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INTEGRATION OF ESG FACTORS INTO FINANCIAL REGULATIONS IN BRAZIL: AN OVERVIEW

PERSPECTIVES – ESG (BRAZIL)

[1]Luciane Moessa de Souza

ABSTRACT

Objective: the integration of environmental, social and governance (ESG) factors into Brazilian financial regulations, including banking, capital markets, insurance and pensions.

Method: in first place, a full descriptive approach is adopted; then, the first main critical gaps and opportunities for improvement are raised, but without an exhaustive analytical approach.

Results: an overview of the current stage of integration of ESG factors into financial regulations in Brazil.

Conclusion: even if all Brazilian financial regulators have already addressed the topic, there are several opportunities for improvement, specially because the impact on market has been limited thus far.

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[1] M.Sc. (UFPR, 2001), Ph.D. (UFSC), having been Visiting Scholar in the University of Texas (Austin) on Consensus-building on Public Policies Disputes (2010), Post-doctoral research on Financial System and Sustainable Development at USP (2016), having been Visiting Researcher at Universitá Luigi Bocconi (Milan), Former Legal Counsel of the Central Bank of Brazil (2007-2016), Founder of Sustainable Inclusive Solutions (SIS), International Consultant and Trainer on ESG Finance, Researcher on Green Finance at CIDEEFF (University of Lisbon). Email: luciane.moessa@sisctm.com.br

INTRODUCTION

The Brazilian financial "ecosystem" includes four financial regulators: one for banking, one for insurance and private open pension schemes (that supplement the public mandatory scheme for employees in the private sector and are offered by financial institutions), one for the pension schemes that are exclusive to the employees of one specific company or public entity (most companies do not offer these schemes, but some do and usually it is an option for the employees to adhere or not to them). It is important to clarify, when it comes to the main sources of finance for the real economy, that credit market is more than two times bigger than investments market, as shown in data from the Bank of International Settlements in 2022.

The Brazilian scenario has been dynamic in recent years and the leadership on the consideration of Environmental, Social and Governance (ESG) issues in finance has usually come from the banking regulator, who is also the monetary authority, but the securities exchange (capital markets) regulator has been active as well, and the other two also have adopted relevant initiatives.

This paper is divided into four sections in order to describe regulations issued by each of the regulatory/supervisory bodies. An analytical approach is not adopted, though, except with respect to some very evident gaps.

I – Banking

The Brazilian banking regulator is the Central Bank of Brazil (BCB, in Portuguese), who also applies regulations of the National Monetary Council (CMN in Portuguese). Integrations of ESG in banking regulations comprise specific rules for rural loans (since Resolution CMN 3.545/2008) and rules that apply to all lending and investing activities. I start with the first ones.

The Resolution BCB 140/2021 (amended by Resolution CMN 5081/2023) sets the following requirements for rural loans:

a) cancellation of inscription in the environmental rural registry (Cadastro Ambiental Rural – CAR, in Portuguese) of the property is considered equivalent to the absence of the register – the Brazilian Forest Code forbids rural loans to properties that are not registered in the CAR;

b) if the rural property is totally or partially inserted in an environmentally protected area of a category that does not admit economic activities, credit granting is forbidden, but only when the process of land-tenure regularization of the specific area is already concluded;

c) if the rural property is totally or partially inserted in an indigenous land, credit granting is forbidden, but only when the process of land recognition is concluded – and about half of indigenous lands in Brazil are still in process of recognition;

d) if the rural property lies totally or partially in a freed slave descendants territory ("terras remanescentes de quilombos" – the Brazilian Constitution recognizes their right to remain in these lands), credit granting is forbidden, but only when the process of land recognition is concluded – and only a bit more than 40 amongst more than 1,500 lands of this type were already completely recognized in Brazil; all the other ones go through a slow process of recognition;

e) prohibition of granting loans to any activity in rural properties involved in illegal deforestation (now in all Brazilian biomes, due to the amendment made in 2023; before that, this was valid only in Amazon), but only when the area was embargoed – another recent improvement is that, before the recent amendment, only embargos by IBAMA (the federal environmental agency, under whose jurisdiction only a few exceptional cases are included) were included, not the ones made by State environmental agencies; the ideal would be that that any area that has illegal deforestation, even before embargos, was included, based in a combination of satellite data proving the deforestation (there are several public and free databases in Brazil for that) plus the lack of authorization for land use conversion after requirement from the owner of the land to present it;

f) prohibition of rural loans for properties involved with modern slavery (that exists since Resolution CMN 3.876/2010) – however, child labour or other violations of labour health and safety rules are not included.

