



COMPETITION AUTHORITY OF KENYA

Joint Venture Guidelines

This publication contains general information intended for the convenient use and guide on how the provisions of the Competition Act, No.12 of 2010 are applied in respect to Joint Ventures. This publication can be made available in alternative formats upon request. Please contact the Competition Authority of Kenya using the contact information provided below. This publication may not be reproduced, in part or in whole by any means without the express permission of the Competition Authority of Kenya.

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Preface

The Competition Authority of Kenya (the Authority) is established under Section 7 of the Competition Act No. 12 of 2010 (the Act) and is charged with, *inter alia*, promoting and enforcing compliance with the Act. In accordance with the powers conferred on the Authority under Section 9 of the Act, the Authority hereby publishes these Joint Venture Guidelines which are intended to, *inter alia*:

- Increase clarity and predictability of transactions that qualify as full function joint ventures under Section 41 (2) (h) of the Act and their notification;
- Provide guidance on how the Authority expects full function joint venture notifications to be undertaken;
- Provide clarity on Greenfield Joint Ventures in the context of the Authority and whether they should be notified to the Authority prior to implementation;
- Provide an overview into the review and analysis of Full Function Joint Venture transactions by the Authority;
- To guide stakeholders on Advisory Opinion requests regarding Joint Venture transactions; and
- Provide guidance on Joint Ventures that may fall under the review of Part III of the Act.

The development of these Guidelines is in line with International Best Practice and also incorporates stakeholder inputs.

This guidance document is not intended to be a substitute for the provisions under Part III and IV of the Act, the Competition (General) Rules, 2019 (“the Rules”) or any other rules to be published by the Minister pursuant to Section 93 of the Act or any court judgement. The Guidelines should be read together with; the Constitution of Kenya 2010, the Act, the Consolidated Guidelines on Substantive Assessment of Mergers (Consolidated Guidelines), the Rules, the Market Definition Guidelines and the Data Protection Act (2019) among other Guidelines and rules to be published by the Minister.

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SECTION 1 - INTRODUCTION

1. In order to compete in modern markets, competitors sometimes need to collaborate through various types of arrangements. This is informed by competitive forces which are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts and lowering production and other costs. These Guidelines are intended to ensure they do not negatively impact on competition.
2. The Authority has developed various Guidelines pursuant to Section 9 (f) of the Act and issued the same to stakeholders, addressing several special circumstances pertaining to competition review with respect to mergers and acquisitions. However, these past Guidelines contained minimal information on merger notification and review with regard to full function joint ventures. The need to provide clarification has arisen due to the increasing number of transactions and inquiries regarding when and how to notify joint ventures, their review and analysis process.
3. The Authority intends to create awareness on elements such as; definition and notification of full function joint ventures and their competition and public interest review. This is through making public the approach which guides the Authority when reviewing and assessing joint ventures.
4. Joint ventures hold enormous potential to produce real economic efficiencies triggering increase in global competition. Alive to this, the Authority, has developed these Guidelines to provide direction and increase predictability in the new frontier of business arrangements.
5. Joint ventures aid in facilitating foreign direct investment through tapping local market expertise and also play an important role especially where such investment would not be possible without a partnership between local and foreign entities.
6. Globally, competition agencies, require notification of joint ventures if (i) they are “full-function”, which, in essence, entail those joint ventures that operate as self-standing, independent businesses; and (ii) the relevant jurisdictional thresholds are met.

7. Joint ventures warrant competition review based on a careful assessment and balancing of pro and anti-competitive effects. Assessing a joint venture's pro-competitive effects involves considering static (combination of existing resources) and dynamic (innovation related) efficiencies.

SECTION 2 – FORMS OF JOINT VENTURES

8. These Guidelines highlight various forms of integration which undertakings can implement:-

8.1. Joint Ventures

Joint Ventures refer to integration of operations between two or more separate undertakings in which any of the following conditions are present:

- (i) The undertaking is under direct/indirect or joint control of the parent undertaking(s);
- (ii) Each party makes a resource contribution to the joint undertaking;
- (iii) The enterprise exists as a business undertaking separate from its parents;
- (iv) joint venture arrangements creates a shared; ownership, expenses, return of investments, profit and rules of governance; and
- (iv) Joint venture creates a new undertaking with a direct market access, in terms of new productive capacity, new technology, new products, or entry into a new market.

