet.pdf](http://www.bc.gov.br/pre/pef/port/guia_de_excelencia_internet.pdf)

moving forward in this area, fulfilling ambitious goals and carrying out effective education projects. But all of this will only bring real results in the long term and market dynamics demand the constant reassessment of strategies in order to maintain the quality of the programmes. An eye must be kept, therefore, on what is happening around the world.

Finally, it is important to note that financial education is not just about blaming the financial industry or shifting all the responsibility onto the companies. It is about making sure that people have all the information they need in order to make better financial decisions and in this way guarantee that they are able to have a good understanding of what they are likely to face.

### 5.3 OMBUDSMAN SCHEMES AND MEDIATION

The establishment of the office of Ombudsman in England and Ireland in the 1980s was, for some people, a result of promoting the emergence of alternative means of conflict resolution. For others it reflected the need for private powers to exercise some measure of responsibility, classic design that already exists in the framework of public services. The key element is that in both countries the Ombudsman schemes have become a central part of the consumer protection process in relation to financial services.

In the UK, the Banking Ombudsman Scheme was originally established in 1986 and was conceived as an alternative to litigation. The Financial Services and Markets Act 2000 created a consolidated statutory dispute resolution scheme—the Financial Ombudsman Service (FOS)—incorporating eight independent ombudsmen and complaint-handling schemes, including the Insurance Ombudsman Bureau, the Personal Investment Authority, the Securities and Futures Authority Complaints Bureau, the Banking Ombudsman, and the Building

Societies Ombudsman. In Ireland, the FOS was set out in the Central Bank and Financial Services Authority of Ireland Act 2004. Its principal function is to deal with complaints by mediation and, where necessary, by investigation and adjudication. In both countries, the FOS is entitled to perform its functions and exercise its powers free from interference by any other person and, when dealing with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form.

The FOS in the UK is administered by a corporate body as the ‘scheme operator’, the Financial Ombudsman Service Limited. It is a public body set up by parliament to carry out statutory functions on a non-commercial, not-for-profit basis. The casework of the FOS is dealt with in three sections: front-line enquiries and initial complaints (customer contact division); adjudicators who settle complaints informally (casework operations); and ombudsmen making formal decisions (a large panel of ombudsmen led by three lead ombudsmen for insurance and investments, banking, loans, consumer credit and mortgages, and legal policy, under two principal ombudsmen and the chief executive and chief ombudsman of the FOS).

The approach taken by the FOS will depend on the nature of the complaint, but generally the FOS will attempt to settle the complaint informally through mediation or conciliation. If such conciliation or mediation is not possible, based on the relevant documents, an adjudicator’s view on how the case should be resolved is given in writing to both sides. Where one side is unhappy with the adjudicator’s view, they can ask for a review and final decision by an ombudsman. Where the ombudsman’s decision is accepted by the complainant, it is binding on both parties, but if not, neither party is bound by the decision; the complainant is then free to initiate court proceedings. In determining what is fair and reasonable, the ombuds-

man will have regard for the relevant laws and regulations, regulators' rules, guidance and standards, codes of practice, and what the ombudsman considers to be good industry practice at the time.

In the UK, the mediation process involves a neutral mediator helping parties to negotiate a settlement. The mediator will not offer an evaluation of each party's cases, but will purely assist the negotiation. If the parties consent, mediation may take place at any stage of the enforcement process. However, mediation is unlikely to be appropriate in cases where bringing a criminal prosecution is being contemplated, or which require urgent action by the FCA.

In Singapore, the Financial Industry Disputes Resolution Centre (FIDReC) was set up as an independent company on 31 August 2005. It reflects a hybrid system of adjudication which functions similarly to the arbitration model in that decisions are made by recognised private industry and legal professionals, but it also bears some similarity to the ombudsman model in that decisions are rendered without prejudice to the claimant. The system itself reflects the importance placed on principles of fairness, impartiality and efficiency. FIDReC's jurisdiction extends over all disputes brought by individuals and sole proprietors against financial institutions which are members of FIDReC, except disputes over commercial decisions (including pricing and other policies, for example, interest rates and fees), cases under investigation by any law enforcement agency, and cases which have been subject to a court hearing.

