COMPETITION AUTHORITY OF KENYA

Joint Venture Guidelines under the Competition Act No. 12 of 2010

Telephone: 254-20-2628233
Direct Line : 254-20-2779000
Website: www.cak.go.ke
Email: info@cak.go.ke

Competition Authority of Kenya
Kenya Railways HQs
Block ,D' Drop – Point; Ground Floor
P. O. Box 36265-00200
Haile Selassie Avenue

Foreword by the Director General

It is an honour to present to our stakeholders and to Kenya at Large, these Guidelines on Joint Ventures. The guidelines are meant, not only to increase predictability of the merger review process, but also to improve the business regulatory framework and enhance the business environment in Kenya.

The Competition Authority of Kenya (the Authority`) is established under Section 7 of the Competition Act and is charged with, *inter alia,* promoting and enforcing compliance with the Competition Act. One of the objectives of the Competition Act is to bring national competition law and practice in line with international best practice. In furtherance of that objective and in accordance with the powers conferred on the Authority under Section 93 of the Competition 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;
- Demystify 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; and
- To inform Advisory Opinion Requests especially on Joint Venture transactions.

This guidance document is not intended to be a substitute for the provisions on mergers under Part IV of the Competition Act, the Competition (General) Rules 2019 ("the Rules") or any other rules to be published by the Minister (made pursuant to section 93 of the Competition Act) or a product of any court judgement. The guidelines should be read together with; the Competition Act, the Consolidated Guidelines on Substantive Assessment of Mergers, the Rules and the Market Definition Guidelines among other guidelines and rules to be published by the Minister (made pursuant to section 93 of the Competition Act) and with any other applicable legal instruments of Kenya including binding or persuasive legal precedencies from competition law cases. These guidelines do not constitute legal advice and do not have the force of law and are not binding on the Tribunal or any court of law.

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. Such collaborations often are not only benign but procompetitive. These guidelines are meant to help ensure that such business collaborations do not undo the competition gains already achieved.

2. The Authority has developed various guidelines and rules in the past in consultation with the Cabinet Secretary pursuant to section 93 of the Competition 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 regards to Full Function Joint Ventures. The increasing number of Joint Venture transactions and frequent questions regarding when and how to notify have yielded requests for improved clarity regarding their treatment under the Competition Act.

3. By rendering public the approach which guides the Authority when assessing joint ventures, the Authority intends to create awareness on elements such as; definition of Full Function Joint Ventures, the notification process for the Full Function Joint Ventures, competition and public interest review of Joint Venture Transactions including increasing the transparency in the Authority's decision-making under the Competition Act.

4. Joint ventures continue to be an important means of tapping local market expertise and thus facilitating foreign direct investment, especially where such investment would not be possible without a partnership between local and foreign partners.

5. Joint ventures, while complex in terms of notification and review, sometimes are a frequent area of competition law compliance questions for competition agencies. This is because some

of the arrangements sometimes border more on Restrictive Trade Practices rather than Mergers and hence the need for guidelines to clarify the grey areas.

6. Many 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 various static and dynamic (innovation related) efficiencies.

7. Most regimes around the world, Kenya included, require notification of joint ventures if (i) they are "full-function", which, in essence, are those joint ventures that operate as self-standing, independent businesses; and (ii) the relevant jurisdictional thresholds are met.

8. Business uncertainty is likely to increase given the fact that joint ventures are taking new forms; they may at times involve putting new ideas together, as is in Greenfield Joint Ventures rather than the more familiar brick and mortar amalgamations and collaborations.

9. This uncertainty is an area of concern to the Authority given that joint ventures hold enormous potential to produce real economic efficiencies triggering increase in global competition. Alive to this, the Authority, in its proactive approach, is developing these guidelines to provide direction and increase predictability in the likely new frontier of business arrangements.

SECTION 2 - DEFINITION OF TERMS

10. The commonly used terms in these guidelines include**: -**

10.1. **Joint Ventures**

10.1.1. In general Joint Ventures refer to integration of operations between two or more separate firms, in which the following conditions are present: (i) the enterprise is under joint control of the parent firms; (ii) each party makes a substantial resource contribution to the joint enterprise; (iii) the enterprise exists as a business entity separate from its parents; and (iv) the joint venture creates significant new enterprise with a direct market access, in terms of new productive capacity, new technology, new products, or entry into a new market.

10.2. **Full Function Joint Ventures**

10.2.1. As indicated in Para 31 of the Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, a joint venture is said to constitute a 'merger' within the meaning of Section 41 of the Competition Act, if it is a 'full-function` joint venture. This means that it must perform, for a long duration (typically 10 years or more) all the functions of an autonomous economic entity, including:

i. Operating on a market and performing the functions normally carried on by undertakings operating in the same market; and

ii. Having a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff and assets (tangible and intangible) in order to conduct for a long duration its business activities within the area provided for in the joint-venture agreement.

