



Agriculture and Food Authority (AFA)

Our Crops, Our Wealth

NOTIFICATION OF REGULATORY IMPACT ASSESSMENT

ON THE DRAFT (SUGAR) REGULATIONS:

THE CROPS (SUGAR) (GENERAL) REGULATIONS, 2018 &

THE CROPS (SUGAR) (IMPORTS, EXPORTS & BY-PRODUCTS) REGULATIONS, 2018

Background & Introduction

The Agriculture and Food Authority (AFA) is a public institution established under the Agriculture and Food Authority Act 2013 and is mandated by law to administer the Crops Act 2013 and to exercise the functions set out in that Act and under the Agriculture and Food Authority Act 2013.

Section 40 of the Crops Act and section 46 of the Agriculture and Food Authority Act empower the Cabinet Secretary responsible for agriculture to make regulations to implement the legislative provisions.

Policy Statement

It is the Government's commitment to accelerate the growth and development of agriculture in general, enhance productivity and incomes of farmers and the rural population, improve investment climate and efficiency of agribusiness and develop agricultural crops as export crops that will augment the foreign exchange earnings of the country, through promotion of the production, processing, marketing, and distribution of crops in suitable areas of the country. The sugar industry is one of the key sub-sectors targeted by the Government for legislative and policy reforms.

The Government is in the process of reforming the sugar industry through strengthening the legal and regulatory framework to achieve its policy objectives stated above.

Draft Regulations & Regulatory Impact Statement

To drive the sugar industry reform agenda, and to operationalise parts of the Crops Act, the Cabinet Secretary, through the Agriculture & Food Authority has, in consultation with various stakeholders over a considerable period of time, has prepared the abovementioned *Draft Regulations*.

Section 6 of the Statutory Instruments Act provides that if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to

making the statutory instrument, prepare a regulatory impact statement about the instrument. The Cabinet Secretary has prepared a regulatory impact statement on the Regulations. Copies of the *Draft Regulations* and the Regulatory Impact Statement may be obtained or inspected *online* at www.kilimo.go.ke or at www.afa.go.ke or may be obtained from or inspected at AFA on payment of copying charges at the AFA Head Office, *Tea House, Naivasha Road, Off Ngong Road, Nairobi*, during working hours.

Invitation of Comments

Section 8 of the Statutory Instruments Act requires that before making a statutory instrument, the regulation-making authority shall publish notice to all persons likely to be affected by the regulations a notification of regulatory impact assessment.

The Ministry therefore invites written comments from the general public and sugar industry stakeholders on the *Draft Regulations*. The comments should be addressed to:

The Interim Director-General/CEO
Agriculture & Food Authority
Tea House, Naivasha Road, Off Ngong Road
P.O. Box 37962-00100
NAIROBI.

E-mail:

So as to him on or before the expiry of fourteen (14) days from the date of publication of this notice.

Dated at Nairobi this 31st day of July 2018.

Cabinet Secretary
**MINISTRY OF AGRICULTURE, LIVESTOCK,
FISHERIES & IRRIGATION**



Agriculture and Food Authority (AFA)

Our Crops, Our Wealth

REPORT

ON

REGULATORY IMPACT ASSESSMENT

OF

***THE CROPS (SUGAR) (GENERAL) REGULATIONS, 2018 & THE
CROPS (SUGAR) (IMPORTS, EXPORTS & BY-PRODUCTS)
REGULATIONS, 2018***

FOR

AGRICULTURE & FOOD AUTHORITY

SUBMITTED TO

The Interim Director-General/CEO
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29th August 2018

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ABBREVIATIONS AND ACRONYMS

AFA	Agriculture and Food Authority
COMESA	Common Market for Eastern and Southern Africa
EMCA	Environmental Management and Coordination Act
GDP	Gross Domestic Product
IGRTC	Inter-Governmental Relations Technical Committee
KEPHIS	Kenya Plant Health Inspectorate Services
KESMA	Kenya Sugar Millers Association
KISCOL	Kwale International Sugar Company Limited
KNFSF	Kenya National Federation of Sugarcane Farmers
KSB	Kenya Sugar Board
KUSDAW	Kenya Union for Sugarcane and Allied Workers
OECD	Organization for Economic Cooperation and Development
RIA	Regulatory Impact Assessment
SDL	Sugar Development Levy
SRI	Sugar Research Institute
WEKO	West Kenya Outgrowers Company
WEKSCOL	West Kenya Sugar Company Limited

LIST OF STATUTES

Agriculture Act (Chapter 318 – Repealed)

Agriculture & Food Authority Act, Act No. of 13 of 2013

Agriculture Produce & Marketing Act (Chapter 320 - Repealed)

Canning Crops Act (Chapter 328 - Repealed)

Cereals and Sugar Finance Corporation (Chapter 329 - Repealed)

Coconut Industry Act (Chapter 331 -Repealed)

Coconut Preservation Act (Chapter 332 – Repealed)

Coffee Act (Act No. 9 of 2001 - Repealed)

Cotton Act (Chapter 335 - Repealed)

Crop Production and Livestock Act (Chapter 321 - Repealed)

Crops Act, Act No. 16 Of 2013

Kenya Sugar Authority Order, L/N No. 32 of 1973 - Repealed

Pyrethrum Act (Chapter 340 - Repealed)

Sisal Industry Act (Chapter 341 - Repealed)

Sugar Act 2001 – Repealed

Tea Act (Chapter 343 - Repealed)

CHAPTER 1: BACKGROUND & INTRODUCTION

This Chapter introduces the subject matter of this report, sets out the background and the context of the assignment, sets out the terms of reference, the deliverables and the methodology used in arriving at the findings in this report. The subject matter of this report, as we shall describe a little more detail below, is regulatory impact assessment of the proposed *Crops (Sugar) (General) Regulations, 2018, the Crops (Sugar) (Imports, Exports and By-Products) Regulations 2018*.

1.1 The Agriculture Sector

The agriculture sector has for a long time been considered as the backbone of Kenya's economy. The Agriculture Sector contributes significantly to Kenya's GDP.¹ The sector is also the means of livelihood for the majority of the Kenyan people. In the national development agenda, agriculture is expected to play a significant role in the growth and transformation of the economy.

According to *Food Security Report*, prepared by the Kenya Agricultural Research Institute,² the agriculture sector-

“...directly contributes 24% of the Gross Domestic Product (GDP) and 27% of GDP indirectly through linkages with manufacturing, distribution and other service related sectors. Approximately 45% of Government revenue is derived from agriculture and the sector contributes over 75% of industrial raw materials and more than 50% of the export earnings. The sector is the largest employer in the economy, accounting for 60 per cent of the total employment. Over 80% of the population, especially living in rural areas, derive their livelihoods mainly from agricultural related activities. Due to these reasons the Government of Kenya (GoK) has continued to give agriculture a high priority as an important tool for promoting national development.”

Agriculture is centrally recognised as a key plank in *Kenya's Vision 2030* which aims to make Kenya a “globally competitive and prosperous country with a high quality of life by 2030”. It is therefore evident why the Government is keen on transforming agriculture.

The Government developed *Strategy for Revitalizing Agriculture (2004-2014)* to provide a framework for increasing agricultural productivity, promote investment and encourage private sector involvement in agriculture. *The*

¹ According to the World Bank (2016) agriculture in Kenya contributes up to 32.4% of the GDP. See https://ec.europa.eu/jrc/sites/jrcsh/files/3_JRC_KenyaWS_Kosura.pdf (accessed on 4th July 2018).

²<http://www.foodsecurityportal.org/kenya/food-security-report-prepared-kenya-agricultural-research-institute/> (accessed on 4th July 2018)

Agriculture Sector Development Strategy (2009-2020) endeavours to align the agriculture's activities to the *Kenya Vision 2030*.

1.2 The Sugar Sub-sector

The history of sugar farming in Kenya goes back to about 100 years ago. The first sugarcane factory was built at Miwani, near Kisumu in 1922. The second one was constructed at Ramisi in the Coast Region in 1927. The construction of the factories was pioneered by Indians who used it to make jaggery. After independence, through the Sessional Paper No. 10 of 1965, *African Socialism and its Application to Planning in Kenya*, the Government outlined the importance and role of the sugar industry. The Government therefore invested in sugar industry as part of implementing the vision in the Sessional Paper, by constructing and holding majority shares in five factories: Muhoroni (1966), Chemelil (1968), Mumias (1973), Nzoia (1978), and South Nyanza (1979). Private investors have also built sugar factories: West Kenya (1981), Soin (2006), Kibos (2007), Butali (2011), Transmara (2011) and Sukari (2012). The latest entrant into the sugar industry is Kwale International Sugar Company Limited at Ramisi is a private enterprise which started milling cane in 2014.³ Mumias Sugar was privatized in 2001 but the Government holds majority shares in the company.

The Sugar Sub-sector has been a key contributor to the agriculture sector. As at 2015, about 203,730 hectares of land in Kenya was under cane farming, mainly confined to Western and Nyanza regions. Of that, 189,390 hectares were under out-grower/small-scale farmers, and only 14,340 hectares were under nucleus estates. About 6 million people derive their livelihood from the sugar subsector either directly or indirectly.⁴

Despite the existence of public and private millers, Kenya is not yet self-sufficient in sugar production. Kenya's annual production of sugar is slightly over 600,000 metric tons compared to annual estimated consumption of 1,030,000 metric tons. The deficit in the domestic consumption is met through importation from COMESA countries and sometimes beyond.

The sugar industry has been facing challenges over the years. Though some of the challenges have been addressed, there is a lot to be done to maximise the sub-sector for sustainability. In the *Draft Sugar Industry Policy*⁵ being discussed currently, the following have been identified as key challenges facing the sugar industry, and which the law and policy need to resolve:

³ Refer to: <http://www.kalro.org/sugar/?q=SRI-history> (accessed on 4th July 2018)

⁴ *Report of Parliamentary Departmental Committee on Agriculture, Livestock and Cooperatives on the Crisis Facing the Sugar Industry* (March 2015)

⁵ Ministry of Agriculture, Livestock and Fisheries, State Department Of Agriculture (2016)

- Inadequate generation of research outputs, dissemination and adoption along the sugar industry value chain;
- Low sugar cane productivity and quality;
- Inefficient processing of sugar and narrow range of product diversification;
- Inappropriate marketing of sugar and co-products;
- Inadequate and poor management of the Sugar Development Fund and ineffective general financing in the sugar industry;
- Insufficient/poor support infrastructure;
- Insufficient Institutional, Legal and Regulatory Framework and lack of adherence;
- Cultural and social-economic constraints to industry performance;
- Heavy industry debt burden.

In the wake of the crisis facing the sugar industry in 2015, a Parliamentary Committee⁶ tasked with investigating the issue, identified the following challenges, after hearing key stakeholders:

- Poaching of sugarcane among sugar millers;
- High cost of production;
- Field and factory inefficiencies,
- Corruption and impunity;
- Lack of capital to modernise and automate the mills;
- Fast decreasing land sizes and loss of soil fertility; and
- Failure by the regulator to properly manage and regulate the sector.

1.3 Legal and Regulatory Framework

1.3.1 Historical Development of Regulation

The earliest legal instrument to regulate the Sugar sub-sector was the *Kenya Sugar Authority Order 1973*,⁷ made pursuant to the powers conferred under the Agriculture Act,⁸ now repealed.

The Order established the Kenya Sugar Authority with the general mandate to promote and foster the effective and efficient development of sugar-cane for the production of white sugar, in any area of Kenya. The functions of the Authority was, in respect of the development of sugar-cane, to-

- a) advise on the effective and efficient development of sugar-cane production for the manufacturing of white sugar;
- b) advise on price of cane to growers;

⁶ *Report of Parliamentary Departmental Committee on Agriculture, Livestock and Cooperatives on the Crisis Facing the Sugar Industry* (March 2015)

⁷ Legal Notice No. 32 of 1973

⁸ Chapter 318 of the Laws of Kenya

- c) advise on rules and regulations necessary to enable the effective and efficient functioning and development of the sugar-cane industry;
- d) advise on all aspects of sugar-cane research services;
- e) develop and implement upon approval by Minister a cane testing service and a sugar-cane quality control system;
- f) advise on all aspects of sugar-cane processing;
- g) register all sugar-cane producers within sugar factory zones;
- h) ensure the availability of adequate statistical information relating to all aspects of the sugar-cane industry;
- i) advise on the utilization of sugar by-products;
- j) with the approval of the Minister, by order in the *Gazette*, impose a levy or levies on growers for the purpose of financing the operations of the Authority and for such other purposes as the Minister may approve;
- k) with the approval of the Minister make an order published in the *Gazette* regulating the manufacture, distribution, storage and marketing of sugar and sugar by-products, and also the quantity and quality of locally produced and imported sugar.

