THE NATIONAL ASSEMBLY
PAPERS LAID
DATE: 28 JUL 2020 DAY:
TABLED BY: Lomp
CLERK-AT THE-TABLE: DMK

THE CROPS (SUGAR) (GENERAL) REGULATIONS, 2020

FOLIO NO	DOCUMENT
1.	FORWARDING LETTERS
2.	THE CROPS (SUGAR) (IMPORTS, EXPORTS & BY-PRODUCTS) REGULATION 2020
3.	EXPLANATORY MEMORANDUM
4.	CERTIFICATE OF COMPLIANCE TO THE STUTORY INSTRUMENTS ACTS
5.	REGULATORY IMPACT STATEMENT
6.	COPY OF GAZETTE NOTICE AND NEWSPAPER ADVERTISEMENT
7.	REPORT ON STAKEHOLDER COMMENTS AND SUBMISSIONS

PARLIAMENT OF KENYA LIBRARY

Draft

Mr. Jeremiah Nyegenye, CBS
The Clerk of the Senate
National Assembly, Clerks Chambers
Parliament Buildings
P. O BOX 41842 00100
NAIROBI.

10.07.2020

Dear

RE: THE CROPS (SUGAR) (IMPORTS, EXPORTS & BY-PRODUCTS) REGULATIONS, 2020.

Please refer to the above subject matter.

Following the enactment of the Crops Act, 2013 the Ministry of Agriculture, Livestock, and Fisheries & Cooperatives has now prepared the Crops (Sugar) (Imports, Exports & By-products) Regulations, 2020 for the Sugar sub-sector. The said regulations have gone through the requisite statutory processes and been published through the office of the Attorney General.

In line with the provisions of the Statutory Instruments Act, please find attached the said regulations together with the requisite statutory documents for consideration by the National Assembly Committee on Delegated Legislation

a) The Crops (Sugar) (Imports, Exports & By-products) Regulations 2020 (The hard copy from the Government printers will be availed once available).
b) Explanatory Memorandum.
c) Regulatory Impact Statement.
d) A copy of the Notification of the preparation of Regulatory Impact Statement for the Regulations in the Kenya Gazette and in the Newspaper.
e) Report on stakeholder Comments and Submissions.
f) The certificate indicating compliance with provisions of the Statutory Instruments Act.

Hon Peter Munya, MGH
Cabinet Secretary

Encls

Draft

Mr. Michael Sialai, EBS,
The Clerk of the National Assembly,
The National Assembly, Clerk's Chambers,
Parliament Buildings,
P. O BOX 41842 – 00100,
NAIROBI

10.07.2020

Dear

RE: THE CROPS (SUGAR) (IMPORTS, EXPORTS & BY-PRODUCTS) REGULATIONS, 2020.

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Yours

Hon Peter Munya, MGH
Cabinet Secretary

Encls

LEGAL NOTICE No. 125

THE CROPS ACT

(No. 16 of 2013)

IN EXERCISE of the powers conferred by section 40(1) of the Crops Act, 2013, the Cabinet Secretary for Agriculture, Livestock, Fisheries and Co-operatives, in consultation with the Agriculture and Food Authority and the County Governments, makes the following Regulations—

THE CROPS (SUGAR) (IMPORTS, EXPORTS AND BY-PRODUCTS) REGULATIONS, 2020

Citation.

1. These Regulations may be cited as the Crops (Sugar) (Imports, Exports and By-products) Regulations, 2020.

Interpretation.

2. In these Regulations, unless the context otherwise requires—

"COMESA" means the organisation established by the Treaty establishing the Common Market for Eastern and Southern Africa, 1994;

"consignment" means sugar or a by-product of sugar, to be exported or imported, by an exporter or importer, who has a valid export permit or import permit, as the case may be;

"export permit" means an permit issued by the Authority in accordance with regulation 3;

"exporter" means a person who exports sugar or a by-product of sugar;

"import permit" means a permit issued by the Authority in accordance with regulation 6;

"importer" means a person who imports sugar or a by-product of sugar;

"permit" means an export permit, import permit, pre-export permit, pre-shipment permit or a release order, issued in accordance with these Regulations;

No. 29 of 2015.

"PIN" has the meaning assigned to it in the Tax Procedures Act, 2015;

"register" means the register of maintained by the Authority under regulation 5;

No. 29 of 2015.

"tax compliance certificate" has the meaning assigned to it in the Tax Procedures Act, 2015;

No. 35 of 2013.

"tax registration certificate" has the meaning assigned to it in the Value Added tax Act, 2013;

Registration of dealers.

3. (1) A person who intends to import or export sugar shall apply to the Authority for registration in Form 1 set out in the First Schedule.

(2) A person who intends to import or export, a by-product of sugar shall apply to the Authority for registration in Form 1 set out in the First Schedule.

(3) An application made under sub-regulation (1) or (2), shall be accompanied by the payment of the registration fee set out in the Second Schedule.

(4) Where the Authority approves an application under sub-regulation (1) or (2), it shall—

(a) record the name and such other particulars as may be required, of the applicant in the register; and

(b) issue the applicant with a certificate of registration in Form 2 set out in the First Schedule.

Consideration of applications for a permit.

4. In considering applications for permits, the Authority shall rely on the COMESA and the Community Annual Quota Export Allocation and the market deficit, the Authority shall provide guidelines to applicants.

Exporters and importers register.

5. (1)The Authority shall maintain a register of all importers and exporters who have been registered in accordance with these Regulations.

(2) The Authority shall maintain a register of all importers and exporters who have been granted permits in accordance with these Regulations.

Permits for importers.

6. (1) A person who intends to import sugar or a by-product of sugar shall apply for an import permit in Form 3 set out in the First Schedule.

(2) An application made under subregulation (1) shall be accompanied by—

(a) the profile of the applicant;

(b) a copy of certificate of incorporation or certificate of registration of the applicant (if the applicant is a company or registered entity);

(c) a copy of the applicant's valid business permit at the time of making the application;

(d) the applicant's latest audited accounts;

(e) a copy of the applicant's PIN certificate;

(f) a copy of the applicant's tax registration certificate;

(g) a copy of the applicant's memorandum of association (if the applicant is a company);

(h) a copy of the applicant's articles of association (if the applicant is a company);

(i) a copy of the identity cards or passports of each of the applicant's directors (if the applicant is a company);

(j) a copy of the profile of each of the applicant's directors (if the applicant is a company);

(k) a copy of the applicant's valid tax compliance certificate;

(l) a copy of a valid certificate of good conduct for each of the applicant's directors (if the applicant is a company);

(m) a copy of the applicant's valid certificate of good conduct (if the applicant is an individual); and

(n) proof of payment of the prescribed fee set out in the Second Schedule.

(3) If the Authority approves an application made under subregulation (1), it shall issue an import permit in Form 4 set out in the First Schedule to the applicant.

(4) The import permit issued under subregulation (3) shall be valid for a period of one year.

(5) The import permit issued under subregulation (3) shall not be transferrable.

(6) A holder of a valid import permit shall apply for a pre-shipment permit for the importation of each consignment in Form 5 set out in the First Schedule.

(7) An application made under subregulation (6) shall be accompanied by the documents referred to in regulation 9(2).

(8) If the Authority approves an application made under subregulation (6), it shall issue a pre-shipment permit in Form 6 set out in the First Schedule to the applicant.

Permits for exporters.

7. (1) A person who intends to export sugar or a by-product of sugar shall apply for an export permit in Form 3 set out in the First Schedule.

(2) An application under subregulation (1) shall be accompanied by—

(a) the profile of the applicant;

(b) a copy of certificate of incorporation or certificate of registration of the applicant (if the applicant is a company or registered entity;

(c) a copy of the applicant's valid business permit at the time of making the application;

(d) the applicant's latest audited accounts;

(e) a copy of the applicant's PIN certificate;

(f) a copy of the applicant's tax registration certificate;

(g) a copy of the applicant's memorandum of association (if the applicant is a company);

(h) a copy of the applicant's articles of association (if the applicant is a company);

(i) a copy of the identity cards or passports of each of the applicant's directors (if the applicant is a company);

(j) a copy of the profile of each of the applicant's directors (if the applicant is a company);

(k) a copy of the applicant's valid tax compliance certificate;

(l) a copy of a valid certificate of good conduct for each of the applicant's directors (if the applicant is a company);

(m) a copy of the applicant's valid certificate of good conduct (if the applicant is an individual); and

(n) proof of payment of the prescribed fee set out in the Second Schedule.

(3) If the Authority approves an application made under subregulation (1), it shall issue an import permit in Form 4 set out in the First Schedule to the applicant.

(4) The export permit issued under subregulation (3) shall be valid for only one year.

(5) The export permit issued under subregulation (3) shall not be transferrable.

(6) A holder of a valid export permit shall apply for a pre-export permit for the importation of each consignment in Form 5 set out in the First Schedule.

(7) An application made under subregulation (6) shall be accompanied by the documents referred to in regulation 9(2).

(8) If the Authority approves an application made under subregulation (6), it shall issue a pre-export permit in Form 6 set out in the First Schedule to the applicant.

Determine of distribution of sugar in the market.

8. The Authority shall determine the quantity of sugar that may be required from manufacturers for domestic consumption while accounting for any shortfall in domestic production of sugar.

Inspection of consignments.

9. (1) The Authority shall physically verify each consignment before issuing a release order in respect of that consignment.

(2) A person whose consignment is being verified under subregulation (1) shall submit to the Authority, duly certified copies of—

(a) the customs entry or exit documents for the consignment;

(b) a proof of payment of taxes by the exporter from whom the consignment was procured;

(c) the invoice and proof of payment for the consignment from the exporter or importer;

(d) the identification and contact details of the exporter or dealer from whom the consignment was procured;

(e) the certificate of origin of the consignment;

(f) the phytosanitary permits, certificates, permits for the consignment; and

(g) the certificate of conformity in respect of the consignment.

Release order.

10. (1) After a consignment has been verified in accordance with regulation 9, the Authority may issue a release order in Form 7 set out in the First Schedule.

(2) The release order issued under subsection (1) shall authorise the consignment to be released to the holder of a valid export permit or import permit, as the case may be.

Monthly returns.

11. (1) A holder of an export permit shall submit monthly returns of their consignments in Form 8 set out in the First Schedule to the Authority.

(2) A holder of an import permit shall submit monthly returns of their consignments in Form 8 set out in the First Schedule to the Authority.

Repackaging of consignments.

12. (1) A person shall not pack sugar or a by-product of sugar, into a package of a different quantity, material or brand from the original packaging, without the approval of the Authority.

(2) An application for approval under subregulation (1) shall be made in Form 9 as set out in the First Schedule to the Authority

(3) A package of an imported consignment, whether repackaged or in its original packaging, shall carry, in bold print, the name and contact details of the manufacturer, country of origin, and the vendor and purchaser, of the consignment.

Rebranding of consignments.

13. (1) A approved importer of sugar or a by-product of sugar, who wishes to rebrand a consignment shall apply for a permit from the Authority before rebranding the sugar.

(2) A person who does not comply with subregulation (1) commits an offence.

Smuggling.

No. 1 of 2005.

14. Sugar that is smuggled or otherwise imported without the authority of the Authority shall be deemed to be prohibited goods under section 18 (2) of the East African Community Customs Management Act, 2004.

Cancellation of permits.

15. The Authority may cancel the import or export permit, or a pre-shipment permit or pre-export permit, issued to a person who contravenes these Regulations.

Appeals.