8.2. Full Function Joint Ventures

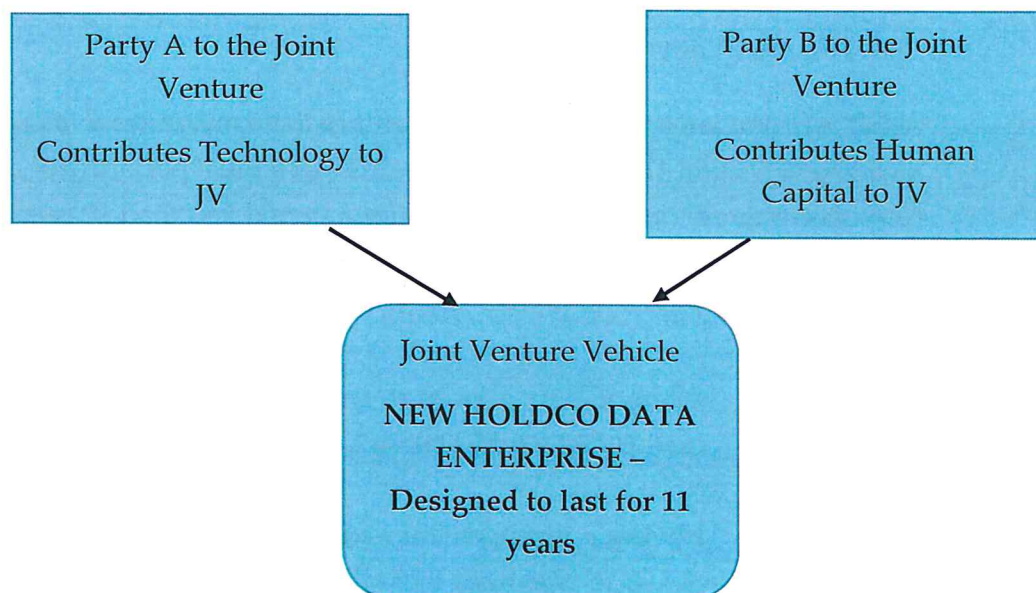
A full function joint venture is a joint venture that constitutes a 'merger' within the meaning of Section 41 of the Act. This means that it must perform, for a long duration (10 years or more) or on a lasting basis (for a period less than 10 years with renewal provisions) all the functions of an existing or new autonomous economic entity, which meets the following criteria among others: -

- i. Operating in a market and performing the functions normally carried on by undertakings operating in the relevant market(s);
- ii. Having a management dedicated to its day-to-day operations and access to resources including but not limited to finance, staff, and

assets (tangible and intangible) and access to critical facilities in order to conduct for a long duration or a lasting basis in its business activities within the area provided for in the joint-venture agreement.;

- iii. A limited partnership, whereby one parent is the general partner responsible for making decisions for the venture, and the other is the limited partner, responsible for arranging and investing capital;
- iv. The provision of management or advisory services, liquidity rights and access to confidential information including data;
- v. The joint venture entity must have activities that go beyond one specific function of the parents; and
- vi. Does not wholly rely on purchase or supply agreements between it and its parents.

8.3. An example of a typical full function junction venture is as shown in **Organogram 1**.



8.4. Greenfield Joint Ventures

Joint Venture arrangements aimed at engaging in a new business venture separate from and unrelated to the activities undertaken by the parties to the joint venture.

8.5. Parties to a Joint Venture

Includes undertakings which have entered into an agreement to engage in business activities that amounts to a full function joint venture as per the Rules.

8.6. Joint Venture Vehicle

It is a Special Purpose Vehicle incorporated/identified for the sole purpose of undertaking the joint venture transaction.

SECTION 3 - FILING A NOTIFICATION INVOLVING JOINT VENTURE TRANSACTIONS

9. This section sets out the requirements for the application process and guides the parties on how to determine the completeness of their submissions and how the Authority will treat the information\documents lodged.

