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

Rafael Wallbach Schwind[1] and Mayara Gasparoto Tonin[2]

1. Introduction

Directive 2014/24/EU provides that tenderers that have committed certain offenses may be excluded from participating in a public procurement procedure. It also provides that tenderers can undergo a self-cleaning proceeding and become reliable, rejoining the public procurement procedures as competitors.

At the time Directive was enacted, the procurement law in force in Brazil (Law 8.666/1993), though containing penalties of exclusion ("impediment to tender" and "declaration of unsuitability"), contained only a very generic prevision on rehabilitation. It had almost no practical effectiveness because it did not clearly establish requirements to be fulfilled. The first cases, initiated after the Operation Car Wash (2014) sanctioned contractors, started to come up for rehabilitation two years after being sanctioned (around 2018 and 2019).

Years later, Brazilian rules regarding rehabilitation have been reformulated. Currently, Brazilian Government Contracts Act (Law 14.133/2021) establishes more detailed requirements to initiate the proceeding, with similar provisions to Directive 2014/24/EU. There has been an improvement in the legal framework, and the impacts are perceptible: although Brazil still ranks 104th out of 180 countries in the Corruption Perceptions Index, it holds the 34th position in public integrity and the 30th position in transparency in the Corruption Risk Forecast Index.[3]

This paper will examine the self-cleaning compatibility to the Brazilian legal system and how the European rules regarding self-cleaning and rehabilitation have influenced the creation of compliance mechanisms by tenderers and the reduction of corruption levels in public procurement in Brazil.

---

[1] Ph.D. and Master of State Law from the University of São Paulo. Visiting Scholar at the University of Nottingham (2016). Fellow of the Chartered Institute of Arbitrators (CIArb). Partner at Justen, Pereira, Oliveira & Talamini Law Firm (Brazil).

[2] Master of Commercial Law from the University of São Paulo (2018). Student of Economics in Brazilian Institute of Study, Development and Research in Brasilia (since 2021). Junior Partner at Justen, Pereira, Oliveira & Talamini Law Firm (Brazil).

[3] CONJUR, 'Brasil is the global leader in transparency and corruption control'. Available at: https://www.conjur.com.br/2024-fev-07/brasil-e-lider-global-em-transparencia-e-no-controle-da-corrupcao/ (Accessed on March 7th, 2024).

2. Self-cleaning in the European Community Law

2.1. Mandatory and discretionary exclusions

Directive 2014/24/EU's penalties can either lead to *mandatory* or *discretionary* exclusions of tenderers from public procurement procedures.[4-5]

Mandatory grounds for exclusion include conviction by a final judgment for: (i) participation in a criminal organization, (ii) corruption, (iii) fraud, (iv) terrorist offenses or offenses related to terrorist activities, (v) money laundering or terrorist financing, and (vi) child labor and other forms of human trafficking (Article 57(1)). A tenderer is also excluded if not fulfilling its obligations regarding the payment of taxes or social security contributions, if determined by a final and binding judicial or administrative decision (Article 57(2)).[6]

Discretionary grounds apply in the following situations: (i) non-compliance with certain environmental, social, and labor obligations; (ii) insolvency or undergoing insolvency proceedings, or assets under judicial administration or by a liquidator, agreement with creditors, activities suspended, or any analogous situation; (iii) serious professional misconduct that questions integrity; (iv) agreements with other companies to distort competition; (v) conflict of interest; (vi) distortion of competition in the preparation of procurement procedure; (vii) significant or persistent deficiencies in the performance of an essential requirement under a previous public contract, which led to the early termination, condemnation for damages, or other equivalent sanctions; (viii) false statements or impossibility to present the supporting procurement documents;[7] or

---

[4] Until 2014, the suspension and exclusion of bidders from public procurement procedures were addressed by Directive 2004/18/EC. The new Directive of 2014 dealt with the matter in a very similar way, precisely adding the explicit provision of the possibility for companies to use self-cleaning measures.

[5] "Mandatory and discretionary exclusion grounds were already contained in Article 45 of the 2004 Procurement Directive. Under the 2014 Directive, new mandatory (Article 57(1)(d) and (f)) and discretionary (Article 57(4)(a), (d)-(g)) grounds were added. Article 57(1) sets out the mandatory exclusion grounds. Those exclusion grounds require a conviction by final judgment for a list of criminal offences. Article 57(4) sets out discretionary exclusion grounds. Member States may require contracting authorities to exclude tenderers if these exclusion grounds apply, or leave this up to their discretion" (FRITON, Pascal; ZÖLL, Janis. Exclusion grounds. In: CARANTA, Roberto; SANCHEZ-GRAELLS, Albert (org.). *European Public Procurement*: commentary on Directive 2014/24/EU. Cheltenham/Northampton: Edward Elgar, 2021, p. 592-593).

[6] The penalty ceases to apply if the company has fulfilled its obligations by making the appropriate payments or by entering into a binding agreement to settle the outstanding taxes or contributions.

[7] According to Article 59 of Directive, "At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions: (a) it is not

(ix) unduly influencing the decision-making process of the contracting authority, obtaining confidential information likely to materially influence decisions regarding exclusion, selection, or award (Article 57(4)).

2.2. Purposes of the exclusions

In European Community Law, exclusion is imposed for various purposes.

First, for *protection of public resources and safeguarding contractors' reliability*. Tenderers sanctioned for practicing irregular acts imply a higher risk of not fulfilling their obligations if compared to tenderers that have never been involved in illegal acts. As the government may be required to pay a tenderer that may not execute the contract, its exclusion is justifiable to protect public resources and safeguard contractors' reliability.

Second, for *prevention of corruption or other unacceptable conduct*.[8] In general, sanctioned tenderers have more difficulties to operate. Tenderer's image is affected with the penalty, and its contracts may be harmed or prevented, either formally or informally. Thus, exclusion sends a strong message that tenderers should not engage in illegal practices, preventing corruption or other misconduct.

Third, for *promotion of values that are relevant to the European Union*. As governments avoid direct association with sanctioned tenderers or prevent contracting authorities from entering contracts with tenderers that do not adhere to integrity standards, they promote the acceptance of values considered relevant. Integrity values become an example for future conduct in public and private contracts.

Fourth, for *ensuring fair competition among tenderers*. Competition will be unequal and unfair if tenderers are allowed to operate through illegal practices. The penalties ensure that tenderers acting with integrity are not disadvantaged by those who use illicit means to enter a contract.

---

in one of the situations referred to in Article 57 in which economic operators shall or may be excluded; (b) it meets the relevant selection criteria that have been set out pursuant to Article 58; (c) where applicable, it fulfils the objective rules and criteria that have been set out pursuant to Article 65".

