Approved for tabling.

REPUBLIC OF KENYA

SNA
18/6/19

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – THIRD SESSION

THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS AND HOUSING

REPORT ON THE INQUIRY INTO THE PROPOSED KENYA AIRWAYS' PRIVATELY INITIATED INVESTMENT PROPOSAL TO KENYA AIRPORTS AUTHORITY

DIRECTORATE OF COMMITTEE SERVICES
CLERK'S CHAMBERS
PARLIAMENT BUILDINGS
NAIROBI

JUNE, 2019

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LIST OF ABBREVIATIONS AND ACRONYMS

AFD	Agence Française de Développement.
ANS	Air Navigation Service.
ASK	Available Seat Kilometre.
CAPEX	Capital Expenditure.
CASK	Cost per Available Seat Kilometre.
CBA	Collective Bargaining Agreement.
CEO	Chief Executive Officer.
DTB	Diamond Trust Bank.
ET	Ethiopian Airlines.
IATA	International Air Travel Association
ICAO	International Civil Aviation Organization.
I&M	I & M Bank.
KAA	Kenya Airports Authority.
KAAO	Kenya Association of Air Operators.
KALPA	Kenya Airline Pilots Association.
KAWU	Kenya Aviation Workers Union.
KCB	Kenya Commercial Bank.
KQ	Kenya Airways PLC.
KRA	Kenya Revenue Authority.
NBK	National Bank of Kenya.
NIC	National Industrial Credit Bank.
OPEX	Operating Expenses
PIC	Public Investments Committee.
PIIP	Privately Initiated Investment Proposal.
PPP	Public Private Partnership.
SAATM	Single African Air Transport Market.
USA	United States of America.

LIST OF STATUTES

State Corporations Act, Cap. 446

Kenya Airports Authority Act, 1991.

East African Community Customs Management Act, 2004.

Civil Aviation Act, 2013.

Public Private Partnerships Act, 2013.

Value Added Tax Act, 2013.

Excise Duty Act, 2015.

Companies Act, 2015.

Public Procurement and Asset Disposal Act, 2015.

Miscellaneous Fees and Levies Act, 2016

Public Service Commission Act, 2017.

LIST OF REGULATIONS

Public Private Partnership Regulations, 2014

D.P.

LIST OF CASES

ELRC Case Number 68 of 2019 Kenya Airports Authority vs Kenya Aviation Workers Union

Constitutional Petition Number 57 of 2019

CHAIRPERSON'S FOREWORD

The Departmental Committee on Transport, Public Works and Housing is established and mandated under Standing Order No. 216 to;

(a) *investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments; and*

(g) *make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.*

Pursuant to its general power of inquiry, and in response to the concerns raised by the general public, the Committee resolved to inquire into the Kenya Airways' (KQ) Privately Initiated Investment Proposal (PIIP) to Kenya Airports Authority (KAA) with a view of presenting to a report to the House under the following terms of reference;

1. Policy issues;
2. Human resource issues;
3. Legal compliance; and
4. General issues of concern to the people.

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The Committee wrote to key stakeholders in the transport subsector and placed an advert in the local dailies on Friday, March 29, 2019 inviting them to submit their views on the Proposal. Thereafter, the Committee held several meetings where it met with the stakeholders to consider the submissions received as incorporated in this report. Memoranda were received from members of the public and key stakeholders in the aviation sector through the Office of the Clerk of the National Assembly. The Committee further held meetings with Officials from the State Department of Transport, Kenya Airways, Kenya Airports Authority, Kenya Civil Aviation Authority (KCAA), the Kenya Aviation Workers Union (KAWU), the Kenya Airline Pilots Association (KALPA) and the Kenya Association of Air Operators (KAAO), the National Treasury and the Officer of the Attorney General, among others.

Thereafter, the Committee proceeded for a report writing retreat which provided the opportunity to consider the submissions of the public and stakeholders and to further draft, consider and approve its Report.

D.P.

The Committee appreciates the assistance provided by the Office of the Speaker and of the Clerk of the National Assembly that enabled it to conduct its inquiry.

I take this opportunity to thank all Members of the Committee for their input and valuable contributions during the deliberations on the inquiry.

Pursuant to provisions of Standing Order 199 (6), and on behalf of the Departmental Committee on Transport, Public Works and Housing, it is my pleasant privilege and honor to present to this House the Report of the Committee for adoption.

HON. DAVID PKOSING, MP
CHAIRPERSON
COMMITTEE ON TRANSPORT, PUBLIC WORKS AND HOUSING

1.0 PREFACE

Committee Mandate

1. The Departmental Committee on Transport, Public Works and Housing is established under **Standing Order 216** whose mandate pursuant to the Standing Order 216(5) is as follows—

   (a) Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;

   (b) Study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;

   (c) Study and review all legislation referred to it;

   (d) Study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;

   (e) Investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;

   (f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (*Committee on Appointments*);

   (fa) examine treaties, agreements and conventions;

   (g) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;

   (h) consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and

   (i) Examine any questions raised by Members on a matter within its mandate.

2. The Second Schedule to the Standing Orders mandates the Committee to consider matters relating to the following subjects:-

   a) Transport;
   b) Roads;
   c) Public works;

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d) Construction and maintenance of roads, rails and buildings;
e) Air and seaports; and
f) Housing.

3. In executing this mandate, the Committee oversees various State Departments, namely:

i. The State Department of Transport;
ii. The State Department of Infrastructure;
iii. The State Department of Housing and Urban Development;
iv. The State Department of Public Works; and
v. The State Department of Shipping and Maritime Affairs.

Membership of the Committee

4. The Committee was constituted by the House on Thursday, 14th December, 2017 comprising of the following Members:-

	Names	Party	Constituency
1.	Hon. David Pkosing (Chairman)	Jubilee	Pokot South
2.	Hon. Moses Kuria (Vice Chair)	Jubilee	Gatundu South
3.	Hon. Dominic Kipkoech Koskei	Jubilee	Sotik
4.	Hon. Peris Pesi Tobiko	Jubilee	Kajiado East
5.	Hon. Kulow Maalim Hassan	EFP	Banissa
6.	Hon. Mugambi Murwithania Rindikiri	Jubilee	Buuri
7.	Hon. Samuel Arama	Jubilee	Nakuru Town West
8.	Hon. Shadrack John Mose	Jubilee	Kitutu Masaba
9.	Hon. Rigathi Gachagua	Jubilee	Mathira
10.	Hon. Rehema Dida Jaldesa	Jubilee	Isiolo
11.	Hon. Ahmed Bashane Gaal	PDP	Tarbaj
12.	Hon. David Njuguna Kiaraho	Jubilee	Ol Kalou
13.	Hon. Johnson Manya Naicca	ODM	Mumias West
14.	Hon. Tom Mboya Odege	ODM	Nyatike
15.	Hon. Suleiman Dori Ramadhani	ODM	Msambweni
16.	Hon. Ahmed Abdisalan Ibrahim	ODM	Wajir North
17.	Hon. Gideon Mutemi Mulyungi	WDP	Mwingi Central

18.	Hon. Savula Ayub Angatia	ANC	Lugari
19.	Hon. Vincent Kemosi Mogaka	Ford K	West Mugirango

Committee Secretariat

5. The following officers facilitate the Committee in its activities -

1. Ms. Chelagat Tungo Aaron	**Clerk Assistant I**
2. Mr. Ahmed Salim Abdalla	**Clerk Assistant III**
3. Ms. Mercy Wanyonyi	**Legal Counsel I**
4. Mr. Walala Ronald	**Legal Counsel I**
5. Mr. James Muguna	**Research Officer III**
6. Mr. Abdinasir Moge Yusuf	**Fiscal Analyst I**
7. Mr. Collins Mahamba	**Audio Officer**
8. Ms. Zainabu Wario	**Sergeant at Arms**

CHAPTER TWO

2.0 BACKGROUND

6. The Kenya Airways PLC (KQ) submitted a Privately Initiated Investment Proposal (PIIP) to Kenya Airports Authority (KAA) in a document dated 3rd October, 2018 dubbed "*Project Simba Public Private Partnership (PPP) for Jomo Kenyatta International Airport (JKIA)*". **Annex I**
7. In the PIIP document, KQ noted that the Proposal was informed by the fact that the aviation sector is critical to the development of the Kenyan economy. According to KQ estimations, the aviation industry contributed USD 3.2 billion and supported 620,000 jobs in 2014 alone. KQ further noted that despite the strategic importance of the aviation sector, the sector faced numerous challenges in the past which have limited its potential to compete internationally for business customers and tourist traffic.
8. KQ noted that it is in light of this challenging background that it proposes a takeover of the Jomo Kenyatta International Airport (JKIA) operations and management through a 30-year concession agreement. The objective of the proposal was given as ensuring efficiency of both JKIA and KQ operations through central management and leveraging on possible synergies to support JKIA's desire for becoming a regional hub and positively impacting the aviation sector's contribution to the economy.
9. The expected outcome from the implementation of the PIIP is given as the growth of the Country's Gross Domestic Product (GDP), development in different segments of the economy, job creation within airline-related industries, increased support for export of goods and services, and transfer of Capital Expenditure (CAPEX) and Operating Expenses (OPEX) risks from the public sector to the PPP partner. KQ further noted that their proposal is in line with practices of other countries which use aviation sector and in particular national airlines and flagship airports as a catalyst for economic growth as seen in Ethiopia, the United Arab Emirates and Qatar. In summary, the PIIP highlights the following areas—

<u>KAA Inefficiencies</u>

10. According to Kenya Airways, some of the inefficiencies proposed to be resolved by the PIIP include JKIA failing to compete and losing its role as the international hub for Kenya. KQ noted that—

    (a) Nairobi airport is operating in a competitive environment dominated by the increasing role of neighbouring Addis Ababa and Gulf airports.

(b) Over the last few years Doha and Dubai have become world-class airports with best-in-class infrastructure to serve millions of passengers per year as a result of massive investment by the respective countries in the airports assets both in terms of the airport capacity and quality of infrastructure to serve passengers.

(c) JKIA is losing its status to competition and it may soon become a hub for East Africa region only and if no significant changes are made its role might be then taken over by Addis Ababa, followed by the new airport, to be constructed in Ethiopia, which will mainly serve its national carrier, Ethiopian Airlines (ET).

(d) JKIA has been under-invested over the years and requires significant CAPEX to improve the quality of services provided both to passengers and airlines which operate to and from Nairobi. The assets requiring upgrade include: runway, aircraft parking and aprons; terminals and commercial areas.

(e) Lack of investments within the next 5 years will result in a drastic reduction of JKIA's capacity from the current 7.2 Million passengers to approximately 5 Million passengers per year (30% drop in traffic). The PIIP and realization of its planned CAPEX investments will spur traffic growth (up to 11 million passengers in 2022, 16 million in 2030 and 34 million in 2050).

(f) Significant upgrade of JKIA infrastructure and need for growth of the capacity requires significant investments within the concession period. JKIA generates significant profit to Kenya Airports Authority (KAA). It is, however, consumed and eroded through losses generated every year by local airports and airstrips. JKIA's profitability is 45% compared to KAA's 24%. The gap is a consequence of losses incurred by 17 financially unviable airports and airstrips.

(g) the current setup does not allow efficient accumulation of funds sufficient for development of the hub in Nairobi and making it a prime aviation asset in Kenya.

(h) the slower growth or decline of passengers at JKIA will negatively impact size of revenues and profits of local domestic airlines and airports. Although this would mean temporary problems with financing local airports in the short run, it will definitely support their financial sustainability in the long-term perspective.

11. KQ further noted that the PIIP seeks to resolve the inefficiency of KAA's improper balance of revenue sources. In this regard, it notes that

(a) Modern, world-class airports earn their profits mainly from passenger-related sources and it is for this reason that some of the international airports do not charge traditional landing fees in order to attract as many customers as possible.

(b) However, JKIA is highly-dependent on aeronautical revenues from Airport Passenger Service Charge (APSC), landing fees, air bridge and fuel concessions which constitute around 80% of its total revenues. JKIA is not utilizing its potential to generate revenue from commercial areas and other non-aeronautical fees charged from companies operating at the airport. According to best-practices, KAA should build its own profit centres acquiring margin from serving end-customers. As such, utilization of the non-aeronautical revenues shall bring additional income which can significantly support financing the CAPEX investments required to grow the airport's capacity and improvement of its service quality.

12. Additionally, KQ stated that it has the potential to increase the efficiency of JKIA operations through introduction of world-class standards.

Transaction Structure

13. KQ noted that it considered various options to address the inefficiencies identified. The PIIP proposes the concession of JKIA to Kenya Airways, accompanied by sectoral reforms to allow Kenya's aviation to shift from a defensive strategy to a strategy focused on gaining market share. According to KQ, the most efficient way of using national assets to work for the long-term benefit of the Country, and to this end the overriding objective that led to its proposal under the PIIP, was to ensure KQ's control over the operations of JKIA to enable it to make unhindered investments in the airport.

14. KQ therefore proposes to form a Special Purpose Vehicle (SPV) specifically dedicated to operating, managing and developing JKIA for a period of 30 years. KQ and the SPV are to fall under one management structure while other Kenyan aerodromes are to continue operations under KAA.

15. The concession to be granted to the SPV mandates it to operate, maintain and develop JKIA; operate and control JKIA assets, all revenue sources and operating costs; ensure

compliance with local, regional and international standards and norms; and collect charges for the use of JKIA by various users. It is structured in line with the provisions of section 61(1)(d) of the Public Private Partnerships Act, 2013 which allows for such a framework. The SPV is to operate, maintain, rehabilitate and upgrade existing JKIA infrastructure and facilities and charge user fees while paying concession fees to KAA.

Key Transaction elements

16. In the PIIP, KQ proposes that current JKIA-related liabilities remain in KAA. It notes that the adequacy of the concession fee will ensure that KAA is able to repay existing loans and interests.