16. (1) An applicant for or holder of a permit who is aggrieved by a decision of the Authority on or in respect of—

(a) the grant, refusal to issue, variation or revocation; or

(b) the conditions imposed on the grant or variation,

of a permit, may appeal to the Cabinet Secretary.

(2) An appeal under this section shall be lodged within thirty days from the date on which the appellant first received notice of the decision.

17. The Sugar (Imports, Exports and By-products) Regulations, 2008. are revoked.

Revocation of L. N. No. 114 of 2008.

FIRST SCHEDULE

(r. 3(1), (2), (4) (b) 6(1), (3), (6), (8), 7(1), (3), (6), (8), 10(1), 11(1), (12(2))

FORMS

AGRICULTURE AND FOOD AUTHORITY

FORM 1
(r. 3(1), (2))

APPLICATION FOR REGISTRATION AS IMPORTER/ EXPORTER

1. Name of applicant:
.....

2. Categories (tick as appropriate)

a.	Exporter	brown sugar	
		white refined sugar	
		by-product of sugar	
b.	Importer	brown sugar	
		white refined sugar	
		by-product of sugar	

3. Registered address:.....
Building:.....
Street:.....
Town/City:.....
L. R. No.:.....
Telephone Number:.....
E-mail address:.....
Postal Address:.....

4. Date of Incorporation (if company):.....
Registration No:.....

5. Full names, addresses and occupations of the directors:

Name	*Address*	*Occupation*
a.		
b.		
c.		
d.		

6. Branch Office(s) if any

Address:.....

Building:.....
Town/City:.....

L. R. No.:.....

Telephone .....

E-mail:.....

Postal Address:.....

a. Address:.....

Building:.....
Street:.....
Town/City:.....

L. R. No.:.....

Telephone .....

E-mail:.....

Postal Address:.....

7. Declarations

a. I/We certify that we have read and understood the provisions of the Crops Act, 2013 and the regulations made there under.

b. I/We also understand that the registration certificate granted on this application may be cancelled and penalties may be imposed on each of us if any document or statement submitted by us in the course of this application is false or materially misleading.

Date.....

Name of Director.....

Signature .....

Name of Director.....

Signature .....

Name of Secretary.....

Signature .....

FORM 2 r.3(4)(b)

AGRICULTURE AND FOOD AUTHORITY

SUGAR DIRECTORATE

Serial No.: AFA/SD/..... Importers's/Exporters
License No.....

EXPORTER/IMPORTER CERTIFICATE OF REGISTRATION

THIS IS TO CERTIFY that
..... of .....

Physical Address ..... Postal Address .....

Email.....Telephone: ..... located in .....

County..... Sub-County.....Ward .....

Is hereby issued with a certificate of registration as a Suagr Exporter/Importer (Delete appropriately) beginning this .....day of .....20.....

Date: .....Signed: .....

Valid from ..... To.....

Official Stamp

Director-General,
Agriculture and Food Authority

This certificate of Registration is not transferable

AGRICULTURE AND FOOD AUTHORITY

AFA
Our Crops, Our Wealth

FORM 3

(r. 6(1), 7(1))

APPLICATION FORM FOR AN IMPORT/EXPORT PERMIT

1. Name of applicant:

   .....
   Registration number:.....
   (attach a copy of the certificate of registration)

2. Categories (tick as appropriate)

a.	Exporter	brown sugar	
		white refined sugar	
		by-product of sugar	
b.	Importer	brown sugar	
		white refined sugar	
		by-product of sugar	

3. I/We enclose the following required certified documentation in support of our application:

   a. the profile of the applicant;

   b. a copy of certificate of incorporation or certificate of registration of the applicant (if the applicant is a company or registered entity;

   c. a copy of the applicant's valid business permit at the time of making the application;

   d. the applicant's latest audited accounts;

   e. a copy of the applicant's PIN certificate;

   f. a copy of the applicant's tax registration certificate;

   g. a copy of the applicant's memorandum of association (if the applicant is a company);

   h. a copy of the applicant's articles of association (if the applicant is a company);

   i. a copy of the identity cards or passports of each of the applicant's directors (if the applicant is a company);

j. a copy of the profile of each of the applicant's directors (if the applicant is a company);

k. a copy of the applicant's valid tax compliance certificate;

l. a copy of a valid certificate of good conduct for each of the applicant's directors (if the applicant is a company);

m. a copy of the applicant's valid certificate of good conduct (if the applicant is an individual); and

n. proof of payment of the prescribed fee.

4. Declarations

a. I/We certify that we have read and understood the provisions of the Crops Act, 2013 and the regulations made there under.

b. I/We also understand that the export permit/import permit granted on this application may be cancelled and penalties may be imposed on each of us if any document or statement submitted by us in the course of this application is false or materially misleading.

Date.....

Name of Director..... Signature .....

Name of Director..... Signature .....

Name of Secretary..... Signature .....

AGRICULTURE AND FOOD AUTHORITY

AFA
Our Crops, Our Wealth

FORM 4

(r. 6(3), 7(3))

Permit Number:.....

IMPORT/EXPORT PERMIT

Issued to

.....

(Insert the name of the successful applicant and their registration number)

This Permit is valid from .....to.....

In respect of—

a.	Exporter	brown sugar	
		white refined sugar	
		by-product of sugar	
b.	Importer	brown sugar	
		white refined sugar	
		by-product of sugar	

.....
Director-General

Date of issue.....

Official stamp.

Kindly note:

1. The holder of this Permit shall submit their returns quarterly without fail.
2. This Permit is not transferrable.
3. The holder of this Permit shall apply for a pre-shipment permit, a pre-export permit, and a release order, in respect of each consignment.

AGRICULTURE AND FOOD AUTHORITY

AFA
Our Crops, Our Wealth

FORM 5

(r. 6(6), 7(6))

APPLICATION FORM FOR A PRE-SHIPMENT PERMIT/PRE-EXPORT PERMIT

1. Name of applicant:

.....

Permit Number:.....

(attach a copy of the import permit/export permit)

2. Categories (tick as appropriate)

a.	exporter	brown sugar	
		white refined sugar	
		by-product of sugar	
b.	importer	brown sugar	
		white refined sugar	
		by-product of sugar	

3. I/We enclose the following required certified documentation in support of our application:

(a) the dated Bill of Lading and Imports Declaration Form, for the consignment;

(b) a proof of payment of taxes by the exporter from whom the consignment was procured;

(c) the invoice and proof of payment for the consignment from the exporter or importer;

(d) the identification and contact details of the exporter or dealer from whom the consignment was procured;

(e) the certificate of origin of the consignment;

(f) the phytosanitary permits, certificates, permits for the consignment; and

(g) the certificate of conformity in respect of the consignment.

5. Declarations

(a) I/We certify that we have read and understood the provisions of the Crops Act, 2013 and the regulations made there under.

(b) I/We also understand that the pre-export permit/pre-shipment permit granted on this application may be cancelled and penalties may be imposed on each of us if any document or statement submitted by us in the course of this application is false or materially misleading.

Date.....

Name of Director.....Signature .....

Name of Director.....Signature .....

Name of Secretary.....

Signature .....

AGRICULTURE AND FOOD AUTHORITY

FORM 6

(r. 6(8), 7(8))

Pre-Shipment/Pre-Export Permit Number:.....

PRE-SHIPMENT PERMIT/PRE-EXPORT PERMIT

Issued to

.....

(Insert the name of the successful applicant and their import/export permit number)

This Permit is valid from .....to.....

In respect of—

a.	Exporter	brown sugar	
		white refined sugar	
		by-product of sugar	
	Details of consignment to be exported	.....	
b.	importer	brown sugar	
		white refined sugar	
		by-product of sugar	
	Details of consignment to be imported	.....	

.....
Director-General

Date of issue.....

Official stamp.

Kindly note:

1. The holder of this Permit shall submit their returns quarterly without fail.
2. This Permit is not transferrable.
3. The holder of this Permit shall obtain a release order, in respect of each consignment at the port of entry/exit during clearance.

AGRICULTURE AND FOOD AUTHORITY

AFA
Our Crops, Our Wealth

FORM 7

(r. 10(1))

Release Order Number:.....

RELEASE ORDER

Issued to

.....

(Insert the name of the exporter or importer and their pre-shipment /pre-export permit number)

This Release Order is valid from .....to.....

In respect of—

a.	exporter	brown sugar white refined sugar by-product of sugar
	Details of consignment to be exported	(1) Declarant/Clearing Agent:..... .... (2) Number of Containers:

		.... (3) Quantity in Metric Tonnes..... .... (4) Entry Number: .... (5) UCR Number: .... (6) Country of Origin: ....
b.	Importer	brown sugar white refined sugar by-product of sugar
	Details of consignment to be imported	(1) Declarant/Clearing Agent:..... .... (2) Number of Containers: .... (3) Quantity in Metric Tonnes..... .... (4) Entry Number: .... (5) UCR Number: .... (6) Country of Origin: ....

Verification Officer Details:

(a) Batch Number:

(b) Production Date:

(c) Expiry Date:

(d) Number of Containers Verified:

Name of Officer

Sign.....

Date .....

Stamp.....

AGRICULTURE AND FOOD AUTHORITY

AFA
Our Crops, Our Wealth

FORM 8
(r. 11(1))

RETURNS FOR AN EXPORTER/IMPORTER

1. Name of Exporter/Importer:
.....
Registration number:.....
(attach a copy of the certificate of registration)

2. Details of consignments imported or exported:

   a. Port and Country of origin:
   .....
   b. Manifest Numbers at Gazetted entry points .....
   c. Quantity .....
   d. C.I.F. value:.....

3. Utilization of imports. Please give detailed breakdown of utilization under following categories: (If space is inadequate provide attachment)

   (a) Direct human consumption (give a full list of purchasers, addresses, physical location and quantities purchased)

.....
.....

(b) Industrial manufacturing (specify type of products in which sugar was used and production returns for the period)
.....

(c) Raw sugar for processing (specify quality of raw sugar processed into mill white, refined sugar, brown sugar or other by-products. Also give a full list, addresses and physical locations of all the end users of the processed goods.)
.....
.....
.....

(d) Transit sugar (provide full details of the quantities imported and exported including the dates of actual export at entry and exit points. Also attach copies of re-export certificates duly signed)
.....
.....

4. Full name and address of purchasers or vendors, to who consignments were sold or bought from:
.....

5. Name and address of warehouses where consignments were inspected:
.....
.....
.....

6. Consignment short shipment if (any):

Manifest Number	*Invoice Nos.*	*Type of consignment*	*Net Weight (kilograms)*
a.			
b.			
c.			

(If space provided is not adequate provide an attachment.)

NB: Applicant to attach certified copies of the following documents for verification.

(a) Sale contract
(b) Letter of credit / Telegraphic Transfer Documents
(c) Commercial invoice
(d) Brokers invoice; and
(e) Sugar Development Levy payment slip.

Date.....

Name of Director.....

Signature .....

Name of Director..... Signature .....

Name of Secretary..... Signature .....

For official use:

.....
Director-General

Date of issue.....

Official stamp.

Form 9

(r. 12 (2))

APPLICATION FOR REGISTRATION OF SUGAR REPACKAGING

To

Agriculture and Food Authority,

1.I/We.....(Officials .....(Name of Association/Institution)

2. Physical Address:.....Market.....Location .....
   Sub-County .....

3. Land Ref. No.....

4. Postal Address:.....
   Tel:..... Fax: .....E-mail .....

5. ..... (name of applicant) apply for the registration of .... (name of brand).

