MIN No. TPWH 225/2019: **PRELIMINARIES**

The meeting was called to order at fifteen minutes past ten o'clock, with a word of prayer from the Hon. Shadrack Mose, M.P. The agenda was confirmed as being confirmation of the minutes of the previous sittings and adoption of the Report on the Inquiry into the Aviation Industry in Kenya.

MIN No. TPWH 226/2019: **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS**

Confirmation of minutes of the previous sitting was deferred to the next sitting of the Committee.

MIN No. TPWH 227/2019: **ADOPTION OF THE REPORT ON THE INQUIRY INTO THE PROPOSED KENYA AIRWAYS' PRIVATELY INITIATED INVESTMENT PROPOSAL TO KENYA AIRPORTS AUTHORITY**

The report on the inquiry into the proposed Kenya Airways' Privately Initiated Investment Proposal to Kenya Airports Authority was adopted, having been proposed and seconded by Hon. Samuel Arama M.P. and Hon. Tom Odege, M.P. respectively.

MIN No. TPWH 228/2019: **ADJOURNMENT**

There being no other business, the sitting was adjourned at half past eleven in the morning. The next meeting to be held on Tuesday 18th June, 2019

Signed.....

(Chairperson)

Date.....

MINUTES OF THE FIFTIETH (50TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON TUESDAY, 11TH JUNE 2019 AT 10.00 A.M. IN 8TH FLOOR UKULIMA SACCO BUILDING, PARLIAMENT.

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Kulow Maalim Hassan, M.P.
3. Hon. Ahmed Abdisalan Ibrahim, M.P.
4. Hon. Shadrack John Mose, M.P.
5. Hon. Tom Mboya Odege, M.P.
6. Hon. Mugambi Murwithania Rindikiri, M.P.
7. Hon. Samuel Arama, M.P.
8. Hon. Ahmed Bashane Gaal, M.P.
9. Hon. Peris Pesi Tobiko, M.P.
10. Hon. Rigathi Gachagua, M.P.
11. Hon. Suleiman Dori Ramadhani, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - Vice Chairperson
2. Hon. Johnson Manya Naicca, M.P.
3. Hon. Savula Ayub Angatia, M.P.
4. Hon. David Njuguna Kiaraho, M.P.
5. Hon. Gideon Mutemi Mulyungi, M.P.
6. Hon. Vincent Kemosi Mogaka, M.P.
7. Hon. Rehema Dida Jaldesa, M.P.
8. Hon. Dominic Kipkoech Koskei, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I
2. Ms. Rose Wanjohi - Clerk Assistant I
3. Ms. Mercy Wanyonyi - Legal Counsel I
4. Mr. Abdinasir Moge - Fiscal Analyst I
5. Mr. James Muguna - Research Officer III
6. Mr. Collins Mahamba - Audio Officer
7. Mr. Yeziel Jilo - Sergeant-at-arm

RECOMMENDATIONS ON THE INQUIRY

The Committee was in agreement with the recommendations of the report but thought it best to revise recommendation number seven which read, ''Upon nationalization of KQ, the Government undertake a staff rationalization programme with a view of harmonizing the terms of service and remuneration of staff under the Aviation Holding Company, including a review of the existing Collective Bargaining Agreements'', to read as follows; "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".

The secretariat was tasked to incorporate the changes in the report and submit to the committee for final consideration and adoption in the next meeting.

MIN No. TPWH 224/2019: **ADJOURNMENT**

There being no other business, the sitting was adjourned at half past three O'clock. The next meeting to be held on Tuesday 11th June, 2019

Signed.....

(Chairperson)

Date.....

d) Amendment of the Second Schedule to the Value Added Tax Act to zero-rate all supplies made or received by the AHC and its subsidiaries, including supplies of Jet A-1 fuel for both international and domestic flights.

The tax exemptions are supported. However, they may not be enough to sustain the airline and enable it to undertake the role of a strategic national asset, primarily to expand its route network and strengthen JKIA as a hub.

❖ **Collection of Charges in Aviation Sector**

- It is recommended that the Air Passenger Service Charge (APSC) be collected by the AHC and provided to the subsidiaries in line with an agreed sharing arrangement. However, the holding company should have some flexibility to consider the strategic plans of the subsidiaries and provide funding as necessary;

- The proposal to allow JKIA Company to collect landing charges, parking charges, en-route charges, aerodrome and approach charges though welcome may affect Kenya Civil Aviation Authority's ability to provide Air Navigation Services in the country. It is therefore proposed that the en-route charges, aerodrome and approach charges which are an integral part of the Air Navigation Service Charges should be collected by the Kenya Civil Aviation Authority;

- The proposal to increase the Air Passenger Service Charge currently being given to the Kenya Civil Aviation Authority (KCAA) from 6% to 20% is therefore not recommended. The Annual budgets of the subsidiaries should be agreed with the holding company and funded as necessary.

Conclusion

The above proposal has been designed in line with the proposed recommendations of the Transport Committee. In our view this proposal offers the structural and long-term reforms of the Kenyan aviation sector. It should be therefore treated as a comprehensive package of solutions (holding structure, tax exemptions, collection of charges scheme etc.) with each element significantly supporting the growth of the airline and airport business in the future. Implementation of this proposal shall ultimately lead to restoration of the national aviation's competitiveness and its market share in East Africa.

The proposal, however, require further deep-dive analyses to carefully study each aspect of the holding operations such as flow of funds between the mother company and subsidiaries, efficient management and governance structure as well as improvement initiatives (quick-wins) to generate benefits in short- and long-perspective. The responsibility to re-organize public assets is vested in the National Treasury. There is thus need for critical analysis of the financial implications of nationalization through the use of financial modelling and other tools.
The technical team considered the following measures:

A. Review of the efficiency drivers for the Airport Operator KAA and Industry Regulator KCAA and optimization of their functions;
B. Affirmative measures that will achieve coherence between aviation policy and broader GOK mainstream policy in a symbiotic manner.

GOK may consider formation of a dedicated team to develop long term measures to create a sustainable aviation policy and oversee its implementation.

MIN No. TPWH 223/2019: CONSIDERATION OF THE COMMITTEE'S

Below is an outline of the required processes to achieve nationalization of the carrier. The points below are based on the assumption that KQ will be delisted:

i. In order to commence the nationalization process, GOK could make an offer to the other shareholders of KQ, with the objective of acquiring majority shareholding. The takeover of a public listed company is prescribed by the Takeover Regulations, with Capital Markets Authority, Competition Authority and the Securities Exchange approvals being some of the mandatory requirements;

ii. Once majority shareholding is obtained by GOK, GOK can then proceed to buy out minority shareholders in accordance with the provisions of the Companies Act 2015.

iii. With regard to the shareholding of KLM and any other foreign investor in KQ, and in addition to the existing KQ Shareholders Agreement, the Foreign Investments Protection Act as read with Article 75 (1) of the Constitution provides that no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:
- the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and
- provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

The following considerations are critical to the nationalization process:
(i) Negotiation of equipment leasing arrangements for KQ as the nationalization option is a trigger for change control provisions which are a trigger for default; and
(ii) Determination of the funding implication to GOK of implementing the proposed structures and provision of requisite budgetary allocations.

B. **Short term measures required to sustain the operations of the National Carrier**
Short term legislative and administrative actions include but are not limited to:

❖ **Tax Exemptions**
In line with recommendations of the Transport Committee it is proposed to specify the following tax exemptions benefiting the AHC and its subsidiaries for a specific period:

a) Amendment of the Miscellaneous Fees and Levies Act, 2016 to exempt the AHC from paying:
- Railway Development Levy (RDL) on aircraft, aircraft parts, Jet A-1 fuel, utilities, commercial / on-board products and related goods and equipment; and
- Import Declaration Fees (IDF) on aircraft parts, utilities, commercial / on-board products and related goods and equipment, Jet A-1 fuel imported by the suppliers and procured by AHC and its subsidiaries.

b) Amendment of the East African Community Customs Management Act (EACCMA) to exempt the AHC from paying Custom Duty on aircraft related parts and accessories not specifically exempted from tax under part B of the 5th Schedule to the act such as jet lubricants, grease, adhesives, aircraft specific detergents used for aircraft maintenance, aircraft seats and other related goods.

c) Amendment of the Excise Duty Act to provide for an exemption from Excise Duty for all excisable goods including excise on Jet A-1 fuel imported by the suppliers and procured by AHC and its subsidiaries.

recommendation to exempt the AHC once nationalized from any of the above laws requires statutory exemption expressly provided in an Act of Parliament, with the consequential amendments to relevant Acts.

Section 5A of the State Corporations act allows the President by notice in the Gazette, to exempt a state corporation from any of the provisions of the State Corporations Act.

In addition, Section 114 A of the PPADA, 2015 provides that a procuring entity may use a procurement procedure specially permitted by the National Treasury. The National Treasury may allow the use of specially permitted procedure where exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act and the Regulations; where the market conditions or behaviour do not allow the effective application of the Act and Regulations made under the Act; for specialized or particular requirements which are regulated or governed by harmonized international standards or practices; where strategic partnership sourcing is applied; where credit financing procurement is applied; or in such other circumstances as may be prescribed. The Act also provides that the Cabinet Secretary may prescribe the procedure for carrying out specially permitted procurement under this section. To enable the operations of the AHC, Regulations for the application of Section 114 A should be enacted.
The statute establishing AHC and the JKIA subsidiary would also provide for the transfer of the relevant assets to JKIA Corporation. The vesting of assets would be preceded by a valuation and determination of Assets to be transferred.

To conclude, it is reiterated that should the legal framework be amended to accommodate the exemptions, alternative measures should be taken to ensure that the proposed AHC and its subsidiaries remain transparent and accountable (to various oversight organs such as the National Treasury, Public Investment Committee and the Auditor General) without excessive bureaucracy.

- **Establishment of Jomo Kenyatta International Airport (JKIA) Corporation**
The modalities of establishing JKIA Corporation are similar to what has been stated above for the establishment of the AHC. The preferred solution is including the establishment of the corporation in the same statute that establishes the AHC. The treatment of exemptions for JKIA Corporation would be the same as what has been stated above for the AHC.

- **Nationalization of Kenya Airways Plc**
The question of nationalization of KQ, is the culmination of a journey that brings the airline back to a similar legal structure that constituted it pre-privatization in 1992. GOK divested a significant portion of its shareholding in the airline to pave way for investment by the public and a strategic partner. Presently, the existing shareholding arrangements provide protection to the other shareholders, in the event of nationalization.

The nationalization of the national carrier is a long-term solution and therefore acceptable. However, the process will require about 18 months due to cost implications and discussions that need to be undertaken with the Banks and private shareholders. There is also need for compliance with applicable laws and regulations such as the Companies' Act, Capital Markets Act, Competition Act, Capital Markets (Take-overs and Mergers) Regulations, 2002 (the "Takeover Regulations").

As part of the nationalization, it has been proposed that a delisting process for KQ be carried out, which includes suspension of trading, negotiation and buyout of shareholders. The option of a long-term bond for KQ Lenders in order to exit them from the shareholding is a critical consideration. A valuation of shares will have to be done to determine the financial implications of this step.

c. Incorporation of the company under the Companies Act, 2015.

For greater flexibility and in order to create a sector specific legislation, option b is the most suitable. It is envisaged that the AHC will have the power to establish other companies in the pursuit of its objectives.

There are proposals to exempt the AHC from specific pieces of existing legislation, namely the State Corporations Act, the Public Finance Management Act 2012, the Public Procurement and Asset Disposal Act 2015 and the Public Service Commission Act. The justification proffered is that these exemptions are primarily for the benefit of KQ and will allow the airline to operate competitively on a global level without being fettered by the bureaucratic processes that are attendant to the afore stated statutes.

The justification given requires further canvassing as the said statutes were enacted to create systems of accountability and prudent use of public resources (both financial and human) in state corporations. Furthermore, the law as it exists does not contain provisions for the blanket exemptions sought, and other related statutes such as the Public Audit Act, 2015, may not afford sufficient safeguards.

The law as currently established, precludes public entities from exemptions from the above laws. The Office of the Attorney General has already pronounced itself on the matter where Kenya Reinsurance Corporation Limited sought to have its subsidiaries in West Africa and Zambia exempted from the Public Procurement and Asset Disposal Act, 2015 (PPADA, 2015).

The PPADA, 2015 defines a procuring entity as a public entity making a procurement or asset disposal. The Act under Section 2 (k) and (q) further provides that a public entity includes a company owned by a public entity or a body in which the national or county government has controlling interest. The AHC will be a public entity by the fact that the Government of Kenya will have a controlling interest in it.

The AHC will be a conduit, handler and controller of certain public funds. Public funds are defined in the Public Audit Act, No. 34 of 2015 as follows:

(a) *"All money that comes into possession of, or is distributed by, a State organ including the national or county governments and intergovernmental entities and money raised by a private body under statutory authority..."*

(a) *"...and any money that can generate liability for the government."*

Moreover, the Public Finance Management Act, 2012 defines public money as:

(a) *"All money that comes into possession of, or is distributed by, a national government entity and money raised by a private body where it is doing so under statutory authority; and*

(a) *Money held by national government entities in trust for third parties and any money that can generate liability for the Government."*

A wholly State-Owned Entity is a public asset held in trust for the People of Kenya and subject to the Constitution, the Public Finance Management Act, 2012, the Public Procurement and Asset Disposal Act, 2015 and other Kenyan laws and regulations.

From the foregoing, the AHC and its subsidiaries would be subject to the application of the Constitution, State Corporations Act, PFMA, PPADA, 2015 and the Public Audit Act. The

region, it must begin to look at its aviation assets more strategically as key contributors to the GDP – and this starts with having a world class airline and world class airports, starting with JKIA as the main gateway to the country.

The main aim is to create operational synergies between Kenya's main hub and the National Carrier, thereby facilitating the airport and airline operations that are economic growth drivers. This model is similar to what is being utilized by Kenya's main competitors in the global aviation industry.

KQ operates internationally and needs to compete on commercially practical terms like any other private sector organization. There are various recommendations to ensure that the place of Nairobi as the civil aviation hub of choice in Africa is restored. Kenya Airways as the national carrier plays a strategic role in this. There is therefore need for KQ to adapt to the rapidly evolving global aviation landscape.

The current process should therefore be viewed from the lens of a restructuring of the entire aviation sector. The Ministry of Transport is currently embarking on a process of policy review and amendment. The new policy framework will inform the second phase of legislation required to develop the aviation sector post the current exercise.

Proposed Recommendations on the Restructuring of the Aviation Sector in Kenya

The recommendations are structured into two key sections:

A. Policy and legal considerations on the creation of an Aviation Holding Company; and
B. Short term measures required to sustain the operations of the National Carrier.

These recommendations are high level and will require additional time to concretize. A minimum period of three (3) months should be granted for the concretization phase.

A. **Policy and legal considerations on the creation of an Aviation Holding Company**

- **Policy Considerations**

  The DCTPWH has shared in its preliminary findings on the proposal for creation of a 100% Government of Kenya (GOK) Aviation Holding Company (AHC) that will consist of the following subsidiaries:

  a hived off JKIA, a residual KAA, a nationalized Kenya Airways Plc and an amalgamated Aviation Academy. The industry regulator KCAA maintains its independent position as governed by existing international and domestic legal and practice frameworks. The proposal of the Committee is a variant of the broad policy approved by Cabinet that supported the consolidation of the aviation assets in the manner proposed and is linked to the reorganization of an already existing sector. As stated previously in this document, the Ministry of Transport is currently undertaking a policy review process with the intended outcome being a standalone revised aviation policy and implementation plan.

- **Legal Considerations**

  The creation of the 100% GOK owned AHC and the consolidation of the aviation assets will require several changes in the law. These changes will centre on three main points: the establishment of the Aviation Holding Company, establishment of JKIA Corporation and the Nationalization of Kenya Airways Plc. It is important that the changes made, dovetail with the existing legal regime and be implementable.

- **Establishment of Aviation Holding Company**

  The creation of the AHC can be achieved by any of the following ways below:

  a. Establishment as a State Corporation as per Section 3 of the State Corporations Act;
  b. Enactment of a specific statute forming the AHC; and

MIN No. TPWH 220/2019: **PRELIMINARIES**

The meeting was called to order at ten minutes to ten o'clock, with a word of prayer from the Hon. Ahmed Abdisalan, M.P. The agenda was confirmed as being confirmation of the minutes of the previous sittings and consideration of the Report on the Inquiry into the Aviation Industry in Kenya.

MIN No. TPWH 221/2019: **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS**

Confirmation of minutes of the previous sitting was deferred to the next sitting of the Committee.

MIN No. TPWH 222/2019: **CONSIDERATION OF THE REPORT ON THE INQUIRY IN RELATION TO KENYA AIRWAYS' PRIVATELY INITIATED INVESTMENT PROPOSAL TO KENYA AIRPORTS AUTHORITY SUBMITTED BY THE MINISTRY OF TRANSPORT AND INFRSTRUCTURE AND THE OFFICE OF THE ATTORNEY GENERAL.**

The Legal officer took Members through the submissions made by the Ministry of Transport and Infrastructure together with the Office of the Attorney General and the National Treasury, pursuant to the directions of the Committee during the meeting held on 7 May 2019, which read as follows;

Background

For close to forty (40) years, Kenya enjoyed dominance in the aviation sector in East and Central Africa. Kenya is endowed with a strategic location in terms of connectivity to the rest of Africa, a highly skilled human resource complement trained in aviation matters, as well as relatively well-developed aviation infrastructure systems.

Regrettably, Kenya's aviation sector has been steadily declining in the past decade. This decline has been characterized by the turbulent performance of the National Carrier Kenya Airways Plc (KQ) and the loss of business by Jomo Kenyatta International Airport (JKIA) to other competing hubs globally. The decline is partly attributable to the existing policies impacting aviation in Kenya as well as a lack of agility and operational inefficiencies within the industry.

The Ministry of Transport is taking certain critical actions aimed at the stabilization and growth of the aviation industry. The National Treasury in conjunction with the Ministry of Transport conducted a financial restructuring of the national carrier in the year 2017. The next critical step is the restructuring of the aviation industry commencing with the consolidation of aviation assets.

The consolidation of the national aviation assets is aimed at restoring Nairobi as the civil aviation hub of choice in Africa, thereby contributing to Kenya's economic competitiveness, with aviation being a corridor for development and technology transfer. If Kenya is to achieve its objective of being an aviation hub in the

MINUTES OF THE FOURTY NINETH (49TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON MONDAY, 10TH JUNE 2019 AT 10.00 A.M. IN COMMITTEE ROOM 9, MAI N PARLIAMENT BUILDING

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Kulow Maalim Hassan, M.P.
3. Hon. Ahmed Abdisalan Ibrahim, M.P.
4. Hon. Shadrack John Mose, M.P.
5. Hon. Tom Mboya Odege, M.P.
6. Hon. Rigathi Gachagua, M.P.
7. Hon. Ahmed Bashane Gaal, M.P.
8. Hon. Gideon Mutemi Mulyungi, M.P.
9. Hon. Mugambi Murwithania Rindikiri, M.P.
10. Hon. Suleiman Dori Ramadhani, M.P.
11. Hon. Vincent Kemosi Mogaka, M.P.
12. Hon. Rehema Dida Jaldesa, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - Vice Chairperson
2. Hon. Johnson Manya Naicca, M.P.
3. Hon. Savula Ayub Angatia, M.P.
4. Hon. David Njuguna Kiaraho, M.P.
5. Hon. Peris Pesi Tobiko, M.P.
6. Hon. Samuel Arama, M.P.
7. Hon. Dominic Kipkoech Koskei, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I
2. Ms. Rose Wanjohi - Clerk Assistant I
3. Ms. Mercy Wanyonyi - Legal Counsel I
4. Mr. Abdinasir Moge - Fiscal Analyst I
5. Mr. James Muguna - Research Officer III
6. Mr. Collins Mahamba - Audio Officer
7. Mr. Yeziel Jilo - Sergeant-at-arm

There being no other business, the sitting was adjourned at four o'clock. The next meeting to be held on Friday, 24th May 2019 at 9:30am.

Signed.....

(Chairperson)

Date.....24/5/2019

17. The minutes of the 35th sitting held on 7th May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Mugambi Rindikiri and Hon. Samuel Arama respectively.
18. The minutes of the 36th sitting held on 9th May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Johnson Naicca and Hon. Samuel Arama respectively.
19. The minutes of the 37th sitting held on 16th May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Abdisalan Ahmed and Hon. Dominic Koskei respectively.
20. The minutes of the 38th sitting held on 20th May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Rehema Jaldesa and Hon. Kulow Hassan respectively.
21. The minutes of the 39th sitting held on 20th May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Shadrack Mose and Hon. Dominic Koskei respectively.
22. The minutes of the 40th sitting held on 21st May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Rehema Jaldesa and Hon. Vincent Kemosi.
23. The minutes of the 41st sitting held on 21st May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Gideon Mutemi and Hon. Peris Tobiko respectively.
24. The minutes of the 42nd sitting held on 22nd May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Vincent Kemosi and Hon. Dominic Koskei.
25. The minutes of the 43rd sitting held on 22nd May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Gideon Mutemi and Hon. Peris Tobiko respectively.
26. The minutes of the 44th sitting held on 23rd May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Vincent Kemosi and Hon. Dominic Koskei.

MIN No. TPWH 203/2019: ADJOURNMENT

7. The minutes of the 25th sitting held on 10th April 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Shadrack Mose and Hon. Dominic Koskei respectively.
8. The minutes of the 26th sitting held on 10th April 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Mugambi Rindikiri and Hon. Hassan Kullow respectively.
9. The minutes of the 27th sitting held on 11th April 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Vincent Kemosi and Hon. David Kiaraho respectively.
10. The minutes of the 28th sitting held on 11th April 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Rigathi Gachagua and Hon. Dominic Koskei respectively.
11. The minutes of the 29th sitting held on 23rd April 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Vincent Kemosi and Hon. Samuel Arama respectively.
12. The minutes of the 30th sitting held on 25th April 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Gideon Mutemi and Hon. Shadrack Mose respectively.
13. The minutes of the 31st sitting held on 3rd May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. David Kiaraho and Hon. Peris Tobiko respectively.
14. The minutes of the 32nd sitting held on 3rd May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Johnson Naica and Hon. Hassan Kullow respectively.
15. The minutes of the 33rd sitting held on 4th May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Dominic Koskei and Hon. Peris Tobiko respectively.
16. The minutes of the 34th sitting held on 4th May 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Gideon Mutemi and Hon. Ayub Savula respectively.

4. Mr. Abdinasir Moge - Fiscal Analyst
5. Ms. Christine Maeri - Audio Officer
6. Ms. Noelle Chelagat - Media Relations Officer
7. Mr. Yeziel Jilo - Sergeant-at-arm
8. Ms. Pauline Nyambura - Executive Assistant

MIN No. TPWH 201/2019: PRELIMINARIES

The meeting was called to order at thirty minutes past two o'clock, with a word of prayer from the Chairperson. Members confirmed the agenda as confirmation of the minutes of the previous sittings.

MIN No. TPWH 202/2019: CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

1. The minutes of the 19th sitting held on 19th March 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Peris Tobiko and Hon. Johnson Naicca respectively.
2. The minutes of the 20th sitting held on 21st March 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Samuel Arama and Hon. Gideon Mulyungi respectively.
3. The minutes of the 21st sitting held on 26th March 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Rigathi Gachagua and Hon. Dominic Koskei respectively.
4. The minutes of the 22nd sitting held on 2nd April 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Johnson Naica and Hon. Samuel Arama respectively.
5. The minutes of the 23rd sitting held on 9th April 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Kullow Maalim and Hon. Shadrack Mose respectively.
6. The minutes of the 24th sitting held on 9th April 2019 were confirmed as true record of the proceedings having been proposed and seconded by Hon. Peris Tobiko and Hon. Johnsonn Naicca respectively.

MINUTES OF THE FOURTY FIFTH (45TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON THURSDAY, 23RD MAY 2019 AT 2.30 P.M. IN MEETING ROOM 2, HILTON GARDEN INN AIRPORT HOTEL, NAIROBI

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Samuel Arama, M.P.
3. Hon. Ahmed Abdisalan Ibrahim, M.P.
4. Hon. Gideon Mutemi Mulyungi, M.P.
5. Hon. Johnson Manya Naicca, M.P.
6. Hon. Kulow Maalim Hassan, M.P.
7. Hon. Mugambi Murwithania Rindikiri, M.P.
8. Hon. Peris Pesi Tobiko, M.P.
9. Hon. Rehema Dida Jaldesa, M.P.
10. Hon. Shadrack John Mose, M.P.
11. Hon. Savula Ayub Angatia, M.P.
12. Hon. Rigathi Gachagua, M.P.
13. Hon. Dominic Kipkoech Koskei, M.P.
14. Hon. David Njuguna Kiaraho, M.P.
15. Hon. Vincent Kemosi Mogaka, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - Vice Chairperson
2. Hon. Suleiman Dori Ramadhani, M.P.
3. Hon. Ahmed Bashane Gaal, M.P.
4. Hon. Tom Mboya Odege, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I
2. Ms. Rose Wanjohi - Clerk Assistant I
3. Mr. Ahmed Salim - Clerk Assistant III

The Solicitor General conveyed the apologies of the Attorney General and informed the Committee that the office of the Attorney General was in total concurrence that the Kenya Airways was an important asset to the country and that it needed urgent surgery. He assured the Committee of a close working relationship for the benefit of Kenya. He also requested time before the getting back to the Committee.

The National Treasury was represented by the Dr. Ronoh Tuimising who submitted that they have carefully listened to the Committee and he promised that the National Treasury would study the Committee recommendation and give their views in two weeks.

MIN No. TPWH 159/2019: **ADJOURNMENT**

There being no other business, the sitting was adjourned at twelve noon. The next meeting to be held at 10:00am, on 9th May 2019.

Signed.....

(Chairperson)

Date.....23/5/19.....

Shipping Affairs on Thursday, 9th May 2019 to receive her views on the proposed amendment to the Merchant Shipping Act, No.4 of 2009 as contained in the Statute Law (Miscellaneous Amendments) Bill, 2019.

Members went through the amendment and noted that the amendment was substantive in nature and ought not to be brought through a Statute Law (Miscellaneous Amendments) Bill which is normally meant for minor amendments to statutes. The Committee further noted that the amendment, even if it were to be considered, ought to have been subjected to extensive public participation process; a process which the Committee could not satisfactorily undertake due to time constraints.

