



## Rules Implementing the Criminal Provisions of the Philippine Competition Act

September 30, 2020

This briefing provides an overview of the salient points of Department of Justice (“DOJ”) *Circular No. 016 (Rules Implementing the Criminal Provisions of Republic Act No. 10667, Otherwise Known As the Philippine Competition Act)*<sup>1</sup> (“PCA Rules on Criminal Provisions”).

### A. Scope and Application

The PCA Rules on Criminal Provisions govern “the implementation of the criminal provisions of the [Philippine Competition Act (PCA)], including the grant of leniency or immunity during preliminary investigation of covered offenses.” These rules took effect on July 17, 2020.

### B. Covered Offenses

The PCA Rules on Criminal Provisions apply to the criminal offenses of entering into anti-competitive agreements that are prohibited *per se*, and prohibited as to object or effect.<sup>2</sup> An anti-competitive agreement is defined as “any agreement, arrangement, understanding, collective recommendation, or concerted action, which is prohibited by the PCA, regardless of type or form of contract.”<sup>3</sup> The PCA enumerates the agreements included in the two types of anti-competitive agreements.<sup>4</sup>

A criminal action for a covered offense prescribes within five (5) years from the time the violation is discovered by the offended party, the authorities, or their agents.<sup>5</sup>

### C. Preliminary Investigation and Prosecution of a Criminal Action

1. A preliminary investigation for a violation of a provision of the PCA is commenced upon the filing of a complaint by the Philippine Competition Commission (PCC) or any authorized agency.<sup>6</sup>

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<sup>1</sup> *Department Circular No. 016 (Rules Implementing the Criminal Provisions of Republic Act No. 10667, Otherwise Known as the Philippine Competition Act)* dated July 2, 2020.

<sup>2</sup> *PCA Rules on Criminal Provisions*, Rule II, Section 1 and 2.

<sup>3</sup> *PCA Rules on Criminal Provisions*, Rule I, Section 4(a).

<sup>4</sup> *PCA*, Section 14(a) and (b).

<sup>5</sup> *PCA Rules on Criminal Provisions*, Rule III, Section 5.

<sup>6</sup> *PCA Rules on Criminal Provisions*, Rule III, Section 2.

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2. The Office for Competition (OFC) of the DOJ is mandated to conduct the preliminary investigation of, and to prosecute all criminal offenses under the PCA and competition-related laws.<sup>7</sup>
3. A person that is subject to a preliminary investigation pending before the OFC may apply for immunity from prosecution under the Leniency Program, and if such application (as defined under Rule IV, Section 3 of the PCA Rules on Criminal Provisions) is perfected,<sup>8</sup> the preliminary investigation will be suspended for a period not exceeding 60 calendar days pending the evaluation and processing of, and action on, the application by the OFC.<sup>9</sup> If the OFC grants conditional immunity to an entity, the preliminary investigation will resume and the complaint against the entity granted immunity “will be provisionally dismissed.”<sup>10</sup>

Please see Part D below for a discussion of the Leniency Program.

4. A criminal action commences upon the filing of an information before the Regional Trial Court (RTC) of the city or province where the offender entity (the business act or conduct of which constitutes the subject matter of a case) has its principal place of business.<sup>11</sup> In case an individual who knowingly and willfully authorized the commission of the offense is charged in his capacity of a director, officer, shareholder, employee, or agent of a corporation or other juridical entity, the information shall be filed with the RTC of the city or province where such corporation or juridical entity has its principal place of business.<sup>12</sup>
5. Every anti-competitive agreement, or each and every violation under such an agreement, whether implemented or not, shall be considered as one distinct offense.<sup>13</sup>
6. An entity criminally charged may, instead of pleading guilty or not guilty, opt to enter a plea of *nolo contendere*<sup>14</sup> if it accepts punishment as if a plea of guilt has been entered, but does not accept or deny responsibility for the charges.<sup>15</sup> The plea of *nolo contendere* may be entered: (a) without leave of court if made on or before arraignment, and (b) with leave of court if made after arraignment.<sup>16</sup> Such plea cannot be used against such entity in a suit for civil liability arising from the criminal action or in another cause of action.<sup>17</sup>

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<sup>7</sup> *PCA Rules on Criminal Provisions*, Rule III, Section 1.

