

Call for Comments: PCC Draft Revised Rules of Procedure - Rule III, Articles III and IV

Revised Rules of Procedure – Consent Orders

Section 3.17. Nature of Consent Order. — A consent order is a non-adversarial remedy that allows an entity, without in any manner admitting a violation of the Act, its implementing rules, or other competition laws, to avoid prosecution by providing commitments acceptable to the Commission to address the competition issues and harm identified by the Enforcement Office: Provided, that this remedy may be availed of only once. In granting an Application for Consent Order (“Application”), the Commission resolves to take no further action on the subject matter of the Investigation in view of the commitments offered by the Applicant and approved by the Commission.

The application for consent order is non-adversarial, ex parte and summary in nature, and the Commission has full discretion to deny or grant the Application, or any subsequent revisions thereto, subject to the provisions in this Article.

Section 3.18. How to file an Application. — At any time prior to the termination of an Investigation relating to Sections 14 and 15 of the Act, any Entity being investigated may, on its own or jointly with another Entity (the “Applicant”), file an Application for Consent Order (“Application”) with the Commission. The Applicant shall comply with Rule IV, Article II of the 2017 Rules of Procedure of the PCC on the manner of filing.

Section 3.19. Contents of the Application. — To be considered complete, the Application shall contain the following matters under appropriate headings:

- (a) Description of the conduct or agreement that is subject of the Investigation (“Description”);
- (b) The proposed commitments, which shall be complete, unambiguous, and self-executing, together with a clear explanation for every proposed commitment how it will resolve particular competition concerns. The commitments shall describe the steps which shall be undertaken by the Applicant to ensure the prevention or cessation of the anti-competitive conduct or agreement;
- (c) A statement of the amount that the Applicant is willing to pay to the Commission which shall be within the range of fines provided for under the Act, its implementing rules, or other competition laws. Such

amount shall not be less than Ten Million Pesos: Provided, that a lesser amount may be stated if the computation of the fine based on sales data or financial statements under Rule VI of the 2017 Rules of Procedure would result in a lesser amount;

- (d) The proposed mandatory compliance reports as well as the identity of the Entity that will submit such reports. The proposal shall contain: (i) the proposed mechanism for the monitoring of Applicant's compliance with its commitments; (ii) details of the contents of the mandatory compliance reports and their corresponding deadlines for submission; and (iii) the procedure for submission of the reports, including, if necessary, a third-party monitor at the cost of the Applicant when the monitoring of compliance requires extensive analysis or involves significant amount of data;
- (e) The Applicant shall identify any private party or parties who may have suffered injury and the amount of damages that it will pay, or if such parties are unidentified, the mechanism to identify them and pay damages; and
- (f) Other terms and conditions that may be provided in the Guidelines to be issued by the Commission.

Further, the Applicant shall provide the email address at which they may be served with documents, pleadings, orders, notices, and other issuances or processes of the Commission.

Section 3.20. Verification. — The Application must be properly verified. If the Entity filing the Application is a juridical entity, the Application must be verified by its duly authorized representative and must be accompanied with the relevant corporate secretary's certificate(s) authorizing the representative to enter into stipulations or admissions of facts and documents, negotiate, and make commitments.

Section 3.21. Determination of sufficiency in form. — Within five (5) days from receipt of the Application, the Commission shall determine if the Application complies with the formalities required in Section 3.19 and 3.20 above. An Application defective in form shall be considered not filed, but without prejudice to the refile of a compliant Application.

The Commission, through the Adjudication Division, shall issue a notice by email within the same 5-day period to inform the Applicant whether or not the Application is sufficient in form, copy furnished the Enforcement Office and the Economics Office.

Section 3.22 Fees. If the Application is found to be sufficient in form, the Applicant shall pay, within five (5) days from receipt of the notice, an Application fee of one to three percent (1%-3%) of the value of the Applicant's assets or annual revenues, but in no case shall be less than P250,000 or more than

P5,000,000. The value of assets shall be based on the last regularly prepared balance sheet or the most recent audited financial statements. The value of annual revenues shall be based on the last regularly prepared annual statement of income and expense of the Applicant.

