

Global Revolution 2024

Nottingham (UK)

Rehabilitation of Tenderers in Brazil: The Influence of Self-Cleaning as Envisaged in Directive 2014/24/EU

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Introduction

- Directive 2014/24/EU: exclusion and self-cleaning
- Brazilian Laws 8,666/93 and 14,133/21: exclusion and rehabilitation
- Perceptible improvements and impacts in Brazil:
 - Corruption Perceptions Index: 104th out of 180
 - Corruption Risk Forecast Index: 34th (public integrity) and 30th (transparency)
- Is self-cleaning compatible with Brazilian Law?
- Has Brazilian Law suffered influenced from EU?



Self-cleaning in the EU Law

- Mandatory and discretionary exclusions from tenders
- Self-cleaning: tenderers must demonstrate effective measures and ensure that the misconduct will not recur in the future
- Alternative and intelligent way to deal with typical exclusion situations
- Directive 2024/24/EU is the first legislative instrument in Europe that expressly addresses self-cleaning as a mechanism of rehabilitation



Requirements for Self-Cleaning

- Self-cleaning measures are intended to “demonstrate its reliability despite the existence of a significant ground for exclusion”
- Measures of Article 57(6) of Directive:
 - Clarify the facts
 - Compensate the damages
 - Take personnel measures
 - Take structure and organizational measures
- There is no standard model



Self-Cleaning in Brazil

- Brazilian Law exclusions:
 - “impediment to tender”
 - “declaration of unsuitability”
- Self-cleaning compatibility with Brazilian Law
- Public Administration can negotiate sanctions and their effects:
 - Substitutive sanction agreements
 - Leniency agreements
 - Agreements for rehabilitation



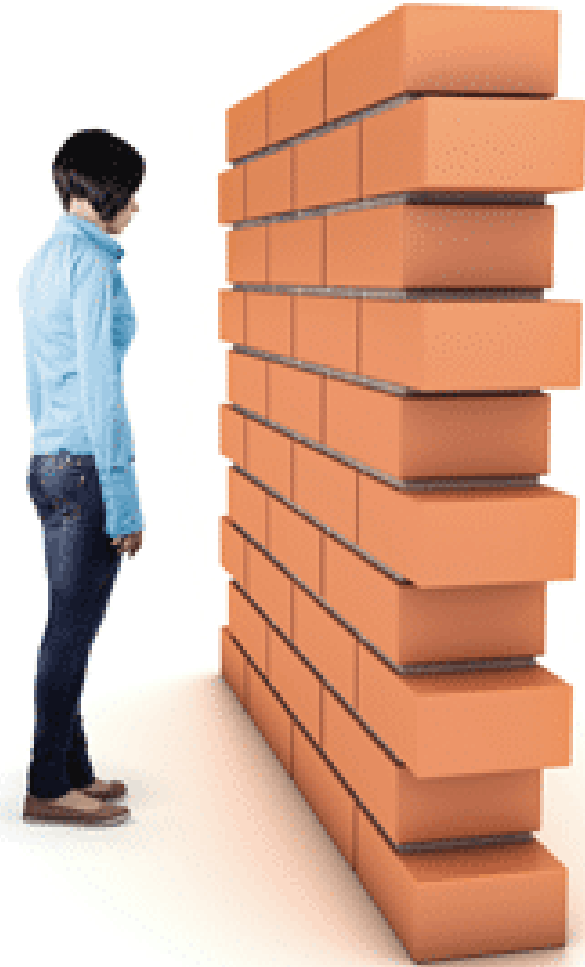
Rehabilitation in Brazilian Law

- It allows the punished agents to reinstate the public procurement market once complying with some requirements
- Law 8,666/1993: initial and general provisions
- Law 14,133/2021: similar provisions to the Directive
- Requirements for rehabilitation:
 - Full reparation of damages
 - Payment of fines
 - Lapse of 1 year for impediment to tender or 3 years for declaration of unsuitability
 - Compliance with rehabilitation conditions defined in the punitive act
 - Prior legal analysis with a conclusion about the established requirements
 - For certain situations, implementation, or improvement of an integrity program



Limited application in Brazil

- Tenderers are not rehabilitated
- Sanctioned tenderers due to Operation Car Wash had their penalties cancelled because Law 14,133/21 established a 6-year maximum period for debarment
- In 2023 and 2024 five debarment penalties were cancelled
- Legal opinions that have supported two of the decisions mentioned self-cleaning:
 - “Although Law 8,666/93 does not detail how this requirement should be met, administrative law doctrine argues that, **to demonstrate that it has regained the ability to contract with the Public Administration, the company must promote its ‘self-cleaning’, adopting disciplinary, technical, and structural measures to ensure the elimination of the causes that led to the penalty. Consequently, this will result in the creation of an adequate environment to prevent the commission of future infractions,** so that self-cleaning not only serves to correct past issues but also to prevent future problems.” [our highlight]



Comparison Brasil vs. EU

Requirement	Brazil	European Union
Compensation for damages	Mandatory requirement by Law	Mandatory requirement by Directive
Payment of monetary fines	Mandatory requirement by Law	Not a mandatory requirement by Directive
Measures of corporate reorganization	Mandatory requirement by Law in 2 specific situations	Concrete technical, organizational and personnel measures
Minimum penalty incidence period	1 to 3 years depending on the penalty	No minimum period except during the judicially applied penalty
Collaboration measures	Not a mandatory requirement by Law	Mandatory requirement by Directive
Possibility of additional requirements	Additional requirements allowed by Law	No express provision in the Directive
Possibility of rehabilitation due to external causes	No express provision in Law	No express provision in the Directive



Self-cleaning: critical assessment

- Influence of self-cleaning as envisaged in the Directive
- Improvements of Brazilian rules on rehabilitation
- Enhancements to be achieved:
 - Rehabilitation's practical applicability is very limited
 - Rehabilitation's requirements still need clarification
 - Rehabilitation should be permitted before the time lapse

Thank you

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