The Committee further noted that exempting an institution from the provisions of an entire Act was a major issue. It was the Committee's position that the proposed amendment, if allowed to pass, would give the Cabinet Secretary draconian powers.

MIN No. TPWH 158/2019: MEETING WITH THE MINISTRY OF TRANSPORT, THE NATIONAL TREASURY AND THE SOLICITOR GENERAL ON AVIATION SECTOR

The Cabinet Secretary for Transport and the Solicitor General were given a write-up of the possible recommendation of the Committee on the aviation sector, following a successful inquiry by the Committee into the sector. The Cabinet Secretary submitted that the Committee proposal was in line with the Cabinet position of consolidating the aviation assets to ensure that the end result was to make Nairobi an aviation hub. He was hopeful that consolidation of the sector will cause increased competitiveness. He noted that investors normally want to see convenience when connecting to places they invest while horticulture and agricultural businesses will also get a boost when the aviation sector is improved. Some of other benefits with a better aviation industry touched on employment in general, foreign policy, tourism among others. The Cabinet Secretary requested the Committee to give the Ministry two weeks to study the Committee recommendation before giving its opinion. He further requested a copy of the draft Committee report so that they can be more informed as they prepare their opinion.

4. Mr. Collins Mahambe - Audio Officer
5. Ms. Zainab Wario - Sergeant-at-arm

IN ATTENDANCE

1. Mr. James Kamau, EGH - Cabinet Secretary, Transport
2. Mrs. Esther Koimett - Principal Secretary, Transport
3. Mr. Ken Ogeto - Solicitor General of Kenya
4. Mr. Nicholas Bodo - Ag. Director, Air Transport, MOTIHUDPW
5. Dr. Ronoh Tuimising - Legal Expert, PPP Unit, National Treasury
6. Mr. Alex Mbuvi - Deputy Chief State Counsel, OAG&DOJ
7. Ms. Joan Chesoni - Senior State Counsel, OAG&DOJ

MIN No. TPWH 155/2019: PRELIMINARIES

The meeting was called to order at ten o'clock, with a word of prayer from the Chairperson. Members confirmed the agenda as consideration of the proposed amendment to the Merchant Shipping Act, No.4 of 2009 as contained in the Statute Law (Miscellaneous Amendments) Bill, 2019 and meeting with the Ministry of Transport, the National Treasury and the Solicitor General on Aviation Sector.

MIN No. TPWH 156/2019: CONFIRMATION OF MINUTES OF THE PREVIOUS

Confirmation of minutes of the previous sitting was deferred to the next sitting of the Committee.

MIN No. TPWH 157/2019: CONSIDERATION OF THE PROPOSED AMENDMENT TO THE MERCHANT SHIPPING ACT, NO.4 OF 2009 AS CONTAINED IN THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019

The Committee was concerned that the Statute Law (Miscellaneous Amendments) Bill, 2019 was coming up for the second reading yet the Committee had not concluded its consideration of the Bill. The Committee noted that it had invited the Principal Secretary for Maritime and

MINUTES OF THE THIRTY FIFTH (35TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON TUESDAY, 7TH MAY 2019 AT 10.00 A.M. IN 5TH FLOOR, CONTINENTAL HOUSE

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Moses Kuria, M.P. - Vice Chairperson
3. Hon. Samuel Arama, M.P.
4. Hon. David Njuguna Kiaraho, M.P.
5. Hon. Savula Ayub Angatia, M.P.
6. Hon. Ahmed Abdisalan Ibrahim, M.P.
7. Hon. Dominic Kipkoech Koskei, M.P.
8. Hon. Gideon Mutemi Mulyungi, M.P.
9. Hon. Johnson Manya Naicca, M.P.
10. Hon. Rigathi Gachagua, M.P.
11. Hon. Kulow Maalim Hassan, M.P.
12. Hon. Mugambi Murwithania Rindikiri, M.P.
13. Hon. Peris Pesi Tobiko, M.P.
14. Hon. Shadrack John Mose, M.P.
15. Hon. Tom Mboya Odege, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Suleiman Dori Ramadhani, M.P.
2. Hon. Ahmed Bashane Gaal, M.P.
3. Hon. Vincent Kemosi Mogaka, M.P.
4. Hon. Rehema Dida Jaldesa, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I/Lead Clerk
2. Mr. Ahmed Salim - Clerk Assistant III
3. Ms. Mercy Wanyonyi - Legal Counsel

MIN No. TPWH 154/2019: **ADJOURNMENT**

There being no other business, the sitting was adjourned at five minutes to one o'clock in the evening. The next meeting to be held at 10:00am, on 7th May 2019.

Signed.....

(Chairperson)

Date.....23/5/19.....

3. Ms. Mercy Wanyonyi - Legal Counsel
4. Mr. Ronald Walala - Legal Counsel
5. Mr. Abdinasir Moge - Fiscal Analyst
6. Mr. James Muguna - Research Officer
7. Mr. Collins Mahambe - Audio Officer
8. Mr. Yeziel Jilo - Sergeant-at-arm

MIN No. TPWH 152/2019: PRELIMINARIES

The meeting was called to order at thirty minutes past two o'clock, with a word of prayer from the Chairperson. Members confirmed the agenda as consideration of the zero draft report on the inquiry into the policy, human resource, legal compliance and issues of concern to the people as contemplated under Article 95 of the Constitution, in relation to the Kenya Airways Privately Initiated Investment Proposal to Kenya Airports Authority.

MIN No. TPWH 153/2019: CONSIDERATION OF THE ZERO DRAFT REPORT ON THE INQUIRY INTO THE POLICY, HUMAN RESOURCE, LEGAL COMPLIANCE AND ISSUES OF CONCERN TO THE PEOPLE AS CONTEMPLATED UNDER ARTICLE 95 OF THE CONSTITUTION, IN RELATION TO THE KENYA AIRWAYS PRIVATELY INITIATED INVESTMENT PROPOSAL TO KENYA AIRPORTS AUTHORITY

The Committee considered the draft report in entirety and it was resolved that out of all the possible options before the Committee, the best route would be to nationalize the Kenya Airways and restructure the aviation sector along that route. This would also mean that the government of Kenya will be the sole shareholder in the new set up. The Committee considered the fact that the Jomo Kenyatta International Airport was a strategic national asset and therefore it ought to remain under the full government control. It was further noted that it was of extreme importance that the national carrier be under full government ownership in light of the fact that the success of the aviation sector highly depends on many intertwined factors, most of which are of strong public interest.

MINUTES OF THE THIRTY FOURTH (34TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON SATURDAY, 4TH MAY 2019 AT 11.00 A.M. IN BARASA 1, WHITESANDS BEACH RESORT, MOMBASA

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Moses Kuria, M.P. - Vice Chairperson
3. Hon. Samuel Arama, M.P.
4. Hon. David Njuguna Kiaraho, M.P.
5. Hon. Suleiman Dori Ramadhani, M.P.
6. Hon. Johnson Manya Naicca, M.P.
7. Hon. Peris Pesi Tobiko, M.P.
8. Hon. Ahmed Abdisalan Ibrahim, M.P.
9. Hon. Dominic Kipkoech Koskei, M.P.
10. Hon. Kulow Maalim Hassan, M.P.
11. Hon. Mugambi Murwithania Rindikiri, M.P.
12. Hon. Gideon Mutemi Mulyungi, M.P.
13. Hon. Savula Ayub Angatia, M.P.
14. Hon. Rigathi Gachagua, M.P.
15. Hon. Shadrack John Mose, M.P.
16. Hon. Tom Mboya Odege, M.P.
17. Hon. Vincent Kemosi Mogaka, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Ahmed Bashane Gaal, M.P.
2. Hon. Rehema Dida Jaldesa, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I/Lead Clerk
2. Mr. Ahmed Salim - Clerk Assistant III

Signed.....

(Chairperson)

Date.....23/5/19.....

3. Ms. Mercy Wanyonyi - Legal Counsel
4. Mr. Ronald Walala - Legal Counsel
5. Mr. Abdinasir Moge - Fiscal Analyst
6. Mr. James Muguna - Research Officer
7. Mr. Collins Mahambe - Audio Officer
8. Mr. Yeziel Jilo - Sergeant-at-arm

MIN No. TPWH 149/2019: PRELIMINARIES

The meeting was called to order at thirty minutes past two o'clock, with a word of prayer from the Chairperson. Members confirmed the agenda as consideration of the zero draft report on the inquiry into the policy, human resource, legal compliance and issues of concern to the people as contemplated under Article 95 of the Constitution, in relation to the Kenya Airways Privately Initiated Investment Proposal to Kenya Airports Authority.

MIN No. TPWH 150/2019: CONSIDERATION OF THE ZERO DRAFT REPORT ON THE INQUIRY INTO THE POLICY, HUMAN RESOURCE, LEGAL COMPLIANCE AND ISSUES OF CONCERN TO THE PEOPLE AS CONTEMPLATED UNDER ARTICLE 95 OF THE CONSTITUTION, IN RELATION TO THE KENYA AIRWAYS PRIVATELY INITIATED INVESTMENT PROPOSAL TO KENYA AIRPORTS AUTHORITY

The Committee came up with the observations and the recommendations to the Report. The Committee noted that there were six options as possible recommendations and it was resolved that the Committee Members think through all the options before deciding on one specific option for recommendation on which direction the aviation sector should take.

MIN No. TPWH 151/2019: ADJOURNMENT

There being no other business, the sitting was adjourned at five minutes to one o'clock. The next meeting to be held at 2:00pm, on 4th May 2019.

MINUTES OF THE THIRTY THIRD (33RD) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON SATURDAY, 4TH MAY 2019 AT 11.00 A.M. IN BARASA 1, WHITESANDS BEACH RESORT, MOMBASA

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Moses Kuria, M.P. - Vice Chairperson
3. Hon. Samuel Arama, M.P.
4. Hon. David Njuguna Kiaraho, M.P.
5. Hon. Suleiman Dori Ramadhani, M.P.
6. Hon. Johnson Manya Naicca, M.P.
7. Hon. Peris Pesi Tobiko, M.P.
8. Hon. Ahmed Abdisalan Ibrahim, M.P.
9. Hon. Dominic Kipkoech Koskei, M.P.
10. Hon. Kulow Maalim Hassan, M.P.
11. Hon. Mugambi Murwithania Rindikiri, M.P.
12. Hon. Gideon Mutemi Mulyungi, M.P.
13. Hon. Rigathi Gachagua, M.P.
14. Hon. Shadrack John Mose, M.P.
15. Hon. Tom Mboya Odege, M.P.
16. Hon. Vincent Kemosi Mogaka, M.P.
17. Hon. Savula Ayub Angatia, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Ahmed Bashane Gaal, M.P.
2. Hon. Rehema Dida Jaldesa, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I/Lead Clerk
2. Mr. Ahmed Salim - Clerk Assistant III

There being no other business, the sitting was adjourned at thirty minutes past nine o'clock in the evening. The next meeting to be held at 11:00am, on 4th May 2019.

Signed.....

(Chairperson)

Date.....23/5/19.....

3. Ms. Mercy Wanyonyi	-	Legal Counsel
4. Mr. Ronald Walala	-	Legal Counsel
5. Mr. Abdinasir Moge	-	Fiscal Analyst
6. Mr. James Muguna	-	Research Officer
7. Mr. Collins Mahambe	-	Audio Officer
8. Mr. Yeziel Jilo	-	Sergeant-at-arm

MIN No. TPWH 146/2019: PRELIMINARIES

The meeting was called to order at thirty minutes past two o'clock, with a word of prayer from the Chairperson. Members confirmed the agenda as consideration of the zero draft report on the inquiry into the policy, human resource, legal compliance and issues of concern to the people as contemplated under Article 95 of the Constitution, in relation to the Kenya Airways Privately Initiated Investment Proposal to Kenya Airports Authority.

MIN No. TPWH 147/2019: CONSIDERATION OF THE ZERO DRAFT REPORT ON THE INQUIRY INTO THE POLICY, HUMAN RESOURCE, LEGAL COMPLIANCE AND ISSUES OF CONCERN TO THE PEOPLE AS CONTEMPLATED UNDER ARTICLE 95 OF THE CONSTITUTION, IN RELATION TO THE KENYA AIRWAYS PRIVATELY INITIATED INVESTMENT PROPOSAL TO KENYA AIRPORTS AUTHORITY

Members of the Committee noted that in the morning session, the Committee looked into the draft report and that it was important for the Committee to dedicate the afternoon session into consideration of the possible recommendations. The Committee analyzed, in comparison, the aviation industry models of other airlines. It was noted that that most of the successful airlines enjoyed strong support from their governments. The Committee tasked the secretariat with developing draft observations and recommendations for consideration during the next session.

MIN No. TPWH 148/2019: ADJOURNMENT

MINUTES OF THE THIRTY SECOND (32ND) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON FRIDAY, 3RD MAY 2019 AT 2.30 P.M. IN BARASA 1, WHITESANDS BEACH RESORT, MOMBASA

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Moses Kuria, M.P. - Vice Chairperson
3. Hon. Samuel Arama, M.P.
4. Hon. Suleiman Dori Ramadhani, M.P.
5. Hon. Johnson Manya Naicca, M.P.
6. Hon. Peris Pesi Tobiko, M.P.
7. Hon. Ahmed Abdisalan Ibrahim, M.P.
8. Hon. Dominic Kipkoech Koskei, M.P.
9. Hon. Kulow Maalim Hassan, M.P.
10. Hon. Gideon Mutemi Mulyungi, M.P.
11. Hon. Shadrack John Mose, M.P.
12. Hon. Tom Mboya Odege, M.P.
13. Hon. Vincent Kemosi Mogaka, M.P.
14. Hon. David Njuguna Kiaraho, M.P.
15. Hon. Rigathi Gachagua, M.P.
16. Hon. Mugambi Murwithania Rindikiri, M.P.
17. Hon. Savula Ayub Angatia, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Ahmed Bashane Gaal, M.P.
2. Hon. Rehema Dida Jaldesa, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I/Lead Clerk
2. Mr. Ahmed Salim - Clerk Assistant III

Signed.....

(Chairperson)

Date.....23/5/19.....

3. Ms. Mercy Wanyonyi - Legal Counsel
4. Mr. Ronald Walala - Legal Counsel
5. Mr. Abdinasir Moge - Fiscal Analyst
6. Mr. James Muguna - Research Officer
7. Mr. Collins Mahambe - Audio Officer
8. Mr. Yeziel Jilo - Sergeant-at-arm

MIN No. TPWH 143/2019: PRELIMINARIES

The meeting was called to order at thirty minutes past nine o'clock, with a word of prayer from the Chairperson. Members confirmed the agenda as consideration of the zero draft report on the inquiry into the policy, human resource, legal compliance and issues of concern to the people as contemplated under Article 95 of the Constitution, in relation to the Kenya Airways Privately Initiated Investment Proposal to Kenya Airports Authority.

MIN No. TPWH 144/2019: CONSIDERATION OF THE ZERO DRAFT REPORT ON THE INQUIRY INTO THE POLICY, HUMAN RESOURCE, LEGAL COMPLIANCE AND ISSUES OF CONCERN TO THE PEOPLE AS CONTEMPLATED UNDER ARTICLE 95 OF THE CONSTITUTION, IN RELATION TO THE KENYA AIRWAYS PRIVATELY INITIATED INVESTMENT PROPOSAL TO KENYA AIRPORTS AUTHORITY

Members of the Committee considered the draft report as prepared by the secretariat. It was noted that the report structure and the content were satisfactory and that there was need to also look into the possible options for recommendations in the afternoon session.

MIN No. TPWH 145/2019: ADJOURNMENT

There being no other business, the sitting was adjourned at one o'clock. The next meeting to be held at 2:30pm, the same day on 3rd May 2019.

MINUTES OF THE THIRTY FIRST (31ST) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON FRIDAY, 3RD MAY 2019 AT 9.30 A.M. IN BARASA 1, WHITESANDS BEACH RESORT, MOMBASA

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Moses Kuria, M.P. - Vice Chairperson
3. Hon. Samuel Arama, M.P.
4. Hon. Suleiman Dori Ramadhani, M.P.
5. Hon. Johnson Manya Naicca, M.P.
6. Hon. Peris Pesi Tobiko, M.P.
7. Hon. Ahmed Abdisalan Ibrahim, M.P.
8. Hon. Dominic Kipkoech Koskei, M.P.
9. Hon. Kulow Maalim Hassan, M.P.
10. Hon. Gideon Mutemi Mulyungi, M.P.
11. Hon. Shadrack John Mose, M.P.
12. Hon. Tom Mboya Odege, M.P.
13. Hon. Vincent Kemosi Mogaka, M.P.
14. Hon. David Njuguna Kiaraho, M.P.
15. Hon. Rigathi Gachagua, M.P.
16. Hon. Mugambi Murwithania Rindikiri, M.P.
17. Hon. Savula Ayub Angatia, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Ahmed Bashane Gaal, M.P.
2. Hon. Rehema Dida Jaldesa, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I/Lead Clerk
2. Mr. Ahmed Salim - Clerk Assistant III

There being no other business, the sitting was adjourned at thirty minutes to four o'clock. The next meeting to be held on notice.

Signed.....

(Chairperson)

Date.....23/5/19.....

6. How would Capex plan and funding be approached during the duration of the JV? The PIIP needs to address the development /and/or redevelopment of JKIA if they want to successfully compete with the redeveloped Ethiopian (Bole International) and new Rwanda airports?
7. What will be the relationship between SPV and existing Kenyan operators at JKIA during the tenure of the JV?
8. How would this JV run in line with current Government policies governing aviation industry as well as the existing competition laws?
9. Have other options of reviving / strengthening KQ been considered, and how critical is this to KQ's business plan going forward?
10. Are there any examples of PIIPs in other jurisdictions and how successful have they been?
11. As we approach this effort to secure Kenya Airways against the emerging commercial competition, have we considered the regional/global competitive context in the light of the treaties that Kenya has signed in the past? We have in mind some within the African Union.
12. Kenya is a contracting State of the International Civil Aviation Organization [ICAO] which is a UN Agency. One of its principles is to encourage fair and healthy competition in international commercial Air Operations. Would running of JKIA by KQ which also runs International commercial flight operations, not pose a large measure of conflict of interest in provision of Airport services to its competitors in International flight operations?

In their closing remarks, KAAO submitted that as the umbrella body for Air Operators in Kenya, KAAO wished Kenya Airways all the best in their regional quest to re-establish its dominance, but added that this must be done without jeopardizing the rest of the industry that is vibrant and plays a pivotal role in tourism, cargo as well as international humanitarian aviation operations, and also employs many Kenyans.

The Committee Chairperson thanked the KAAO Executive Officer for a good presentation and informed him that the Committee will engage KAAO further when the need may in future arise.

MIN No. TPWH 128/2019: ADJOURNMENT

opposed to any reasonable strategic initiative that ensures the National Carrier (Kenya Airways) re-establishes itself as a leading carrier on the African continent but further added that KAAO believes this can only be achieved through the appropriate restructuring of KQ, both financially and operationally, using the best available resources both nationally and internationally.

KAAO further submitted that without detailed access and time to review the actual PIIP document, the Association was unable to comment on the importance or relevance of the Proposal, which they believed it needed to also address the legitimate concerns of the rest of the aviation industry.

The Executive Officer for KAAO further submitted that KAAO had perused the Progress Report on the Inquiry into the Proposed Takeover of Jomo Kenyatta International Airport by Kenya Airways by the Public Investments Committee dated 26th February 2019 and shares a number of the concerns and questions raised in that report as follows:

1. In this JV contemplated, what is the shareholding and structure, considering that KAA is a government institution?
2. How will other airports under KAA be managed – operationally and financially, considering that most of them do not have the traffic sufficient to fund their operations, while it is not a secret that hitherto they have been supported from the funds accruing from the JKIA?
3. What assurance do we have from KAA that these other airports, some being international, will retain the requisite standards as prescribed by ICAO without an additional cost to the already over-burdened operators?
4. What is the current revenue per airport for KAA and expenditure per airport? The Parliamentary Committee report indicates that there will be a net shortfall of approximately Kshs. 3.7 billion in KAA's operating budget post takeover. The Association is extremely concerned about the implications this has for the management, maintenance and development of the other national airports.
5. What areas does the JV envisage? Ground services, security, duty free shops, cargo, other concessions?

4. Mr. Abdinasir Moge - Fiscal Analyst I
5. Mr. James Muguna - Research Officer III
6. Mr. Eugine Luteshi - Audio Officer
7. Ms. Noelle Chelagat - Media Relations Officer

IN ATTENDANCE

1. Col. Rtd. Eurychus Waithaka - Executive Officer, KAAO
2. Ms. Salome Kariuki - Administrative Officer, KAAO

MIN No. TPWH 126/2019: PRELIMINARIES

The meeting was called to order at two o'clock, with a word of prayer from the chairperson. Members confirmed the agenda as meeting with the leadership of the Kenya Association of Air Operators (KAAO) as the Committee continues with its inquiry into the aviation sector in Kenya.

MIN No. TPWH 127/2019: SUBMISIONS FROM THE KENYA ASSOCIATION OF AIR OPERATORS (KAAO)

KAAO submitted that the invitation to submit memoranda before the Committee presupposes access to critical information. They submitted that they were unable to submit a detailed memorandum discussing any aspect as proposed in the Privately Initiated Investment Proposal except for a few questions they chose to raise. From the information available to them in the public domain they believe that there was a desire to forge a joint venture partnership between Kenya Airways (KQ) and Kenya Airports Authority (KAA) to run the Jomo Kenyatta International Airport. KAAO explained that when KAA had previously called for a stakeholder public meeting, KAAO requested for the PIIP document but were not given. The planned meeting was later cancelled and as such, KAAO had inadequate factual information. All the same, KAAO declared that their members have a special interest in the matter.

The KAAO Executive Officer submitted that KAAO's interest was encompassed in their vision which is to create a safe, efficient, and economically viable National Civil Aviation Industry, through promotion and enhancement of safe and sustainable operations, and the provision of aviation services. He explained that the Kenya Air Operators Association was not fundamentally

MINUTES OF THE TWENTY EIGHTH (28TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON THURSDAY, 11TH APRIL 2019 AT 2.00 P.M. IN MINI CHAMBER, COUNTY HALL

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. David Njuguna Kiaraho, M.P.
3. Hon. Ahmed Abdisalan Ibrahim, M.P.
4. Hon. Ahmed Bashane Gaal, M.P.
5. Hon. Dominic Kipkoech Koskei, M.P.
6. Hon. Johnson Manya Naicca, M.P.
7. Hon. Mugambi Murwithania Rindikiri, M.P.
8. Hon. Rigathi Gachagua, M.P.
9. Hon. Tom Mboya Odege, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - Vice Chairperson
2. Hon. Samuel Arama, M.P.
3. Hon. Savula Ayub Angatia, M.P.
4. Hon. Suleiman Dori Ramadhani, M.P.
5. Hon. Kulow Maalim Hassan, M.P.
6. Hon. Peris Pesi Tobiko, M.P.
7. Hon. Gideon Mutemi Mulyungi, M.P.
8. Hon. Rehema Dida Jaldesa, M.P.
9. Hon. Shadrack John Mose, M.P.
10. Hon. Vincent Kemosi Mogaka, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I
2. Mr. Ahmed Salim - Clerk Assistant III
3. Mr. Ronald Walala - Legal Counsel I

KALPA informed the Committee that fifteen years ago Kenya Airways was highly profitable and that it even had a two billion shilling reserve with staff receiving annual bonuses. They submitted that details of the Deloitte Audit Report of 2016 on Kenya Airways needed to be revealed to the public so that Kenyans can know what was really ailing the Kenya Airways.

MIN No. TPWH 125/2019: ADJOURNMENT

There being no other business, the sitting was adjourned at fifty minutes past one o'clock. The next meeting to be held at 2.00 p.m. on Thursday, 11th April 2019.

Signed.....

(Chairperson)

Date.....23/5/19.....

The Committee thanked KAWU for their presentation and the supporting documents but asked them to submit a written and signed submission or memorandum to the Committee for Committee consideration, reference and record.

MIN No. TPWH 124/2019: SUBMISIONS FROM THE KENYA AIRLINE PILOTS ASSOCIATION (KALPA)

The Kenya Airline Pilots Association (KALPA) submitted that they were not opposed to the idea of JKIA takeover by Kenya Airways as long as the workers' jobs were protected. They further declared that as KALPA, they have not been given the copy of the proposal but that they will submit their memorandum on the same nonetheless (copy attached).

KALPA contested the salary rates of the KQ pilots as reported by the KQ CEO before the Committee on 9th April 2019. They submitted that KQ pilots were not the best paid in the continent as reported by the KQ CEO. They argued that in the last six years, Kenya Airways lost at least 130 pilots to other airlines and that this could not have happened if indeed the pilots were well paid. They further submitted that KQ was still operating long haul and ultra-long haul flights with only two pilots against the best global practice. They informed the Committee that KQ had a shortage of at least 200 pilots, an issue that has led to pilots missing their leave days to cover the shortage.

KALPA further submitted that the joint venture between the Kenya Airways and the KLM was not balanced as it favored KLM at the expense of KQ especially on routes and passenger allocation. They also reported that KQ was losing so much on the West African market simply because of bad marketing decisions.

KALPA regretted that KQ was using so much of resources in numerous litigation matters, especially those on matters employment. They identified consultancy issues as a problem, giving example of the McKenzie report which, in the opinion of KALPA, offered all the wrong solutions to the KQ at a heavy price in terms of fees and the overall health of KQ. KALPA also submitted that there were five Polish nationals who were consultants for KQ and who were not KQ employees.

MIN No. TPWH 123/2019: SUBMISIONS FROM THE KENYA AVIATION WORKERS UNION (KAWU)

The Committee asked the leadership of KAWU to first clarify on whether the organization was duly registered. KAWU explained that there was a pending matter in court and although the High Court had earlier revoked its registration, KAWU appealed and they got a stay pending appeal. KAWU therefore reverted back to its original status pending appeal, and therefore duly registered.

In their submission to the Committee, KAWU urged the National Assembly to reject the KQ/KAA proposal because they believed that it will cause redundancy. They explained that JKIA takeover will kill other facilities and affect Vision 2030. They acknowledged that Kenya Airways needed assistance but that the PIIP proposal was not the best option.

