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LEGAL ALERT

SEPTEMBER 4th, 2024

RELEVANT ASPECTS OF CGU NORMATIVE ORDINANCE 155/2024 REGARDING THE EXECUTION OF COMMITMENT AGREEMENTS UNDER LAW 12,846/2013, REPLACING CGU NORMATIVE ORDINANCE 19/2022

I. INTRODUCTION

On August 29, 2024, the Office of the Comptroller General ("CGU") published its Normative Ordinance 155 ("PN 155"), which governs the execution of commitment agreements under Law 12,846/2013 ("Anti-Corruption Law"). PN 155 replaces CGU Normative Ordinance 19/2022 ("PN 19"), which regulated the procedure for the summary judgment of Administrative Liability Proceedings ("PAR").

The new commitment agreement is a negotiating tool designed to promote a culture of integrity within the private sector by ensuring appropriate, proportional, and prompt accountability of legal entities for violations of the Anti-Corruption Law (article 1, § 1). Similar to summary judgments, commitment agreements are applicable when a leniency agreement cannot take place, such as when a legal entity is not the first to express interest in cooperating with the authorities or lacks sufficient evidence to expedite the investigation of violations of the Anti-Corruption Law (article 1, § 1).

Summary judgement, which preceded commitment agreements, was an important and successful tool in encouraging the adoption of consensual solutions by the public administration under the Anti-Corruption Law. Similarly, the provisions of PN 155 regulating the commitment agreement aim to consolidate a culture of consensuality and negotiated justice, as provided in article 26 of Decree-Law 4,657/1942, the Introduction Act to Brazilian Law Rules ("LINDB"), including the amendments made by Law 13,655/2018 in 2018[1].

Another relevant aspect of PN 155 is the adoption of a pragmatic approach in the application of its provisions, reflecting the trend established by the 2018 amendment to LINDB[2]. PN 155 includes provisions stipulating that the peculiarities of each specific case must be considered to: (i) condition the signing of commitment agreements on the adoption, implementation or improvement of an integrity program, and (ii) mitigate sanctions that restrict the right to bid and contract with public authorities.

It is noteworthy that PN 155 was preceded by a public consultation conducted by the CGU in August 2023. This consultation aimed to encourage active participation from the private sector, promote dialogue between civil society and the CGU, and to make use of the practical experience gained since the implementation of the summary judgment procedure.

A summary of the main differences between PN 155 and PN 19, with emphasis on the innovations of commitment agreements, is available in Attachment I.

[1] LINDB's provision allows the signing of commitment agreements between administrative authorities and interested parties, considering the pursuit of legal solutions that are proportionate, fair, efficient, and compatible with the general interest.

[2] LINDB's article 20, also introduced by Law 13,655/2018, states that, in the administrative, supervisory, and judicial spheres, decisions will not be based on abstract legal values without considering the practical consequences of the decision, especially considering the particularities of each legal entity seeking to enter into a commitment agreement.

II. APPLICABILITY AND REQUIREMENTS FOR ENTERING INTO A COMMITMENT AGREEMENT

A commitment agreement is suitable when a leniency agreement cannot be signed (e.g., lack of the requirements) (article 1, § 2). PN 155 states that requests to enter into leniency agreements may be converted into requests to enter into commitment agreements, if the corresponding conditions are met (article 1, § 3).

The requirements for entering into a commitment agreement are outlined in article 2 of PN 155. It is worth noting that many of the requirements from the previous summary judgment procedure have been retained for the commitment agreement, with some revisions in the wording.

The first requirement refers to the admission of responsibility for the investigated violations committed by the legal entity, as well as the provision of evidence and detailed reports of the information known to the legal entity, when available (article 2, I). It is noteworthy that PN 19 already had a similar requirement, with the addition of the phrase “when available” to refer to detailed reports and evidence of the committed violations.

The next requirement pertains to the obligation for the legal entity to completely cease its involvement in the violations from the date of the commitment agreement's proposal (article 2, II), a stipulation that was not present in the text of PN 19.