Dispute resolution is handled on three levels within FIDReC. First, Counselling Services carries out a preliminary review, and gives the complainant time to consider whether to proceed to the lodging of a formal complaint against a financial institution. Secondly, case managers, who are employees of FIDReC, are assigned to assist in the mediation of disputes.

Where appropriate, mediation conferences are arranged to allow parties to communicate face to face. Case managers have no jurisdiction to make monetary awards, and can only seek to reach a settlement that parties to the dispute agree to. And thirdly, adjudicators are experts appointed by the FIDReC board of directors and will, as required, decide disputes in favour of either the consumer or the financial institution where a case manager has been unable to resolve the dispute through mediation. Among FIDReC's adjudicators are retired judges, senior counsels, lawyers and retired industry professionals.

FIDReC members—the financial institutions—are required to enter into a subscription agreement under which they are bound by the Terms of Reference, by which they agree not to take legal action against FIDReC, and to honour the payment of subscriptions, levies and fees. Members of FIDReC can be expelled for failing to comply with the Terms of Reference. The territorial scope of jurisdiction of FIDReC extends to complaints about the activities of a financial institution or its representative carrying on business in Singapore. All types of dispute with a member financial institution may be brought before, and dealt with by, FIDReC. Complaints must be made at the earliest opportunity upon showing that an attempt has been made to resolve the matter by the financial institution's internal dispute resolution unit. Cases may be dismissed by a case manager with the approval of FIDReC's chief executive officer if the dispute is frivolous or vexatious, has been previously considered and excluded under FIDReC's predecessor schemes, or if there are other compelling reasons why it is inappropriate for the dispute to be dealt with by FIDReC.

In Brazil, under Resolution N. 3849, 2010, the National Monetary Council, from the Portuguese *Conselho Monetário Nacional* (CMN), provides for the institution of an ombudsman by financial institutions and other institutions authorised to operate by the Central Bank. In addition to requiring the om-

budsman's installation in order to ensure the effectiveness of its functioning, the agents must have capacity-building, by means of certification exam of the staff in the area in order to work the ombudsman's offices and maintenance of control system of the history of attendances.

The above-mentioned normative presents rules that are compatible with those that have been applied in other countries, but measures which allow the regulator to achieve full compliance from supervised institutions are still needed. In other words, there is still room for improvement. It would be a major breakthrough if the regulations for institutions encouraged them to adopt alternative means of dispute resolution, such as mediation and arbitration. It is also important to guarantee the performance of the ombudsman as a driver of improvements in the processes of work. For this, it is necessary to achieve a compromise between the directors of the institutions and the results presented by the ombudsman. It could be possible to establish a process of periodical reporting to managers and internal committees and also a central system to control the quality of improvements implemented in a given period.

In both the UK and Singapore, the ombudsman scheme is efficient and generally effective. For the year 2009–2010, the FOS handled 925,095 cases and resolved 166,321 of them, resulting in compensation for consumers in 50 per cent of the cases. Over the same period, FIDReC dealt with 2,555 cases and a total of 2,263 cases were resolved by mediation or adjudication.<sup>12</sup> This is evidence of the effectiveness of ombudsmen in preventing high percentages of meritless claims going forward. The scheme also avoids litigation costs where there is a basis for voluntary settlement and it has greatly contributed to the enhancement of consumer and industry confidence. It could

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<sup>12</sup> *Consumer Financial Dispute Resolution in a Comparative Context. Principles, Systems and Practice, Chapters 2 and 6.* Shahla F. Ali. Cambridge: Cambridge University Press.

be the same in Brazil.

## 5.4 RESEARCH

It is important to highlight that for every action aimed at effective consumer protection, the current issues faced by users should be taken into account. Due to market dynamics, changes in the products and services provided do affect those issues. This leads to the necessity of making frequent assessments and studies on the subject. An effective way of collecting data for this analysis is to carry out market research and consumer research.

Research is frequently used by the Financial Conduct Authority. The FCA has just set out its Business Plan 2014/2015, in which there is mention of the use of research for better fulfilment of its mission:

*Consumer research helps us to understand what consumers want and expect, the role that credit plays for them in different general circumstances at different points in their lives, and how it can either help them or lead them into difficulty. Similarly, firm research gives us better understanding of what firms are doing, their business models, the dynamics of competition, how the markets are evolving and why.*

By understanding market failures and consumer expectation, the regulator will be able to achieve more suitable and efficient standards.