KAWU submitted that Kenya Airways enjoys exclusive use of Terminal 1A since its construction and that parking bays 13 to 23 were also under KQ and therefore wondered why the Kenya Airways couldn't perform despite all the benefits and preferences they currently enjoyed.

KAWU submitted that in order to save KQ, the government needed to buy all the shares, to nationalize KQ as t would be much easier for the government to control the aviation sector in totality. They argued that success of aviation sector depended on many other interconnected factors including the hospitality industry, connectivity in general among so many other issues which are normally under the government control.

The Committee wanted to know whether an assurance that no jobs would be lost will suffice. KAWU submitted that as much as nationalization would be an ideal option, it all depends on how the structuring will be done because the biggest problem at KQ was the management. They further submitted that selling some of the fleet that KQ has could give KQ up to fifty billion shillings.

4. Mr. Abdinasir Moge	-	Fiscal Analyst
5. Mr. James Muguna	-	Research Officer
6. Mr. John Mungai	-	Audio Officer
7. Ms. Noelle Chelagat	-	Media Relations Officer

IN ATTENDANCE

1. Mr. Moss Ndiema	-	Secretary General, KAWU
2. Mr. Robert Lichoro	-	Union Official, KAWU
3. Mr. Daniel Yatich	-	Union Official, KAWU
4. Mr. Bonne NM Baraza	-	Union Official, KAWU
5. Mr. Walter Onguri	-	Union Official, KAWU
6. Mr. Danstone Muteshi	-	Union Official, KAWU
7. Mr. Bernard Owiti	-	Union Official, KAWU
8. Mr. Patrick Njuguna	-	Union Official, KAWU
9. Mr. Humphrey Mayebei	-	Union Official, KAWU
10. Mr. Robert Sifa	-	Union Official, KAWU
11. Mr. Abubakar Muhamed	-	Union Official, KAWU
12. Mr. John K. Waweru	-	Union Official, KAWU
13. Mr. Opicho Wakoli	-	Union Official, KAWU
14. Mr. Sylvester Otiato	-	Union Official, KAWU
15. Capt. Timothy Njoroge	-	Vice Chairman, KALPA
16. Capt. Muriithi Nyagah	-	General Secretary, KALPA
17. Capt. Dzochera Warrakah	-	Asst. General Sec., KALPA
18. Capt. Mathew Karimi	-	Asst. Treasurer, KALPA

MIN No. TPWH 122/2019: PRELIMINARIES

The meeting was called to order at ten o'clock, with a word of prayer from the chairperson. Members confirmed the agenda as meeting with the leadership of the Kenya Aviation Workers Union (KAWU) and the leadership of the Kenya Airline Pilots Association (KALPA) as the Committee continues with its inquiry into the aviation sector in Kenya.

MINUTES OF THE TWENTY SEVENTH (27TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON THURSDAY, 11TH APRIL 2019 AT 10.00 A.M. IN MINI CHAMBER, COUNTY HALL

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. David Njuguna Kiaraho, M.P.
3. Hon. Ahmed Abdisalan Ibrahim, M.P.
4. Hon. Ahmed Bashane Gaal, M.P.
5. Hon. Dominic Kipkoech Koskei, M.P.
6. Hon. Johnson Manya Naicca, M.P.
7. Hon. Kulow Maalim Hassan, M.P.
8. Hon. Mugambi Murwithania Rindikiri, M.P.
9. Hon. Peris Pesi Tobiko, M.P.
10. Hon. Rigathi Gachagua, M.P.
11. Hon. Shadrack John Mose, M.P.
12. Hon. Tom Mboya Odege, M.P.
13. Hon. Vincent Kemosi Mogaka, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - Vice Chairperson
2. Hon. Samuel Arama, M.P.
3. Hon. Savula Ayub Angatia, M.P.
4. Hon. Suleiman Dori Ramadhani, M.P.
5. Hon. Gideon Mutemi Mulyungi, M.P.
6. Hon. Rehema Dida Jaldesa, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I/Lead Clerk
2. Mr. Ahmed Salim - Clerk Assistant III
3. Mr. Ronald Walala - Legal Counsel

from the air navigation services and that air navigation service capabilities cannot be given to any airline.

The Committee was informed that a broad view of the aviation sector points to an encouraging growth even as more still needed to be done. The Committee resolved to give the KCAA Director General a copy of the KQ/KAA PIIP proposal for the KCAA consumption and information.

MIN No. TPWH 120/2019: ANY OTHER BUSINESS

1. Responding to Members' questions on slow pace of air accidents investigations, the KCAA Director General informed the Committee that investigators have been doing their work a lot of constraints and that KCAA was proposing that the unit be established as a totally independent organization with its own budget.

2. The Committee was informed by the Director General of KCAA that the Kenya Airline Workers Union was deregistered. The Committee resolved that it will first seek clarification from KAWU before it engages them on 11th April 2019, even as the Committee considers writing to the Registrar of Societies; a process that may take time before receiving feedback.

MIN No. TPWH 121/2019: ADJOURNMENT

There being no other business, the sitting was adjourned at thirty minutes past five o'clock. The next meeting to be held at 10 a.m. on Thursday, 11th April 2019.

Signed.....

(Chairperson)

Date.....23/5/19.....

4.	Mr. Abdinasir Moge	-	Fiscal Analyst I
5.	Mr. James Muguna	-	Research Officer III
6.	Mr. Collins Mahambe	-	Audio Officer
7.	Ms. Noelle Chelagat	-	Media Relations Officer

IN ATTENDANCE

1.	Mr. Gilbert M. Kibe	-	Director General, KCAA
2.	Mr. Joseph K. Chebungei	-	Director, Corporate Services, KCAA
3.	Mr. Denis K. Kimani	-	Manager, Legal Services, KCAA

MIN No. TPWH 118/2019: PRELIMINARIES

The meeting was called to order at three o'clock, with a word of prayer from the chairperson. Members confirmed the agenda as meeting with the Director General of the Kenya Civil Aviation Authority (KCAA) as the Committee continues with its inquiry into the aviation sector in Kenya.

MIN No. TPWH 119/2019: SUBMISIONS FROM THE DIRECTOR GENERAL, KENYA CIVIL AVIATION AUTHORITY (KCAA)

The Director General of the Kenya Civil Aviation Authority (KCAA) submitted that the KCAA did not have any official position on the KQ/KAA PIIP the KCAA did not have the proposal for its information. The DG however stated that based on the small information in the public domain, it appeared that KQ was looking at the balance sheet of KAA and believed that they could expand their business. The KCAA DG informed the Committee that although KQ owed KCAA substantial amount in debt, the KQ had in the last year been making regular payments unlike before, a clear sign that there were some positive financial improvements with the KQ and therefore quite encouraging.

KCAA submitted that there were about 40 carriers that use JKIA and 25 cargo carriers and further noted that the Kenya Airways was the single most significant airline that contributed to air navigation services in Kenya. He informed the Committee that 80% of KCAA revenue came

MINUTES OF THE TWENTY SIXTH (26TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON WEDNESDAY, 10TH APRIL 2019 AT 3.00 P.M. IN MINI CHAMBER, COUNTY HALL

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Samuel Arama, M.P.
3. Hon. David Njuguna Kiaraho, M.P.
4. Hon. Savula Ayub Angatia, M.P.
5. Hon. Ahmed Abdisalan Ibrahim, M.P.
6. Hon. Dominic Kipkoech Koskei, M.P.
7. Hon. Johnson Manya Naicca, M.P.
8. Hon. Kulow Maalim Hassan, M.P.
9. Hon. Mugambi Murwithania Rindikiri, M.P.
10. Hon. Shadrack John Mose, M.P.
11. Hon. Tom Mboya Odege, M.P.
12. Hon. Vincent Kemosi Mogaka, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - Vice Chairperson
2. Hon. Suleiman Dori Ramadhani, M.P.
3. Hon. Ahmed Bashane Gaal, M.P.
4. Hon. Gideon Mutemi Mulyungi, M.P.
5. Hon. Peris Pesi Tobiko, M.P.
6. Hon. Rehema Dida Jaldesa, M.P.
7. Hon. Rigathi Gachagua, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I
2. Mr. Ahmed Salim - Clerk Assistant III
3. Mr. Ronald Walala - Legal Counsel I

efforts and had KQ not been a national carrier, more stringent actions would have been taken against it including grounding it. KAA submitted that KQ represented 40% of KAA business. It was the KAA submission that irrespective of whether the proposed PIIP goes through or not, something must be done in one way or another to improve the aviation industry in Kenya.

KAA submitted that from a broader policy perspective, it was high time that something is done to increase our competitiveness as a country. KAA further argued that the Concession Order has not been looked at since 1996 and that KAA was, as a result, disadvantaged. They pleaded with the National Assembly, through the Committee, to look into the issue of the Concession Order,

---

The KAA submitted that they needed a month for the KAA to come with its own proposal as an alternative to the KQ proposal. The Committee resolved that, considering the urgency of time, it would be very important if KAA could submit their proposal to the Committee by 24th April 2019.

The Committee Chairperson further informed the KAA Chairperson and the Chief Executive Officer that the Committee may, in the course of the inquiry, need to engage them on short notice and therefore requested them to be flexible in case their presence was required for any further clarifications.

MIN No. TPWH 117/2019: ADJOURNMENT

There being no other business, the sitting was adjourned at twelve minutes past two o'clock. The next meeting to be held at 3.00 p.m., same day on Wednesday, 10th April 2019.

Signed.....

(Chairperson)

Date.....23/5/19.....

a. KQ capacity in terms of its financial strength, technical capability to rn an airport and the legality of the KQ proposal in its entirety;
b. Whether the deal will be profitable to KAA as it may be to KQ;
c. Whether 1+1=3 in case KAA joins KQ;
d. Whether the proposal as it is was the best option to provide value for money;
e. Viability gap; in case JKIA is taken by KQ, what gap will remain for KAA; and
f. Considering that JKIA represents almost 80% of KAA revenues, how does KAA finance other airports?

The MD explained that KAA had identified those questions and other gaps so that KAA may sit with KQ to negotiate.

The Chairperson of the KAA was asked to clarify on conflict of interest, considering that he was also the Group Managing Director of CBA Bank; one of the banks that formed the KQ Lenders 2017 Ltd. He explained that whereas it would really appear that there was conflict of interest, in reality the CBA Bank in Kenya has its own CEO who was fully running the day to day responsibilities of the bank. He further explained that he had informed the KAA board of the perceived interest in board meetings and he was confident that he was not in actual sense conflicted considering the clear demarcation of roles for both institutions.

The Committee was further informed that the CBA Bank had converted its debt into equity and that CBA Bank had no direct shareholding in KQ. It was reiterated that the management of the day to day issues of the bank was left with CEO of the company and not the Chairperson.

KAA MD informed the Committee that the Authority, as part of its due diligence measures, competitively procured a transaction adviser to assist the KAA in analyzing the proposal and its implication even as they await the feedback from the PPP unit and before the transaction support phase, in case the proposal goes through.

The Committee was informed that the Kenya Airways owed the KAA slightly over five billion shillings, accumulated over time. KAA submitted that it had been very forceful in its recovery

4. Mr. Abdinasir Moge	-	Fiscal Analyst I
5. Mr. James Muguna	-	Research Officer III
6. Mr. Collins Mahambe	-	Audio Officer
7. Ms. Noelle Chelagat	-	Media Relations Officer

IN ATTENDANCE

1. Mr. Jonny Andersen	-	Managing Director, Kenya Airports A.
2. Mr. Isaac Awuondo	-	Chairman, Kenya Airports Authority
3. Mr. Alex Gitari	-	G.M. Finance, Kenya Airports Authority
4. Mr. Fred Odawo	-	G.M. Projects and Eng. Services, KAA
5. Ms. Grace Odhaimbo	-	Communications Department, KAA

MIN No. TPWH 115/2019: PRELIMINARIES

The meeting was called to order at ten minutes past ten o'clock, with a word of prayer from the chairperson. Members confirmed the agenda as meeting with the Chairperson and the Chief Executive Officer of Kenya Airports Authority as the Committee conducts its inquiry into the aviation sector in Kenya.

MIN No. TPWH 116/2019: SUBMISIONS FROM THE CHAIRPERSON AND THE CEO, KENYA AIRPORTS AUTHORITY (KAA)

Members of the Committee sought clarification from the Managing Director on his denial of the knowledge on the proposal when he last appeared before the Hon. Members. He clarified that there was a misunderstanding and that he had actually not received the proposal by then. He further submitted that KAA has not responded to the KQ proposal on the PIIP as the process would be informed by the outcome of the due diligence and negotiation process in line with the law. He informed the Committee that KAA has not received any feedback from the PPP unit and therefore KAA has not responded to the KQ proposal. This, he explained, informed the KAA silence on the proposal.

The KAA MD informed the Committee that even as they await the feedback from the PPP unit, the KAA would itself seek answers to a number of questions. This includes the following:

MINUTES OF THE TWENTY FIFTH (25TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON WEDNESDAY, 10TH APRIL 2019 AT 10.00 A.M. IN MINI CHAMBER, COUNTY HALL

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Samuel Arama, M.P.
3. Hon. David Njuguna Kiaraho, M.P.
4. Hon. Savula Ayub Angatia, M.P.
5. Hon. Ahmed Abdisalan Ibrahim, M.P.
6. Hon. Ahmed Bashane Gaal, M.P.
7. Hon. Dominic Kipkoech Koskei, M.P.
8. Hon. Johnson Manya Naicca, M.P.
9. Hon. Kulow Maalim Hassan, M.P.
10. Hon. Mugambi Murwithania Rindikiri, M.P.
11. Hon. Peris Pesi Tobiko, M.P.
12. Hon. Shadrack John Mose, M.P.
13. Hon. Tom Mboya Odege, M.P.
14. Hon. Vincent Kemosi Mogaka, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - Vice Chairperson
2. Hon. Suleiman Dori Ramadhani, M.P.
3. Hon. Gideon Mutemi Mulyungi, M.P.
4. Hon. Rehema Dida Jaldesa, M.P.
5. Hon. Rigathi Gachagua, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I
2. Mr. Ahmed Salim - Clerk Assistant III
3. Mr. Ronald Walala - Legal Counsel I

reported that the companies were not owned by Kenyans despite the Kenyan names and that they were created by the banks to syndicate their loans.

The CEO explained that they were looking forward to expanding employment, more airlines coming to Kenya by lowering charges, more connections, and expansion of JKIA to increase capacity from the current 11 million to 20 million passengers. He stated that the PIIP proposal was given to KAA and guided by PPP Act and that it was normal to address issues on KAA in the proposal as KAA was part of KQ challenges but was not a big problem.

MIN No. TPWH 113/2019: ANY OTHER BUSINESS

1. The Kenya Airways clarified that contrary to media reports, KQ direct flights to New York were still operating. He explained that frequencies were reduced to five during low season and that they will go up to daily flights in high season.

2. The Committee Chairperson informed the Kenya Airways' Chairperson and the Chief Executive Officer that the Committee may, in the course of the inquiry, need to engage them on short notice and therefore requested them to be flexible in case their presence was required for any further clarifications. The KQ Chairperson informed the Committee that whereas the CEO would be available any time as may be required by the Committee, the Chairperson would not be available for the next two weeks as he will be engaged in other preplanned activities.

MIN No. TPWH 114/2019: ADJOURNMENT

There being no other business, the sitting was adjourned at forty seven minutes past five o'clock. The next meeting to be held at 10 am, same Wednesday, 10th April 2019.

Signed.....

(Chairperson)

Date.....23/5/19.....

including Oman Air and even Ethiopian Airline brought stiff competition to KQ but KQ failed to act appropriately. While emphasizing the need to support Kenya Airways, the KQ Chairman submitted that there was need to consider the structure of costs and how the competition was and further noted that in real sense, 92% of KQ shareholders are Kenyan. The CEO, on his part, submitted that KQ's main focus was on creating more jobs, expanding connectivity and increasing contribution to the country's GDP.

On staff remuneration, the CEO reported that Kenya Airways had around 400 pilots, and that he would share with the Committee the salary structure for the CEO and the Directors by the morning of 10th April 2019.

The CEO explained that airline leasing was a better option and that it was the practice worldwide. He stated that there is normally flexibility on the length of leasing and it may take between 3 to 12 years before an operator requests for a new aircraft. He gave an example of Emirates which was leasing 62% of its aircraft. He explained that KQ had leased 20 of its fleet while 17 was on loan and 3 were fully owned by KQ. He explained that there was no formula for leasing from manufacturers as manufacturers only sell. He submitted that the mix of fleet of KQ was reasonable and that the fleet cost was currently at 11% even as they make attempts to lower the monthly costs. The CEO acknowledged that KQ might have previously done mistakes in its fleet acquisition program. He asserted that for KQ to fly more, then it needed to have more flexible routes.

The CEO submitted that he had reservations with Collective Bargaining Agreement with pilots and that is why he earlier refused to sign it around June 2017 as he was convinced that it highly favored pilots at the expense of KQ. He submitted that he ultimately had to sign the agreement because the go-slow by the pilots had devastating effects as flight were being cancelled within six hours of the pilots' go-slow.

The CEO submitted that the financial restructuring which was done two years ago was meant to lower the interest rates and the lease rates. Arising from the CEO presentation, Members wanted to know about the Tsavo Ltd Loan Structure and the Samburu Ltd Loan Structure. The CEO

4. Mr. Abdinasir Moge	-	Fiscal Analyst I
5. Mr. James Muguna	-	Research Officer III
6. Mr. Collins Mahambe	-	Audio Officer
7. Ms. Noelle Chelagat	-	Media Relations Officer

IN ATTENDANCE

1. Mr. Michael Joseph	-	Chairman, Kenya Airways (KQ)
2. Mr. Sebastian Mikosz	-	CEO, Kenya Airways (KQ)
3. Mr. Dennis Kashero	-	Head of Comm. & Public Affairs, KQ
~~4. Mr. Emmanuel Mwaniki~~	~~-~~	~~Business Support Manager, KQ~~

MIN No. TPWH 111/2019: PRELIMINARIES

The meeting was called to order at twenty minutes past two o'clock, with a word of prayer from the chairperson. Members confirmed the agenda as meeting with the Chairperson and the Chief Executive Officer of Kenya Airways as the Committee proceeds with its inquiry into the aviation sector in Kenya.

MIN No. TPWH 112/2019: SUBMISIONS FROM THE CHAIRPERSON AND THE CEO, KENYA AIRWAYS

In his ıtation, the Kenya Airways (KQ) CEO submitted that comparative analysis of the aviatic :or globally shows that other succeeding airlines have full support of their goverr making them making an edge in the market. He admitted that competitiveness of KQ wa compared to other airlines. He submitted that Emirates, for instance, contributes 20% tc of the GDP of Dubai while KQ was only doing 3% in Kenya. He, for example, explain while Kenya Airways had a mandate of paying dividends, other airlines did not.

The KQ CEO submitted that through the KQ/KAA PIIP, KQ was simply proposing to align all the interests and to reduce costs. He gave an example of Rwanda which was copying Kenya in routes but it was offering cheaper rates because they had a different system of operation. On his part, the KQ Chairperson regretted that about nine years ago the Ethiopian Airline was half of KQ while it was now far much ahead. He noted that the advent of Middle Eastern airlines

MINUTES OF THE TWENTY FOURTH (24TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON TUESDAY, 9TH APRIL 2019 AT 2.00 P.M. IN MINI CHAMBER, COUNTY HALL

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Samuel Arama, M.P.
3. Hon. Savula Ayub Angatia, M.P.
4. Hon. Ahmed Abdisalan Ibrahim, M.P.
5. Hon. Dominic Kipkoech Koskei, M.P.
6. Hon. Johnson Manya Naicca, M.P.
7. Hon. Kulow Maalim Hassan, M.P.
8. Hon. Mugambi Murwithania Rindikiri, M.P.
9. Hon. Peris Pesi Tobiko, M.P.
10. Hon. Rigathi Gachagua, M.P.
11. Hon. Shadrack John Mose, M.P.
12. Hon. Tom Mboya Odege, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - Vice Chairperson
2. Hon. David Njuguna Kiaraho, M.P.
3. Hon. Suleiman Dori Ramadhani, M.P.
4. Hon. Gideon Mutemi Mulyungi, M.P.
5. Hon. Ahmed Bashane Gaal, M.P.
6. Hon. Rehema Dida Jaldesa, M.P.
7. Hon. Vincent Kemosi Mogaka, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I
2. Mr. Ahmed Salim - Clerk Assistant III
3. Mr. Ronald Walala - Legal Counsel I

requested the Cabinet Secretary to be flexible in case his presence is required, albeit in a short notice, for any further clarifications.

MIN No. TPWH 110/2019: ADJOURNMENT

There being no other business, the sitting was adjourned at thirty eight minutes past noon. The next meeting to be held at 2pm, same day on 9th April 2019.

Signed.....

(Chairperson)

Date.....23/5/19.....

in a way that the KQ and KAA will form a Special Purpose Vehicle (SPV) to manage the Jomo Kenyatta International Airport.

On the legality of PIIP, the Cabinet Secretary submitted that the Public Private Partnership Act was identified as suitable legal framework and added that the government was exploring other possible options.

Responding to Members' concern on how a loss-making entity like KQ can manage a profit-making entity like KAA, the Cabinet Secretary submitted that the aviation sector needs to be looked at holistically. The CS further asserted that there cannot be differing opinion between the Ministry and the KAA because KAA was a government agency and it therefore cannot be delinked from the government.

On the possible conflict of interest of the KAA Chairperson who is also the group Chairperson for CBA Bank, the Cabinet Secretary submitted that the position of the Chairman of KAA and that of the bank were totally unrelated to the events in the aviation sector. He explained that there was no linkage between the management of the banks and the management of Kenya Airports Authority.

The Cabinet Secretary further informed the Committee that an expressway from Jomo Kenyatta International Airport to Westlands was being planned as well as a commuter rail system from JKIA to town centre with assistance from the French government.

MIN No. TPWH 109/2019: ANY OTHER BUSINESS

1. Members were concerned about a suicide case by a KCAA employee. The Cabinet Secretary informed the Committee that the case was still under investigation by the relevant government agencies and that the Ministry was equally concerned and closely following on the matter.

2. The Committee Chairperson informed the Cabinet Secretary that the Committee may, in the course of the inquiry, need to engage the Cabinet Secretary on short notice and therefore

the aviation sector. Members however noted that as long as KQ remained a private entity, it would always be looked at commercially.

On expected job losses, the Cabinet Secretary asserted that there will be no job losses in case the restructuring of the aviation sector takes shape and that he had personally assured the KAA employees of the same. While emphasizing that the intention is to save the entire aviation sector, he noted that KQ was just but a single component in the entire aviation sector. He termed KQ as a quasi-government institution. He explained that in terms of shareholding we were moving towards making KQ a full public entity.

The CS noted that 70% of the business at JKIA was KQ and that it was important to consolidate the gains and manage them in a way that we got the best value. He insisted that the policy was to allow us to look into the best options on how to manage aviation assets and that all options were open. Responding to Members' questions, the Cabinet Secretary submitted that we could consider Nationalization of KQ as an option but termed it a piece-meal formula at the moment because we didn't know how the final lasting solution will be to the aviation sector.

On the assertion that KQ was still paying interest to the consortium of banks (KQ Lenders 2017), the CS explained that they wanted to convert the loans to equity but under the Banking Act banks cannot own shares in their companies, and this is why the KQ Lenders was created to hold some shares while some were left as a loan to be held by the KQ Lenders 2017 Ltd. The Committee was informed that the shares were time-bound with a period of ten years and that the KQ Lenders Ltd was the shareholder, not the banks. The Committee heard that the shares were to give KQ some breathing space and that the dividends were very minimal because KQ was hardly making profits.

The Cabinet Secretary explained that the government starts with a policy after which the corporates may come in before the feedback is taken back to the Cabinet. Policy shift in this case was therefore predicated by the challenges being faced in the aviation sector. He explained that the KQ proposal was taken to the PPP Unit in the National Treasury for consideration. He further explained that the currently proposed Privately Initiated Investment Proposal (PIIP) was framed

4. Mr. Abdinasir Moge	-	Fiscal Analyst
5. Mr. James Muguna	-	Research Officer
6. Mr. Collins Mahambe	-	Audio Officer
7. Ms. Noelle Chelagat	-	Media Relations Officer

IN ATTENDANCE

1. Mr. James Macharia, EGH	-	Cabinet Secretary, MOTIHUD&PW
2. Mrs. Esther Koimett, CBS	-	Principal Secretary, Transport

MIN No. TPWH 107/2019: PRELIMINARIES

The meeting was called to order at thirty minutes past ten o'clock, with a word of prayer from the chairperson. Members confirmed the agenda as meeting with the Cabinet Secretary and the Principal Secretary for Transport as the Committee starts an inquiry into the aviation sector in Kenya. The Chairperson of the Committee informed the Cabinet Secretary that the meeting follows a Committee meeting of 19th February 2019 where the Ministry submitted a copy of the Kenya Airways PIIP and subsequent events that followed, including a communication from the Speaker of the National Assembly on mandate of the House Committees.

MIN No. TPWH 108/2019: SUBMISIONS FROM THE CABINET SECRETARY FOR TRANSPORT, INFRASTRUCTURE, HOUSING, URBAN DEVELOPMENT AND PUBLIC WORKS

The Committee largely interrogated the Cabinet Secretary on policy issues, legal issues and general issues of concern to the people of Kenya.

The Cabinet Secretary submitted that the Cabinet granted policy approval to restructure and improve the aviation sector without deciding on any particular route and that all options were still open. He explained that what the Cabinet Memo was essentially asking was for the Ministry to go out of its way and get the KQ to become a financially prudent institution. He noted that Kenya Airways (KQ) was flying the Kenyan flag globally and therefore it cannot be looked at purely on commercial basis. He submitted that the aviation sector needed to be looked at very broadly; Ethiopian government being an example of why government involvement was vital in

MINUTES OF THE TWENTY THIRD (23RD) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON TUESDAY, 9TH APRIL 2019 AT 10.30 A.M. MINI CHAMBER, COUNTY HALL

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Samuel Arama, M.P.
3. Hon. Savula Ayub Angatia, M.P.
4. Hon. Ahmed Abdisalan Ibrahim, M.P.
5. Hon. Dominic Kipkoech Koskei, M.P.
6. Hon. Johnson Manya Naicca, M.P.
7. Hon. Kulow Maalim Hassan, M.P.
8. Hon. Mugambi Murwithania Rindikiri, M.P.
9. Hon. Peris Pesi Tobiko, M.P.
10. Hon. Rigathi Gachagua, M.P.
11. Hon. Shadrack John Mose, M.P.
12. Hon. Tom Mboya Odege, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - Vice Chairperson
2. Hon. David Njuguna Kiaraho, M.P.
3. Hon. Suleiman Dori Ramadhani, M.P.
4. Hon. Gideon Mutemi Mulyungi, M.P.
5. Hon. Ahmed Bashane Gaal, M.P.
6. Hon. Rehema Dida Jaldesa, M.P.
7. Hon. Vincent Kemosi Mogaka, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I
2. Mr. Ahmed Salim - Clerk Assistant III
3. Mr. Ronald Walala - Legal Counsel I

10. What is the respective contribution of KQ/ KAA to the economy?
    - In terms of the GDP; and
    - The number of people employed by KQ/ KAA?