It is important to clarify that the regulations described next also apply to rural loans. The biggest shortage that can be pointed out, however, including from a climate risks perspective, is the fact that rural loans are still possible for properties involved in illegal deforestation.

Circular BCB 3.846/2017 requires that banks that adopt the ICAAP regime consider environmental and social risks in their capital adequacy assessment.

Resolution CMN 4.943/2021 and Resolution CMN 4.944/2021 both replace Resolution CMN 4.327/2014, from a risk management perspective, with regard to environmental, social and (now also) climate risks, filling its gaps. The first applies to larger institutions, while the second simplifies requirements for financial institutions (Fis) with lower capital.

The main innovations are:

a) a clear (non exhaustive) definition of situations of environmental, social and climate risks;

- for climate, international standards (such as the TCFD framework) with definitions of physical (including extreme weather events and permanent changes in weather patterns or consequences of these changes, such as sea-level rise) and transition risks (changes in regulation, market preference, investors demands, technological innovations, reputational risks) were adopted, in all their comprehensiveness;

- for environmental risks, an important highlight is that even the "excessive use of natural resources" was mentioned; also, non-compliance with environmental permit requirements, environmental violations in general (including illegal deforestation, illegal use of water resources, pollution of air, water or soil, biodiversity degradation, traffic or cruelty against animals); and even legal activities that might impact negatively the reputation of the institution due to environmental damages; finally, environmental transition risks were also included (changes in environmental regulations that might impact negatively the institution);

- for social risks, topics include modern slavery, illegal child labour, illegal discrimination, any sort of labour harassment or labour traffic, violations of labour regulations (including labour health and safety ones), damages to indigenous people or other traditional communities; damages to historic or cultural heritage, damages to urban heritage, violations of data privacy laws, disasters that cause damages to communities (such as collapses of mining waste dams); social transition risks due to regulatory changes were also included;

b) environmental, social and climate risks must be managed jointly with money laundry risks;

c) the risk management system must include identification, assessment, mitigation, classification, monitoring and control of the risks; the criteria for risk classification are: 1) sector/industry; 2) geographic location; 3) environmental and social compliance track record; 4) environmental and social performance/efficiency (including E&S governance);

d) environmental and social risks regarding suppliers of financial institutions must be managed as well, whenever relevant;

e) requirement for portfolio-level (loans and investments) risk management, assessing risk concentration per geographies and industries, defining limits of risk exposure;

f) environmental, social and climate covenants in loan agreements in order to mitigate such risks;

g) periodic assessment of collaterals and its sufficiency considering environmental, social and climate risks;

h) periodic reporting to high management of environmental, social and climate risks;

i) scenario analysis and stress testing at portfolio level, considering the transition to a low carbon economy;

j) environmental, social and climate factors must be considered for all categories of risks – credit risk, market risk, operational risk (including legal risk) and liquidity risk.

The main shortcomings are the lack of clear definition of financial transactions to be assessed and of minimal sources of information on environmental, social and climate risks. Criteria for the definition of frequency, scope and consequences of risk monitoring would also be very useful. And the requirement that key-performance indicators for each economic sector are used for environmental, social and climate risk management, at all stages, is certainly a big need.