11. **Greenfield Joint Ventures**

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

12. **Parties to a Joint Venture**

12.1. Includes entities which have entered into an agreement to engage in business activities that amounts to a full function Joint Venture as per the Act.

13. **Joint Venture Vehicle**

13.1. Is a Special Purpose entity incorporated/identified for the sole purpose of undertaking the Joint Venture transaction.

SECTION 3 - FILING A NOTIFICATION INVOLVING JOINT VENTURE TRANSACTIONS

14. 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**.**

14.1. **Target and Acquirer**

14.1.1. 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 entity separate from the parents. Thus identifying the target and acquirer may be difficult.

14.1.2. The Authority, in its administration of Joint Venture transactions, shall require the parent entities to separately submit documents relating to the transaction by duly filling the Merger Notification Forms as Joint Venture Parents.

14.1.3. The Joint Venture Vehicle, shall also fill the Merger Notification Form as the Joint Venture Vehicle.

14.1.4. Where two or more entities 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 14.1.2.

14.1.5. In cases involving parties acquiring shares in an existing undertaking, that inherently result in a joint venture arrangement as stipulated in Section 41 of the Competition Act, parties to the arrangement will be required to notify the Authority in the manner stipulated in Para 14.1.2.

14.1.6. An undertaking may seek an advisory opinion from the Authority where it is unclear on any matter provided in these Guidelines.

14.2. **Information and Documents Required by the Authority**

14.2.1. The documents\information to be submitted for Joint Venture filings include, but shall not be limited to: -

i. The Covering letter
ii. Duly filled and stamped/sealed Merger Notification Forms;
iii. Business plans;
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. Filing fees where applicable;

ix. Business model;

x. Justification of efficiency gains from the transaction; and

xi. Failing firm defense report and documentation where necessary.

SECTION 4 - GREENFIELD JOINT VENTURES

15. **Definition**

15.1. There are situations where local/foreign entities collaborate with other local domiciled entities to develop a new product separate from the products and services provided by the parent entities. Such ventures are referred to as Greenfield joint ventures. The nature of such arrangements may either result in full function joint ventures or may not depending on the prevailing circumstances.

15.2. It is a form of market entry commonly used when a company wants to achieve the highest degree of control over its foreign activities. It 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.

16. **Elements of Greenfield Joint Ventures**

16.1. Greenfield joint ventures are mostly marked by investments by undertakings in the country, in 'new' areas uninhabited by any of the parties existing in the country;

16.2. The investors form a new Joint Venture vehicle for the purposes of the transaction;

16.3. The transaction entail entry into a new space or enhancement of an existing business. Businesses can enter into all sorts of Greenfield Joint Ventures including, but not limited to: -

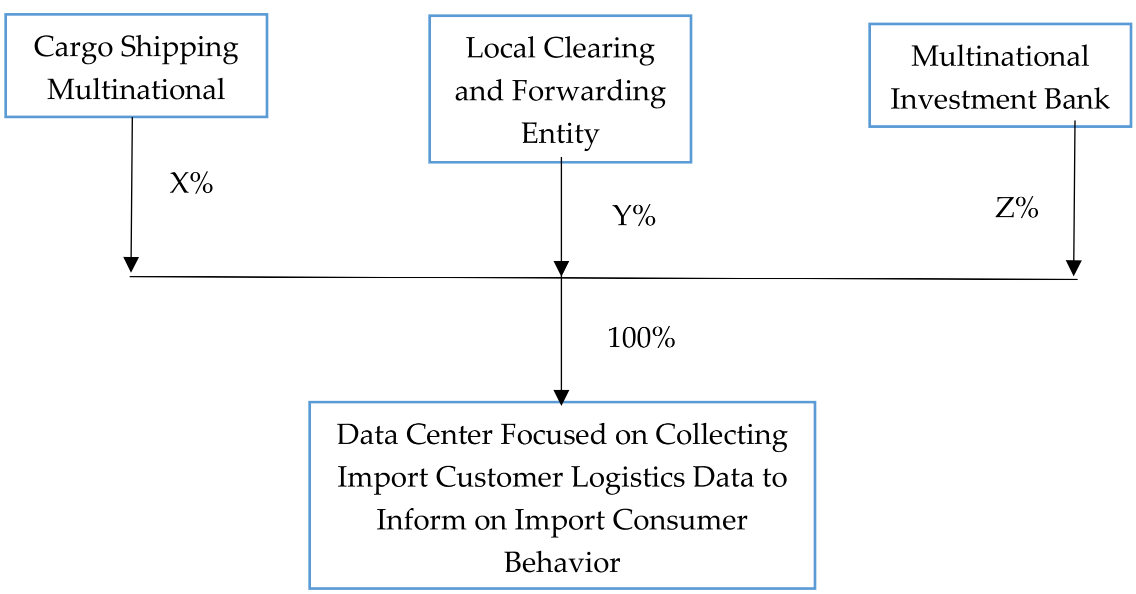
i. Instances where parties come together for the sole purpose of sharing knowledge and expertise on a new area of business and in the process, incorporate an entity to undertake this venture;

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;

iii. Undertakings utilize new information from other areas of the world to better an existing idea in the country with the help of one of the entities from the country of origin as a joint venture partner.