These were noble functions of the Authority and are still largely good enough. The composition of the Authority governance was largely representative of the key stakeholders. But the Authority was not properly anchored in the law as it was created by a subsidiary legal instrument.

Parliament enacted the Sugar Act in 2001. The Act repealed the Kenya Sugar Authority Order. The object of the Act was, and is, as appears from its preamble to the Act;

“to provide for the development, regulation and promotion of the sugar industry, to provide for the establishment, powers and functions of the Kenya Sugar Board, and for connected purposes.”

The Act set up the Kenya Sugar Board to replace the then existing Kenya Sugar Authority. The objects of setting up the Board were set out in the Act, and were generally to:

- regulate, develop and promote the sugar industry;
- co-ordinate the activities of individuals and organizations within the industry;
- facilitate equitable access to the benefits and resources of the industry by all interested parties.

Additionally, the Board was mandated to do a number of things as specified in the Act.⁹ The law imposed Sugar Development Levy on sugar to help operate a number of functions in the sugar industry.¹⁰

1.3.2 The Crops Act

The Crops Act¹¹ was enacted as part of the ongoing policy and regulatory reforms by the Government in an attempt to respond to the challenges in the sugar industry, and to position the sector in a pole position to have significant contribution to *the Kenya Vision 2030*. The goal of the Act is to transform Kenya's agriculture sector into a commercially-oriented and internationally competitive industry. The new structures created under the Act are envisaged to help Kenya modernize agricultural production, improve service delivery, and harmonize the regulatory and legal framework of government programmes.

The Act states, in its long title, that its intention is to “*consolidate and repeal various statutes relating to crops; to provide for the growth and development of agricultural crops and for connected purposes.*” The Act¹² further provides that-

The objective of this Act is to accelerate the growth and development of agriculture in general, enhance productivity and incomes of farmers and the rural population, improve investment climate and efficiency of agribusiness and develop agricultural crops as export crops that will augment the foreign exchange earnings of the country, through promotion of the production,

⁹ Other functions were to participate in the formulation and implementation of overall policies, plans and programs of work for the development of the industry; act as an intermediary between the industry and the Government; facilitate the flow of research findings to interested parties through the provision of effective extension services; monitor the domestic market with a view to identifying and advising the Government and interested parties on any distortions in the sugar market; facilitate the arbitration of disputes among interested parties; facilitate the export of local sugar; promote and encourage the use of environmentally friendly technologies in the industry; provide advisory services to growers, out-grower institutions and millers; facilitate an equitable mechanism for the pricing of sugar-cane and appropriation of proceeds from the disposal of the by-products of sugar production between millers and growers as stipulated in the guidelines; represent the industry in such organizations as are relevant for the promotion of the industry; oversee the formulation of standard provisions governing the mutual rights and obligations of growers, millers and other interested parties; collect, collate and analyze industry statistics and maintain a data base for the industry; licence sugar mills; promote the efficiency and development of the industry through the establishment of appropriate institutional linkages; and to perform such other functions as may, from time to time, be assigned by the interested parties.

¹⁰ See s.18 of the Sugar Act 2001 (repealed). The Sugar (Sugarcane Development Levy) Order, 2006, imposed a levy that was set at 7% of the market price on all sugar sales. The levy was collected by the Kenya Revenue Authority but managed by KSB. The levy comprised the Cane Development (2%); infrastructure (1%); factory rehabilitation (3%); grants to research (0.5%); and KSB administration 0.5%.

¹¹ Act No. 16 of 2013.

¹² Section 3 of the Act.

processing, marketing, and distribution of crops in suitable areas of the country and in particular to-

- (a) circumvent unnecessary regulatory bureaucracy in the crops subsector;*
- (b) reduce unnecessary levies, taxes or other barriers to free movement of crop products and provide for a rationalized taxation system;*
- (c) reduce unnecessary regulation or over-regulation of the crops subsector;*
- (d) reduce duplication and overlap of functions among institutions involved in the regulation of crop agriculture;*
- (e) promote competitiveness in the crops subsector and to develop diversified crop products and market outlets; and*
- (f) attract and promote private investment in crop agriculture.*

The Act endeavours to emphasise good crop husbandry on the part of relevant stakeholders. The stakeholders recognised under the Act include growers, growers associations, manufacturers, county governments, national government, dealers, and other public institutions.

The Act lists “scheduled crops” and allows the Cabinet Secretary to add to the list, in which case the Act becomes applicable to those crops. The administration of the Crops Act is entrusted with the Agriculture and Food Authority (hereafter referred to as “the Authority” or “AFA”). The Authority is established under the Agriculture and Food Authority Act.¹³ A number of measures are required to be taken by the Authority with respect to the scheduled crops, for the purpose of promoting those crops.

1.4 The Agriculture & Food Authority

The Agriculture and Food Authority (AFA) is a public institution in the agriculture sector, established under the Agriculture and Food Authority Act.¹⁴ The Authority falls under the Ministry of Agriculture, Livestock, Fisheries & Irrigation. It is the successor to a number of institutions existing before the commencement of AFA Act and the Crops Act.¹⁵ The Act consolidates the laws on the regulation and promotion of agriculture. It makes provision for the respective roles of the national and county governments in

¹³ Act No. 13 of 2013

¹⁴ Act No. 13 of 2013, which Act took effect on 14th January 2013.

¹⁵ The Crops Act took effect on 1st August 2014. It repealed the following Acts: Agriculture Produce Marketing Act (Cap 320), Canning Crops Act (Cap 328), the Cereals and Sugar Finance Corporation (Cap 329), the Coconut Industry Act (Cap 331), the Cotton Act (Cap 335), the Pyrethrum Act (Cap 340), the Sisal Industry Act (Cap 341), the Tea Act (Cap 343), the Coffee Act (No 9 of 2001) and the Sugar Act (No 10 of 2001). Consequently, the following institutions had to be wound up to pave way for a new institutional framework: the Kenya Sugar Board, the Tea Board of Kenya, the Coffee Board of Kenya, the Horticultural Crops Development Authority, the Pyrethrum Board of Kenya, the Sisal Board of Kenya, the Cotton Development Authority and the Kenya Coconut Development Authority.

agriculture and related matters, in line with the provisions of the *Fourth Schedule* to the Constitution of Kenya 2010.

Before the promulgation of the Agriculture and Food Authority Act, the Kenya Agricultural and Livestock Research Act, No. 17 of 2013 and the Crops Act, the Agriculture Sector had numerous statutes that made the sector uncompetitive, inefficient and too bureaucratic for a conducive business environment. The reforms that drove the enactment of the new laws were intended to make the sector efficient and effective.

The Authority is now made up of the a number of directorates that were previously stand-alone entities: the Coffee Directorate, the Tea Directorate, the Sugar Directorate, the Horticultural Crops Directorate, the Fiber Crops Directorate, the Nuts and Oil Crops Directorate, the Pyrethrum and Other Industrial Crops Directorate, and the Food Directorate.

1.5 Regulatory Impact Assessment

Regulatory impact assessment (RIA) involves a range of methods aimed at systematically assessing the negative and positive impacts of proposed and existing regulations. It is conceived toward “regulatory management”, aimed at improving how governments use their regulatory powers.¹⁶

RIA is an important instrument for improving the quality of regulations and good governance, by ensuring more coherent and transparent policies, and making regulation more effective and efficient.¹⁷ Through RIA, an analysis of proposed regulations is done, and by comparing different options, RIA is a methodological framework and an administrative procedure for better-informed policy-making and legislative enactments. RIA facilitates the interdepartmental process and often involves public consultation. It thereby improves the transparency of governmental decision-making and also increases the quality of political debate.

In his paper¹⁸ on the subject of RIA, Prof. Peter Carroll of Tasmania University, Australia, states:

RIA is now the mandated policy development system in both countries for proposed regulation with potentially significant impact. As such, with its requirement for objective, systematic consideration of all relevant policy options, including that of taking no action, as well as a full

¹⁶ According to OECD (1997) *Regulatory Impact Analysis: Best Practices In OECD Countries*, p. 7.

¹⁷ Jacob, Klaus, et al, (2011) ‘Integrating the Environment in Regulatory Impact Assessments’, p.10

¹⁸ Peter Carroll (2014), ‘Ex Ante Evaluation in Australia and New Zealand: the case of Regulatory Impact Assessment’, p.7

consideration of their potential costs and benefits, RIA does not fit particularly well with the traditional process for the development of policy by departments. In very brief summary, the traditional process was one in which public servants prepared a Cabinet paper recommending a specific policy proposal, according to their minister's specifications, focused most often on a preferred policy option. Within these constraints the extent and depth of analysis was often quite reasonable, but it also often neglected the analysis of other policy options.

Through the process, RIA ensures that the benefits of government action justify the costs, and that the option chosen maximizes benefits and minimizes costs. This is why cost-benefit analysis is usually part and parcel of RIA. RIA has been used widely especially in the OECD countries. But the practice has now found its way into many countries, including Kenya, where it has been given legislative impetus.

The Statutory Instruments Act¹⁹ requires that RIA be undertaken in certain cases. The Act provides that-

*If a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.*²⁰

The Act further provides for the content of a regulatory impact statement and the publication of the same for public consumption.

The Authority has a huge mandate which necessitates that many pieces of regulations have to be made to fully operationalise the Act. The Act mandates the Cabinet Secretary in charge of agriculture to make regulations.²¹ Additionally, the Crops Act, which is to be administered by the Authority, mandates the Cabinet Secretary to make regulations to deal with many aspects of agriculture as outlined in the Act.²² We shall discuss this a little later.

1.6 Objectives of Regulatory Impact Assessment

The general objective for carrying out regulatory impact assessment respect to the draft *Crops (Sugar) (General) Regulations, 2018*, and draft *Crops (Sugar) (Imports, Exports and By-Products) Regulations 2018*, was to determine the

¹⁹ Act No. 23 of 2013

²⁰ Section 6 of the Statutory Instruments Act, No. 23 of 2013.

²¹ See section 46.

²² Section 40 of the Crops Act.

impact of the Regulations on the economy, people, business and the environment and to prepare a report with several other deliverables.

The specific objectives of this consultancy, as determined from the terms of reference, were-

- a) To analyse and interpret the objectives of the relevant Acts of Parliament relating to the Sugar Sub-sector, that is, the Agriculture and Food Authority Act and the Crops Act;
- b) To assess and determine the *likely impact* and effect of the Crops (Sugar) (General) Regulations, 2018, the Crops (Sugar) (Imports, Exports and By-Products) Regulations 2018 on the private and public sectors, as well as on fundamental rights and freedoms;
- c) To determine the options available (policy, legal, administrative, etc.) in lieu of the said regulations, which may achieve the objectives for which the regulations are made, and justify the options taken;
- d) To assess and determine the likely cost implication, both to the government and the private sector, should the proposed regulations be promulgated;
- e) To assess and determine the benefits that would accrue from the said Regulations which would justify the costs that may arise out of the proposed Regulations;
- f) To prepare a regulatory impact statement;
- g) To prepare a compliance certificate; and
- h) To prepare appropriate explanatory memoranda to accompany the proposed Regulations.

1.7 Interpretation of the Terms of Reference

In order to meet the above objectives, the consultant interpreted the terms of reference to require the consultant to undertake the following:

- a) *Analyse and interpret the objectives* of the relevant Acts of Parliament relating to the sugar sub-sector, that is, the Agriculture and Food Authority Act and the Crops Act;
- b) *Analyse and determine the objectives* of the proposed regulations: the *Crops (Sugar) (General) Regulations, 2018, the Crops (Sugar) (Imports, Exports and By-Products) Regulations 2018*;
- c) *Assess and determine* the impact and effect of the Crops (Sugar) (General) Regulations, 2018, the Crops (Sugar) (Imports, Exports and By-Products) Regulations 2018 on the private and public sectors as well as on fundamental rights and freedoms;
- d) *Determine the options available* (policy, legal, administrative, etc.) in lieu of the said regulations, which may achieve the objectives for which the regulations are made, and justify the options;

- e) *Assess and determine the cost* implication, both to the government and the private sector, should the proposed regulations be promulgated;
- f) *Assess and determine the benefits* that would accrue from the said regulation that justify the costs that may arise out of the proposed regulations;
- g) *Ensure* that the Authority and the Cabinet Secretary comply with the requirements of the Statutory Instruments Act, and, in particular-
 - i. by ensuring that there has been public participation and consultation in making the Regulations;
 - ii. by preparing Regulatory Impact Statement;
 - iii. by preparing a Compliance Certificate; and
 - iv. prepare Notice on Regulatory Impact Statement for publication in *the Gazette*.
- h) Prepare appropriate explanatory memoranda to accompany the proposed regulations.