Section 3.23. Assessment of the application. — Within forty-five (45) days from the payment by the Applicant of the required fee, the Commission shall complete an assessment of the Application to determine if it can render a decision or if further proceedings are needed. This period may be extended for another forty-five (45) days in consideration of the complexity of the matter involved. As part of the assessment, the Enforcement Office and the Economics Office, or other offices of the PCC that the Commission may direct, shall submit to the Commission, within thirty (30) days from the time that the Application is deemed sufficient in form, all material and relevant information regarding the conditions of competition in the relevant markets, including competition concerns and recommended remedies to address them.

Section 3.24. Decision after assessment. — If the Commission determines that there is no need for further proceedings, the Commission shall, within fifteen (15) days after completing the assessment of the Application, decide to approve or deny the Application based on Section 3.26.

Section 3.25. Further Proceedings. — Within sixty (60) days after completing the Assessment of the Application, the Commission may conduct further proceedings and issue orders as may be necessary to aid in the just and expeditious resolution of the Application, including, but not limited to the following:

- (a) Require the disclosure of additional information from the Applicant;
- (b) Undertake in-depth market analysis, including developing where appropriate, economic models, quantitative or qualitative indicators or determinants, and examining pertinent variables that could guide the Commission in objectively assessing the effectivity of the proposed commitments and proposing alternative remedies to address the harm to competition and consumers of the Applicant's acts;
- (c) Conduct clarificatory conferences or consultation hearings;
- (d) Require the submission of position papers, memoranda or other documents; and
- (e) Obtain public comments and consult with government agencies as provided in Section 3.26.

At its discretion, the Commission may hold conferences and hearings at such locations that will be practical and convenient to the Applicant and other attendees.

The period for conducting further proceedings may be extended to a maximum of one hundred eighty days (180) should the Commission engage third party technical experts to conduct the market analysis referred to in subparagraph (b) above. The compensation of the third party technical expert, including all the costs and expenses that may be incurred in the course of the engagement, shall form part of the cost to be shouldered by the Applicant.

Section 3.26. *Public Comments and Consultations with Government Agencies.* During the period for conducting further proceedings, the Commission may seek public comments, particularly from relevant stakeholders. The relevant stakeholders are those that are likely to be affected by the Applicant's proposed commitments and shall include, but not be limited to, consumers and competitors of the Applicant.

The Commission shall determine the manner of obtaining comments from the public such as through surveys, focus group discussions, and requests for written comments, among others. The costs necessary for obtaining comments from the public shall be shouldered by the Applicant.

After receipt of the comments and other information, the Commission shall provide a summary of the same to the Applicant to inform it of the general nature of the responses received and the required changes to the Applicant's commitments, if any.

The Commission may also, within the same period, consult sector regulators, relevant government agencies, as well as agencies from foreign jurisdictions.

Section 3.27. *Decision* — The Commission shall resolve an Application for Consent Order within thirty (30) days from the termination of further proceedings. Such period may be extended for an additional thirty (30) if warranted due to the complexity of the subject matter involved.

The issuance of a Consent Order shall cause the termination of any Investigation involving the conduct subject of the Consent Order Application: Provided, that any inquiry or investigation for the same or similar conduct or agreement, if continued or repeated, shall not be barred.

The denial of the Application for a Consent Order shall be final. However, such denial shall not be construed as a prejudgment on the investigation subject of the application.

Section 3.28. *Evaluating the Application.* In evaluating the Application, the Commission may take into consideration the following, among others:

- (a) the commitments sufficiently address the possible competition concerns identified by the Enforcement Office;
- (b) the commitments are unambiguous and self-executing and are not dependent on the will of a third party;

- (c) when the matter involves a violation of Section 14(a) or 14(b) of the Act, the Investigation is not near termination and there is no strong indication of the existence of a criminal violation; and
- (d) the costs and benefits of pursuing the Investigation against the Applicant. The Commission may consider the following types of costs and benefits:

- (1) Direct costs and benefits which are those arising directly out of granting the Application. These may include the economic value to the relevant market of the continuation or cessation of an identified anti-competitive conduct, fines and penalties, administrative expenses, and damages paid to injured parties.

- (2) Indirect costs and benefits which are those arising as externalities out of granting the Application.

- (3) Pecuniary and non-pecuniary externalities.

Pecuniary externalities refer to those which result in actions that affect market prices, while non-pecuniary externalities are those which affect the market through means other than prices.

- (4) Incommensurable costs and benefits which are those not easily measured in monetary terms.

- (5) Intangible costs and benefits, which refer to the non-economic costs and benefits which cannot be measured in monetary terms.

