

PCC MEMORANDUM CIRCULAR NO. 20-001

Subject: PROCESS FOR EXEMPTION FROM COMPULSORY NOTIFICATION OF JOINT VENTURE (JV) AGREEMENTS ENTERED INTO PURSUANT TO THE “GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AGREEMENTS BETWEEN GOVERNMENT AND PRIVATE ENTITIES” ISSUED BY THE NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY

Whereas, Republic Act No. (“R.A.”) 10667 or the Philippine Competition Act (the “PCA” or the “Act”) and its Implementing Rules and Regulations (“PCA-IRR”) mandate that the State, through the Philippine Competition Commission (“PCC”), shall enhance economic efficiency and promote free and fair competition in trade, industry and all commercial economic activities, as well as establish a national competition policy to be implemented by the government and all of its political agencies as a whole;

Whereas, the Guidelines and Procedures for Entering Into Joint Venture Agreements between Government and Private Entities, including its subsequent amendments or revisions (the “NEDA JV Guidelines”), provide the framework within which joint venture arrangements between government and private entities are executed, in a transparent and competitive process, to encourage pooling of resources and expertise between Government and Private Entities through joint ventures;

Whereas, the PCA is enforceable against any person or entity engaged in any trade, industry and commerce in the Republic of the Philippines;

Whereas, joint ventures (“JV”) as defined under Rule 2 (i) of the PCA-IRR, between public or private entities, are subject to the compulsory notification requirement under Section 17 of the Act if the relevant thresholds under the PCA-IRR, as amended, are met;

Whereas, should a JV agreement be executed between the winning private sector participant and the government entity under the NEDA JV Guidelines, a notification to the PCC is mandatory once notification thresholds are met under Rule 4, Section 3 of the PCA-IRR, as amended by Memorandum Circular No. 18-001;

Whereas, given that the delivery of JV projects should be transparent, competitive, and timely, the PCC recognizes the necessity of a coordinated approach in reviewing JV projects falling under the PCA’s mandatory notification and review requirements;

Whereas, the PCC is mandated to advocate pro-competitive policies of the Government, monitor and analyze the practice of competition in markets that affect the Philippine economy, implement and oversee measures to promote transparency and

accountability, and ensure that prohibitions and requirements of competition laws are adhered to;

NOW, THEREFORE, pursuant to its authority under the Act, the Philippine Competition Commission hereby promulgates the following rules:

Section 1. Purpose. This Circular aims to establish and institute a framework to exempt from compulsory notification JV between private and government entities for a JV project formed pursuant to the NEDA JV Guidelines, that is consistent with the mandate of the PCC.

Section 2. Coverage. This Circular shall apply solely to JV projects undertaken by Government Entities¹ (each an Agency) with private sector entities, pursuant to the NEDA JV Guidelines.

For purposes of this Circular, all capitalized terms shall have the same meaning ascribed in the PCA, the PCA-IRR, and the NEDA JV Guidelines.

Section 3. Procedure of review. Agencies may seek exemption from compulsory notification in behalf of their prospective bidders or proponent by filing an application for a Certificate of Project Exemption from the PCC, subject to PCC's review of the JV project in terms of: (1) the nature and scope of the JV project; (2) the bidding design and process; and (3) competition concerns that may arise from the nature and/or composition of prospective bidders, original proponent, comparative proponents (collectively, "prospective bidders") or the winning private sector participant, and, if necessary, the PCC shall render advisory opinion/s and require undertakings to address competition concerns, if any.

In order to qualify for the exemption, the application shall be made:

- (i) For projects under Competitive Selection process—prior to the issuance of the Invitation to Apply for Eligibility and to Submit a Proposal;
- (ii) For Negotiated JV projects—prior to the issuance of Certification of Successful Negotiation or Conferment of Original Proponent ("OP") Status.

After receipt of an Agency's application, the PCC shall determine whether all Project Documents² have been submitted. Upon complete submission by the Agency of all the Project Documents, PCC shall issue a Notice of Sufficiency within seven (7) working days stating that it shall commence review of the application on the next working day. Otherwise, PCC shall issue a notice to the concerned Agency of any additional documents or information that must be submitted with the application.

PCC shall review the application and Project Documents, and provide its inputs for a period not exceeding twenty (20) working days from issuance of the Notice of Sufficiency ("Review Period"). The processing of the JV project by the Agency shall continue while the PCC's review is ongoing. The Agency may, at any stage, consult with the PCC on matters affecting competition in the markets affected by the JV project.