MIN No. TPWH 100/2019: ANY OTHER BUSINESS

1. Arising from the deliberations made on processes of successful inquiry , Members proposed that a roadmap for the inquiry process be outlined as follows;
    i. Advertisement for the public to submit views on the inquiry to be out by 28th March 2019
    ii. Members of the public to submit their views by 4th April 2019
    iii. Hearing to be conducted between 8th and 12th April 2019
    iv. Committee Secretariat to prepare the first draft report between 15th and 18th April 2019
    v. Committee to retreat from 18th to 21st April 2019
    ~~vi. Committee to meet selected stakeholders from 23rd and 24th April 2019~~
    vii. Committee to retreat gain for the final report writing from 25th to 28th April 2019
    viii. Committee to table its report on 2nd May 2019

2. The Committee came up with a List of witnesses/stakeholders to be invited so as to submit their views and they included;
    i. Ministry of Transport
    ii. Kenya Airways
    iii. Kenya Airports Authority
    iv. State Corporations Advisory Committee
    v. Transaction consultants
    vi. Kenya Civil Aviation Authority
    vii. Public Service Commission

The Secretariat were tasked to prepare invitations to stakeholders, prepare a newspaper advert to run in the dailies from Thursday, 28th March, 2019 and to further make all the arrangements necessary for the Committee to carry out Public hearings.

MIN No. TPWH 101/2019: ADJOURNMENT

There being no other business, the sitting was adjourned at twenty minutes to one o'clock. The next meeting to be held on notice

Signed.....

(Chairperson)

Date.....02/04/2019.....

4. General issues of concern to the people.

The following is a breakdown of the four items around which the inquiry process is proposed to be built and upon which the pertinent questions are supposed to be addressed:

A. Policy Issues

1. What did the Cabinet Memo and the White Paper seek to address regarding aviation policy?
2. What is PIIP in summary? What is it attempting to address in line with the Cabinet Memo?
3. Is PIIP the best proposal to address the policy aviation problems? Why?
4. What options exist to address the matters of aviation policy if not PIIP?

B. Human Resource Issues

1. Should it go as proposed, what is the implication of PIIP to human resource?
2. PIIP as it is may lead to redundancy, sooner or later. What are the mitigating measures?
3. What is the current staffing formation structure for KAA?
4. What about the future of the staff who are on Permanent and Pensionable scheme of service?

C. Legal Compliance Issues

1. Did the PIIP follow the due process of the law? What are the legal regimes covering the PIIP process and any other related matters?

D. Issues of Concern to the Public in General

1. Is KQ a Public or Private Company and who are the shareholders?
2. How can a loss making company like KQ take over a profit making company like KAA?
3. If KQ takes over JKIA, what happens to other airports?
4. Is there conflict of interest between the current KAA chairman who happens to be the CEO of CBA Bank which is currently in the process of acquiring NIC bank?
5. Is the current model of KQ causing hemorrhage in terms of;
   - Wage bill and expatriate issue
   - Fuel hedging
   - Aircraft Leasing
6. How many Aircraft has KQ leased and who are the owners? Are there alternatives to leasing? Are there any other Airlines that have leased aircrafts directly from Manufacturers?
7. What is the financial health status of KQ/ KAA respectively, in terms of;
   - Its balance sheet
   - Debt held by KQ/ KAA
   - Cash flow of KQ/ KAA
   - Assets and Equities
   - Securities by EXIM Bank and local banks
8. What is the optimum revenue generation from JKIA?
9. What amount of the revenue generated by JKIA is used to maintain other Airports?

MIN No. TPWH 096/2019: PRELIMINARIES

The meeting was called to order at ten minutes past ten o'clock, with a word of prayer from the Hon. Vincent Kemosi, MP. Members confirmed the agenda as consideration of the Speaker's ruling and way forward on Kenya Airways/ Kenya Airport Authority PIIP. Agenda was proposed by Hon. Dominic Koskei, MP and Seconded by Hon. Shadrack Mose, MP.

The Principal Secretary for Housing had been invited for a consultative meeting on National Housing Scheme which was to be part of the agenda, but the Committee had received written request to have the meeting postponed to a later date since the accounting office was away on official duty.

MIN No. TPWH 097/2019: CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

The agenda item was differed to the next committee meeting.

MIN No. TPWH 098/2019: BRIEFING BY THE LEGAL COUNSEL ON SPEAKER'S RULING ON THE INQUIRY INTO THE PROPOSED TAKEOVER OF JKIA BY KENYA AIRWAYS

The Committee noted that on Thursday, 21st March, 2019, The Hon. Speaker of the National Assembly issued a Communication on mandate of Audit Committees Vis a Vis that of Departmental Committees and the place of progress reports in inquiry processes of the takeover of JKIA by KQ.

Key issues and directives given in the Communication included;

i. The Committee to confine itself to matters of policy, human resource, compliance with due process of law and generally address any issues of concern to the people as contemplated under Article 95 of the Constitution;

ii. Restricting the Committee in carrying out public participation of the privately initiated Invested Proposal between KQ and KAA at this infancy stage. That at this stage, the exercise is obligation of the Kenya Airports Authority and / or the relevant state department, which are expected to thereafter apprise the House on the progress of the initiative through the said Departmental Committee.

iii. Upholding high standards, being mindful of the strategic interests of the nation and the welfare of the present and future generations. Thus this behooves everyone to exercise sobriety, patriotism and reasonable confidentiality as servants who "have been called to the performance of important trust in the Republic".

The Committee however thought it right to carry out an open inquiry and engage members of the Public in order to get their view before reporting its findings to the House.

MIN No. TPWH 099/2019: WAY FORWARD ON KQ/KAA PIIP

In developing the roadmap to a successful inquiry, the Committee after considering the Speaker's Communication identified four key issues which could assist the Committee in developing the Terms of Reference for questions under the inquiry. These four are:

1. Policy issues;
2. Human resource issues;
3. Legal compliance; and

MINUTES OF THE TWENTY FIRST (21ST) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON 10TH FLOOR, CDF BOARDROOM, HARAMBEE SACCO, PARLIAMENT BUILDINGS ON TUESDAY, 26TH MARCH 2019 AT 10.00 A.M.

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - **Chairperson**
2. Hon. David Njuguna Kiaraho, M.P.
3. Hon. Johnson Manya Naicca, M.P.
4. Hon. Peris Pesi Tobiko, M.P.
5. Hon. Ahmed Abdisalan Ibrahim, M.P.
6. Hon. Dominic Kipkoech Koskei, M.P.
7. Hon. Gideon Mutemi Mulyungi, M.P.
8. Hon. Rigathi Gachagua, M.P.
9. Hon. Shadrack John Mose, M.P.
10. Hon. Tom Mboya Odege, M.P.
11. Hon. Vincent Kemosi Mogaka, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - **Vice Chairperson**
2. Hon. Samuel Arama, M.P.
3. Hon. Savula Ayub Angatia, M.P.
4. Hon. Suleiman Dori Ramadhani, M.P.
5. Hon. Ahmed Bashane Gaal, M.P.
6. Hon. Kulow Maalim Hassan, M.P.
7. Hon. Mugambi Murwithania Rindikiri, M.P.
8. Hon. Rehema Dida Jaldesa, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I
2. Mr. Ahmed Salim - Clerk Assistant III
3. Ms. Christine Odhiambo - Legal Counsel I
4. Mr. James Muguna - Research Officer III
5. Mr. Collins Mahambe - Audio Officer
6. Ms. Zainab Wario - Sergeant at Arm II

ANNEX III

VOLUME I

Minutes of the meetings of the Committee

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

Finally, Honourable Members, as I conclude, I wish to laud the Public Investments Committee for bringing this matter to the attention of the House. **Nevertheless, even as the two Committees resume their examination and the House makes comments on the progress report, may I caution the two committees and indeed the House that, in examining this investment proposal, we must be conscious that it is at its infancy. All of us must uphold high standards, be mindful of the strategic interests of the nation and the welfare of the present and future generations. This behoves all of us to exercise sobriety, patriotism and reasonable confidentiality as servants who "have been called to the performance of important trusts in this Republic.[9]"**

The House is accordingly guided.

I thank you!

THE HON. JUSTIN B. MUTURI, E.G.H., MP
SPEAKER OF THE NATIONAL ASSEMBLY

Thursday, March 21, 2019

9 Derived from the prayer contained in the National Assembly Standing Orders, Fourth Edition, page xxiii

indeed the practice in many other comparative jurisdictions regarding treatment of progress reports. I will however allow the Chairperson of the Committee to present his report to the House by way of a statement as contemplated under Standing Order 44. In so doing, he is expected to speak to the progress of the matter before the Committee, which is essentially the substance of the said Report;

7. **THAT**, following the statement of the Chairperson of the Public Investments Committee, I will allow other Members of the House to make comments on the Progress Report. This is in keeping with the precedent set by the House on Thursday, July 5th, 2018, when the Chairperson of the Departmental Committee on Agriculture & Livestock and the Chairperson of the Departmental Committee on Trade, Industry & Cooperatives presented a joint progress report on the *Inquiry into Alleged Importation of Illegal and Contaminated Sugar in the Country*, which was an active matter before the joint Committee. This practice is however distinct from the procedure contemplated under Standing Order 200 providing for *half-yearly progress reports* which are to be submitted to the Liaison Committee and thereafter tabled in the House; and,

8. **THAT**, since a progress report is intended for information and to elicit comments without resolution, and may **not** be amended, the proposed amendment by the Chairperson of the Departmental Committee on Transport, Public Works and Housing to the subject progress report is also inadmissible.

The Committee is expected to offer oversight on the stages of implementation contemplated to complete the process and be apprising the House on the progress of the matter, should it proceed as initiated. This is also in tandem with my letter of 21st February, 2019 to the Chairperson of the Committee;

4. **THAT**, since the Investment Proposal is at its infancy, it may in due course, become inevitable for Parliament to be involved, particularly if there are any legislative interventions required as part of the process. In this regard, the House ought to exercise **restraint** at the current initial stages so as not to become prejudiced should the legislative intervention stage become inevitable;

5. **THAT**, henceforth, any Committee of the House which is desirous of benefiting from the specialized expertise of the Office of the Auditor General by way of requests for **special audits** must comply with the parameters contained in this Communication. The Auditor General, in considering the request may accede to the request, based on his reasoned judgment and inform the Committee through the established channels;

6. **THAT,** notwithstanding my earlier approval of the notice of Motion in respect of the adoption of the Progress Report of the Public Investments Committee on *The Inquiry into the Proposed Takeover of Jomo Kenyatta International Airport (JKIA) by Kenya Airways (KQ)*, laid on the table of the House by the Chairperson on *Wednesday, February 27, 2019,* I am constrained **NOT** to allow the motion to proceed. This is because, by doing so, the House will be offending its own established practice and

In summary, **Honourable Members**, I wish to guide the House as follows-

1. **THAT**, I have established that the commercial arrangement between the Kenya Airports Authority and Kenya Airways regarding the Jomo Kenya International Airport is a Privately Initiated Investment Proposal under the Public Private Partnership Act, 2013 **which is still at initiation stage**. This is evidenced from the information provided by the Chairpersons of the Public Investments Committee and the Departmental Committee on Transport, Public Works and Housing and the Report of the Auditor General submitted to my office on 14th March, 2019;

2. **THAT**, the Leader of the Majority Party or another Member designated by the House Business Committee may hereupon proceed to lay the Report of the Auditor General titled "*Special Audit Report on the Proposed Privately Initiated Proposal (PIIP) Between Kenya Airports Authority (KAA) and Kenya Airways (KQ)*", which was submitted to my office on 14th March, 2019. Upon tabling, the Report will stand referred to the Public Investments Committee, which shall, in its examination of the matters contained therein, confine itself to the financial and expenditure aspects of the reservations of the Auditor General as well as omissions and/or commissions on the part of the Kenya Airports Authority;

3. **THAT**, as for the Departmental Committee on Transport, Public Works and Housing, it is also at liberty to proceed with its inquiry. However, the Departmental Committee is to confine itself to matters of policy, human resource, compliance with due process and the law, benefits to the society and the nation and generally addressing any issues of concern to the people as contemplated under Article 95(2) of the Constitution.

However, that particular progress report was made through a statement to the House- and rightly so. The progress report was not debated by the House. Nonetheless, I did allow a few Members to make comments on it and thereafter allowed the Committee to resume its work, with an extended deadline. In the same vein, the Public Investments Committee will automatically be granted leave to resume its sittings and consideration of the subject matter, once the special audit report of the Auditor General is Tabled in the House as I will later direct.

Honourable Members, as cited from the three legislative authorities, a progress report is seldom discussed and if so it has to be debated without calling the House to make a resolution, give orders or directions. A resolution based on an interim report may certainly prejudice the outcome of the actual inquiry. Moreover, it should not be lost to the House that, a motion governed by Part XII of our Standing Orders and which seeks a resolution of the House ultimately **ends with a question being put**, the result of which may be that "Ayes" or the "Nays" have it. This begs the question; *what would be the procedural implication if the "Nays" had it (for instance), meaning that the progress report is rejected?* Obviously, such a decision, which is probable in a parliamentary set up, would render worthless the incomplete work of the Committee and any related special audit. It is for these reasons that most commonwealth legislatures have resorted to only allowing comments on progress reports or statements, instead of debate upon a motion. Allowing comments is meant to accord the Committee an opportunity to inform the House on the progress of the inquiry before it, while cushioning the remaining work from possible criticism, prejudices and binding directive that would arise if the House was to debate the report by way of an ordinary Motion.

"This procedure (of interim report) provides a cost and time- effective way for a committee's views to be placed before Parliament, but should be used with care, as the committee could leave itself open to criticism that some community, government, or interest group have been excluded from the process. In addition, the committee runs the risk that its conclusions and recommendations could be based on incomplete or incorrect information[6]."

Further, **Honourable Members**, Robert's Rules of Order, an authority in Parliamentary Procedure applied in State Assemblies of the United States of America states the following with respect to a report containing only information, which is essentially a progress report "Even *if a report contains only an account of work done or a statement of facts or opinion for the assembly's information,* ***it should be in writing****. Apart from filing such report, however,* ***no action on it is necessary*** *and usually none should be taken."*[7]

In addition, **Honourable Members**, the Canadian House of Commons Procedure and Practice notes that, *"since the early 1990s, a number of take-note motions have been debated in the House or in Committee of the Whole. These debates solicit the views of Members on some aspect of government policy and allow Members to participate in policy development, making their views known before the government makes a decision[8]".* In our case, take-note motions are similar to the usual motions for noting.

Honourable Members, you will indeed recall that last year on 5th July, 2018 I did allow the Departmental Committees on Trade, Industry and Co-operatives and that of Agriculture and Livestock to present a progress or interim report on their *Inquiry into the Alleged Importation of Illegal & Contaminated Sugar in the Country.*

---

6 House of Representatives Practice, (Fifth Edition), page 684

7 Robert's Rules of Order, (11th Edition), page 525

8 The House of Commons Procedure and Practice (Canada) (Third Edition 2017), Page 706

Honourable Members, The progress report of the Public Investments Committee on *Inquiry into the Proposed Takeover of Jomo Kenyatta International Airport (JKIA) by Kenya Airways (KQ)*, which was laid on the Table of the House by the Chairperson on *Wednesday, February 27, 2019* was meant to inform the House that, amongst other issues, the Committee was seized of the matter and that it had requested for a special audit. The widely held meaning of a progress report is that *"an interim report on progress made to date on a job, project, etc*[3]*"* Indeed, a progress report is an information report, usually prepared for several purposes, amongst them being to inform the House on salient issues awaiting completion of an inquiry and to keep the public updated on what is before a committee or schedule of activities so as to avoid speculations on a matter. ***Can we fault the Committee for informing the House at this stage?*** Certainly not. According to Rule 177 of The Rules of Procedure and Conduct of Business of the Legislative Assembly of National Capital Territory of Delhi, *"A Committee may, if it thinks fit, make a special report to the House on any matter that arises or comes to light in the course of its working which it may consider necessary to bring to the notice of the Speaker or the House, notwithstanding that such matter is not directly connected with, or does not fall within or is not incidental to, its terms of reference*[4]*."* This authority is further amplified by David McGee in the Third Edition of the Parliamentary Practice in New Zealand, which provides that "a *committee has used a special report to the House; ...to announce that it had initiated a major inquiry*[5] *".*

What is the House then supposed to do with such a progress report? **Honourable Members**, in discussing interim or progress reports, the Fifth Edition of the Australia House of Representatives Practice notes the following-

3 Derived from the Advanced Oxford Dictionary

4 Rule 177 of Rules of Procedure and Conduct of Business of the Legislative Assembly of National Capital Territory of Delhi, 2009

5 Parliamentary Practice in New Zealand (Third Edition), page 293

(d) *state the **nature** of the audit requested, e.g. compliance audit, financial or value for money audit, operational audit, ordinary investigative audit;*

(e) *state the **specific** matters to be covered in the audit. The Committee is to be specific and accurate where there are names of people, places, projects or programmes; and,*

(f) *state the preferred **timeline** within which the report is required by the Committee.*

Honourable Members, In keeping with the provisions of Standing Order 206(7)(c), a special audit shall not be sought on any mattes for which machinery is established by any special statute. Similarly, the provisions of Standing Order 199(2) with respect to the special majority of members required to adopt a report of a Committee shall apply to a resolution of a Committee requesting for a Special Audit. Further, it is inconceivable that the attention of the Speaker on a special audit by a Committee would only be drawn at the point of tabling of its report. The Clerk is henceforth required to satisfy himself, without exception that any request for a special audit complies with these guidelines before conveying the request to the Auditor General. Thereafter, the particular Committee shall not be properly seized of the matter until the special audit is tabled before the House, unless the House is in recess, in which case the Speaker may refer the report to the Committee and inform the House upon resumption. May I hasten to add that, the nature of the final report of the Auditor General shall determine the Committee to which the report is to be referred, notwithstanding that a particular committee made the request. These guidelines take effect immediately.

Honourable Members, the fifth matter requiring my determination is **whether the Committee is at fault to make a progress report to the House and what is the House expected to do with such a report.** I will address this issue together with the last question requiring my attention, which is **whether it would be procedurally in order for the House to be moved on a motion to debate the particular Progress Report of the Public Investments Committee as *laid on the Table of the House on Wednesday, February 27, 2019,* given that the report is interim.**

Honourable Members, As you are aware Article 229 of the Constitution establishes the office of the Auditor General as an independent office subject only to the Constitution and law and not subject to direction or control by any person or authority. In light of this Article as read together with Article 249(2) as well as the reasoning of the Court in declaring section 42 of the Public Audit Act, 2015 unconstitutional, whenever Committees desire to benefit from the specialized expertise of the Auditor General by way of **special audits**, they must be conscious that they cannot order or compel the Auditor General to do so. *What steps therefore should a committee follow to seek for a special audit from the Auditor General?* In absence of parameters in the Public Audit Act, 2015 and our Standings Orders, as your Speaker, I will resort to invoking provisions of Standing Order 1 which provides that, and I quote-

In cases for not provided for, the Speaker to decide

> *In all cases where matters are not expressly provided for by these Standing Orders or by other orders of the House, any procedural question shall be decided by the Speaker.*

Honourable Members, I therefore give the following guidance with respect to the manner of requesting for special audits-

A committee wishing to request for special audits from the Auditor General shall-

(a) *indicate **how** the matter came before the Committee. This is to be supported by, amongst others, the agenda and the minutes of the Committee;*

*(b) indicate any preliminary information or evidence adduced before the Committee on the matter to justify the request and outline the **compelling** issues that have necessitated request for a special audit;*

*(c) indicate whether the Committee has confirmed the **absence** of any other audit report on the same matter and absence of an ongoing one;*

As we all know, the Auditor General invariably submits audit reports on an annual basis. These reports are mostly post mortem reports on a range of subject areas under which public funds have been spent. Nonetheless, Committees are not precluded from requesting the Auditor-General to undertake a special audit and submit a report thereof to the Committee, as and when need arises. Indeed, the Public Investments Committees of successive Parliaments have always been alive to this reality and have carefully navigated the path of getting seized of investigation into allegations of misuse of public funds before the release of the reports on audited accounts.

Honourable Members, the established practice of the House is that a Committee may resolve to request the Auditor General to carry out a special audit and furnish a report to the Committee before the said Committee carries out further examination. Indeed, I have had the benefit of perusing the confirmed minutes of the 6th sitting of the Public Investments Committee which was held on 19th February, 2019, during which the Committee resolved as that, and I quote-

> *"The Office of the Auditor General should conduct a special audit on the proposed concession arrangement with a view to establishing adherence to the relevant laws, the risks that KAA and the public face if the takeover is implemented and the procurement process for the services of the transaction advisor[2]".*

It is evident from the foregoing, **Honourable Members,** that the Committee did fairly follow procedure in requesting for the special audit. However, whereas we applaud the Public Investments Committee for bringing this matter to the attention of the House by way of a progress report, it is important that I also address the basis of any future requests for special audits, going forward.

---

2 Excerpt of the Minutes of the 6th sitting of the Public Investments Committee held on 19th February, 2019, page 4.

In this regard, based on this finding by the Hon. Judge, I need not dwell on the question as to *"whether the Auditor General is excluded by law from examining a government policy"* any further. I nonetheless remind the House that, in the last two years, the Auditor General has submitted several audit reports to this House touching on performance and policy issues. These reports include the following-

(a) Performance Audit Report from the Office of the Auditor General on the provision of Mental Healthcare Services in Kenya for the period December, 2017;

(b) Performance Audit Report on the implementation of the National School Upgrading Programme by the Ministry of Education, Science and Technology for the period, March, 2018;

(c) Performance Audit Report on Effectiveness of Measures put in place by Kenya Wildlife Services in Protecting Wildlife by the Ministry of Tourism and Wildlife for the period, June, 2018; and,

(d) Performance Audit Report on Provision of Housing to Prison Officers in Kenya.

These reports, having been tabled are now before the respective Departmental Committees for examination and consideration by the House. This implies that the Auditor General is **NOT** precluded by any law from auditing matters of government policy.

Honourable Members, I will now turn to the fourth issue of my consideration, which regards the ***procedure for requesting for a special audit from the Auditor General.*** **Honourable Members**, to address this issue, it is important that we revisit the core mandate of the Public Investments Committee, as enumerated under Standing Order 206(6)(b), which is to *examine the reports, if any, of the Auditor General on the public investments.*

Honourable Members, the third matter requiring my determination is ***whether the Auditor General can audit the merits of policy issues of Government.*** Those who were in the 11th Parliament may recall that, this matter was a subject of heated debate during consideration of the Public Audit Bill, 2014 in both Houses, which is today the Public Audit Act (No. 34 of 2015). Indeed, when passing the Bill, Parliament did include section 42, which provided that, and I quote:-

> *s.42. "Notwithstanding the provisions of this Act, in an examination under this Act, the Auditor-General shall not question the merits of a policy objective of the National Government or county government or any other public entity."*

The foregoing was the prevailing position in law until 16th February, 2018, when the High Court did make a pronouncement in so far as the application of that section was concerned.

Honourable Members, in Petition No. 388 of 2016 (*Transparency International Kenya vs The Attorney General and Two others*[1]) the learned Judge, Hon. E. Chacha Mwita, in his judgment held that, a statute could not impose conditions on the performance of the Auditor General's functions where the Constitution did not impose them. Section 42 of the Public Audit Act, 2015 was therefore declared a violation of Article 10 of the Constitution which provides for national values and principles of governance which include integrity, transparency and accountability and also Article 201 of the Constitution which provides for financial openness. This decision has implication on the business of the House and its Committees, in so far as the scope of requests for special audit is concerned.

---

[1] High Court at Nairobi (Petition No 388 of 2016), Transparency International (TI Kenya) v Attorney General & 2 others [2018] eKLR.

The second aspect of this matter regards the contention that, the **policy** aspects of the inquiry fall within the mandate of the Departmental Committee on Transport, Public Works and Housing. In view of the provisions of Standing Order 216(5) as enumerated earlier, the Departmental Committee on Transport, Public Works and Housing is at liberty to proceed and inquire into the policy aspects of the commercial arrangement between KAA and KQ.

Honourable Members, May I, at this juncture inform the House that, the Auditor General has since submitted to me a report titled "*Special Audit Report on the Proposed Privately Initiated Proposal (PIIP) Between Kenya Airports Authority (KAA) and Kenya Airways (KQ)*". The particular report was received in my office on 14th March, 2019 and I will be asking the Leader of the Majority Party to lay that Report on the Table of the House, later during this sitting in keeping with the requirements of sections 39 and 49 of the Public Audit Act, 2015. Having perused the Report, it is evident that this matter is still at infancy. However, the Auditor General has raised several operational and policy audit issues as well as two financial audit issues. Upon tabling of the Report, the Public Investments Committee will be at liberty to resume its inquiry on the matter, but the Committee **must confine itself** to the financial and expenditure aspects of the reservations of the Auditor General as well as omissions and/or commissions on the part of the Kenya Airports Authority. As for the Departmental Committee on Transport, Public Works and Housing, the Committee is also at liberty to proceed with its inquiry. The Departmental Committee must confine itself 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.