9.1. Filing Parties

- 9.1.1 Ordinarily, mergers and acquisition transactions have a clearly set out target and acquirer. However, joint ventures may sometimes lack this element due to the fact that the arrangements mostly involve parties coming together to set up an independent vehicle separate from the parents. Therefore, identifying the acquirers and the targets may be a challenge.
- 9.1.2 The Authority, in its administration of joint venture transactions, shall require the parties to the joint venture to separately submit documents relating to the transaction by duly filling the Merger Notification Forms as Joint Venture Parents.
- 9.1.3 If the Joint Venture Vehicle has a market presence, it shall be required to separately submit documents relating to the transaction by duly filling the Merger Notification Form as the Joint Venture Vehicle.
- 9.1.4 Where two or more undertakings have entered into a contractual relationship without any existing Joint Venture Vehicle, the parties to the

Joint Venture will then fill the Merger Notification Forms in accordance with Para 9.1.2.

- 9.1.5 In cases involving parties acquiring shares in an existing undertaking, that inherently result in a joint venture arrangement, parties to the arrangement will be required to notify the Authority in the manner stipulated in Para 9.1.2 and 9.1.3 where applicable.

10. Information and Documents Required by the Authority

10.1 The documents\information to be submitted for joint venture filings include, but shall not be limited to: -

- i. The covering letter/Introductory email;
- ii. Duly filled Merger Notification Forms in the prescribed manner;
- iii. Business plans and/or models;
- iv. Board resolutions;
- v. Duly signed joint venture agreement;
- vi. The joint venture terms of operations (where applicable);
- vii. Three (3) year most recent Audited Financial statements for the Joint Venture parents (including the entire group structure where applicable), its subsidiaries and the Joint Venture Vehicle where applicable;
- viii. Disclosure of global financial values where applicable;
- ix. Filing fees where applicable;
- x. Justification of efficiency gains from the transaction; and
- xi. Failing firm defense report and documentation where necessary.

SECTION 4 - GREENFIELD JOINT VENTURES

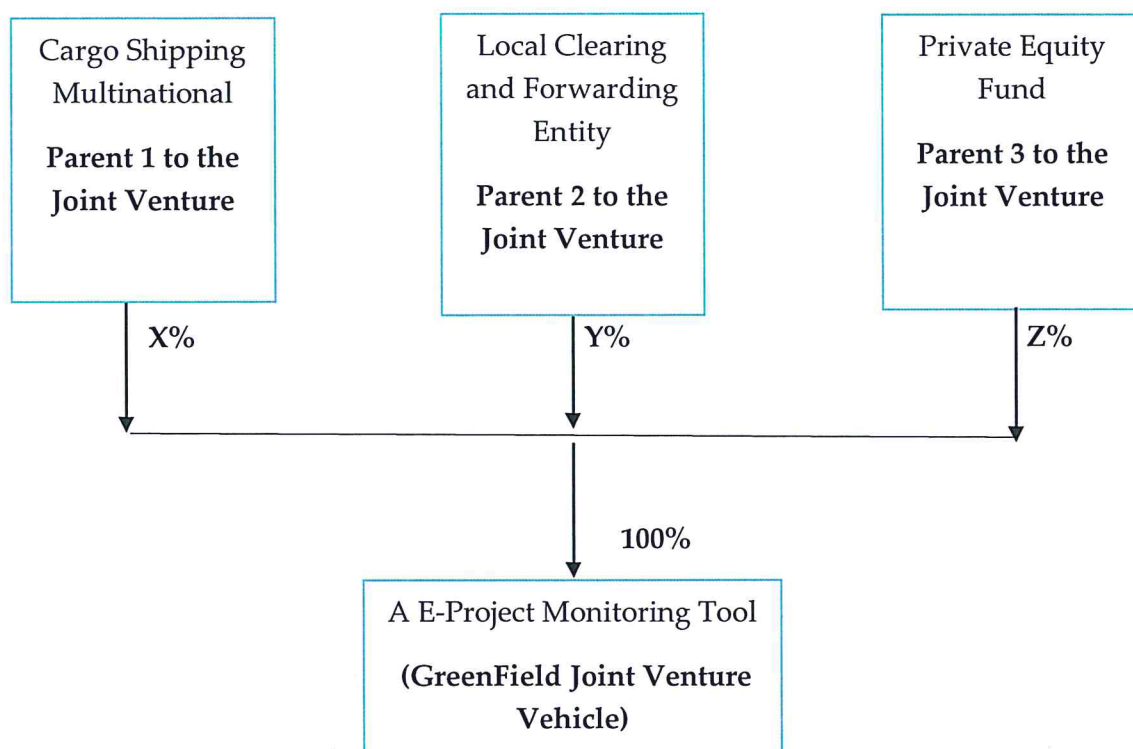
11. Establishment of Greenfield Joint Ventures may occur in instances where local/foreign undertakings collaborate with either local, international or hybrid undertakings to develop new goods and services separate from those offered by the parent undertakings. Additionally, they are a common form of market entry used when a company wants to achieve the highest degree of control over its foreign activities. This can be compared to other foreign direct investments such as the purchase of foreign securities or the acquisition of a majority stake in a foreign company in which the parent company exercises little to no control over daily business operations.