Research is also used to assess the impact of the measures adopted. The FCA is going to undertake a post-implementation review of the Retail Distribution Review (RDR), carrying out research throughout 2014/15 using regulatory data, publicly available data, and specially commissioned industry and consumer research to assess the effects of the RDR against its objectives following the first 12 months after the rules were implemented.

The Consultative Group to Assist the Poor (CGAP) has experimented with the application of three different tools for

consumer research: a) consumer group discussions; b) in-depth consumer interviews; and c) quantitative surveys, which can be used alone or alongside other methods. These tools can be more or less effective, depending on the particular consumer protection needs or interests in a country, as well as the information sought. The experience of the CGAP suggests that research has helped the regulating authorities make use of the resources in a more rational way, according to what it is more important for the protection to the consumer. The group believes that listening to low-income consumers directly is essential for gaining a complete perspective of what is currently happening in the marketplace, and where the greatest resources and effort should be invested in order to improve outcomes for low-income, less experienced, and more vulnerable users of financial services. By listening to the consumers themselves, these priority issues can be better identified, vetted, and analysed by policy makers for follow-up action.

Research addresses issues of interest to regulators in a practical way so that it can be used to quickly build evidence in areas they are particularly concerned about. It helps to identify and understand market mechanisms and business and consumer behaviours that may be driving consumer outcomes.

## 5.5 BANKING CODES AND OTHER INITIATIVES

Deficiencies in the financial market are often a symptom of a failure in the regulatory system. This is true worldwide, as evidenced by the 2008 financial crisis. For each scandal or crisis, governments come up with more and more rules and regulations without considering that the failures could be a result of cultural disobedience. This highlights a limitation of the laws and the norms for the optimal discipline of the financial market. The agents usually apply the rules by the environment influence in which they live. It is not always necessary to

affirm that these agents apply their moral and ethical qualities to the interpretation and application of the norms they have to obey. Such a perception reveals that something more needs to be done in order to discipline the agents of this market.

Regarding this matter, Martin Wheatley (2013), Chief Executive of the FCA, in his speech at the ICI Global Trading Market Structure Conference, stated that:

The traditional regulatory mechanism for dealing with cultural weakness has always been to enhance the rules. To close loopholes in the law as and when they appear. To require more disclosure or compliance with specific processes. The problem with this approach is twofold. First: it is 'static'. So it is closing stable doors after horses have bolted. Second we know it can encourage the behaviour it seeks to stamp out. ...In other words, growing the rulebook did not prevent cultural weakness.

Europe is brimming with initiatives, such as the creation of behaviour codes, which are applied alongside the laws, resulting in a change in ethics within institutions, with the creation of codes for agent performance in the market. The aim is to strengthen and transform the corporate culture infusing ethical values that will influence the development of activities and thereafter protect consumers.

In some cases, the codes are developed by the institutions themselves by way of self-regulation, which has long been an important part of the regulatory landscape in the UK. The principal example of the use of self-regulation to protect the consumer is that of the Banking Code. The Banking Code was created as a result of recommendations made by the Committee on the Review of Banking Services Law (the Jack Committee), which was established to examine the statute and common law relating to the provision of banking services within the UK to personal and business customers. One of its more specific functions was to recommend the introduction of codes of good practice on such matters as model contract terms, information for customers, and new banking procedures.

Furthermore, the financial services industry around the world has produced numerous ‘codes of conduct’, ‘codes of ethics’ and ‘principles of best practice’ which purport to articulate various cultural and commercial norms. Prominent examples include the Chartered Financial Analyst (CFA) Institute’s *Code of Ethics and Standards of Professional Conduct*,<sup>13</sup> the Chartered Institute for Securities and Investment’s *Code of Conduct*,<sup>14</sup> and the Alternative Investment Management Association’s *Guide to Sound Practices*.<sup>15</sup> The Central Bank of Ireland’s revised Consumer Protection Code came into operation on 1 January 2012. The new version replaces the original code published in 2006 and in so doing strengthens provisions contained in the original code and introduces a number of requirements intended to provide further protection to consumers when dealing with regulated financial service providers.