In turn, item III of article 2 sets out a series of commitments that the legal entity must fulfill as a requirement for signing the commitment agreement:

- Fully repair the undisputed portion of the damage caused (III, “a”);
- Surrender the amounts corresponding to the unjust enrichment or illicit gain obtained from the violation (III, “b”);
- Provide proof of payment of the fine specified in article 6, item I, of the Anti-Corruption Law (a fine ranging 0.1% and 20% of the gross revenue from the last fiscal year prior to the initiation of the PAR, excluding taxes, and which shall never be less than the benefit obtained, if it can be estimated), within 30 days following the publication of the decision granting the commitment agreement by the Minister of State of the CGU, accompanied by elements that allow the calculation and determination of the fine amount (III, “c”);
- Fulfill requests for information related to the facts of the case that are within its knowledge (III, “d”);
- Not appeal the administrative decision that fully approves the proposal to enter into commitment agreement (III, “e”);
- Waive the submission of a defense statement, when applicable (III, “f”); and
- Withdraw any existing legal actions, if applicable, and refrain from filing new claims related to the PAR or the commitment agreement entered into (III, “g”).

The fourth requirement specified in article 2 is the need for a declaration that, following approval by the Private Integrity Secretariat and a decision by the Minister of State of the CGU, the agreement will become an enforceable title for all legal purposes, and that non-compliance will nullify all incentives granted under the commitment agreement, particularly those outlined in article 3 of PN 155 (article 2, IV).

It should be noted that the request to enter into a commitment agreement suspends the statute of limitations for the duration of the negotiation, which is limited to three hundred and sixty days under all circumstances (article 1, § 4)."

III. INTEGRITY PROGRAM

A significant innovation of PN 155 is the possibility for the CGU to condition the signing of the commitment agreement on the inclusion of an obligation for the legal entity to adopt, implement or improve an integrity program, based on the analysis of the specific case, as indicated in the sole paragraph of article 2.

IV. EFFECTS OF ENTERING INTO A COMMITMENT AGREEMENT

Regarding the effects of entering into a commitment agreement, PN 155 has maintained the rationale established in summary judgment procedures. In brief, entering into the commitment agreement will result in the isolated application of the fine stipulated by the Anti-Corruption Law, without the additional sanction of extraordinary publication of the sanctioning decision (article 3, I). Under no circumstances may this fine be less than the benefit obtained by the legal entity, when its estimation is possible (article 3, § 4).

The signing of the commitment agreement will also lead to the mitigation of sanctions restricting the right to bid and contract with the government, where applicable. This may result in a reduction in the duration or a modification of the type of sanction to be applied, based on the specifics of each case and ensuring the proportionality of the penalty (article 3, II). Additionally, there is a provision guaranteeing that sanctions restricting bidding and contracting with the government, when applicable, will be applied in accordance with the specifics of each case and the severity and nature of the infractions (article 3, § 5).

For the purposes of calculating the fine, the legal entity will be eligible for mitigating factors based on the procedural stage at which the proposal to enter into commitment agreement is submitted and the percentages set forth in article 23 of Decree 11,129/2022, which regulates the Anti-Corruption Law (article 3, § 2). The benefit will be granted as indicated in the table below:

Procedural stage	**Items in article 23 of Decree 11,129/2022**		
	Evidence that the legal entity voluntarily returned the benefit obtained and reimbursed the damage resulting from the harmful act, or non-existence or lack of evidence of the benefit obtained and of damage resulting from the harmful act **(item II)**	Degree of cooperation provided by the legal entity in the investigation or assessment of the harmful act **(item III)**	Voluntary acknowledgment by the legal entity of strict liability for the harmful act **(item IV)**
Before the administrative liability proceeding is introduced	1%	1.5%	2%
Until the deadline for presenting the defense's written statement	1%	1.5%	1.5%
Until the deadline for presenting the closing arguments	1%	1%	1%
After the deadline for presenting the closing arguments	1%	0.5%	0.5%

PN 155 established a minimum duration for sanctions restricting the right to bid and contract with the government (60 days of prohibition or suspension, as per §1 of article 3) and specified that no settlement

proposal will be accepted after the judgment of the PAR, even if the deadline for submitting a request for reconsideration is still ongoing (article 3, § 3).

