This Regulatory Impact Assessment (RIA) has been prepared by the Cabinet Secretary - Ministry of Investments, Trade & Industry Section 6 and 7 of the Statutory Instruments Act (No.23 of 2013)
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Chapter 1: INTRODUCTION

1.1 : Regulatory-Making Authority and the Legal Mandate

KEBS is the National Standards Body in Kenya established under the Standards Act, Chapter 496 of the Laws of Kenya. KEBS operates an integrated quality infrastructure that encompasses Standards, Metrology and Conformity Assessment (SMCA). The SMCA services are provided through; development of standards for use by the industry, provision of testing and calibration facilities, product and system certification, undertaking educational work in standardization and practical application of standards, and maintenance & dissemination of International System of Units (SI) of measurements.

KEBS plays a critical role in consumer protection by inspecting commodities coming into the Kenya market, issuing permits to local manufacturers and conducting random market surveillance to ensure that products in the market comply to the set standards and are safe for consumption. KEBS facilitates trade by setting standards for various classes of goods with the aim of ensuring such commodities are safe for consumers and the environment and subsequently acceptable to the local, regional and international market. KEBS issues competent local manufacturers permits to produce commodities against prescribed standards and to apply KEBS certification marks on the said products to enable them access the local and regional markets. KEBS achieves this through its recognition as the National Standards Body of Kenya within the East African Community legal framework as well as Mutual Recognition Agreements negotiated between KEBS and counterpart Standardization Bodies in various countries from time to time with the aim of accepting certification marks of member countries without having to go through inspection. This has played a key role in ensuring free movement of goods across regions.

KEBS also plays a critical role in promoting Micro & Small Enterprises (MSEs). MSEs are the biggest hope for Kenya’s Industrial Development. KEBS subsidizes MSEs to the tune of KES225 Million annually. From 1990 to date, Standards Levy has helped Kenyan industry to grow from 1,200 to over 19,000 companies. At least 12,000 companies have grown from MSEs to large firms since 1990 due to Standards Levy.

Section 10B (1) of the Standards Act provides that the Cabinet Secretary may make a standards levy order for the purpose of giving effect to proposals submitted by the Council and approved by the Cabinet Secretary. Further, the order may provide for the amendment of a previous standard levy order and may make different provisions in relation to different classes or description of industry. In exercise of the above powers therefore, the Minister (now referred to as “Cabinet Secretary”) prepared the Standards Levy Order, 1990 which came into operation on 1st July 1990. The Order was revised in 1999 to increase the maximum of levy payable from KES. 200,000 (Kenya Shillings Two Hundred Thousand) to KES. 400,000 (Kenya Shillings
Four Hundred Thousand). The 1990 Order has been applied in Kenya for over 30 years and given the dynamic nature of the manufacturing industry, some of its provisions have become obsolete and need to be replaced with market-oriented and research-based technical provisions. There is a further need to align the Order with principles of public finance entrenched in the Constitution.

In consideration of the above, the Cabinet Secretary relying on proposals submitted by the Council has prepared the draft Standards (Standards Levy) Order, 2023 (proposed Order). This is a statutory instrument which seeks to boost the practice in Standardization, Metrology and Conformity Assessment (SMCA). It is likely to impose costs to manufacturers who play a key role in Kenya’s economic development.

1.2: Requirements of the Statutory Instruments Act

The Statutory Instruments Act, No. 23 of 2013 is the legal framework governing the conduct of RIA in Kenya. Sections 6 and 7 require 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 RIA about the instrument. The Act further sets out certain key elements that must be contained in the RIA namely:

(a) a statement of the objectives of the proposed legislation and the reasons;
(b) a statement explaining the effect of the proposed legislation;
(c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;
(d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; and
(e) the reasons why the other means are not appropriate.

Section 5 of the Act requires a regulation-making authority to conduct public consultations drawing on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument and ensuring that persons likely to be affected by the proposed statutory instrument are given an adequate opportunity to comment on its proposed content. The Cabinet Secretary now undertakes public consultations and prepares this Regulatory Impact Assessment (RIA) in partial fulfilment of the requirements of the Statutory Instruments Act.

1.3: What is a Regulatory Impact Assessment?

RIA is a systematic policy tool used to examine and measure the likely benefits, costs and
effects of new or existing regulation. It is an analytical report to assist decision makers. As an aid to decision making RIA includes an evaluation of possible alternative regulatory and non-regulatory approaches with the overall aim of ensuring that the final selected regulatory approach provides the greatest net public benefit. Typically, the structure of a RIA should contain the following elements: title of the proposal, the objective and intended effect of the regulatory policy, an evaluation of the policy problem, consideration of alternative options, assessment of all their impacts distribution, results of public consultation, compliance strategies, and processes for monitoring and evaluation\(^1\).

RIA is usually conducted before a new government regulation is introduced to provide a detailed and systematic appraisal of the potential impact of a new regulation in order to assess whether the regulation is likely to achieve the desired objectives. RIA promotes evidence-based policy making as new regulations typically lead to numerous impacts that are often difficult to foresee.

From a societal viewpoint, RIA should confirm whether or not a proposed regulation is welfare-enhancing, in that, the benefits will surpass costs. RIA therefore has objectives of improving understanding of the real-world impact of regulatory action, including both the benefits and the costs of action, integrating multiple policy objectives, improving transparency and consultation; and enhancing governmental accountability.