(c) *matters for the consideration of which machinery is established by any special statute under which a particular public investment is established.*

In this regard, **Honourable Members**, I find that, when examined in totality, the matter in question at this point falls into two categories. On one hand, the Kenya Airports Authority is a state corporation, 100% percent owned by the Government. The Public Investments Committee is therefore 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 being managed in accordance with sound financial or business principles and prudent commercial practices.*** However, in doing so, the Committee ought to follow the usual procedure, particularly as guided in my *Communication of 5th December 2013.* In that Communication, I did guide that, and I quote- *"Should the Committee intend to examine matters of procurement, I would expect them to order a special audit by the Auditor General* ***after being satisfied that the matter requires a special audit"*** This means that, whenever the Committee requests for a special audit, the examination of the matters before the Committee is discontinued, until the special audit is undertaken and tabled in the House. This is informed by the universal dictum that, when a party asks another party to carry out forensic inspection or any other specialized task, then the work of the first party becomes *functus officio*. This means that, any further examination or even debate in the Committee on the same matters for which a special audit has been requested may vitiate or injure the process of the special audit. In addition, it would be important to note that the Public Investments Committee may also examine this matter if it was an audit issue or query arising from the examination of audited reports and accounts of the Kenya Airports Authority or a special audit.

(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) 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;

On the other hand, Standing Order 206(2) provides that "*the Public Investments Committee shall be responsible for the examination of the working of the public investments on the basis of their audited reports and accounts.*"

Honourable Members, additional functions of the Public Investments Committee as highlighted under Standing Order 206(6), include –

(a) to *examine the reports and accounts of the public investments;*

(b) to *examine the reports, if any, of the Auditor General on the public investments; and*

(c) to *examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices.*

Under Standing Order 206 (7), the Public Investments Committee is prohibited from examining any of the following—

(a) *matters of major Government policy as distinct from business or commercial functions of the public investments;*

(b) *matters of day-to-day administration; and,*

At this stage, that exercise is obligation of the Kenya Airports Authority and/or the relevant state department, which are expected to thereafter apprise the House on the progress of the initiative through the said Departmental Committee.

Honourable Members, Let me now turn my focus to the second issue requiring my determination, namely, ***whether or not the proposed PIIP between the Kenya Airports Authority and Kenya Airways is a matter under the purview of Public Investments Committee or Departmental Committees***. In doing so, permit me to refer the House to the ruling made by the Speaker on 5th December, 2013. Then, as now, the question arose, in similar framing, as to the delineation of the mandates of the watchdog committees of the House, namely the Public Investments and the Public Accounts Committees on the one hand, and Departmental Committees on the other. In sum, the Speaker then guided that indeed the mandates of Departmental Committees were clearly distinct from those of the Public Accounts Committee (PAC) and the Public Investments Committee (PIC). That, as a matter of fact, PAC or PIC ought not delve into such matters as review of legislation, vetting of appointments or matters of administration of ministries or State corporations. This finding, **Honourable Members**, was on the basis of Standing Orders 205 and 206, which preclude the Public Investments Committee from examining matters of day-to-day administration of state corporations. In the same vein, the Speaker did then caution Departmental Committees from veering into the province of the Public Accounts Committee and the Public Investments Committee, save for the manner contemplated under Standing Order 216.

For avoidance of doubt, **Honourable Members**, the said Standing Order 216 under paragraph (5) provides that the functions of a Departmental Committee shall be to-

Whereas the Kenya Airports Authority is a state corporation fully owned by the government, the Kenya Airways is a company in which the government has a 48.9% stake in terms of shareholding. Kenya Airways is therefore a company in which the government has substantial shareholding both for strategic and national interest.

Honourable Members, You will also agree with me that, Kenya Airways being a listed company at the Nairobi Securities Exchange cannot be devoid of public scrutiny in as far as its operations are concerned. Any major restructuring or reorganization of the Kenya Airways will therefore attract deserved attention of the people of Kenya. On the other hand, **Honourable Members**, should the Kenya Airways proposal fall under the purview of the Privatization Act, No. 2 of 2005, section 23(3) of the Act provides-

> *(3) The Cabinet Secretary shall submit a report in form of a Sessional Paper on a privatization proposal approved by the Cabinet to the National Assembly for consideration.*
> *(4) Upon laying before the National Assembly, a report under subsection (3) shall stand referred to the relevant committee.*

Honourable Members, it is clear from the foregoing that Parliament's involvement in the conclusion of the Kenya Airways proposal cannot be overlooked, irrespective of the nature of the commercial arrangement. It is therefore not a matter of "if Parliament will be involved", rather it is **when** is the right stage for Parliament to be involved. It is inconceivable, in parliamentary parlance, that the House or its Committees would become part of **policy execution**, as that may prejudice the oversight function of the House as enshrined in Article 95(5)(b) of our Constitution. It is for this reason that I found it inappropriate for the Departmental Committee on Transport, Housing and Public Works to attempt to undertake what it termed as "public participation" of the Privately Initiated Investment Proposal between KQ and KAA **at this infancy stage.**

Section 54(3) of the Act provides that the Cabinet Secretary for Finance and the Cabinet Secretary in the State department responsible for the implementation of the project shall prepare a joint cabinet memorandum based on the recommendations of the Public Private Partnership Committee and submit the memorandum to the Cabinet for approval before any execution.

Honourable Members, Section 55 of the Act provides for the only instance in which Parliamentary approval may be sought in respect of public private partnerships, and that is where the partnership is for the exploitation of natural resources under Article 71 of the Constitution, and this approval would be made through a ratification process. Parliament in its wisdom, during the legislative process leading up to the enactment of the Public Private Partnerships Act, No. 15 of 2013, removed itself from the requirement of parliamentary approval of public private partnerships.

Honourable Members, Irrespective of the absence of the requirement of parliamentary approval in the Act, as your Speaker I ask myself- "*is it possible for the Kenya Airways Privately Initiated Investment Proposal to be complete without Parliament's knowledge?*" In my view, the realistic implementation of the proposal, if and when approved by the Cabinet, would require various legislative interventions, including amendments to various statutes. Ultimately, there may be need to amend different statutes including the Kenya Airports Authority Act (No. 3 of 1991) , the Labour Relations Act (No. 14 of 2007), the Air Passenger Service Charge Act (Cap. 475) and possibly taxation related laws amongst others. As you are all aware, an amendment to any of these statutes is a matter which squarely falls within the legislative mandate of Parliament.

Honourable Members, It is important to note that Article 95(2) of the Constitution provides that one of the roles of the National Assembly is to deliberate on and resolve issues of concern to the people.

This is in keeping with our Standing Order 91 on responsibility for statement of facts, which behooves all Members to speak with accuracy based on facts.

Honourable Members, Permit me at this point to refresh your memory on the Policy making process and the nexus between the Executive and the Legislature in this process. By practice, a policy of this magnitude and importance, like many others before or after it, would have to obtain Cabinet consideration. The relevant Cabinet Secretary would then undertake other preliminary processes with the relevant bodies and, at the appropriate stage, submit to the House a *Sessional Paper*. It then follows that, the people's elected representatives would at this point exercise their oversight function by giving their views in considering the particular *Sessional Paper*. In noting the *Paper*, the House may make reservations, comments or acquiesce to it unconditionally.

Honourable Members, As regards the legal framework that underlies the proposed management of JKIA operations by the Kenya Airways, the question that now begs is- *"Is the proposed commercial arrangement an arrangement under the Public Private Partnerships Act, No. 15 of 2013, or the Privatization Act, No. 2 of 2005?"*

Honourable Members, If the proposed commercial arrangement is to be governed by the Public Private Partnerships Act, No. 15 of 2013, the Act provides for the procedure for entering into a public private partnership agreement. It contemplates for an elaborate process, including preparation of a the privately initiated investment proposal, consideration by the target public entity, submission of the initiative to the public private partnership unit established in the National Treasury and approval for the parties to enter into negotiations. The law also contemplates that the said unit shall submit a project report, a financial risk assessment report and its recommendations to the Public Private Partnership Committee for consideration.

Housing are concerned. You will note that the two Committees, separately and rightly under the authority vested in them by the law and the Standing Orders, instituted inquiries on their own motion, which inquiries I will be addressing later.

Honourable Members, as your Speaker, if I am called upon to answer the question of "what is the nature of the commercial arrangement between the Kenya Airports Authority and Kenya Airways?", I may not be able to respond appropriately. This is because I am not privy to contents of the commercial arrangement between the two entities. However, based on information presented in my chambers by the Chairperson of the Departmental Committee on Transport, Public Works and Housing and the Chairperson of the Public Investment Committee and having read the Special Audit Report of the Auditor-General on the matter, which I will be speaking to at a later stage in this communication, I am guided that the commercial arrangement between the Kenya Airports Authority and Kenya Airways is a proposed Privately Initiated Investment Proposal (PIIP) within the ambit of the Public Private Partnership Act, 2013.

Honorouble Members, a clear reading of section 2 of the Public Private Partnership Act, 2013 defines a **"privately initiated investment proposal"** as "*a proposal that is originated by a private party without the involvement of a contracting authority and may include information that enables a complete evaluation of the proposal as if it were a bid.*"

This definition in itself demonstrates the inappropriateness of the application of the term "take over" as used by the two Committees and indeed by a section of Members who spoke in the House on the matter. Consequently, Committees and indeed this House should restrict themselves to terms used in the evidence adduced so far and the expressions used in the relevant laws.

(ii) whether the proposed commercial arrangement between Kenya Airports Authority and Kenya Airways 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;

(iii) whether the Auditor General can audit the merits or demerits of a Government policy;

(iv) the procedure for requesting a special Audit of a Government project; and,

(v) whether the Committee could submit a progress report to the House and, if so, what the is House expected to do with such a report;

(vi) in view of the motion for adoption of the *Progress Report of the Public Investments Committee on the Inquiry into the Proposed Takeover of Jomo Kenyatta International Airport by Kenya Airways, laid on the Table of the House on Wednesday, February 27, 2019,* whether it would be procedurally in order for a motion on an interim report to be moved in the House and for the House to proceed to debate it.

Honourable Members, the first issue that calls for my determination is the question of **what is the nature of and at what stage is the arrangement between Kenya Airports Authority and Kenya Airways regarding the management of the Jomo Kenyatta International Airport, and what is the applicable legal framework to the proposed management of Jomo Kenyatta International Airport by Kenya Airways?** To address this question, it is important to first determine whether the House is properly seized of the said Policy or issues. Obviously, the actual Policy itself is not before the House or its Committees. Indeed, it is clear that the House is seized of the matter only in so far as the parallel inquiries of the Public Investments Committee and the Departmental Committee on Transport, Public Works and

The Minority Party Whip expressed concern that formulation and implementation of public policy is a function of the executive arm of Government and the House has no role, nor does it participate in the formulation and implementation of Government policy. In his view, the involvement of the House at this stage would amount to pre-emption, interference and abuse of the doctrine of separation of powers. A section of the House supported the need for the House and its Committees to get to the bottom of the matter, irrespective of the stage at which the policy is.

Honourable Members, may I also, at this point, inform the House that the Chairpersons of the Departmental Committee on Transport, Public Works and Housing and the Departmental Committee on Finance and National Planning had also separately written to the Speaker on February 20, 2019 and February 21, 2019, respectively, claiming **exclusive** jurisdiction of their respective Committees to examine the same matter. In this regard, my Office did respond to the letter from the Chairperson of the Departmental Committee on Transport, Public Works and Housing, outlining broadly the issues in question which I will similarly address shortly.

Honourable Members, having reviewed the content and substance of the submissions by the Leader of the Majority Party and the procedural arguments by other Members who spoke to the *Point of Order* on 7th March, 2019, I have identified the following as the primary issues to address myself to in providing guidance to the House-

(i) what is the nature of and at what stage is the arrangement between Kenya Airports Authority (KAA) and Kenya Airways (KQ) regarding the management of the Jomo Kenyatta International Airport, and what is the applicable legal framework to the proposed management of the Airport by Kenya Airways?

(b) whether the Auditor General could carry out *ex-ante* or anticipatory investigations into a matter to establish adherence to the law and government policy.

Honourable Members, in his submission, the Leader of the Majority Party observed that the matter of the ongoing arrangements between the Kenya Airways and the Kenya Airports Authority (KAA) is a matter of Government policy that does not fall within the remit of the Public Investments Committee and by extension, the Auditor- General.

He further contended that the Constitution gives the functions of the Auditor-General, as amongst other things, the examination of the accounts of the national and county governments; the accounts of all funds and authorities; the accounts of all courts and the accounts of the National Assembly and the Senate. The Leader of the Majority Party and indeed a section of other Members who spoke, pointed out that, the nature of the work of the Auditor-General is to a great extent, **post-mortem**, that is, limited to expenditure already incurred and that the Auditor General should not audit a government policy, particularly at conceptualization stage.

Honourable Members, you will indeed recall that these very weighty procedural issues raised by the Leader of the Majority Party elicited reactions from the floor, with very valuable input from the Chairperson of Public Investments Committee (the Hon. Abdulswamad Sharriff Nassir); the Chairperson of the Departmental Committee on Transport, Public Works and Housing (the Hon. David Pkosing); the Majority Party Whip (the Hon. Benjamin Washiali); the Minority Party Whip (the Hon. Junet Mohamed), amongst others, who advanced varying positions on the matter.

REPUBLIC OF KENYA

TWELFTH PARLIAMENT– (THIRD SESSION)

THE NATIONAL ASSEMBLY

COMMUNICATION FROM THE CHAIR

_____(No. 12 of 2019)_____

ON MANDATE OF AUDIT COMMITTEES *VIS-À-VIS* THAT OF DEPARTMENTAL COMMITTEES AND THE PLACE OF PROGRESS REPORTS IN INQUIRY PROCESSES

Honourable Members,

You will recall that on Thursday, 7th March, 2019, the Leader of the Majority Party rose on a *Point of Order* citing Standing Orders 83, 206, and 216 and sought the guidance of the Speaker on alleged conflict of mandate between the Public Investments Committee and those of the Departmental Committees. He also sought guidance on the role of the Auditor General in so far as special audits are concerned and the place of the progress report of the Public Investments Committee on *The Inquiry into the Proposed Takeover of Jomo Kenyatta International Airport (JKIA) by Kenya Airways (KQ)*, which was laid on the table of the House by the Chairperson on *Wednesday, February 27, 2019*. In particular, the Leader of the Majority Party invited the Speaker to pronounce himself on two key issues-

(a) whether it would be procedurally in order for a Committee of the House to **order** stay of progress, or indeed to **recommend** stay of progress on an ongoing government-initiated policy or project **which is at infancy stage** citing ongoing inquiry by the House; and,

ANNEX II

VOLUME I

Speaker's Communication

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

End

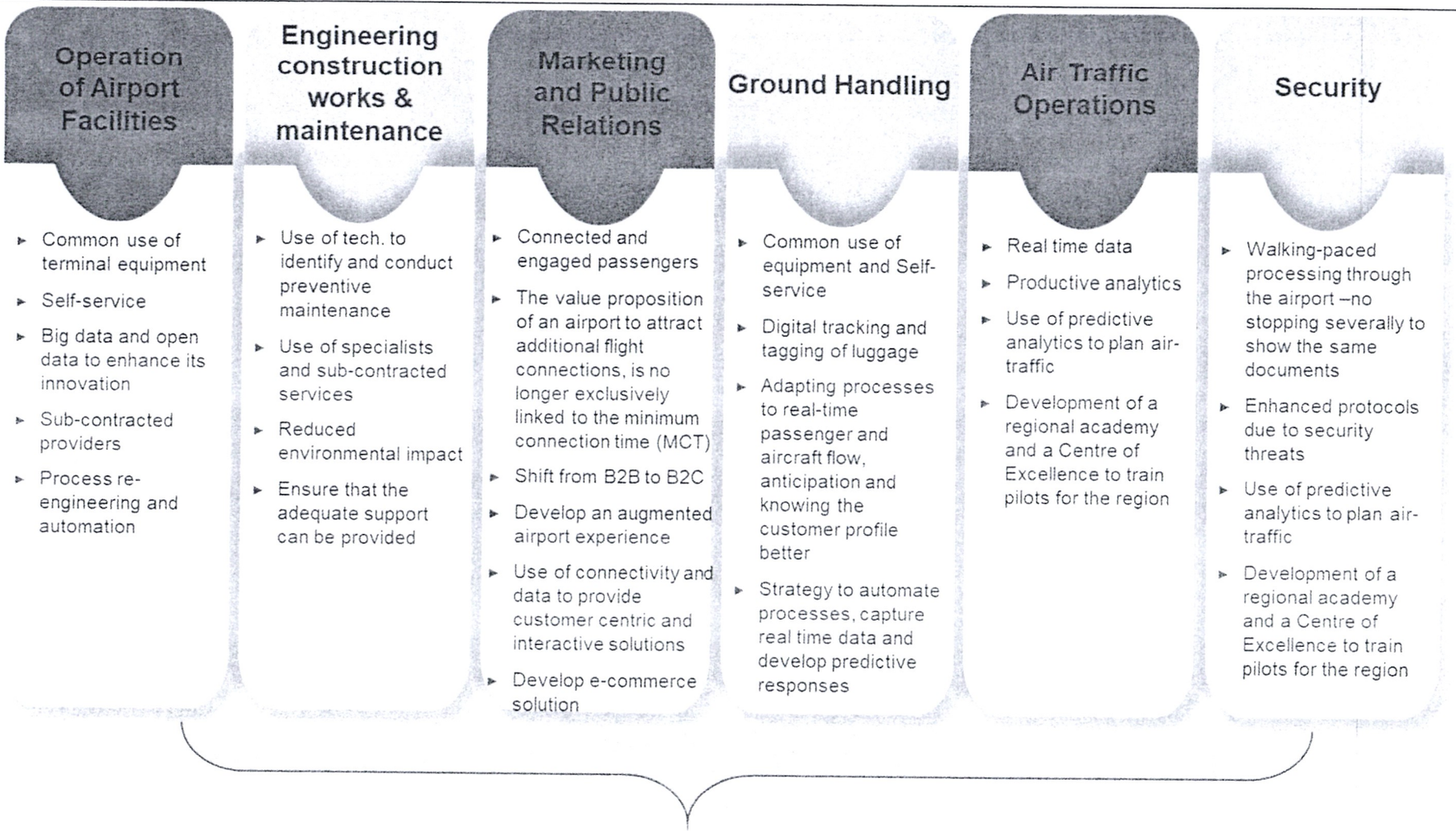
Proprietary and Confidential Information:

This Proposal contains information that Kenya Airways considers to be confidential, trade secret and proprietary in nature. The Proposal is intended to be strictly confidential and to be used only for the purposes of evaluating its contents as a basis for a PIIP. No part of this Proposal may be disclosed to any third party or reproduced by any means without the prior written consent of Kenya Airways.

© 2018 Kenya Airways.

All Rights Reserved.

Figure 41: Airport management operations



- Realized costs: These are a function of how well the airport handles its operation and work practices. They are tactical in nature, making them easier to increase or decrease than inherent and structural costs.

The consolidation of JKIA as an international hub requires the strengthening and consolidating the airport's operations. Based on the analysis of the previous chapters, JKIA has the challenge and opportunity to implement operational initiatives that are in line with the sector trends, making JKIA the preferred airport of the region.

The following diagram presents trends in the different airport management functions. These trends lead to initiatives that will help JKIA achieve efficiencies and improve the customer experience.

As a conclusion, JKIA is a profitable entity that is facing a steep competition from its neighbours (especially Ethiopia). JKIA needs to understand and adapt to the above trends and challenges in order to provide a better customer experience, attract more tourists to Kenya and be identified as a connection hub.

FINANCIAL/COMMERCIAL		ENVIRONMENTAL	
KPI	JKIA's Performance	KPI	JKIA's Performance
Debt service as a % of operating revenue	-	Renewable energy purchased by the airport (%)	-
Long term debt per passenger	-	Utilities/Energy usage per Square meter of terminal	-
Debt to EBITDA ratio	-		
EBITDA per passenger	-	Water consumption per Passenger	-
Non-aeronautical revenue as a % of total operating revenue	-		

Source: JKIA 2017/2018 budget, KAA financial statements 2016/2017. JKIA figures not indicated in the KAA financial statements were estimated proportionately using the 2017/2018 budget. JKIA was estimated to account for 86.3% of KAA revenues, 45% of operating costs and 48% of total costs in 2016/17

In order to improve their performance, airports need to be able to focus on actionable levers such as costs and investments. A framework to help airports understand their costs and get a high level understanding of airport's expenditures breakdown has been developed. The framework identifies 4 types of costs as follows:

- Inherent costs: These are determined by the nature and design of the airport and the industry itself. The nature and design include the airport's location, the number of runways it has, the regulatory regime under which it operates, and the products and services it is able to offer (including lounges, retail services, and large-scale cargo warehousing). These are strategically critical issues that have a significant impact on costs but are often outside the near- and medium-term control of management.

- Structural costs: These are determined by the type of business the airport engages in and how it provides its services and products. This includes the mix of airlines served by the airport, whether it operates at constrained capacity rate levels (at potential bottleneck points, such as landing slots, gates, and check-in desks), and the extent to which it maintains its own staff versus outsourcing different activities and operations.

- Systemic costs: These involve the organization, processes, policies, and infrastructure the airport uses to manage its product and service delivery. They include people management processes, overhead and the technologies that support the business.

SERVICE QUALITY		PRODUCTIVITY/COST EFFECTIVENESS	
KPI	JKIA's Performance	KPI	JKIA's Performance
Practical hourly capacity	-	Passengers per employee	-
Gate departure delay	-	Aircraft movements per employee	-
Taxi departure delay	-	Aircraft movements per gate	-
Customer satisfaction	-	Total cost per passenger	-
Baggage delivery time	-	Total cost per movement	-
Security clearing time	-	Total cost per WLU	-
Border control clearing time	-	Operating cost per passenger	-
Check-in to gate time	-	Operating cost per movement	-
		Operating cost per WLU	-

FINANCIAL/COMMERCIAL		ENVIRONMENTAL	
KPI	JKIA's Performance	KPI	JKIA's Performance
Aeronautical revenue per passenger	-	Carbon footprint	-
Aeronautical revenue per movement	-	Waste recycling	-
Non-aeronautical revenue per	-	Waste reduction percentage	-

Figure 40: KPAs and KPIs.

The table below presents JKIA's current KPIs.

CORE		SAFETY & SECURITY	
KPI	JKIA's Performance	KPI	JKIA's Performance
Passengers	-	Runway Accidents	-
O & D Passengers	-	Runway Incursions	-
Aircraft movements - landings	-	Bird Strikes	-
Aircraft movements – take off	-	Public Injuries	-
Destinations - Nonstop	-	Occupational Injuries	-
Freight/Mail - Loaded/unloaded	-	Lost work time from employee accidents	-

Figure 39: Key performance areas

Core

- Passengers
- Origin and Destination Passengers
- Aircraft Movements
- Freight or Mail Loaded/Unloaded
- Destinations—Nonstop

Safety and Security

- Runway Accidents
- Runway Incursions
- Bird Strikes
- Public Injuries
- Occupational Injuries
- Lost Work Time from Employee Accidents and Injuries

Service Quality

- Practical Hourly Capacity
- Gate Departure Delay
- Taxi Departure Delay
- Customer Satisfaction
- Baggage Delivery Time
- Security Clearing Time
- Border Control Clearing Time
- Check-in to Gate Time

Productivity/Cost Effectiveness

- Passengers per Employee
- Aircraft Movements per Employee
- Aircraft Movements per Gate
- Total Cost per Passenger
- Total Cost per Movement
- Total Cost per WLU
- Operating Cost per Passenger
- Operating Cost per Movement
- Operating Cost per WLU

Financial/ Comercial

- Aeronautical Revenue per Passenger
- Aeronautical Revenue per Movement
- Non-Aeronautical Operating Revenue as Percent of Total Operating Revenue
- Non-Aeronautical Operating Revenue per Passenger
- Debt Service as Percentage of Operating Revenue
- Long-Term Debt per Passenger
- Debt to EBITDA Ratio
- EBITDA per Passenger

Environmental

- Carbon Footprint
- Waste Recycling
- Waste Reduction Percentage
- Renewable Energy Purchased by the Airport (Percent)
- Utilities/Energy Usage per Square Meter of Terminal
- Water Consumption per Passenger

SOURCE: Airports Council International (2012), Guide to Airport performance measures,

12.1.2 Operational Review

The airport management service industry includes airport operators (public and private companies) and national airport authorities (public company). The services underlying Airport management are technology support, security services and traffic handling. They also include operators that support airports offering aircraft refuelling, aircraft parking, hangar space rental, air traffic control services, baggage-handling services, cargo handling services and others.

According to the International Civil Aviation Organization's Airport Economic Manual, airports should "create a structure that enables the airport to meet its objectives and carry out its functions in the most efficient and cost-effective manner while maintaining a high standard of service". This manual identifies the following main operational functions:

- Operation of airport facilities: operation of the passenger and freight terminals, including air bridges, and runways, taxiways and aprons including ramp equipment, buses and other airport vehicles, and automobile parking.
- Engineering, construction works and maintenance: provide maintenance services for airport installations and equipment, and also perform civil engineering work at the airport.
- Marketing and public relations: promote the airport to aircraft operators and the general public, as well as to potential users of airport services.
- Ground Handling: the function may be separated into terminal handling (passenger check-in, baggage and freight handling, flight plan processing) and apron handling (aircraft handling, cleaning and servicing).
- Air traffic operations: movement of aircraft within the airport and its vicinity, air traffic operations, including air traffic control and related associated procedures, firefighting and rescue services, meteorological services, and the operation of pilot briefing offices, which are usually also responsible for the provision of aeronautical documentation and information.
- Security, immigration, health and customs.

Airport managers face constant challenges to optimize their operations and provide an adequate customer experience. Key trends in the sector include increasing service expectations (from both passengers and airlines) and constraints on aeronautical charges due to regulations.

The first step for an airport to understand its performance and identify improvement opportunities is to measure its operations and track, benchmark and improve key performance indicators.

Airports Council International has developed a Guide to Airport Performance measures. This guide identifies 42 performance indicators in Six Key Performance Areas. The following diagram presents a summary of the key performance areas and the identified performance indicators.

Types	Item	Name of documents/information required	Yes	No	Remarks
	E4	Any bankruptcy or insolvency proceedings involving the Corporation, its parent Corporation or subsidiaries in the past 5 years			
F. Foreign Exchange Controls	F1	Any Fiscal Regulatory measures governing the use of Foreign Exchange by the corporation			
G. Competition Legislation	G1	All municipal and international legislation and frameworks applicable to the corporation			

The detailed legal due diligence covers the following headings:

- Use and user rights
- Relevant aviation sector laws and regulations
- Relevant financial laws and regulations
- Relevant environmental laws
- Tax legislations
- Foreign exchange legislations
- Competition legislation
- Building and fire codes
- Zoning rights and land use regulations
- Review of legal aspects of existing labour legislations and arrangements in the context of the proposed structure
- Review of existing contractual arrangements to ensure compatibility with proposed arrangement
- List of likely project agreements
- Dispute settlement mechanism and legal jurisdiction.