1.8 Scope of the Consultancy

The consultant worked within the Terms of Reference and contract agreement to deliver quality output. The scope of the consultancy was as follows:

- a) Review of the Constitution of Kenya 2010, especially the Bill of Rights and the sharing of functions between the National and County governments to determine whether the proposed Regulations have unintended effect on either level of government;
- b) Review relevant Government policies on-
 - i. sugar sub-sector;
 - ii. local, regional and international trade;
 - iii. sugar production inputs and subsidies.
- c) Review other documents relating to the sugar sub-sector, including relevant Parliamentary reports, relevant Parliamentary sessional papers, research papers and other published materials on the sugar sector;
- d) Review statistics on the trade in sugar and sugar products;
- e) Review the relevant repealed statutes to determine the mischief that was intended to be addressed under the new legal regime;
- f) Review the existing statutes and regulations that will be replaced to determine the significant changes that would arise under the proposed regulations;
- g) Investigate policy options available to address the concerns;
- h) Review and assess the *social, economic* and *environmental* impact of the proposed Regulations;
- i) Review and assess the potential impact of the proposed regulations on market competition; and

- j) Prepare a comprehensive Report addressing all the issues above, and make appropriate recommendations.

1.9 Methodology

This consultancy was predominantly *qualitative*. It relied heavily on pre-existing material-primary sources of data and also secondary sources - gathered for some time on the development of the Proposed Regulations. The assignment was undertaken by Mr. Isaac Kuloba (Lead consultant) assisted by Mr Samuel Akhwale (consultant) on behalf of the Kenya School of Law (the consultant). The consultant was not required to collect from the field views or input by various stakeholders, but the sources of this information were already documented. However, the consultant did interview key persons who were involved in the development of the Regulations.

The consultant used the methodology set out next.

1.9.1 Inception Meeting & Inception Report

The consultant held an inception meeting with the client's legal team on 10th May 2018. Another meeting was held between the Lead Consultant (Mr Isaac Kuloba) with the team at the Sugar Directorate on 21st May 2018. During the inception meeting, the consultant agreed with the client on the documents to be furnished to the consultant by the client.

The consultant prepared an *Inception Report* and an agreed work plan in consultation with the legal team to ensure that the process was completed on schedule with a minimum disruption of the ongoing activities.

1.9.2 Data Collection Methods

- a) The consultant employed desktop review of statutes, circulars, policy documents, reports, statistics, records and other documents.
- b) The consultant reviewed and analysed the reports compiled by client on public participation and consultations with stakeholders on the content of the proposed regulations to determine the issues and concerns raised by the stakeholders.
- c) The consultant undertook limited focused group discussions with relevant officers of the Sugar Directorate to acquire more insight into the process leading to the Draft Regulations.

1.9.3 Constitutional and Statutory Review

The Constitution, relevant statutes, regulations, legal notices, government circulars and policy instruments, Parliamentary papers, etc. were reviewed and specific portions or sections analyzed in order to extract relevant information to contribute to the deliverables.

1.9.4 Data Analysis & Presentation

The consultant analysed the data and information collected and plot the findings in appropriate manner. The purpose of the analysis was to determine, with respect to the Proposed Regulations:

- a) The likely impact of the proposed regulations on-
 - i) the sugar sub-sector generally;
 - ii) market competition;
 - iii) cost of production of sugar and related products;
 - iv) importation and exportation of sugar.
- b) the cost implication, both to the Government (national and county governments) and the private sector;
- c) the impact on Kenya's regional or international obligations;
- d) the impact on the environment;
- e) whether there are other non-statutory options to some of the matters addressed by the regulations;
- f) Social impact.

1.10 Deliverables/Outputs

The deliverables of the consultancy were:

- a) Inception Report;
- b) Work Plan;
- c) Regulatory impact assessment report;
- d) Regulatory impact statement;
- e) Compliance certificate;
- f) Explanatory memorandum to the Regulations.

1.11 Exit Meeting

The exit meeting was held on 31st July 2018 to discuss key findings in the Interim Report, identify any gaps and omissions, correct any errors and clarify any issues arising. Useful feedback was obtained from client.

1.12 Confidentiality

The consultant observed at all times confidentiality prior to, during and after this consultancy. The consultancy was guided by best practices and ethical requirements. No information or document obtained by the consultant under this consultancy would be disclosed to any other person except for the purpose of this consultancy, or with the express consent of the Authority.

CHAPTER 2: DISCUSSION AND FINDINGS

2.1 Introduction

This Chapter discusses the *Crops (Sugar) (General) Regulations, 2018*, and the *Crops (Sugar) (Imports, Exports and By-Products) Regulations 2018*. The following are set out:

- a) The objectives of the regulations;
- b) The consultation undertaken prior to the final draft of the regulations;
- c) The broad content of the regulations (regulated activities);
- d) Analysis of the impact in its various facets.

2.1 Objectives of the Proposed Regulations

The Proposed Regulations are aimed at addressing the problems and challenges experienced over the years in the sugar industry. The challenges have already been addressed in Chapter 1 of this Report, but we shall keep on referring to them as they form the chunk of the reasons why the Authority has undertaken this study.

2.1.1 Crops (Sugar) (General) Regulations, 2018

The purpose of these Regulations is to provide for the regulation, promotion, development and oversight of the sugar industry. To 'regulate' entails the power to control the Sugar industry by means of rules; to set according to a certain standard. To 'promote', on the other hand, means to support or actively encourage the sugar industry or to further the progress thereof. Finally, 'oversight' means that the Authority is required to supervise the sugar industry (a person or their work).

Gleaned from the discussions and consultations that have taken place, the *Crops (Sugar) (General) Regulations, 2018* are meant to do accomplish the following:

- a) To set out and amplify the functions of the Sugar Directorate;
- b) To define the procedure for registering, licensing and renewing licences for processors of sugar cane;
- c) Makes provision for corporate social responsibility of a miller as well as responsibility relating to environmental sustainability;
- d) To introduce and provide for *mill command zones* to ensure an orderly development of cane and for sustainability, as well as deal with instances of 'cane poaching';²³

²³ 'Cane poaching' is euphemism for a situation where a miller benefits from another miller by luring a farmer to divert cane to the miller at the expense of the miller who may have invested in the farmers activities and therefore entitled to receive the cane and deduct his expenses from the proceeds due to the farmer.

- e) Allow the creation of organised *apex bodies*²⁴ for millers and growers;
- f) Provide registration, governance and responsibilities of out-grower institutions;
- g) Makes provision for *contracting* with respect to miller-grower, out-grower-miller, cane-cutting, harvesting and transporting arrangements;
- h) Provides for provision of payment information to growers and out-grower institutions by millers as parties may agree; further provides for payment by millers for cane supplied to be made within 30 days. The formula for cane pricing has been agreed upon and is part of the Regulations and the Authority is given power to establish sugarcane pricing committee in consultation with relevant county governments. The price of cane is determined based on weight and sucrose content;
- i) The farm-gate²⁵ system is provided, such that the weighing of cane is done at the nearest point from the cane farm, such weighing points to be approved by the Authority;
- j) Under the proposed Regulations, operators of sugar nurseries, harvesters, transporters have to be registered by the relevant County government;
- k) To deal with 'poaching' of cane, the proposed Regulations provide for sugarcane transportation permit as well as entering into contractual commitments by growers binding them to a certain miller;
- l) The proposed Regulations come up with a system of member-based association of sugar technologists to generate knowledge and improvement in the sugar husbandry;
- m) The *Schedule to the Crops (Sugar) (General) Regulations, 2018* provides details of conditions for licensing millers, including: active participation of a miller at all stages of cane development till transportation; payment of shillings 1,000,000/= for a miller and shillings 50,000/= for a juggery operator before the licence is issued to the miller. There are also grounds for the Authority to refuse to grant or renew licence (clause 16 of the *Second Schedule* to the Regulations);
- n) Specifications for different types of sugar are stated in the *Second Schedule* to ensure that there is quality assurance of the product. Conformation with Kenya Bureau of Standards requirement is both an obligation to millers and importers;

²⁴ Under apex organization arrangement, cane growers and millers are allowed to form organizations that bring several outgrower organizations or millers to represent them. These are expected to be national in character rather than being regional.

²⁵ A 'farm-gate' is used to refer to a point which is not far from where sugarcane is harvested as may be determined by the Authority. The intention is to cushion famers against losses of cane incurred by reason of spillage or theft due to the long distance from the farm to the mill.

The Regulations give some leeway to stakeholders to determine certain terms of engagement through contracts, but the Authority retains the power to standardize those terms through templates of contracts to be entered into.

2.1.2 Crops (Sugar) (Imports, Exports & By-Products) Regulations 2018

The *Crops (Sugar) (Imports, Exports and By-Products) Regulations 2018* are intended to set procedures for those who are interested in exporting or importing sugar, or otherwise dealing in by-products of sugar.

The major issues arising from stakeholders' engagement concern:

- The criteria for licensing importers and exporters of sugar and related by-product;
- The determination of quantities of sugar imports to be allocated to a person;
- The criteria and procedures for exporting sugar;
- The mechanisms for preventing *illegal imports* of sugar, or un-inspected sugar finding its way into the market;
- Monitoring of the *origins* and *destination* of sugar being brought into the market;
- Repackaging of sugar which is a threat to fair competition as it may be used to circumvent the provisions of a licence.

The Regulations do not make any radical proposal *vis a vis* the current regulations.

2.2 Stakeholder Consultations

2.2.1 Public Participation and Consultations

The Constitution of Kenya 2010 and the Statutory Instruments Act require that there be consultations in making a law or an instrument that is likely to affect people. What is the extent of the consultations? Is consultation by 'sampling' good enough? These matters have come before courts for interpretation of the meaning of "public participation."

The law does not expressly provide that records of all consultative meetings be kept but requires that public participation be done to ensure that the outcome is an instrument that truly reflect the wishes and consensus of all stakeholders in line with Article 10 of the Constitution of Kenya 2010, which declares, as one of the national principles of governance, "*patriotism, national unity, sharing and devolution of power, the rule of law, democracy and*

participation of the people.²⁶ (Emphasis added) But there must be evidence of such consultations, hence keeping of records is paramount.

The Statutory Instruments Act was recently amended²⁷ to insert the following meaning of the expression public participation:

“public participation” means involvement by the regulation making authority of persons or stakeholders that the statutory instrument may directly or indirectly apply to”

In **Moses Munyendo and 908 Others v. Attorney General and Another, Petition Number 16 of 2013** the Court rendered the following view of the issue:

“[21] As concerns the pre-parliamentary or consultative stage, the Permanent Secretary has given evidence on how different stakeholders were consulted. Some of the organisations consulted include the following; Kenya National Federation of Cooperatives, National Cotton Growers Association, Meru Central Dairy Co-operative Union Limited, Cereal Growers Association and the Horticultural Farmers and Exporters Association. The organisations consulted are, in my view, broadly representative of agricultural interests in the country. This evidence is not controverted by the petitioners. Furthermore, I do not think it is necessary that every person or professional be invited to every forum in order to satisfy the terms of Article 10. Thus the contention by the first petitioner that “I am aware that majority of Kenyans producers, processors, professionals or policy makers have not been invited to any stakeholders meetings to enrich any of the law” is not necessarily decisive of the lack of public participation...” (Emphasis added)

The above amendments also amend the definition of *explanatory memorandum*. The definition is replaced by a new definition as follows:

“explanatory memorandum” means a statement, prepared by the regulation making authority that explains the purpose and operation of the statutory instrument and it includes any documents incorporated in the statutory instrument by reference and indicates how they may be obtained.” (emphasis added).

According to the Statutory Instruments Act²⁸, an “explanatory memorandum” in relation to a statutory instrument, means a statement that-

- a) is prepared by a regulation-making authority;

²⁶ Article 10(2)(a)

²⁷ The amendment is by s. 2 of Statute Law (Miscellaneous Amendments) Act, 2018 No.4 of 2018 (Schedule), assented on 4th April, 2018 and took effect on 21st May, 2018.