[8] The preventive function has already been emphasized by the European Commission on Disqualification Communication, which stated in Communication COM (2006)0073 that disqualifications due to criminal convictions are "a category of sanction whose primary purpose is preventive. When a person who has been convicted of an offense is prevented from exercising certain rights (...), this occurs primarily to prevent him or her from relapsing" (ARROWSMITH, Sue; PRIESS, Hans-Joachim; FRITON, Pascal. Self-cleaning – an emerging concept in EC Public Procurement Law? In: PÜNDER, Hermann; PRIESS, Hans-Joachim; ARROWSMITH, Sue (org.). *Self-cleaning in public procurement law*, p. 19).

Finally, for *protection of tenders as a legitimate means of conducting public procurement*. By removing dishonest tenderers from the market of public contracts, citizens will perceive tenders, regardless of specific procedures, are the most legitimate means for the government to establish contractual relationships. It guarantees the continuity of the public procurement system.

As will be seen, self-cleaning is not intended to exempt these purposes, but rather to give substance to them. If the reason of exclusion would be just punishing the tenderer, self-cleaning would not be acceptable because it would circumvent the penalties regularly provided for by the legal system.

2.3. Concept of self-cleaning

The general idea behind self-cleaning is that a tenderer may regain the right to participate in tenders and enter public contracts if it demonstrates that effective measures have been taken to ensure that the misconducts will not recur in the future.[9] The measures will depend on the circumstances of each specific case, considering the gravity of the act committed, its duration, potential recurrence, and economic impact.

In other words, a tenderer that could potentially be barred from participating in public procurement procedures due to involvement in illegal practices may be allowed in bidding procedures if it has taken all necessary measures to prevent future misconduct.

Allowing self-cleaning of tenderers is an alternative and intelligent way to deal with situations that would typically lead to an exclusion. Instead of excluding the tenderer, contracting authorities have the duty to assess whether the tenderer has or has not taken measures that ultimately aim to restore its reliability before the government. Self-cleaning in based on the principles of competition and proportionality.[10]

[9] "Self-cleaning can be defined as the opportunity for a tenderer, which would otherwise be excluded, to be admitted to the procurement procedure because it has adopted all measures that are necessary to prevent future misconduct" (FRITON, Pascal; ZÖLL, Janis. Exclusion grounds. CARANTA, Roberto; SANCHEZ-GRAELLS, Albert (org.). *European Public Procurement*: commentary on Directive 2014/24/EU. Cheltenham/Northampton: Edward Elgar, 2021, p. 621).

[10] "Although exclusions are a suitable means for achieving the objectives of the mandatory exclusions in the procurement directives it is submitted, however, that exclusion is not *always necessary* to achieve these objectives. A less severe method, short of an absolute exclusion, is to take into account, in certain individual cases, self-cleaning measures which the affected company has taken. Further […] the accomplishment of a complete self-cleaning can often, in fact, *positively support* the objectives of the mandatory exclusions provisions. It is submitted that these considerations lead to the conclusion that contracting authorities are *required* to accept the existence of self-cleaning measures as a limitation on the mandatory exclusion rules, and hence to admit contractors that have undertaken effective self-cleaning measures" (ARROWSMITH,

2.4. Self-cleaning under the Directive 2014/24/EU

The concept of self-cleaning is not an innovation of Directive 2014/24/EU.[11] But the Directive is the first legislative instrument in Europe that expressly addresses self-cleaning as a mechanism destined to rehabilitation of tenderers, allowing them to regain the right to enter public contracts. Undoubtedly the introduction of specific rules regarding self-cleaning represents a significant evolution in the EU public procurement law.

2.4.1. Directive provision of self-cleaning

Self-cleaning is outlined in Article 57(6) of the Directive, as follows:

> Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.
> For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offences or misconduct.
> The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.
> An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.[12]

It is a very complete and detailed provision, with not only requirements to be fulfilled but also circumstances to be considered.

Sue; PRIESS, Hans-Joachim; FRITON, Pascal. Self-cleaning – an emerging concept in EC Public Procurement Law? In: PÜNDER, Hermann; PRIESS, Hans-Joachim; ARROWSMITH, Sue (org.). Self-cleaning in public procurement law. Carl Heymanns Verlag, 2009, p. 24-25).

[11] The European institutions' procurement rules that are laid down in Council Regulation 1605/2002/EC ("Finantial Regulation") explicitly mention self-cleaning in the context of an exclusion decision (ARROWSMITH, Sue; PRIESS, Hans-Joachim; FRITON, Pascal. Self-cleaning – an emerging concept in EC Public Procurement Law? In: PÜNDER, Hermann; PRIESS, Hans-Joachim; ARROWSMITH, Sue (org.). Self-cleaning in public procurement law. Carl Heymanns Verlag, 2009, p. 30).

[12] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014L0024-20240101 (Accessed on February 17th, 2024).

2.4.2. Applicability of self-cleaning

Self-cleaning applies to both mandatory and discretionary exclusions. Regardless the gravity of the act, if it falls within the situations specified in the items 1 and 4 of Article 57, and the tenderer adopts effective measures to assure the misconduct will not be repeated in the future, exclusion can be set aside.

However, a tenderer that has been excluded "by a final decision from participating in public procurement or concession procedures cannot resort" to self-cleaning during the exclusion period. In other words, if a tenderer is sanctioned by the courts of law, the suspension cannot be set aside due to self-cleaning measures.[13]

2.4.3. Requirements for the application of self-cleaning

Directive 2014/24/EU provides for that self-cleaning measures taken by tenderers are intended to "demonstrate its reliability despite the existence of a significant ground for exclusion" and establishes four measures that must be complied with.[14]

First, the tenderer must *clarify the facts*, which allows an adequate assessment of appropriate self-cleaning measures. Without a clear understanding of the facts, self-cleaning measures could not be credited as a genuinely effective effort in eliminating the occurrence of unlawful practices.[15]

Second, it must *compensate the damages*, which does not necessarily precede the rehabilitation. The tenderer may also prove that it has "taken measures to compensate"

---

[13] Not applying the concept of self-cleaning to judicial decisions reveals a certain lack of confidence in the institution and fosters a dual system that can be unfairly disproportionate. ALBERT SÁNCHEZ GRAELLS argues that self-cleaning should also apply to exclusions determined in judicial decisions, even if it represents a more rigorous (and challenging) examination of the measures to be implemented. According to him, at least an escape clause should have been provided for in the Directive, for reasons of public interest (which may be the case in highly concentrated and specialized markets), so that the penalty would be waived if the economic agent took appropriate measures. In any case, the scholar argues that Member States should explore alternatives to develop a more consistent and competitiveness-oriented system, as due value should be given to self-cleaning (GRAELLS, Albert Sánchez. *Public procurement and the EU competition rules*. 2.ed. Oxford: Hart Publishing, 2015, p. 295-296).

[14] According to Article 57, item 6, second part, "For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offences or misconduct".