17. As regards JKIA staff, KQ proposes to engage KAA, the Government, the employees, the union to ensure that an acceptable solution is arrived at in relation to the employees. As an initial proposal, KQ commits to second all the current JKIA staff to the SPV on the same terms for a period of 12 months. After the secondment period, the KQ is to give the employees the option of being transferred to the SPV upon which the employees will receive the transfer proposal. Potential employees not transferred to the SPV after secondment period will be reallocated by KAA to other airports and airstrips. Responsibility for any employee related costs is to be defined by parties in the process of negotiations.

18. As per the proposal, the SPV will be 100% owned by KQ but will allow for potential minority investments by other parties in the future. KQ commits not to lose control over the SPV during the whole concession duration.

19. For the management of the SPV, KQ is to rely on current JKIA management, staff and an external Airport Advisor to implement world-class solutions and best practices in running the airport. Some of the its pre-selected Airport Advisors include TAV Airports, the leading airport operator in Turkey, Groupe ADP ,an international airport operator based in Paris, Schiphol Amsterdam Airport, Egis Group, a French engineering and consulting group and Flamingo International ,a Dubai based global duty free and travel retail operator.

20. KQ further commits to pay a regular concession fee for disposing the defined assets. Concession fee will consist both of a fixed component (to cover KAA liabilities) and a variable one based on the revenue generated by JKIA in the last, audited financial year (revenue-sharing mechanism). KQ noted that the proposed project is self-financing and

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does not require additional Viability Gap Funding (VGF), such funding only potentially becoming necessary to support KAA with financing any deficit with regard to the operations of the other local airports and airstrips.

21. KQ also commits to minimum CAPEX investments in runway, parking, aprons and terminals. The minimum investment requirements are subject to negotiations and agreement with KAA. KQ further assumes a capital structure for the project of 80: 20 of debt to equity ratio. Attached to the PIIP is a financial model estimating the expected profitability of the Project and calculating the value of concession fee to be paid to KAA on annual basis.

22. For the successful implementation of the PIIP, KQ notes that it will require various regulatory amendments and tax exemptions, the PIIP defines regulatory amendments necessary to execute the Project as well as other changes and tax exemptions which will significantly support achievement of Project objectives. These included amendments to—

    i. Section 2, 8, 12, 17A, 17B, 17C and 19 of the KAA Act to exclude charges that will be collected by the SPV from the funds that must be remitted to KAA; to exclude JKIA from the administration, management and control of KAA and exclude JKIA property from the exclusive administration, control and management by KAA; to enable KAA delegate its powers to administer, control, operate and maintain JKIA to the SPV; to expressly allow KAA to enter into concession agreements with any person to operate, administer, control and manage one or more aerodromes; to exclude the remitting of charges collected from JKIA to the KAA Fund and direct the collections to the SPV and to release all JKIA assets from any existing security in favour of KAA lenders and exclude them from automatically being charged during the period of the concession.

    ii. Paragraph 2 of the Kenya Airports Authority Concession Order to exempt tariffs collected from JKIA from being remitted to the KAA and direct the tariffs to the SPV.

    iii. Section 3 and 6A of the Air Passenger Service Charge Act to allow for the collection of the charge by the SPV or its payment into a Fund created for the benefit of the SPV, to ring-fence the APSC collected at JKIA from other airports and to make it mandatory for the Commissioner to pay the APSC collected from passengers at JKIA directly to the SPV or a Fund established for the benefit of the SPV.

iv. revoke the Air Passenger Service Charge Act (Apportionment) Order and gazettement of a new order for the SPV to benefit APSC.

v. Section 639 (1) of the Companies Act and the Income Tax Act to enable KQ offset its tax losses from the profits of the SPV.

vi. Section 5 of the First Schedule to the Value Added Tax Act to zero-rate the value added tax on all taxable supplies made to and by the SPV and KQ.

vii. Section 5 Part A of the Second Schedule to the Excise Duty Act to exempt all excisable goods imported by the SPV and KQ from excise duty; and

viii. Section 59 of the Public Private Partnerships Act to provide for circumstances where a special dispensation may be given for the use of vehicles other than a limited liability company and allow for the registration of the SPV as a limited liability company.

23. KQ further proposes a number of key investment requirements including, in the first instance, rehabilitation of Taxiways and Parking Aprons to reduce the time an aircraft remains on the runway and as a consequence increase the capacity of the airport; remodeling of Terminal 1B, C, D to increase the capacity of the terminal by 3 million passengers annually; and upgrading of the Category 1 runway to Category 2 thus increasing the capacity of the airport. As a second priority, KQ proposes to commence Phase I of Terminal 2 construction which is expected to result in a capacity of approximately 10 million passengers annually when completed and thereafter Phase II construction which is expected to result in a capacity of around 20 million passengers.

24. Additionally KQ stated that it will consider investing in private jets and VIP terminals to satisfy the market needs and enlarge the functionalities of JKIA.

2.1 Oversight role of the National Assembly and jurisdiction of the Departmental Committee of Transport Public Works and Housing, to undertake inquiry

25. Article 95 of the Constitution mandates the National Assembly amongst others to oversight state organs and deliberate issues of concern to the people.

26. The Departmental Committee on Transport, Public Works and Housing is established pursuant Standing Order 216 and mandated amongst others to, "*investigate, inquire into and report on all matters relating to the mandate, management, activities and estimates of the assigned Ministries and departments*".

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27. During a meeting held by the Committee, Members deliberated on reports concerning a proposed take-over of JKIA operations by KQ or a merger of KQ and KAA in response to various media reports and concerns raised by members of the public. In light of the alarm and confusion caused by the reporting, the Committee resolved to inquire into the alleged proposed takeover between KQ and KAA with a view of securing the interests of the public over the running of JKIA, Kenya's principal international airport.

2.2 Speaker's Ruling on the mandate of the Committee vis-à-vis that of the Public Investments Committee

28. In response to a Point of Order raised by the Leader of the Majority Party on alleged conflict of mandate between the Public Investments Committee (PIC) and Departmental Committees, the Speaker of the National Assembly issued a Communication on Tuesday, 21st March, 2019. **Annex II**

29. In the Communication which touched on the place of a progress report tabled by PIC on *The Inquiry into the Proposed Takeover of Jomo Kenyatta International Airport (JKIA) by Kenya Airways (KQ)*, the Speaker noted that the Chairpersons of PIC and the Departmental Committee on Transport, Public Works and Housing had separately written to him on February 20, 2019 and February 21, 2019, respectively, claiming exclusive jurisdiction of their respective Committees to examine the proposed merger between the two institutions.

30. The Speaker noted that his office responded to the Chairperson of the Departmental Committee on Transport, Public Works and Housing and proceeded to broadly outline the thrust of the response including the question of whether the proposed commercial arrangement between KAA and KQ regarding the management of the Jomo Kenyatta International Airport is a matter falling under the mandate of the Public Investments Committee or the relevant Departmental Committee.

31. The Speaker guided Members that Parliament's involvement in the conclusion of the Kenya Airways proposal could not be overlooked, irrespective of the nature of the commercial arrangement. In addition, the Speaker noted that consideration of the matter fell into two categories. On one hand, on account of KAA being a state corporation wholly owned by the Government, PIC was at liberty to procedurally invoke the provisions of Standing Order 206(6)(c) and examine whether the affairs of the public investments made or being made by the KAA, are in accordance to sound financial or

business principles and prudent commercial practices. On the other hand, the Speaker noted that, in view of the provisions of Standing Order 216(5), the Departmental Committee on Transport, Public Works and Housing is mandated to inquire into the policy aspects of the commercial arrangement between KAA and KQ.

32. In allowing the two inquiries to proceed alongside each other, the Speaker confined the activities of PIC to the financial and expenditure aspects of the reservations of the Auditor General on the proposed transaction as well as omissions and/or commissions on the part of the KAA and the Departmental Committee on Transport, Public Works and Housing, to matters of *policy, human resource, compliance with due process of law and generally addressing any issues of concern to the people as contemplated under Article 95 of the Constitution*. In conclusion the Speaker called on both Committees Members to uphold high standards, be mindful of the strategic interests of the nation and the welfare of the present and future generations.

2.3 The Inquiry and terms of reference

33. The Committee, pursuant to the Communication from the Speaker issued on Tuesday, 21st March, 2019 and the resolution made during its meeting held on Tuesday, 26th March, 2019 proceeded to conduct an inquiry on Kenya Airways' (KQ) Privately Initiated Investment Proposal (PIIP) to Kenya Airports Authority (KAA) with the following Terms of Reference (ToR's) –

   i. the policy,
   ii. human resource,
   iii. legal compliance and
   iv. issues of concern to the people as contemplated under Article 95 of the Constitution,

2.4 Method of Work

34. In conducting the Inquiry, the Committee undertook a number of activities including requesting for and receiving written submissions, conducting research and analysis on various aspects of the inquiry as defined by the terms of reference, conducting meetings with various stakeholders and receiving oral submissions among others.

2.4.1 Meetings of the Committee

35. The Committee held its first meeting with regard to the Inquiry on Tuesday, 26th March, 2019 where it adopted a work plan, identified relevant stakeholders for engagement with

the Committee and prepared a framework for meetings with the identified stakeholders. The Committee held eight (8) meetings with stakeholders and thereafter proceeded for a working retreat to consider the submissions by the stakeholders and the public and to further draft, consider and approve its Report. The Report of the Committee contains a number of recommendations based on the Terms of Reference adopted by the Committee. The Minutes of the meetings of the Committee are annexed as **Annex III.**

2.4.2 Stakeholder Meetings and Public Participation

36. The Committee, through the Office of the Clerk of the National Assembly formally invited the Cabinet Secretary and Principal Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works; the Chairperson and Chief Executive Officer of Kenya Airways; the Chairperson and Chief Executive Officer of Kenya Airports Authority; the Kenya Civil Aviation Authority (KCAA); the Kenya Aviation Workers Union (KAWU); the Kenya Airline Pilots Association (KALPA); and the Kenya Association of Air Operators (KAAO) to appear and make submissions with regard to the Inquiry. The letters are annexed as **Annex IV.**

37. In addition, the Committee invited interested members of the public to make representations addressing the ToRs of the Inquiry vide an advert in the dailies of Friday, March 29, 2019. The advertisement is annexed as **Annex V.**

    In response to the invitations and advertisement, the stakeholders duly appeared before the Committee and made both oral and written submissions. The Committee received fifty two (52) written submissions from the Public. The written submissions are annexed as **Annex VI**

2.5.3 Report lay out

38. The report is divided into chapters which cover the various aspects of the inquiry's terms of reference.

CHAPTER THREE

3.0 POLICY ISSUES

3.1 Submissions Received

Stakeholders made submissions on policy issues as follows—

Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works

39. The Cabinet Secretary (CS) for Transport, Infrastructure, Housing, Urban Development and Public Works submitted that the Cabinet, during its meeting held on 29th May, 2018 considered a Memorandum he jointly submitted with the CS for the National Treasury and Planning aimed at consolidating Kenya's aviation assets, **Annex VII.**

The meeting resolved to grant policy approval for KQ and KAA to negotiate and agree on a framework to restore Nairobi as the civil aviation hub of choice in Africa. The meeting further required a substantive Memorandum to be submitted to Cabinet for consideration and approval upon conclusion of the proposed framework and directed the two CSs and the Attorney General to take appropriate action.

40. The Cabinet Secretary further submitted that the Cabinet Memorandum and the White Paper on "*Strategy for Continuous and Sustainable operations of Kenya Airways PLC*" sought to restore Nairobi to its place as the civil aviation hub of choice in Africa and enhance Kenya's economic competitive edge. The CS noted that Kenya has failed to adapt to the rapidly evolving global aviation landscape leading to the current turbulence experienced by KQ as well as loss of business by Jomo Kenyatta International Airport (JKIA) to other competing hubs. This market situation, in his view, has therefore created a need for a comprehensive restructuring of the entire aviation sector.

41. The CS noted that KQ has over time been pushed out of the market by competitive airlines which are very strongly protected by their own Governments. Within a period of nine (9) years, Ethiopian Airlines (ET) has grown from half the size of KQ to three times the size of KQ.

42. The CS further submitted that Kenya's aviation model does not facilitate the growth of both KQ and local airports, especially JKIA. This evidences an urgent need to find a solution that will establish KQ as one of the biggest African carriers and JKIA as a leading international aviation hub. It was his view that KQ and JKIA should be treated as national assets and the proposed restructuring be viewed in geopolitical rather than financial terms. In

light of this, the two parties opted to engage in a Concession Agreement framework under the PPP Act, 2013 in order to enjoy the advantage of executing the project rapidly and efficiently.

Kenya Airways

43. The KQ CEO, Mr. Sebastian Mikosz, accompanied by KQ Chairperson, Mr. Michael Joseph, appeared before the Committee. The CEO informed the Committee that the next few years will determine which airlines dominate the African skies and which airline will be regional carriers feeding passengers to the main hubs. He further noted that the Kenyan market is among the most interesting in Africa owing to significant number of companies with headquarters in Kenya and a liberalized market with a large number of premium leisure tourists.

44. However, the CEO noted that the conditions surrounding KQ and JKIA are alarming. It was his submission that Kenyan aviation has lost its market share over the last couple of years to its competitors, especially the Ethiopian Airlines (ET) which has gradually grown and currently has 153 destinations and a fleet of 100 aircrafts and 59 on order, compared to KQ which has 53 routes and a fleet of 40 aircrafts with none on order.

45. The CEO further submitted that the Kenyan aviation sector is facing a steady decline, characterized by the turbulence experienced by the national carrier as well as job loss of business at JKIA to other competing hubs. He noted that the key reasons for this situation include different mandate of Kenya aviation and competition, liberalization of aviation market in Africa and Kenya, aviation asset(s) not being integrated and opposing interests between the national airline and the local airport hub. According to KQ, if no positive changes are made to consolidate the Country's aviation assets, whole market growth will be consumed by foreign airlines.