V. SUBMISSION OF A REQUEST BY A LEGAL ENTITY

PN 155 innovates by detailing relevant procedural aspects of the request to enter into commitment agreement, particularly in articles 4 and 5.

Article 4 states that the legal entity must submit the request to the CGU, addressed to the Private Sector Integrity Secretariat, and it may be filed independently, with restricted access (§ 2). In turn, § 1 of the same provision highlights that the request must include: (i) the fulfillment of the requirements for entering into the commitment agreement, and (ii) the documentation needed to assess the mitigating factor provided in article 23, V, of Decree 11.129/2022, related to the integrity program.

Article 4 also stipulates that withdrawing the request to enter into a commitment agreement or its rejection will not imply acknowledgment of the harmful act and cannot justify the imposition or aggravation of sanctions against the legal entity (§ 3). It further provides that, in such cases, the CGU may not use the information and documents received in connection with the submission of the commitment agreement proposal (§ 4), without prejudice to opening investigative procedures or conducting inquiries to ascertain facts related to the commitment agreement proposal based on independent evidence brought to the attention of the authority through any other means (§ 5).

Article 5, in turn, provides for the possibility of proposing a commitment agreement within the scope of preliminary investigations or a PAR initiated by the CGU or any federal executive branch agency or entity.

According to this provision, in cases where the preliminary investigation or PAR was initiated by a government body or entity of the federal executive branch, the proposal to enter into a commitment agreement must be submitted in the original case file as well as to the CGU. In this situation, the CGU will make a reasoned decision on whether to call up the preliminary investigation or PAR underway at the federal executive branch body or entity (§ 1 and § 3). The original procedure will be automatically suspended until a final decision is made (§ 4). In that sense, PN 155 stipulates that any judgment of a PAR by a federal executive branch body or entity occurring between the date of the proposal to enter into a commitment agreement and the CGU's arrogation of jurisdiction over the procedure will be considered null and void (§ 5).

If the CGU decides to return the investigation to the original government body or entity, the deadline that was in effect at the time of the proposal submission will be reinstated (§ 7). On the other hand, if the procedure is called up by the CGU and, subsequently, the commitment agreement is not finalized, the CGU will determine whether to continue the investigation under its responsibility or return it to the original government body or entity (§ 6).