Where applicable, the limitation on the scope of the costs and benefits to be assessed shall be the defined product and geographic markets relevant to the identified anti-competitive conduct.

The Commission shall also take into consideration the precedential value or significant deterrent effect should the Commission decide to deny the Application and whether the matter involves the following:

- (a) any of the priority sectors identified by the PCC;
- (b) a matter that results in widespread consumer detriment in the relevant market; or
- (c) misuse of public funds.

Section 3.29. Contents of the Consent Order. Should the Application be approved, the Consent Order shall contain the following:

- (a) the commitments submitted by the Applicant, with an explanation on how these commitments resolve the identified competition concerns;

- (b) the amount which the Applicant will pay, and the schedule for such payment;
- (c) the procedure for monitoring and reporting by the Applicant of its compliance with the commitments, including the manner of submission of the mandatory compliance reports and its contents;
- (d) the amount of damages to be paid to private parties who may have suffered injury in relation to the identified competition concerns; and
- (e) other terms and conditions that may be considered appropriate and necessary by the Commission.

Without prejudice to any party claiming damages in the proper proceedings before the competent court, the Consent Order shall include the amount of damages to be paid only where such damages are apparent based on the acknowledgement of the Applicant, or where there is clear evidence of the injuries sustained by private parties.

Section 3.30. *Notice to complainant or sector regulator* — If the subject matter of the Consent Order Application is subject of a verified complaint or a referral from a sector regulator, the Commission shall furnish them a copy of its decision or consent order.

Section 3.31. *Breach of commitments*. The Commission may assign the Enforcement Office to monitor the Applicant's compliance with its commitments in the Consent Order. The Commission may impose appropriate sanctions or revoke the grant of the Consent Order if the entity is found to have committed a breach.

Section 3.32. *Confidential Information*. The Commission shall handle confidential information in accordance with Rule XI of these Rules.

Section 3.33. *Prohibited documents*. Only the documents required under this Article or by the Commission shall be allowed and will be given consideration. Any motion or request for reconsideration shall not be entertained.

Section 3.34. *Effectivity of the approval of written proposals*. — The order by the Commission approving the written proposal or granting the application in the Show Cause and Consent Order proceedings, as the case may be, shall be final and immediately executory. (Renumbered, formerly Section 3.23)

Section 3.35. *Monitoring of compliance*. — The Commission shall monitor the compliance by the Entity or Entities concerned, their officers, directors, trustees, partners, and employees, with the Binding Ruling, order based on a Show Cause proceeding, or Consent Order. Upon motion of an interested party, the Commission shall issue a certification or resolution to the effect that the Entity or

Entities concerned have, or have not, as the case may be, complied with the ruling or order. (Renumbered, formerly Section 3.24)

Section 3.36. Inadmissibility of evidence in criminal proceedings. —

The request for a Binding Ruling, the Show Cause Order, or the application for Consent Order; the facts, data, and information therein contained or subsequently supplied by the Entity or Entities concerned; admissions, oral or written, made by them against their interest; all other documents filed by them, including their evidence presented in the proceedings before the Commission; and the judgment or order rendered thereon; shall not be admissible as evidence in any criminal proceedings arising from the same act subject of the Binding Ruling, Show Cause Order, or Consent Order against such Entity or Entities, their officers, employees, and agents.

This Section shall not apply to requests for Binding Ruling, applications for Consent Order, facts, data and information, oral and written admissions, evidence, documents, judgments, or orders which: (a) do not relate to the matter under Investigation or the Subject Matter of the request for a Binding Ruling, Show Cause Order, or a Consent Order application; (b) are already in the possession of the PCC prior to the initiation of the non-adversarial proceedings; (c) are independently obtained; or (d) are false or fraudulent. (Renumbered, formerly Section 3.25)

Section 3.37. Void ruling or order. — Upon application by the Enforcement Office or upon motu proprio determination by the Commission, and subject to the requirements of due process, a Binding Ruling, order based on a Show Cause proceeding, or Consent Order found to be obtained on the basis of fraud, or incorrect or misleading or information as described in Section 6.11, shall be void. (Renumbered, formerly Section 3.26)

Section 3.38. Investigation not suspended. — The proceedings under this Rule shall not suspend the conduct of an ongoing Investigation. (Renumbered, formerly Section 3.27)

Section 3.39. Powers of the Enforcement Office. — The Enforcement Office may exercise the powers provided in Section 2.14 when appropriate. (Renumbered, formerly Section 3.28)

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