<sup>8</sup> *PCA Rules on Criminal Provisions*, Rule I, Section 4(l). The perfection of the application for the Leniency Program refers to the “full and complete compliance with all the requirements for a leniency application within the period prescribed” by the PCA Rules on Criminal Provisions. For more details, please see Part D (4).

<sup>9</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 2.

<sup>10</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 6(b).

<sup>11</sup> *PCA Rules on Criminal Provisions*, Rule III, Section 4(b).

<sup>12</sup> *PCA Rules on Criminal Provisions*, Rule III, Section 4(b).

<sup>13</sup> *PCA Rules on Criminal Provisions*, Rule III, Section 4(a).

<sup>14</sup> A Latin phrase that translates as “I do not wish to contend.”

<sup>15</sup> *PCA Rules on Criminal Provisions*, Rule III, Section 6.

<sup>16</sup> *PCA Rules on Criminal Provisions*, Rule III, Section 6.

<sup>17</sup> *PCA Rules on Criminal Provisions*, Rule III, Section 6.

7. Upon conviction: (a) the fine shall be imposed upon the entity, and (b) imprisonment shall be imposed on (i) officers, directors, or employees holding managerial positions who are knowingly and are willfully responsible for the violation, in a case involving a juridical entity, or (ii) officers or directors, owners, and other persons responsible for the entity, in a case involving a non-juridical entity.<sup>18</sup>

#### **D. Leniency Program**

1. The PCA provides for a Leniency Program. According to the PCC, [the Leniency Program “is designed to deter the creation of cartels, and to aid in the detection and prosecution of existing ones. This is done by incentivizing cooperation from current and former cartel participants who possess information and/or evidence necessary for a successful investigation and case.”<sup>19</sup>
2. Under the Leniency Program, the OFC may grant an application immunity from prosecution for a covered offense under the PCA Rules on Criminal Provisions that is subject of a preliminary investigation pending before it.<sup>20</sup>
3. Entities that are parties to an anti-competitive agreement may not jointly apply for immunity.<sup>21</sup> However, two or more individuals that are part of the same entity applying for immunity may appoint a joint representative to act on their behalf with respect to their application with the OFC.<sup>22</sup>
4. During preliminary investigation, a qualified respondent in a complaint involving an anti-competitive agreement may apply for immunity by submitting a Leniency Marker Request Form (marker) to the OFC.<sup>23</sup> The submission of the marker (a) protects the applicant’s place in the marker queue, and (b) grants the applicant a period of 30 calendar days from submission of the marker “to perfect the marker.”<sup>24</sup> If the complaint is filed by the PCC, the period to perfect the marker is 10 calendar days.<sup>25</sup>
5. To perfect the marker, the applicant must submit a sworn statement within the applicable period that provides information on the alleged anti-competitive agreement known to the applicant at the time of submission, such as: (a) the nature and duration of the alleged anti-competitive agreements, (b) the parties to the agreement, (c) the affected product/s or services, and (d) the affected geographic area/s.<sup>26</sup>

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<sup>19</sup> *Philippine Competition Commission, Leniency Program*; <https://phcc.gov.ph/leniency-application/>; last accessed 1:00 PM of September 30, 2020.

<sup>19</sup> *Philippine Competition Commission, Leniency Program*; <https://phcc.gov.ph/leniency-application/>; last accessed 1:00 PM of September 30, 2020.

<sup>20</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 1(a).

<sup>21</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 10(a).

<sup>22</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 10(b).

<sup>23</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 3(a).

<sup>24</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 3(b).

<sup>25</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 3(b).

<sup>26</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 3(c).