Types	Item	Name of documents/information required	Yes	No	Remarks
	B15	Domestic laws governing the business of the Corporation and evidence of compliance (licences, intellectual property, etc)			
C. Commercial, Trading and Business Arrangements	C1	Copies of any current powers of attorney granted by the Corporation that may impact the project			
	C2	Statement/details of all outstanding commitments of the Corporation and whether they will impact the project			
	C3	Particulars and details of any: undischarged guarantees, related party transactions, or change in the control of the Corporation that may affect the project			
	C4	Details of: all ongoing long-term contracts above 5 years, Contracts entered into other than in the ordinary course of the business of the Corporation			
	C5	Particulars of any joint venture/consortium that the Corporation is engaged in; copies of: joint venture/consortium Agreement, Board approval of the Joint venture/Consortium, Power of Attorney for the person authorized to sign documents on behalf of the Joint Venture/Consortium			
D. Employment Matters	D1	Tabulation of all service agreements, consultancy agreements and any particulars of appointment/employment issued to directors and employees			
	D2	An up-to-date list of all employees' statutory contributions			
	D3	A list of all persons to whom payments are made without any deduction for PAYE or National Insurance Contributions			
	D4	A list of all directors, consultants and others engaged in whatever capacity in connection with the Corporation, together with details of applicable payment or commission arrangements			
E. Claims, Disputes and Litigation	E1	All current, pending or threatened litigation, judgement, arbitration or action by a regulatory body, authority or agency relating to the operation, businesses or assets and the amounts involved in any claims			
	E2	Any violation of any law, order, ruling or regulation which might lead to a judgement, decision, ruling or finding materially and adversely affecting it			
	E3	Any breach or default under the terms of any agreement or licence to which it is a party			

Types	Item	Name of documents/information required	Yes	No	Remarks
	B2	Location of the Corporation's registered offices, trading address and branches			
	B3	Details of all bank accounts maintained by the Corporation			
	B4	Tax details including VAT registration, PAYE and all applicable taxes. Details of last tax return. Copies of tax clearances and exemptions where applicable. Details of any disputes with KRA			
	B5	Copies of all charges, debentures, guarantees, indemnities, facility letters and all other loan and banking documents which relate to the Corporation			
	B6	Details in the form of a group structure (chart) of holding, subsidiary and associated companies and of any interests held in other companies or firms and particulars of such companies or firms, including details of investments stating whether or not there are quoted securities			
	B7	A list of all creditors (other than trade creditors and bank overdrafts) showing the repayment dates, outstanding balances and amount and rate of interest			
	B8	The parties with which the Corporation has entered into any partnership or joint venture and copies of any documents concerning such partnerships or joint venture agreements, to which the Corporation is party (relevant to the project)			
	B9	Full inventory of the Corporations' assets and liabilities. (Copies of any titles, leases mortgages, debentures and/or charges over any assets owned by the Corporation.)			
	B10	Confirmation that the statutory books/returns of the Corporation are written up-to-date and the location at which they are kept and can be inspected/compliance certificate			
	B11	Details of any contracts that materially alter the structure of the Corporation			
	B12	Details of any Director under any disability including bankruptcy			
	B13	Details of whether the Corporation, subsidiaries or its holding companies have been deregistered in any other jurisdiction			
	B14	Any existing Agreements with other parties that may have an impact on the project			

12. ANNEXES

12.1 Detailed Situation Analysis of KAA/JKIA

The following can be stated in the PIIP, with an indication that the actual due diligence will be conducted once the authorization to engage in negotiations is granted by the PPP Committee.

12.1.1 Legal Due Diligence for the project

Legal Overview of KAA Structure

The Contracting Authority KAA is a public authority established by statute. Section 3 of the Kenya Airports Authority Act establishes KAA and confers to it the status of a body corporate and all attendant rights and obligations of a body corporate. The governance structure of KAA is through a Board of Directors established under Section 5 of the Act. The Powers pertaining to actions that can be undertaken by KAA are vested in the Board, Minister and Authority itself under Sections 10, 11 and 12 of the Act. The statutory powers conferred under the Authority suffice for it to undertake the current transaction.

The determination of the Management Structure is a prerogative of the Managing Director under Section 9. A Private party has engaged with the Contracting Authority by way of requesting information on the internal structure and has been provided with the following organogram.

The Contracting Authority is also subject to the State Corporations Act as well as the Public Finance Management Act, 2012. It is however to be noted that the current transaction is outside the application of the Public Procurement and Asset Disposal Act, 2015 as provided for under Section 4(2)(e) of the said Act.

Proposed Initial Due Legal Diligence Matrix

It is the intention of the Private Party to carry out a detailed due diligence during the negotiation phase. The initial diligence matrix is as outlined below:

Table 28: Initial Due Legal Diligence Matrix

Types	Item	Name of documents/information required	Yes	No	Remarks
A. Constitution and Incorporation	A1	Name of the Corporation			
	A2	Enabling laws setting it up			
	A3	Statutory Duties and Obligations of the Corporation			
	A4	Copy of Board Decisions in relation to the project			
B. Corporate Matters and Structure	B1	Details of the names and addresses of the Directors and Board Secretary of the Corporation (including directors' job titles and other directorships and business interests)			

	Description of Work	Start Date	End Date	Responsibility	Legal Provision supporting Requirement
	well as Risk Assessment Report to PPPU				
16.	Submission of Project Report to PDMO for concurrence on risk assessment			PPPU	R. 53 PPPR
17.	Post PDMO clearance, Submission for PPPC approval			PPPU	S.24, S. 61 PPPA R. 53 PPPR
18.	Preparation and Submission of Joint Cabinet Memorandum based on PPPC recommendations			Cabinet Secretary National Treasury Cabinet Secretary Ministry of Transport	S. 24 PPPA (Format available is under S. 54 PPPA)
19.	Cabinet Approval of the Project			Cabinet	S. 24 PPPA (Format available is under S. 54, S.56 PPPA)
20.	Communication of Cabinet Approval to CA			PPPU	(Format available is under S.56 PPPA)
21.	Communications to Shareholders and Stakeholders			KQ + KAA + GOK	(Format available is under S. 60 PPPA)
22	Execution of Concession Agreement			KQ+KAA	(Format available is under S. 57 PPPA)
23.	Formulation and actualization of Joint Investment Plan			KQ+KAA	This is to be done in line with the commitments and obligations contained in the Concession Agreement

	Description of Work	Start Date	End Date	Responsibility	Legal Provision supporting Requirement
	This Agenda is driven by the risk allocation matrix				
3.	Registration of Project Company			KQ	S. 59 and S.66 PPPA
4.	Board Approval for Private Party			KQ	Constituting Documents of private party – This transaction if a Board Reserved matter
5.	Submission of PIIP to CA			KQ	S.61 PPPA R.51 PPPR
6.	Submission to CA Board for Approval			KAA	S.10 KAA Act
7.	Application by CA to CS Treasury through PPPU to proceed with the use of a PIIP for Project Simba			KAA	S. 61 PPPA R. 51 PPPR
8.	Submission of PIIP to PPPU			KAA	S.61 PPPA R. 53 PPPR
9.	Assessment of PIIP by PPPU			PPPU	S.61 PPPA R. 53 PPPR
10	Submission of PIIP to PPPC by PPPU			PPPU	S.24, S. 61 PPPA R. 53 PPPR
11.	Approval of Proposal by PPPC and authority for parties to proceed to negotiations			PPPC	S.24, S. 61 PPPA R. 53 PPPR
12	Appointment of Transaction Advisor and Finalization of project due diligence based on recommendations by PPPC.			KAA is required to appoint a TA on the advice of the PPPU to support the internal capacity during negotiations	S.36 PPPA R. 17 PPPR
13.	Negotiations by parties and preparation of Project Negotiation Report (which must meet the criteria required of the Feasibility Report).			KAA +KQ	S.61 PPPA R. 53 PPPR
14.	Board Approvals for Negotiated outcomes			KQ+KAA	Constituting Documents/ Statute of each entity
15.	Submission of Project Report that contains outcome of Negotiations as			KAA	R. 53 PPPR

- In the event KAA holds an Environmental Impact Assessment Licence in relation to JKIA, approval from the National Environmental Management Authority to transfer the Environmental Impact Assessment Licence to the SPV.

- Where it is intended that KQ be delisted from the Nairobi Stock Exchange as part of this project, the prior approval of the Capital Markets Authority and the shareholders of KQ by special resolution.

- Tax exemptions from the National Treasury including:

  - Where this project involves a transfer of immovable property, stamp duty exemption in relation to the instruments of transfer by virtue of Section 106 of the Stamp Duty Act.
  - Where this project involves a transfer of immovable property, exemption from payment of any capital gains tax on transfer of such property.
  - Import Declaration Fee in relation to imports by KQ and the SPV.
  - Railway Development Levy in relation to imports by KQ and the SPV.

- Transaction approval from the Competition Authority of Kenya.

- Exemptions under the Competition Act issued by the Competition Authority of Kenya in relation to restrictive trade practices by the SPV during its operations.

- Transaction approval from the COMESA Competition Commission (if required).

- Authorisation from the COMESA Competition Commission in relation to restrictive trade practices by the SPV during its operations (if required);

11.4.3 Implementation schedule.

The table below shows proposal project implementation timetable.

Abbreviations:

PPPA	- Public Private Partnerships Act No. 15 of 2013
PPPR	- Public Private Partnerships Regulations 2014
PIIP	- Privately Initiated Investment Proposal
PPPC	- Public Private Partnerships Committee
PPPU	- Public Private Partnerships Unit
CA	- Contracting Authority

Table 27: Implementation timelines

	Description of Work	Start Date	End Date	Responsibility	Legal Provision supporting Requirement
1.	Preparation of PIIP: technical and financial components			KQ	S. 61 PPPA R. 53 PPPR
2.	Development of Negotiation Agenda by each party.			KQ and KAA individually	R. 52 PPPR

11.4 Implementation program and timelines

11.4.1 Overview of the Project execution strategy.

The proposed undertaking is under the auspices of a Privately Initiated Investment Proposal as described under Section 61 of the Public Private Partnerships Act 2013. The modalities of preparation prior to implementation include proposal preparation by the private party without the involvement of the Contracting Authority save for requests for information that is crucial for the crafting of a plausible proposal. The Contracting Authority will engage fully upon the approval to enter negotiations. During negotiations, the parties will refine the proposal based on the negotiation agenda and outcomes. The negotiated outcomes will require Board Approval prior to crystallization into the Concession Agreement. The conclusion and execution of the concession agreement will mark the close of the first phase.

The second phase of the project is implementation and will commence with engagement on the investment plan. The Joint Investment Plan will be concluded within 12 months of the conclusion of the Concession Agreement.

The third phase of this proposal is the creation of the Special Economic Zone and this is to be considered as a separate project in line with the Executive Approvals already in place.

11.4.2 Required approvals

- (Optional) Confirmation / legal opinion from the Government that KQ, and consequently the SPV, is not a state corporation within the meaning of the State Corporations Act.
- Inclusion of the Project in KAA's Development Programme as required by the Public Private Partnerships Act.
- Where the transaction involves a transfer of KAA's assets, approval from the Cabinet Secretary for Transport as well as the National Treasury pursuant to the State Corporations Act.
- Approval from the Cabinet Secretary for the National Treasury for the Project to be implemented as a PIIP under Limb (d) of Section 61 (1) of the Public Private Partnerships Act
- The approval of the Public Private Partnerships Committee to the PIIP before negotiations with KAA can commence on the concession agreement.
- Approval of the Public Private Partnership Committee to the negotiated concession agreement prior to signing.
- Mandatory public consultations as required under Section 114 of the County Government Act for the development of nationally significant projects.
- Shareholder approval to this project including the establishment of the SPV as a subsidiary of KQ pursuant to the Capital Markets (Public Offers, Listing and Disclosures) Regulations.
- Approval by KQs board of directors to this project.

Long-term in sequence:

a) Development of a concrete and strategic long-term aviation policy to replace the current framework which has been overtaken by time;

b) Massive investment in Human Resource Development for the aviation sector, particularly in policy and regulation formulation;

c) Investment and utilization of modern technology in the aviation sector;

d) Linking air transport facilities to the other transport modes to create a seamless system that is key stimulant to the economy.

e) Development of framework to mitigate costs associated with jet fuel costs; Realignment of designation of security officers charged with border control and immigration matters. This office should be autonomous and report directly to the Cabinet Secretary in charge of Immigration.

Required actions	Benefits
Governmental support in KQ investments in new fleet, revenue boosting IT systems and tools, fuel hedging etc.	▶ Development and upgrade of KQ fleet; ▶ Modern technologies and systems used to increase KQ profitable operations.
Appropriate amendments to Foreign Policy and use of diplomacy to influence the direction of aero politics in favour of the Kenyan aviation industry with a focus on the national carrier.	▶ Protection of JKIA as the national hub; ▶ Protection of KQ as the national carrier.
Full implementation of fly Kenya Policy	▶ Enact fly Kenya act

Below are further proposals to restructure and revitalize the aviation sector and create an enabling environment for KQ to operate in:

Short-term:

a) Alignment between current aviation and foreign policy frameworks with the objective of facilitate growth of the Kenyan aviation sector;

b) Aggressive aerial diplomacy policy with specific function of ensuring the fair treatment of Kenyan airlines in foreign jurisdictions, including solving the issues of blocked funds and double taxation;

c) Waiver on a percentage of outstanding airport use and air navigation fees to enable airlines to reinvest the amounts saved in their operations;

d) Inclusion of aviation as a key pillar to facilitate the principal four areas that GOK wishes to focus on, particularly manufacturing. Aviation can be a catalyst for the creation of high income generators such as industrial and business parks. Aviation can also aid the achievement of the affordable healthcare objective by facilitating connectivity within the country, thereby reducing costs associated with accessing medical facilities;

e) Creation of an Aviation Fund to facilitate the transformation, modernization and growth of the Kenyan aviation sector. This fund can be carved out from current revenues of the airport operator. The fund will ensure a fall back for support of airlines and the aviation industry in times of difficulty;

f) Granting the national carrier and other domestic carrier's priority status for the use of the airport as opposed to giving the best to foreign carriers. A matter of policy, for example, the best airport slots should be given to KQ first;

g) Development of tax exemption regime specific to the aviation sector to facilitate growth of the airport and airlines.

into law in its current form). In addition, further consideration to be given to structuring the SPV and the wider Concession Project under the SEZ framework.

- Introduction of a group taxation regime through an amendment to the Income Tax Act.

11.3 Other actions required for successful implementation

Full introduction of proposed concept of JKIA & KQ Public Private Partnership will require a series of changes to enable Kenyan Civil aviation to enhance its operations and regain the position in the region. Actions mentioned in the table below must be implemented to achieve defined objectives:

Table 26: Actions needed to introduce the project concept.

Required actions	Benefits
Integration of airline and Jomo Kenyatta International Airport.	▶ Much higher connectivity of Kenya with the world; ▶ Defending United Nations presence in Kenya; ▶ Growth of investments and number of jobs in airline industry; ▶ Integrated airport – airline balance sheet; ▶ Possibility to control competition in our own market and limit other airlines' profits; ▶ Increased profits from tourism and exports of goods.
Investing in the airport nearby areas (development of the Silicon Savannah Valley in Nairobi, creating international airline MRO hub etc.).	▶ Supporting economic growth through profitable investments; ▶ Strengthening companies working for airline industry; ▶ Creating jobs in airline-related industries.
Expansion in the market (building sub-hubs, control over / acquisition of other airlines, e.g. Air Seychelles).	▶ Much higher connectivity and control over international markets, growth of traffic in JKIA; ▶ Development of strong Kenyan airline and outperform competition (especially Ethiopian Airlines).
Support from state-owned companies Kenya Pipeline Company (KPC) and National Oil Corporation of Kenya (NOCK) to lower fuel prices.	▶ Controlled fuel costs in the hub versus competition; ▶ Enabling development of fuel distribution profit centre at JKIA; ▶ Expanding the network and increasing number of passengers carried by KQ.
Support from Kenya Revenue Authority (KRA) through tax exemptions.	▶ Lowering costs in the hub and increasing JKIA and KQ competitiveness.

- Approval required for the disposition of JKIA Property by KAA

  Any disposition of land vested in KAA (including transfers and leases) requires approval from the Government of Kenya (GoK).

- Section 19 of the KAA Act creates an automatic charge over KAA's assets

  KAA's creditors who have the benefit of the statutory automatic charge on assets of KAA need to release such charges from JKIA property in order to implement the Project. Further, Section 19 of the KAA Act should be reviewed to exclude any KAA assets that are subject to the concession.

- Review of the Air Passenger Service Charge Act, to amend the recipients of Air Passenger Service Charge and allocate it fully to KAA, thereby improving its position to engage in the Project

- Amendment of the Air Passenger Service Charge Act, to allow the SPV to collect and retain the Air Passenger Service Charge portion associated with the Concession Agreement for this Project

- SPV will need to obtain certain licences from KCAA in order to operate JKIA

  The SPV would need to obtain the following fresh licences from KCAA as the transfer or assignment of licences currently held by KAA in relation to JKIA is not allowed by law:

  - License to operate an aerodrome issued by KCAA pursuant to the Civil (Certification, Licensing and Registration of Aerodromes) Regulations, 2018; and
  - Licence to provide air navigation services issued by KCAA pursuant to the Civil Aviation (Air Navigation Services) Regulations, 2013.rr

- Urgent review and amendment of Kenya Airports Authority Concession Order, 1996 to facilitate the increase in profitability of JKIA.

- Amendment of the Miscellaneous Fees and Levies Act, 2016, to perpetually exempt KQ and the SPV from paying Railway Development Levy and Import Declaration Fees, on Aircraft, Aircraft parts, utilities and all goods and equipment to be used imported for purposes of implementing the Project, thereby lowering KQ and SPV's costs and improving KQ liquidity and ability to engage in the Project.

- Amendment of the East African Community Customs Management Act to exempt all goods imported by KQ and the SPV for purposes of the Project from customs duties

- Amendment of the Value Added Tax, 2013, Second Schedule to include zero rating of value added tax for the operations of the SPV and all supplies made or received by the SPV.

- Designation of the Concession Project as a special operating framework arrangement with the Government, pursuant to which a concessional income tax rate of a maximum of 10% can be imposed to the SPV under the provisions of section 11 (a) of the Finance Bill 2018 (subject to the Finance Bill 2018 being passed

include air traffic services, communication, navigation and surveillance, and aeronautical information services.

- Slot allocation

  - There are currently no legal regulations in Kenya on slot allocation. As indicated above, slot allocation at JKIA is coordinated by the Ground Flight Safety Section of KAA on what appears to be an informal basis. It is therefore not clear how the SPV would manage and assign slots at JKIA during the concession.

- Charges, rates, tariffs and payments out of the KAA Fund

  - With respect to the KAA Fund under the Kenya Airports Authority Act, clarity is required on what payments can be made out of the KAA Fund. Under the Kenya Airports Authority Act, payments can only be made for purposes of "expenditure" by KAA and KCAA. The KAA Fund includes monies that KAA receives from other sources including tariffs and charges from users of all airports managed by KAA.

  - It is intended that one of the SPV's revenue streams shall be the passenger service charge (PSG) collected pursuant to the Air Passenger Service Charge Act. Agreement needs to be reached on the apportionment of the PSG to JKIA for passengers coming in from other airports in and outside Kenya. The PSG collected in relation to JKIA should be ring-fenced and the payment such portion of the PSG to the SPV will need to be agreed. The June 2018 Air Passenger Service Charge Act (Apportionment Order) which requires a portion of the PSG to be paid to Tourism Promotion Fund is possibly ultra vires. We need to see appropriate evidence to confirm otherwise.

  - The rates and charges which KAA receives in respect of JKIA need to be paid directly to SPV. We note that the currently applicable rates have not been revised since 1996 and would need to be updated to reflect prevailing rates and as revenue stream for the SPV. The SPV should ideally have the requisite authority to amend such rates without reference to KAA or to the Cabinet Secretary of Transport. The relevant legal provisions would need to be reviewed for purposes of the Project.

  - Currently, KAA and KCAA control the collection of the charges as follows:

    a) KAA

       - landing charges;
       - parking charges;
       - airbridge charges; and
       - passenger departure tax.

    b) KCAA

       - aerodrome and approach charges; and
       - en-route charges.

The SPV ideally needs to take over collection of all KAA charges listed above.

11. IMPLEMENTATION AND APPROVALS

11.1 Detailed review of JKIA operations and preparation of an investment plan

This proposal assumes that there will be a detailed Due Diligence of JKIA by Kenya Airways that will cover financial, technical and operations, legal and finance areas. The findings from that review will help prepare a detailed investment plan for the project under which Kenya Airways will be responsible for implementing.

11.2 Required Legislative Amendments relating to the Project

Having undertaken a review of the applicable aviation laws in Kenya, KQ has identified a number of regulatory challenges that will have to be resolved for the successful implementation of the Project. KQ will in this regard be seeking the assistance of KAA and drawing on KAA's experience and expertise as the statutory body mandated with the task of overseeing aeronautical facilities in Kenya on how to best tackle these challenges.

Where amendments to existing laws, regulations, guidelines or orders are required KQ and the KAA will work together to lobby the relevant authorities (including KCAA, Parliament, KRA, National Treasury, Ministry of Transport, the Attorney General's Office among others) to implement the required changes.

We have set out below a number of the amendments which KQ believes are critical to the implementation of the concession.

- Amendments to the Kenya Airports Authority Act are necessary to give KAA express power to transfer KAA's powers to operate JKIA to the SPV:
    - The Kenya Airports Authority Act does not give KAA express authority to transfer its powers to operate an aerodrome to any other person whether by way of concession or by other methods. It is recommended that the law be amended to give KAA this express authority.
    - To operate JKIA, the SPV will take over functions of KAA and KCAA. The SPV will need to take over the following duties/authority from KAA:
        a) administration, control and management of JKIA (including the property/land) and related facilities;
        b) provision of rescue and fire-fighting equipment and services;
        c) construction, alteration or maintenance of buildings at JKIA;
        d) grant of authority to carry on any trade or business at JKIA; and
        e) power to carry on such activities as are necessary or desirable for the performance of its functions.

    The SPV may additionally require to take over the provision of air navigation services at JKIA from KCAA. Air navigation services

that the transaction is in the public interest. In this regard, by virtue of section 106 of the Stamp Duty Act, an application can be made by the SPV for exemption from stamp duty on the transfer of property from KAA to the SPV.

b) Value Added Tax (VAT)

(a) If KAA is registered for value added tax, the transfer of movable and immovable property (excluding vacant land) from KAA to the SPV will be treated as a taxable supply and therefore subject to value added tax at the rate of 16%. The VAT charged on the transfer could however be claimed as input VAT by the SPV to the extent that the SPV will be registered for VAT.

(b) The First Schedule to the Value Added Act provides for certain supplies that are exempt from value added tax. Pursuant to Paragraph 94 of Section A of Part 1, a transfer of business as a going concern (**TOGC**) by a registered person to another registered person is an exempt supply. In this regard, if KAA transfers its business as a going concern to the SPV, such transfer will be exempt from value added tax. For the exemption to apply, both the transferor and the transferee should be registered persons for purposes of value added tax at the time of the transfer. Further analysis would be required to ascertain whether the transaction would qualify as a TOGC.

c) Capital Gains Tax

(a) CGT is chargeable at the rate of 5% on the gain which will accrue to KAA on the transfer of property, pursuant to section 3(2) (f) and the Eighth Schedule to the ITA. The CGT cost of transferring any real estate owned by KAA would be prohibitive (although this cost would be incurred by KAA).

(b) A CGT exemption can be granted where a transaction is undertaken in public interest, at the discretion of the Cabinet Secretary for the National Treasury. In this regard, an application for exemption from CGT should be sought with respect to the transfer of assets from KAA.

Table 25: Proposed risk allocation.

	IDENTIFIED RISK	RISK ALLOCATED TO	IMPACT
1.	Political Risk	GOK/PP	High
2.	Financing Risk	PP/CA	High
3.	Change in Law and Tax	GOK/PP	Medium
4.	Project Planning Risk	PP	Medium
5.	Approvals Risk	PP	High
6.	Operation and Maintenance	PP	Medium
7.	Demand Risk	PP	High
8.	Revenue Risk	PP	High
9.	Pricing Risk	PP	High
10	Performance Risk	PP	High
11.	Contingent Liability Risk	CA	High
12.	Renegotiation	PP/CA	Medium
13.	Governance Risk	PP	Medium
14.	Project Termination Risk	PP/CA	Medium
15.	Design and Construction (new)	PP	High
16.	Insurance	PP/CA	Medium
17.	Technology Risk	PP/CA	Medium
18.	Labour Relations Risk	PP/CA	High

10.7 Taxes

10.7.1 Tax implications on the transfer of assets from KAA to the SPV under the Concession

a) Stamp duty

(a) Stamp duty is payable by a purchaser on the transfer of immovable property at the rate of 4% (if the property is situated within a municipality) and 2% (if the property is situated outside a municipality) pursuant to Paragraph 12A and 11 of the Schedule to the Stamp Duty Act respectively. However, the transfer of moveable property is exempt from stamp.

(b) The Cabinet Secretary for the National Treasury on the recommendation of the Cabinet Secretary for Land, may direct that any instrument be exempted from stamp duty if he is satisfied

	ACTION	RATIONALE	CHALLENGE	CATEGORY
8.	**Review of Air Passenger Service Charge Recipients**	Proceeds arising out of APSC should be fully allocated to KAA to improve its position to engage in the project	• Amendment subject to the **Statutory Instruments Act, 2013**; • Prioritization before the National Assembly	Policy Political Legal
9.	**Contract Risk Management Plan**	Apart from the Statutory Requirements of S.65 of the PPPA pertaining to the actual project management, Parties must formulate and agree on a concrete management plan for all risks.	• This requires full government support	Political
10.	**Letter of support from the GOK to the Concessionaire**	The Concessionaire will be requesting that GOK provides a letter of support to the SPV pursuant to the PPPA as is the practice in PPP transaction of this nature. The Letter of support shall set out the nature of GOK support that will be required in relation to various matters including the provision of support relating to (i) the occurrence of various political events which may affect the Concessionaire (e.g. change in law, change in tax, expropriation), (ii) legislative amendments that will be required to permit the implementation of the Project and further to provide appropriate fiscal support to the Project, (iii) dealing with legacy matters, and (iv) such other matters that may be required to ensure the bankability of the Project.	• Bankability of the project requires GOK support in relation to certain political risks	Political

10.6 Proposed risk allocation

It is proposed that parties discuss and agree on risk allocation during the negotiation phase.