²⁸ Section 2 of the Act.

- b) explains the purpose and operation of the statutory instrument;
- c) if any documents are incorporated in the statutory instrument by reference, contains a description of the documents so incorporated and indicates how they may be obtained;
- d) if consultation was undertaken before the statutory instrument was made, contains—
 - a brief statement of the way the consultation was carried out;
 - an outline of the results of the consultation; and
 - a brief explanation of any changes made to the legislation as a result of the consultation;
- e) if no such consultation was undertaken, explains why no such consultation was undertaken;
- f) contains such other information as is prescribed on the notes as set out in the Schedule; and
- g) is accompanied by the regulatory impact statement prepared for the statutory instrument.

The consultant sought to work within the above understanding to produce the deliverables in this Report.

2.2.2 Consultations Undertaken

At the heart of RIA, is the understanding that there must be consultation with those people who are likely to be affected by the statutory instrument. The Authority has been consulting for a considerable period of time and the Regulations have been in draft form for some time now. There were many formal and informal meetings that discussed the Sugar Sub-Sector, including the Regulations.

There were a number of key consultative meetings held with various stakeholders over a number of years, as per the **Appendix** to this Report. Stakeholders and the public generally were notified to attend consultative meetings on the Regulations.

Specifically, the consultations involved the following:

- a) Sugar millers, through their recognised representative organizations;
- b) Sugar growers, through their recognised representative organizations;
- c) Members of Parliament in the cane growing areas;
- d) Members of County assemblies in the cane growing areas;
- e) Council of Governors;
- f) Members of County Executives
- g) Sugar Research Institute;
- h) The National Treasury;
- i) Kenya Plant Health Inspectorate Services (KEPHIS);
- j) Inter-Governmental Relations Technical Committee (IGRTC);

- k) Privatization Commission;
- l) Ministry of Agriculture Livestock & Fisheries;
- m) Agriculture and Food Authority;
- n) Development partners.

A major stakeholder consultation meeting was held on 16th November 2017 in Kisumu, attended by the following:

- Cabinet Secretary for Agriculture, Livestock, Fisheries & Irrigation;
- Ministry of Agriculture Livestock, Fisheries & Irrigation;
- Council of Governors;
- Members of Parliament;
- Members of County Executives;
- Members of County Assemblies;
- Representatives of farmers;
- Representatives of millers;
- Development partners.

Further consultations were held on 28-29 June 2018 at Windsor Golf and Country Club and on 2nd July 2018 at the AFA Headquarters, and both dealt with the challenges facing the Sugar industry and the policy and legislative measures taken to bring back the industry to productive course.

Some recommendations made by different groups or stakeholders did not directly or at all find their way into the Regulations, and there are reasons for that:

- Re-establishment of cane development fund: there is already a fund set up for all scheduled crops, i.e. the Commodities Fund;
- State to waive debts by millers: this is a policy issue by the National Government, not a regulatory issue;
- Millers to establish their own research associations and be funded by the Government: the Regulations allow member-based technology associations but the funding is not to be made by the Government;
- Allocation of sugar development to be clear and transparent: not mentioned by reason of existence of Commodities Fund;
- Importers of sugar to be made to pay the same amount of licence fee as the millers: this would amount to an unreasonable rule as it would be difficult to make any economic sense were this to happen;
- Sugar levy is not addressed in the draft Regulations;
- Special committee to be formed (with representation from the stakeholder) to be responsible for licensing of importers: this would amount to allowing a competitor to be involved directly in licensing a competing person;

- Re-introduction of Sugar Arbitration Tribunal.²⁹

2.3 Assessment of the Impact of the Regulations

2.3.1 Introduction

Regulatory impact assessment helps the Authority to ascertain that the objectives of the Regulations are met. The assessment identifies the mischief that is sought to be cured by the Regulations, and where necessary, assess the options that are available to the proposed regulations.

In a regulatory impact assessment, a number of questions are implicit:

- a) The problem the Authority trying to solve.
- b) Why government action needed
- c) The policy options to be considered.
- d) The likely net benefit of each option.
- e) The stakeholders to be consulted about these options and the manner of consultations.
- f) How the option chosen be implement and evaluated.

We have already addressed some of the above aspects. RIA is performed when a proposed new policy or law would appear to have significant consequences on the businesses, the economy, the society, or the environment. This assessment is intended to help the Authority decide whether:

- the regulation is necessary;
- aimed at the right target;
- in proportion to the problem being addressed; and
- whether it will achieve its intended objective in a cost-effective way.

2.3.2 The Need for Regulations

The Crops Act is a framework statute that does not provide the details necessary to implement its objectives. The details on crop husbandry cannot be included in the Act, hence parliament delegates that function in

²⁹ As a matter of law, the Sugar (Arbitration Tribunal) Rules, 2008 are still in force until officially revoked (refer to section 24 of the Interpretation and General provisions Act, Chapter 2 of the Laws of Kenya. However, the Tribunal had been established under the Sugar Act 2001. With the repeal of the Act, the Regulations are hanging as there is no tribunal for the purpose of the Regulations, hence the Tribunal cannot be operationalised without an amendment to the Crops Act to specifically establish the tribunal and the Regulations be made to operationalise it.

accordance with the Constitution of Kenya 2010.³⁰ The Act expressly provides³¹ that-

The Cabinet Secretary may, in consultation with the Authority and the county governments, make regulations for the better carrying into effect of the provisions of this Act, or for prescribing anything which is to be prescribed under this Act.

The Act further provides that the Regulations so made by the Cabinet Secretary should, amongst other things, provide for the following issues:

- the relationship between farmers and other dealers in crops;
- the formula for the pricing of scheduled crops;
- the regulation of standard industry agreements;
- the forms and fees to be paid for anything to be done under this Act;
- rules for ensuring food safety including handling, transportation; processing and market standards of food crops and crop products;
- rules and regulations of any organization dealing with crops and crop products, made by any such organization to be in conformity with the provisions of this Act;
- the submission of returns and reports by the holders of licences and permits under this Act;
- standards, and the manner of grading and classification of various crop products under this Act.

Despite the many well-intended object of the regulations, the following are not adequately addressed or they have altogether been omitted in the proposed Regulations:

- The Regulations do not adequately provide for diversification at the grower and miller levels. Millers need to venture into other products, including power generation, charcoal, soft boards, etc. while famers also need to be assisted to diversify their activities.
- Sugar importers and exporters are not required by the regulations to provide more details about the *ownership* of their firms, tax compliance issues, etc.

³⁰ See Article 94 of the Constitution which provides: "(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation. (6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority."

³¹ Section 40 of the Crops Act, No. 16 of 2013.

The Sugar sub-sector has faced a number of challenges which have been highlighted earlier. One of the challenges was identified as insufficient legal framework, for example, to prevent “cane poaching” by some millers in the regions controlled by another miller. As discussed in Chapter One on the background, the Sugar industry has faced a number of *challenges* which may be summarised as follows:

- a) the plight of farmers, who complain of poor prices;
- b) the problem of import into the market of cheap sugar, thus flooding the market and stifling local sugar enterprises (millers);
- c) Sustainability of sugar cane production- most mills lack sufficient cane supplies;
- d) Lack of uniformity in the terms between various players in the sugar sector, such as harvesters, financiers, transporters, farmers and millers;
- e) Environmental degradation arising out of improper application of pesticides and poor farming methods;
- f) Lack of finances to support growers and also millers, who are heavily indebted;³²
- g) Obsolete equipment and poor technology;
- h) Lack of effective supervision and monitoring of the various players in the sub-sector, including sanctions which meant that some conduct could go undetected or unpunished.

2.3.3 New provisions in the Regulations

The two pieces of regulations³³ basically address these concerns. The Regulations are not totally new; indeed they are substantially the same as the existing Regulations but with new innovations to improve the sugar sub-sector. The impact of the new Regulations is informed by the changes introduced in the Regulations, which were not in the previous Regulations, such as:

- a) Registration of harvesters, transporters and ‘breeders’ of cane by the County government. Only registered producers of seed cane are allowed to supply the market, to ensure that quality of the cane is maintained for high yields;
- b) Supervision of the sub-sector by inspectors under the County government;

³² The Crops Act sets up Commodities Fund in section 9. The object of the Fund is intended to deal with financing of the agriculture sector as far as scheduled crops are concerned. The Commodities Fund is intended to also handle the functions that were previously handled by the Sugar Development Levy.

³³ The Crops (Sugar) (General) Regulations, 2018 and the Crops (Sugar) (Imports, Exports & By-Products) Regulations, 2018

- c) Expansion of standard contracts for various players, to create legally-binding relationships. New entrants into this arrangement are the harvesters and transporters previously left out;
- d) Require that the Authority not only generates industry data, but disseminates it;³⁴
- e) Introduction of *zoning*, or what is called *mill command zones* to ensure that there is sufficient supply of cane and also to deal with ‘cane poaching’. A transporter who transports cane across a zone requires a permit to do so, from the relevant County government.³⁵ To ensure high yields of cane, the Regulations provide for a scientific parameters would be utilised in terms of climatic selections and suitability of soil and its characteristics;
- f) Introduction of industry-driven technology associations.³⁶ These are meant to help growth of sugar technology to probably become a recognised profession, hence improve quality and productivity in the Sugar cane industry;
- g) Recognition of associations of farmers and millers as unions to promote their respective rights. The Regulations expect that there will be more orderly governance structures³⁷ and hence provide that the relevant County government shall oversee effective corporate governance for grower institutions.³⁸ Formation of apex association is expected to bring together millers or growers for collective decision-making and action;
- h) Provide for capacity building within the industry, including training of farmers and provision of extension services;
- i) Provision of more orderly manner of election of representatives;
- j) Enhancement of the role of the Authority in matters of the industry;
- k) The County governments to provide extension services to support growing of the cane, unlike under the existing arrangement where that function is granted to the millers and it is not mandatory.³⁹ Supervision extends inspecting millers, cane nurseries and warehouses within the county;
- l) The Regulations now introduce a fee for registering a miller, a phenomenon that was not provided for in the previous regime.⁴⁰ What was provided was annual licensing fee.

³⁴ In one of the consultative forums for the Regulations, millers raised concerns that statistics and information on sugar imports were not available to them. The Regulations now require the Authority to share the information.

³⁵ Regulation 32(1) of the Crops (Sugar) (General) Regulations, 2018

³⁶ Regulation 36 *ibid.*

³⁷ Regulation 18 of the Crops (Sugar) (General) Regulations, 2018

³⁸ Regulation 4(f) of the Crops (Sugar) (General) Regulations, 2018

³⁹ See s. 16(5) of the Sugar Act, No. 10 of 2001 (repealed)

⁴⁰ Regulation 9(1) of the Crops (Sugar) (General) Regulations, 2018 and s. 15 of the Sugar Act (*ibid.*)

- m) The Regulations provide for consultation on a number of issues in the industry between the Authority (National Government) and the County governments in the spirit of the *Fourth Schedule* to the Constitution of Kenya 2010;
- n) Enforcement of codes of conduct and security in the relevant areas by the County government in collaboration with other agencies makes the County government an active participant in the Sugar industry in terms of curbing malpractices;⁴¹
- o) The introduction of *sugarcane development plans* as a requirement for a miller and sanctions for production falling below a certain threshold means that millers will have to work hard to ensure sustainability of the cane supplies vis a vis the milling capacity;
- p) Packaging and branding;
- q) Delays and uncertainties in terms of what is payable to a grower and when it is payable is addressed. A miller and out grower institution must give statement to the grower. Payment for cane supplied is required to be made within 30 days and any delay may attract interests as per the contract between the parties. Sugar cane testing unit would ensure that it tests for sucrose content and weight, which are the bases of pricing.⁴² Cane pricing is supposed to be more consultative and competitive with the possibility that there will be an all-inclusive Sugarcane Pricing Committee.⁴³
- r) The Import Regulations hardly introduce any new provisions. The Regulations restate the position as before but adds an obligation to the Authority to “disseminate” data on sugar imports. What the expression ‘disseminate’ means is not clear, but may be presumed to refer to sharing of information on sugar import with millers and other stakeholders.⁴⁴

2.3.4 The Impact of the Proposed Regulations

In assessing the likely impact of a regulatory action or instrument, the baseline position is relevant. In the sugar industry, there have been Regulations. What was lacking was clear legal and policy direction on some aspects. There were also weak institutional infrastructure to effectively manage and oversee the sector. It must also be stated that there has been no

⁴¹ It is necessary to re-look at regulation 4 (d) of the Crops (Sugar) (General) Regulations, 2018, which appear to cede power to enforce national and County laws to the County governments. The power may need to be confined to enforcing of County laws relating to sugar.