Resolution CMN 4.945/2021 addresses governance issues and also provides definitions of positive environmental, social or social impacts:

a) for environmental ones, the definition encompasses conservation and restoration of nature;

b) for social impacts, the promotion, respect and protection of all human/basic rights are included;

c) for climate ones, both mitigation and adaptation to climate change are included, whereas preservation of natural carbon sinks is explicitly mentioned for mitigation, as well as offsetting of GHG emissions (together with GHG emissions reduction, of course); for adaptation, increase in frequency and intensity of extreme weather events and long-term changes are mentioned;

d) for governance, banks are required to publish online not only their Policy on Environmental and Social Responsibility (now added by Climate) – a requirement that existed in previous regulation, but also the actions towards its implementation; the list of industries to which restrictions exist due to environmental, social or climate factors; the list of financial products with positive environmental, social or climate impacts; the list of self-regulations on environmental, social or climate matters to which the FI voluntarily adhered; the mechanisms used to interact with stakeholders; as an option, it is also recommended to publish the assessment of implementation of the Policy;

e) the periodic review of the Policy was reduced to 3 years or whenever there are substantial changes in: business strategy of the FI, societal structure, offer of financial products or services, or in the environmental, social or climate risk exposure, including transition risks;

f) environmental, social and climate impacts must be considered in all financial products and services offered by the FIs.

There are some governance topics that are missing, though, such as the integration of ESG factors into compensation schemes of top management; the creation of sustainability departments and/or officers with a dimension, budget and background proportional to the size and characteristics of banks portfolios; the effects of self-regulatory commitments, making them mandatory and requiring the disclosure of their implementation; the results of stakeholder dialogues.

Resolution BCB 139/2021 and Normative Instruction BCB 153/2021 bring mandatory and optional contents of the Report on Environmental, Social and Climate Risks and Opportunities, to be published annually from 2023 on (with reference to year 2022). There are more requirements for larger FIs (according to capital – the smaller ones only have to report the first category below) and information to be reported encompass:

a) governance of environmental, social and climate risks;

b) strategies for environmental, social and climate risk management;

c) procedures for environmental, social and climate risk management;

d) environmental, social and climate key performance indicators for risk management;

e) business opportunities related to environmental, social and climate issues.

However, the most relevant information, that would be portfolio composition, not with description of borrowers and investees, but with their sectors, location and risk level, are not required to be disclosed.

Last but not least, Resolution BCB 151/2021, Normative Instruction BCB 222/2021 and Instructions DESIG for the filling of DRSAC, establish the contents and procedure for sending to the Central Bank a document on the periodic (semestral) reporting of information related to: a) environmental, social and climate (physical and transition) risk management by supervised institutions; b) indicators of positive environmental, social or climate contributions. The reporting shall be based on the implementation of their own policies. If focusses on three levels of risk assessment: sector risk (for companies); client risk; transaction risk (both loans and investments). When there is risk assessment for the transaction, the same is expected for the client. The regulation provides examples of environmental risks and, regarding social and climate ones, it refers to the definitions of previous regulations. Circumstances that mitigate or exacerbate risks must also be informed.

For the financial transactions, location information shall be included, preferably georeferenced information or, in case data are unknown, postal code of the project or activity, or, if not possible to determine the code, the Municipality. When the project or activity is located abroad and there are no georeferenced data, the country must be informed; the same for cases when not even the Municipality is possible to be determined in Brazil (e.g., highway or energy transmission line).

Another information that is required is if there are specific restrictions for any economic sector and, in such case, which are the restrictions.

The supervised institutions shall also inform the risk exposure level, defined as probability of default due to environmental, social or climate risks, for each transaction, client and sector. For client assessment, the economic sector code to be considered, if there is more than one, is the one that best represents the client activities. Each transaction, client and sector must be classified as: high risk, medium risk, low risk, irrelevant risk, not assessed, or out of scope of the financial institution risk management.

They have also to report the GHG emissions estimation for the previous 12 months, in tons of CO_2 equivalent, as well as CO_2 equivalent capture for the following 12 to 60 months. Estimates of off-setting of GHG emissions (for example, through carbon credits purchase) must be reported as well.