[15] Among the activities related to clarifying the facts, there are two interesting precedents from Germany where the option was made to conduct special audits by certified public accountants or independent third parties. Düsseldorf Court of Appeal, decision of April 9, 2003 – Verg 66/02; and Berlin Regional Court, decision of March 22nd, 2006 – 23 O 118/04.

for any damages. But it is not clear whether compensating the government is sufficient or if harmed competitors should also be compensated.

Third, the tenderer must take *personnel measures,* meaning that shareholders, executives and employees who were involved in the offenses need to be dismissed. It should be done immediately and in a way that they understand the reason for the measure.

Finally, it must take *structure and organizational measures*, which means that, in addition to dealing with the past and present, the tenderer must focus on the future. For example, it may conduct in-house training with staff members and formulate internal conduct rules; establish a dual control system and even foresee an employee rotation within its ranks; appoint a company compliance officer and an ombudsman who can be contacted by potential whistleblowers.

Although Directive establishes these four self-cleaning measures, some of them may not apply depending on the situation. Their effective content will depend on each specific case, considering the gravity of the conduct, its duration, recurrence, economic impact, and the appropriateness of the measures adopted. For example, if the offense did not cause any harm, even if it is reprehensible, there will be no damages to be repaired.

There is no standard model of self-cleaning measures. The measures will be examined considering the misconduct severity and specific circumstances. Directive also stipulates that "if the measures are considered insufficient, the economic operator receives an explanation of the reasons for this decision." Therefore, the government must provide the grounds of the rejection, so the tenderer will know the reasons why the measures were considered insufficient and can supplement them to achieve the intended purpose.

3. Self-cleaning in Brazil

3.1. "Impediment to tender" and "declaration of unsuitability"

As Directive 2014/24/EU, Brazilian Government Contracts Act (Law 14,133/2021) prohibits tenderers that commit certain offenses from bidding and contracting with the Public Administration. Depending on the conducts, there are penalties of "impediment to tender" and "declaration of unsuitability".[16] Both are

[16] Article 156 of Law 14,133/2021: "The following sanctions shall be applied to those responsible for administrative infractions under this Law: (…) III – impediment to tender and contract; IV – declaration of unsuitability for bidding or contracting".

equivalent of debarment, with the difference that impediment to tender is valid only within the specific agency that imposed it, and declaration of unsuitability ranges from 3 to 6 years and is valid throughout all agencies and all levels of government.[17]

Impediment to tender can occur in the following situations: (i) causing partial non-performance of the contract that causes serious harm to the Public Administration, the functioning of public services, or the public interest; (ii) causing total non-performance of the contract; (iii) failing to submit the documentation required for the bidding process; (iv) not maintaining the proposal unless due to a duly justified supervening event; (v) not entering into the contract or not submitting the documentation required for the contract when called within the validity period of their proposal; and (vi) causing a delay in the execution or delivery of the object of the bidding without justified reason (Law 14,133/2021, Article 155).

On the other hand, acts that may lead to *declaration of unsuitability* are the following: (i) presenting false statements or documentation required for the bidding process or making false statements during the bidding or contract execution; (ii) defrauding the bidding process or engaging in fraudulent acts during the contract execution; (iii) behaving in an ineligible manner or committing fraud of any kind; (iv) committing illicit acts to frustrate the objectives of the bidding; and (v) corruption.[18]

There is no suspension and debarment officer in Brazil. Impediment to tender can be applied by any authority responsible for the contract, but declaration of unsuitability

---

[17] FORTINI, Cristiana. YUKINS, Christopher; AVELAR, Mariana. A comparative view of debarment and suspension of contractors in Brazil and in the USA. *A&C – Revista de Direito Administrativo e Constitucional*, Belo Horizonte, ano 16, n. 66, p. 61-83, out./dez. 2016.

[18] According to Article 5 of Law 12,846 of 2013, acts of corruption are defined as: “I - to promise, offer, or give, directly or indirectly, undue advantage to a public official or a third party related to them; II - demonstrably finance, cover the costs of, sponsor, or in any way subsidize the commission of the illicit acts provided for in this Law; III - demonstrably use an intermediary natural or legal person to hide or disguise their real interests or the identity of the beneficiaries of the acts practiced; IV - concerning bids and contracts: a) frustrate or defraud, through an arrangement, collusion, or any other means, the competitive nature of a public bidding procedure; b) prevent, disturb, or defraud the performance of any act in a public bidding procedure; c) exclude or attempt to exclude a bidder through fraud or offering any type of advantage; d) defraud a public bidding or a resulting contract; e) create, fraudulently or irregularly, a legal entity to participate in a public bidding or enter into an administrative contract; f) fraudulently obtain undue advantage or benefit from modifications or extensions of contracts entered into with the public administration, without authorization in law, in the bidding invitation for public bidding or in the respective contractual instruments; or g) manipulate or defraud the economic-financial balance of contracts entered into with the public administration; V - hinder the investigative or supervisory activities of public bodies, entities, or officials, or intervene in their actions, including within the scope of regulatory agencies and entities overseeing the national financial system”.

may be applied exclusively by a cabinet-level officer (a federal Minister or a state or local Secretary).[19]

3.2. Purposes and effects of penalties

Regardless of whether penalties have a punitive nature or not[20] (and it seems they have under the Brazilian Law), impediment to tender and declaration of unsuitability are sanctions with *prospective* effects. They necessarily extend their effects beyond the scope of the specific bidding or contract in which they were applied, because the tenderer will be unable to participate in other public bids and contracts for a certain period of time.

Future effects must be considered. Punitive measures only make sense when the public authority concludes that the contractor represents such a significant risk that its removal from the market of public contracts is essential for the protection of the State. As all types of offenses that entail impediment to tender or declaration of unsuitability also leads to fines, the competent authority must decide if exclusion is suitable for the case.[21]

Practical consequences that may arise from the application of penalties must also be considered. Article 20 of the Brazilian Law Introduction Act (Decree-Law 4,657/1942 amended by Law 13,655/2018) establishes that "in the administrative, controlling, and judicial spheres, *decisions will not be made based on abstract legal values without considering the practical consequences of the decision*".

After all, impediment to tender and declaration of unsuitability can represent a death penalty for a tenderer, who will be prevented from entering contracts with the government for many years.[22] Even though a tenderer excluded from the market of public contracts can enter private contracts, it may not always be viable. Usually, tenderers are specialized in participating in public tenders, and is very common that private-owned companies refuse to contract sanctioned companies.

---

[19] PEREIRA, Cesar; TONIN, Mayara Gasparoto. 'Corruption in Public Procurement in Brazil', in: WILLIANS, Sope; TILLIPMAN, Jessica. *Routledge Handbook of Public Procurement Corruption.* Routledge, Forthcoming. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4370744 (Accessed on March 25th, 2024).