17. The Authority, as mandated to regulate market structure, guides that parties should seek to utilize advisory opinions before implementation of Greenfield Joint Venture transactions where they are uncertain. The guidance is informed by the fact that that the Greenfield Joint Ventures are reviewed on a case by case basis and it may not be possible to develop a general position with regards to the same.

18. A model Greenfield Joint Venture is shown in **Organogram 1.**



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SECTION 5 - BASIS FOR DETERMINATION OF ASSETS AND TURNOVER THRESHOLDS

19. **Size of the Parties Test**

19.1. The main aim of determination of assets and revenue thresholds is to inform the Authority on the likely competition impact a Joint Venture transaction is likely to have in a market. Where parent entities have higher thresholds, these thresholds can be invested in the Joint Venture thus bringing a dynamic change to competition in the market.

19.2. Parties to a Joint Venture are required to provide complete financial information when filing, even for entities who may not be deriving their turnover from the country prior to the Joint Venture.

20. **Turnover/Assets**

20.1. In reviewing the transaction, the Authority will expect parties to submit the following sets of asset and turnover figures: -

20.1.1. Turnover and asset figures of all the parents to the Joint Venture transaction, whether attributed to the parties in Kenya or not. This requirement is to enable the Authority gauge the size of the Joint Venture Parties and how they are likely to channel resources to the Kenyan Joint Venture Vehicle and its likely effect on competition; and

20.1.2. Turnover and asset figures of any other entities directly or indirectly controlled by the parent entities in Kenya;

20.1.3. Turnover and asset figures of the Joint Venture entity, where applicable.

20.2. In the determination of the relevant turnover for the purposes of computation of merger filing fees, the Authority, guided by Rules, will consider the sum of the assets or turnover figures attributable to the parent entities as well as the Joint Venture entity,

20.3. for the target and acquirer as is the practice in other notifications.

20.4. Parties will be required to pay filing fees based on the sum of the assets or turnover, whichever is higher.

SECTION 6 - ELEMENTS OF JOINT VENTURES AND ANALYSIS

21. **Competition Review and Analysis**

21.1. The competition review of full function joint venture transactions will be guided by the Rules and the *Consolidated Guidelines* among others. Specifically, the determination of whether a transaction is a vertical, horizontal or conglomerate transaction will be based on the guidance in the *Consolidated Guidelines*.

21.2. The Authority may request for additional documentation from the parties upon preliminary review of the filing.

21.3. Regarding anti-competitive effects, assessment will begin by examining the terms of the Joint Venture's agreement(s) including: the activities of the joint venture and its parent undertakings, the governance structure adopted; the joint venture's duration; the nature and extent of assets transferred to the joint venture versus those retained by the participants; and, especially, the freedom parents retain to compete with each other and with the joint venture. This is geared towards establishing whether the transaction is likely to increase concentration or facilitate coordination in a market.

21.4. Any exclusivity clauses that tend to raise barriers to entry or expansion facing third parties would also trigger review. In cases where competition exists among the joint venture parents, the investigation should probably be broadened to include making a formal market definition, estimating concentration levels, and considering the significance of barriers to entry/expansion.

22. **Public Interest Review and Analysis**

22.1. The Authority will conduct review on public interest as outlined from *Para 207 of the Consolidated Guidelines*. Specifically, the review of public interest issues will seek to identify the positive synergies such as employment, entry and growth of SMEs, expansion to international markets, among others likely to arise from the transaction.

22.2. **Efficiency**

22.2.1. 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. T*he* Authority guided by the *Consolidated Guidelines* will weigh the two and provide a balance to any likely competition concerns.

SECTION 7 - OTHER ISSUES REGARDING JOINT VENTURE TRANSACTIONS

23. The Authority seeks to provide further guidance on the new trends in the merger regime and how such aspects are viewed with respect to Joint Venture arrangements .

23.1. **The Digital Economy**

23.1.1. Ecommerce has become the mainstay in most sectors with Big data playing a crucial role in entry and operations in most digital economies. The Authority, in its review of the Joint Venture transaction 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.

23.1.2. 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, value of the data among other things.

23.2. **Remedies**

23.2.1. 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. Additionally, the Authority will direct on which of the Joint Venture parties as well as the Joint Venture Vehicle will be impacted by the mitigating factors.