The use of codes has advantages over legislation. Cartwright (2004) refers to some of them in his book ‘Banks, Consumers and Regulation’. He states:

First, codes reduce many of the costs associated with legislation, in particular those associated with rule-making and parliamentary time. Addressing detailed legislation at specific industries is frequently impractical. Secondly, codes are far more flexible than legislation and can be changed in the light of new judicial or statutory developments, or in the light of changes in business practice.

In this sense, one of the ways in which the FCA is seeking to achieve its consumer protection objectives is the Treating Customers Fairly (TCF) initiative, which was established by its predecessor the FSA. TCF is an on-going project that involves developing a common view of the rights and responsibilities of both consumers and businesses. It mandates senior

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<sup>13</sup> <http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx> (last visited 14 April 2014).

<sup>14</sup> <http://www.cisi.org/bookmark/genericform.aspx?form=29848780&URL=ethics#> (last visited 14 April 2014).

<sup>15</sup> <http://www.aima.org/en/education/aima-guides.cfm> (last visited 14 April 2014).

management to work out for themselves what practices guarantee fair treatment for their clients and it is premised on the idea of enforced ‘self-regulation’, here understood in its broadest possible sense as any arrangement whereby the conduct of an activity is under the control of a person actively engaged in the activity.

The TCF initiative implies a growing emphasis on the capacity of each individual firm for self-regulation in areas such as best practice in relation to the internal management of risks pertaining to the fair treatment of customers, and the monitoring and review of processes with respect to the firm’s evaluation of its own performance. TCF involves, in fact, a cultural change for firms and their staff. The TCF initiative identifies six outcomes<sup>16</sup> which the FCA expects financial services companies to achieve on behalf of their retail clients:

- *Outcome 1:* Consumers can be confident that they are dealing with firms where the fair treatment of customers is central to the corporate culture.
- *Outcome 2:* Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.
- *Outcome 3:* Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.
- *Outcome 4:* Where consumers receive advice, the advice is suitable and takes account of their circumstances.
- *Outcome 5:* Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.
- *Outcome 6:* Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

In short, the initiative aims to ensure that consumer information is simple and understandable, and that firms operat-

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<sup>16</sup> <http://www.fca.org.uk/firms/being-regulated/meeting-your-obligations/fair-treatment-of-customers> (last visited on 4 April 2014).

ing in the retail sector are well managed, adequately capitalised and capable of treating customers fairly.

The outcomes listed above are stated in one of the FSA's communication papers regarding TCF. They are not part of the FCA Handbook. Indeed, it is not simply one more set of rules. In place of a tailor-made rulebook, the conduct authority has opted for a regime that places emphasis on interpretive practice and its regulatory capacity to inform, shape, guide and monitor the endeavour of each regulated firm in order to develop best managerial practice and ultimately deliver the envisaged TCF outcomes. And the experience with the TCF initiative drives home the importance of leadership and commitment on the part of senior management as a necessary precondition to any shift towards a more ethical culture within financial services firms.

The Brazilian Federation of Banks (Febraban) searched all existing instruments and launched, in 2009, its own Code of Banking. It is a system of auto-regulation inspired by the principles of ethics, legality, transparency and respect for the consumer by means of the adoption of procedures of self-discipline to be applied by the signatory institutions. The Code is structured in ten chapters and discloses all the products and services offered in the market. Moreover, it contains rules of obligatory observance according to the Code of Defence of the Consumer. One of these concerns is a praiseworthy initiative with the objective of guiding the performance of the agents and which will have a significant impact on the creation of a new culture and on limiting abuse of the consumer. Nonetheless, it is still necessary to establish a more rigid set of punishments, and institutions must be encouraged not simply to have their own interests in mind.

There is no evidence that these various codes will provide the complete solution to problems that consumers face in dealing with financial markets. There is also no guarantee that

institutions will obey the codes or that greater attention to ethics will reduce the number of problems for the consumer. But the fact is that of all the measures that regulators are seeking to implement, these codes are those with the greatest potential to transform the culture of the corporations and change the way agents work in a market which is, most of the time, characterised by relations of undeniable disequilibrium. It is essential, therefore, that at least some attempt is made.