[20] TILLIPMAN, Jessica. A House of Cards Falls: why 'Too Big to Debar' is all slogan and little substance. Fordham Law Review Res Gestae, New York, Vol. 80, n. 49, p. 49-58.

[21] JUSTEN FILHO, Marçal. *Comentários à lei de licitações e contratações administrativas*. 2ª ed. São Paulo: Thomson Reuters Brasil, 2023, p. 1675.

[22] "Suspension and debarment can be economically devastating – a 'death sentence' for contractors" (PACHTER, John; YUKINS, Christopher; TILLIPMAN, Jessica. US Debarment: an introduction. In: VAN ROOJI, Benjamin; SOKOL, D. Daniel. *The Cambridge Handbook of Compliance n. 288*. Cambridge: Cambridge University Press, 2021, p. 288).

In addition, excluding a tenderer from the market of public contracts can generate serious consequences for the Public Administration itself. It restricts the number of potential bidders who have sufficient qualifications and reduces the chances of obtaining more advantageous proposals that could lead to saving public funds.

Therefore, impediment to tender and declaration of unsuitability should not be considered as an "additional layer of punishment" for contractors under Brazilian Law. Due to their severity and purposes, they should only be applied when necessary, proportional and appropriate.

3.3. Compatibility of self-cleaning with the Brazilian Law

The idea of self-cleaning is compatible with the Brazilian Law. Public Administration is allowed to negotiate sanctions and their effects with companies that are willing to assure the misconduct will not be repeated in the future. The available mechanisms are agreements of substitutive sanction, leniency, and rehabilitation.

3.3.1. Substitutive sanction agreements

Brazilian Law Introduction Act (Decree-Law 4,657/1942 amended by Law 13,655/2018) provides that the government can enter agreements to eliminate irregularities, legal uncertainties, or contentious situations in the application of public law. Article 26 allows consensual action by the Public Administration in the exercise of its sanctioning power, without the need for any other specific norm.[23]

This means that the Public Administration can negotiate agreements to not apply administrative sanctions. The "substitute" sanction agreement does not necessarily result in the removal of all potentially applicable sanctions, but it can replace (i) the beginning of the sanctioning procedure, (ii) the procedure already in progress, or even (iii) the final decision of that procedure (including the appeal phase). The agreement can be concluded: (i) before the initiation of an administrative sanctioning procedure, (ii) during the

[23] Brazilian doctrine agrees that any administrative body or entity is immediately authorized to enter commitments due to Article 26 of Law 13,655/2018 without the need for the issuance of any other specific law, decree, or internal regulation. (GUERRA, Sérgio. PALMA, Juliana Bonacorsi de. Art. 26 da LINDB: novo regime jurídico de negociação com a Administração Pública. *Revista de Direito Administrativo*. Rio de Janeiro, Edição Especial: Direito Público na Lei de Introdução às Normas do Direito Brasileiro – LINDB – Lei nº 13.655/2018. nov. 2018, p. 146).

procedure (including the decision phase), (iii) in the appeal phase, and (iv) after the establishment of administrative *res judicata*.[24]

Considering this scenario, the substitute sanction agreement may include self-cleaning measures. The Public Administration, although recognizing the applicability of impediment to tender and declaration of unsuitability may decide not to apply them, or even decide to suspend their effects until the tenderer takes effective self-cleaning measures.

The agreement may establish the non-application of impediment to tender and declaration of unsuitability, and instead the tenderer may undertake various commitments that result in its self-cleaning (reparation of damages, payment of fines, dismissal of individuals, creation or improvement of internal control and integrity mechanisms).

If the substitute sanction agreement is signed before the beginning of an administrative sanctioning procedure or during its course, and the tenderer fulfills the commitments of self-cleaning, impediment to tender and declaration of unsuitability may no longer be applied.

Formalizing self-cleaning conditions through a substitute sanction agreement even allows it to be used as the basis for a judicial claim. If the procedural formalities are fulfilled, the agreement constitutes an enforceable title and any part can demand its judicial enforcement.

3.3.2. Leniency agreements

Leniency agreements can also be used as a tool to facilitate the self-cleaning of tenderers that have been or are in the process of being disqualified or debarred.

Brazilian Anticorruption Act (Law 12,846/2013) provides for leniency agreements in Article 16.[25] In this case, the lenient party must be the first to express its

[24] Brazilian Law guaranties a "judicial style" procedure.

[25] Article 16: "The highest authority of each public body or entity may enter into a leniency agreement with legal entities responsible for the acts provided for in this Law that effectively cooperate with investigations and the administrative process, provided that such collaboration results in: I - the identification of other individuals involved in the offense, when applicable; and II - the swift obtaining of information and documents that substantiate the offense under investigation. §1st. The agreement referred to in the head of the Article may only be entered into if the following requirements are cumulatively met: I - the legal entity is the first to express its interest in cooperating with the investigation of the illegal act; II - the legal entity completely ceases its involvement in the investigated offense from the date of proposing the agreement; III - the legal entity admits its participation in the offense and cooperates fully and permanently with investigations and the administrative process, appearing at its own expense whenever requested at all procedural stages, until its conclusion".

interest in cooperating with the investigation of the illicit act. Then, it must identify other individuals involved, swift acquisition of information and documents that prove the wrongdoing, and effectively collaborate with the investigation. Consequently, it will be exempt from the sanctions and will have the applicable fine reduced by up to two-thirds.

However, Article 17 of Law 12,846/2013 states that the Public Administration may also enter leniency agreements due to the offenses related to the unjustified delay and total or partial non-execution of a public contract provided for in Law 8,666/1993, "aiming at exemption or mitigation of the administrative sanctions". Since Law 8,666/1993 (former Brazilian Government Contracts Act) is no longer in force, this leniency agreement applies to penalties stipulated in Law 14,133/2021 (current Brazilian Government Contracts Act). The penalties are fundamentally the same that Anticorruption Law aims to cover when it refers to Law 8,666/1993, among which are impediment to tender and declaration of unsuitability.[26]

This leniency agreement does not have the same requirements as the one provided for in Article 16. Based on the provision of Article 17, entering a leniency agreement that results in the "exemption" or "mitigation" of administrative penalties set forth in Article 156 of Law 14,133/2021 is possible.[27]

Therefore, the leniency agreement can be an instrument of self-cleaning. Instead of imposing a penalty such as impediment to tender or declaration of unsuitability, Public Administration can establish commitments that, if fulfilled by the tenderer, will result in the removal of the penalties or, at least, in their mitigation.[28] Among the commitments assumed by the tenderer there may be self-cleaning measures, such as the creation or improvement of integrity mechanisms.