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The perfection of the marker “suspend[s] the preliminary investigation for a period not exceeding 60 calendar days pending the evaluation and processing of, and action on, the application by the OFC.”<sup>27</sup> If the applicant fails to perfect the marker within the required period, the application will be denied.<sup>28</sup>

6. The OFC generally has 30 calendar days from the perfection of the marker to evaluate the information and evidence provided by the applicant, as well as any information submitted by the PCC.<sup>29</sup> The OFC also recognizes the immunity granted by the PCC.<sup>30</sup> If the PCC had granted immunity to the applicant, the PCC will submit all the evidence which formed the basis for such grant, and such other relevant evidence to the OFC for evaluation.<sup>31</sup>
7. If the OFC finds clear and convincing evidence of the covered offense, the OFC will grant conditional immunity to the applicant.<sup>32</sup> The immunity will extend to all directors, trustees, partners, officers, employees, and agents of the juridical entity who admit involvement in the offense.<sup>33</sup> If the juridical entity withdraws its application or fails to qualify for immunity, the director, trustees, partners, officers, employees and agents who come forward with such entity will (a) take the place of the juridical entity in the queue, and (b) be considered as if they submitted individual applications with the OFC.<sup>34</sup>
8. Once conditional immunity is granted, the preliminary investigation will resume and the complaint against the entity granted immunity will be provisionally dismissed.<sup>35</sup> The conditional immunity may be revoked in case the entity fails to discharge its responsibilities or violates any of the provisions of the PCA Rules on Criminal Provisions.<sup>36</sup>
9. If the application for leniency is denied or the conditional immunity is revoked, the entity may appeal the denial or revocation to the DOJ Secretary within 15 days from notice.<sup>37</sup> The appeal will generally not suspend the proceedings before the OFC or stay the resolution subject of the appeal.<sup>38</sup>
10. The denial of an application for leniency or revocation of conditional immunity does not prohibit the OFC from using any information or evidence provided by the applicant.<sup>39</sup> However, information or evidence submitted by an applicant whose place in the marker queue falls after that of the entity granted conditional immunity may not be used against it, except when such information or evidence is independently obtained by the OFC.<sup>40</sup>

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<sup>27</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 3(e).

<sup>28</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 5.

<sup>29</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 6(a).

<sup>30</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 1(b).

<sup>31</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 1(b).

<sup>32</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 6(a).

<sup>33</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 9(b).

<sup>34</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 9(a).

<sup>35</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 6(b).

<sup>36</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 8.

<sup>37</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 12.

<sup>38</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 12.

<sup>39</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 11(a).

<sup>40</sup> *PCA Rules on Criminal Provisions*, Rule IV, Section 11(b).

**E. Other Matters**

1. The PCA Rules on Criminal Provisions allow parties and applicants to file criminal complaints and other pleadings, and applications and other documents related to leniency proceedings electronically<sup>41</sup> through [dojofc.ph@gmail.com](mailto:dojofc.ph@gmail.com), pending the creation of an online portal for electronic filings. Documents filed electronically are deemed filed on the date and time of actual receipt by the OFC.<sup>42</sup>
2. The PCA provides for non-adversarial administrative remedies, such as binding rulings, show cause orders, and consent orders.<sup>43</sup> Evidence submitted in non-adversarial remedies are inadmissible in criminal proceedings arising from the same act subject of the non-adversarial administrative remedy against the entity that applied for the non-adversarial remedy and against the entity's officers and agents.<sup>44</sup>

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<sup>41</sup> *PCA Rules on Criminal Provisions*, Rule V, Section 1.

<sup>42</sup> *PCA Rules on Criminal Provisions*, Rule V, Section 2.

<sup>43</sup> *PCA*, Section 37.

<sup>44</sup> *PCA Rules on Criminal Provisions*, Rule III, Section 7.

### Other COVID-19 related bulletins

The links to our earlier bulletins and briefings can be found at the SyCipLaw information hub, <https://syciplawresources.com/>.

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