¹ As defined under the NEDA JV Guidelines.

² As defined under Section 4 of this Circular.

Section 4. *Inputs to the project documents.* The PCC may provide inputs on the selection or tender documents, feasibility study, draft JV agreement, JV proposal, eligibility documents and other related documents for review (“Project Documents”). Particularly, the feasibility study and/or the JV proposal submitted to the PCC shall include the following information:

1. A description of the supply chain of the market/s affected by the JV project;
2. A description of the products or services to be provided through the JV project;
3. A description of the geographic or catchment area where the JV project will operate;
4. Identification of potential competitors (or entities that provide or may provide substitutable products or services with the JV project) and their corresponding market shares;
5. A description of the target users or consumers of the products or services to be provided through the JV project (demographics);
6. Policy and regulatory framework of the market/s affected by the JV project;
7. Alternatives available to suppliers and users of the JV project;
8. Barriers to entry into the market/s affected by the JV project; and
9. Other information on industry structure and prevailing conditions of the market.

The PCC may provide inputs on how the JV project may affect competition in the market/s affected by said JV project, using the substantive standards and practices as provided under the PCC Merger Review Guidelines and other PCC related issuances.

In addition to its inputs to the Project Documents, PCC may require undertakings to be complied with by the prospective bidders, likewise to be incorporated in the Project Documents (“Undertakings”). The Undertakings shall refer to a list of commitments that the PCC requires to be complied with by the prospective bidders, which will address any potential competition issues identified by the PCC.

During the Review Period, PCC may request additional information or documents from the Agency or the prospective bidders, as necessary.

Section 5. *Exemption from compulsory notification.* Within seven (7) working days from submission to the PCC of the final Project Documents evidencing observance of the above procedures and adoption of PCC’s inputs, counted from the date of submission of the last Project Document, the PCC shall issue a Certificate of Project Exemption in favor of the prospective winning private sector participant; *Provided that*, should PCC require Undertakings to be executed by prospective bidders pursuant to its inputs, the PCC shall issue the Certificate of Project Exemption within seven (7) working days from submission by the prospective bidders of their executed Undertakings; *Provided further*, that the period for issuance of the Certificate of Project Exemption shall start to run from the date of last submission by a prospective bidder.

The PCC may, upon its discretion, commence a *motu proprio* review of the JV project in the event that a winning private sector participant violates any of its commitments under its Undertakings to the PCC.

Section 6. Application of compulsory notification and merger review under the PCA.

In cases where the PCC's inputs were not implemented by the Agency, or was secured on the basis of fraud or false material information, or where the required Undertakings were not duly executed by the prospective bidders, or in the event of substantial changes³ to the JV project subsequent to the PCC's review, the PCC shall not be precluded from exercising its mandate to: (a) require the Agency and the winning private sector participant to notify; and (b) conduct full review of the JV transaction.

Applications filed beyond the periods provided under Section 3 of this Circular are not qualified for exemption from compulsory notification under the PCA and the PCA-IRR.

Section 7. Unsuccessful negotiation or modifications. In case of an unsuccessful negotiation or substitution of any of the members of an original proponent or if the Negotiated JV project is bid out for competitive selection or the Agency accepts a new Negotiated JV project, the Agency must apply for a new Certificate of Project Exemption observing the relevant PCC issuances.

Section 8. Monitoring and reporting of compliance. The PCC, in coordination with NEDA, shall monitor compliance by the Agency and winning private sector participant to the terms and conditions of their contract, particularly its provisions which may affect competition in the Philippine markets.

The PCC may require the Agency and the winning private sector participant to submit periodic reports, or conduct separate, independent inspections to ascertain compliance with the PCA, the PCA-IRR and other issuances relating to competition and prohibition of anti-competitive conduct.

Section 9. Effectivity. This Memorandum Circular shall take effect fifteen (15) calendar days after the date of its publication in a newspaper of general circulation.

Quezon City, Philippines, 16 June 2020.


Arsenio M. Balisacan
Chairman


Johannes Benjamin R. Bernabe
Commissioner


Amabelle C. Asuncion
Commissioner


Macario R. De Claro, Jr.
Commissioner


Emerson B. Aquende
Commissioner

³ Substantial changes include, but is not limited to, changes in the composition or identity of the winning private sector participant, subsequent transfers or assignments of the assets of the winning private sector participant, changes in the parameters of the project which impacts the competition issues identified.