---

[26] Article 87 of Law 8,666/1993: "III – temporary suspension from participating in bidding processes and prohibition from entering into contracts with the Administration, for a period not exceeding 2 (two) years; IV – declaration of ineligibility to bid or contract with the Public Administration for as long as the reasons for the penalty persist or until rehabilitation is granted by the same authority that imposed the penalty. Rehabilitation will be granted whenever the contractor reimburses the Administration for the resulting damages and after the expiration of the sanction imposed based on the previous clause". Article 156 of Law 14,133/2021: III – disqualification from bidding and contracting; IV – declaration of ineligibility to bid or contract".

[27] Article 17 of Law 12,846/2013 is an extremely important consensual control instrument for the scope of public procurement in Brazil. The most accurate designation for it would be a "substitute agreement", similarly to those provided for in the specific regulations of some regulatory agencies in Brazil. (FERRAZ, Luciano. *Controle e consensualidade*: fundamentos para o controle consensual da Administração Pública – TAG, TAC, SUSPAD, acordos de leniência, acordos substitutivos e instrumentos afins. Belo Horizonte: Fórum, 2019, p. 180).

[28] The leniency agreement provided for in Law 12,846 of 2013 also authorizes the suspension of the effectiveness of sanctions outlined in procurement and administrative contracting legislation. In such cases, a similar effect to rehabilitation can be achieved. (JUSTEN FILHO, Marçal. *Comentários à lei de licitações e contratações administrativas*. 2ª ed. São Paulo: Thomson Reuters Brasil, 2023, p. 1711).

Anticorruption Act establishes that the existence of internal integrity programs, auditing procedures, and encouragement of reporting irregularities, as well as the effective application of codes of ethics and conduct, should be considered in the application of sanctions. If the evaluation of these programs can be done when imposing penalties, the same criteria can be used as commitments assumed by the tenderer in a leniency agreement concluded under Article 17 of Law 12,846/2013.

3.3.3. Agreements for rehabilitation

Rehabilitation is the recognition by Public Administration of the self-cleaning of the tenderer after the penalty is applied. If rehabilitation is concluded after the end of the sanction procedure that resulted in the application of the penalty, an agreement can be sealed. The tenderer complying with the self-cleaning conditions established in the agreement will shorten the duration of the disqualification or debarment, restoring the company to the market of public contracts.

Article 163 of Brazilian Government Contracts Act (Law 14,133/2021) does not require a rehabilitation agreement to grant the rehabilitation. Its recognition can occur by an administrative decision that deems the necessary requirements to have been fulfilled.

However, Law 14,133/2021 does not forbid an agreement as an instrument of rehabilitation. So, Public Administration and the tenderer may negotiate commitments, including measures for the future, whose compliance will be subject to monitoring. An agreement is a fully possible instrument of rehabilitation in these cases.

Moreover, as will be seen, item IV of Article 163 admits the punitive act to establish conditions for rehabilitation, which means the conditions provided for in Article 163 do not cover all possible situations. That is why a negotiating instrument may be appropriate to define extra conditions, as well as the metrics and monitoring systems.

4. Rehabilitation of tenderers in Brazilian Law

Rehabilitation "allows the punished agents to reinstate the public procurement market once complying with some requirements".[29] Brazilian Government Contracts Act

---

[29] PEREIRA, Cesar; TONIN, Mayara Gasparoto. 'Corruption in Public Procurement in Brazil', in: WILLIANS, Sope; TILLIPMAN, Jessica. *Routledge Handbook of Public Procurement Corruption*. Routledge, Forthcoming. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4370744 (Accessed on March 25th, 2024).

has provided for the rehabilitation of tenderers sanctioned by Public Administration for decades, but in very generic and less effective terms. More recently, Law 14,133/2021 made interested improvements, which rise the enforceability and success of rehabilitation.

4.1. Initial provisions: cancellation and rehabilitation in Law 8,666/1993

Law 8,666/1993 established two possibilities of revoking the declaration of unsuitability: (i) overcoming the reasons for the penalty and (ii) rehabilitation.

The first hypothesis has always received little attention. An important Brazilian scholar has defended the possibility of "cancellation" of the penalty. He has argued that it could occur "as long as the board, technical team, or professional responsible for contractual and technical failures is removed, as, once the cause ceases, the effects of the sanction should cease" [30] since "perpetual administrative interdictions go against the nature of the Law".[31]

Therefore, it has long been argued that declaration of unsuitability, which protects Public Administration against bad contractors,[32] could be canceled if measures were adopted to demonstrate the overcoming of the reasons that led to the imposition of the sanction. This understanding is the origin of what is currently understood as self-cleaning in Brazil – the possibility of adopting measures to restore the reliability of the tenderer so that it can participate again in public bids and contracts.

According to Law 8,666/1993, rehabilitation should be required before the authority that imposed the penalty and there are only two requirements for its applicability: (i) repairing the damages and (ii) the lapse of two years (Article 87, item IV). There was no procedure except the fulfillment of these two requirements.

The little importance Law 8,666/1993 gave to rehabilitation probably stemmed from its orientation more focused on simply punishing tenderers and contractors. At that time (the first half of the 1990s), there were no concerns about integrity instruments and no legal mechanisms to encourage them.

Other laws enacted at the same time also did not concern about rehabilitation, negotiation or adoption of integrity mechanisms. For example, of Improbity Law (Law 8.429/1992), Organic Law of the Federal Court of Accounts (Law 8.443/1992), and

---

[30] MEIRELLES, Hely Lopes. *Direito administrativo brasileiro*. 16ª ed., São Paulo: RT, 1991, p. 220; MEIRELLES, Hely Lopes. *Licitação e contrato administrativo*. 7ª ed., São Paulo: RT, 1987.

[31] MEIRELLES, Hely Lopes. *Direito administrativo brasileiro*. 16ª ed., São Paulo: RT, 1991, p. 220.

[32] MEIRELLES, Hely Lopes. *Direito administrativo brasileiro*. 16ª ed., São Paulo: RT, 1991, p. 221.

Reverse Auction Law (Law 10.520/2002) only established the removal of offenders from the market of public contracts and the maximum periods for such removal.

4.2. Evolution of rehabilitation: objective requirements in Law 14,133/2021

Currently, Brazilian Government Contracts Act establishes requirements for rehabilitation, with similar provisions to Article 57(6) of Directive 2014/24/EU. Despite still being concise in addressing the topic, Law 14,133/2021 has more detailed provisions than the previous legislation.

4.2.1. Legal provision

Article 163 has the following terms:

> Article 163. The rehabilitation of the bidder or contractor before the authority that imposed the penalty is allowed, subject to the following cumulative requirements:
> I – full repair of the damage caused to the Public Administration;
> II – payment of the fine;
> III – elapse of a minimum period of 1 (one) year from the application of the penalty, in the case of disqualification from bidding and contracting, or 3 (three) years from the application of the penalty, in the case of a declaration of unsuitability;
> IV – compliance with the rehabilitation conditions defined in the punitive act;
> V – prior legal analysis, with a conclusive position regarding the fulfillment of the requirements defined in this article.
> Sole Paragraph. The sanction for violations provided for in paragraphs VIII and XII of the main section of Article 155 of this Law will require, as a condition for the rehabilitation of the bidder or contractor, the implementation or improvement of an integrity program by the responsible party.