46. The CEO noted the important contribution of airlines to the GDP of a country and that majority of African and Middle Eastern carriers have opted to use their airlines and airports as instruments of economic development and geopolitical presence, rather than as instrument to maximize the benefits and dividends for airline shareholders. In this regard, it was his submission that KQ currently competes with airlines whose mandate is to grow the economy rather than focus on profit. These airlines are strongly protected by their Government and operate in an integrated model with the airport hub making it easy to lower their ticket prices.

47. The CEO enumerated the benefits of growing a Country's aviation market as job creation, stimulation of economic growth, increased competitiveness of the economy,

improved connectivity, skills development for Kenya and the region, growth of the tourism industry, establishment and sustenance of Nairobi as a Financial Centre and as a hub for, support for exports of horticultural produce and other goods and imports, among others.

48. As an alternative option, KQ proposed the creation of an aviation holding company wholly owned by the Government of Kenya with KQ and an Airports SPV as its fully owned subsidiaries. To this end, KQ would have to be nationalized with an appropriate guarantee being issued to KQ shareholders to allow for its delisting. In its proposal, KQ noted that the Aviation Holding Company would ensure synchronization of goals and growth plans in the best interest of Kenya. Additionally, KQ noted that the proposed Airports SPV would accommodate selected, strategic airports in Kenya and allow it to build strong hub and sub-hubs while Kenya Airports Authority would remain a parastatal outside the Holding Company and support the development of remaining aerodromes through an Airports and Airstrips Development Fund. The proposed structure is as shown in Figure 1 below.

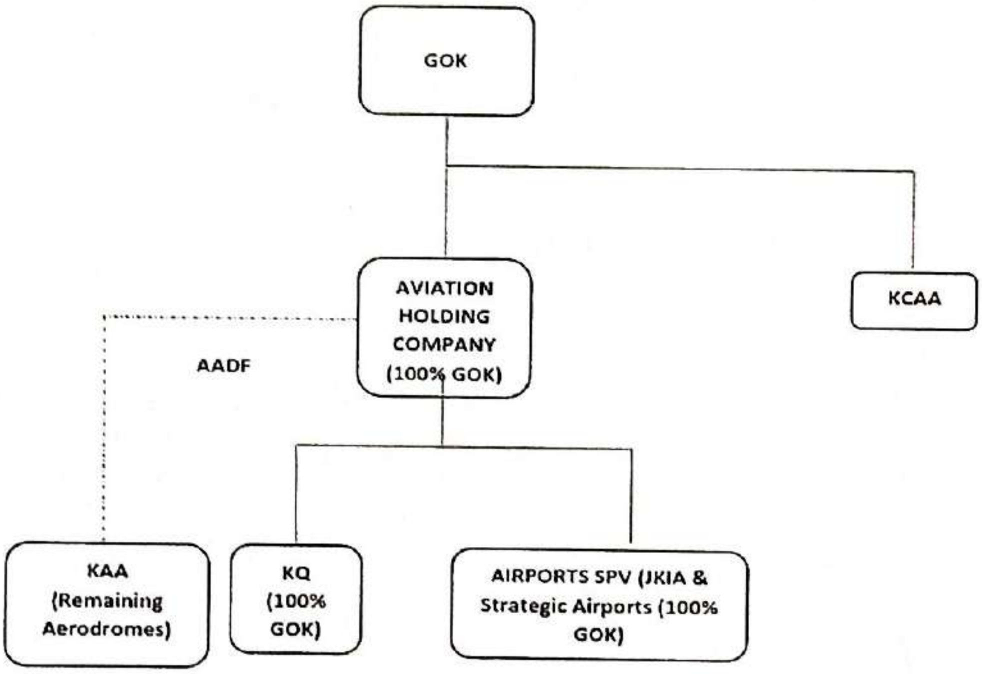

Figure 1.

49. For the proposed structure to work, KQ noted that apart from its nationalization and delisting, the companies in the proposed structure would have to benefit from exemptions from the State Corporations Act, the Public Procurement and Asset Disposal Act, the Public Finance Management Act and the Public Service Commission Act to enable them run as

commercial enterprises with minimal bureaucracy. In addition, it was their view that the entities under the Holding Company would have to benefit from concessional rates of taxation and exemption from a number of taxes to lower their costs and improve their liquidity.

Kenya Airports Authority

50. The Chief Executive Officer of Kenya Airports Authority, Mr. Jonny Andersen, appeared before the Committee accompanied by the KAA Chairperson, Mr. Isaac Awuonda. The CEO noted that the rationale for the PIIP is the implementation of a Government Policy to consolidate key aviation assets and realize significant operational efficiencies and synergies, restore the aviation sector's regional and international competitiveness, protect JKIA's regional hub status, improve diversification and utilization of JKIA resources and support KQ's turnaround programme. He further noted that as a key partner for JKIA, KQ's success is aligned to the success of KAA.

51. According to the CEO, the Kenyan aviation sector should be restructured due to the fact that despite East Africa's national airports registering capacity growth measured by Available Seat Kilometers (ASK) of nearly 41% between 2013 and 2017, JKIA's market share has declined steadily from a high of 47% to 34%. In contrast, the market share of Bole International Airport, Ethiopia has grown from 34% to 44% over the same period.

52. It was the CEO's further submission that KQ accounts for over 40% of KAA's business and revenues. He demonstrated the level of the symbiotic relationship between KAA and KQ by noting that as at 31st March, 2019, KQ owed KAA more than Kshs 5.54 billion in relation to unpaid Air Passenger Service Charge, landing fees, rent and other charges.

53. Noting the strategic contribution of the aviation sector to the Country's economic development, the need to protect JKIA's regional competitive position and KAA's commercial interests, the CEO submitted that KAA supports an engagement with KQ geared towards optimizing the Country's aviation assets.

54. As an alternative option and based on strategic and efficiency considerations, KAA proposed a Holding Company Structure under which the country's main aviation assets will be brought under one roof with the separate entities operating as subsidiaries to leverage on the balance sheet value of the assets and to optimize on their performance. In their proposal, the Kenya Aviation Holding Company Limited (KAHCL) would be fully owned by the Government and initially have four separate subsidiaries, KQ, JKIA Company, Kenya

Airports Company and Kenya Aviation Academy Limited. In their opinion, the structure will allow KAA to focus on improving the financial and operational performance of the facilities under its mandate without being subsidized by JKIA as is currently the case. In addition, it was their view that the Holding Company will also consider establishing other aviation subsidiaries in the future, including a Maintenance Repairs and Operations (MRO) Centre for Africa.

55. With regard to the role of the Kenya Airports Company Limited under the proposed structure, KAA submitted that the company mandated to run the other aerodromes would not be cannibalized and left without resources as the Holding Company will be under obligation to fund all entities in the structure. For purposes of harnessing economies of scale and creating a regional centre of excellence in aviation training, KAA proposed the establishment of the Kenya Aviation Academy Limited as a subsidiary to the KAHC bringing together the KQ Pride Centre, the East African School of Aviation run by KCAA and the KAA Training Academy.

56. The proposed structure, benchmarked with jurisdictions such as South Africa, Egypt, Morocco, Ethiopia and Rwanda, is represented in Figure 2 below.

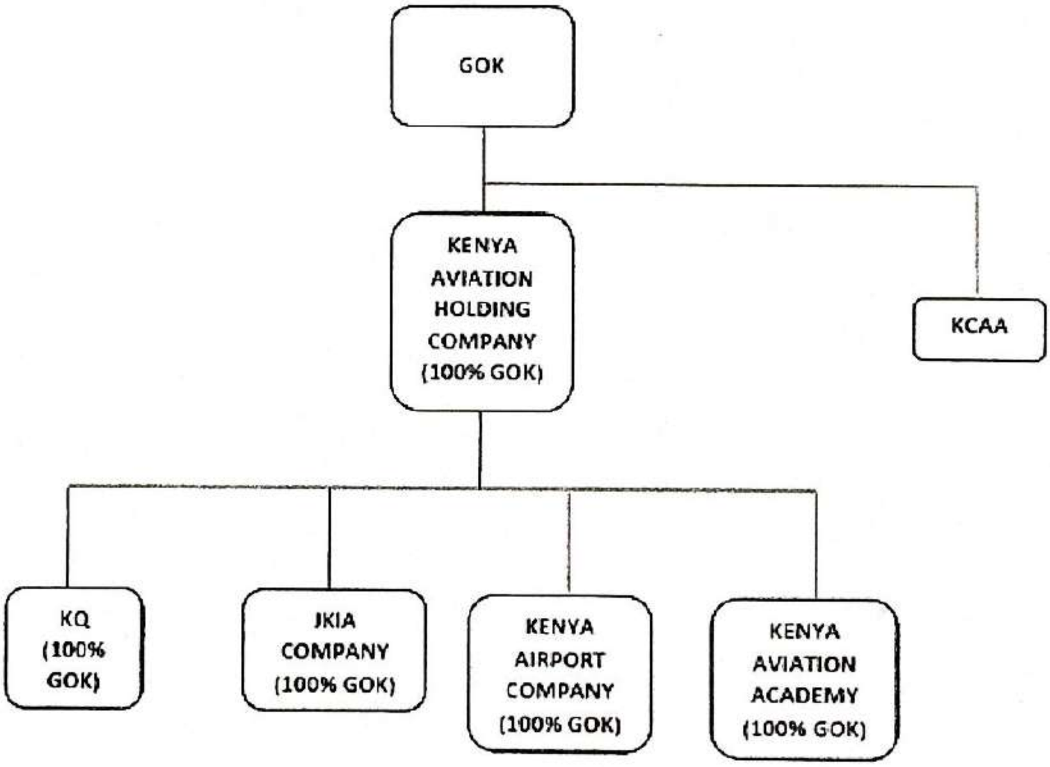

Figure 2.

Kenya Civil Aviation Authority

57. The Director General of KCAA, Capt. Gilbert Kibe, appeared before the Committee. He submitted that the concession of JKIA to Kenya Airways would result in re-allocation of resources to strengthen airline business operations but compromise safety and security of the operations of the SPV with less resources allocated to the Air Navigation Service Provider (ANSP) and aerodrome operations. The loss of revenue by KAA would negatively impact on the development of the other airports in Kenya and slow the growth of domestic aviation.

58. He further submitted that the PIIP does not clearly define the aviation assets and non-aviation assets it intends to cover. According to KCAA, all assets at the airports are aviation assets including land and as such clarity is required on the assets that would be vested in the SPV. Additionally, he submitted that the PIIP is not clear with regard to the specific KCAA functions the SPV is to take over at JKIA. He noted that other services are also offered at JKIA such as Area Control Centre Service, Meteorological Services and Search and Rescue which all serve the entire airspace and not just JKIA. Further, Air Navigation Services facilities and equipment are interconnected and interdependent hence opening up provision of services by more than one provider would be difficult to implement.

59. It was KCAA's further submission that with regard to restructuring security at JKIA, the PIIP proposal to create an autonomous body reporting to the Cabinet Secretary Immigration in charge of security and border control would result in a conflict of interest thus compromising security at JKIA.

60. With regards to the SPV model, KCAA submitted that the model as proposed in the PIIP is profit oriented while ANS are provided on the basis of cost recovery as per the Chicago Convention leading to an apparent conflict in objectives.

61. The Director General further submitted that, the organization of air navigation services in Kenya is guided by ICAO requirements with the key objective being safety and security rather than commercial activities. In this regard, he noted that the PIIP proposal to exempt KQ from payment of ANS charges would directly impact safety as investment in critical infrastructure would not be realized in the planned time frames in the KCAA Strategic Plan.

62. The Director General also submitted on the regulatory issues that would affect the proposed SPV. He noted that Certificates it issues under ICAO guidelines are not transferrable hence the implementation of the PIIP would instantly result to the loss of the certificate for the provision of ANS at JKIA and that this would have an impact on international aircraft operations before the SPV obtains certificate.

63. The Director General additionally noted that airspace is a national asset touching on the sovereignty of the State to regulate and manage and secure its use and therefore the SPV as a private entity should not be entrusted with such a key fundamental State right. He submitted that there is no precedent globally where an airline has been merged with an ANSP as it would result in conflict of interest.

64. The Director General noted that KCAA is currently funded using ANS charges and the Air APSC yet in the PIIP, the APSC is proposed to fund the SPV. Diverting the APSC would have serious implications on KCAA oversight capacity as the resultant under funding would make it difficult for it to attract and retain qualified and competent technical personnel, hence making it unable to meet and comply with ICAO Standards and Recommended Practices (SARPs). Lack of qualified personnel would create the possibility of a Serious Safety Concern (SSC) on the part of ICAO and result in grounding of all international flights.

65. In terms of options, KCAA recommended the establishment of a Government Holding Company to own several agencies including a national airline such as KQ, KAA, ground handling service providers and catering as is the case in Ethiopia, UAE and Qatar. Each agency under the Holding Company would operate independently but generate synergies with the other agencies. It was KCAA's view that the agency providing ANS should not be included under the Holding Company to avoid a conflict of interest due to the strong links of ANS to State sovereignty and security of the airspace and the serious implication to a State if the services are interrupted or not operated as per the international regulations. The Director General noted that in the UAE, Singapore and Qatar, ANS is part of the Ministry responsible for Transport, while in South Africa, Nigeria and Rwanda ANS are provided by autonomous State agencies. In KCAA's view, their proposed Holding Company model with a separate ANS provider will ensure a balanced growth in the aviation sector. The proposed structure, benchmarked with jurisdictions such as Singapore and the United Arab Emirates is as shown in Figure 3 below.