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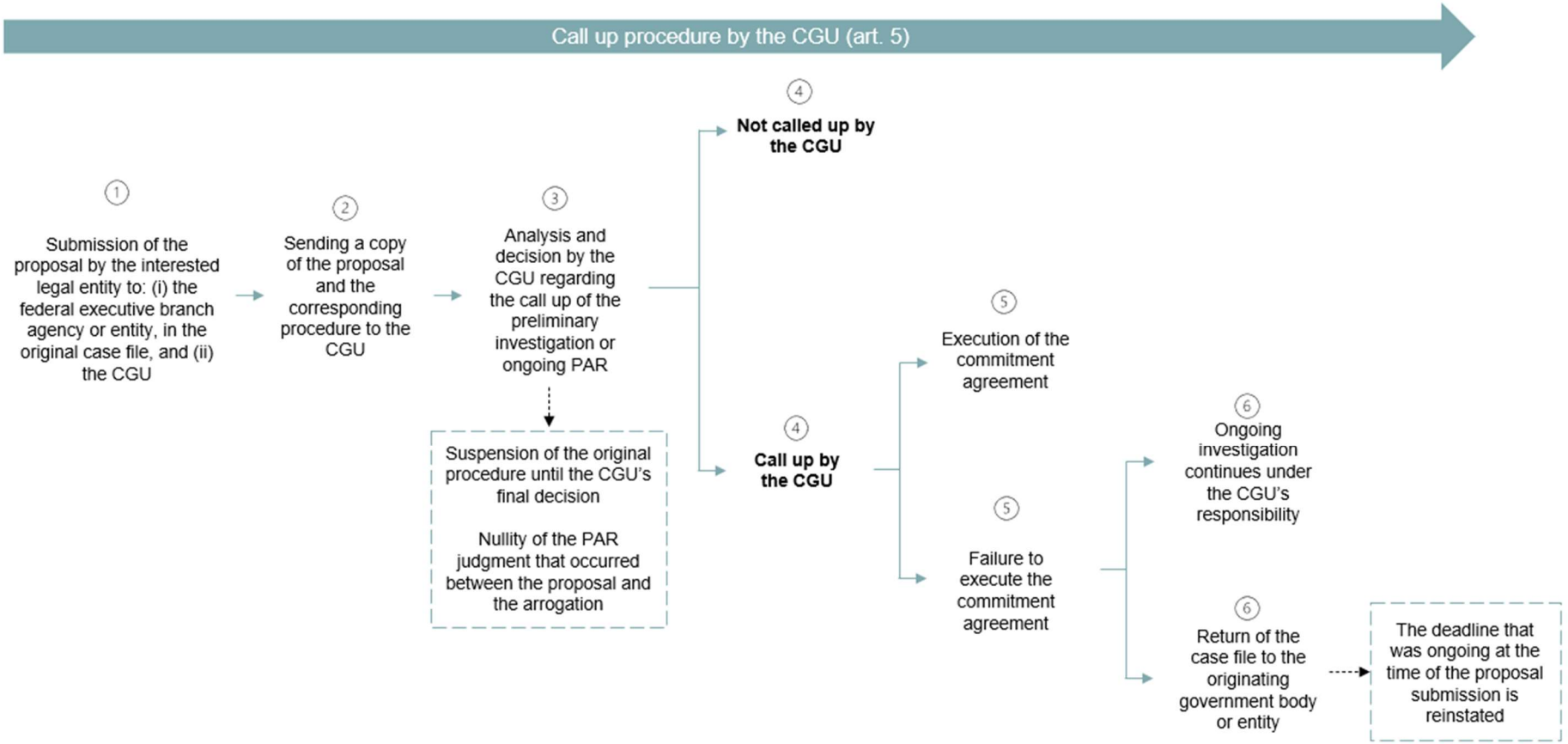
To facilitate understanding the flow established in article 5 of PN 155 for the call up procedure by the CGU, see the flowchart below:



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VI. PROCESSING OF THE COMMITMENT AGREEMENT REQUEST

Article 6 outlines the responsibilities for analyzing the request to enter into a commitment agreement, depending on the procedural context of the proposal: (i) in cases of preliminary investigations, a PAR that has been arrogated, or where final arguments are being analyzed, the analysis must be conducted by the General Investigation Coordination Office in charge of handling the case; (ii) in cases where a PAR is at the evidentiary stage, the analysis must be conducted by the PAR commission; and (iii) in cases where a request to enter into a leniency agreement is converted into a request to enter into a commitment agreement, as specified in § 3 of article 1, the analysis must be carried out by the Leniency Agreements Board or the leniency agreement negotiation commission.

The second paragraph of article 6 formalizes the possibility of requesting and receiving additional documents and information for the final review of the commitment agreement proposal by the CGU.

Once the analysis is complete, the Private Entities Accountability Board or the Leniency Agreements Board, as applicable, will submit the matter to the Secretary of Private Integrity, who may: (i) reject the proposal with justification, determining that the investigation or negotiations for a leniency agreement should continue; or (ii) approve the request, recommending to the CGU's Minister of State that a commitment agreement be entered into with the requesting party (article 7).