⁴² Regulation 34(8)

⁴³ Regulation 34(2) *ibid.*

⁴⁴ Lack of information on import statistics is one of the problems raised by stakeholders, principally the millers who are the hardest hit by irregular or uncontrolled sugar imports.

sector policy and this may account for lack of clear direction to meet the many needs of stakeholders, principally the millers and the growers.

Good regulations will have certain characteristics which make them the most appropriate option to take in order to influence action or conduct. Some of the qualities that will be sought in the two pieces of legislation are as follows:

- a) *Proportionate*: the Regulations must be justified and must not impose obligations that are disproportionate to the benefits to be derived there from. They must be mindful of the compliance burden imposed. The regulation should be financially viable; cost-effective; benefits justify costs. Remedies must be appropriate to the risk posed; (see for example Art. 201 of the Constitution);
- b) *Effective*: the goal of the Regulations must be practically achievable; it should be capable of achieving its objectives.
- c) *Legally sound*: consistent with the Constitution, treaties or convention and existing law (see Art. 2 of the Constitution)
- d) *Efficient*: the Regulations must be capable of achieving measurable results in terms of implementation; operationally practicable; efficient to manage and enforce;
- e) The Regulations must be *focused on the problem* and minimize *side effects*;
- f) *Predictable and stable* in application; no likelihood of unforeseen or undesired consequences;
- g) *Transparent*: Legislation should not be secretive; need of prior consultations; likely to secure public acceptance and reasonable compliance (Art. 10 (2) of the Constitution)
- h) *Clear*: the Regulations should be understood by those who are subject to them, i.e. the participants in the Sugar industry and the general public. They must be clearly drafted and reasonably comprehensible, especially to those directly affected by or interested in the regulations;
- i) *Equity*: there is need to ensure that regulations made do not unduly discriminate against or prejudice sections of the society, or impose a burden that is too heavy on the subject or the section of the population that is subject to the regulations (see Art. 27 (1)).
- j) *Published* promptly and readily accessible (see Art. 116 of Constitution). This is an aspect of communication: that regulations must be communicated to those to whom they apply. It may be necessary to conduct public education of newly enacted legislation or regulation;
- k) Employ the *minimum regulation* necessary to achieve objectives. They should not be unduly prescriptive.

2.3.4.1 Impact on the Fundamental Rights and Freedoms

The Constitution of Kenya 2010 declares that-

*The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.*⁴⁵

Further, the grand law provides:

*"It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights."*⁴⁶

The obligation to observe these and other Constitutional provisions therefore means that the Authority and the Ministry, being public entities, are required to comply with the imperatives set out in the Constitution while developing Regulations. The Bill of Rights is a great masterpiece of normative order which guarantees the citizens the necessary rights and freedoms without which the purpose of Government would be a nullity.

In promulgating the Regulations, the Authority must not restrict, limit or diminish the Bill of Rights unless the action is justified under Article 24 (1) of the Constitution of Kenya 2010.⁴⁷

There is no negative impact of the Regulations on the fundamental rights and freedoms. Upon analysis of the two sets of Regulations, the following are discernible:

The Regulations provide for:

- a) *Fair administrative actions* procedure by providing for appellate procedure against adverse decisions.⁴⁸ In any case, despite the Regulations, the procedure provided under the Fair Administrative Actions Act⁴⁹ apply to all relevant actions authorised by, or incidental to the actions under, the proposed Regulations. But provision for cancellation of licences need be *expressly* be subject to Fair Administrative Actions Act, as the Regulations are silent;
- b) The right of growers and millers to form their respective *unions* or apex bodies and membership to those unions is not compulsory, in recognition of the freedoms of association under Article 36 of the Constitution of Kenya 2010;
- c) *Right to information*: the Regulations recognise the *right to information* by every person interested in the Sugar industry. The Regulations

⁴⁵ Article 19(1) of the Constitution of Kenya 2010

⁴⁶ Article 21(1), *ibid.*

⁴⁷ Article 24(1) provides that- "*A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...*"

⁴⁸ Article 47 of the Constitution of Kenya 2010

⁴⁹ Act No. 4 of 2015.

provide for maintenance of data and information by the various organs in the sugar governance structures, including the Authority, the millers, and out grower associations.⁵⁰

- d) *Right to quality services*: the Regulations also recognise, though indirectly, the right of citizens getting the highest possible quality of services delivered by a public entity (the Authority, public millers and others) as required under Article 46 of the Constitution.
- e) *Environmental rights*: the right to a clean environment is a Constitutional issue.⁵¹ The State is required to manage the environment in a sustainable manner, and to eliminate processes that are likely to endanger the environment. The *Crops (Sugar) (General) Regulations, 2018* encourage the application of practices that are intended to protect the environment. Regulation 19 of the above-mentioned Regulations makes reference to environmental impact assessment. Further, in licensing millers, the Environmental Management and Coordination Act, 1999, is applicable, whether or not the Regulations refer to that Act. Consequently, there is no negative impact on the environment if the regulations are operationalised.

The Regulations however, do not expressly provide for:

- Gender equity in certain positions (Article 27 of the Constitution);
- Equity in terms of recognizing the role of the youth and persons with disability (articles 54 & 55 of the Constitution).

2.3.4.2 Impact on the Private Sector

Private sector comprises largely the private millers and the growers of sugarcane. It also includes dealers in sugar (including traders) as well as the consumers of the sugar products.

It is anticipated that the Regulations would positively impact on the private sector by increasing productivity upon better harnessing of resources toward sugar production and processing. Miller-grower relationship is expected to be strengthened and this will have positive impact on farm productivity. The use of miller-grower contracts will help drive productivity improvements by enabling the mill to drive adoption of better seed varieties and advanced farm practices. It will also incentivize the mill for investing in *extension services* for improving the farm productivity.

By incorporating sugar technology into the process, it is anticipated that the growers' yields would improve and this would trickle up to the millers and impact on their sustainability campaign in the sugar industry.

⁵⁰ See regulations 3(d) & 16 of the Crops (Sugar) (General) Regulations 2018

⁵¹ Articles 69 & 70 of the Constitution of Kenya 2010.

The Regulations would ensure that there are proper structures of governance within growers' and millers' organizations which will promote efficiency and accountability of actions by those entrusted with responsibilities.

It is envisaged that the proposed Regulations would standardize contracts relating to cane growing, harvesting and transportation to ensure that growers are certain about their obligations and the cost of production. The Regulations address cost of production by trying to control costs incurred in harvesting and transportation. In a report on sugar industry in Australia (2006)⁵² it was found that 30% of the costs of sugar production are associated with harvesting and transportation of cane.

The Regulations provide for remedies for delayed payment to farmers for their supplies to the millers. This would eliminate or reduce excessive delays in payment for cane supplied to millers that has been of concern in the industry, though affected by other extraneous factors.

The result of the Regulations includes more democratic participation of the private sector in the management sugar industry. More structured methods of discussing and resolving issues relating to sugarcane are provided. There is enhanced opportunity to farmers and millers to discuss and solve issues pertaining to the sugar industry. Section 40 (1) of the Agriculture and Food Authority Act provides that-

For purposes of ensuring effective participation of farmers in the governance of the agricultural sector in Kenya, there shall be close consultation with all registered stakeholder organisations in the development of policies or regulations and before the making of any major decision that has effect on the agricultural sector.

Opportunity to have value for money and reasonable return through mechanisms proposed for determining or setting cane prices in a consultative manner. The regulations, through setting the formula for determining cane prices, would have an impact on the *ex-factory* price of the sugar or its product, since this price is directly affected by the price of the input into the sugar production as well as the price that may be set by the Sugarcane Pricing Committee.⁵³ The impact of cane prices can have considerable impact on the economy. Once the cane price and sugar price are aligned, high cane prices would imply high sugar prices and it would impact the consumer interests. Also, low sugar prices would imply low cane price and it would impact the farmer interests. A sustainable price band would therefore be required, which could balance the consumer and farmer interests on a long term basis. So the

⁵²Sugar Industry Oversight Group Strategic Vision (2006): http://Www.Agriculture.Gov.Au/Sitecollectiondocuments/Ag-Food/Crops/Sugar/Sirp-2004/Final_Sugar_Vision.Pdf (accessed on 23rd July 2018)

⁵³ See regulation 34(2) *ibid*.

Sugarcane Pricing Committee, if properly directed, would help a great deal in balancing the various conflicting interests, which would in turn trickle down to the ordinary consumer of sugar and sugar products.

By encouraging the various players to engage in sustainable farming practices, the Regulations enable the social elevation of the members of the society in the cane-growing areas. Roads constructed and extension service provided have positive externality effect on the society in terms of environment, education and health as well as good road network.

Despite these benefits, the Regulations may increase bureaucracy due to the consultations on many issues between the Authority and the relevant County governments.

2.3.4.3 Impact on the Public Sector

The improvement in the governance and management of the sugar industry is the natural output of the proposed regulations. The Regulations are expected to provide solution to the sugar industry that has suffered challenges in different dimensions.

Amongst the benefits to flow from the new regime is clarity of relationship and roles between National Government and relevant County governments. The Regulations set out the mandate and powers of each level of government, hence this facilitates smooth interrelationship between the two levels of government as envisaged under the Constitution of Kenya 2010.

The Regulations, as read with the Agriculture and Food Authority Act, allow *depoliticization* of the Board of the Authority which has taken over the functions of the defunct Sugar Board. Previously, the Board consisted of representatives of millers and growers *elected* by their members. Qualifications were not given. The new regime provides for appointment of eight (8) representatives, "*being farmers representing farmer organizations in the major crop sub-sector s in Kenya*"⁵⁴ appointed by the Cabinet Secretary in consultation with the Council of Governors. With minimum academic and professional qualifications, this is expected to enhance the quality of leadership and governance in the Sugar industry.

The Regulations would enhance compliance with the law and better accountability for actions on the part of the public millers. The oversight mechanism includes both the Authority, the County government and other organs, such as the Kenya Bureau of Standards.

⁵⁴ See section 5(1) of the Agriculture and Food Authority Act.

Unlike in the old regime, the Regulations provide clearer procedures for licensing millers and sanctioning malpractices. The factors to be considered in licensing are stipulated.

There is enhanced role of County governments in the sugar sector in terms of providing grass-root support in extension services and monitoring of compliance with the Regulations.⁵⁵ The County Government is responsible for registering harvesters and transporters, and issuing cane movement permit.

Under the proposed regulatory regime, there will be better public participation by stakeholders in matters affecting them in line with Article 10 of the Constitution of Kenya 2010.

Finally, it is envisaged that there will be a rise in costs of implementing the Regulations: registration of millers, monitoring and enforcing compliance with the Regulations are expected to lead to a rise in costs of implementing the Regulations.

2.4 Alternative Options

Regulation is not the only means of effecting Government policy. There are other ways of dealing with problems, including at the very least taking no action in appropriate circumstances. Regulations often come with costs and other consequences. To quote Peter Mumford⁵⁶ statement:

“Regulatory interventions are necessary for sustaining the environment, saving lives, protecting consumers and vulnerable social and economic groups, and promoting better economic performance by, for example, safeguarding competition in the marketplace. There are however, costs associated with any regulatory intervention and these will vary depending on how well the regulatory regime is designed, implemented and administered.”

There are a number of options that are also available, more so because regulations cannot deal with all matters. Some of the options that may be exploited include:

a) Policy

Instead of prescribing regulations, some matters are best left to policy. The Ministry of Agriculture, Livestock, Fisheries & Irrigation is working to produce a policy that will guide the Sugar industry. This policy, though not law, will inform what is or is not permissible with respect to the industry and may be

⁵⁵ See regulation 4(d) of the Crops (Sugar) (General) Regulations, 2018.

⁵⁶ Mumford, Peter, 2003, 'What Constitutes Good Regulation for Services?' Ministry of Economic Development, Wellington New Zealand, p. 2

implemented without regulations. For instance, regulation 19 of the Draft *Crops (Sugar) (General) Regulations, 2018* provide that-

A miller shall demonstrate their ability to continuously satisfy cultural and socio-economic needs of its local community, in particular, the miller shall positively influence—(a) population dynamics; (b) Kenya’s economy; (c) agriculture sector institutions; (d) infrastructure; (e) communication; (f) education; (g) health; and (h) the status of food and cash crops. (2) A miller shall ensure that the sugarcane mill does not have a detrimental impact on the local and global environment in accordance with the Environmental Management and Coordination Act, 1999.