II – Insurance and open pension schemes

The Brazilian insurance and open pension schemes regulator (SUSEP – Superintendência de Seguros Privados, in Portuguese) issued Circular 666/2022 to address the integration of ESG factors both into investment management and insurance products design. SUSEP's regulation was largely inspired by the Central Bank of Brazil ESG regulations issued in 2021, for example: a) in the definition of environmental, social and climate risks (art. 2); b) in the immediate requirement for a sustainability report and the definition of its minimum content; c) in the definition of the minimum content of sustainability policies, including opportunities related to the generation of positive environmental, social or climate impacts (art. 8); d) record of losses related to sustainability risks; e) the requirement for sustainability criteria being adopted in the selection of suppliers of goods and services (the latter only for larger institutions).

With regard to sustainability risk management (environmental, social and climate risks), the new regulation stipulates that the system must include the identification, assessment, classification, measurement, treatment, monitoring and reporting of these risks (art. 4). It makes ith clear that risk management must be done at portfolio level by establishing that supervised institutions need to define limits for risk concentration and/or restrictions for doing business considering the exposure to certain economic sectors, geographic regions, products or services. It also clarifies that sustainability risks are not an autonomous risk category, but should be considered in the underwriting, credit, market, operational and liquidity risk categories. It is worth mentioning the provision for a "materiality study" (an innovation in relation to the draft text submitted to public consultation), to be renewed every 3 years (art. 3), which represents the adoption of the principle of relevance. This principle implies that if a certain entity, for example, only operates with life insurance, it does not make much sense to think of sustainability risk management in the risk underwriting policy; if it only invests in national government bonds (therefore, the only option are bonds issued by the Brazilian federal government), there is no possibility of integrating ESG factors into the investment policy - and so on.

It is worth highlighting the definition of minimum criteria for pricing and underwriting risks (rule applicable to insurance - art. 5): a) the client’s track record and commitment to managing sustainability risks; b) the client's capacity and willingness to mitigate sustainability risks associated with the transaction; c) any restrictions or limits defined in the insurer's policy (relative to exposure to certain sectors, regions, etc).

With respect to investment management, the regulation requires as a minimum that risks arising from exposure of assets or their issuers to sustainability risks or the non-adoption of good corporate governance practices be considered, in addition to the limits related to exposure to certain sectors or regions. This consideration applies to market, credit and liquidity risks, and must be expressly stated in the investment policy, with the exception only of small entities (the S4 segment, mentioned in art. 6). However, it is possible that these criteria apply only to certain classes of assets (real estate investments, investments in companies - whether fixed income, shares or social quotas), and not to others (such as government bonds), and, for this purpose, the availability of information about sustainability and governance risks must be considered (for the latter, for example, this implies that in a market where the average sustainability performance is not yet good enough, it will not be possible for insurers and pension schemes to establish overly restrictive criteria, otherwise there will be no options for investment). In addition, the risk-return targets established in their policy must be considered too. As a minimum, however, and starting to interpret the norm, it should be required that companies comply with environmental, social, climate and governance regulations applicable to them, requiring all appropriate licenses and authorizations and that the number of lawsuits/investigations of possible violations is not incompatible with company size and average of the sector/industry. Also, key-performance indicators for each economic sector should be required.

As for the Sustainability Policy, the regulation implicitly adopts the proportionality principle and requires that it is aligned with the business strategy of the financial institution, disclosed to the general public and re-evaluated every three years (art. 9). A single policy may be adopted for the entire group or conglomerate, when one of these exists (art. 10). The implementation of a sustainability policy must include at least two aspects: a) supply of products or services that consider these factors; b) direct operations of the entities, i.e., their own environmental, social and climate performance (art. 11), being mandatory the constant monitoring and evaluation of these actions (art. 12). A critical aspect of the standard is that it does not require, but considers optional, the participation of stakeholders in the development and review of the policy.

Furthermore, with regard to governance, the regulation requires that the sustainability policy is integrated with the other policies of each institution, and that the remuneration and performance evaluation policies do not encourage conduct that is incompatible with it (art. 13). On this last topic, the rule represents an advance even in relation to the Brazilian banking regulation, which does not address the subject - and it is very relevant, especially in relation to investments, where the focus is predominantly on quarterly financial results, while sustainability implies long-term vision. Moreover, the regulation makes it clear that the implementation of the policy is the responsibility of the Executive Board (art. 14).