If the request is approved, the recommendation from the Private Integrity Secretariat will be made through a statement that includes: (i) a brief description of the charges and evidence, (ii) an analysis of the proposal for fulfilling the financial obligations, and (iii) a reasoned conclusion regarding whether the conditions for entering into the commitment agreement have been met (article 8).

VII. EXECUTION OF THE COMMITMENT AGREEMENT

PN 155 includes provisions for notifying the Public Prosecutor's Office ("MP") and the Attorney General's Office ("AGU") of the execution of the commitment agreement, in order to ensure legal certainty for the procedure.

Article 9, § 2 and § 3 of PN 155 stipulates that the MP and the AGU must be notified of the execution of the commitment agreement via a communication that will indicate the non-applicable sanctions outlined in article 19 of Law 12.846/2013[3].

[3] Art. 19. The Federal Government, the States, the Federal District and the Municipalities, through their respective Public Advocacy Offices or legal representation bodies, or their equivalent, and the Public Prosecution Office may file a judicial action in relation to the wrongful acts set forth in Article 5 of this Law, with a view to the application of the following sanctions to the responsible legal entities:
I - loss of the assets, rights or valuables representing the advantage or profit directly or indirectly obtained from the wrongdoing, except for the right of the damaged party or of third parties in good faith;
II - partial suspension or interdiction of its activities;
III - compulsory dissolution of the legal entity;
IV - prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or government-controlled entities from 1 (one) to 5 (five) years.

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Furthermore, PN 155 stipulates that any information, documents, and evidence related to the harmful act will only be shared with other entities or bodies under a commitment not to use such information, documents, and evidence against the applicants of the commitment agreement (article 9, § 4).

Article 10 of PN 155 provides for the publication of the commitment agreements in active transparency on the CGU's website, while respecting legal confidentiality and the interests of ongoing investigations. Notably, the sole paragraph of this article establishes that committing a harmful act after entering into a commitment agreement constitutes recidivism, subject to the time frame specified in item V of article 22 of Decree 11,129/2022.

VIII. COORDINATION WITH THE ATTORNEY GENERAL'S OFFICE

A significant innovation is the ongoing collaboration with the AGU's National Prosecutor's Office for Public Assets and Integrity, as outlined in article 11 of PN 155, to "ensure the effectiveness and legal certainty of the commitment agreements signed".

In this context, PN 155 stipulates that, upon receiving a proposal to enter into a commitment agreement, the Private Sector Integrity Secretariat will consult with the AGU regarding any existing legal actions concerning the same facts or prior proceedings aimed at initiating legal action (article 12). If the AGU confirms the existence of such actions, the commitment agreement will be executed in coordination with the AGU, to ensure "a joint resolution of the legal claim and of the administrative negotiation act, as well as to prevent the filing of new lawsuits related to the same facts" (article 12, sole paragraph).

IX. NON-COMPLIANCE WITH THE COMMITMENT AGREEMENT

PN 155 outlines the consequences of non-compliance with the commitment agreement. If the competent authority terminates the commitment agreement due to unjustified non-compliance with the established obligations, the legal entity will forfeit the agreed-upon benefits and will be barred from entering into a new commitment agreement for a period of three years, starting from the date on which the administrative decision becomes final (article 13, I).

Furthermore, in the event of unjustified non-compliance by the legal entity, the unpaid installments of the commitment agreement will become due immediately, requiring the payment of (i) the full amount of the fine and (ii) the total amounts related to damages, unjust enrichment, and any other amounts specified in the agreement, with any amounts previously paid being deducted from the fines and damages (article 13, II, "a" and "b").

PN 155 also establishes that other sanctions and consequences provided for in the regulations regarding non-compliance with leniency agreements and in the applicable legislation may be imposed following the appropriate administrative process (article 13, III).

According to the sole paragraph of article 13, non-compliance with the commitment agreement by the legal entity shall be registered by the CGU in the National Register of Sanctioned Companies ("CNEP").