6. Copies of the following documents are attached to this application

   a. Trademark registration certificate;

   b. Sample of the brand

   c. Certificate of Incorporation or Business name.

   d. ID or Passport of Directors

8. Project Objectives

a. .....

b. .....

c. .....

Contact Details:

Name: .....Title: .....

Telephone:..... Fax: .....

Email.....

SECOND SCHEDULE

(r. 3(3), 6 (2)(n), 7(2)(n))

FEES

No.	Particulars of Service	Amount in Kshs.
1.	Registration of an exporter or importer.	100,000/-
2.	Issuance of an export permit or an import permit.	100,000/-

Made on the 9th June, 2020.

PETER MUNYA,
Cabinet Secretary, Ministry of Agriculture,
Livestock, Fisheries and Co-operatives.

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

SCHEDULE

EXPLANATORY MEMORANDUM

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

PART I

Name of Statutory Instrument:	The Crops (Sugar) (Imports, Exports & By-Products) Regulations, 2018
Name of the Parent Act:	The Crops Act, No. 16 of 2013
Enacted Pursuant to:	Section 40 of the Crops Act, No. 16 of 2013
Name of the Ministry/Department:	Ministry of Agriculture, Livestock, Fisheries & Irrigation
Gazetted on:	
Tabled on:	

PART II

1. Purpose of the Statutory Instrument

The purpose of these Regulations is to provide for the regulation, promotion, development and oversight of the sugar industry. Specifically, the Regulations provide for-

1.1 the registration of importers and exporters of sugar or sugar by-products;

1.2 the procedure for licensing of importers and exporters of sugar or sugar by-products, including conditions for the licence;

1.3 the ascertainment of quantities of sugar or by-products required in any given year for purposes of determining the quantity to be imported;

1.4 ensuring that only authorised sugar imports reach the Kenyan market;

1.5 preventing unauthorised repacking or re-branding of sugar or sugar by-products with a view to circumventing regulations or passing off;

1.6 fair procedures for licensing importers and exporters.

2. LEGISLATIVE CONTEXT

2.1 Parliament enacted the Crops Act 2013 which came into force on 1st August 2014. By section 40 of the Act, delegated regulation-making powers to the Cabinet Secretary who is expected to consult with county governments;

2.2 The Crops Act repealed the Sugar Act 2001 amongst other Acts;

2.3 Despite the repeal of the Sugar Act, the subsidiary legislation made under the repealed Act relating to import and export of sugar and by-products of sugar continue operating by dint of section 24 of the Interpretation and General provisions Act, Chapter 2 of the Laws of Kenya;

2.4 These Regulations are made pursuant to s. 40 of the Crops Act and are meant to operationalise the Crops Act as far as sugar as a scheduled crop is concerned.

2.5 These Regulations are meant to replace Sugar (Imports, Exports and By-products) Regulations, 2008.

3. POLICY BACKGROUND

3.1 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 within the context of agriculture development.

3.2 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. Mumias Sugar was privatized in 2001 but the Government holds majority shares in the company.

3.3 The Sugar subsector 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 was under out-grower/small-scale farmers, and only 14,340 hectares was under nucleus estates. About 6 million people

derive their livelihood from the sugar subsector either directly or indirectly.

3.4 However, the Sugar Industry has faced 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* being discussed currently, a number of challenges have been identified, and which the law and policy need to resolve.

3.5 The Agriculture Sector Reforms began in earnest way back in 2003 with the formulation of the Economic Recovery Strategy for Wealth and Employment Creation (ERS) and the Strategy for Revitalization of Agriculture (SRA).

3.6 The Sector reforms were aimed at reviewing, updating and harmonizing the legal framework that would rationalize multiple legislation and regulations governing the sector.

3.7 Prior to the current reforms, the Agriculture Sector had in excess of 100 laws that made the Sector uncompetitive, inefficient and too bureaucratic for a conducive business environment. It was also envisaged that these reforms would make the sector regionally and globally competitive through the overall reduction of cost of production and increased efficiency in service delivery;

3.8 The merger process commenced with consolidation of the agriculture Sector legislation which culminated into the enactment of three key laws, namely, the Agriculture and Food Authority Act, 2013, the Crops Act, and the Kenya Agricultural and Livestock Research Act, 2013. The Regulations are meant to operationalise part of the Crops Act.

4. CONSULTATION OUTCOME

4.1 As required under Article 10 of the Constitution of Kenya 2010 as well as the Statutory Instruments Act, the Cabinet Secretary has held consultative fora involving stakeholders for a considerable period of time, especially between the years 2015 and 2018.

4.2 The following stakeholders have been involved in the development of the Regulations: all millers; growers through the Kenya National Federation of Sugarcane Farmers, millers, County governments through the Council of Governors as well as directly with Counties through County Executive Committee members and other officials, members of county assemblies in sugar growing regions, members of

Parliament from sugar growing regions, and other dealers in sugar and related products.

4.3 There were stakeholders' consultative meetings on many dates. Meetings were held between the Ministry, Agriculture and Food Authority, Council of Governors, the defunct Transition Authority, the Attorney-General's Office, the Law Reform Commission as follows: 16th March 2015 (Nairobi), 14th-18th April 2015 (Mombasa), 28th & 30th, May 2015, 2nd & 17th June 2015, and 1st July 2015 (all in Nairobi); 30th October 2015 (Kisumu), 26th February 2016 (Nairobi), 27th May 2016, 23rd September 2016 and 16th November 2017 (Kisumu), 28th – 29th June 2018 (Windsor Golf & Country Club, Nairobi, and 2nd July 2018 (AFA Headquarters).

4.4 The problems being addressed are: unclear rules on licensing of importers; unfair licensing regime; unfair competition on account of imported sugar and that produced by local millers; illegal entries of "cheap" sugar and by-products into the market; lack of sugar import statistics; and passing off.

4.5 The following were as the result of consultations in various meetings with stakeholders:

a) That the Authority should make available to stakeholders statistics on sugar imports;
b) That pre-shipment licences should be issued on quarterly basis and to be valid for 45 days;
c) Importation of sugar must be tightly controlled in order to shield growers and millers from unfair competition.

5. GUIDANCE

5.1 Upon *Gazettement* of these Regulations, the Ministry shall, through the Agriculture and Food Authority, organize meetings of stakeholders to sensitize them on the requirements of the Regulations and how to ensure their effective implementation;

5.2 The Ministry will also ensure that there is an approved policy document to guide the sugar industry.

6. IMPACT STATEMENT

6.1 Impact on Fundamental Rights and Freedom

a) The Regulations are not expected to have negative impact on fundamental rights or freedoms of persons or institutions that are subject to the Regulations.
b) The Regulations address matters that relate to the Bill of Rights, especially on *fair administrative actions* with regard to decision-making on licensing.
c) The Regulations do not have negative impact on the environmental rights.

6.2 Impact on the Private Sector

a) It is anticipated that the Regulations would positively impact on the private sector by increasing participation in the sugar import and export business, as well as related by-products;
b) There will be protection of the growers and millers against unfair competition through import of sugar and sugar products;
c) The Regulations leave, to the discretion of the licensing authority, the manner of determining import rights.

6.3 Impact on the Public Sector

a) Better compliance with the law and better accountability for actions on the part of the sugar importers and exporters;
b) Increase transparency by providing for reporting and oversight of import and export business;
c) Provide procedures for licensing exporters and importers and sanctioning malpractices;
d) The Regulations provide for the Authority to keep statistics on sugar imports and to disseminate the same to the stakeholders;
e) Ensure that there is no smuggling of illegal or contraband sugar into the country.

7. Monitoring and Review

Regulations are designed to achieve goals which may relate to impact, effectiveness (in terms of cost and usability), net benefit or efficiency and

finally, equity or fairness. If they do not lead to these results, then it means they have fallen short of their objectives.

The implementation of the Regulations will achieve good results if the following measuring are undertaken for the purpose of monitoring and review:

a) The Authority to maintain and update data base of all licensed importers and exporters of sugar and related by-products, and the data or statistics to be published;

b) Verification of import documents and the actual commodities are necessary;

c) Inspection and oversight of sugar dealers should be ongoing to ensure that the Regulations are adhered to;

d) The Authority should carry out regulatory impact assessment in the first three years of these Regulations to ensure that the Regulations have no loopholes, and if there are, to be addressed appropriately by amendment.

8. Contact

psagriculture@kilimi.go.kee (Ministry of Agriculture, Livestock, Fisheries & Irrigation)

STATUTORY INSTRUMENTS ACT, NO. 23 OF 2013

CERTIFICATE OF COMPLIANCE

(UNDER SECTION 7(4) OF THE STATUTORY INSTRUMENTS ACT, 2013 (NO. 23 OF 2013)

THE CROPS (SUGAR) (IMPORTS, EXPORTS & BY-PRODUCTS) REGULATIONS, 2020

Whereas the Cabinet Sectary for Agriculture, Livestock, Fisheries and cooperatives has published the Crops (Sugar) (Import, Export and By-Products) Regulations, 2020 in pursuant to the powers conferred by Section 40 of the Crops Act, 2013 (No. 16 of 2013), IT IS HEREBY CERTIFIED that the aforesaid **Crops (Sugar) (Imports, Exports & By-Products) Regulations, 2020:**

a) Meet the requirements relating to the regulatory impact statement in the Statutory Instruments Act, 2013 (No. 23 of 2013) and the guidelines have been complied with; and

b) In my opinion, the regulatory impact statement adequately assesses the likely impact of the Crops (Sugar) (Imports, Exports & By-Products) Regulations, 2020.

Dated this ....15th..... Day of....July... 2020

HON PETER MUNYA, MGH

CABINET SECRETARY,

MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES AND COOPERATIVES,

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
Agriculture & Food Authority (AFA)
Tea House, Naivasha Road, Off Ngong Road
P.O. Box 37962-00100
NAIROBI.

CONSULTANT

The Kenya School of Law
Off Lang'ata South Road, Karen
P.O. Box 30369 00100
NAIROBI

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*

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[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:

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[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 Committee[6] 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;

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[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 Act[11] 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 Act[12] 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,*

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[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

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[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 paper[18] 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 Act[19] 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

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[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 famers 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-gate[25] 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;

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[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 amended[27] 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 Diary 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 Act[28], an "explanatory memorandum" in relation to a statutory instrument, means a statement that-

a) is prepared by a regulation-making authority;

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[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 provides[31] 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.

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[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 regulations[33] 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;

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[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 structures[37] 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.

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[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 positon 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 a 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 Act[49] 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 in 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

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[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.

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[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

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[52] *Sugar 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 Mumford[56] 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

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[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.

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[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 conservation[60] including managing noxious weeds can be achieved by using *incentives* in favour of growers. The Government could zero-rate taxes on applicable chemicals to

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[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 top 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 Act[61] 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] Section29(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 competiveness 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.[64]This 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-

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[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."*

[65]Under 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* provides[67] 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]

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[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 levy[71] 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 Committee[72]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

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[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

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[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 Regulations[75] 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.

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[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.



Isaac S Kuloba
LEAD CONSULTANT & ASSISTANT DIRECTOR
CPD, PROJECTS & RESEARCH
THE KENYA SCHOOL OF LAW

29th August 2018

Appendix: Consultations with Stakeholders

VENUE & DATE	STAKEHOLDERS	PROPOSALS/RECOMMENDATIONS
Kisumu Hotel: 27/5/16	• 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	• General consultations undertaken • No particular resolutions available
Imperial Hotel: 23/8/2016	• 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	• That most people were not aware of the development of draft regulations • That *command zones* 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

Imperial Hotel Kisumu: 30/10/15	• AFFA – SD Chairing • WEKSCOL • KNFSF • Busia Sugar • KISCOL • Sony Sugar • Muhoroni Sugar • Butali Sugar • Kibos Sugar • Chemelil Sugar • WEKO	**Proposals by farmers:** • 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 *sugar levy* they proposed that they expand the application of the fund to accommodate the federation for *capacity building* at 0.1%.