This provision should better be addressed through *policy guidelines*. Policy may be communicated through conditions in the licence or just as a policy or guideline. For example, the Agriculture and Food Authority Act provides that the Cabinet Secretary may make *guidelines* in relation to user of any particular land.⁵⁷ The above provision in the draft Regulations may be addressed under *guidelines*. The same applies to regulation 18 dealing with matters of corporate governance of registered out grower institutions.

b) Self-regulation

The Government should allow, in appropriate cases, for the sector to regulate itself up to a certain threshold. For instance, in the current Regulations, the Government has allowed parties to negotiate terms of contract but provides a template which contains standard terms. For instance the problem of “cane poaching” is a good candidate for allowing millers and farmers’ organization to deal with through self-regulation.

c) Market-based instruments

There are a number of instruments that may be used in lieu of regulation, such as *competition*. Auction method, for example, which existed under the previous Regulations but which has now been dropped, allows certain issues to be sorted out by competition amongst interested parties.

⁵⁷ S. 21 of the AFA Act provides: “The Cabinet Secretary shall, on the advice of the Authority, and in consultation with the National Land Commission, provide ...land development guidelines, applicable in respect of any category of agricultural land to the owners or the occupiers thereof. (2) The land development guidelines contemplated under subsection (1) shall be implemented by the respective county governments taking into account the circumstances of the respective areas under their jurisdiction. (3) The guidelines referred to in this section may require the adoption of such system of management or farming practice or other system in relation to land in question (including the execution of such work and the placing of such things in, on or over the land, from time to time) as may be necessary for the proper development of land for agricultural purposes.” (See also ss. 22 & 23 of the Act for further related issues).

d) Information or guidance

In some cases, it may not be desirable to have a binding rule on an aspect which need go to the realm of a rule. Remember that a rule must reflect a policy and it becomes a rule only because the policy is sufficiently concrete as to be considered a norm from which no derogation is permitted. Information approaches-education and persuasion-can be used to achieve certain objectives. Strategies which attempt to address perceived problems by providing more information, or changing the distribution of information can improve market functioning by enabling people to make better informed decisions.⁵⁸ An example where this option may be used is on environmental sustainability and promotion of sugar cane high yields production by growers. This may be achieved through extension services, which is provided in the Regulations.⁵⁹

e) Procedural Rules

Governing the steps officials are expected to follow in carrying out specified administrative processes, e.g. through circulars. Such a procedure is directed at the person authorizing certain things as opposed to every person who is involved in a process.

f) Recommendations

This involves providing *advisory guidance* as to appropriate action in order to implement specified policy objectives. Guidance may for instance be provided on the issue of good crop husbandry through information given to farmers. There is no need, except for the purpose of environmental conservation or protection, or for physical planning purposes, to prescribe by regulations what a farmer should do on his or her plot, because it may be difficult to enforce certain practices unless well thought-out.

g) Fiscal Instruments

Tax may be used to deal with certain problems. Cheap sugar imports need not be prohibited but the Government can impose heavy import duty on it such that it becomes non-profitable to those who want to take advantage of the short supply of the product to sneak in cheap sugar.

Further, the management of environmental conservation⁶⁰ including managing noxious weeds can be achieved by using *incentives* in favour of growers. The Government could zero-rate taxes on applicable chemicals to

⁵⁸ See the OECD Report: *Alternatives to Traditional Regulation*, (Glen Hepburn) found at <https://www.oecd.org/gov/regulatory-policy/42245468.pdf> (accessed on 16th July 2018)

⁵⁹ See Regulation 4(a) of the Crops (sugar) (General) Regulations 2018.

⁶⁰ See, for example, Regulation 19 of the Crops (Sugar) (general) Regulations 2018 which attempt to impose environmental sustainability practice upon millers.

encourage farmers to empress the practice. It can also be effected by making it very expensive for a grower to choose a particular practice that is harmful to the environment.

h) Codes of conduct

Codes of conduct prescribe guidelines or standards for action or behaviour in specified contexts. These are ideal for matters that are difficult to monitor on continuous basis. For example, in the sugar sector, a code of conduct could easily address the question of poaching, corporate governance of registered out grower organizations, etc.

i) Social partnership agreements

Social partnerships between government and civil society, etc. may play roles that regulation would have done. In the sugar industry, social partnerships may be utilised as between millers' organization and growers' organization to promote certain practices for the benefit of the two sides.

CHAPTER 3: CONCLUSION AND RECOMMENDATIONS

3.1 Introduction

Under the scope of this consultancy, the consultant was required to do a number of things, as follows, after reviewing the existing legal and policy framework:

- a) Review and assess the *social, economic and environmental* impact of the proposed regulations. Under this head, the Consultant investigated and reviewed: impact on fundamental rights and freedom; impact on the private sector; impact on the public sector; and impact on competition;
- b) Investigate policy options available to address the concerns;
- c) Prepare a comprehensive report on all the issues above, and make appropriate recommendations.

This Chapter sets out the conclusion on regulatory impact assessment and makes recommendations on action necessary to achieve the objectives of the Regulations.

3.2 Impact of the Regulations

The impact of the Regulations is positive in different dimensions discussed. There is no adverse impact on fundamental rights, environment, public sector, private sector and the business. The effect of the Regulations will be to improve these aspects.

There will be increased bureaucracy in some areas, including consultations, licensing of millers, and etc. but the projected benefits outweigh any burdens that are likely to be imposed by the Regulations. Substantial portion of the Regulations retain the identity of the old Regulations but with a few noble provisions introduced.

There is no negative impact on the fundamental rights and freedoms of the citizen or sugar industry stakeholders. The Regulations would impact positively on social, environmental and economic fronts.

3.3 Recommendations

The following may be considered to bolster the Regulations and support the growth of the Sugar industry.

We recommend that the options set out below should be considered after the Regulations have been operationalised. The options will support the Regulations by filling out missing elements in the Regulations. Where legislative review is required, the options may be considered after such legislative review has been done.

3.3.1 Promulgate the Proposed Regulations

The proposed Regulations have many positive aspects that would help to enhance the attainment of the objectives of the sugar industry. It goes without saying that the Gazettement of the Regulations is the first option. The projected impact has already been discussed in Chapter Three.

The proposed Regulations are the basic tools for actualizing the Act and enabling the full realization of the object of the Crops Act, as far as sugar industry is concerned.

3.3.2 Recommendation

The proposed Regulations should be *Gazetted*, after correcting any provisions that are not properly aligned to the legislation and policy. The short-comings in the draft Regulations are not substantial but may be dealt later by way of amendment. Some parts of the Regulations need to be re-drafted in proper drafting language for clarity to avoid ambiguities in meaning or failing to communicate the intended legislative intent.

3.3.3 National Policy on Sugar Industry

In view of the provisions of Article 186 (1) of the Constitution of Kenya 2010, as read with the *Fourth Schedule* to the Constitution, the need for a national policy to guide the industry cannot be gainsaid. Section 29 of Part 1 of the *Fourth Schedule* mandates the national government to make “Agriculture Policy.” Section 10 of the *Fourth Schedule* provides that the county government is responsible for implementing specific national policies. The Sugar industry policy is one of those policies that the relevant county governments will be called upon to implement. The Agriculture and Food Authority Act⁶¹ provides that-

Each county government shall, for purposes of ensuring uniformity and national standards in the agricultural sector, through its legislation and administrative action, implement and act in accordance with the national policy guidelines issued by the Cabinet Secretary on the advice of the Authority under this Act. (Emphasis added).

The ratification of National Policy for Sugar Industry is very crucial as a tool to guide County Government in making their legislation and policy guidelines.

⁶¹ Section 29(3) of the Act

The *Crops (Sugar) (General) Regulations, 2018*⁶² provide for the role of county government in the sugar industry and the legislation and policy must speak the same language to ensure that there is harmony.

Though Agriculture policy is a wide subject, the making of a specific policy on sugar is well within that mandate. In making that policy, consistent with good policy-making principles, the national government, through the Authority, must consult with all key stakeholders in the sugar industry.

At the time of this report, there was already a *Draft Sugar Industry Policy* (2016) which addresses key policy concerns for the industry. The objectives of the (draft) *Sugar Industry Policy*⁶³ are stated as:

- a) To ensure sustainable and adequate supply of quality cane that meets licensed milling requirements and guarantees favourable returns on farmers' investment;
- b) To enhance the milling efficiency and competitiveness of sugar and co-products production;
- c) To promote a favourable business environment both locally and internationally which will guarantee sustainable supply of quality and affordable sugar products to the consumer;
- d) To facilitate sustainable access to affordable credit and mitigate industry risk for guaranteed quality raw material supply and returns to the farmer;
- e) Provide adequate support infrastructure to enhance efficiency of operations in the industry;
- f) To create a vibrant and modern research sector that is responsive to the needs of stakeholders in the sugar industry;
- g) To develop structures and systems that will enhance service delivery and promote sustainability of the sector;
- h) To establish and promote robust institutional arrangements, a legal and regulatory framework that facilitates good governance and efficiency in the sugar industry operations.

These objectives are noble and are, subject to some reservations and qualifications as will be set out in the following portion of the report, generally reflected in the proposed *(Crops (Sugar) (General) Regulations, 2018* and *the Crops (Sugar) (Import, Export & By-products) Regulations 2018*.

⁶² Section 4 of the draft Regulations.

⁶³ See page 13 of the Draft Sugar Industry Policy (2016)

3.3.4 Recommendations

- a) The Ministry of Agriculture, Livestock, Fisheries & Irrigation should fast-track the finalization of the *Sugar Industry Policy*. The policy is supposed to guide the development of Regulations. Ideally, the Policy should precede any legislation. Policy bequeaths legislation. But the policy must abide by the Constitution of Kenya 2010.
- b) Some of the regulated matters in the proposed Regulations should be left to be addressed through policy option: the requirement that a miller considers social and cultural factors in undertaking its process.⁶⁴This provision should not crystallise into a law. One way of applying it is through conditions to be inserted in a millers licence; another issue which should be left to policy is corporate governance issues affecting registered out growers. The Authority may come up with a code of conduct or guidelines for governance of the institutions.

3.3.5 Harmonise Legislative & Policy Provisions

There is contradiction in some provisions of the Crops Act and the proposed regulations. For instance, section 16 of the Crops Act provides that the Authority shall be responsible for registering “dealers in a scheduled crop”⁶⁵, who therefore include harvesters and transporters of cane. However, the Regulations contradict this by providing that the power to licence harvesters lies with the relevant county government.

Unless the legal provisions are harmonized with the Regulations as well as the constitution (especially the *Fourth Schedule*) there is bound to be conflict between the Authority and the county governments on the implementation of their respective mandate.

Although poor utilization of technology in the sugar sector has been identified by stakeholders and also in the draft Sugar Industry Policy as a matter of concern, the Regulations do not adequately address this issue. The Policy states that-

⁶⁴ The draft Crops (Sugar) (General) Regulations, 2018 provide: “A miller shall demonstrate their ability to continuously satisfy cultural and socio-economic needs of its local community, in particular, the miller shall positively influence—(a) population dynamics; (b) Kenya’s economy; (c) agriculture sector institutions; (d) infrastructure; (e) communication; (f) education; (g) health; and (h) the status of food and cash crops. (2) A miller shall ensure that the sugarcane mill does not have a detrimental impact on the local and global environment in accordance with the *Environmental Management and Coordination Act, 1999*.”

⁶⁵Under the Crops Act (s.2), “dealing in crop” includes collecting, transporting, storing, buying or selling crops or crop products but in the case of food crops, excludes any noncommercial activity”.

*Inadequate Research capacity: The Industry has inadequate human, physical and financial capacity to undertake research that meets its requirements. The industry has inadequate technical staff in key research areas e.g. industrial, engineering and marketing. Some laboratories within the industry are not well equipped. Research financing has relied on Sugar Development levy allocation, donor funding and government grants which are not sufficient to carry out sustainable research activities.*⁶⁶

The draft *Crops (Sugar) (General) Regulations, 2018 Crops (Sugar) (General) Regulations, 2018* provides⁶⁷ that the Authority shall “encourage and support the formation, growth and regulation of a vibrant member-based sugar technologists’ association” which would provide leadership in developing sugar technology and provide technical or professional knowledge.” This provision does not seek to harmonise the existence of institutions dealing with research in the Sugar industry such as the Kenya Sugar Research Institute, as well as financing of research.