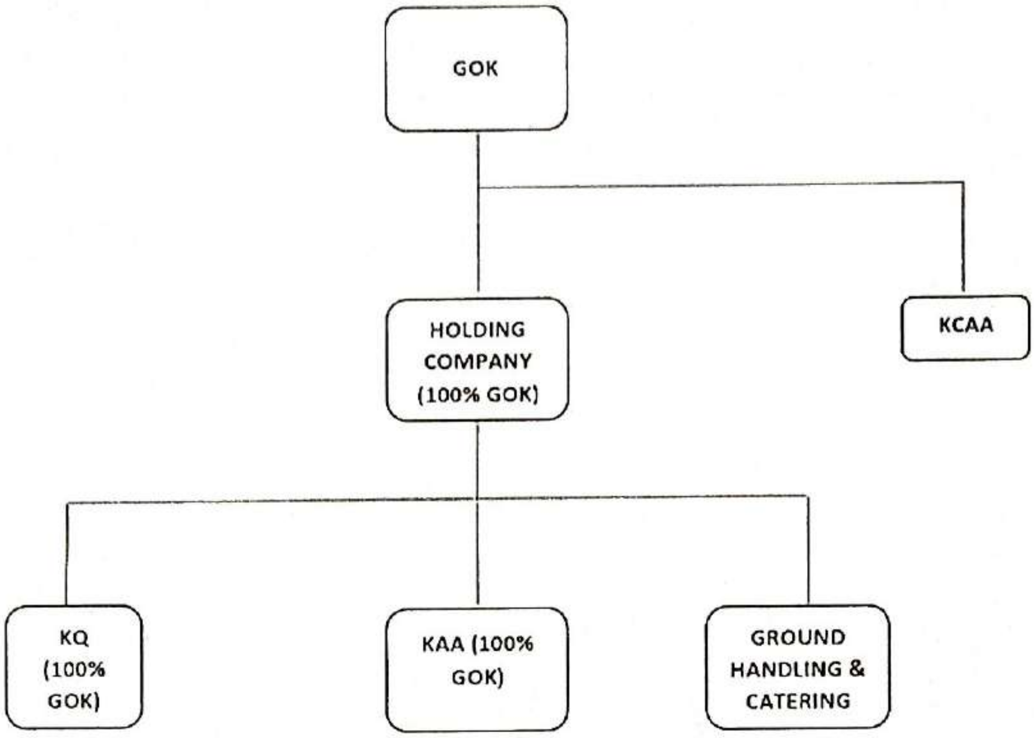

Figure 3.

Kenya Aviation Workers Union

66. The KAWU Secretary General, Mr. Moss Ndiema, appeared before the Committee together with several KAWU officials. He submitted that KAWU was opposed to the PIIP because KQ is a private company operating as the nation's flag carrier while KAA is wholly owned by the government. Further, he noted that the proposed PIIP model had no inbuilt risk sharing element making it resemble a take-over rather that a Public Private Partnership. In addition, he submitted that the PIIP would possibly lead to a viability gap funding affecting the other airports which is contrary to the PPP Act, 2013 and the KAA Act, 1991.

67. With regards to revenue, the Secretary General further submitted that JKIA generates over 90% of KAA's revenue and that by ceding the business unit that generates the largest share of their revenue to KQ, KAA would remain a shell of its former self since it would not only be against public interest but also a poor and misinformed business decision. Further, KAA would not be able to execute its mandate of expanding and growing more aerodromes and airports in Kenya due to lack of sufficient funding.

68. KAWU noted that KPMG, an audit and consulting firm contracted by KAA as its transaction advisor on the PIIP, had observed that it had not received detailed financial information from KQ to ascertain whether it would be able to fund the PIIP. Further, it was observed that KQ's five year plan does not cover the concessionary period it proposes to run JKIA and that such rescheduling would detrimentally impact on KQ's cash flow, consequently impacting on their ability to fund the PIIP; that KQ was in breach of certain financial covenants as at June, 2018 and had received waivers from lenders covering the period up to 31st December, 2018; and that KQ had not provided the detailed SPV organization structure that is essential in determining the fate of majority of KAA employees, the selection criteria used and clarity on the policies and procedures that will apply to the SPV.

69. KAWU submitted that KPMG had noted that despite KQ having restructured their debt in 2017, it had continued to experience difficulties in restructuring its debts and that its non-equity participating lenders had not been apprised of the PIIP which would adversely affect KQ's existing loan arrangements.

70. KAWU further submitted that KPMG had concluded that KQ lacks the credentials and the competence to run an airport like JKIA and that without JKIA revenues, KAA would require funding for the other aerodromes and its liabilities such as environmental remediation and pension deficit funding.

71. It was the view of KAWU that, the take-over of JKIA was not the only option available to turn around KQ. KAWU noted that in February, 2017 KQ contracted Seabury Group to advise it on a viable turn-around strategy. Seabury recommended the conversion of debts owed to local banks and the Government to equity, the negotiation of productivity based Collective Bargaining Agreements (CBAs), engaging the Government to waive taxes on imported aircraft materials used for aircraft maintenance and jet fuel to save Kshs. 7 Billion annually; and the enactment of a law to ensure all Government employees and contractors use KQ for their travel. KQ only implemented the recommendation to convert debt to equity.

72. In addition, KAWU was of the view that the sale-lease-back of the aircraft owned by KQ would allow it to raise Kshs. 50 to 70 Billion. It recommended the formation of a Kenya Aviation Holding Group (KAHG) to replicate the operating models of other airlines like the Ethiopian Airline Group, Rwandair, Royal Air Morac and Egypt Air. To this end KQ would have to be delisted and fully owned by the Government. The proposed KAHG

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would then incorporate KQ, KAA, KCAA, catering, Ground handling, Cargo and other air operators that would facilitate robust concessions. The proposed structure is as shown in Figure 4 below.

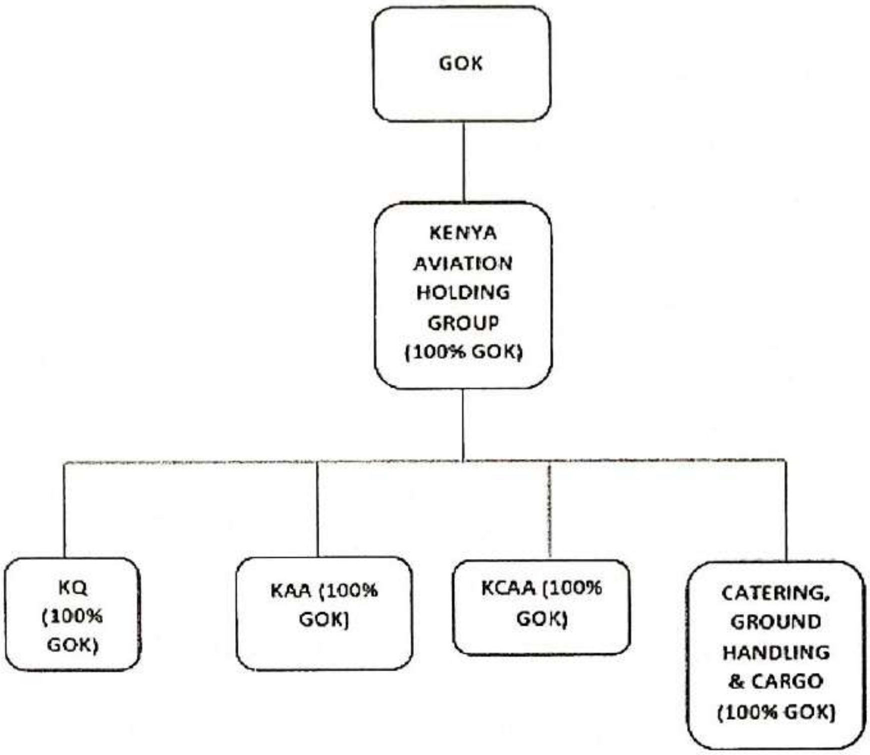

Figure 4.

Kenya Airline Pilots Association

73. The Kenya Airlines Pilots Association (KALPA) General Secretary and CEO, Capt. Muriithi Nyagah, appeared before the Committee accompanied by other KALPA officials. He noted that KALPA had not had access to the PIIP and was not able to comment in detail. He noted that KQ was established as a fully owned Government entity with the objective of being Kenya's main flag carrier, thus giving visibility to the country. This was a significant step in enhancing and promoting tourism, a key sector in the economy. When it was privatized the Government's intention was to improve its efficiency and get value for money. In KALPA's view, KQ remains an important pillar in the development of tourism and aviation in Kenya and in the East African region. Further, KQ offers various quality jobs that have significant impact in other areas of the economy which need to be protected.

74. The General Secretary submitted that the aviation industry contributes 5% to the GDP, and supports an estimated 620,000 jobs. He noted that the industry can contribute more if both KQ and Kenya Airports Authority (KAA) experience growth and that the future of KAA growth is not assured in the event KQ was to collapse. In KALPA's view, KQ's growth is similarly not assured without significant financial injection from investors and shareholders. As the Government is now the largest shareholder and guarantor in KQ, the Kenyan taxpayer would be at great risk in the event KQ were to collapse.

75. The General Secretary submitted that KALPA's outlook is that the proposal suggests an avenue of improving KQ's cash position without additional financial injection. If implemented, the proposal would develop the aviation industry and grow JKIA as a regional hub while improving KQ's cash flow. This will spur growth and, in effect, increase traffic into JKIA and improve revenue for KAA. They noted the need for thorough due diligence on the proposal and the conclusion of a well-crafted agreement.

76. KALPA further submitted that, part of what could be ailing KQ is its skewed agreement with KLM which allows one KLM-appointed director to veto the decision of the rest of the members of the KQ Board and the formula of sharing monies for routes flown by the KQ which largely favours KLM.

77. In the view of KALPA, nationalization of KQ would be in order as long as such a process adequately caters for the obligations agreed to in their CBA with KQ.

Kenya Association of Air Operators

78. The Kenya Association of Air Operators (KAAO) CEO, Col. (Rtd.) Eutychus Karumba Waithaka appeared before the Committee. He submitted that air operators under KAAO wish Kenya Airways all the best in their regional quest to re-establish its dominance noting that such an endeavor must be done without jeopardizing the rest of the industry which is vibrant and plays a pivotal role in tourism, cargo as well as international humanitarian aviation operations, and also employs many Kenyans.

79. The CEO noted that apart from KQ, Kenya currently has 13 other national carriers who meet the requirements and have been granted such status in line with Kenyan aviation policy.

80. KAAO further noted that, they are yet to see the PIIP and that despite having been called for a public consultative forum over the document, the forum was indefinitely postponed. KAAO urged the Committee to interrogate the following areas of the transaction—

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(a) The shareholding and structure of the proposed venture, considering that KAA is a Government institution;

(b) The operational and financial management of the other 300 aerodromes under KAA, considering that most do not have the traffic sufficient to fund their operations and have been supported by revenues from JKIA;

(c) Assurances that the other aerodromes will retain the requisite standards as prescribed by the International Civil Aviation Organization (ICAO) without an additional cost to the already over-burdened operators;

(d) The current revenue and expenditure per airport for KAA and whether the proposal will lead to a shortfall in KAA's operating budget post takeover that will affect the management, maintenance and development of the other national airports;

(e) The exact scope of the PIIP in terms of the areas to be ceded to KQ by KAA;

(f) The applicable capital expenditure plan and funding during the concession period including development and/or redevelopment of JKIA to enable it compete with Bole International Airport and the new Rwanda airports;

(g) The expected relationship between the proposed SPV and other existing Kenyan operators at JKIA during the tenure of the concession;

(h) How the concession would run in line with current Government policies governing the aviation industry as well as the existing competition laws;

(i) Whether other options of reviving or strengthening KQ have been considered, and how critical the concession is to KQ's business plan going forward;

(j) Whether there are any examples of PIIPs in other jurisdictions and how successful have they been;

(k) The regional and global competitive context of the proposal in the light of the treaties that Kenya has signed in the past, including within the African Union; and

(l) Whether KQ, an international flights operator, running JKIA would pose a conflict of interest in provision of airport services to its competitors in International flight operations in light of the ICAO principle of encouraging fair and healthy competition in international commercial air operations.

Views from Members of the public

The Committee received various memoranda from members of the public with regard to the inquiry.

81. The Member for Embakasi East Constituency, Hon. Babu Owino opposed the PIIP noting that there would be massive job losses, KQ would be unable to fund the PIIP and that KQ is a private company seeking to benefit from a public asset. He further submitted that there was need for re-negotiation or nullification of the joint venture agreement between KQ and KLM/Air France.

82. The County Government of Uasin- Gishu submitted a memoranda dated 16th April, 2019 proposing a number of recommendations which the Committee took note of.

83. Dorcas Makena opposed the PIIP and proposed that KQ be nationalized.

84. Peter Mbatha opposed the PIIP noting that it would lead to the death of other airports and airstrips. He further noted that the PIIP would lead to the risk of using other airlines operating out of JKIA as it would give KQ an unfair advantage over other airlines.

85. Wilfred Momanyi opposed the PIIP questioning how an entity which does not have the capacity to run an airport could take over JKIA operations. He proposed the nationalization of the airline borrowing from the example of Ethiopian airlines and Emirates.

86. Denis Oseko opposed the PIIP noting that KAA has been running JKIA successfully and maintained its profitability. He proposed the nationalization of KQ instead.

87. Evans Mwangi proposed the nationalization of KQ before any merger with KAA

88. Debrah Kemunto opposed the PIIP and proposed that any merger between KQ and KAA should only be concluded in the event KQ is nationalized.

89. Harrison Mlamba on behalf of the Chartered Institute of Logistics and Transport (CILT) proposed that the Privatization Commission establishes an a

90. Advisory Committee to examine the pros and cons of the issue of JKIA and consider retaining public ownership but introducing management expertise. He additionally proposed that the part privatization of KAA to avoid its financial bondage and attract much needed funds. He opposed the subsidization of airports and air services and proposed that this be anchored in law.

91. Tony Kajiita submitted that the PIIP will not work as the current ownership of KQ constitutes a conflict of interest which will affect KQ employees and the aviation industry. He proposed the nationalization of KQ to enable a scrutiny and termination of the arrangement between KLM and KQ.