12. The nature of such arrangements may result in full function joint ventures depending on the elements of the greenfield joint venture and if at least one of the parties has a local nexus. This shall be reviewed on a case by case basis.

13. Elements of Greenfield Joint Ventures

- 13.1. Greenfield joint ventures are marked by undertakings investing in the country in 'new' areas uninhabited by any of the parties to the joint venture.
- 13.2. The undertakings form a new joint venture vehicle for the purposes of the transaction.
- 13.3. The transaction entails entry into a new space or enhancement of an existing business. Undertakings can enter into all sorts of greenfield joint ventures including, but not limited to: -
- i. Instances where undertakings come together for the sole purpose of sharing knowledge and expertise on a new area of business and in the process, incorporate a joint venture vehicle to undertake this venture;
 - ii. Parties use resources within their disposal to develop a business idea. For instance, a power distribution entity utilizing its customer data in conjunction with other investors to set up data centers with information that is likely to be of interest to other sector players; and
 - iii. Undertakings utilize new information to better an existing idea in the relevant market with the help of one of the undertakings from the country of origin as a joint venture partner.

14. An example of a typical Greenfield Joint Venture is shown in **Organogram 2**.



SECTION 5 - BASIS FOR DETERMINATION OF ASSETS AND TURNOVER THRESHOLDS

15. The main aim of determination of assets and turnover thresholds is to inform the Authority on the likely competition impact of a joint venture transaction. Parent undertakings can have resources or exercise their market power through investments in the joint venture thus bringing a dynamic change to competition in the market.
16. Parties to a joint venture are required to provide complete financial information (Audited Financial Statements in Kenya and Disclosure of global financial values for the preceding three (3) years) when filing, including undertakings which may not be deriving their turnover or assets from the country prior to the joint venture.

17. In reviewing the transaction, the Authority will expect parties to submit the following sets of asset and turnover figures: -
- i. Turnover and asset figures of all the parties to the transaction, whether attributed to the parties to the joint venture in Kenya or not;
 - ii. Turnover and asset figures of any other entities directly or indirectly controlled by the parties to the joint venture entities in Kenya;
 - iii. Turnover and asset figures of the joint venture vehicle, where applicable; and
 - iv. Global financial values of the parties to the joint venture.
18. In the determination of the relevant turnover/assets for the purposes of computation of merger filing fees, the Authority, guided by the Rules, will consider the combined value of the assets or turnover figures attributable to the parent undertaking entities as well as the joint venture vehicle in Kenya.
19. Parties will be required to pay filing fees based on the sum of the assets or turnover in Kenya, whichever is higher as per the Rules.

SECTION 6: REVIEW AND ANALYSIS OF JOINT VENTURE TRANSACTIONS

20. Competition Review and Analysis

- 20.1. The competition review and analysis of a full function joint venture is geared towards establishing whether the transaction is likely to increase concentration or facilitate coordination in a market of the joint venture parties. The review will be guided by, *inter alia*, the Rules and the Consolidated Guidelines.
- 20.2. The Authority will additionally consider in the assessment of the anti-competitive effects of a full function joint venture:
- i. The ability of the joint venture to implement its own commercial policy;
 - ii. Whether the activities of the joint venture go beyond one specific function for the parents; and
 - iii. Whether there are any purchase or supply agreements between the joint venture and its parents that would undermine its independent character.