		Another 0.1% for *Society for Sugar Technology* to provide more funds for training sugar in technology. • That the requirements on out grower institutions were too punitive • Licensing of mills should be clearly defined according to the geographical zones **Proposals by KESMA:** • The Chairman of the millers association concurred with the famers that *zoning* 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 *licensing committee* 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.'

		• The millers proposed that the administrative fees for the *Sugar Directorate* should be reviewed to a *fixed amount.* • 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 *annual operating licence* 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

02/06/17	• 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	• 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
National Sugar Industry Stakeholders Consultative Forum at Kisumu: **16/11/17**	• 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	• 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

		• Transport infrastructure to be improved in the cane production regions • Industry regulations to provide for diverse needs of the industry
28/06/2018 **At Windsor Golf and County Club, Nairobi**	• 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	• 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, *inter alia*, 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.
02/07/2018 **Multi-Sectoral Technical Committee on Sugar at AFA Headquarters**	• Ministry of Agriculture, Livestock, and Fisheries • Council of Governors • Privatization Commission • Miller representatives • Farmers' representatives	• 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

NATIONAL COUNCIL FOR
LAW REPORTING
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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 ASSESMENT 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.

Applicant	Gulf Afro Investments Limited
Address	P.O. Box 36–70100, Garissa, Kenya
Application No.	PL/2017/0014
Area	45.2694 km²
Locality	Hamberesa, Sambo Sub-location, Sala Location, Tana-River County
Mineral(s) Sought	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

THE CROPS ACT

NO 16 OF 2013

(PURSUANT TO SECTION 8(6) OF THE STATUTORY INSTRUMENTS ACT NO 23 OF 2013)

ANALYSIS OF COMMENTS AND SUBMISSIONS MADE TO THE MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES AND IRRIGATION BY STAKEHOLDERS IN RELATION TO THE DRAFT CROPS (SUGAR) (GENERAL) REGULATIONS, 2018

1. SONY SUGARCANE FARMERS

No	Heading of the Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1.	Preliminary	Cap. 490 Should be placed right before the meaning of "co-operative society" It is wrongly placed before the meaning of country government	The amendment has been done.	
2.	Definition – Regulation 2 "Mill Sugarcane Union"	Should be added as a recognized farmers advocacy institution at the mill level	Clause 2 remains as it is	Association of the growers at the zonal level is at their discretion as provided for in the Constitution of Kenya,2010
3.	Definition- Regulation 2 "Sugarcane Growers Union"	Means a national sugarcane farmer's organization formed by respective registered growers advocacy institution from sugar milling zones and as may be gazette by the Cabinet Secretary from time to time"	The Clause remains as previously amended	This regulations have provided for an Apex Milers' body at the national level and the Authority will provide guidelines for its governance structure.
4.	Functions of the authority and the	Paragraph e should be removed	The Clause remains as it is.	Agriculture has been devolved and regulations

No	Heading of the Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	County Government (e) enforce policies and guidelines on corporate governance in sugar growers' institutions;			have taken cognizance of this.
5	Functions of the authority and the County Government (f) facilitate mechanisms for negotiations for equitable pricing of sugarcane and provide a schedule for the pricing of sugarcane and appropriation of proceeds	Paragraph f should be removed	The proposal has been accepted and the sub clause deleted	This has been provided for in Clause 34 of the regulations

No	Heading of the Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
6	Functions of the authority and the County Government h) register of sugar growers..	Paragraph h be left to the growers' institutions as per the Crops Act, 2013	The sub clause will remain as it is	Clause 13 of the regulations provide for registration by the County Government and out-grower institution.
7.	Registration of dealers and licensing of millers	Registration of out-growers union. 12 (1) The Authority shall register a union made up of all the registered mill sugarcane farmer's advocacy institutions/licensed out growers as an umbrella organization to represent and advocate for grower's interests.	Section 12 of the draft regulations is amended to read; 12. Registration of growers Apex body (1) The Authority shall register a growers' Apex body made up of all registered/licensed out-growers as an umbrella association to represent and advocate for growers' interests. (2) All out-growers institutions may be members of an umbrella association to advocate for their interests.	In the spirit of fairness, the ministry shall not dictate how the growers choose to associate and interact

No	Heading of the Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
			(3)The Authority may recommend guidelines for the governance structures of the apex body.	
8.	Registration of Out growers and Out Growers Institutions 13. (1) Every grower shall register with the county government and the respective county government shall forward a copies of the grower's registers to the Authority biannually.	Every grower shall register with growers' institutions representing and advocating for their interests and the respective farmers	The Clause remains as it is	The Crops Act, Section 6(2) The Constitution, 2010 under Article 189 encourages cooperation between the national and county government.
9.	Regulation 14 (4)	There should be separation of roles of growers' institutions to	The clause remains as it is.	Clause 14 (4) specifies the roles of the out grower institutions and

No	Heading of the Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
		avoid conflict of interests as witnessed previously		is not in conflict with the out grower institutions
10.	Mill Command Zone 53. If any party decides to discontinue the production of sugarcane or terminate the relationship with the other party, he shall give a three months' notice of his intention to do so and shall pay all his dues before the expected time of harvest and the miller or the grower will then harvest sugarcane in the normal manner provided that such notice	Should be added to read that the registered mill Sugarcane growers institution shall negotiate with the relevant milling Sugar Miller but in the event the grower wants to deliver his/her Sugarcane to another milling company as a matter of order within the industry. The miller is bound to accept such negotiations for the peace to prevail between the interested parties in cane business		This concern has been adequately addressed under Clause 53, under Form E1

No	Heading of the Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	shall only be effective if the grower shall, within the period of notice, repay in full all loans received by him from the miller. Any such termination of the contract shall be without prejudice to all rights accrued and obligations incurred to or by either party prior to the date of termination and shall not prejudice claim for damages for such breach of contract.			
11.	Funding of growers institutions	Growers shall contribute to their respective institution at mill level a per centum that shall be	The clause remains as it is.	This concern will be addressed by

No	Heading of the Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
		agreed upon by all growers in a general growers meeting. The resolution passed in such a meeting shall be forwarded to the respective miller to deduct the same and remit to the growers' institution for the management and operation		institutions' internal constitution
11	FIRST SCHEDULE Form E1 Agreement between grower and miller on sugarcane farming and supply 23. The miller may harvest, transport and weigh sugarcane on behalf of the grower within the terms and	Clause 23 Remove the word may and replace with the word shall; the miller shall harvest, transport and weigh sugarcane on behalf of the grower who is contracted with the relevant miller within the terms and conditions agreed between the parties	The clause remains as it is	The services listed in this clause can be outsourced by the grower. The grower cannot compel the Miller.

No	Heading of the Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	conditions agreed between miller and grower.			
12	Growers Representative Agreement between grower and miller on sugarcane farming and supply	Proposal of establishment of a Dispute Resolution Committee	The clause remains as it is.	The dispute resolution provisions within the agreement are sufficient.

THE CROPS ACT

NO 16 OF 2013

(PURSUANT TO SECTION 8(6) OF THE STATUTORY INSTRUMENTS ACT NO 23 OF 2013)

ANALYSIS OF COMMENTS AND SUBMISSIONS MADE TO THE MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES AND IRRIGATION BY STAKEHOLDERS IN RELATION TO THE DRAFT CROPS (SUGAR) (GENERAL) REGULATIONS, 2018

2. KAKAMEGA COUNTY SUGARCANE FARMERS

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1.	Regulation 9 (9) (1) The Authority may, after inspection and evaluation of an application for a sugar milling or manufacturing license, grant the licence applied for or reject the application.	Regulation is vague as it does not state the factors of parameters which the authority shall rely on in deciding whether to grant the license or not Recommend that the regulation is made clear by incorporating the factors that will be considered in deciding whether to grant the millers the licenses or otherwise	The clause remains as it is.	Clause 7, 8 & 9 sets out the factors and parameters which the Authority shall rely on granting the license.
2.	Regulation 10 10.(1) The Authority in consultation with the respective county government shall assign a specific geographical	The regulation is discriminatory and biased against farmers and millers since the producers and the traders of other commodities whether agriculture or otherwise are allowed to buy or sell from markets of their own choice Millers' investments shall fail if Zoning is considered	The clause remains as it is	Mill command Zone are supposed to provide for proper planning of agricultural activities in identified agro-ecological zones suitable for cane development. There are not meant to restrict access to

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	zone for development and procurement of sugarcane.			markets and services for sugarcane growers.

THE CROPS ACT

NO 16 OF 2013

(PURSUANT TO SECTION 8(6) OF THE STATUTORY INSTRUMENTS ACT NO 23 OF 2013)

ANALYSIS OF COMMENTS AND SUBMISSIONS MADE TO THE MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES AND IRRIGATION BY STAKEHOLDERS IN RELATION TO THE DRAFT CROPS (SUGAR) (GENERAL) REGULATIONS, 2018

3. BUSIA SUGARCANE FARMERS CAUCUS AND TESO SOUTH SUGARCANE FARMERS

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1.	Mill Command Zones 10. (1) The Authority in consultation with the respective county government shall assign a specific geographical zone for development and procurement of sugarcane.	Zoning of sugar factories will discriminate farmers and deny them healthy competition Clause Opposed	The clause remains as it is.	Mill command Zone are supposed to provide for proper planning of agricultural activities in identified agro-ecological zones suitable for cane development.
2.	Registration of Out Growers Institutions 13. (1) Every grower shall register with the county government and the respective county government shall forward a	Oppose re-introduce of out-growers institutions Farmers are still demanding 15% retention that has not been paid up to now by the out grower institution since 2003 Tractors bought by out-growers financed by cane farmers cannot be traced to date	The Clause remains as it is.	The Crops Act, Section 6(2) The Constitution, 2010 under Article 189 encourages cooperation between the national and county government.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	copies of the grower's registers to the Authority biannually. (2) A small holder shall register with an out-grower institutions of which he is a member.			
3.	Sugar Cane Transportation	Opposed to any rule that gag free movement of their farm products Too much red tape in the sugarcane farming disfranchises the farmer and oppose any restriction to transportation		The concern is not precise. However, there are not 'too many' restrictions and there is no taxation provided for in the regulations other than the transport tariff. Transportation permits will allow for an organized way of accessing sugarcane in any zone hence preventing sugarcane poaching.