Finally, the last chapter of the regulation approaches the contents of the annual Sustainability Report, to be published by end of April each year (art. 15): a) the supply of products or services that consider these factors; b) the entities' direct operations; c) the most relevant aspects of sustainability risk management, including the main risks identified and their possible short, medium and long term impacts on the institution's business, the risk management governance structure and the processes used for risk management, the monitoring of its results, and also how sustainability risks are integrated into the general risk management structure and the management of underwriting, credit, market, operational and liquidity risks. The report must also explain the methodologies used to obtain the information and be publicly available, as well as forwarded to the control and superior management bodies. The Circular provides that SUSEP will issue additional guidance, with tables concerning the format for disclosure of the information (art. 16).

Nevertheless, the most relevant disclosure information, which is portfolio composition, has not been addressed yet – this requirement would not necessarily include the description of investees, but their sectors, location (including value-chain) and risk level.

III – Pension schemes for employees

The Brazilian pension schemes that are exclusive to the employees of public or private owned companies are regulated by a different public body – PREVIC (Superintendência de Previdência Complementar, in Portuguese). The first rules on ESG topics were issued in 2009, but they were broadened in 2018 and 2019, with basic rules and guidance. Some of them were replaced by more recent rules in 2020 and 2022, without any change in contents, though.

First of all, Resolution CMN 4994/2022, that applies to pension schemes of employees of private-owned companies, in its art. 10, 4th. paragraph (the same way Resolution CMN 4661/2018 already did), and Resolution CMN 3922/2010, that applies to pension schemes of employees of States' and Municipalities' entities, in its art. 15, 5th. paragraph, I, "d", require that ESG factors are integrated into investment policies, whenever "appropriate", without clarifying in which cases this is deemed appropriate.

Furthermore, there is also Normative Instruction PREVIC 35/2020, whose art. 7th, VI, states that the guidelines for integration of ESG factors into investments, preferably with the consideration of sector specific E&S KPIs, in a slightly more advanced approach than done by Normative Instruction PREVIC 6/2018, whose art. 23, VI, mentioned that such guidelines were optional.

The PREVIC Guide on best practices for investments (version of 2022, replacing the 2019 version, but without any change in contents on this topic), at pages 17-19, provides examples of strategies to integrate ESG factors into investing, explains its benefits both for risk management and additional financial returns, provides some examples of relevant ESG issues and recommends that pension schemes define ESG criteria for the selection and monitoring of their assets, as well as the periodicity for monitoring, assigning roles and reporting on the implementation. It further recommends that they engage with invested companies so that they improve their ESG disclosures.

However, there are several shortcomings, starting with a clear definition of sources of environmental, social and climate risk information. Criteria for the definition of frequency, scope and consequences of risk monitoring are also needed, as well as examples of risk mitigation strategies, and a risk classification system should also be required. Governance requirements should be stablished, and disclosure requirements too, at least regarding portfolio composition, not necessarily with the description of investees, but with their sectors, location (including value-chain) and risk level.

IV – Capital markets

The Brazilian capital markets regulator is CVM (Comissão de Valores Mobiliários, in Portuguese). The first rules addressing the integration of environmental issues were issued in 2014, with regard to disclosures of companies that issue bonds or equities. These rules were significatively broadened by Resolution CVM 59/2021, which addressed the following topics to be disclosed by companies on environmental and social matters:

a) characteristics of the production process;
b) main raw materials and inputs, and relations with suppliers;
c) need for public permits for the operations and relations with public bodies in charge of issuing them;
d) main aspects related to the compliance with environmental and social regulations;
e) if the company publishes a sustainability report and, in case it does, which is the methodology adopted, which are its environmental and social key-performance indicators and if there is any auditing and how it works;
f) if the Sustainable Development Goals are considered in the reporting and which SDGs are material to the business;
g) if the TCFD recommendations (or similar) are considered in the reporting of climate issues;
h) if there is GHG emissions inventory and for which scope;
i) which are the environmental, social and climate risks faced by the company;