The problem is identified but the law has not adequately tried to solve it; the effect will be that there will still be problem in terms of sugar development technology as well as sugar processing technology.

The Crops Act does not provide for mechanisms for disputes settlement; it refers to settlement of arbitration disputes “between farmers and other crop dealers.”⁶⁸ This does not address the issue clearly and it would have been better for the Act to be more explicit on this issue rather than leaving it to rules to be made by the Cabinet Secretary. The Agriculture and Food Authority Act also provides that a person aggrieved by a decision made pursuant to the Act, may appeal to the Environment and Land Court.⁶⁹

⁶⁶ Page 15 of the Policy.

⁶⁷ Regulation 36 of the Regulations.

⁶⁸ Section 41 of the Crops Act.

⁶⁹ See section 41 of the Agriculture and Food Authority Act

3.3.6 Recommendations

- The Regulations should expressly recognise an institution that is empowered to lead in the development of sugar technology through research.⁷⁰ By leaving out this existing institutional framework, the Act and the Regulations may adversely affect the Sugar industry where technology-related problem has been identified.
- There should be sugar development levy to help finance various projects in the cane development, growing and processing. The repealed Act provided for imposition of sugar development levy⁷¹ for the purpose of creating and maintaining a fund to be used by the then Sugar Board “for the furtherance of the objects of the Board” which included providing financial credit facilities to millers and farmers.
- The Crops Act should establish Crops Tribunal to resolve disputes in the Sugar industry as well as those arising from sub-sectors of other scheduled crops. Once this is done, regulations may then provide rules for the operationalisation of the tribunal.

3.3.7 Market Instruments

Certain conducts in the market are better left to be dealt with through market instruments, principally *competition*. Kenya being a developing country, there is usually pressure for the Government to control matters such as price of commodities or produce or market share.

For instance, under the *Sugar (Imports, Exports and By-Products) Regulations 2008*, the *Second Schedule* to the Regulations provide for some competition on the right to import sugar. There is no similar mechanism in the proposed Regulations, hence the use of market instrument of competition is not available. Without competition, complaints about favouritism and corruption in the issuance of import licence will continue to be raised by parties who feel excluded from the import business unfairly.

The Regulations propose the establishment of Sugarcane Pricing Committee⁷² with the mandate to revise from time to time the cane prices based on sucrose content and weight, “and any other measurable quality parameter of sugarcane.” The market has no place in the determination of the sugarcane prices. The Regulations do not however deal with the prices of the

⁷⁰ The Second Schedule to the Sugar Act 2001 (repealed) provided for the role of the Sugar Research Foundation in promoting research and innovativeness in several aspects. The Foundation was also empowered to raise funds for research (which was heavily donor-related).

⁷¹ See sections 18 and 19 of the Sugar Act 2001 (repealed).

⁷² Regulation 34(2) of the Crops (Sugar) (General) Regulations, 2018.

processed sugar, which means that millers could hike prices without regard to the prevailing price of the sugarcane and this may hurt general consumers of the sugar and its products.

The Agriculture and Food Authority Act requires that the Authority-

In the discharge of its functions under this Act or any other written law, the Authority shall ensure that there are no dominant undertakings in the sector as defined in section 23 of the Competition Act (Cap. 504).⁷³

This provision is, in effect, mandating the Authority to create an enabling environment for competition in the industry and not to create monopolies or duopolies.

3.3.8 Recommendation

Introduce some elements of *competition* in the market by making the right to import sugar competitive. The *Second Schedule* to the Sugar Act 2001 provided for auctioning of the right to import, and this was better than a system where the Authority has absolute discretion to licence a person who intends to import sugar or its by-product.

3.3.9 Self-regulation

In a regulatory paradigm, we can roughly say that legislation is the highest form of regulation. In the middle we have co-regulation and finally at the extreme end, there is self-regulation. In Kenya, the public transport service industry has some form of co-regulation and self-regulation.

Governments employ a variety of institutional arrangements to regulate the economy. One exceedingly common arrangement in developed countries is self-regulation, the “deliberate delegation of the state’s law-making powers to an agency, the membership of which wholly or mainly comprises representatives of the firms or individuals whose activities are being regulated” (Ogus, 1999, p. 590).⁷⁴

‘Regulation’ encompasses three components:

- a) Legislation: where rules are defined;
- b) Enforcement: where appropriate actions are initiated against the rule violators; and

⁷³ Section 44 of the Act.

⁷⁴ P. Grajzl, P. Murrell, *Journal of Comparative Economics* 35 (2007) 520–545, p. 521

- c) Adjudication: where consideration is made if the rules had indeed been breached, and where the appropriate sanctions for such breach are determined.

In 'self-regulation' it is envisaged that the Sugar industry is responsible for at least two out of the three components, ideally the first two components above.

The Sugar industry in Kenya has adopted, to a small extent, what may be referred to as co-regulation: there is leeway allowed where industry players lay down rules for themselves. Non-compliance with the given rules is directly or at least indirectly (e.g., in the form of enforcement of contracts) sanctioned by the state (the Authority).

Self-regulation system is situated at the end of the "regulatory scale." Under this system, social groups (growers, providers, millers, etc.) draw up their own regulations in order to achieve their objectives and take full responsibility for monitoring compliance with them. The regulations may take the form of technical or qualitative standards, potentially combined with codes of conduct defining good and bad practice. Codes of conduct may also contain rules on out-of-court mediation and on the structures of the relevant complaints bodies. These rules may be laid down by a self-regulatory organisation created by the parties concerned (ideally involving other interested parties, such as consumers). The body so-created may also monitor compliance with the rules and impose any sanctions, if provided.

What aspects of the sugar industry may be removed from regulation to co-regulation or self-regulation?

3.3.10 Recommendations

- a) Control of ‘cane poaching’: implementation of the proposed Regulations⁷⁵ may require a costly surveillance mechanism on the part of County governments. Some aspects of this process should be left to be undertaken through self-regulation by the millers. The millers and growers would be in a better position, through their organization, to enforce adherence to certain normative rules dealing with poaching of cane. The law need only to provide broad legal and institutional framework for this to be implemented. It will save the Government at both levels substantial amounts of money.
- b) To ensure that there is no conflict in roles of different organs, the Crops Act should make a provision that would not allow room for a legal challenge on the ground of the doctrine of *delegatus non potest delegare*.⁷⁶ The Act has delegated power to make rules to the Cabinet Secretary. The Cabinet Secretary, under this rule, cannot delegate further unless Parliament has expressly allowed further delegation to other sugar industry organs.
- c) The provisions on registration of growers may also effectively be handled within the framework of self-regulation by the registered millers or out grower organizations where applicable.

3.3.11 Enhance Co-regulatory Mechanism

Co-regulation affords government the opportunity to involve industry and other stakeholders in the investigation and enforcement of the regulations. This can lead to significantly greater levels of compliance, as stakeholders in the industry become co-monitors, while it also encourages participants to see good industry-wide performance as a common good, through its impact on public perceptions. From the government viewpoint, co-regulation can be highly cost effective, as industry experts will often participate on a voluntary basis, while the “arm’s length” relationship with government can also mean lower overheads and greater responsiveness.

There are a number of aspects that may be subjected to co-regulation regime, such as prevention of ‘cane poaching’, harvesting and transportation issues, etc. The law need only provide framework for co-regulation and this will be a useful tool in dealing with a few problematic issues in the sugar industry.

⁷⁵ See Regulation 4(d) of the Crops (Sugar) (General) Regulations, 2018.

⁷⁶ This Latin maxim means that *an agent to whom an authority or decision making power has been delegated by a principal or higher authority may not delegate it to a sub agent unless the original delegator expressly authorizes it, or there is an implied authority to do so. It is a fundamental principle of administrative law. A delegate may not delegate.*

3.3.12 Recommendation

Amend the Crops Act to provide for a legal framework to enable co-regulation to be effected. As seen in the case of self-regulation, the Act needs to empower co-regulation, otherwise any resultant rules would be amenable to be quashed by the High Court under the doctrine of *delegatus non potest delegare*.

3.3.13 Fiscal Measures

Fiscal measures involve use of tax system to affect behaviour in the industry. It relies on the principle that people would choose a more affordable methods in producing goods rather than pursue an expensive avenue. Where a tax rate is high, the cost increases and hence tax measures can be effective tools for affecting market conduct and other behavioural acts.

3.3.14 Recommendations

Use tax measures to act as incentives or disincentives to deal with certain practices in the sugar industry. Whenever a Finance Bill is to be passed, it is possible for the Cabinet Secretary to include provisions that would encourage acts that build the industry and at the same time discourage activities that have negative consequences on people, business or the environment.



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29th August 2018

Appendix: Consultations with Stakeholders

VENUE & DATE	STAKEHOLDERS	PROPOSALS/RECOMMENDATIONS
Kisumu Hotel: 27/5/16	<ul style="list-style-type: none"> • AFA, Sugar Directorate • Nzoia Sugar Company • Kenya National Federation of Sugarcane Farmers • Muhoroni Sugar Company • Kibos Sugar Company • Transmara Sugar Company • Mumias Sugar Company • Butali Sugar Company • West Kenya Sugar Company/Sukari Sugar Company • Sony Sugar Company • Chemelil Sugar Company 	<ul style="list-style-type: none"> • General consultations undertaken • No particular resolutions available
Imperial Hotel: 23/8/2016	<ul style="list-style-type: none"> • AFA – Sugar Directorate, Chair • KESMA Chair/West Kenya/Sukari • KNFSF Chair • Nzoia Sugar Company • Busia Sugar Industry • Mumias Sugar Company • Butali Sugar Company • Kibos Sugar Company • Chemelil Sugar Company • Transmara Sugar Company Muhoroni Sugar Company 	<ul style="list-style-type: none"> • That most people were not aware of the development of draft regulations • That <i>command zones</i> be introduced • In absence of the Sugar Development Levy, there was a proposal that Government to identify a source of funds to support farmers, there was a request for more funds

<p>Imperial Hotel Kisumu: 30/10/15</p>	<ul style="list-style-type: none"> • AFFA – SD Chairing • WEKSCOL • KNFSF • Busia Sugar • KISCOL • Sony Sugar • Muhoroni Sugar • Butali Sugar • Kibos Sugar • Chemelil Sugar • WEKO 	<p>Proposals by farmers:</p> <ul style="list-style-type: none"> • Clause 4 on Mill command zone, the Federation proposes that the mill command zone should be removed in the Regulations as it is limiting the farmer’s options in disposing their cane to millers. • On legal importation of sugar, federation proposes that there should be a special committee to deal with approval of importation of sugar. • On the penalty for delay of payment of cane sold to millers, the proposed penalty at 1.5% (to the miller) is very low it should be reviewed to 2%. They propose the penalty should be reviewed upwards. • The VAT on the transport of cane should be reviewed and removed in totality. • On the issue of contracts between the Millers and the Farmers, they proposed that the Directorate should take up the issue and standardize contracts across the industry. • The issue of the weighbridges (by millers) contradicted the mill command zones concept • On the issue of the definition of ‘farm gate’, they proposed that it should be redefined (proposal to reduce it to 10 kilometres) • On the <i>sugar levy</i> they proposed that they expand the application of the fund to accommodate the federation for <i>capacity building</i> at 0.1%.
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		<p>Another 0.1% for <i>Society for Sugar Technology</i> to provide more funds for training sugar in technology.</p> <ul style="list-style-type: none"> • That the requirements on out grower institutions were too punitive • Licensing of mills should be clearly defined according to the geographical zones <p>Proposals by KESMA:</p> <ul style="list-style-type: none"> • The Chairman of the millers association concurred with the famers that <i>zoning</i> should be removed to allow competition. • Cancelling of the license by the directorate for 50% utilization of the mill should be reviewed as it was punitive. • That no transporters should register with the Directorate. • On importation of sugar they proposed that white refined sugar should be banned, and if allowed at all, then it should be from within EAC and to attract 100% duty. • The millers proposed that their association be incorporated in the <i>licensing committee</i> for sugar imports. • They proposed that the requirement for sugar data should be a requirement in the regulations. • The formula for sugar levy should be simplified. • The reserve on sugar development levy at 15% should be 'reviewed downwards.'
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		<ul style="list-style-type: none"> • The millers proposed that the administrative fees for the <i>Sugar Directorate</i> should be reviewed to a <i>fixed amount</i>. • Research and extension money should be reviewed and taken to another institution to handle. • They proposed that miller funds should be distributed equitably and depending on the contribution of the mill. • The millers proposed that the <i>annual operating licence</i> fees should be removed. • Importers should pay the license fees equivalent to that paid by millers • On environmental impact assessment should be removed as it has been covered under EMCA. • That the provision on burnt cane should not be in the Regulations • The tribunal on disputes should be crop-specific. • On allocations on the SDL: it wasn't clear on who was the final Authority. • Statements on utilization of SDL should be provided to stakeholders and the accounts published. • They also proposed that the import/export Regulations should be reviewed. • A technical committee made up of the Directorate, and the millers and the farmers (5 each) be formed to look into the Regulations
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<p>02/06/17</p>	<ul style="list-style-type: none"> • IH/SD Chairing • Chairman KESMA (West Kenya) • Butali Sugar Mills • Mumias Sugar • Muhoroni • Kibos and Allied Sugar • KISCOL • Transmara Sugar • Nzoia Sugar • Sony Sugar • Kibos Sugar • KUSDAW • SRI – Kibos 	<ul style="list-style-type: none"> • Members formed an industry committee to go on the ground and make factual report • Meeting noted that there was a problem of seed development for cane • Millers to start their own research association and be funded by Government • There should be control of packaging of sugar
<p>National Sugar Industry Stakeholders Consultative Forum at Kisumu: 16/11/17</p>	<ul style="list-style-type: none"> • Ministry of Agriculture Livestock & Fisheries • Council of Governors • Members of Parliament • Members of County Executives • Members of County Assemblies • Representatives of farmers • Representatives of millers • Development partners 	<ul style="list-style-type: none"> • That the Regulations should be fast-tracked and gazetted once the issue of right to license was resolved between the Council of Governors and the AFA • There should be re-established cane development fund • Research should be promoted on seed cane production • The state should waive debts owed by millers to prepare them for privatization • There should be ended the importation and illegal packaging of sugar • Introduction of zoning and block farming • There should be a review of construction and operation of weigh bridges • Extension services to be restored