92. Joyce Kebati questioned the logic of the PIIP and whether KQ, a loss making private company should be left to manage KAA a profitable public entity.

93. Jared Mosota questioned whether KQ, a loss making company should be left to manage KAA, a profitable entity. He proposed that any merger between KQ and KAA should only be concluded in the event KQ is nationalized.

94. Jane Gichia opposed the PIIP questioning whether a loss making company should be allowed to take over a profit making company.

95. Festus Kalu opposed the PIIP questioning how a loss-making entity could take over operations of a profit-making one. He proposed the nationalization of KQ instead.

96. JK Waweru proposed the nationalization of KQ noting that as a loss-making private entity, KQ cannot be trusted with a profitable public entity.

97. Dennis Mutua opposed the PIIP questioning how a loss-making private entity could take over operations of a profit-making one.

98. Michael Kevin opposed the PIIP questioning how a loss-making private entity could take over operations of a profit-making one. He called for the consideration of the employees in the transaction.

99. John Matu opposed the PIIP. He proposed the nationalization of KQ.

100. Samuel Odunga opposed the PIIP. He proposed the nationalization of KQ.

101. Edward Gitonga submitted that the PIIP does not present any value for money to KAA and that the public, stakeholders and KQ shareholders have not commented on the document which is currently inaccessible.

102. Walter Mocha questioned the rationale of KQ as a private company seeking to benefit from a public asset and the reason why despite recommendations during the KQ restructuring, the renegotiation or nullification of the Joint Venture Agreement between KQ and KLM had not been implemented. He noted that the examples of airlines given by KQ are all owned by their respective governments

103. Raymond Muthomi opposed the PIIP noting that a loss making private entity ought not to take over a profit making Government entity and claim to develop it.

104. Edwin Mango opposed the PIIP noting that KQ has continued to make losses even after being bailed out by the Government and owing levies to KAA for the past four years.

105. Desmond Kiprotich opposed the PIIP noting that KQ is not capable of managing JKIA as they are unable to manage themselves and that such a move would kill the aviation industry. He proposed that KAA manage KQ.

106. Ebu Loter opposed the PIIP noting that KQ is a private entity and its revival should not be tied to the take-over of JKIA

107. Paul Wamai submitted that KQ's proposed involvement in KAA matters will affect other operators with investments at the airport who have legal agreements with KAA. According to him, such operators have not been included in the PIIP discussions and any new management of JKIA should absorb all liabilities before the transfer of JKIA assets.

108. Boniface Mugambi opposed the PIIP noting that KQ is poorly managed and cannot account for its resources given the fact that KQ tickets are the most expensive, their flights always full and in some instances overbooked yet they continue to make losses. He further noted that KQ has many managers earning huge salaries and that as a loss-making private company should not take over a profit making public entity.

109. Ronald Odhiambo opposed the PIIP noting that KAA has not demonstrated that it is unable to run JKIA and that it does not make sense to hand over JKIA, which is a strategic national asset to a privately owned, loss-making poorly run and financially crippled entity.

110. John Waweru opposed the PIIP on the basis of KQ being a poorly managed private company.

111. Alloys Siaya, ICT Manager KAA opposed the PIIP noting that KQ management has failed in terms of business strategy and innovation to tum around the KQ's fortunes, and will not be able to manage JKIA, a totally different kind of business. It was his further submission that the management of KQ have not been held to account for its huge losses and should not be allowed to oversee JKIA operations. In addition, it was his submission that the rescue of KQ in the national interest is a wrong premise for the consideration of a PPP. It was his view that the operations of JKIA as a border control point incorporate complex interactions between several state institutions which a private entity cannot execute and that airports are highly regulated and must comply with international civil aviation statutes and regulations and, by necessity, should be

managed by the Government to ensure compliance. He proposed that if KQ is technically insolvent, the Government should consider its natural death and that another airline take over as the national carrier.

112. Capt. Gad Kamau opposed the PIIP noting that the agreement will deny other airports revenue and the fact that KQ has failed in its core business does not support its proposal to run an airport without any experience in running airports. He noted that KQ and JKIA are not joined as JKIA can easily survive without KQ given new players will step in and fill the void. In his view, the implementation of the PIIP will kill the aviation industry as other KAA airports will be open to safety and security challenges due to lack of revenue while development of new airports will cease

113. Julius Kinyua opposed the PIIP noting that KQ is owned by unknown individuals, including KLM which is a foreign airline and the implementation of the PIIP will result in Government money being directed into private hands. He proposed the nationalization of KQ before any such discussions continue.

114. Siddy Jepkirui proposed a 100% take-over of the aviation industry and that the industry should be viewed as a facilitator of economic growth.

115. Omache Violet, Everlyne Khayega, Juliet Wawira, Kalinga Charles, Hellen Nyamai, Jacinta Njeri, Jeremiah Suter and Susan Njenga opposed the PIIP.

116. Frank Lekaldale opposed the PIIP, noting that no UK or US airline manages an airport.

117. Maria Mbugua opposed the PIIP and proposed that KAA run KQ instead.

118. Richard Lumett opposed the PIIP, submitting that a loss-making private entity cannot take over a profitable public entity.

119. John Waweru opposed the PIIP noting that it could destabilize KAA.

120. Pius Victor opposed the PIIP noting that a Private individual should not be allowed to take over public properties through mismanagement of their business.

121. Stephen Mwangi opposed the PIIP submitting that JKIA is a public facility which should not be handed over to private hands. He proposed nationalization of KQ.

122. Lydia Munene opposed the PIIP and proposed that KQ be nationalized instead.

123. Antone Haukwa opposed the PIIP noting that it is not viable much like KQ's project Mawingu which was not well thought out. He proposed that KQ be nationalized like Qatar Airways and Emirates and its management issues sorted out first.

124. Kenedy Lumet Chumba opposed the PIIP submitting that it amounts to a loss-making private entity taking over a profit making public entity.

125. Lucy Kagambo opposed the PIIP. She proposed that KQ be nationalized.

3.2 Committee Observations

126. From the submissions of the stakeholders, the Committee observed that—

(1) KQ is losing its competitiveness and market share to other competing airlines in the region like Ethiopian Airlines and Rwandair. Currently in Africa, KQ operates 45 routes, ET 77 routes, Turkish Airlines 44 routes, Qatar Airways 23 routes and Emirates 21 routes. Secondly with regard to airport size, Bole International Airport, Ethiopia has a capacity of 22 million passengers annually, JKIA a maximum capacity of 7.4 million passengers, Kigali Airport 1.5 million passengers, Doha Airport 35 Million passengers, Istanbul Ataturk Airport 37 Million passengers and Dubai Airport 90 Million passengers. Third, with regard to the number of aircraft, Ethiopian Airlines has approximately 100 aircraft and 59 on order, Rwanda Air has 12 aircraft with four on order, Qatar Airways has 222 aircraft with 207 on order, Turkish Airlines has 335 aircraft with 205 on order, Emirates has 254 aircraft with 234 on order while KQ has 40 aircraft and currently no aircraft on order. Fourth, with regard to market share of the hubs in the region, between 2013 and 2017 JKIA's market share declined from 50% to 34% while the share of Bole International Airport and Kigali International Airport increased from 30% to 44% and 1% to 4 percent, respectively.

(2) KQ is operating using a different model, as it is a private company as compared to its competitors like Ethiopian Air and Qatar Air which are wholly Government owed.

(3) Other competing airlines like Ethiopian Airlines, Qatar Airways, Emirates, EgyptAir, Singapore Airlines and RwandAir enjoy Government subsidies as compared to KQ which does not.

(4) There is need to protect JKIA's regional competitive position in order to re-establish its regional dominance and KAA's commercial interests. In the event the current decline of Kenya's competitiveness in the aviation sector continues, Nairobi could be replaced by Addis Ababa as an aviation hub leading to loss of revenue and employment and the potential collapse of KQ which shall ultimately expose the Kenyan taxpayers to the Government guarantees of Kshs. 75 Billion issued to KQ's creditors;

(5) From the submissions to the Committee all successful airlines operate on a model which consolidates and shares aviation assets.

(6) The PIIP is not an appropriate vehicle for the implementation of the Government's Policy of consolidating key aviation assets and restoring the aviation sector's regional and international competitiveness as KQ and the proposed SPV are private companies which are proposed to benefit from public funds, facilities and concessions;

(7) The concession of JKIA to Kenya Airways as proposed in the PIIP will result in re-allocation of resources to strengthen airline business operations but could compromise safety and security of the operations of the SPV with less resources allocated to the Air Navigation Service Provider (ANSP) and aerodrome operations; and negatively impact the development of the other airports/airstrips in Kenya and slow the growth of domestic aviation as a result of loss of revenue by KAA since JKIA generates over 90% of KAA's revenue.

(8) The implementation of the PIIP will result to the loss of the certificate for the provision of ANS at JKIA and this will have a negative impact on international aircraft operations since Certificates under ICAO guidelines are not transferrable.

(9) Kenya Airways and KAA have a symbiotic relationship and KQ accounts for over 40% of KAA's business and revenues and as at 31st March, 2019, KQ owed KAA more than Kshs 5.54 billion in relation to unpaid Air Passenger Service Charge, landing fees, rent and other charges.

(10) The proposed role of KQ in the PIIP of operating JKIA creates a conflict of interest with regard to its dealings with other airline operators at the airport and may lead to the oppression of such operators.

(11) Most of the successful airlines in the aviation sector like Ethiopian Airlines, Emirates and Qatar Airways offer non-aeronautical services such as hospitality and catering.

(12) In terms of exemptions, section 5A of the State Corporations Act, Cap. 446 allows the President to exempt a state corporation from any of the provisions of the State Corporations Act by notice in the Gazette. Further, Section 114A of the Public

Procurement and Asset Disposal Act, 2015 allows a procuring entity to use a procurement procedure specially permitted by the National Treasury.

(13) The shares of KLM and any other foreign investors in KQ are protected by any existing Shareholder's Agreement, the provisions of the Foreign Investments Protection Act and Article 75 of the Constitution which precludes the Government from compulsorily acquiring property except for cause. To comply with Article 75 of the Constitution, the Government must demonstrate that compulsory acquisition of an asset is intended to promote the public benefit and promptly pay fair compensation.

(14) The nationalisation of KQ under the stated policy of consolidating Kenya's aviation assets qualifies as an exercise intended to promote the public benefit.

(15) Nationalisation of KQ shall entail its delisting and negotiation and buy-out of other shareholders after the valuation of KQ shares. The buy-out may require appropriate and adequate budgetary arrangements to be made by the National Treasury, including consideration of issuing a long-term Bond or Guarantee to the other shareholders to expedite the process.

(16) Nationalisation of KQ shall affect its currently existing contractual obligations in respect of aircraft leasing and employment.

CHAPTER FOUR

4.0 IMPACT OF THE PIIP ON HUMAN RESOURCE

4.1 Submissions Received

Stakeholders made submissions on human resource issues as follows—

Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works

127. The Cabinet Secretary submitted that in the event the PIIP was approved, it would not lead to the loss of employment. He noted that he had given the affected trade unions a similar guarantee in talks held when JKIA staff recently took industrial action protesting against the PIIP.

Kenya Airways

128. The CEO submitted that KQ is a global company operating in a complex airline market where word wide standards must be fulfilled. He noted that KQ employs around 3,700 employees who need to be protected at whatever cost. He informed the Committee that implementation of the PIIP will result in increased employment in aviation-related and other industries through creation of between 25,000 to 30,000 jobs for Kenyans. According to him, more employees will be required once KQ traffic increases as a result of the proposal.

129. The CEO further submitted that in the PIIP, KQ has committed to second all the current JKIA staff to the SPV on terms equal to those offered at KAA for a period of 12 months. After the secondment period, KQ has undertaken to transfer employees to the SPV and that no jobs will be lost in the process.

130. The CEO noted that of KQ's 3,700 employees, 14 are expatriates whereas of the top 50 managers, 5 are expatriates thus representing 10% of the leadership team. He noted that 2 expatriates are managers, the Chief Operating Officer and the Head of Global Sales, seconded from KLM.

131. In terms of remuneration of staff, the CEO noted that it constitutes 19% of KQ's total costs. He informed the Committee that he earns Kshs. 4 Million in salary, allowances and benefits, before tax as reported in KQ's financial statements. He submitted that on average, Airline Captains and First Officers earn Kshs. 1.6 Million and Kshs 900,000/- per month, respectively. It was his submission that on average, staff in flight operations

earn Kshs. 225,000/- while technical, ground services, cargo and commercial staff earn Kshs. 150,000/- per month.

132. With regard to pilots, the CEO noted that their remuneration is substantial in comparison to their counterparts from wealthy, developed economies such as the United Arab Emirates, Kuwait, Lebanon, Mauritius, Qatar, and South Africa. Locally, the CEO noted that, KQ pilot remuneration was equivalent to 29 times the private sector average, 12 times the average of the earnings of workers in the electricity and gas sector and 11 times the average remuneration of workers in the financial and insurance services sector.

133. The CEO noted that the remuneration is not, however, commensurate to their productivity submitting that KQ pilots flew an average of 533 hours per year, much lower than the 859 hours flown by ET pilots who, he submitted, are paid half the remuneration.

Kenya Airports Authority

134. The CEO submitted that the implementation of the PIIP will not lead to any job redundancies or adverse changes to the existing terms and conditions for KAA staff as clarified by the CS Transport, Infrastructure, Housing & Urban Development in a press release dated 5th February, 2019.

135. With regard to the current KAA staffing structure, the CEO submitted that as at 31st March 2019, KAA employed a total of 1,945 staff, with 753 being in management. Out of those numbers, JKIA contributed 993 employees comprising 318 management and 675 non-management staff. In terms of remuneration, the CEO submitted that the management staff of KAA earn a total of Kshs. 2.316 Billion while non-management staff earn a total of Kshs. 1.92 Billion, annually.