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4. BUNGOMA - TRANS-ZOIA FARMERS

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1.	General provisions on registration of dealers and millers Clause 6(1) 6.(1) The Authority may in consultation with the relevant county government and other stakeholders, conduct an evaluation and prepare a written evaluation report within ninety working days after submission of an application.	Requirement of 90 working days should be reviewed to about 60 days to cut down on delay	The Clause remains as it is.	This is a consultative process involving various stakeholders and ninety days is the upper limit
2.	Sub Clause 3 (3) After the report under sub regulation (1) is prepared, the Authority, shall within twenty-one working days, give a written notice to the applicant of the date of the next sitting of the Authority, with respect to the application.	Twenty One working days should also be reviewed to 7 working days considering the improved information technology	The clause remains as it is.	Twenty one days given in the regulation is the upper limit.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
3.	Sub Clause 5 (5) If an applicant does not receive a notice of the Authority's decision within the time prescribed under sub regulation (3), the applicant may appeal to the Cabinet Secretary within thirty days.	An applicant should appeal to the cabinet secretary immediately without wasting any time instead within 30days	The Clause remains as it is	An applicant is not compelled to appeal after 30 days but rather at any time within the 30days.
4.	Sub Clause 6 (6) The Authority may seek information from other government agencies or liaise with appropriate authorities before granting the license.	The requirement that the authority seeks information from other government agencies omits the farmers who are the key stakeholders in the investment	The clause remains as it is.	Clause 6 (i) provides for the consultation of farmers
5.	Clause 9 Licensing of Millers	Investors are subjected to rigorous and lengthy processes to acquire a license	The Clause remains as it is	The process ensures integrity, due diligence, consultation necessary to identify

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
				a competitive investor
5	Mill Command Zones	It has been tried before but has failed miserably. We recommend a free market which is conducive to farmers economic growth	The Clause remains as it is.	"Mill command Zone are supposed to provide for proper planning of agricultural activities in identified agro-ecological zones suitable for cane development. There are not meant to restrict access to markets and services.
6.	Registration of out-growers unions	Out growers are thorns to the farmer's flesh. Farmers' cooperative representatives should be taken on board to replace the out-growers unions	The Clause remains as it is.	These concerns are addressed in the agreements set out in the Schedule I which ensure accountability in the industry.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
7.	Registration of dealers in Sugarcane Regulation 31 31. A person who intends to be a sugarcane harvester, transporters or primary distributor of sugarcane products shall be registered/ by the relevant county government.	Farmers object Regulation 31 as it will constitute additional bureaucracy to enable them do their business	The clause remains as it is.	Section 6 of the Crops Act, 2013 Registration is for purposes of maintaining a database and planning purposes at the county level.
8.	Sugarcane Transportation Permit Regulation 32 32. (1) A person shall not transport or cause to be transported, sugarcane across the zone of a registered miller without a sugarcane transportation permit granted in Form C set out in the First	Farmers object to zoning and request to continue transporting their farm produce freely	The clause remains as it is.	Transportation permits will allow for an organized way of accessing sugarcane in any zone hence preventing sugarcane poaching.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	Schedule by the respective county government			
9.	Monthly Crop Programme Regulation 33 33. A registered miller shall provide a grower or a registered out-grower institution with a monthly sugarcane harvesting program which shall conform to the sugarcane development plan	Regulation 33 is not relevant since farmers already objected to out-grower institutions. Info should be shared between Miller and Grower.	The Clause remains as it is.	These concerns are addressed in the agreements set out in the Schedule I which ensure accountability in the industry
10.	Sugarcane Pricing Committee (2) The Authority in consultation with the county governments establishes a Sugarcane Pricing Committee, which shall comprise of —	The farmer believed the clause is in order with inclusion of ; • One rep from ministry of agriculture • One rep from the county government • 3 Farmers Reps • 3 Millers Reps	The Clause remains as it is	The intention of having a sugar pricing committee is to ensure fairness in pricing between the grower and the miller and therefore this requires the presence of refereeing mechanisms which

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	a) One representative from the Ministry for the time being in charge of Agriculture b) Two representatives from the Authority; c) Two representatives elected by the Sugarcane Growers Apex Body; d) Two representatives elected Sugarcane Millers Apex Body; and e) Three representatives nominated by the council of governors representing the county governments from the sugarcane growing areas.			will be provided by the technical experts of the ministry, the authority and the county government.
11	Burnt Sugarcane (d) a payment for burnt sugarcane shall be made one	Okay apart from Sub clause d on payment of delivered burnt sugarcane to the miller. It is proposed in case of	Clause 3 (d) remains as it is	It is imperative that investigation is done to find out whether cane was burnt

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	month from the date of the scheduled harvest of sugarcane.	accidentally burnt sugarcane, delivered to the miller, payment be made promptly like any other normal cane delivery		deliberately or accidentally hence the 30-day period.

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5. NZOIA ZONE FARMERS PETITION

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1.	Mill Command Zone	Supports zoning through a petition to the Cabinet Secretary to gazette the Sugar Industry regulations preserving the Nzoia Sugar Zone Boundary as it existed before the removal of the zones	The clause has provided for Zoning.	

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6. AWENDO, URIRI AND NDHIWA SACCO

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1.	Regulation 10 Mill Command Zone	1. Not supporting zoning of sugarcane 2. Restriction to choice of Market	The Clause remains as it is	"Mill command Zone are supposed to provide for proper planning of agricultural activities in identified agro-ecological zones suitable for cane development. There are not meant to restrict access to markets and services for sugarcane growers. The agreements will ensure rights, remedies and obligations of each party are guaranteed.
2	Regulation 15 (1,2,3,4) Agreements for dealing in sugar)	Cane supply contracts	The draft remains as it is.	Non contracted growers are free to engage millers of their choice.

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7. MUHORONI MULTIPURPOSE COOPERATIVE UNION

Heading of Regulation	No	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
Mill Command Zones 10. (1) The Authority in consultation with the respective county government shall assign a specific geographical zone for development and procurement of sugarcane.	**1.**	Zoning intends to leave out farmers. This is in contravention to the Constitution of Kenya, 2010	The clause remains as it is.	Mill command Zone are supposed to provide for proper planning of agricultural activities in identified agro-ecological zones suitable for cane development.
Non-authorization of a new Miller in another registered miller zone	2.	Opposes zoning	The Clause remains as it is	There are not meant to restrict access to markets for sugarcane growers.

Heading of Regulation	No	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
Sugar Development Levy	3.		The clause was not re-introduced in the draft regulations.	There is no taxation provided for in the regulations.
The Cane Pricing Committee	4	Opinion that issues of determining sugar price be taken to miller and committee constituted at the miller level	The clause 34 remains as it is.	The Committee is an all-inclusive industrywide committee for the purposes of uniformity that sets sugarcane pricing standards.
Cess Funds	5.		This is not provided for in the draft regulations.	
Kenya Federation of Sugarcane Farmers 2) All out-growers institutions		Farmers are challenging the existence of this organization	This clause remains as it is under Clause 10 of the regulations	The farmers are at liberty to form an apex body that will advocate for their interests.

Heading of Regulation	No	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
may be members of an umbrella association to advocate for their interests				
Sugar directorate	6	The Sugar directorate as currently constituted has no representation of the farmers as it used to be.	This is not provided for in the draft regulations.	
Privatization	7.	Recommend that the privatization program be fast tracked in order to bring the state owned sugar factories at the same level with the private mills.	This is not provided for in the draft regulations.	

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8. KENYA NATIONAL FEDERATION OF SUGARCANE FARMERS

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1.	Definitions page 1 and 2 "farm-gate" means a site nearest to a grower designated as such by the Authority where sugarcane weighing and quality testing facilities have been set up;	Definition of Farm Gate Proposal to remove the whole definition or alternatively defined as 'as a site within 10 km of the growers farm a such by the Authority for purposes of weighing/collecting/transloading the growers sugarcane and for purpose of calculation of maximum transport costs to the grower	The definition should remain as proposed in the draft regulations	AFA will determine the distance considering all factors that favour both the farmer and the Miller
2.	"independent grower" means a grower who— (a) is not a member of any out-grower institution; (b) does not depend on the	Definition of Independent grower Does not depend on the miller or grower Institution	The definition remains as proposed in the draft regulations	The definition is sufficient in defining to the fullest extent who an independent grower is, and it is not the purpose of the definition to exclude independent growers from contracting with institutions and the miller.

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	miller for any assistance; (c) depends solely on his own resources to develop and supply sugarcane directly to any miller under contract;			
3.	"miller" means a person who owns or operates a sugarcane mill to produce sugar, including refined sugar, jaggery and other by-products;	Definition of miller 'Sugar Miller' means a person who owns or operates a Sugarcane mill to produce Sugar including refined sugar and other by products	The definition remains as proposed in the draft regulations	The definition in the draft regulation is a more inclusive definition
4.	"Sugarcane Growers Apex Body" has the meaning assigned to it in regulation	Definition of 'Sugar Growers Apex Body' Should be clarified to capture that the Apex Body is constituted by	Section 12 of the draft regulations should be amended to read 'Sugarcane Growers	The proposal by the federation is restrictive and leaves out certain critical players

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	12 means a national sugarcane farmers organization as may be Gazetted by the Cabinet Secretary from time to time;	growers themselves through an election	Apex Body' instead of 'Union' The ministry will adopt the proposed definition as in the draft regulations	The election shall be as provided for in the constitution of the organization
5.	"mill command zone" means a specific geographical area assigned to a miller by the Authority in consultation with the relevant County Government based on milling capacity and crop productivity for the purpose of development and	Definition of Miller Command Zone Consultations should involve the farmers and has the same meaning as zone	The draft regulations should retain 'Mill command zone as it is "mill command zone" means a specific geographical area assigned to a miller by the Authority in consultation with the relevant County Government based on milling capacity and crop productivity for the	The definitions are similar for both 'mill command zone' and 'zone'. The consultation done by the Authority jointly with the County with the County Government will incorporate the farmer in line with the Constitution.

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	procurement of the sugarcane. "zone" means specific geographical area assigned to a miller by the Authority based on milling capacity and crop productivity for development and procurement of the sugarcane.		purpose of development and procurement of the sugarcane.	
6.	PART II FUNCTIONS OF THE DIRECTORATE Page 3 b) Co-ordinate the activities of	Need to establish mill level regular structured committees to attend to activities such as land preparation, harvesting programes, transportation and other minor crops	(b) co-ordinate capacity building activities for players in the sugar value chain;	The current clause in the draft regulation covers the farmers' interests. Can be dealt with administratively and under self-regulation

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	individuals and organizations within the Industry			
7.	3(k) Regulate the export and import of sugar and by-products	Growers and Millers should be included in the process of export and import of sugar for better stability of the domestic market	The draft regulation shall retain this function under Clause 3 (i) 'regulate the export and import of sugar and the by-products of sugar'	Import and export of sugar is a function of the Authority as defined by the Crops Act, 2013. Farmers are represented in the AFA board.
8.	3(o) Facilitate mechanism for equitable sharing of by-products of sugar production	Reword to read facilitate mechanisms for pricing of sugarcane and negotiations for equitable distribution of the proceeds of sugar and sugar by products between millers and growers	Section 34 of the current draft regulation establishes Sugarcane pricing committee. No. 13 of 2013.	The issue raised has been incorporated through the Sugarcane Pricing Committee
9.	3(m) Review agricultural policies	Growers should be involved	The growers are already involved	The Constitution of Kenya provides for stakeholder

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
				consultation which included the growers
10.	PART III LICENSING AND REGISTRATION OF MILLERS (1)Registration of Millers	Proposal to replace Miller with a 'person who intends to'	Part 3 has been redrafted and takes care of this concern	
11.	(10) Mill Command Zone 1)The Authority in consultation with the County Government project shall assign a specific geographical zone for development and procurement of sugar	Proposal to have 8,600 hectares for every crushing capacity of 1000TCD	The draft regulations retain that; 10. (1) The Authority in consultation with the respective county government shall assign a specific geographical zone for development and procurement of sugarcane.	This concern is exhaustively addressed under Section 10 of the draft regulations

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
12.	(11) Registration of Millers in an Apex body	All millers shall be members of an umbrella association known as Kenya Sugar Manufactures Association for advocacy of their interests The Cabinet Secretary in consultation with Sugar Millers shall make rules for the elections Sugar Millers Apex Body and recognize and gazette elected representatives	Section 11 of the draft regulations is amended to read 11. Registration of Millers in an Apex body 11. (1) The Authority shall register an apex body made up of all registered/licensed millers as an umbrella association to represent and advocate millers' interests. (2) All millers may upon licensing join the apex body of millers to advocate for their interest or be members of an umbrella	In the spirit of fairness, the ministry shall not dictate how the millers choose to associate and interact