		<ul style="list-style-type: none"> • Transport infrastructure to be improved in the cane production regions • Industry regulations to provide for diverse needs of the industry
<p>28/06/2018</p> <p>At Windsor Golf and County Club, Nairobi</p>	<ul style="list-style-type: none"> • Governors from sugar growing regions • Cabinet Secretary Agriculture, Livestock, Fisheries & Irrigation • Sugar millers: SONY, Chemelil, Muhoroni, Miwani (in Receivership), Nzoia Sugar Company, Mumias Sugar, Privatization Commission 	<ul style="list-style-type: none"> • Identified challenges facing the sugar industry to include: low cane supply, cane poaching, ageing equipment and obsolete technology, debts, farmers' arrears, lack of regulations, poor corporate governance, lack of funding of the sector, excess sugar importation • Resolved, <i>inter alia</i>, that: various policy intervention would be pursued; that regulations to address poaching and the need for zoning; that both levels of government be involved in licensing millers, that sugar importation be restricted to COMESA agreement; that arbitration tribunal be re-established.
<p>02/07/2018</p> <p>Multi-Sectoral Technical Committee on Sugar at AFA Headquarters</p>	<ul style="list-style-type: none"> • Ministry of Agriculture, Livestock, and Fisheries • Council of Governors • Privatization Commission • Miller representatives • Farmers' representatives 	<ul style="list-style-type: none"> • Discussed the sharing of responsibilities between the National Government and County governments • Agreed on the mutual roles that the two levels of government would handle



NOTIFICATION OF REGULATORY IMPACT ASSESSMENT ON THE DRAFT REGULATIONS FOR THE SUGAR INDUSTRY

THE CROPS ACT No 16 of 2013

THE CROPS (SUGAR) (GENERAL) REGULATIONS, 2018 & THE CROPS (SUGAR) (IMPORTS, EXPORTS & BY-PRODUCTS) REGULATIONS, 2018

BACKGROUND & INTRODUCTION

The Agriculture and Food Authority (AFA) is a public institution under the Ministry of Agriculture, Livestock, and Fisheries & Irrigation and is established under the Agriculture and Food Authority Act 2013. Its mandate is to administer the Crops Act 2013.

Section 40 of the Crops Act empowers the Cabinet Secretary responsible for agriculture to make regulations to implement the legislative provisions in consultation with the Authority and the County Governments.

POLICY STATEMENT

It is the Government's commitment to accelerate the growth and development of agriculture in general, enhance productivity and incomes of farmers and the rural population, improve investment climate and efficiency of agribusiness and develop agricultural crops as export crops that will augment the foreign exchange earnings of the country. The sugar industry is one of the key sub-sectors targeted by the Government for legislative and policy reforms.

DRAFT REGULATIONS & REGULATORY IMPACT STATEMENT

To drive the sugar industry reform agenda the Cabinet Secretary, has in consultation with the Agriculture & Food Authority and County Governments and various stakeholders over a considerable period of time, prepared The Crops (Sugar) (General) Regulations, 2018 and The Crops (Sugar) (Imports, Exports & By-Products) Regulations, 2018.

The Cabinet Secretary has also prepared a regulatory impact statement on the Regulations. Copies of the Draft Regulations and the Regulatory Impact Statement may be obtained or inspected online at www.kilimo.go.ke or at www.afa.go.ke or may be obtained from or inspected at AFA on payment of copying charges at the AFA Head Office, Tea House, Naivasha Road, Off Ngong Road, Nairobi, during working hours.

INVITATION OF COMMENTS

The Cabinet Secretary therefore invites written comments for Consideration from the general public and sugar industry stakeholders on the Draft Regulations. The comments should be addressed to:

**The Interim Director-General
Agriculture & Food Authority
Tea House, Naivasha Road, Off Ngong Road
P.O. Box 37962-00100
NAIROBI.**

E-mail: info@agricultureauthority.go.ke

So as to reach on or before the expiry of fourteen (14) days from the date of publication of this notice.

Dated at Nairobi this 7th day of August 2018.

**MWANGI KIUNJURI, EGH
CABINET SECRETARY,
MINISTRY OF AGRICULTURE, LIVESTOCK,
FISHERIES AND IRRIGATION**

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CORRIGENDA

IN Gazette Notice No. 506 of 2018, *amend* the expression printed as "Toyota Townace" to read "KBV 830R Toyota Townace" where it appears.

IN Gazette Notice No. 12111 of 2017, Cause No. 23 "B" of 2017, *amend* the deceased's name printed as "Isaiah Mutai Andrew" to read "Isaiah Mutua Andrew".

IN Gazette Notice No. 1025 of 2017, Cause No. 72 of 2016, *amend* the deceased's name printed as "Francis Muiru Ngacha alias Hudson Muiru Ngacha" to read "Francis Muiri Ngacha alias Hudson Muiri Ngacha".

GAZETTE NOTICE NO. 556

THE UNIVERSITIES ACT

(No. 42 of 2012)

PRESBYTERIAN UNIVERSITY OF EAST AFRICA

REVOCATION OF LETTER OF INTERIM AUTHORITY

IN EXERCISE of the powers conferred by section 17 of the Universities Act, 2012, the Cabinet Secretary for Education revokes the Letter of Interim Authority of Presbyterian University of East Africa, with effect from the 23rd January, 2018.

Dated the 22nd January, 2018.

FRED MATIANG'I,
Cabinet Secretary for Education.

GAZETTE NOTICE NO. 557

THE CROPS ACT

(No. 16 of 2013)

DRAFT SUGAR (GENERAL) REGULATIONS, 2018

REQUEST FOR COMMENTS ON THE DRAFT REGULATORY IMPACT ASSESSMENT REPORT AND ON THE DRAFT SUGAR (GENERAL) REGULATIONS, 2018 AND THE CROPS (SUGAR IMPORTS, EXPORTS AND BY-PRODUCTS) REGULATIONS, 2018

The Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries is in the process of promulgating Sugar (General) Regulations, 2018 as provided under section 40 of the Crops Act.

The Act requires consultation with the county governments and the public/ other stakeholders to give their comments prior to enactment and implementation of regulations.

In compliance with the provisions of the Crops Act and the Statutory Instruments Act (No. 23 of 2013), the Ministry announces to the public the availability of draft Sugar (General) Regulations, 2018, the Crops (Sugar Imports, Exports and By-Products) and draft Regulatory Impact Statement.

The objective of the draft Sugar (General) Regulations, 2018, and the Crops (Sugar Imports, Exports and By-Products) is to provide for the regulation, promotion and development of the sugar industry in Kenya.

The Regulatory Impact Statement contains detailed information on the Sugar (General) Regulations, 2018, and the Crops (Sugar Imports, Exports and By-Products).

The draft Regulatory Impact Statement will also be subjected to independent expert review as to its adequacy.

The Constitution, Crops Act and the Statutory Instruments Act provide that the public participates in the decision making-process through submission of comments to the Ministry. It is in this spirit that we request the public to participate by submitting their comments to the Ministry through the provided address. The Ministry thereafter, will draft the final decision on the draft Sugar (General) Regulations 2018, and the Crops (Sugar Imports, Exports and By-Products) 2018 based on adequacy, socio-economic considerations and comments received from the public.

After all considerations and following approval of Parliament, the Ministry shall publish the draft Sugar (General) Regulations 2018, and the Crops (Sugar Imports, Exports and By-Products) 2018 which shall apply to all aspects of the Sugar sector.

All interested persons should submit written comments on the draft Sugar (General) Regulations 2018, and the Crops (Sugar Imports, Exports and By-Products) 2018 and the draft regulatory impact statement using the prescribed public comments form, to reach the undersigned not later than February, 9, 2018.

The draft Sugar (General) Regulations 2018, the Crops (Sugar Imports, Exports and By-Products) 2018 and the draft regulatory impact statement as well as public comments form can be accessed through the following websites: www.agricultureauthority.go.ke; www.kilimo.go.ke. The draft Sugar (General) Regulations 2018, the Crops (Sugar Imports, Exports and By-Products) 2018 and draft regulatory impact statement are also available on request at the Sugar Directorate located at Sukari Plaza, Kangemi, Nairobi during normal working hours.

There shall be a public forum on Friday February, 9, 2018 to discuss the draft Sugar (General) Regulations 2018, and the Crops (Sugar Imports, Exports and By-Products) 2018 and comments received to be held at the Tom Mboya Labour College, Kisumu starting at 9.00 a.m.

Please send your written comments to either:

The Principal Secretary, State Department of Agriculture, Ministry of Agriculture, Livestock and Fisheries, Kilimo House, Cathedral Road, P.O. Box 30028-00100, Nairobi. E-mail: psagriculture@kilimo.go.ke

The Director-General, Agriculture and Food Authority, Tea House, Naivasha Road off Ngong Road, P.O. Box 37962-00100, Nairobi, or by e-mail: info@agricultureauthority.go.ke

Dated the 18th January, 2018.

WILLY BETT,
Cabinet Secretary,
Ministry of Agriculture, Livestock and Fisheries.

GAZETTE NOTICE NO. 558

THE MINING ACT

(No 12 of 2016)

APPLICATION FOR A PROSPECTING LICENCE

NOTICE is given by virtue of section 34 of the Mining Act, that an application for a prospecting licence, whose details and area boundary Schedule are as described here below, has been made under section 72 of the Act and the said application has been accepted for consideration.

<i>Applicant</i>	Gulf Afro Investments Limited
<i>Address</i>	P.O. Box 36-70100, Garissa, Kenya
<i>Application No.</i>	PL/2017/0014
<i>Area</i>	45.2694 km ²
<i>Locality</i>	Hamberesa, Sambo Sub-location, Sala Location, Tana-River County
<i>Mineral(s) Sought</i>	Gypsum

Any objection to the grant of the prospecting licence may be made in writing and addressed to the Cabinet Secretary, Ministry of Mining, P.O. Box 30009-00100, Nairobi, Kenya to reach him within twenty-one (21) days from the date of the publication of this notice in the *Kenya Gazette*.

SCHEDULE OF THE PROPOSED APPLICATION BOUNDARIES

The proposed application's area is particularly described by the following WGS 84 co-ordinates.

Order	Lat Deg.	Lat Min.	N/S	Lat Sec.	Long Deg.	Long Min.	Long Sec.	E/W
1	0	38	S	15	39	32	15	E
2	0	38	S	15	39	33	15	E
3	0	38	S	30	39	33	15	E
4	0	38	S	30	39	35	30	E
5	0	42	S	30	39	35	30	E
6	0	42	S	30	39	32	15	E
7	0	38	S	15	39	32	15	E