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The Draft Joint Venture Guidelines

Introduction

The Competition Authority of Kenya ("CAK") has published draft Guidelines (the "Guidelines") on Joint Ventures ("JVs") to provide clarity and certainty on the competition regulatory framework in respect of JVs.

JVs, while positive, may also lessen or have restrictive effects on competition and that is why JVs fall under CAK's oversight.

Which transactions qualify as JVs?

Under the Guidelines, a JV refers to the integration of operations between two or more separate firms, where:

i. The enterprise is under the joint control of the parent firms;
ii. Each party makes a substantial resource contribution to the JV;
iii. The enterprise exists as a business entity separate from its parents; and
iv. The JV 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.

A JV may be formed by either, incorporating a special purpose limited liability company or a limited liability partnership as JV vehicle, or entities entering into an agreement to engage in business that amounts to a full function JV.

When does joint control exist?

Joint control will exist where there is contractually agreed sharing of control between parties to a JV. Joint control is deemed to exist, when an entity can determine the strategic commercial decisions of the JV, for example, to veto strategic decisions, or through equal voting rights. This is determined from the JV documents.

Full Function JVs

Under the CAK's Consolidated Guidelines on the Substantive Assessment of Mergers (the "Merger Guidelines") and the Competition (General) Rules, 2019 (the "Rules"), a JV is a 'merger' if it is a 'full function' JV. There are three essential characteristics of a full function JV:

i. Functional autonomy – The JV operates on a market and performs the functions normally carried out by other undertakings operating in the same market;
ii. Duration – The JV must perform for a period of ten years or more; and
iii. Resources – The JV must have the necessary resources in terms of finance, staff (including management dedicated to its day-to-day business) and assets.

Greenfield JVs

Greenfield JVs are also notifiable to the CAK where the parent undertakings' objective is to make the JV be full function – that is, the greenfield JV has to meet the elements that make up a full function JV.

Greenfield JVs are established to conduct new business separate from what its parent undertakings conduct. The new business can combine the parent entities' know-how and information to start the new business or be an entirely novel concept developed particularly to undertake that venture.

Similarly, greenfield JVs may take the form of a JV vehicle established by the parent undertakings, or may be set up contractually by the parties.

Notification Thresholds

The CAK will expect the parents to the JV transaction to submit information on their respective turnovers and assets as well as those of the JV entity (where applicable). Parties to the JV are required to issue CAK with the complete financial information when filing. This assessment on the size of the parties informs the CAK on the likely competition impact a JV transaction is likely to have.

Identifying the 'target' and 'acquirer' in a JV may be hard compared to identifying them in a classic mergers and acquisition transaction. Clarity is needed in the Guidelines to determine whether for the JV established, the applicable test is the parent's assets that will be combined or contributed to the JV or the gross revenues generated by assets to combined or contributed to the JV. This is because by implication the JV will not be in existence at the time of notification and therefore will not have any assets or turnover. Certain companies, because of their size, would then be required to notify CAK of any JVs regardless of the fact that the amounts to be contributed to the JV may be minimal.

For the computation of merger filing fees, the CAK will be guided by the thresholds provided in the Rules. The CAK will consider the sum of the assets or turnover figures attributable to the parent entities as well as the JV entity. This requirement is to enable the CAK to quantify the size of the JV and how the parent entities are likely to channel resources to the JV.

Notification Procedure

Once it has been established that the JV is full-function, the parties must notify it to the CAK before implementation. The parent entities will separately submit transaction documents and fill the merger notification forms as JV parents while the JV vehicle, if a separate, will also fill the form.

CAK Considerations in assessing a JV

Three issues determine the assessment of a JV by the CAK:

i. Effect on competition. Some of the factors the CAK will look at are the freedom parents retain to compete with each other and with the JV and the nature and extent of assets transferred to the JV versus those retained by the parents;

ii. Public interest. In line with the Merger Guidelines, CAK applies a balancing approach in assessing public interest and effect on competition while assessing efficiency gains from the JV transaction, such as the effect on employment; and

iii. Efficiency. The parties to the JV must show that any efficiencies generated (such as technological benefits) outweighs the harm on competition.

CAK also notes the crucial role big data plays in the digital economy and therefore on competition, information on custody of data pre and post transaction and its value shall also be a key consideration in CAK's assessment.

Conclusion

Business arrangements are evolving and JVs are an efficient way of adapting to the ever-changing business industry. We have seen market players enter into collaborative arrangements, with the effect of additional economic benefits to the entities in the JV. This does not discount the ability of these JVs to hinder competition, to the consumer's detriment. In the adoption of the Guidelines, we see CAK's pro-active role in encouraging business efficiencies through JVs. The benefits of a JV would include access to greater resources, for example in technology, access to new markets and distribution networks and limited risk and costs liabilities.

Presently, the Guidelines are a draft but we will keep you updated as to any developments regarding their coming into force and implementation.