136. The CEO noted that the Kenya Aviation Workers Union (KAWU) issued a strike notice dated 29th January, 2019 which prompted KAA to file ELRC Case Number 68 of 2019 ***Kenya Airports Authority vs Kenya Aviation Workers Union*** to restrain KAWU from calling for the strike. The Court issued temporary orders on 5th February, 2019 suspending the strike notice and referring the matter to conciliation. He noted that the matter is currently under conciliation. On the advice of the Director of Public Prosecutions, (DPP) KAA withdrew a contempt of court application against KAWU officials.

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137. The CEO further noted that KAWU has separately filed Constitutional Petition Number 57 of 2019 against the PIIP. The matter is pending in Court and is scheduled for directions on 4th June, 2019.

Kenya Civil Aviation Authority

138. KCAA submitted that the concession does not adequately address industrial relations issues which if not properly acted upon would lead to a complete halt in airport operations.

139. It was KCAA's further submission that with regard to the secondment of staff to the SPV, the 12 month period does not address the issue of job security and staff may decline to take up the offer with the SPV. Further, it was their view that ANS technical staff like Air Traffic Controllers, Communication, Navigation and Surveillance engineers and technicians, and Aeronautical Information Services are highly specialized and that in the event such staff do not take up the SPV offer, it would result to loss of critical services at JKIA. KCAA was also concerned with the provision of ANS in the same airspace and different remuneration by two different entities would result to conflict and an increase in safety incidents

Kenya Aviation Workers Union

140. The Secretary General submitted that KQ's declining business performance over the past seven years spells doom to the Country and its employees whose jobs have always been at risk. He noted that both KQ and KAA neither informed nor engaged their employees on the PIIP which is a sensitive issue with a great potential to affect their jobs. He submitted that KAWU's efforts to seek information on the PIIP had been futile and that if the take-over proceeds, there would definitely be redundancies mainly affecting KAA staff currently working at JKIA and the head office.

141. The Secretary General further submitted that KAWU was apprehensive and convinced that like many other previous attempts of resuscitating KQ since 2012, the PIIP could also fail and could lead to the retrenchment of many employees as was the case in 2012 where 600 employees were retrenched. He also noted that in 2016, another restructuring exercise had been carried out, being spearheaded by McKinsey Consultants in which over 100 employees had been retrenched.

142. As regards KQ management, KAWU submitted that KQ had continued to sink in losses even after engaging a foreign Chief Executive Officer and other foreign airline experts and consultants. The Secretary General submitted that KAWU and most KQ employees had lost confidence in the stewardship of the current KQ CEO, Mr. Sebastian Mikosz, under whose tenure KQ had sunk into deeper losses. He noted that some of the foreign airline consultants contracted by KQ had questionable credentials and that there was high number of expatriates employed by KQ despite there being sufficient local talent to perform the same roles. It was further submitted that the current KQ CEO had recruited and appointed managers without any regard to the established recruitment policy which advocates for transparency and openness.

Kenya Airline Pilots Association

143. The Kenya Pilots association submitted that KQ is currently haunted by various pitfalls which it needs to address. The General Secretary noted that KQ has a poorly motivated work force, especially for the customer care staff who are outsourced and have very poor working condition, in terms of their contract which are short term contracts and low in pay. Further, he informed the Committee that KQ has contracted several consultants like McKinsey who made a total of Kshs. 2.3 Billion for 10 months work and still recommended the retrenchment of KQ staff, sale of prime KQ assets such as the KQ slot in London, Heathrow and the sale of KQ fully owned aircraft equipment.

144. With regard to the remuneration paid to pilots, KALPA submitted that the information provided to the Committee by KQ was misleading. They submitted that their remuneration is the subject of a comprehensive CBA entered into between them and KQ and that the CBA does not cover the number of hours pilots are required to work. They submitted that the current pilots working for KQ do not meet the required ratio per aircraft as agreed in the CBA and that KQ actually lacks sufficient pilots to crew their aircrafts. As a result of this shortage of pilots and suitable aircraft, pilots are currently working their maximum allowed hours and KQ owes each pilot an average of 100 leave days. They noted that some flights have had to be cancelled due to inadequate crew. They submitted that on average they fly approximately 780 hours per year.

145. KALPA submitted that under the CBA, KQ agreed to have 12 pilots to crew each narrow body aircraft and 16 pilots or each wide-body aircraft and as per those numbers, the airline currently has an operating shortage of 200 pilots. They further noted that in

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terms of computing the average hours flown by a pilot should be viewed in the context of the statutory requirements and that they similarly are entitled to leave days and training every 6 months.

146. KALPA noted that in the past three years, KQ has lost more than 130 pilots to the Middle East owing to their uncompetitive remuneration. They submitted that the current CBA shows that on the higher side, a Captain and a First Officer earn an average of Kshs. 1,584,719/- and Kshs. 1,506,789/- respectively in salary and monetary allowances.

Views from Members of the public

The Committee received various memoranda from members of the public with regard to the inquiry -

147. Edward Gitonga submitted that the PIIP could lead to job losses.

148. Walter Mocha noted that there shall be massive job losses to both KAA employees and other operators who have invested heavily at JKIA if the PIIP is implemented as KQ proposes to consolidate all the businesses at JKIA through its SPV. He further noted that with the current deficit at which KQ is being run, it will be unable to fund the PIIP. He noted that KQ is afflicted with managerial problems that ought to be solved first, including the importation of Polish expatriates who are paid exorbitantly as compared to local KQ employees.

149. Roy Kinyanjui opposed the PIIP noting that it does not have the interest and welfare of KAA employees at heart. It was his view that as a performing parastatal, KAA should be allowed to continue managing JKIA.

150. KAA staff at JKIA submitted that the Committee should pay critical attention on staff welfare in its consideration of the PIIP and that if any retrenchment is to be considered, the exit package for KAA staff be significantly higher as the retrenchment shall not be for purposes of cost cutting.

151. Capt. Gad Kamau noted that the PIIP will lead to layoffs as most positions will be scrapped.

152. Plonyang Atudo opposed the PIIP noting that its implementation will lead to job losses.

153. Peter Mbalanya opposed the PIIP submitting that it would lead to retrenchment of employees.

4.2 Committee Observations

154. The Committee observed that—

(1) Kenya Airways and KAA neither informed nor engaged their employees on the PIIP which is a sensitive issue with a great potential to affect their jobs.

(2) In the PIIP, though KQ has committed to second all the current JKIA staff to the SPV on terms equal to those offered at KAA for a period of 12 months after which they will be transferred to the SPV, it does not address the issue of job security and could result in the loss of ANS technical staff since staff could decline taking up the SPV offer, a situation that could result in loss of critical services at JKIA;

(3) There is an over-reliance on expatriates for the core management operations of KQ. Out of KQ's 3,700 employees, 14 are expatriates whereas of the top 50 managers, 5 are expatriates thus representing 10% of the leadership team.

(4) The key union representing aviation workers has lost confidence in the stewardship of the current KQ management;

(5) Operations at JKIA constitute majority of KAA's work. As at 31st March 2019, KAA employed a total of 1,945 staff, with 753 being in management. Out of those numbers, JKIA contributed 993 employees comprising 318 management and 675 non-management staff;

(6) The current remuneration of the KQ management, senior staff and pilots is relatively high and does not accord with the financial performance of the company.

CHAPTER FIVE

5.0 LEGAL COMPLIANCE ISSUES

5.1 Applicable Legal Provisions

155. The Public Private Partnerships Act, No. 15 of 2013 was enacted by Parliament to provide for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the Government through concession or other contractual arrangements, the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects and for related purposes. The Act establishes three key organs to assist in the evaluation of PPPs, namely the PPP Committee, the PPP Unit and PPP nodes.

156. The PPP Committee comprises the Principal Secretaries responsible for matters relating to finance, national planning, land, county government; transport, infrastructure and energy, the Attorney General and the Director of the PPP Unit who are tasked with—

(a) ensuring that each project agreement is consistent with the provisions of the Act;

(b) formulating policy guidelines on PPPs;

(c) ensuring that all projects are consistent with the national priorities specified in the relevant policy on PPPs;

(d) approving project proposals submitted to the Committee by a contracting authority;

(e) approving project lists submitted to the Committee by contracting authorities

(f) authorizing allocations from the Project Facilitation Fund established under section 68 of the Act;

(g) formulating or approving standards, guidelines and procedures for awarding contracts and standardized bid documents;

(h) examining and approving a feasibility study conducted by a contracting authority under the Act;

(i) reviewing the legal, institutional and regulatory framework of public PPPs;

(j) overseeing the monitoring and evaluation by contracting authorities of a PPP from the commencement to the post completion stage;

(k) ensuring approval of, and fiscal accountability in the management of, financial and any other form of support granted by the Government in the implementation of projects under the Act; and

(l) ensuring the efficient implementation of any project agreement entered into by a contracting authority. [1]

157. Section 11 of the PPP Act, 2013 established the PPP Unit within the State Department responsible for matters relating to finance which, as provided under section 14 of the Act is to serve as the secretariat and technical arm of the PPP Committee and to support contracting authorities to identify, appraise, procure, negotiate, contract and monitor the operation of PPP projects.

158. The Act requires any public contracting authority which intends to enter into a PPP arrangement to establish a PPP node headed by the authority's accounting officer assisted by a number of financial, technical, procurement and legal personnel as the authority, in consultation with the PPP Unit, consider necessary.[2] A PPP node is responsible for project selection and development, procurement and contracting as well as the day to day management of a project. It reports administratively to the Contracting Authority and functionally to the PPP Unit.[3]

159. Section 19, as read together with the Second Schedule to the Act, outlines the 13 forms of PPP arrangements that a contracting authority may enter into with a private party, each subject to unique conditions. These are—

(a) Management contracts;

(b) Output performance-based contracts

(c) Leases not exceeding thirty years;

(d) Concessions at a fee;

(e) Build-Own-Operate-Transfer schemes;

(f) Build-Own Operate schemes;

(g) Build-Operate-and-Transfer schemes for a period not exceeding thirty years;

(h) Build-Lease-and-Transfer schemes;

(i) Build-Transfer-and-Operate schemes;

(j) Develop-Operate-and-Transfer Schemes;

[1] Section 7, PPP Act, 2013.
[2] Section 16 PPP Act, 2013.
[3] Section 17 PPP Act, 2013.

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(k) Rehabilitate-Operate-and-Transfer schemes;

(l) Rehabilitate-Own-and-Operate schemes; and

(m) Land Swaps.

160. The Act requires each contracting authority to prepare a list of projects that it intends to undertake on a priority basis under the Act and shall submit the list to the PPP Unit for assessment.[4] The projects submitted must be part of the development program of the authority. Upon submission, the list is assessed and transmitted, together with recommendations, to the PPP Committee for approval which similarly reviews it and transmits it to the Cabinet in a national priority list.[5]

161. The Act allows for a contracting authority to solicit for proposals, subject to a transparent and competitive bidding process, with successful bids being subjected to a feasibility study before consideration by the PPP Unit, the PPP Committee and Cabinet. [6] In addition, the Act allows a private party to propose a Privately Initiated proposal for the construction or development of a project or the performance of a service by negotiation outside the normal requirement for the authority to and undertake a competitive procurement process. A contracting authority may only consider a PIIP where—

(a) there is an urgent need for continuity in the construction, development, maintenance or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical on condition that the circumstances giving rise to the risk of disruption were not foreseeable by the contracting authority or the result of an unreasonable failure to act by the contracting authority;

(b) the costs relating to the intellectual property in relation to the proposed design of a project are substantial;

(c) there exists only one person or firm capable of undertaking the project, maintaining the facility or providing the service or such person or firm has exclusive rights over the use of the intellectual property, trade secrets or other exclusive rights necessary for the construction, operation or maintenance of the facility or provision of the service; or

[4] Section 23 PPP Act, 2013.
[5] Section 24 PPP Act, 2013.
[6] Section 37-60 PPP Act, 2013.

(d) there exists any other circumstance as the Cabinet Secretary may prescribe.[7]

162. Before commencing any negotiations with the proponent of a PIIP, a constricting authority is required to prescribe a criteria against which the outcome of negotiations shall be evaluated, submit the proposal to the PPP Unit for consideration and recommendation, apply for and obtain approval from the PPP Committee to negotiate the contract.

163. A contracting authority is expressly precluded from considering a PIIP unless it is satisfied that the project shall provide value for money and be affordable and that the appropriate risks of the project are transferred to the private party.[8]

164. Regulation 51 of the Public Private Partnerships Regulations, 2014 allows a contracting authority to consider a privately initiated investment proposal which is not specified in section 61 (1) (a), (b) or (c) of the Act on condition that the project which the proposal covers is included in the contracting authority's development programme. In considering such a proposal, the contracting authority is required, through the Unit, to apply to the Cabinet Secretary for approval.

165. With regard to negotiations, Regulation 52 of Public Private Partnerships Regulations, 2014 requires a contracting authority to develop criteria for the negotiation of a PIIP and submit it to the Unit for review and recommendation where it is of the opinion that the proposal meets the requirements of section 61 (3) of the Act with regard to the affordability and value for money to be derived from the project; and the transfer of any project risks to the proponent. The contracting authority is allowed to engage a transaction advisor to assist it in developing negotiation criteria and appraising the proposal. The Regulations further require a contracting authority to take all reasonable steps to prevent a conflict of interest by its officers and prevent any impropriety during negotiations.[9]

166. A PIIP proponent is required to submit both a financial and technical bid as part of the proposal. In the event of negotiations, the contracting authority may request for more information in relation to the proposal or a modification of the privately initiated investment proposal. At the close of negotiations, a contracting authority is required to prepare a project risk assessment report specifying the terms agreed with the proponent and submit the report to the PPP Unit for review and transmission to the Debt Management Office to confirm the accuracy of the contingent liabilities and the risk matrix contained in the proposal. Any award

[7] Section 61 PPP Act, 2013.
[8] Section 61(3) PPP Act, 2013.
[9] Regulation 54, Public Private Partnerships Regulations, 2014.