j) if the company has relevant lawsuits, administrative procedures or arbitration procedures ongoing on labour, tax, civil or environmental issues and, if it has, relevant facts, values involved, current stage of the procedure and likely outcomes;
k) policy of integrity (corruption prevention and control);
l) if any ESG factors are considered in the variable part of remuneration of higher management;
m) for workforce: data on gender, race, age or other diversity information that the company might consider material;
n) difference between the highest remuneration and the average one.

The main shortcomings that can be pointed out is that there are three very simple information that companies could disclose to provide a better assessment of their environmental, social and climate risks and performance that were not included (and usually are not required by other capital markets regulators either): a) the location of the companies' operations with environmental and social impacts (and, when relevant, also of their value-chain); b) quantitative data on the production of goods or services, use of raw materials and inputs, in order to assess their efficiency in the use of natural resources, energy, water, etc; c) data on occupational diseases and accidents, in order to compare with the size of the workforce. Regarding items "b" and "c", investors could analyse the performance of the companies compared to their industry peers. Concerning item "a", they could use databases to check if there are vulnerable environmental areas or communities close to the locations and then question the companies about risk mitigatory measures.

Moreover, CVM has also recently published regulation on the labelling of ESG investment funds, Resolution CVM 175/2022, whose art. 49 requires that investment funds that use any type of ESG, sustainability, environmental or social label disclose: a) which are the expected environmental, social or governance benefits and how the investment policy searches to created them; II – which methodologies, principles or guidelines are adopted for the label; c) which is the entity responsible for certificating or issuing a second party opinion on the certification, if there is one, as well as information on its independence regarding the fund; d) information on the format, contents and periodicity of the disclosure on the environmental, social or governance outcomes, as well as who is the responsible for the reporting. The regulation clarifies that this type of label cannot be adopted if the investment fund strategy is limited to the integration of ESG factors; such information must be disclosed in the investment policy, but does not authorize the use of any label.

In Brazil, there is no regulation on similar labelling for bonds. There is a developed market of private green, social, sustainable, and sustainability-linked bonds, but the standards adopted are based on self-regulations, such as the International Capital Markets Association (ICMA) principles and Climate Bonds Initiative (CBI) guidelines. Regarding sovereign bonds, there is still no standard at all, but the federal government (the only one that can issue them in Brazil) announced its intention to publish a framework in 2023. There is no regulation on ESG ratings either.

Final remarks

The elaboration of ESG financial regulations is a journey – and a journey that should be based on continuous market assessment. Of course, if there was already a robust integration of ESG considerations by financial institutions in their decision-making and a lot of transparency of companies on ESG information, regulatory action would not be necessary. But it is. Despite all these initiatives, the maturity and sophistication of the Brazilian financial market on the topic is still generally low, even if there has been progress in recent years, specially in the banking market. One of the reasons might be the fact that some of the regulations or guidelines are too generic, or maybe there are limits in the enforcement. Regarding the contents of regulations themselves, specific comments on the most evident shortcomings were made each of the four fields: banking, insurance, pensions and capital markets.

The fact is that we cannot rely upon market awareness alone, even if there are studies demonstrating that the integration of ESG issues impacts positively (from a financial perspective) both companies and financial institutions. Only market leaders have awareness before and regardless any regulatory action. They are a minority, in Brazil and elsewhere. And self-regulations, who usually do not require reporting or include penalties for non-compliance, and of course do not reach the whole market, despite their value, clearly cannot replace regulatory action.

The Brazilian experience demonstrates, overall, that, beyond regulations, it is important to define clear indicators to assess actual impact on the market and to adjust the route when necessary. Broadening and deepening are necessary movements as well – even if what is already done can be considered above global average. The final criteria, after all, should be how much these regulations are able (or not) to make the Brazilian economy more sustainable.

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