Rehabilitation must be required before the public authority that imposed the penalty, who will verify the fulfillment of the requirements and the appropriateness of the measure and whose decision is essential. It is insufficient if another authority believes the tenderer has regained trust while the authority that imposed the sanction does not recognize it.

4.2.2. Applicability of rehabilitation

Law 14,133/2021 expanded the scope of rehabilitation, which used to be applied only for declaration of unsuitability (Article 87, item IV, Law 8.666/1993). Currently, rehabilitation is also an option for impediment to tender (Article 163, III, of Law 14,133/2021).

This expansion is positive. Firstly, it increases incentives for positive conduct and the establishment of new practices in public-private relations. The possibility for a sanctioned tenderer to return to the market of public contracts after one year is an incentive for effectively fulfilling the legal requirements.

Secondly, extending rehabilitation to cases of impediment to tender corrects a distortion. In fact, allowing rehabilitation in case of a more severe penalty (declaration of unsuitability) and not providing the same possibility for the ones who faced a less severe penalty (impediment to tender) was meaningless.[33] Both penalties can have significantly negative effects, as they avoid tenderers from entering public contracts for a significant period of time. Rehabilitating only contractors that were declared unsuitable to tender was an inconsistency of the system.

4.2.3. Requirements for rehabilitation

Article 163 of Law 14,133/2021 establishes five cumulative requirements for rehabilitation: (i) full reparation of damages, (ii) payment of fine, (iii) lapse of 1 year for impediment to tender or 3 years for declaration of unsuitability, (iv) compliance with rehabilitation conditions defined in the punitive act, and (v) prior legal analysis with a conclusion about the established requirements. Additionally, (vi) *for certain situations*, implementation, or improvement of an integrity program.

Full reparation of damages means the restitution must effectively cover all damages caused to the Public Administration. There is no formula for calculating the amount, but outlining general criteria allows the establishment of specific rules. For example, Ordinance 1,214 of 2020 of the Comptroller General of the Union (known as CGU in Brazil) already set as a requirement for rehabilitation the full reimbursement of the losses caused by the acts that justified the sanction (Article 2, II). It also stipulates the adoption of definitions and methodology set forth in Normative Instruction CGU/AGU 2/2018 (Article 2, §1), which provides a more detailed framework for calculating the amount of reimbursement. It has three categories of values: (i) the sum of any undisputed damages assignable to the sanctioned companies seeking rehabilitation; (ii) the sum of all bribes paid; and (iii) the profit or enrichment that would have been reasonable if the

[33] Declaration of unsuitability is more severe than impediment to tender because the previous one prevents the bidder from participating in tenders carried out by all federative entities, and such impediment can last for a longer period, up to six years.

misconduct had not occurred. However, there may be direct and indirect damages – or no damages at all, in which case there will be nothing to repair, and therefore, the rehabilitation will not be conditioned on repairing any damage.

Payment of fine implies a previous and valid administrative procedure and must be related to the conduct that led to the penalty. Other fines imposed on the tenderer will be irrelevant for rehabilitation purposes, as will be the ongoing sanctioning procedures. In addition, any installment allowed by Public Administration is sufficient to comply with item II of Article 163, as long as the requirements are met, including being up to date with the installments.

Expiration of minimum period is the necessary time lapse during which the contractor must face the consequences of impediment to tender or declaration of unsuitability. Once the penalty effects are in force, the countdown for obtaining rehabilitation begins. In certain cases, this will only occur at the end of a sanctioning proceeding. However, if the Public Administration anticipates precautionarily the effects of the penalty, the rehabilitation period must also be anticipated. In fact, the legal provision regarding the minimum period serves as a disincentive for the ones interested in the rehabilitation. If a contractor could meet all the requirements before the time lapse, rehabilitation should be granted. It would be a greater incentive to establish transparent and ethical practices in the public-private relationship. On the other hand, a minimum period has a didactic effect on the market: serious misconduct leads to appropriate consequences even though they may be shortened in case of rehabilitation.

Compliance with rehabilitation conditions defined in the punitive act means there can be other conditions for rehabilitation that are not set forth in the Law 14,133/2021. There are only two situations in which the implementation or improvement of an integrity program is mandatory: (i) presentation of false statement or documentation required for bidding or making a false statement during the bidding or contract execution (Article 155, VIII) and (ii) corruption (Article 155, XII). Besides that, the competent authority can establish other conditions based on proportionality and effectiveness, which means the requirements must be reasonable and aim to overcome the reasons that justify the penalty. If no extra requirements are established, and the contractor does not request any clarification, requirements provided for in Article 163 must be observed.

Legal analysis and conclusive position regarding the requirements are intended to provide technically more appropriate analysis and to afford greater legal certainty. It is highly positive for decision-making, as in a situation of uncertainty Public Administration

tends to either inadequately evaluate the rehabilitation request or simply to reject it. Moreover, it is not binding, meaning that the competent authority may disagree with the legal opinion, as long as there are appropriate grounds.

Implementation, or improvement of an integrity program, which applies only in case of false statement or document and corruption, could have been more explored by the Law 14,133/2021. Considering rehabilitation involves allowing a tenderer to reacquire its right to enter public contracts based on effective measures to solve misconducts and prevent future ones, Brazilian Law seems to have missed the opportunity to use self-cleaning as a tool to improve companies and the marketplace.[34]

Any additional requirements for rehabilitation must be already foreseen in the decision that imposed the penalty (Article 163, item IV, of Law 14,133/2021). This forces the authority to reflect on the penalty from the perspective of what measures are necessary to overcome its application. Furthermore, it allows greater legal certainty for the contractor, who will be aware of the steps to take as soon as the penalty is applied.

4.2.4. Effects of rehabilitation

The application of penalties that excludes contractors from the market of public contracts can represent a true death sentence for them, generating economic and social repercussions even for the public authority and society. Therefore, rehabilitation is an intelligent approach.

The overall effect of the rehabilitation will be two-fold. Firstly, contractors will be able to rejoin the market of public contracts, which benefits the competition and the contracts executed for Public Administration. Secondly, contractors will have incentives to establish effective mechanisms to prevent corruption (notably related to compliance). For example, in contracts for large-scale construction, services, and supplies, implementation of an integrity program is mandatory within 6 months (Article 25, §4, Law 14,133/2021).