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
			association for advocacy of their interests. (3) The Authority may recommend guidelines for the governance structures of the apex body.	
13.	(12)Registration of growers Apex body	All growers shall be members of an umbrella association known as Kenya National Federation of Sugarcane Farmers for advocacy of their interests The Cabinet Secretary in consultation with farmers shall make rules for the elections Sugarcane growers Apex Body and recognize and gazette elected representatives	Section 12 of the draft regulations is amended to read; 12. Registration of growers Apex body (1) The Authority shall register a growers' apex body made up of all registered/licensed out-growers as an umbrella association to represent and advocate for growers' interests.	In the spirit of fairness, the ministry shall not dictate how the growers choose to associate and interact

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
			(2) All out-growers institutions may be members of an umbrella association to advocate for their interests. (3)The Authority may recommend guidelines for the governance structures of the apex body.	
14.	(13) 2 (a)Promotion and represent the interests of growers	Proposal to remove the entire clause	The draft regulation retains this provision under Section 14 (4)(a)	This is the mandate of the out-growers institutions and not the apex body
15.	2 (b) Negotiate the terms of supply sugarcane to the millers and the coordination of production,	The word negotiate to be removed as it implies advocacy Should reworded to read coordinate the production of sugarcane, harvesting and transport thereof	The draft regulation retains this provision under Section 14 (4)(b)	This is the mandate of the out-growers institutions and not the apex body

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	harvesting and transport thereby			
16.	(15) (1) Growers assisted by Millers shall enter into a agreement with the miller	Proposal to remove the words 'or through a registered out-grower in Form E1 set out in the first Schedule	The draft regulation retains Clause 15(1) as it is	The removal will limit the farmers' access to services offered by the out-grower institutions
17.	(2)Payment due to farmers within 30 days 27. (1) A miller shall ensure, whether a grower delivered sugarcane independently or through an agent	A registered Miller shall ensure whenever a grower delivered sugarcane independently or through an agent or registered out-grower institution that the grower is paid within seven days after delivery of the sugarcane	The draft regulation retains the Clause 27 as it is Section 28(2) was amended to read as; 2) If a registered out-grower institution or	Global management practice allow up to 90 days credit period. However for farmers, we have limited it to a maximum of 30 days after which they attract interests and penalties Clause 27(2)

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	or a registered out-grower institution that the grower is paid within thirty days after delivery of the sugarcane.		agent fails to remit to a grower the payment received from the registered miller under regulation 27 within 7 days, for any reason other than delay in payment by the miller, the institution shall be liable to pay interest, at market rates, on the due payment and an additional penalty at the rate of three per cent per month on the outstanding payment.	
18.	30. (1) Sugarcane shall be harvested, weighed and transported to the miller, at maturity in accordance with	30. (1) Sugarcane shall be harvested, weighed and transported to the miller, at maturity in accordance with a sugarcane development plan and	The recommendation will be adopted	

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	a sugarcane development plan and supply agreement in Form E3 set out in the First Schedule.	supply agreement in Forms E1,E2 and E3 set out in the First Schedule.		
	(i)Harvested cane shall be weighed at the farm gate	Proposal to weigh the sugarcane at the sugar mill weighbridge	The clause 30 (2) shall remain as it is	Farm gate has been defined as a site nearest to a grower designated as such by the Authority where sugarcane weighing and quality testing facilities have been set up, which is practicable.
19.	Formula for pricing of sugarcane	Proposal to change the formula	The formula shall remain as provided under Clause 34 of the draft regulations	All the options were considered when arriving at the current formula. There will be an opportunity for review of the parameters in the formula from time to time by the

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
				Cane Pricing Committee as provided for in the draft regulations, Clause 34
20.	34 (2) (c) Two representatives elected by the Sugarcane Growers Apex Body;	Increase representation of farmers to cover more regions	The sub clause shall remain as it is	The Apex body is representative of all regions
21.	Financial provisions	Sugar Development levy to incorporate a percentage for the KENAFESUF	There is no provision for levies currently	
22.	39. (1) There shall be an agreement that may be negotiated between growers and registered millers, between growers and registered out-grower institutions, and between	Proposal to replace 'may' with 'shall'	The clause shall remain as it is	All agreements are by their very nature negotiated by both parties

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	registered millers and registered out-grower institutions.			
23.	Page 29 First Schedule Form B1 Application for registration of an Out-grower Institution The memorandum and article of association or partnership agreement	Partnership does not appear to conform with the requirements of registration of an Out-grower institution. Proposal to remove the words partnership agreement	The form B1 shall remain as it is	A partnership is considered an association and should not be left out.
24.	Page 41 Terms of agreement	The wording to conduct their business above authority should read above board and not Authority		The latest draft has amended to use the words integrity, transparency and

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
				accountability in place of 'above board'
25.	Page 42 (16) in the case of sugar cane Second last line percentage for Pol is (12%)	Remove this Phrase Proposal to reduce the percentage from Pol% from 12% to 10%	The phrase shall be retained The percentage shall remain as 12% Pol	There are other sugar crops with varying percentages of sugar 12.5% Pol is the industry's standard whereas the draft regulations has given a generous 12% Pol
26.	(18)	Proposal to reduce the days 7 days	The phrase shall remain as it is.	Global management practice allow up to 90 days credit period.

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	The millers shall pay farmers within 30 days of delivery			However for farmers, we have limited it to a maximum of 30 days after which they attract interests and penalties Clause 27(2)
27.	(19) If the milers fails to pay the grower as specified in the regulations the miller shall be liable to a penalty	Word omitted 'shall be liable to pay interest at Market rates and a penalty of 1.5%	The proposal has been adopted and the schedule amended	To conform with Clause 27 (2) of the draft regulations
28.	**(NEW)** Delayed Harvests	The miller should be penalized for delayed harvests	This has been addressed in the current draft regulations	The draft regulations Clause 30(3) adequately addresses the compensation for unscheduled harvesting and delayed payments
29.	**(NEW)**	The miller should compensate the farmer for opportunity lost when cane is harvested before maturity	The proposal has been adopted, and inserted in Form E1 (18). The Clause reads as,	

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	Harvesting Immature Cane	If a miller harvest immature cane without the consent of the grower, it shall compensate the grower at 2.9 tons per month per hectare per plant crop and 3.2 tons per month per hectare for ratoon crop for late maturity varieties and at 4 tons per month per hectare for early maturity varieties	18. (a) The miller shall pay the grower within thirty days of sugarcane delivery provided that the sugarcane will be harvested at maturity as set out more specifically in the Sugarcane Development Plan.	
30.	Page 47 (20) in the case of sugarcane or rendement of 10%	Proposal ton cane/ton of sugar ratio be increased to 11%	The draft regulations has been amended to read; Tonnes Cane/ Tonnes Sugar of 9:1 Sub Clause, 20 (a)in the case of sugar cane, tonne cane/tonne	11% rendement matches with the ratio of 9:1

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
			sugar ratio of 9:1 or renderment of 11%;	
31.	Page 48 (30) Crop Husbandry b) Applying by Out grower institution	Remove Out Grower institution and replace with Miller	Form E1, Clause 30 (b) has been amended to include Millers and extension services by the County Government to read as; (b) applying, at the recommended time and in the recommended amounts, all fertilizers and other material recommended by the Miller or Out-grower institution or the body responsible for research or County Government extension services;	The service cannot be made an exclusive domain of the out-grower institutions because it is best provided by whoever provides the extension services

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
32.	Page 46 grower "48. The grower shall appoint a representative in all matters of advocacy for sugarcane development, financing of sugarcane supply services, costs of farm inputs and related services. "	Proposal to appoint the Kenya National Federation of Sugarcane Farmers as the representative for farmers	The draft regulations retains Clause 48 as it is	In the spirit of fairness, the ministry shall not dictate how the growers choose to associate, interact or be represented.
	(NEW)	The grower shall support the operations of Kenya National Federation of Sugarcane Farmers body through contribution as provided for under its constitution	The proposal is declined	The issue of contribution by the farmers should be as provided in the constitution of the federation.
33.	Page 52 (57) Disputes	To be dealt with under the Crops Act in in case of contracts under Arbitration	The draft regulations retains Clause 57 as it is	Arbitration is one of the dispute resolution mechanisms available under the Laws of Kenya. It is an

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	57. Any question or dispute as to the responsibility to fulfil the terms of this agreement shall be resolved in accordance with the Laws of Kenya.			expensive mechanism and the ministry does not deem it prudent to force the parties to an expensive dispute resolution forum.
34	SECOND SCHEDULE Formula	Which formula? This one or the other one. There should be consistency about which formula to use	The draft regulation has adopted the formula under clause 34 (1)	There is only one formula for consistency purposes.
35	SUGARCANE TRANSPORTATION AGREEMENT		S.D take action	

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
36.	Form F3, Clause 7 & 8	3% is too low Change 8 (a) to 10 per cent and above	The draft regulation shall retain Clause 8 as it is	3% is a good practice. It promotes good quality standards. The miller has the discretion where conditions may not allow such standards to be achieved.
37.	Grower Representatives		The proposal has been declined	In the spirit of fairness, the ministry shall not dictate how the millers choose to associate and interact

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9. WEST KENYA SUGAR COMPANY LIMITED AND SUKARI INDUSTRIES

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
2.	Definition – Regulation 2 "farm-gate" means a site nearest to a grower designated as such by the Authority where sugarcane weighing and quality testing facilities have been set up;	Definition of Farm Gate "farm-gate" means a site where sugarcane weighing and quality testing facilities have been set up;	The definition should remain as proposed in the draft regulations	The definition addresses; 1 The distance between the miller and the grower and cane wastage. 2. The designation by the authority is intended to bring order in the industry.
2	"miller" means a person who owns or operates a sugarcane mill to produce sugar, including refined sugar, jaggery and other by-products;	The definition is vague. "miller" means a person who owns and has been licensed in accordance with Section 20 of Crops Act and these regulations to operate sugarcane mill to produce sugar, including refined sugar, jaggery and other by-products;	The definition remains as proposed in the draft regulations	The definition is adequate for the purpose of this regulations. The aspects of licensing and registration are covered under PART III
3.	"Mill command zone" means a specific geographical area assigned to a miller by the Authority in consultation with the relevant County	Zones should be deleted	The draft regulation retains the definition of 'Mill Command Zone' as it is.	"Mill command Zone are supposed to provide for proper planning of agricultural activities in identified agro-ecological

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	Government based on milling capacity and crop productivity for the purpose of development and procurement of the sugarcane.			zones suitable for cane development. There are not meant to restrict access to markets for sugarcane growers.
4.	Zones	Deletion of Zones	The definition remains as in the draft regulations	Definition of Zones in the regulation does not contravene the constitution
5.	Review Heading "Registration of Dealers and licensing Millers"	Registration and Licensing of dealers and Millers	The heading in PART III remains as in the draft regulations	A registered miller is deemed to be a dealer. The proposed changes to the heading will imply that even dealers who are not processors or manufacturers will be required to be licensed which is against Section 16 of the Crops Act, 2013.
6.	Clause 7	To reintroduce the procedures on registration of sugar	The proposals have been incorporated under Clause 7	