CA = Contracting Authority = KAA

PP = Private Party =KQ

GOK = Government of Kenya

Table 24: Issues critical to project implementation.

	ACTION	RATIONALE	CHALLENGE	CATEGORY
1.	**Management of the political environment**	The interest groups that will be affected must be managed	• Sustained political will	Political
2.	**Review of Kenya's Aviation Policy and Strategy**	Creation of a policy and legislative framework environment that will ensure the optimal functioning of the Project. Includes appointment of relevant aviation experts in the Executive to effectively manage sector	• Process involves Executive and Legislature alignment	Policy Political Legal
3.	**Review of Kenya's engagement on the Single African Air Transport Market**	SAATM is an instantaneous deregulation framework without the attendant competition and consumer protection regime	• The Commitment was made at Head of State Level	Policy Political Legal
4.	**Review of the Fiscal Regime affecting Aviation in Kenya**	The Aviation sector in Kenya is subject to numerous taxes and levies that erode the bottom line for airlines, leaving little room for growth	• This is a long term engagement – a balance has to be struck between the sustainability of the airlines and the impact on government revenues. The extinction of the airlines would impact national revenues negatively.	Policy Political Legal
5.	**Implementation and application of the Fly Kenya Policy of April 2016**			
6.	**Amendment of KAA Concession Order, 1996**	Positive impact on the revenues to be generated by the JKIA-KQ PPP	• Amendment subject to the **Statutory Instruments Act, 2013**; • Prioritization before the National Assembly	Policy Political Legal
7.	**Perpetual Tax Exemption of KQ from specific Taxes**	Improvement of KQ liquidity position to engage in project	• Amendment of **Miscellaneous Fees and Levies Act, 2016**, which imposes the Railway Development Levy and Import Declaration Fees on Aircraft, Aircraft parts and utilities	Policy Political Legal

Act Name	Section Number	Issue	Status
Kenya Airports Authority Act	Section 19	The amendment of Section 19 which creates and automatic security on KAA's assets, including JKIA, in favour of lenders such that: a. all JKIA assets are released from any existing security in favour of KAA's lender; and b. all JKIA assets are excluded from automatically being charged during the period of the concession.	Critical
Kenya Airports Authority Concession Order	Paragraph 2	The Kenya Airports Authority Concession Order be amended or a new order exempting tariffs collected from JKIA from being remitted to the KAA, rather they should be remitted to the SPV.	Critical
Air Passenger Service Charge Act	Section 3 (3)	The amendment of the Air Passenger Service Charge Act to allow for the collection of the service by the SPV.	Critical
Air Passenger Service Charge Act	Section 3	An amendment to Section 3 to provide for the ring-fencing of the service charge collected at JKIA from other airports and to allow for such funds to be paid to the SPV or a fund created for the benefit of the SPV.	Critical
Air Passenger Service Charge Act	Section 6A	An amendment to Section 6A to exclude service charge collected from JKIA from being deposited into the Fund and to include a new provision that makes it mandatory for the Commissioner to pay the service charge collected from passengers at JKIA directly to the SPV or a fund established for the benefit of the SPV.	Critical
The Air Passenger Service Charge Act (Apportionment) Order		The revocation of the Air Passenger Service Charge and a new order made for the SPV to benefit from the Fund or the passenger service charge collected.	Critical
Companies Act	Section 639 (1)	Amendments to the Companies Act and to the Income Tax Act to enable KQ offset its tax losses from the profits of the SPV.	Critical for project financial viability
Value Added Tax Act	Section 5 First Schedule	The Second Schedule to the Value Added Tax Act to provide for zero-rating of value added tax on all taxable supplies made to and by the SPV and KQ.	Critical for project financial viability
Excise Duty Act	Section 5 Part A of the Second Schedule	To be amended to provide for an exemption from excise duty for all excisable goods imported by the SPV and KQ.	Critical for project financial viability
Public Private Partnerships Act	Section 59	Section 59 should be amended to provide for circumstances where a special dispensation may be given for the use of other vehicles other than a limited liability company. In particular, to allow for the registration of the SPV as a limited liability company.	Critical for project financial viability

The above list of regulatory amendments has also been extended in the next table defining issues critical to the project implementation.

10.5.2 Actions Necessary to Support Successful Contracting.

This proposal being the first of its kind for this sector in Kenya presents a challenge in that there are no local benchmarks to draw experience from, in terms of the irreducible minimums required for successful contracting. It is proposed that the Unit and Committee consider this item open for the duration of the project and provide conditional approvals that will support the progressing of actions that will be vital for sustaining the existence of the project. The private party has identified certain issues that are critical to the project and these are tabulated below. Further actions required for successful contracting will be canvassed during the negotiations phase.

Please find below the list of regulatory changes necessary to execute the proposed PPP.

Table 23: Regulatory amendments necessary to execute the Project.

Act Name	Section Number	Issue	Status
Kenya Airports Authority Act	Section 2	Amendment to the definitions of "charges" and "rates" to exclude charges that will be collected by the SPV from the funds that must be remitted to KAA.	Critical
Kenya Airports Authority Act	Sections 8 (1) (b) and 8 (2) (d) and 8 (3) (d)	Amendments to this section to: 1) exclude JKIA from the administration, management and control of KAA; and 2) exclude JKIA property from the exclusive administration, control and management by KAA.	Critical
Kenya Airports Authority Act	Section 8	Section 8 and the Kenya Airports Authority Act to enable: a. KAA delegate its powers to administer, control, operate and maintain JKIA; and b. the SPV levy and collect charges and rates relating from JKIA.	Critical
Kenya Airports Authority Act	Section 12 (1) (a)	An amendment be made to expressly allow KAA to enter into concession agreements or agreements with any person to operate, administer, control and manage one or more aerodromes.	Critical
Kenya Airports Authority Act	Section 12	Section 8 and the Kenya Airports Authority Act be amended to enable: a. KAA delegate its powers in relation to JKIA to the SPV including the administration, control, operation and maintenance of JKIA; and b. the SPV levy and collect charges and rates relating at JKIA.	Critical
Kenya Airports Authority Act	Section 17A, 17B and 17C	With respect to the Kenya Airports Authority Fund, the amendment of these sections to exclude the remitting of charges collected from JKIA to the Fund such that the same is remitted to the SPV by the collecting agents.	Critical

Table 22: Selected transaction details.

Category	Characteristic
Legal setup of Public Private Partnership (PPP)	Concession Agreement under PPP Framework, S.19 PPP Act 2013, Schedule 2
Public Private Partnership vehicle	Project Company / SPV
JKIA assets and liabilities	Contracting Authority – Transfer of Usufructuary and development rights as well as assets and enter into a long-term lease with the SPV with respect to the land where the Jomo Kenyatta International Airport is situated.
JKIA employees	Secondment / Transfer and implementation of various options to be considered.
Cash management	TBD
Tax shield	Designation of the concession Project as a special operating framework arrangement with the Government under section 11 (a) of the Finance Bill 2018 pursuant to which a concessional tax rate of a maximum of 10% will be granted by the Government to the SPV. In addition, further consideration to be given to structuring the SPV and the wider Concession Project under the SEZ framework. Obtaining exemptions from customs duty, excise duty, import declaration fee, Railway development levy and zero rating of value added tax on services procured and provided by the SPV and on goods to be imported and purchased by the SPV.
Concession Fee: contribution of private partner to public entity	Fixed and Variable Components
CAPEX investments	SPV Obligation both on Airport and Airline

The Scope of services for the SPV will cover all aspects of the Airport Services and will include the following:

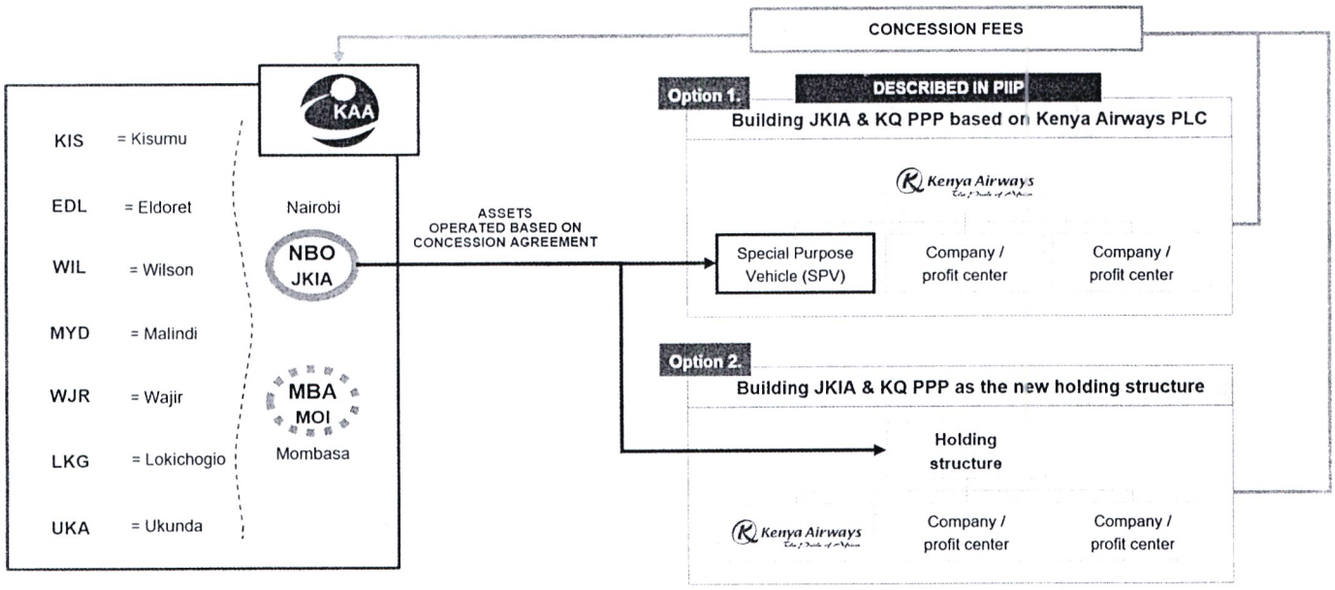
- Terminal Operations
- Ground Services
- Aircraft and Airport Catering Services
- Cargo Services
- Engineering and Maintenance Services

To deliver these services, the SPV will also be required to fund and invest in airport facilities as detailed in the proposed investment plan as agreed before the implementation. The investment plan will cover:

- Upgrading of the Runway
- Remodelling of Terminals 1B, C and D
- New Terminal 2

The table below summarises the other terms.

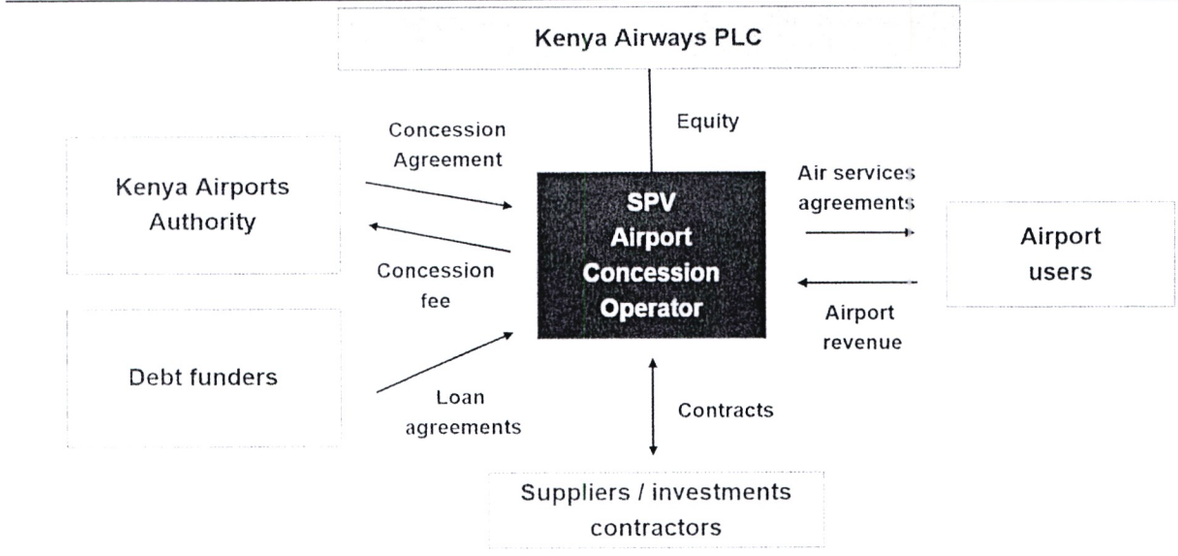
Figure 37: Schematic of the Proposed Project Contractual Structure.



The SPV is set up to undertake the contracted airport functions in line with the contractual relationship between the SPV and the Government. There however other contractual relationships that are critical and interdependent, particularly Loan Agreements / Direct Agreements (financing is typically limited recourse to SPV equity providers).

The debt and equity injections into the SPV will fund the development obligations and initial working capital requirements. The SPV will typically receive all revenues in respect of the provision and performance of various services (as set out in detail in the transaction documents) and pay all costs relating to airport operations, and pay a concession fee to the government. This relationship is shown in the diagram below.

Figure 38: SPV structure.



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

d) in such other circumstances as the Cabinet Secretary may prescribe."

We note that the Project may not meet the criteria contemplated under Sections 61 (1) (a) to (c) above. Based on our understanding of the proposed arrangement, the Project would have to be developed on the basis of the last condition. Section 61 (1) (d) allows the Cabinet Secretary of the National Treasury to issue special dispensation to a contracting authority to consider implementing a project through a PIIP.

Given the strategic national importance of this Project and the value for money proposition set out in this PIIP, it is proposed that the transaction be considered under Section 61(1) (d) of the PPP Act.

In this regard we would note as follows:

e) The PPP Regulations provide that:

- The contracting authority shall, through the Unit, apply to the Cabinet Secretary to use the privately initiated investment proposal for a project that is not a project specified in section 61(1) (a), (b) or (c) of the Act;
- The Unit shall review the privately initiated investment proposal made in accordance with this regulation and make recommendations to the Committee in relation to the proposal.
- The Cabinet Secretary shall make a decision on an application made in in accordance with this regulation after taking into consideration the recommendations of the Committee in relation to the application.

f) Based on the above, it can be concluded that the process of prescription is as set out above (i.e. the Cabinet Secretary makes a determination on the basis of the recommendations made by the PPP Unit and the PPP Committee.)

10.5 Structure of the proposed Legal Engagement between the Parties

10.5.1 Overview of the legal structure

The PPP is intended to be a Concession where the Contracting Authority will concede usufructuary and development rights to the Private Party. The Private Party will operate, maintain, rehabilitate and upgrade existing infrastructure and facilities, and charge user fees while paying concession fees to the contracting authority.

Section 59 of the PPP Act 2013 requires the establishment of a project company by the bidder in accordance with the Companies Act, 2015, for the purposes of undertaking the Project. The Project Company is authorized to pledge its shares for the purposes of financing the Project.

The proponent of this project will constitute the project/SPV as a subsidiary wholly owned by the Kenya Airways. Further details relating to the proposed transaction structure are set out in detail in the Term Sheet.

details relating to the proposed transaction structure are set out in the Term Sheet;

v) align the project with international best practice in airport concessions projects thereby enhancing the bankability of the transaction. Examples of similarly structured transactions include: JFK International Airport - Delta Airlines entered into a 33 year lease for terminals C and D (2017), Chhatrapati Shivaji International Airport (CSIA) in Mumbai 30 year lease (2003), Kuala Lumpur International Airport 50 year lease (1998) etc.

Additionally, to provide the necessary comfort to a contracting authority granting long-term leases to a concessionaire such long-term leases are structured in a manner such that the provisions of the lease are back-to-back with the provisions of the project agreement. Therefore, for example, the user rights under the land lease would be directly linked to the Concessionaire's rights under the project agreement. Further appropriate cross default provisions would be set out in both the lease and the project agreement.

A concession is further described in the Schedule to the PPP Act (as a type of PPP) and this definition provides as follows, 'where contracting authority issues a contractual licence to the private party to operate, maintain, rehabilitate or upgrade an infrastructure facility and to charge a user fee *while paying a concession fee to the contracting authority*".

UNDERTAKING A PIIP UNDER THE PPP ACT

In initiating a PPP project, a Contracting Authority may either conceptualise the project before inviting private parties to bid for the project on a competitive basis, or a private party may approach the Contracting Authority with a privately initiated proposal for a project (in which case no competitive bidding is required to be undertaken). The PPP Act refers to the former as a "Solicited Proposal" and the latter as a "**Privately Initiated Investment Proposal** (**PIIP**)".

A PIIP is a proposal that is originated by a private party without the involvement of a Contracting Authority.

It should be noted that a under the PPP Regulations a Contracting Authority may only consider a project (whether as a PIIP or otherwise) *if it is part of the development programme of the Contracting Authority*. As such, the Project will have to be included (to the extent it is not already) in KAA's development programme before it can be implemented as a PIIP.

Section 61 (1) of the PPP Act provides that a Contracting Authority may consider a PIIP in the following non-cumulative situations:

a) *"where 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; provided that the circumstances giving rise to the risk of disruption were not foreseeable by the Contracting Authority or the result of an unforeseeable failure to act by the Contracting Authority;*

b) *where the costs relating to the intellectual property in relation to the proposed design of the project is substantial;*

c) *where there exists only one (1) person or firm capable of undertaking the project, maintaining the facility or providing the service or such*

- The following are listed as National Government functions under the Fourth Schedule of the Constitution:
    - Transport and communications, including, in particular, civil aviation;
    - National public works; and
    - Public investment.

▶ Benefit Received by the Third Party

- The PPP Act defines a PPP as an arrangement between a Contracting Authority and a private party pursuant to which a private party:
    - "receives a benefit for performing a public function either by way of *compensation from a public fund or charges/fees collected by the private party from users/consumers of a service provided* to them or a combination of both; and
    - is liable for risks arising from the performance of the function in the agreement ".

TYPE OF PPP ARRANGEMENTS

The PPP Act sets out thirteen (13) types of PPP arrangements that can be entered into between a Contracting Authority and a private party. Where an arrangement is sought to be entered into *which is not listed*, the Cabinet Secretary's approval is required in respect of such an arrangement.

The PPP Act defines a concession as, "a contractual licence formalised by a *project agreement*, which *may be linked to a separate interest or right over real property*, entitling a person who is granted the licence to make use of the specified infrastructure or undertake a project and to charge user fees, receive availability payments or both such fees and payments during the term of the concession". Under the PPA Act, a concession need not be the only standalone arrangement entered into between the parties, and to the extent addition rights linked to real property are required (e.g. a lease), such supplemental arrangements can be entered into. As part of the implementation of the proposed transaction, the KAA will transfer assets and enter into a long-term leasing arrangement with the SPV in respect of the land relating to the Jomo Kenyatta International Airport.

In addition to the rights granted to the SPV under the concession, a transfer of assets and long term lease arrangement is required in connection with the proposed transaction because such transfers:

i) will give the SPV the ability to raise third party debt/equity financing to implement the proposed transaction and the develop the Jomo Kenyatta International Airport in the medium to long term;

ii) allow the SPV to directly undertake and implement the development and upgrading of the Jomo Kenyatta International Airport;

iii) enable the SPV to directly procure requisite consents in order for it to manage, maintain, develop and operate the Jomo Kenyatta International Airport;

iv) enable the SPV to directly enter into contracts and arrangements with third parties with respect to various activities linked to the operations and management of the Jomo Kenyatta International Airport. Further

10.4 Legal framework for implementing the proposed structure

10.4.1 Criteria to qualify as a public private partnership

The PPP Act is the legal framework pursuant to which government entities may undertake PPPs.

The PPP Act is applicable to "...*every contract for the financing, construction, operation, equipping or maintenance of a project or for the provision of public services (the **First Requirement**) undertaken as a public private partnership (the **Second Requirement**).*".

For the PPP Act to apply to the Project, both the First Requirement and the Second Requirement must be satisfied.

In our view, the First Requirement is satisfied for purposes of the present transaction as KAA is a public entity which performs a public function pursuant to statutory powers provided to it under the KAA Act and the SPV would be performing the relevant functions on behalf of KAA as part of the proposed transaction.

With respect to the Second Requirement, the definition of a Public Private Partnership must be taken into consideration. Section 2 of the PPP Act defines a PPP as *"...an arrangement between a Contracting Authority and a private party, where the private party:*

- *undertakes to perform a public function or provide a service on behalf of the Contracting Authority;*
- *receives a benefit for performing a public function by way of:*
  - *compensation from a public fund;*
  - *charges or fees collected by the private party from users or consumers of a service provided to them; or*
  - *a combination of such compensation and such charges or fees; and*
- *is generally liable for risks arising from the performance of the function in accordance with the terms of the project agreement."*

For the Second Requirement to be satisfied, the arrangements between the KQ SPV and the Contracting Authority must satisfy the criteria set out above.

- A Public Function
  - The PPP Act does not define what constitutes a "public function". The Fourth Schedule of the Constitution of Kenya, 2010 (the Constitution) sets out the distribution of functions between the National Government and the County Governments, and as such provides guidance on the intended meaning of a public function for the purposes of the PPP Act.
  - Under the Constitution, the functions of the National Government and the County Government are for the benefit of the public and could arguably constitute public functions.
  - The Fourth Schedule of the Constitution sets out the distribution of functions between the National Government and the County Government.

Capital Markets	Section Number	Description
Capital Markets (Public Offers, Listing and Disclosures), Regulations	Paragraph G.07 to the Fifth Schedule	The concession agreement must be lodged with the Capital Markets Authority and the Nairobi Securities Exchange and be made available for inspection at KQ's registered office. Paragraph G.07 provides that where any agreement has been entered into in connection with any acquisition or realisation of assets or any transaction outside the ordinary course of business of the issuer and/or its subsidiaries, a copy each of the relevant agreement must be lodged with the Capital Markets Authority and the Nairobi Securities Exchange and be made available for inspection at the issuer's registered office. In this regard KQ would be required to lodge the Concession Agreement with the Capital Markets Authority and the Nairobi Securities Exchange. The Concession Agreement should also be made available for inspection at KQ's registered office.
Capital Markets (Public Offers, Listing and Disclosures), Regulations	Regulation 22	We understand that KQ is considering delisting from the Nairobi Securities Exchange, this would require approval from the Capital Markets Authority. Regulation 22 provides that no security shall be de-listed by a securities exchange without the prior approval of the Capital Markets Authority. The Capital Markets Authority may require the Nairobi Securities Exchange to de-list KQ's securities where a recommendation has been made by the directors to the shareholders to have the securities de-listed and where the shareholders of such securities through a special resolution at which a minimum of 75% of such security holders are represented without objection to the proposed withdrawal from at least 10% of the holders of securities resolve to have the KQ's securities de-listed. The advantage of delisting KQ with respect to the transaction is that there would be fewer regulatory reporting obligations. KQ would no longer be required to follow the rules of the Capital Markets Authority or the Nairobi Securities Exchange and KQ would not be obligated to abide by the requirements of full disclosure obligations of listed companies and de-listing will give KQ maximum flexibility to make decisions about the company.

As part of Kenya Airways' share capital is publicly traded on the Ugandan Securities Exchange and the Dar-Es-Salaam Stock Exchange, Kenya Airways will also be required to comply with the continuous listing obligations pursuant to the Dar es Salaam Stock Exchange Public Limited Company Rules 2016 and the Uganda Securities Exchange Listing Rules, 2003. Similar obligations in terms of approvals and disclosures would thus be required in both Tanzania and Uganda.

Table 21: Shareholding of Kenya Airways as of June 2017.

Shareholder	Number of shares (issued and unissued)	Shareholding % (rounded to one decimal)
Government of Kenya	2,847,844,811	48.9%
KQ Lenders Company 2017 Limited	2,219,285,317	38.1%
KLM Royal Dutch Airlines	451,661,470	7.8%
Employee Share Ownership Scheme	142,164,558	2.4%
Other Shareholders	162,632,113	2.8%
Total	5,823,588,269	100%

Table 20: Necessary capital markets approvals

Capital Markets	Section Number	Description
Capital Markets Act	Section 30F	KQ, is required to keep the Capital Markets Authority, the members of KQ and the holders of its securities, the Nairobi Securities Exchange and the general public informed as soon as is reasonably practicable of the information relating to the proposed transaction which might be reasonably expected to materially affect market activity in the price of its securities. The Capital Markets Authority must approve the wording of such notice. It should therefore be noted that KQ will be required to make public the proposed transaction potentially when the PIIP is approved by the PPP Committee.
Capital Markets (Public Offers, Listing and Disclosures), Regulations	Regulations 19 (2) and 19 (3)	Every listed company is required to disclose any transaction that is likely to lead to a material change in the price of its securities listed on the Nairobi Securities Exchange within 24 hours of the signing of the transaction documents. KQ shall therefore be required to notify the Nairobi Securities Exchange, the Capital Markets Authority the members of KQ and the holders of its securities and the general public of the fact of the signing of the concession agreement and the heads of terms within 24 hours of the relevant signing. Such disclosure will need to be in aligned with the requirements for prior approval from the Capital Markets Authority as set out above.
Capital Markets (Public Offers, Listing and Disclosures), Regulations	Paragraph A.02 to the Fifth Schedule	All recipients of information relating to the Project are required to receive written notice of its confidentiality. An issuer may give information in strict confidence to its advisers and to persons with whom it is negotiating with a view to effecting a transaction or raising finance. With respect to the fact that KQ shall be giving information and documents to third parties relating to the proposed transaction, we propose that the following wording should be provided by KQ in the written notice to the recipients of the confidential information: *"The information contained in these documents are confidential, privileged and only for the information of the intended recipient and may not be used, published or redistributed without the prior written consent of Kenya Airways Plc."*
Capital Markets (Public Offers, Listing and Disclosures), Regulations	Paragraph A.04 to the Fifth Schedule	Paragraph A.04 stipulates that where the information relates to a proposal by the issuer which is subject to negotiations with employees or trade union representatives, the issuer may defer publication of the information until such time as an agreement has been reached as to the implementation of the proposal. It is proposed that the employees of KAA will be seconded and subsequently be transferred to the SPV. Negotiations with the KAA employees or union need not be disclosed and such disclosure may be deferred until such time as an agreement has been reached as to the implementation of the proposal
Capital Markets (Public Offers, Listing and Disclosures), Regulations	Paragraph G.06 to the Fifth Schedule	Shareholder approval is required to enable KQ register and own the SPV. Paragraph G.06 provides that an issuer shall obtain approval of shareholders and make a disclosure in the annual report, for any acquisition of shares of another company or any transaction resulting in such other company becoming a subsidiary or related company of the issuer. In this regard KQ should obtain approval of its shareholders and make a disclosure in the annual report for the transaction resulting in the SPV becoming a subsidiary of KQ.