X. FINAL AND TRANSITIONAL PROVISIONS

PN 155 came into force on the date of its publication, August 29, 2024. Requests for summary judgment that were pending on that date have been automatically converted into requests to enter into a commitment

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agreement, with legal entities being granted the option to withdraw the request within ten days of the publication of PN 155 (article 14).

Article 15 of PN 155 highlights that the commitment agreement does not apply in cases involving proceedings related to harmful acts committed by the same legal entity within three years following either the granting of summary judgment under PN 19 or the signing of the commitment agreement. Therefore, this provision maintains the three-year restriction period for entering into a new consensual resolution of the same nature, as previously established by article 8 of PN 19.

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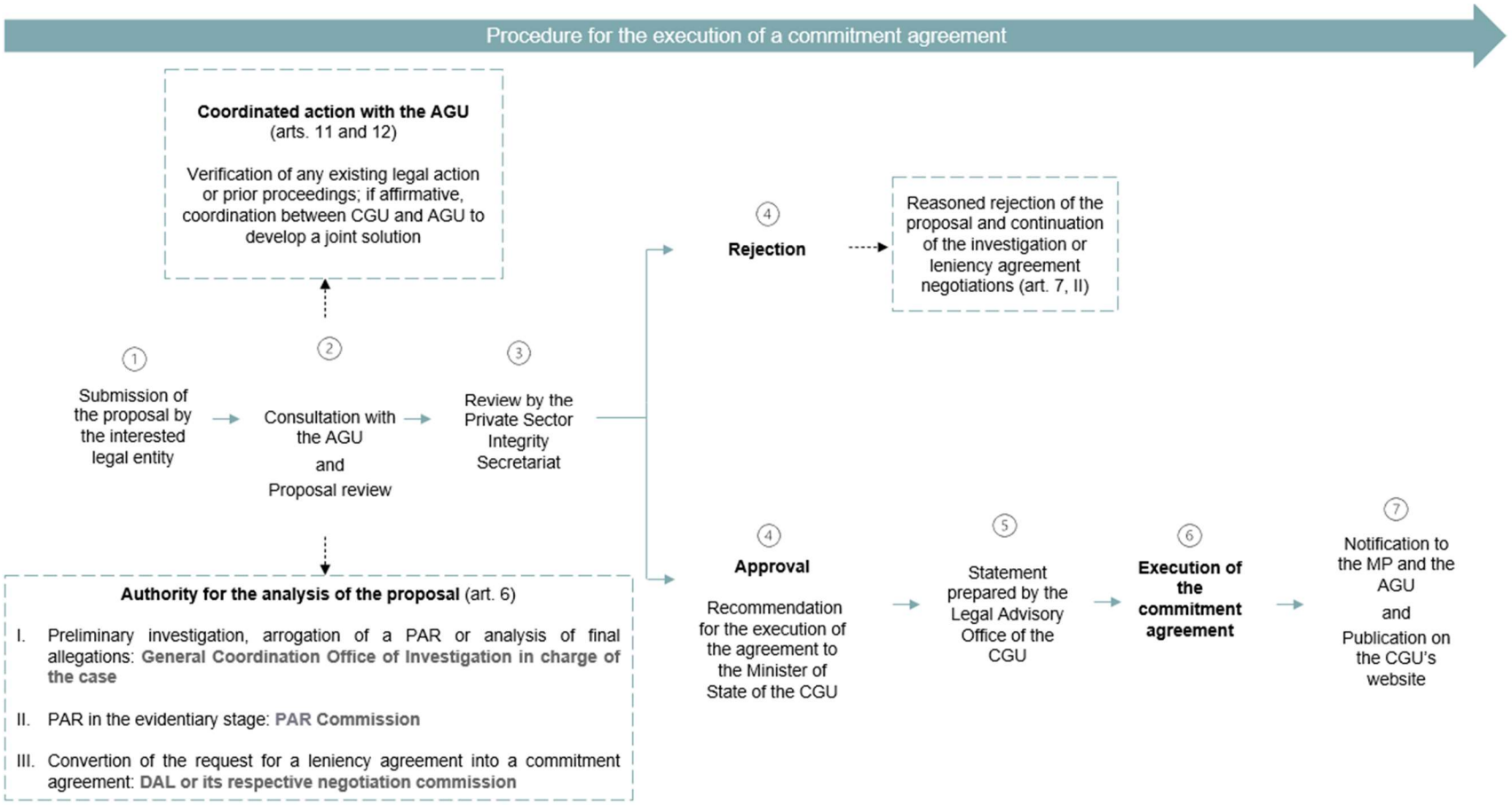
XI. REPRESENTATIVE FLOWCHART