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
		mills and letters of comfort that existed in previous drafts		
7.	6.(1) The Authority may in consultation with the relevant county government and other stakeholders, conduct an evaluation and prepare a written evaluation report within ninety working days after submission of an application.	Stakeholder should be defined to include; govt, lead agencies, other relevant regulatory bodies, millers, growers, or out-grower institutions	The draft regulations retain the clause as it is.	The Authority has the capacity to identify the relevant stakeholders at any material time
8	Regulation 7(1) 7. (1) An applicant shall apply to the Authority for a letter of comfort to erect a sugar mill	Deletion of the word "to erect a sugar mill"	The draft regulations retain the clause as it is.	The concerns have already been included in Clause 7 (2)
9.	Regulation 7(2) Delete Part (d) proposed mill command zone	Delete	The draft regulation retains the definition of 'Mill Command Zone' as it is.	Definition of Zones in the regulation does not contravene the constitution

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
10	NEW	Introduce a new regulation on registration of a sugar mill	The draft regulations will not make the introduction.	The process of setting up a new sugar mill starts with an application for a letter of comfort
11	Regulation 8 (1) 8. (1) An applicant, who fails to establish a sugar mill within two years of being issued the authority to erect a factory without reasonable cause, shall have the Authority revoked.	Delete and substitute with New Regulation An applicant who fails to construct a sugar mill within 3 years of being issued a certificate of registration of a sugar miller authorizing it to erect a factory without reasonable cause shall have the certificate of registration revoked.	The regulation remains as it is.	In setting the two years, all other external requirements to AFA were considered. The time is therefore adequate.
12.	Regulation 9(5) (5)The Authority shall, at least thirty days before granting a manufacturing licence for a sugar mill, give notice of the proposed grant in the Gazette and in such	To amend to read as follows; The Authority shall, at least thirty days before granting a manufacturing licence for a sugar mill, give notice of	Clause 9 (5) remains as it is.	The Clause is adequate and provides the options for other national wide forms of circulation

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	other manner as the authority may determine.	the proposed grant in the Gazette and *publish the same in two newspapers with a national wide circulation.*		
13.	Regulation 9 (6-8) Contents of the notice	The notice should inter-alia indicate *where intended objectors can be able to get a copy off the application*	The clauses remains as they are	Clause 8 provides for this under the Authority (8) invite objections to the proposed grant of licence and direct that such objections be lodged with the Authority within fourteen days from the date of the notice.
14.	Regulation 9(8) (8) invite objections to the proposed grant of licence and direct that such objections be lodged with the Authority within fourteen	Proposal for conduct of objection hearing as follows; Upon receipt of an objection the authority shall summon the objector for hearing by	Clause 9(8) remains as it is	Section 20(6) of the Crops Act, 2013 provides for the procedure for conducting objection hearing.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	days from the date of the notice.	giving him at least 7 days written notice		
15	Interpretation of Regulation 9 (13) The Authority in consultation with the county governments may establish a licensing Committee, which shall comprise of —	Delete	Clause 9(13) remains as it is	The Crops Act, Section 20(1) The Crops Act, Section 6(2) The Constitution, 2010 under Article 189 encourages cooperation between the national and county government.
16	Regulation 10 Mill Command Zone	Delete Mill Command Zone	The draft regulation retains the of 'Mill Command Zone' as it is.	"Mill command Zone are supposed to provide for proper planning of agricultural activities in identified agro-ecological zones suitable for cane development
17	Regulation 11(1)	Membership should be voluntary and not compulsory	The clause remains as it is	The use of the word "may" in Clause 2 shows that it is not mandatory. (2) All millers **may** upon licensing join the apex body

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
				of millers to advocate for their interest or be members of an umbrella association for advocacy of their interests.
18	Regulation 32 Zones	Delete	The Clause shall remain as it is	Transportation permits will allow for an organized way of accessing sugarcane in any zone hence preventing sugarcane poaching.

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10. KENYA SUGAR MANUFACTURING COMPANY

No	Issue	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1.	Attainment of zoning Through Regions 10. (1) The Authority in consultation with the respective county government shall assign a specific geographical zone for development and procurement of sugarcane. (4)The Authority in consultation with the respective County governments shall from time to time review the mill command zones.	They are supporting regional zones but reject the notion of exclusive zones	Clause 10 remains as it is	Clause 10 on the Mill Command Zones which addresses the establishment of zones through a consultative process with the county government based on parameters Inter-zonal cane transfers is allowed in the current regulations
2.		Establishment of Executive Advisory Board	The draft regulations do not provide for this. Section 40 of the Crops Act empowers the CS to make regulations but does not permit him to establish an Executive Advisory Board	The draft regulations provide for an Apex Body Under Clause 11 and 12 to advocate for millers and growers interests respectively. Other proposed mandates and

No	Issue	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
				sanctions are being undertaken by other institutions and organs of the government as provided for under the regulations and the Acts.

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11. KENYA ASSOCIATION OF MANUFACTURERS

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1.	Citing of the regulation, The Crops (Sugar)(General) Regulations, 2018	Review of the title to provide a distinction between 'sugar crop' and 'sugarcane'	The title of the draft regulations remains as it is.	Definition of sugarcane captures sugar-related crops
2.	Definition – Regulation 2 "farm-gate" means a site nearest to a grower designated as such by the Authority where sugarcane weighing and quality testing facilities have been set up;	Definition of Farm Gate Weighbridges and transit stations need to be recognized under the definition	The definition should remain as proposed in the draft regulations	The definition implies that weighbridges and the testing facilities are at the farm gates.
3.	"mill command zone" means a specific geographical area assigned to a miller by the Authority in	Definition of Miller Command Zone Inclusion of the definition of "Mill command Zone Roll out Policy"	The draft regulation retains the definition of 'Mill Command Zone' as it is.	Inclusion of the definition of "Mill command Zone Roll out Policy" is not necessary as it does not appear

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	consultation with the relevant County Government based on milling capacity and crop productivity for the purpose of development and procurement of the sugarcane.			anywhere in the regulations. The roll out of the command zone areas will be done by the Authority jointly with the County Government
4.	"independent grower" means a grower who— (a) is not a member of any out-grower institution; (b) does not depend on the miller for any assistance; (c) depends solely on his own resources to develop and supply sugarcane directly	Definition of Independent grower Inclusion of a definition of an independent grower in terms of their contractual engagement with millers on cane.	The definition remains as proposed in the draft regulations	The definition is sufficient in identifying who an independent grower is.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	to any miller under contract;			
5.	"miller" means a person who owns or operates a sugarcane mill to produce sugar, including refined sugar, jaggery and other by-products;	Definition of miller Inclusion of definition of 'jaggery operators'	The definition remains as proposed in the draft regulations	The definition in the draft regulation is an all-inclusive and identifies jaggery operators as Millers
6.	Regulation 2 "'interested party" means a stakeholder in the sugar industry including **but not limited** to the Government, millers, growers and out-grower institutions;	Inclusion of the following stakeholders; • Research institutions • Industry regulators • National Government • County Government • Millers • Cane Transporters • Distillers • Traders • Importers • Farmer organizations	The draft regulations retains the definition as it is.	The definition is inclusive and is not limited only to the mentioned institutions.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
7.	Farm gate "farm-gate" means a site nearest to a grower designated as such by the Authority where sugarcane weighing and quality testing facilities have been set up;	"farm-gate" means a site designated as such by the Authority where sugar crop weighing and quality testing facilities have been set up;	The draft regulations retain the definition as it is.	The definition of sugarcane herein has been used to refer to all sugar crops "site nearest to a grower" takes care of the distance as a major concern of the farmer.
8.	Regulation 2 "Agreement" "agreement" means an agreement specifying the standard provisions that govern the rights and obligations of growers, millers,	Agreement means an agreement specifying the standard provisions that govern the rights, obligations, enforcement measures and remedies of breach of growers, millers, out grower institutions, harvesters and transporters.	The proposal has been incorporated and the draft regulations amended.	It brings out more clarity.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	out-grower institutions, harvesters and transporters;			
9.	Regulations 3 Functions of the Directorate	Inclusion of provisions on the functions of county government in the regulation	The draft regulations shall remain the same.	The draft regulations has adequately addressed the role of the county government in accordance with the Crops Act, 2013 and the Constitution of Kenya, 2010.
10	Regulation 3 Functions of directorate (b) co-ordinate capacity building activities for players in the sugar value chain;	Inclusion of the word regulation in addition to coordinate	The draft regulations remains the same.	The term 'regulation' has already been captured under Clause. (1) as, 'The Authority shall carry out such activities as are necessary to promote, develop and **regulate** the sugar

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
				industry through the Directorate for the time being in charge of the Sugar Industry.
11	Functions of the Directorate	Formation of an independent tribunal or dispute resolution system to address disputes	The draft regulations remains the same	The concern has been addressed in the Crops Act, 2013 and the Judicature Act.
12	Functions of the Directorate	Deletion of proposed function under regulation 3 to promote linkage and coordination with international research agencies and regional organizations	This was done and draft regulations amended	
13	Functions of the Directorate	Indicate the specific role of the Directorate which is sugar regulation by replacing the word "agricultural" with "Sugar" industry policies	The function was removed from the draft regulations.	
14	The Cabinet Secretary may appoint an umbrella	The cabinet secretary registers Sugar Association by Notice in the Gazette as follows,	Section 11 of the draft regulations is amended to read 11.	In the spirit of fairness, the ministry shall not dictate how the millers

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	Association as Sugarcane Millers Apex body by a notice in the Gazette	"Sugar Millers shall form and duly register an umbrella "Sugar Crop Millers Apex Body" which shall be duly recognized as such by the relevant cabinet secretary."	(1) The Authority shall register an apex body made up of all registered/licensed millers as an umbrella association to represent and advocate millers' interests. (2) All millers may upon licensing join the apex body of millers to advocate for their interest or be members of an umbrella association for advocacy of their interests. (3) The Authority may recommend guidelines for the governance structures of the apex body.	choose to associate and interact
15.	Environmental Impact Assessment 19. (1) A miller shall demonstrate their ability to continuously satisfy	Inclusion of provisions which specify the objective method of demonstration, frequency and how the information will be obtained (e.g. filling returns), stored and shared.	The draft regulations remains as it is	The concerns have been adequately addressed by EMCA, 1999.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	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.	Inclusion of sanctions and incentives where appropriate		

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
16.	Regulation 34(1) Sugarcane Pricing Committee	Current formula should be deferred until a conclusive agreement is concluded with sugar stakeholders based on the Sucrose based payment policy. Provide a definition of extraneous matter	This has been done. The draft regulations has only one formula. Extraneous matter has been defined in the regulations and the limits set	
17.	Reg. 34 (10)Sugarcane Pricing Committee The committee shall be responsible for determining a transport tariff or sugarcane	Provide a criteria to determine a transport tariff	The draft regulations remains as it is.	The Sugarcane Pricing Committee will come up with a criteria while determining the transport tariff per Clause 34 (10)
18.	Regulation 35 Burnt Sugarcane	Replacing the proposed 7 days in the regulation 35 (b) seven days with two days	The proposal has been incorporated and draft regulations amended.	