Convention also establishes the International Civil Aviation Organization (ICAO) which is responsible for coordinating and regulating international air travel.

10.2 Legal framework governing KAA

The Contracting Authority KAA is a public authority established by under Section 3 of the Kenya Airports Authority Act and confers to it the status of a body corporate and all attendant rights and obligations of a body corporate. The Kenya Airports Authority (Vesting) Order vests all properties previously owned by the Department of Aerodromes in KAA.

The governance structure of KAA is through a Board of Directors established under Section 5 of the Act. The Powers pertaining to actions that can be undertaken by KAA are vested in the Board, Minister and Authority itself under Sections 10, 11 and 12 of the Act. The statutory powers conferred under the Authority suffice for it to undertake the current transaction.

Control and executive management of the Contracting Authority is vested in the Managing Director under Section 9. The Private party has engaged with the Contracting Authority by way of request for information.

Under the Kenya Airports Authority Act, no execution or attachment can be issued against any land of KAA, vessels, aircraft, other operating equipment, machinery, fixtures or fittings. The SPV should be provided with similar protection.

KAA being an entity established by statute is subject to the State Corporations Act which sets out certain restrictions on state corporations including restrictions on disposal of assets. Approvals will therefore have to be obtained from the Ministry of Transport and the National Treasury in respect of a transfer of assets and the granting of a long term lease to the SPV. KAA is also subject to the Public Finance Management Act, 2012.

The Public Procurement and Asset Disposal Act, 2015 applies to all state organs and public entities, including KAA, with respect to all procurement and asset disposal matters. It is however to be noted that the current transaction is outside the application of the Public Procurement and Asset Disposal Act, 2015 as provided for under Section 4(2)(e) of the said Act which excludes procurements under the PPP Act.

10.3 Legal and regulatory framework covering Kenya Airways

Kenya Airways is a public company incorporated in Kenya and is the national airline carrier of the Republic of Kenya. Its hub for domestic and international operations is the Jomo Kenyatta International Airport.

Kenya Airways is not a state corporation and it is a public company which is listed and part of its share capital is publically traded on the Nairobi Securities Exchange, the Ugandan Securities Exchange and the Dar-Es-Salaam Stock Exchange.

Kenya Airways will require the following Kenyan capital markets approvals to implement various steps of the proposed transaction:

10. LEGAL, TAX AND INSTITUTIONAL FRAMEWORK

10.1 Institutional structure, sectoral framework and key policies

The aviation industry is regulated by the following institutions:

a) The State Department for Transport in the Ministry of Transport, Infrastructure, Housing and Urban Development; and

b) The Kenya Civil Aviation Authority (KCAA) established under Section 4 of the Civil Aviation Act, No. 21 of 2013, Laws of Kenya as amended by the Civil Aviation (Amendment) Act, No. 42 of 2016, Laws of Kenya;

The Ministry makes policies in respect of the industry and KCAA regulates the industry. KCAA is responsible for, amongst other functions, air navigation services, security and advising the Government on matters concerning civil aviation.

The Kenya Airports Authority (KAA) was established in 1991 to, inter alia, administer, control, and manage aerodromes and other property vested in it under the Kenya Airports Authority Act.

The legislation for the sector includes numerous regulations promulgated under the Civil Aviation Act which cover various matters including tariffs, security, safety management and licencing of aerodromes.

There are also statutes regulating other aspects of the industry including the Civil Aviation Act, the Carriage by Air Act that gives effect to the Warsaw Convention and the Air Passenger Service Charge Act which provides for charging of service charge on passengers. Further details are discussed below.

The Carriage by Air Act No. 2 of 1993 gives effect to the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Hague Protocol 1955 (the Warsaw Convention). The Carriage by Air Act establishes a liability regime for the death or injury of passengers, loss of or damage to cargo and damage occasioned by delay that occurs during carriage by air.

Kenya domesticated the Convention on International Interests in Mobile Equipment (the Cape Town Convention) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Cape Town Protocol) by enacting the International Interests in Aircraft Equipment Act (No. 27 of 2013), which gives the High Court of Kenya jurisdiction in respect of claims brought under the Cape Town Convention or the Cape Town Protocol, or to grant relief and award damages as provided under the same.

Kenya ratified the Convention on International Aviation, 1944 (the Chicago Convention) on 1 May, 1964. The Chicago Convention details the rights of the signatories to the Convention including the right to: fly across another's territory without landing; land for non-traffic purposes; put down passengers and cargo taken on in the territory of the aircraft's nationality; take passengers and cargo destined for the territory of the aircraft's nationality; and take on passengers and cargo, and to drop-off passengers and cargo destined for, or coming from the territory of any signatory state. The Chicago

9.4 Airport Competitiveness and Affordability Analysis

One of the most crucial goals of this Proposal is to present the impact of recommended JKIA and Kenya Airways on the performance of JKIA and, indirectly, also Kenya Airports Authority as the owner of the assets disposed to PPP. This assumption has been treated as key transaction enabler being calculated in each of the analysed scenarios.

Due to efficient improvements in the overall service provision, JKIA would, on the whole, become a cheaper airport. These benefits would be passed on by Kenya Airways in its ticket sales and in the process, spur more air travel through JKIA. The benefits would also accrue to other airlines resulting in more traffic to JKIA.

This is reflected through:

- Significant growth of Airport Pax Services Charges (APSC) due to development of KQ fleet, network and therefore PAX number (charge per passenger remained AS-IS at the level of USD 50 per PAX).
- Significant growth of other revenues including Duty Free income and other concessions due to obtaining full control over this revenue stream, upgrade in existing infrastructure and growth of PAX number.

On average, JKIA is cheaper than other competing airports for the more popular types of aircraft, B787, B737 and E90. However, the increase in charges which is sought would not make the airport less competitive than the regional airports.

9.3 Assessment of Fiscal Impact

This section of the proposal assesses the fiscal impact of the proposed JKIA concession projects. The impact can be in the form of fiscal commitment or contingent liabilities (FCCL), depending on the agreement that is eventually signed. The chapter therefore, draws input from the PPP procurement and structuring analysis, the risk allocation and the recommended contractual structures.

Typically, PPP projects involve some form of public support that include assistance with finance raising, guarantees and direct responsibilities. Currently, KAA and Kenya Airways have received some form of government guarantees including loan guarantees for sub-sovereign and non-sovereign borrowings the entities have accessed. It is envisaged that this type of support would continue in some form. These types of involvements require the government to bear explicit direct and contingent liabilities.

Explicit direct liabilities will arise in any event and are therefore certain and will include liabilities and/or obligations specifically cited in the PPP contract agreement, for example, the fixed or periodic payments. Similarly, the proposed contract structures have obligations that are dependent on some certain outcomes, for example guarantees in case the WSP defaults on fees payment, and are therefore uncertain in nature and difficult to predict.

These risks need to be accounted for by the government in accordance with the International Public Sector Accounting Standards No 32, Service Agreements (IPSAS 32) which provide guidance on how the fiscal liabilities related to PPP arrangements ought to be recognised.

9.2.3 Assessing Value for Money (VFM)

PPP projects aim to improve the delivery of infrastructure services to the community in a way which provides VFM and protects the public interest. Value for money is maximised by allocating risk optimally. In general terms, this means allocating each risk to the party best able to manage that risk. In theory, this reduces individual risk premiums and the overall cost of the project because the party in the best position to manage a particular risk should be able to do so at the lowest price.

The main drivers behind potential VFM are:

(i) Risk allocation. Pricing risk with the party who is better able to manage it at the lowest cost.

(ii) Whole-of-life costing. Full integration of up-front design and construction costs with ongoing service delivery, operational, maintenance and refurbishment costs.

(iii) Innovation. Focuses on output specifications, providing wider opportunity and using competition as an incentive for bidders to develop innovative solutions in meeting these specifications.

(iv) Asset utilisation. In some instances, private sector providers are motivated to develop opportunities for revenue generation beyond the government payment stream and this may be used in part to reduce the cost of services to government.

The JKIA concession is expected to deliver the following results on a regular basis:

- Focus on service delivery. Allows KAA to enter into a long-term contract for services to be delivered at JKIA at specified standards.
- Predictability of costs and funding. Ensures that whole-of-life costing and budgeting are considered, providing the airport infrastructure and related ancillary services to specification for a significant period, including any growth or upgrade requirements.

Value for money is determined by comparing the risk-adjusted PSC model to the risk adjusted PPP financial model on an NPV basis. Based on the preceding examples, the PPP model achieves improved value for money compared to conventional public procurement by 25% return.

Table 19: VFM Summary analysis

Budget discount rate	%	8.29%
NPV of accepted risks	ths USD	(49,270)
Total Public party costs for PPP		
NPV for budget	ths USD	1,006,804
NPV of accepted risks	ths USD	(49,270)
Total	ths USD	**957,534**
Public sector comparator calculation		
Total Public party costs (-) and profits (+) for Public procu	ths USD	336,005
Total Public party costs (-) and profits (+) for PPP	ths USD	957,534
Value for money coefficient	%	**185%**
Value for money	ths USD	621,530
Project scheme		
The project should be realised based on PPP		

Source: Financial model

- Capital receipts
- Maintenance and lifecycle costs
- Direct operating costs
- Indirect operating costs
- Procurement costs
- Project revenues.

2) Using the cost estimates for retained and transferred risks obtained from the risk assessment process, constructing the risk-adjusted PSC model.

3) Using an appropriate discount rate to calculate the Net Present Cost of the PSC and PPP models.

4) Developing the PPP financial model.

5) Assessing value for money.

9.2.2 The raw PSC

9.2.2.1 Building the raw PSC

The Raw PSC is equivalent to the basic public procured life-cycle project cash flows and reflects the estimated costs of the PPP Concession undertaking the project on a conventional delivery model basis over the life of the project, without adjusting for the project risks.

It therefore calculates the net present cost (NPC) of a project, based on an appropriate discount rate for the public sector. The Excel-based cash flow model contains all the capital, operating costs and expected revenues and excludes non-cash items such as depreciation and amortisation. The detailed assumptions have been included in the financial modelling chapter.

9.2.2.2 Discount rate

The Raw PSC has been discounted by 10.6% -- being the risk free rate for a long term (30 years) government issued bond used as a discount rate for similar public sector assignments in Kenya.

10.6%

The discount rate for the raw PSC

The risk free rate is estimated using the five-year monthly average nominal government bond yield rate over a term similar to that of the project. The PSC is presented in Net Present Cost (NPC) terms. The NPC is based on the 'time value of money' concept and takes into account the effects of the timing of different cash flows over the project lifespan by calculating the total net amount of all cash flows in the equivalent present-day values.

9.1.4 Quantitative assessment of the risks

Risks with a rating of "medium risk" and above have been carried forward to the quantitative assessment. Risks with a rating of "low risk" or "negligible risk" are considered to have minimal quantitative impact and are consequently excluded from the quantitative assessment.

The second part of the risk analysis process involves the quantitative assessment of each material risk identified in the previous step. This is based on the proposed best estimate of the following quantification factors for each risk:

- Probability of occurrence;
- Risk values for best case, most likely and worst case scenarios;
- Cost base that underpins the estimate of risk values;
- Risk profile or timing.

The results of the quantitative risk assessment were then reviewed to determine the relativities and correlations between categories, any obvious gaps or overlaps and reasonableness against other similar projects/experiences.

9.1.5 Allocate Risks as Transferred or Retained

Proposed risk allocation is discussed above and in the detailed register. Risk allocation is at the heart of project structuring and pricing. Whereas the table above suggests possible allocations, this will need to be revisited at the transaction stage and especially during contract negotiations as the allocations may move to address project pertinent issues.

9.1.6 Incorporate Quantifiable Risks into the PSC

The quantifiable risks have been incorporated in the PSC to determine value for money for the project. The results of this analysis are contained in the public sector comparator analysis below.

9.2 Value for Money Analysis

9.2.1 Introduction

Does the nature and structure of the proposed PPP transaction incentivise sufficient benefits from the Kenya Airways to justify choosing the PPP delivery route?

This chapter sets out the compilation and calculation of the projects Public Sector Comparator (PSC). The PSC provides the base case conventional delivery scenario against which the PPP funding options will be assessed. The purpose of the PSC is to assess whether the nature and structure of the proposed PPP transaction incentivise sufficient benefits from the private sector to justify choosing the PPP delivery route. If so, this would show "value for money" for the public when measured against the public qualitative and quantitative objectives.

The PSC represents the estimated total cost to the public of meeting the output specifications under a public procurement delivery method. The PSC has been developed using the following broad approach:

1) Creating a raw PSC financial model which covers the following:
   - General assumptions such as timing, inflation assumptions etc.
   - Direct revenues
   - Direct capital costs

9.1.3 Qualitative Assessment of Risks

The first part of the risk assessment process involved the qualitative review and ranking of project risks. Each risk is assessed in terms of its likelihood of occurrence. The consequence of risks materialising is scaled from "insignificant" to "catastrophic".

The likelihood and consequence ratings are combined to produce risk maps from "negligible" to "significant or extreme" for the key risk categories described above; the following scoring has been used.

Figure 35: Risk mapping criteria

Risk Assessment						Risk Management	
			Probability			Score	Risk management strategy
			High	Medium	Low	9	Action required
			3	2	1	6	Contingency plan prepared
Impact	High	3	9	6	3	3,4	Review and address
	Medium	2	6	4	2	2	Monitor
	Low	1	3	2	1	1	Accept and Ignore

Figure 36: Risk map

No	Risk Group	Impact	Public/KAA	KQ	Shared	Probability	Score			Risk management comments
							Impact	Probabilit y	Overall	
1	Political, Regulation, Legal & Similar Risks	M			✓	✓	2	2	4	Monitor - Follow up on recommended PPP procurement approach should reduce likelihood of occurring
2(a)	Site Related Risks	M	✓			✓	2	2	4	Review – Public party to secure site access
2(b)	Design Related Risks	M		✓			3	3	9	Review - Significant design obstacles
2(c)	Construction Risks	M		✓			3	2	6	Review- construction supervision expertise required
3	Commercial Risks	H		✓		✓	3	3	9	Develop an action plan to expand network, review and index tariffs
4	Commissioning and operating risks	M		✓			2	2	4	Medium - monitor commission & delivery schedule
5	Financing	H		✓			3	3	9	Develop an action plan to secure financing of the project. KQs ability to raise funding in limited.
6	Force Majeure events	L			✓		1	1	1	Low - monitor contract execution. Both entities controlled by state.

Further evaluation of the risk including Risk Allocation Matrix has been provided in Chapter 10 of this PIIP.

	Group	Description	Applicability and mitigation	Allocation
			▪ Relief and Compensation Events ▪ Insurance (to eliminate from force majeure definition) ▪ Termination.	

	Group	Description	Applicability and mitigation	Allocation
e)	Financial	This includes the risk that financing costs are higher than expected due to unanticipated changes of interest rates, exchange rates, risk that when debt and/or equity is required by the private party for the project it is not available then and in the amounts and on the conditions anticipated. Given the dynamic financial markets, it is possible that the Private Party will not get good terms for the debt or equity funding. The dynamic cost of finance, including interest rates, exchange rate risk, inflation, insurance etc. may increase the cost of finance. The risk is strengthened due to the fact that no VGF has been assumed to support the project.	For large infrastructure projects, the contractor will need to raise some debt and equity to fund the development of the infrastructure envisaged, in return for an ongoing stream of revenue. It is likely that required, minimal subscribed equity would be provided for the projects. Sub-debt (or quasi-equity) would be provided by equity providers. This sub-debt would rank as junior to senior debt repayments because payments to senior debt providers would have the first call on cash-flows. Lenders will look for real robustness for the operator selected – because the lifecycle risks presented by this development are very real. In particular, the ability of the operator to complete the development will be scrutinized heavily – and the strength of the balance sheet will be a key consideration. For the project finance bit, market is currently heavily focused on delivering 15-20 year projects – hence a 25+ year PPP could be more challenging. It is also conceivable that an operator could seek to finance the development through relationship with banks who might focus on the corporate risks of the operator itself, as opposed to the specific project risks for the bulk supply – hence providing finance on more attractive terms. Most civil works design life is longer 40-50 years while the PPP Act provides concession period of up to 30 years (although renewals are possible). Financing 30 year under the current financial markets could raise more challenging financing issues as it could be difficult for project finance to secure over such a long period, since there are few project finance banks that would consider such a long commitment. However, the refinancing markets are quite dynamic and almost all operating project finance deals entered pre-credit crunch of 2008 have been refinanced.	Private Party
f)	Force Majeure events	This may overlap with operating risk or completion risk and includes certain unexpected factors outside the control of the PPP operators (whether natural or "man-made"), which may affect the construction or operation of the PPP.	This will affect both of the projects similarly. Mitigation measures include: Defining "Force Majeure" narrowly to exclude risks that can be insured against or are dealt with more adequately by other mechanisms such as Relief Events or Compensation Events	If risks are not insurable, risk is shared insofar Institution may pay compensation

	Group	Description	Applicability and mitigation	Allocation
		External influencers e.g. environmental, political, social etc.		
c)	Commercial Risks	Commercial risks relate to the variability of demand for the services that the Kenya Airways is unable to influence. This would include risks such as low demand for air travel, making the asset unable to earn adequate revenues.	There is a real risk with the current regional airport development that significant expansion may not be utilised. This can be mitigated by having comprehensive demand forecast and strategies to promote JKIA as a hub.	Private Party.
d)	Commissioning and operating risks	There is always a possibility that the design, procurement construction and commissioning of the facilities required for the Project may be delayed for various reasons. Most infrastructure contracts delivered for the public in Kenya under typical construction contracts often suffer delays. Delays in construction cost the public huge amounts in contract variations and other costs. During operations, the operating requirements of the projects (including projected operating expenditure and skills requirements, e.g. labour disputes, employee competence, employee fraud, technology failure, environmental incidents and any failure to obtain, maintain and comply with necessary operating permits) may be different from what is expected. It is anticipated that the introduction of the PPP will reduce the possibility of contract delays and improve operations and management.	Both types of contracts would suffer from the similar commissioning and operating risks. Mitigation measures would include: Special insurance (delay in start-up insurance) Liquidated damages, construction bonds and other appropriate security from the Private Party to achieve completion, unless caused by the Institution Clear output specifications Penalty regime and performance monitoring Adequate O&M contract Substitution rights Security and special insurance	Private Party, unless de operations risk is caused Public Party.

Table 18: Broad risks and applicability

	Group	Description	Applicability and mitigation	Allocation
a)	Political, Regulation, Legal & Similar Risks.	These include the possibility of action by any government authority that materially and adversely affects the completion and/or operation of a Project, or the expected return on investment of the Private Party's founders including the necessary approvals, and change in law that substantially changes the nature of the contract. This risk overlaps with some financial risks (e.g. tax rate change risk) and other risks such as operating risk. For an airport project, this includes the ability of the political establishment to influence the level of tariff for airport services which is significant given these are regulated.	This risk will apply to the concession of the airport and, in particular the Government's treatment of the changes in law and treaties it has signed that give access to various carriers to the Kenyan airspace. It also includes the delivery of the required approvals to ensure a concession is successful. This may affect the performance of the concession in terms of its ability to meet the long-term sector objectives. This classification is therefore appropriately reflected in the risk matrix in this document. The contract should spell out the key risks defined under change in law to cover specific circumstances such as expropriating actions on the services or assets of the private party as well as events that distinguish between general and discriminatory changes in law. A clear identification of the requited approvals reduces the risks of regulatory and approvals risks.	The Political, Regulato Legal Risk are shared bet the Proponent and Government of K The party acting for an behalf of the public would the risks in terms discriminatory changes ir and expropriating actions. Where possible, ge changes in law are assum the Private Party. The Public Party should d the required approvals, pe before commencement, e where the private sect unable to meet licensing other operating obliga either spelt in the co or general law.
b)	Airport Infrastructure Design, Construction and Investment Risk	This risk relates to the matters affecting the delivery of airport services – from design to completion - and would include risks such as: The design may not achieve the required output specifications. Not able to deliver the required service levels Non-compliance to agreed standards e.g. ICAO, construction, safety etc. Deficiencies relating to technical requirements	These risks may negatively affect airport services. The implications can be significant in both cases. The PPP contract should include compensation mechanism should the risk materialize. Clear output specifications Design warranty Patent and latent defect liability Consultation with and review by Institution (but review must not lead to input specifications by Institution). Independent Expert appointment to resolve disputes on expedited basis.	Private Party.

9. PROPOSED RISK ALLOCATION AND VALUE FOR MONEY ANALYSIS

9.1 Risk Analysis and Allocation

9.1.1 Introduction

Risk is central to the evaluation of the PPP project and appropriate risks need to be identified, quantified, allocated and shared

Methodology used to identify, allocate and evaluate project risks is outlined below. These steps helped to ensure that risks were systematically recorded and quantified for the project.

Step 1: Identify risks

Step 2: Categorise risks

Step 3: Estimate the likelihood of the occurrence of each risk

Step 4: Estimate the financial impact of the occurrence of each risk

Step 5: Allocate risks as transferred or retained

Step 6: Finalise the formation of the risk register

Step 7: Incorporate quantifiable risks into the PSC financial model discounted cash flow analysis

9.1.2 Risk Identification and Categorisation for the Selected Options

This Proposal reviews potential risks that could afflict the concession and proposes an initial risk allocation between the various parties involved in the concession. The aim is to identify the 'material risks' – i.e. the risks that could have a significant cost impact if they occur.

The risks are allocated, on a preliminary basis, according to the PPP principles. It is difficult to estimate the likely cost of the risk when it materialises and the proposal uses estimates based on the past experience. As the project is further structured at the transaction phase, the risk valuation exercise will need to be reviewed since the allocation may change based on the final structuring and negotiations with the private sector operator. Certainly the risks need to be reviewed after detailed due diligence of JKIA and Kenya Airways.

The identified risks can be broadly categorised as follows:

- Political, regulation, legal & similar risks
- Design and construction risk
- Commercial risks
- Commissioning and operating risks
- Financial
- Force majeure events

The table below provides a broad summary of risks and their applicability for this project. However, risks are particular to each project and we have included detailed risk matrix under Appendices of this report.

Benefit	Characteristic
Stable employment and redistribution of wealth	▶ JKIA & KQ Public Private Partnership, as a stable and growing employer, will support redistribution of wealth among its employees and partners. Developing aviation sector will support all companies specialized in the industry as well as encourage global suppliers to establish their operations in Kenya.
Branding element of JKIA and Kenya Airways	▶ National airlines, with their strong brands can serve as an advertisement for investment, tourism, and trade; successful JKIA & KQ represents an opportunity to raise awareness about Kenya. ▶ Although not easily measured, the branding merits of JKIA & KQ are substantial and could be a significant benefit for Kenya.

Benefit	Characteristic
	regional leader for transportation of goods. The bulk of the Cargo handled in Nairobi originates from Europe, Asia and Middle East transiting into other African countries. ▶ Most of the major carriers such as KLM, Emirates, Etihad, and Martin Air deploy larger and wider planes, while KQ Cargo operates B737 with maximum 15 tones against a B777 of four times the tonnage. It means that we cannot do long-haul flights to access cargo from Europe and Far East. KQ is still operating with old ground and ramp operations equipment in dire need of upgrade or replacement. ▶ To remain competitive and to access the sources of cargo from Europe and Asia, a mid- to long-haul aircraft is required. ▶ The government and its agencies move lots of goods ranging from exam papers to medical supplies and construction equipment. This area should be prioritized to the national carrier as is the case for the Ethiopian Governments arrangement with ET. ▶ Data collected over the years show a direct relationship between political stability, business growth and movement of goods, people and services. The government has a pivotal obligation to enable the environment that can favour trade and related economic activities and export and import business.
Introduction of cross-subsidising by other airlines	▶ Non-Kenyan carriers will continue to fly mainly into Nairobi and Mombasa airports. Services that other airlines will procure from JKIA & KQ Public Private Partnership will in a way subsidise its development (service rates to be defined solely by the aviation PPP). Thanks to an integrated P&L, the benefits from handling, fuel distribution, cargo and other services will support growth of the airline.
Nairobi as a pan-African Warehousing & Logistics Hub	▶ The goal of development of special economic zone around JKIA is not only to grow airline-related businesses, but most importantly to create favourable conditions for bringing investments to Kenya. ▶ We believe that one of the key potential industries is Warehousing and Logistics: that could mean transformation of Nairobi into the international hub with a focus on Africa as the rapidly growing market for consumer products. Companies like Amazon, Ikea or FedEx could become very interested in developing their activities in JKIA special economic zone as centres for sub-Saharan Africa.
Creation of more than 30.000 new jobs	▶ Our estimates show that more than 30.000 new jobs may be created directly and indirectly through development of JKIA & KQ Public Private Partnership. This includes new positions in: ▶ Directly aviation-related industries such as MRO, cargo, ground services, catering – all developed within JKIA & KQ Public Private Partnership; ▶ Development of small and medium enterprises supplying aviation industry; ▶ Warehousing & logistics centre located in JKIA special economic zone; ▶ Hotels & accommodation sector which will need to grow significantly to accommodate the incoming traffic; ▶ Other industries located in JKIA special economic zone; ▶ Comparison of Ethiopian Airlines size of 14.000 employees in 2017 versus 5.000 in JKIA and Kenya Airways shows a huge potential to increase employment rate in Kenya through investments in the aviation segment.