See below the representative flowchart of the signature procedure of a commitment agreement, in accordance with the provisions of PN 155:



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ATTACHMENT I
COMPARISON OF CGU ORDINANCES 19/2022 AND 155/2024

CGU's Normative Ordinance 19/2022 Summary Judgement (Repealed)	CGU's Normative Ordinance 155/2024 Commitment agreement
Applicability and Implementation	
(article 8)	(articles 1 & 15)
• Subsidiary procedure to the PAR. • Does not apply to the same circumstances for a period of three years from its signature.	• Subsidiary procedure to the PAR. • Does not apply to the same circumstances for a period of three years from its signature. • Possibility of converting the request to enter into leniency agreement into a request to enter into commitment agreement. • Suspension of the statute of limitations while negotiations last (up to 360 days, without extension).
Requirements for signing	
(article 2)	(article 2)
• Admission of strict liability, with detailed evidence and reports. • Commit to: (i) indemnify amounts corresponding to the damaged caused; (ii) disgorge any undue advantage gained (where it can be estimated); (iii) pay the fine stipulated by Law 12,846/2013; (iv) respond to requests for information relating to the facts of the case of which they are aware; (v) not appeal the decision that fully grants the proposal; (vi) reject the defense's complaint; and (vii) withdraw from any legal action relating to the administrative proceeding. • Submission of the form and deadlines for the payment of financial obligations at the time of the request.	• Admission of liability, with detailed evidence and reports, when available. • Commit to: (i) fully repair the incontrovertible damage caused by the offenses; (ii) disgorge, in favor of the aggrieved party or the Union, any undue patrimonial gain or illicit enrichment obtained from the offense, according to the terms and amounts established during negotiations; (iii) provide proof of payment of the fine under Law 12,846/2013 within 30 days of the publication of the decision granting the commitment agreement; (iv) respond to requests for information related to the facts of the case; (v) refrain from appealing the decision that fully grants the proposal; (vi) waive the right to present a defense, when suitable; and withdraw from any legal action; an (vii) not to file any new lawsuits relating to the administrative process or the signed commitment agreement. • Cease completely its involvement in the offenses as of the date of the commitment agreement's proposition; and • The commitment agreement will become enforceable and non-compliance will invalidate the benefits granted.
Integrity program	
(no correspondence)	(article 2, sole paragraph)
• N/A.	• Possibility of conditioning the signing of the commitment agreement on the adoption, implementation, or enhancement of an integrity program.