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	The sugarcane shall be delivered to the mill weighbridge within a period of not more than seven days after cutting, inclusive of the day of burning according to specific registered miller zones			
19.	Regulation 35 (d) a payment for burnt sugarcane shall be made one month from the date of the scheduled harvest of sugarcane.	Inclusion of provision on burnt sugar prices Inclusion of a price penalty for burnt cane	There is no provision for levies currently in the draft regulations as it is not in the scope of this regulations	The Sugar Cane Pricing committee is better placed to determine prices for cane, including burnt cane
20	Imposition of Sugar Levy	Purpose of creating a reserve of 15% out of its fund and its	There is no provision for levies currently in the draft	

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
		management/appropriation needs to be specified	regulations as it is not in the scope of this regulations	
21	FINANCIAL PROVISIONS Sugar development Levy	Inclusion of provisions on a distribution policy of Sugar Development Levy(SDL) towards infrastructure and Cane Development	There is no provision for levies currently in the draft regulations as it is not in the scope of this regulations	
22.	AGREEMENTS AND FORMS Form E1 agreement Clause 1 1. The term of this agreement shall commence on the date it is signed and shall, unless sooner determined under the provisions hereof, continue until the grower has harvested one	Include under Clause 1the following changes on the harvest to commence the term of agreements as follows; • One Plant Crop and • 2 Ratoon Crops or 3 Ratoon Crops as may be applicable at time of entering into contract	Clause 1 of the draft regulations takes care of this concern	

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	plant and two ratoon crops, which is a period of up to maturity for both plant crop and up to twenty two months for each ratoon crops as specified in this agreement provided that for early maturing varieties, the crop may be harvested earlier as appropriate, and that by mutual consent the said term maybe extended to include the harvesting of one the third or more ratoon crops as long as the crops meet agreed			

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	quality standards, with or without modifications of the terms and conditions herein contained, by a memorandum of extension endorsed hereon not less than three months before the date of the anticipated commencement of harvesting of what would otherwise have been the last ratoon crop under the contract.			
23.	Clause 2	Include Provisions "and any other development services which may be provided for in in the agreement"	The draft regulations will remain as it is.	Clause 2 does not limit the provision of any other services

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
24.	Form E1, Clause 5 5.Sugarcane shall be transported efficiently in stack units (6 tonnes) or their multiples such as two stacks ((12) tonnes) or three stacks (eighteen (18) tonnes), to avoid field and transport losses.	Stack size to be determined by Miller and Grower	The draft regulations shall remain with slight amendments to read; 5. Sugarcane shall be transported efficiently in stack units (6 tonnes) or their multiples such as two stacks (12) tonnes) or three stacks (eighteen (18) tonnes), or as may be agreed between the miller and grower to avoid field and transport losses.	To be more accommodative of new transport developments and differences in regions
25.	Form E1, Clause 6	Inclusion of provisions; (i) Recognizing a miller as a transporter and general commercial transporters (ii) Recognize loss of Sugarcane alongside spillage	Clause 6 takes care of this concern. The draft regulations remains as it is. This has been included in the draft regulations and it remains as it is.	
26.	Form E1, Clause 8	Deletion of Clause due to its ambiguity and that it goes	The clause remains as it is.	The price is determined in consultation with all

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	8. The sugarcane price payable by any party shall be the price derived through the payment formula provided by the sugarcane Pricing Committee.	against the Market Price determination		the stakeholders including Millers.
27.	Form E1, Clause 15 15. The lead time in harvesting sugarcane shall not be more than twenty-four (24) hours and all the lead sugarcane harvested within the lead- time shall be under the responsibility of the miller, who may arrange to offer the sugarcane to	Replacing the proposed lead time of 24 hours to not more than **seventy two (72) hours**	The clause remains as it is.	To avoid deterioration of the cane

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	another miller or bear the cost of wastage.			
28.	Form E1, Clause 16 16. In the case of sugarcane the miller shall buy all sugarcane of requisite quality harvested from the area specified in this supply contract in accordance with the programme provided for herein and the requisite quality of sugarcane shall be as specified by the Authority in respect of the specified sugarcane variety whose harvest-to-mill time for green	Proposal for; i. Harmonizing lead times proposed under Clause 15 and 16 since they are in conflict ii. Review of the proposed lead time on: • Green Sugarcane • Burnt Sugarcane	The clause remains as it is.	Clause 16 deals with accidental fires and Clause 15 provides for planned fires therefore the situations are different. Lowering the Pol percentage will encourage immature cane harvesting.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	sugarcane shall ideally not exceed seventy-two (72) hours, and in case of accidentally burnt sugarcane harvest-to-mill time shall ideally not exceed forty-eight (48) hours; with extraneous matter of less than three per cent (3%); of Pol % cane of twelve percent (12%) or above and fibre content of 15% but not more than 17.5% at maturity.			
29	Form E1, Clause 20 1. The miller shall maintain and develop	Propose to understand the consequence and impact of the grower.	Clause 20 shall remain the same	There is no negative impact on the grower.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	adequate milling capacity for sugarcane planted based on agreed planting plans with the growers and further strive to mill sugarcane efficiently to realize maximum returns for both parties by achieving the following standards: (a) in the case of sugar cane, tonne cane/tonne sugar ratio of 9:1 or rendement of 11%;	Standards are not realistic and should be removed		These are the Kenyan sugar industry minimum standards.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	(b) mill extraction of 94%; (c) preparation index of 90%; (d) boiling house recovery of 88%; (e) factory time efficiency of 92%; (f) overall time efficiency of 80 %; and (g) overall time utilization of 75%.			
30.	Form E1, Clause 21 21.The miller shall off-load sugarcane quickly and efficiently by applying the principle of first in first out (FIFO) and	We propose removal of this proposal in the agreement since it only applies to millers and not growers	Clause 21 remains as it is.	Storing sugarcane in the yard for more than 12 hours affects the K (Expected Mill Extraction) and R (Expected boiling house recovery) parameters

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	no sugarcane shall be stored in the yard for more than 12 hours from mill-time, provided that during the handling of sugarcane in the yard vehicles shall not be used in such a manner as to destroy sugarcane.			and consequently the cane price to farmers.
31	Form E1, Clause 25 25. The miller shall list charges for all goods and services to be provided in the agreement as shown hereafter to allow the grower to make a choice and such chargeable goods and services shall include,	Propose addition of, "which charges may be reviewed from time to time by the miller"	Clause 25 remains as it is.	All charges will be agreed at the time of signing the contract.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	pesticides, herbicides, fertilizers, land development, crop maintenance, harvesting, weighing, transportation and any other specified hereof.			
32.	Form E1, Clause 26 26. The miller shall do anything necessary for either party in terms hereof provided that, if the grower fails to facilitate the harvesting of his sugarcane at the appointed time, the miller shall refer the matter to the	Propose inclusion on the tribunal roles and responsibilities especially with regard to Sugar Disputes	Clause 26 remains as it is	The concern will be addressed during the formulation of rules and regulations governing the operations of the Crops Arbitration tribunal once it is established.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	Crops Arbitration Tribunal.			
33.	Form E1, Clause 28 28. The grower shall at all times allow the miller to enter upon his land together with any vehicles, machinery or livestock which the miller may require to inspect	Propose removal of the word "Livestock"	Clause 28 remains as it is.	The provision of including livestock is for the purpose of giving oxen-driven carts power to be used for transportation of cane like in other countries.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	the land and the sugarcane growing thereon without causing damage to property, sample the sugarcane, gain access to other grower's land, including such construction of access tracks as may be required for the transport of sugarcane produced by the grower or others provided that any damage to property by miller or his agents shall be borne by the miller.			
34.	Form E1, Clause 30 b) applying, at the recommended time	Propose deletion of the words "Out-grower Institution' and	Clause 30 remains as it is.	All parties included are mandated to provide the service.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	and in the recommended amounts, all fertilizers and other material recommended by the Miller or Out-grower institution or the body responsible for research or County Government extension services;	replace with "The miller or authorized Authority"		
35.	Form E1, Clause 30 (g) except for seed cane production, planting the sugarcane inter-row, one row only of common beans, soybeans, potatoes, tomatoes, onions,	Removal of the words, "Inter-cropping"	Clause 30 remains as it is	Inter cropping provides diversification, additional income and food security to the farmer including environmental conservation.

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
	cabbages or carrots and any other crop maturing within four (4) months and recommended by body responsible for research; and			
36.	Form E1, Clause 50 51. Where the miller offers services at the wrong time, the farmer shall have the option of arranging for services upon notice to the miller.	Proposal a. Define the services b. Deletion of the word "his" to ensure gender sensitivity	Clause 50 has been amended by deleting the word his.	Services are included in the agreement under Clause 2 of Form E1 For purposes of gender sensitivity
37	Form E1, Termination of the contract	Delete this provision	Clause remains as it is.	The termination clause is in the interest of both parties of the agreement. Every agreement must have a

No	Heading of Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
				termination clause in any event.
38	CHARGES BY THE MILLERS (Table)	Proposal that this be amended in line with individual miller services	The table under Firm E1 remains as it is.	The miller will be at liberty to quote or not and add other relevant services as applicable.

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12. FRED OKETCH JONAM, JAMES ADANI AND LAZARO ATIENO

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1	Sugar Directorate		This is not provided for in the draft regulations	
2.	Definitions page 1 and 2 "farm-gate" means a site nearest to a grower designated as such by the Authority where sugarcane weighing and quality testing facilities have been set up;	Definition of Farm Gate Inclusion its definition carried the intention that the farmer responsibility should end at the gate and miller to take care of transportation and not to make it another business burdening the farmer.	The definition should remain as proposed in the draft regulations	AFA will determine the distance considering all factors that favour both the farmer and the Miller
3.	"Sugarcane Growers Apex Body" has the meaning assigned to it in regulation 12 means a national sugarcane farmers organization as may be Gazetted by the Cabinet Secretary from time to time;	Inclusion and definition of Sugar Manufactures association	Section 12 of the draft regulations should be amended to read 'Sugarcane Growers Apex Body' instead of 'Union'	The apex bodies will cater and advocate for the interest of both millers and growers

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
4.	Functions of the Directorate Clause 3 (d)	The directorate shall have the right to access to all data from all institutions in the industry to enable it	The clause remains as it is.	AFA has this mandate under the Crops Act, 2013. Data collection is provided for under Section 4 (c) of the AFA Act and crops Act, Section 28.
5.	Functions of the Directorate Clause 3(f)	To add 'establish linkages with various government agencies and research institutions	The clause remains as it is.	This is provided for in the Crops Act
6.	Registration of dealers and licensing of millers Page 5 Clause 7 (2) a-g	Inclusion of transfer of technology for new projects	Clauses remain as they are.	Use of technology is taken care of Form E1 clause 20 Ministry of trade industries & cooperatives enforces policies on technology transfer

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
		Performance Standards		Addressed under clause 15 of Form E1 Regulation 19 sets out a licensing criteria
7	Pricing Formula	New Formula	The formula remains as it is	The price is determined in consultation with all the stakeholders including Millers. All formula were taken into consideration while arriving at the current one.
8	Sugarcane Development Levy			Not provided in the draft regulations

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13. MUMIAS SUGAR

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1	Mill Command Zone	Supportive of the addition of Zoning in the regulations as it is advantageous to farmers	The Clause remains as it is	Mill command Zone are supposed to provide for proper planning of agricultural activities in identified agro-ecological zones suitable for cane development. There are not meant to restrict access to markets and services.

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14. COUNTY GOVERNMENT OF KAKAMEGA

No	Draft Regulation	Proposed Changes By the Stakeholder	Position of the Ministry	Justification
1	Clause 3(p) Clause 3(t) Clause 8 1,3,4,5,6,7		All these proposals were incorporated and the offending provisions removed	
2	Clause 32(2)	Replace "Farm Gate" with "cane buying centers"	The clause remains as it is.	The proposal has not properly construed the definition of farm gate as is in the regulations. It does not refer to a gate of a farm
3	Clause 42	Introduction of County Executive committee as an appeal	The provision was removed	We cannot introduce a county executive committee while there are structures in law that caters for these.