20.3. The Authority may request for additional documents/information from the parties following preliminary review of the filing.

20.4. The analysis will include making a formal market definition, estimating concentration levels, and considering the significance of barriers to entry/expansion of the parties to a joint venture who are competitors. In regards to anti-competitive effects, the assessment entails examining the terms of the Joint Venture's agreement(s) and shall include among others: -

- i. The activities of the joint venture vehicle and its parent undertakings;
- ii. The governance structure adopted;
- iii. The business plans;
- iv. The duration of the joint venture;
- v. The nature and extent of assets transferred to the joint venture versus those retained by the undertakings; and
- vi. Ability of the parties to the joint venture to continue competing with each other and with the joint venture vehicle.

21. Public Interest Review and Analysis

The Authority will conduct review on public interest as outlined in the Consolidated Guidelines. Specifically, the review of public interest issues will seek to identify the positive synergies such as entry and growth of SMEs, expansion to international markets and employment among others, likely to arise from the joint venture.

22. Efficiency

The Authority, in the review of full function joint ventures will consider the likely technological benefit, real resource savings, compatibility with competition and economies of scale accompanying the transaction. Where the efficiency benefit is likely to bring more economic gains compared to the competition detriment likely to result from the transaction, the Authority guided by the Consolidated Guidelines will weigh the two and provide a balance to any likely competition concerns.

SECTION 7 – JOINT VENTURE AGREEMENTS UNDER PART III OF THE ACT

23. Joint ventures which fall outside the scope of the merger regime can be reviewed under the provisions of Part III of the Act. These arrangements include but are not limited to: - agreements of research and development; production agreements; joint purchasing agreements; and commercialization agreements¹.
24. These following elements among others will be taken into account in review of these agreements;
- i. Existence of an agreement between one or more undertakings;
 - ii. The nature of the agreements (horizontal or vertical relationship);
 - iii. Whether the agreement have as its object or effect the prevention, lessening or distortion of competition in the market; and
 - iv. The duration of the agreement.
25. The approval of any Full Function Joint Venture does not exempt parties from other statutory requirements including seeking exemption approvals as provided for under Part III of the Act where applicable.
26. For implementation of joint venture agreements that fall under Part III of the Act the joint venture parties must apply for an exemption to the Authority if the said agreements do not fall under the Block Exemption Guidelines.

SECTION 8- ADVISORY OPINION

27. The Authority, as mandated to regulate market structure, guides that parties should seek to utilize advisory opinions before implementation of Joint Venture transactions where they are uncertain and where they are unclear on any matter provided in these Guidelines. The Authority shall revert on the advisory opinion request within the timelines provided in the Service Charter.

¹<https://cak.go.ke/sites/default/files/Consolidated%20Guidelines%20on%20Restrictive%20Trade%20Practices%20.pdf>

SECTION 9 - OTHER ISSUES REGARDING JOINT VENTURE TRANSACTIONS

28. The Authority aims to provide further guidance on the new trends and emerging issues and how such aspects are viewed with respect to joint venture arrangements: -

28.1. The Digital Economy

Ecommerce has become the mainstay in most sectors with big data playing a crucial role in entry and operations in digital economies. In its review of the joint venture transactions, the Authority will consider aspects of big data and digital economy dynamics of entry and access to data in transactions likely to involve big data even where data is not the main component of the transaction.

Where necessary, the Authority may request for data specific information such as custody of data pre and post transaction, extent of meaningfulness of the data in custody to entry and competition in the relevant market/sector identified and value of the data among other issues.

28.2. Remedies

Where the Authority identifies likely negative competition and public interest impacts of the joint venture, it may engage the joint venture parties to come up with remedies to mitigate against the harm.

EFFECTIVE DATE

These Joint Venture Guidelines are effective as from 1st June 2021, and will be reviewed as and when the need arises.

Director General:

Wang'ombe Kariuki, MBS

Sign.....