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granted to the proponent of a PIIP after the conclusion of negotiations and verification of the project risk assessment report of must be approved by the PPP Committee.[10]

5.2 Submissions Received

Stakeholders made submissions on legal and compliance issues as follows—

Ministry of Transport, Infrastructure, Urban Development, Housing and Public Works

167. The CS submitted that for purposes of implementing the resolution of the Cabinet during its meetings, the Public Private Partnership Act, 2013 was identified as the suitable legal framework which allowed KQ to submit a PIIP to KAA. As required under the provisions of the Act, the PIIP has been submitted to the PPP Unit for consideration.

168. The CS however noted that following the concerns raised by the Public over the PIIP, the Ministry is exploring other options of enabling the Government to consolidate all aviation assets for approval by Cabinet.

Kenya Civil Aviation Authority

169. The Director General submitted that from the regulatory perspective, the current financial position of Kenya Airways could significantly affect the airline's capacity to comply with civil aviation regulations as provided for in the air operator certification and that the PIIP does not meet the criteria of the PPP concept which entails the concession of a public service to a private entity which has the technical expertise and financial capacity to manage, operate and undertake investment.

170. It was the further submission of the Director General that implementation of the PIIP would result in the loss of the regulatory certificate to operate JKIA and consequently loss of the FAA IASA Category I status that the airport currently enjoys with regard to its direct flights to USA and that it would take years for Kenya to be audited again and similar approval granted to the SPV. As per the International Standards and Recommended Practices (SARPs), Certificates and Licenses issued by a civil aviation authority are not transferrable and hence, locally, the SPV would be required to undertake the processes of getting new certifications, a process that could take more than one year. The Air Service License (ASL) currently held by Kenya Airways would

[10] Regulation 53, Public Private Partnerships Regulations, 2014.

have to be revoked and the SPV would have to apply for a new ASL with the scope of services being an Air Operator and Airport Operator combined.

171. In addition, for the implementation of the PIIP, the Director General noted that there would be need to renegotiate MOUs and Letters of Procedures previously signed with neighboring States and Agencies in respect to ANS coordination activities which were entered into on the strength of the ANS being part of the KCAA's mandate.

172. KCAA further submitted that with regard to the use of SPV for the PIIP, there is need to establish clear legal mechanisms of resolving ownership especially for funds to be used for the purpose of any CAPEX activities.

5.3 Committee Observations

173. The Committee observed that—

(1) The Public Private Partnerships Act, No.15 of 2013 allows a private party to propose a Privately Initiated proposal for the construction or development of a project or the performance of a service by negotiation outside the normal requirement for the authority to undertake a competitive procurement process on condition that the project is included in the development programme of the contracting authority;

(2) The concession of JKIA was not and is currently not included in the development programme of KAA;

(3) Kenya Airways has not demonstrated that it has the financial capacity, relevant experience and the relevant expertise to manage JKIA as required by section 23 of the Public Private Partnerships Act, No.15 of 2013;

(4) The implementation of the PIIP would result in the loss of the regulatory certificate to operate JKIA and consequently loss of the FAA IASA Category I status the airport currently enjoys with regard to its direct flights to USA and it would take years for Kenya to be audited again and similar approval granted to the SPV. The current regulatory certificates issued with regard to JKIA are not transferable to a third party;

(5) There would be need to renegotiate MOUs and Letters of Procedures previously signed with neighboring States and Agencies in respect to ANS coordination activities which were entered into on the strength of the ANS being part of KCAA's mandate if the PIIP is implemented.

CHAPTER SIX

6.0 GENERAL ISSUES OF CONCERN TO THE PEOPLE

6.1 Submissions Received

Stakeholders made submissions on issues of concern as follows—

Status of the PIIP

174. The CS, Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works noted that at present the PIIP is just a proposal that must be subjected to the rigorous process outlined in the PPP Act including a review and consideration by the PPP Committee and negotiations between KQ and KAA over any issues of concern for the mutual benefit of the parties. Such negotiations would include, staff matters, the concession fees payable, investments to be made over the concession period, service standards, transaction structure, roles and responsibilities of each party and competition with other airlines. It was his view that the running of the other airports and airstrips would constitute a critical part of the negotiations.

175. The CS further noted that Kenya has to start viewing its aviation assets more strategically as key contributors to the Gross Domestic Product (GDP) where having a world class airline and world class airports enables the country to achieve its objective of being an aviation hub in the region. In this regard, the aim of the PIIP is the creation of operational synergies between Kenya's main hub, JKIA and the national carrier, KQ to establish the two institutions as drivers of economic growth. This same structure is the one utilized by Kenya's main competitors in the global aviation industry.

Whether Kenya Airways is a public or private company

176. The KQ CEO submitted that KQ is a publicly listed company with Government of Kenya owning the majority of shares. In terms of shareholding, currently, the Government owns 48.9%, KQ Lenders Company 38.1% , KLM 7.8% , the Employee Share Ownership Plan 2.4%, and other individual shareholders own 2.8%.

The impact of fuel hedging on KQ performance

177. The KQ CEO submitted that Fuel hedging is a contractual tool used by airlines as an industry standard to reduce exposure to volatile fuel prices. He informed the Committee that the fuel hedge in place at the moment guarantees KQ's purchase of fuel at a set

price while protecting it against rises above a certain price. He noted that KQ is benefiting from fuel hedging as the current fuel prices are above $70 while its volumes are hedged at rates lower than $68. In addition, it was his submission that KQ is expected to reap benefits in the month of April going forward as the fuel curve projections point to an increase in fuel prices. He was of the view that KQ is not losing money through fuel hedging.

The impact of aircraft leases on KQ performance

178. The KQ CEO submitted that even though an outright purchase is an option in acquiring an aircraft, it is not a wise and financially sound option. According to him, the core competence of an airline is flying and not owning assets and tying up money in the form of aircraft. He submitted that the purchase of aircraft requires huge capital outlay, that the older an aircraft is, the less efficient it is, both fuel and maintenance wise and that passengers prefer to fly on newer aircraft.

179. The CEO submitted that the estimated cost of buying the entire 37 aircraft in KQ's fleet would cost Kshs. 486.4 Billion, representing 16% of the entire country's budget. He noted that the benefits of leasing an aircraft clearly outweigh those of outright purchase as it allows faster access to aircraft, a reduced capital outlay, access to fuel efficient aircraft, flexibility, access to latest technology, and not having to deal with residual value in aircraft.

180. The KQ CEO further submitted that leasing is not a case unique to KQ, but is the trend world over and more so in airlines that are a lot larger than Kenya Airways both in terms of fleet, revenue, as well as passenger numbers. He noted that the fleets of Emirates, Delta Air Lines, and Air France contain 62%, 22% and 64% leases respectively. The CEO submitted that KQ has a fleet of 40 Aircraft of which it wholly owns 20, and 20 are under operating leases. The breakdown of the fleet is shown in Table 1 below and the list of lessors for the leased aircraft is shown in Table 2.

AIRCRAFT TYPE	Owned	Leased	TOTAL
Boeing 777-300 ER	1	2	3
Boeing 787-8	6	3	9
Boeing 737-800	-	8	8
Boeing 737-700	-	2	2
Boeing 737-300	1	-	1
Boeing 737-300F	2	-	2
Embraer 190	10	5	15
TOTAL	20	20	40

Table 1: Kenya Airways Fleet Breakdown
Source: Kenya Airways.

Lessor Name	Lessor Headquarters	Lessors Total Fleet	No. Leased to KQ	Aircraft Type
Aviation Capital Group	California, USA	297	3	Boeing 737-800
GE Capital Aviation Services (GECAS)	Dublin Ireland & Connecticut, USA	931	1	Boeing 737-800
			1	Boeing 787-8
China Development Bank (CDB) Leasing	Beijing, China	151	1	Boeing 737-800
MACQUIRIE AirFinance	Sydney, Australia	202	1	Boeing 737-800
Goshawk Aviation	Dublin Ireland	223	2	Boeing 737-800
AERCAP	Dublin, Ireland	1,153	1	Boeing 787-8
Dubai Aerospace Enterprise (DAE)	Dubai, UAE	350	1	Boeing 787-8
Bank of China (BOC) Aviation	Singapore	285	1	Boeing 777-300 ER
Cross Ocean Partners	London, UK	N/A	2	Boeing 737-700
China Development Bank (CDB) Leasing	Beijing, China	151	1	Boeing 777-300 ER
Nordic Aviation Capital	Billund, Denmark	468	5	Embraer 190

Table 2: List of lessors of KQ Aircraft
Source: Kenya Airways

181. The CEO noted that the leasing companies do not usually lease a large number of aircraft to one airline as a mechanism of limiting their exposure to risk and that it would not be possible for KQ to lease its entire fleet from one leasing company or bank. Of the 20 aircraft owned by KQ, the CEO submitted that 6 Boeing 787-8 and one Boeing 777-300 were purchased from proceeds of a syndicated loan from City Bank NA, JP Morgan Chase Bank, and Afrexim Bank through Tsavo Limited. In addition 10 Embraer 190 were purchased from proceeds of a syndicated loan from Standard Chartered Bank International and Afrexim Bank through Samburu Limited. The 3 remaining Boeing 737-300 aircraft are fully paid for.

182. The KQ CEO noted that due to the current KQ network structure, specific commercial needs and cost efficiency analysis, KQ had decided to sublease three of the 777-300ER to Turkish Airlines and one 787-8 Dreamliner to Oman Air to avoid the burden of costs of aircraft that cannot be utilized efficiently at the moment.

183. He further submitted that currently none of the two aircraft manufacturers, Boeing and Airbus are directly involved in leasing, which is the preserve of leasing companies and banks.

Public views

184. Walter Mocha called for the disclosure and review of any aircraft leasing agreements to ascertain their value as compared to other arrangements made internationally.

185. Joyce Kebati questioned the ownership of KQ aircraft.

186. Capt. Gad Kamau noted that what ails KQ is the internal procurement procedures and the leasing of aircraft through brokers and middlemen which has bled the airline over time. It was his view that this should be addressed before any bailout of KQ is considered.

The financial health status of KQ

187. The KQ CEO submitted that KQ had diagnosed the root causes of its previous poor financial results which enabled it to establish fundamentals for the turnaround plan currently being implemented to assist it to achieve operational profitability, first, and in the long run, ability to generate profit before tax and dividends for its shareholders. He noted that KQ is currently engaged in activities geared towards boosting revenues, reducing costs and efficient governance. He refereed the Committee to the KQ 2018 half year figures which showed KQ generated Kshs. 52 Billion in revenue, held a Kshs. 1 Billion operating loss with a Kshs. 4 Billion profit before tax.

188. The CEO noted that KAA charges KQ annual fees of up to USD 22 Million annually comprising of landing fees of USD 16 Million, Building and rent utilities of USD 4 Million and concession fees of USD 2 Million. In addition, he noted that KQ pays KAA the Air Passenger Service Charge (APSC) which is dependent on the number of passengers departing from Kenya with the airline. The APSC KQ pays annually amounts to USD 43 Million accounting for approximately 50% of JKIA's total revenue from APSC per year. In addition, he noted that KQ is charged various taxes and levies

by Kenya Revenue Authority (KRA). Import Declaration Fees and Railway Development Levy.

189. The KQ CEO submitted details on the company's other financial information, noting that the airline owed Kshs. 84.8 Billion in non-current liabilities and Kshs. 53.6 Billion in current liabilities financed by Kshs. 113.1 Billion in non-assets and Kshs. 21.3 Billion current assets, thereby leading to a cash-flow of Kshs. 5.9 Billion.

190. With regard to the nature of securities held by foreign and local banks in relation to KQ operations, the CEO submitted that the Government of Kenya has issued a sovereign guarantee to the Exim Bank for USD 525 Million for the loan taken by KQ to purchase one Boeing 777-300 Aircraft, 6 Boeing 787-8 Aircraft and one GEnx engine. In addition, the Government of Kenya has issued a further sovereign guarantee to a consortium of local banks comprising the Commercial Bank of Africa (CBA), NIC Bank Limited, Kenya Commercial Bank Limited (KCB), I&M Bank, National Bank of Kenya (NBK), Diamond Trust Bank (DTB), Ecobank, Jamii Bora Bank, Chase Bank, and Equity Bank, for a USD 225 Million debt that was converted into 38.1% equity in KQ held by KQ Lenders 2017 Limited (KQ Lenders) as part of the 2017 deal to restructure the airline. Under the terms of the restructuring, KQ Lenders may hold the equity for up to 10 years.

191. The CEO further noted that the banks whose debt was converted to the equity held by KQ Lenders, with the exception of Chase Bank and Jamii Bora Bank extended KQ a further loan of USD 44 Million for purposes of liquidity which amount is not guaranteed by the Government and KQ is currently only obligated to service the interest element over time.

192. With regard to KQ revenues, the CEO noted that for the financial years 2015, 2016 and 2017, KQ had generated revenues of Kshs. 110. 1 Billion, Kshs. 116.1 Billion and Kshs. 106.2 Billion, respectively. For the 2018 half year, he noted that KQ had generated Kshs. 52 Billion. The CEO submitted projections of revenue for the years 2019, 2020, 2021 and 2022 as USD 1.36 Billion, USD 1.64 Billion, USD 1.81 Billion and USD 1.98 Billion, respectively.

193. The Director General, KCAA submitted that KQ owes it Kshs. 516,195,794/- in outstanding Air Navigation Service fees and the PIIP would have to address how KQ's debts would be managed.

Collection of ANS charges

194. KCAA submitted that the PIIP was not clear with respect to the collection of ANS charges, on whether the SPV would collect ANS charges at JKIA or the entire country.

Ticket prices

195. KALPA submitted that KQ ticket prices are very expensive and passengers are opting for other cheaper airlines like Emirates and ET thus contributing to its decline.