However, rehabilitation is practically not used in Brazil. The cases of sanctioned tenderers due to Operation Car Wash were solved only because the new Government Contracts Act was enacted in 2021 and established 6 years as the maximum period for

---

[34] PEREIRA, Cesar; TONIN, Mayara Gasparoto. 'Corruption in Public Procurement in Brazil', in: WILLIANS, Sope; TILLIPMAN, Jessica. *Routledge Handbook of Public Procurement Corruption*. Routledge, Forthcoming. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4370744 (Accessed on March 25th, 2024).

debarment. As a result, in 2023 and 2024 CGU cancelled 5 debarment penalties because the legal limit was expired.[35]

4.3. Comparison with EU provisions: similarities and differences

As seen, European Community Law and Brazilian Law require quite different conditions for tenderers to return to the market of public contracts.

Directive 2014/24/EU outlines the requirements for self-cleaning as (i) compensation for damages or at least the adoption of measures of compensation, (ii) full clarification of the facts and circumstances through active collaboration with the responsible authorities, and (iii) the adoption of concrete technical, organizational, and personnel measures that are suitable for preventing other criminal offenses or serious misconduct from occurring in the future.

Law 14,133/2021 requires (i) full reparation of the damages, (ii) payment of a fine, (iii) expiration of a minimum period depending on which penalty is imposed, (iv) compliance with rehabilitation conditions defined in the punitive act, (v) prior legal analysis with a conclusion about the established requirements; and (vi) for certain situations implementation, or improvement of an integrity program.

The two systems will be compared considering the following topics: (i) compensation for damages, (ii) payment of fines, (iii) measures of corporate reorganization, (iv) minimum penalty incidence period, (v) collaboration measures, (vi) openness to establishing additional requirements, and (vii) rehabilitation due to external causes.

4.3.1. Compensation for damages

[35] Iesa Óleo e Gás S.A., Mendes Júnior Trading e Engenharia S.A., Jaraguá Equipamentos Industriais Ltda., GDK S.A., and Alumini Engenharia S.A. had their penalties of debarment cancelled by CGU. The legal opinions that supported two of these 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." (Legal Opinion 00328/2023/CONJUR-CGU/CGU/AGU and Legal Opinion 00242/2023/CONJUR-CGU/CGU/AGU). Decisions and sanctions are available at the Brazilian federal government's transparency portal (https://portaldatransparencia.gov.br/sancoes).

Both laws require the sanctioned tenderer to compensate for damages. However, European Community Law accepts that the contractor adopts measures aimed at repairing the damages. The admission of the same solution under Brazilian Law is debatable. It is known that there is at least one case in which the company was not allowed to pay in installments. CGU has required a bank guarantee that a sanctioned contractor could not obtain. This rehabilitation procedure began in 2019 and was only solved by the cancellation of the penalty due to the expiration of the maximum period established by the new Government Contracts Act.[36]

4.3.2. Payment of monetary fines

Brazilian Law expressly requires payment of fine as a condition for rehabilitation. There is no such requirement in European Community Law, which does not mean the possibility is forbidden.

4.3.3. Measures of corporate reorganization

In Brazil, the only legal requirement for rehabilitation, in terms of corporate reorganization, is the creation or improvement of integrity programs. As seen above, this requirement is mandatory only in two specific cases. However, the penalty decision may define other conditions, including broader corporate reorganization measures.

On the other hand, Directive 24/2014/EU requires, for self-cleaning, that the tenderer adopts concrete technical, organizational, and personnel measures suitable to prevent other criminal offenses or serious misconduct. It may involve, for example, reorganizing the corporate structure, not just the establishment of an integrity program.

4.3.4. Minimum penalty incidence period

Rehabilitation in Brazil can only occur after minimum periods (1 year in the case of impediment to tender and 3 years in the case of declaration of unsuitability). At this point, Brazilian Law differs from European Community Law, which does not require the fulfillment of minimum period for requiring or obtaining rehabilitation.

---

[36] CGU, Administrative Sanction Procedure 00190.004173/2015-00. Available at: https://sei.cgu.gov.br/sei/processo_acesso_externo_consulta.php?id_acesso_externo=116019&id_orgao_acesso_externo=0&infra_hash=df97364a7249174d4805270ef2c65323 (Accessed on March 7th, 2024).

Directive 2014/24/EU only establishes that, in cases of judicial exclusion, the tenderer can only request a return to the market of public contracts after the expiration of the sanction period. However, there is no similar rule for exclusion imposed by the Public Administration itself.

4.3.5. Collaboration measures

Brazilian Law does not expressly provide for duty of collaboration in the rehabilitation rules. Though, measures involving collaboration can be included in the punitive act, especially considering the duty is typically included in leniency agreements, which can be an instrument to enable rehabilitation.

European Community Law, on the other hand, expressly provides for the adoption of collaboration measures to obtain self-cleaning. Indeed, one of the requirements demanded by Directive 2014/24/EU is the clarification of facts and circumstances through active collaboration with the authorities responsible for the investigations.

4.3.6. Additional requirements

Brazilian Law expressly allows the public authority to define other rehabilitation conditions, in addition to those already provided for in Article 163 of Law 14,133/2021. However, they must appear in the punitive act to assure transparency and legal certainty.

Directive 2014/24/EU does not explicitly provide for this possibility. It only provides that the assessment of the sufficiency of the requirements will consider the gravity and specific circumstances of the offense.

4.3.7. Possibility of rehabilitation due to external causes

Law 14.133/2021 and Directive 2014/24/EU do not contain any rules determining that external factors should be considered in rehabilitation. There are also no rules that forbid them to be considered. In fact, it is reasonable that they are considered if they contribute to overcoming the imposed penalty, even if they are not expressly provided for in the rehabilitation rules.

In the Brazilian system, for example, the discovery of new evidence could lead to a review of the penalty, based on the Administrative Procedure Law.[37]

4.3.8. Summary of legal systems' comparison

The comparison of the two legal systems is summarized below:

Requirement	Brazil	European Union
Compensation for damages	Mandatory requirement by Law.	Mandatory requirement. It also admits proof that the interested party "took measures" to compensate for the damages.
Payment of monetary fines	Mandatory requirement by law.	It is not a mandatory requirement, although it may be required by the competent authority.
Measures of corporate reorganization	The Law only provides for the creation or improvement of an integrity program for two specific situations. But it is possible to require business reorganization measures in each case.	The Directive provides for the need to take appropriate concrete technical, organizational and personnel measures to prevent further criminal offenses or serious misconduct.
Minimum penalty incidence period	The Law provides for a minimum penalty incidence period (one year for impediment to tender and three years for declaration of unsuitability).	The Directive does not provide for a minimum period (it only establishes that it is not possible to request rehabilitation during the period of the judicially applied penalty).
Collaboration measures	It is not a legal requirement, but it can be foreseen in each specific situation, including through an agreement between Public Administration and private individuals.	It is a regulatory requirement of Directive 2014/24/EU.
Possibility of additional requirements	This is a possibility provided for in section IV of article 163.	There is no express provision in the Directive about the possibility of additional requirements.
Possibility of rehabilitation due to external causes	There is no express provision in Law 14,133/2021, but it is possible through the review institute (article 65 of Law 9,784/1999).	There is no express prediction in the Directive, but it is possible.