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CGU's Normative Ordinance 19/2022 Summary Judgement (Repealed)	CGU's Normative Ordinance 155/2024 Commitment agreement
Aspects of the request for a commitment agreement	
(article 4)	(article 4)
• Withdrawal or rejection of the request does not imply recognition of the violation or the imposition of a sanction – The Public Administration may not use documents received during the negotiations	• Withdrawal or rejection of the request does not imply recognition of the harmful act or the imposition of a sanction – The Public Administration may not use documents received during negotiations. • The request may include documentation for evaluating the mitigating criteria for the fine. • The CGU may initiate an investigative procedure to examine facts related to the proposal if these arise from indications or evidence from other sources.
Call up by the CGU	
(no correspondence)	(article 5)
• N/A.	• In cases where the preliminary investigation or PAR has been initiated by another government body or entity within the federal executive branch, the proposal to enter into a commitment agreement must be submitted (i) in the original case file and (ii) to the CGU. • The CGU will decide whether or not to call up the procedure, which will be suspended until a final decision is made. • See the flowchart about the procedure to call up cases on item V of the legal alert.
Evidentiary stage of the request to enter into a commitment agreement	
(article 3)	(articles 6 & 7)
• The request can be either rejected (leading to the continuation of the investigation) or accepted (resulting in a recommendation for summary judgment or the initiation of a PAR in preliminary and summary investigations).	• Jurisdiction for analyzing the request based on the procedural stage: (i) Preliminary investigation, called up PAR or analysis of final arguments: General Investigation Coordination Office; (ii) PAR in the evidentiary stage: Processing Commission; e (iii) Discussion of the leniency agreement: DAL or its respective negotiation commission. • Supervision by DIREP or DAL. • Possibility of providing additional documents and information at the request of the CGU. • The request may be either rejected (leading to the continuation of the investigation or leniency negotiations) or accepted (resulting in a recommendation for a commitment agreement).
Effects of the Agreement's Execution	
(article 5)	(articles 3 & 8)
• If agreeing with the request, the final report will include: a) Suggestion for the isolated application of the fine provided by Law 12,846/2013, without the cumulative application of the extraordinary publication of the condemnatory decision; and b) Suggestion for mitigating sanctions related to restrictions on bidding and contracting with the government, where applicable.	• The signature of the commitment agreement implies: a) Isolated application of the fine provided by Law 12,846/2013, without the cumulation of the extraordinary publication; and b) Mitigation of restrictive sanctions related to the right to bid and contract with the government, when suitable, which may lead to a reduction in time (minimum of 60 days) or a modification of the type of sanction, based on the specifics of the case.

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CGU's Normative Ordinance 19/2022 Summary Judgement (Repealed)	CGU's Normative Ordinance 155/2024 Commitment agreement
• The percentage of mitigating factors for the fine varies depending on the procedural stage of the request. • The fine must not be less than the undue advantage obtained.	• The percentage of mitigating factors for the fine varies depending on the procedural stage of the request. • The fine must not be less than the undue advantage obtained. • Proposals submitted after the PAR judgment will not be accepted.
Signature of the commitment agreement	
(article 6)	(articles 9 & 10)
• The Minister of State of the CGU makes a preliminary judgment on the merits, preceded by a statement from the CGU's Legal Advisory. • The fulfillment of the established commitments shall result in the exclusion of the applied sanction from the CNEP records.	• CGU's Minister of State shall sign the commitment agreement, preceded by the CGU's Legal Advisory. • The MP and the AGU must be notified of the agreement, with an explanation regarding the inapplicability of the judicial liability sanctions under Law 12.846/2013. • There is a possibility of sharing elements and evidence of the harmful act with other entities or agencies, subject to a commitment not to use such information against the applicant. • Published in active transparency on the CGU's website. • Committing a harmful act within less than five years after the agreement constitutes recidivism.
Coordination with the AGU	
(no correspondence)	(articles 11 & 12)
• N/A	• Provision of ongoing liaison with the National Prosecutor's Office for Public Assets and Probity and Integrity at the AGU (PNAU/PPP). • Consult the AGU upon receipt of the request to verify if there is an ongoing lawsuit or prior procedure related to the same facts – coordinate actions if so.
Non-compliance with the commitment agreement	
(no correspondence)	(article 13)
• N/A	• Termination in the event of unjustified non-compliance, with the following effects: a) Loss of benefits and impeditive period of three years; b) Early due date and execution of unpaid installments, deducting any amount already paid; c) Possibility of applying other sanctions related to the non-compliance with leniency agreements; and d) Registration of non-compliance with the CNEP.
Final and transitional provisions	
(no correspondence)	(article 14)
• N/A	• Requests for summary judgment under review as of the effective date of PN 155 will be converted into requests for commitment agreements, with a 10-day period for withdrawal by the legal entity, starting from the date of publication.