196. On this issue, the KQ CEO noted that currently, his remit is the maximization of shareholder profits and that therefore requires him to negotiate the highest ticket price he can obtain for the airline. He however noted that in the even the PIIP is implemented and the aviation assets consolidated to streamline synergies between JKIA and KQ, the increased investment, traffic and routes would automatically bring down the prices of tickets

197. The Member for Embakasi East Constituency, Hon. Babu Owino questioned KQ's rationale for allowing ticketing software to be controlled and managed from India.

KQ Baggage Policy

198. KALPA questioned the rationale behind KQ's policy of reducing check-in baggage allowance from two bags to one bag weighing 23Kilograms, thus charging for any extra baggage while ET allows passengers an allowance of two bags, each double the weight of KQ's one bag. This, in their view acts to drive customers away from KQ.

199. The Member for Embakasi East Constituency, Hon. Babu Owino questioned KQ's one-bag baggage policy noting that the policy has decimated KQ's market share and benefited ET and other Airlines serving its African routes.

200. Walter Mocha questioned KQ's one-bag baggage policy noting that the policy has decimated KQ's market share and benefitted ET and other Airlines serving its African routes.

Deployment of inappropriate aircraft

201. KALPA also question KQ's deployment of smaller aircraft on their West African routes despite the route having being fully booked and the need for larger aircraft to ensure that passenger baggage is not left behind. The General Secretary noted that in many cases passengers have been forced to travel without their bags since the smaller aircraft

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cannot carry the luggage plus the passengers. This has led to dissatisfaction amongst their customers who have opted for other airlines. Further, it was KALPA's view that this particular failure has led to the decline of routes that could have been very profitable for KQ such as Douala, Yaoundé, Lagos and Accra.

Due Diligence on PIIP

202. The KAA CEO submitted that KAA engaged a consortium of transaction advisors comprising MMC Africa Law, KPMG and Saracen to provide transaction advisory services on the PIIP, including—

(a) a review of the PIIP, Heads of Terms and Financial Model;

(b) advice on the applicable legal and regulatory matters including approvals to be secured and the potential legal and operational risks to be managed;

(c) assessment of the financial deliverability of the transaction including KQ's legal, financial and operational capacity to enter into the proposed transaction;

(d) due diligence on the adequacy of the proposed operating, maintenance and investment plans in relation to the traffic growth assumptions made by KQ;

(e) a review of the terms and structure of the PIIP and a scenario analysis of the different possible transaction structures to evaluate and determine the deal structure most beneficial to the KAA;

(f) a Fiscal Commitments and Contingent Liability analysis of the PIIP under various transaction structure options;

(g) a review and stress-test of the Public Sector Comparator, Value for Money and affordability components of the financial model submitted by KQ to assess its robustness.

(h) a review of the structure and adequacy of the consideration offered by KQ and an investigation into structuring of contingent payouts that enhance value for money to KAA;

(i) advice on the tax structuring of the transaction and the subsequent tax impact on KAA;

(j) an assessment of and advice on matters related to possible staff redundancy, severance and pension liabilities arising out of the PIIP; and

(k) environmental, social and economic analyses of the project; and

(l) negotiation support throughout the deal execution phase.

203. The engagement of the transaction advisors was done through a restricted tendering process in light of the urgency of the matter and the fees of Kshs. 15 Million quoted by

the winning bid of MMC Law Africa were paid out of KAA's Legal budget. KAA is to shoulder all the costs of the transaction paid to its transaction advisors whether or not the PIIP is approved and implemented.

204. The CEO noted that apart from a review of certain key KQ agreements, the due diligence phase of the transaction advisory engagement had been completed and that KAA had already submitted a draft negotiation criteria to the PPP Unit and is awaiting approval from the Unit and from the National Treasury as envisaged under section 61(1) of the PPP Act for it to proceed to the negotiation phase.

205. The CEO submitted that, arising from the due diligence, KAA had identified significant gaps in the PIIP that would have to be addressed in its negotiations with KQ. These gaps include KQ's capacity to undertake the PIIP, the value of the PIIP to KAA, compliance of the PIIP with the viability gap funding requirements under the PPP Act and the financing gap left in KAA once JKIA and its assets are concessioned out under the PIIP.

206. The CEO further noted that KAA is yet to formally respond to KQ on the PIIP as it awaits the outcome of the due diligence and the statutory negotiation process under the PPP Act.

Standard of JKIA operations

207. The KAA CEO submitted that JKIA facilities are being operated within the required International Standards. He noted that JKIA has been granted an aerodrome certificate by the Kenya Civil Aviation Authority (KCAA) as evidence that the airport meets the design, operations and safety management systems of an international Airport. Further, he noted that JKIA has been granted Certification by the United States Department of Transport as a Last Point of Departure enabling direct flights from Nairobi to the United States of America (USA).

KAA Finances

208. The CEO submitted that as at 30th June 2018, KAA assets stood at Kshs. 82.78 Billion comprising Kshs. 50.845 Billion in fixed assets and Kshs. 31.935 Billion in current Assets. With regard to the fixed assets, the CEO submitted that the value submitted was based on a 2004 valuation and that KAA assets are slated to be revalued afresh by the Ministry of Lands with the current valuation of its prime portfolio of land and building

expected to be in excess of Kshs. 1 Trillion. The CEO further submitted that KAA's current assets include Cash and Bank balances of Kshs. 14.1 Billion in investment reserves for the financing of its priority projects which include runway upgrades, remodeling of terminals B, C and D, a second runway and a new terminal building.

209. The CEO noted that KAA owes long term liabilities of Kshs. 8.997 Billion comprising a World Bank loan of Kshs 2.2 Billion and a Kshs. 7.9 Billion loan from Agence Française de Développement (AFD) whose proceeds were used to finance JKIA's aviation infrastructure including the construction of Terminal 1A.

KAA Revenue and Sources

210. The CEO submitted that for the years 2015/2016, 2016/2017 and 2017, 2018, KAA generated total revenues of Kshs. 12 Billion, Kshs. 17. 2 Billion and Kshs. 17.624 Billion, respectively, from the Air Passenger Service Charge, landing and parking charges, air bridge charges, fuel uplift charges, rentals, concessions and other sources. The Air Passenger Service Charge contributed the single largest portion to KAA revenue during this period, generating Kshs. 6.719 Billion, Kshs. 9.567 Billion and Kshs. 10.147 Billion in the respective financial years.

211. The CEO further submitted that, as per its projections for the years 2018/2019, 2019/2020 and 2020/2021, KAA expected to generate revenues of Kshs. 17.429 Billion, Kshs. 16.889 Billion and Kshs. 18.332 Billion, respectively. In its projections, the Air Passenger Service Charge is similarly expected to contribute the single largest portion of more than half of KAA revenue in each year.

Contribution of KAA to the economy

212. The CEO submitted that according to the International Air Transport Association (IATA) KAA's contribution to GDP for the 2017/2018 financial year comprised Kshs. 18 Billion in income, Kshs 352 Million in corporation tax, Kshs 2.7 Billion in capital expenditure, Kshs. 13 Billion in spending, Kshs. 128 Million in dividend paid to the government, a Kshs. 79.8 Billion proportion of earnings from tourism and direct and indirect employment of 1,946 and 9730 persons, respectively.

Conflict of Interest

213. JK Waweru questioned why the KAA Chairperson should continue serving as Group CEO Commercial Bank of Africa, one of the banks which converted its loans to KQ into equity thus being in a position of conflict of interest.

214. The Chairperson of KAA, Mr. Isaac Awuonda, submitted that his dual roles of KAA Chairperson and Group General Manager of Commercial Bank of Africa Limited, one of the banks whose debt was converted into equity held by KQ Lenders in the 2017 in the restructuring of KQ could be perceived as a conflict of interest with regard to the consideration of the PIIP. He however noted that he is not engaged in the day-to-day operation of Commercial Bank of Africa (K) Limited and that he had at a very early stage declared the issue to the KAA Board and received no objection to his presence during deliberations over the PIIP.

6.2 Committee Observations

215. The Committee observed that—

(1) KQ is a private company which is listed at the Nairobi Securities Exchange. In terms of shareholding, currently, the Government of Kenya owns 48.9%, KQ Lenders Company 38.1%, KLM 7.8%, the Employee Share Ownership Plan 2.4%, and other individual shareholders 2.8%.

(2) KQ currently leases aircraft at an exorbitant cost, putting into question the manner in which the leases were negotiated;

(3) The fuel hedging model adopted by KQ is one of the areas of financial leakages in the company;

(4) The PIIP is not clear with respect to the collection of air navigation service charges especially on whether the SPV will collect the charges at JKIA only or the entire country.

(5) KQ ticket prices are very expensive and passengers are opting for other cheaper airlines like Emirates and ET thus contributing to its loss of market share.

(6) KQ's policy of reducing check-in baggage allowance from two bags to one bag weighing 23Kilograms, thus charging for any extra baggage drives customers away since other airlines like ET give passengers an allowance of two bags, each double the weight of KQ's one bag.

(7) KQ's deployment of smaller aircraft to busy routes has led to customer dissatisfaction since customers fail to secure seats and passenger baggage is left behind.

(8) There is a conflict of interest with regard to the consideration of the PIIP, since the Chairperson of KAA is also the Group CEO of Commercial Bank of Africa, one of the banks whose debt was converted into equity held by KQ Lenders in the 2017 restructuring of KQ.

CHAPTER SEVEN

7.0 COMMITTEE RECOMMENDATIONS

216. The Committee considered the submissions made by the stakeholders and noted that the PIIP does not present a viable option for restoring Nairobi as the civil aviation hub of choice in Africa and treating KQ and JKIA as strategic national assets. In addition, the Committee noted that taking into account KQ's current financial status and the current lack of competitiveness of Kenya's aviation industry, the Government and the people of Kenya stand to lose the most in the event the trend is left to continue, noting that KQ debtors enjoy a sovereign guarantee of Kshs. 75 Billion. Appreciating the policy adopted by the Cabinet with regard to the consolidation of the country's aviation assets and re-establishing Nairobi as a competitive international aviation hub, the Committee recommends—

(1) That Kenya Airways be nationalized.

(2) The government establishes an Aviation Holding Company with four wholly owned subsidiaries, namely,—

   (a) JKIA company incorporated to manage JKIA as an international hub, ground handling and catering services;

   (b) Kenya Airports Authority with a revised mandate of managing the remaining airports and airstrips. Under its new mandate KAA shall maintain at least one serviceable airstrip in each county for purposes of security, health and other emergencies;

   (c) KQ as the national carrier; and

   (d) a centralised Aviation Services College/Institute.

(3) The resources of the Aviation Holding Company and any revenue generated from such resources must be utilized for the mutual benefit and development of all its subsidiaries.

(4) All Air Navigation Services shall remain within the exclusive mandate of the Kenya Civil Aviation Authority. KCAA shall, in addition, collect en-route charges and aerodrome and approach charges.

(5) Upon nationalization of KQ, amendments be made to include exemptions in the State Corporations Act, the Public Finance Management Act, the Public Procurement and Asset

Disposal Act and the Public Service Commission Act; or a specific legislation be enacted to provide for the governance and operations, financial matters, procurement and disposal of goods and services, designation of certain air transport services as essential services and management of human resource in the Aviation Holding Company and all its subsidiaries in a manner that allows the entities to function as accountable going concerns without restrictive bureaucracy;

(6) Upon nationalization of KQ, priority legislation be enacted—

(a) to grant the Aviation Holding Company and its subsidiaries favourable tax concessions for a specified period;

(b) to amend the Miscellaneous Fees and Levies Act, 2016 to exempt the Aviation Holding Company, and KQ from paying Import Declaration Fees on aircraft, aircraft parts, utilities, commercial/on-board products and related goods and equipment, and imported Jet A-1 fuel for a specified period;

(c) to amend the East African Community Customs Management Act to exempt the Aviation Holding Company and its subsidiaries from paying customs duty on aircraft related parts and accessories including jet lubricants, grease, adhesives, aircraft specific detergents used for aircraft maintenance, aircraft seats and other related goods for a specified period;

(d) to amend the Excise Duty Act to exempt the Aviation Holding Company and its subsidiaries from excise duty on all excisable goods including imported Jet A-1 fuel for a specified period;

(e) to amend the Second Schedule to the Value Added Tax Act to Zero-rate all supplies made or received by the Aviation Holding Company and KQ, including supplies of Jet A-1 fuel for both domestic and international flights for a specified period;

(f) to amend the Kenya Airports Authority Act to—

(i) transfer the management and assets of JKIA to the JKIA Company; and

(ii) allow the Aviation Holding Company to collect tariffs and other airport user charges, including landing charges and parking charges;

(g) to amend the Air Passenger Service Charge Act to—

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(i) allow the Aviation Holding Company to collect the Air Passenger Service Charge for distribution to its subsidiaries subject to subparagraphs (ii) and (iii);

(ii) allocate at least 6% of the Air Passenger Service Charge to the Kenya Civil Aviation Authority to finance its operations; and

(iii) allocate and ring-fence at least 20% of the Air Passenger Service Charge to KAA for the management of the remaining airports and airstrips; and

(h) to amend the Civil Aviation Act to allow the transfer of any JKIA licenses to the SPV incorporated to manage JKIA;

(7) Upon nationalization of KQ, the government undertakes a staff rationalization programme with a view of retaining existing staff and harmonizing the terms of service and remuneration thereof under the Aviation Holding Company, including a review of the existing Collective Bargaining Agreements.

(8) Upon nationalization of KQ, the government reviews the aircraft leasing agreements entered into by KQ with a view to renegotiating better terms on account of the consolidated balance sheet of the Aviation Holding Company, improved KQ cash flow and a lowered risk profile of Kenyan aviation assets. Any future leasing arrangements for aircraft must be cost-effective.

SIGNED:.. DATE: 17/06/2019.

HON. DAVID PKOSING, CBS, MP - CHAIRPERSON

DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS AND HOUSING