## 6. FINAL REMARKS

Crises always provide opportunities for policymakers and confirm that it is necessary to (according to the jargon) ‘think outside the box’ in order to make more effective regulations. During the crisis of 2008, it was felt that consumers should play a more active role in the financial market, and that institutions should adapt their behaviour in order to allow that to happen so that the market can develop in a healthy and secure way. There also arose the idea that authorities should devote more resources to monitoring the conduct-of-business of financial institutions, suggesting the implementation of the “Twin Peaks” model as an ideal means of achieving this. This was because distinguishing between prudential regulation and conduct regulation, whether in different bodies or not, reduces unnecessary competition for resources. Moreover, it makes better use of the technical expertise of the staff involved in each activity.

As research developed, however, the conclusions were twofold: First, notwithstanding the effects of globalisation, the adoption of the aforementioned model is not a solution to be adopted worldwide as that the efficiency of any format will depend on variables such as local government politics, culture, and the historical and judicial framework of each country. Secondly, adopting the organisational structure of the Twin Peaks

model with the specialised conduct-of-business supervision of the agents is not of itself enough to effect real changes in the market. It is necessary to ensure that effective tools (especially measures for enforcement and for the development of financial education programmes) are made available to the authority responsible for conduct-of-business supervision in order that it may achieve its goals. The good news is that a number of these measures are already being tested around the world.

Considering these variables, the conclusion is that the newly implemented reforms in Brazil have been successful: there is now a board in the Central Bank dealing with the public, and also a body dealing exclusively with conduct-of-business supervision, in line with a moderate Twin Peaks model. As stated above, these actions alone are not enough: there must be an adequate set of tools with a common goal. But the Central Bank is evolving in this respect and will also be able to benefit from some of the ideas that have been put forward in this study and that are already in progress in other countries.

Unlike in the UK and the USA, in Brazil there is no possibility, at least for now, of creating a new agency with the specific task of checking the conduct of financial agents, or of giving specialised treatment to relations with consumers. The Central Bank can and should take this cause upon itself, thus taking on a more pro-active form of management directed at protecting banking consumers, at least in terms of market discipline. The monetary authority, without forgetting its current assignment of assuring a solid and efficient financial system, should discipline the market, clearly highlighting the importance of establishing relationships with clients, and assuring the necessary balance in contractual relations imposed by the legal system which we are all subject to. It is therefore important for the BCB to provide strategic goals for maintaining a solid and efficient financial system and also an inclusive and sustainable scheme.

As a second step, once this goal has been established and the institution is well structured, with the necessary financial and human resources in place, and as long as the judicial system grants legal competence to the legitimising authority, the BCB should take direct charge of conflict resolution between financial institutions and their clients. Such a measure would be a step forward in consumer protection as taking advantage of its experience in regulating and controlling these relations would bring about more speedy and effective solutions. In addition, it would reduce the number of consumer complaints and thus help services in other areas, and it would also reduce the number of legal actions against banks. These changes should obviously be introduced in a planned and gradual manner as the authority will need to adapt its structures and train its staff for its new function without prejudicing its other work. There should be a partnership between several public organs that have a role in the protection of banking customers, especially *Senacon* and *Procon*, so that there is a transfer of functions and information, without any gap.

During the transition period, which depends, as stated before, on planning and legal provision, it is recommended that the regulating authority improves its structures and procedures in terms of working with the supervision of conduct of business. In this respect, it seems relevant to evaluate the adoption of certain measures that can be taken immediately by the Central Bank. In terms of its organisational structure, it would be efficient to link the team responsible for conduct-of-business supervision—the Department of Conduct—to the same authority that deals, in any kind of way, with the objective of consumer protection as well as the Department of Financial Education and the Department of Attendance to the Public, pursuing greater synergy between the actions developed. As for the work processes, it is of extreme urgency that the Central Bank makes a set of tools available to the teams responsible for making sure

institutions comply with best practice in the financial system. Among the measures contemplated in this study, I would recommend the prioritisation of research to evaluate what has already been happening and the development of codes of conduct for the market agents.

By adopting, and succeeding with, the suggested measures, the Central Bank will raise Brazil to the level achieved by other countries that have already adopted, as state policy, an effective consumer protection regime, and have become a driving force of the whole financial market. This will put the country alongside those which have adopted the principle of a solid, efficient, inclusive and sustainable financial system.