5. Critical assessment of self-cleaning in Brazil

As Directive 2014/24/EU, Brazilian Law excludes tenderers that have committed certain offenses by imposing penalties of impediment to tender or declaration of unsuitability, and provides for the self-cleaning, especially through rehabilitation. Both laws address conflicting goals, "namely the need to sanction wrongdoers, and the need to

[37] In accordance with Article 65 of Law 9,784/1999, "Administrative proceedings resulting in sanctions may be reviewed at any time, upon request or *ex officio*, when new facts or relevant circumstances arise that justify the inadequacy of the imposed sanction". Additionally, its sole paragraph sets forth that "the review of the process shall not result in an increase in the sanction".

preserve economic activity and the government's ability to obtain competitive offers in public tenders".[38]

Recently the generic provision on rehabilitation of Brazilian Government Contracts Act has been substituted by a more specific disposition. Law 14.133/2021 included more detailed requirements, similarly to Directive 2014/24/EU, and rehabilitation has undergone radical improvements.

Self-cleaning mechanisms seem to be the key for further improvements. But there is still critical assessment of the current self-cleaning provisions. Rehabilitation's practical applicability is very limited. As have been seen, the cases that were solved until now are the ones the 6-year period expired due to the new Government Contracts Act.

In addition, rehabilitation's requirements, although significantly more specific and detailed in comparison to the former provision, still need clarification. As exposed above, there are no rules for repairing damages through installments nor for situations where there is no damage at all.

At last, rehabilitation should be permitted before the expiration of the minimum period. Setting out subjective or excessive conditions hinder the reinstatement of tenderers and the rehabilitation goals.[39] The minimum duration of declaration of unsuitability, for example, is already quite extensive and might be deadly for contractors. But statutory obstacles are difficult to overcome.

Therefore, the influence of self-cleaning as envisaged in the Directive 2014/24/EU reflected and caused many improvements of Brazilian rules on rehabilitation of tenderers and contractors. However, there are more enhancements to be achieved in the application of the Law, in the implementation of self-cleaning measures and in the conduction of rehabilitation procedures.

6. References

ARROWSMITH, Sue; PRIESS, Hans-Joachim; FRITON, Pascal. Self-cleaning – an emerging concept in EC Public Procurement Law? In: PÜNDER, Hermann; PRIESS,

[38] PEREIRA, Cesar; TONIN, Mayara Gasparoto. 'Corruption in Public Procurement in Brazil', in: WILLIANS, Sope; TILLIPMAN, Jessica. *Routledge Handbook of Public Procurement Corruption*. Routledge, Forthcoming. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4370744 (Accessed on March 25th, 2024).

[39] PEREIRA, Cesar; TONIN, Mayara Gasparoto. 'Corruption in Public Procurement in Brazil', in: WILLIANS, Sope; TILLIPMAN, Jessica. *Routledge Handbook of Public Procurement Corruption*. Routledge, Forthcoming. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4370744 (Accessed on March 25th, 2024).

Hans-Joachim; ARROWSMITH, Sue (org.). Self-cleaning in public procurement law. Carl Heymanns Verlag, 2009.

FERRAZ, Luciano. Controle e consensualidade: fundamentos para o controle consensual da Administração Pública – TAG, TAC, SUSPAD, acordos de leniência, acordos substitutivos e instrumentos afins. Belo Horizonte: Fórum, 2019.

FORTINI, Cristiana. YUKINS, Christopher; AVELAR, Mariana. A comparative view of debarment and suspension of contractors in Brazil and in the USA. A&C – Revista de Direito Administrativo e Constitucional, Belo Horizonte, ano 16, n. 66, p. 61-83, out./dez. 2016.

FRITON, Pascal; ZÖLL, Janis. Exclusion grounds. CARANTA, Roberto; SANCHEZ-GRAELLS, Albert (org.). *European Public Procurement*: commentary on Directive 2014/24/EU. Cheltenham/Northampton: Edward Elgar, 2021, p. 588-635.

GRAELLS, Albert Sánchez. Public procurement and the EU competition rules. 2.ed. Oxford: Hart Publishing, 2015, p. 295-296.

GUERRA, Sérgio. PALMA, Juliana Bonacorsi de. Art. 26 da LINDB: novo regime jurídico de negociação com a Administração Pública. Revista de Direito Administrativo. Rio de Janeiro, Edição Especial: Direito Público na Lei de Introdução às Normas do Direito Brasileiro – LINDB – Lei nº 13.655/2018. nov. 2018.

JUSTEN FILHO, Marçal. Comentários à lei de licitações e contratações administrativas. 2ª ed. São Paulo: Thomson Reuters Brasil, 2023.

MEIRELLES, Hely Lopes. Direito administrativo brasileiro. 16ª ed., São Paulo: RT, 1991.

MEIRELLES, Hely Lopes. Licitação e contrato administrativo. 7ª ed. São Paulo: RT, 1987.

PACHTER, John; YUKINS, Christopher; TILLIPMAN, Jessica. US Debarment: an introduction. In: VAN ROOJI, Benjamin; SOKOL, D. Daniel. The Cambridge Handbook of Compliance n. 288. Cambridge: Cambridge University Press, 2021.

PEREIRA, Cesar; TONIN, Mayara Gasparoto. 'Corruption in Public Procurement in Brazil', in: WILLIANS, Sope; TILLIPMAN, Jessica. *Routledge Handbook of Public Procurement Corruption.* Routledge, Forthcoming. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4370744 (Accessed on March 25th, 2024).

TILLIPMAN, Jessica. A House of Cards Falls: why 'Too Big to Debar' is all slogan and little substance. Fordham Law Review Res Gestae, New York, Vol. 80, n. 49, p. 49-58.

CGU, Administrative Sanction Procedure 00190.004173/2015-00. Available at: https://sei.cgu.gov.br/sei/processo_acesso_externo_consulta.php?id_acesso_externo=116019&id_orgao_acesso_externo=0&infra_hash=df97364a7249174d4805270ef2c65323 (Accessed on March 7th, 2024).

CONJUR, 'Brasil is the global leader in transparency and corruption control'. Available at: https://www.conjur.com.br/2024-fev-07/brasil-e-lider-global-em-transparencia-e-no-controle-da-corrupcao/ (Accessed on March 7th, 2024).

Düsseldorf Court of Appeal, decision of April 9, 2003 – Verg 66/02; and Berlin Regional Court, decision of March 22nd, 2006 – 23 O 118/04.