## 7. REFERENCES

- Ackarya, Viral V. et al. 2011. *Regulating Wall Street: the Dodd-Frank Act and the new architecture of global finance*. John Wiley & Sons, Inc.
- Akimbami, F. 2011. *Financial services and consumer protection after the crisis*. *International Journal of Bank Marketing*. Vol. 29, No. 2, pp. 134–147. Emerald Group Publishing Limited.
- Awrey, Dan et al. 2012. *Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?* LSE Law, Society and Economy Working Papers 14/2012, London School of Economics and Political Science. Law Department.
- Barbosa, Fernanda Nunes. 2008. *Informação: direito e dever*

- nas relações de consumo*. São Paulo: Editora Revista dos Tribunais.
- Bazley, Stuart et al. 2007. *Financial Services Authority Regulation and Risk-based Compliance*. Tottel Publishing Ltd.
- BIS. 2008. *Customer suitability in the retail sale of financial products and services*. The Joint Forum. Bank of International Settlements: Basel. April.
- Carmichael, Jeffrey et al. 2004. *Aligning Financial Supervisory Structures with Country Needs*. World Bank Institute: Washington, D.C.
- Cartwright, Peter et al. 1999. *Consumer Protection in Financial Services*. International Banking, Finance and Economic Law Series. Volume 9. Kluwer Law International.
- Cartwright, Peter. 2004. *Banks, Consumers and Regulation*. Oxford and Portland Oregon.
- CGAP. 2011. *Global Standard-Setting Bodies and Financial Inclusion for the Poor: Toward Proportionate Standards and Guidance*. CGAP: Washington, D.C., September.
- Connery, Niamh et al. 2009. *Regulatory Law in Ireland*. Dublin: Tottel Publishing Ltd.
- Deloitte. 2012. *Changing the domestic supervisory architecture in Europe. Scaling the peaks*. Deloitte for EMEA Center for Regulatory Strategy. London, March 2012.
- Duke, Elizabeth A. 2009. *The Systemic Importance of Consumer Protection*, Elizabeth A Duke, Member of the Board of Governors of the US Federal Reserve System at the 2009 Community Development Policy Summit, Cleveland Ohio, 10 June 2009.
- ECB. 2010. *"Recent Developments in Supervisory Structures in the EU member States (2007-10)"*. European Central Bank, Outubro, 2010.

- Ferreira, Gabriel Jorge. 2005. *A Estrutura Normativa de Supervisão do Sistema Financeiro Nacional*. In: Revista de Direito Bancário e do Mercado de Capitais nº 28, Ano 8, abril-junho de 2005, São Paulo: Revista dos Tribunais.
- Ferran, Eilis. *The Break-up of the Financial Services Authority*. Oxford Journal of Legal Studies. Published Advance Accessed 10 April 2011.
- IMF. 2012. *Brazil: Financial System Stability Assessment*. Country Report No. 12/206, Financial Sector Assessment Program.
- Georgosouli, A. 2011. *The FSA's 'Treating Customers Fairly' (TCF) Initiative: What is So Good About It and Why It May Not Work*. Journal of Law and Society, Volume 38, Number 3, ISSN: 0263-323X, pp. 405–27.
- \_\_\_\_\_. 2012. *The FSA-PRA coordination scheme and the challenge of policy coherence*. Oxford University Press.
- Goodhart, C. et al. 1998. *Financial regulation: why, how, and where now?* Routledge.
- Goodhart, C. 2000. *The Organisational Structure of Banking Supervision*. Occasional Paper. Financial Stability Institute. Bank for International Settlements.
- HM Treasury. 2010. “*A new approach to financial regulation: judgment, focus and stability*”. Presented to Parliament by Command of Her Majesty. HM Treasury, July 2010.
- Lastra, Rosa Maria. *Banco Central e Regulamentação Bancária*. Tradução e comentários Dan M. Kraft. Belo Horizonte: Del Rey. 2001.
- OECD. 2011. “*G-20 High-level Principles on Financial Consumer Protection*”. Organization for Economic Co-operation and Development: Paris, October.
- Ogus, Anthony. 2010. *Better Regulation – Better Enforcement*. Vol. 6: Studies of the Oxford Institute of European and Comparative Law.

Taylor, Michael. 1995. *A Regulatory Structure for the New Century*. Centre for the Study of Financial Innovation.  
Tood, P. Textbook on Trusts.