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Chapter 2: PURPOSE AND OBJECTS OF PROPOSED STANDARDS (STANDARDS LEVY) ORDER 2023

2.1: Scope

The scope of the Proposed Order is:
(a) manufacturer’s liability to pay levy or their discharge of that liability;
(b) prescribe the levy payable;
(c) collection of standards levy
(d) Exemption from payment of Standards Levy;
(e) levy paid in excess;
(f) registration and classification of manufacturers;
(g) issuance of a levy compliance certificate;
(h) consequences of non-compliance to Standards Levy order requirements;
(i) procedure for making monthly payments of standards levy;
(j) procedure for waiver of penalties imposed under Section 10B (3) of the Standards Act;
(k) Maintenance of records and sharing of information -; and
(l) revocation of the 1990 Order.

2.2: Objective

The Proposed Order aims to enumerate provisions to give effect to Section 10B of the Standards Act.

2.3: Specific objectives

Specifically, the implementation of the Standards Levy Order is intended to:
(a) specify the evidence by which a manufacturer’s liability to the levy or their discharge of that liability may be established;
(b) identify manufacturers that are exempt to payment of the levy;
(c) administer payment in excess of the levy payable;
(d) manner of recovery of unpaid levy;
(e) provide for notification of intention to manufacture;
(f) registration of manufacturers including the classification of their respective industries;
(g) procedure for the issuance and renewal of a levy compliance certificate;
(h) maintenance of levy records by manufacturers;
(i) procedure for the waiver of penalties imposed;
(j) obligation to publish and publicize levy related information; and
(k) provision to save any authorization, charge, fee, certificate or proceedings issued or commenced under the 1990 Order;
(l) format for the standard levy notification form; and
(m) format for standards levy return form.

2.4: An Overview of the Proposed Order: Salient Features
This overview is intended to assess whether the proposed Order is clear, consistent, comprehensible, and comprehensive enough to address the identified problem. The rules should be understood by persons likely to be affected by the proposed order, and to that end KEBS has taken steps to ensure that the text and structure of proposed order are as clear as possible.

The structure of the proposed Standards Levy Order is as follows:

1—Citation.
2—Interpretation.
3—Levy.
4—Exemption.
5—Levy paid in excess
6—Liability for non-payment of any sum due
7—Notification
8—Registration of manufacturers
9—Levy Compliance Certificate
10—Maintenance of records by manufacturers
11—Waiver of penalty
12—Digitization
13—maintenance and sharing of records
14—Revocation

FIRST SCHEDULE – LEVY NOTIFICATION FORM & LEVY RETURNS FORM

SECOND SCHEDULE – CLASSES OF INDUSTRY FOR THE MANUFACTURERS
Chapter 3: BACKGROUND AND CONTEXT

3.1: Policy Background

United Nation Sustainable Development Goals (SDGs)

Goal 8 addresses decent work and economic growth. It entails achieving higher levels of economic productivity through diversification, technological uprating and innovation and increasing aid for trade support for developing countries through the Enhanced Integrated Framework for Trade-Related Technical Assistance. Further Goal 9 on building resilient infrastructure, promoting sustainable industrialization and fostering innovation entails increasing the access of small-scale industries and other enterprises, in particular in developing countries, to financial services, including affordable credit, and their integration into value chains and markets. These ideals are achievable with enhanced manufacturing where standards development plays a critical role. The Proposed Order is intended to support standards development which will in effect power the manufacturing sector.

Africa Agenda 2063

One of the key aspirations of Africa Agenda 2063 is “A Prosperous Africa, based on Inclusive Growth and Sustainable Development”. One of the goals under this aspiration is Transformed Economies whose priority areas are:

- Sustainable and inclusive economic growth
- Science Technology and Innovation (STI) driven Manufacturing / Industrialization and Value Addition
- Economic diversification and resilience

Technology and innovation is considered a key driver of the manufacturing sector. KEBS will need to continuously develop standards in line with developing technologies. This exercise comes with a cost implication which the Proposed Order seeks to address.

African Regional Organization for Standardization (ARSO)

Among the fundamental mandates of ARSO is to develop tools for standards development, standards harmonization and implementation of these systems to enhance Africa’s internal trading capacity, increased Africa’s product and service competitiveness globally, and uplift of the welfare of African consumers as well as standardization forum for future prospects in international trade referencing. In carrying out its mandate, ARSO seeks to:

- Harmonize national and/or sub-regional standards as African Standards and issue necessary recommendations to member bodies for this purpose.
- Initiate and co-ordinate the development of African Standards (ARS) with references to products which are of peculiar interest to Africa.
- Encourage and facilitate adoption of international standards by member bodies.
- Promote and facilitate exchange of experts, information and co-operation in training of personnel in standardization activities.
- Co-ordinate the views of its members at the ISO, IEC, OIML, Codex and other international Organizations concerned with Standardization activities.
- Create appropriate bodies in addition to the organs of the organization for the purposes of fulfilling its objectives.

KEBS is Kenya’s National Standardization Body mandated to develop standards for utilization by the industry. ARSO plays its role through national standardization bodies such as KEBS. KEBS role in standards development therefore needs support for KEBS to actively participate in standards harmonization activities under ARSO to aid local products to access the regional market.

**Kenya’s Vision 2030**
The Vision identifies manufacturing as being a key enabler for driving the country to a globally competitive and prosperous country with a high quality of life by the year 2030. The goal is to generate an additional KES. 30billion to GDP by producing consumer goods that compete with imports. Quality consumer goods cannot be manufactured without establishment of standards.

**The Kenya National Trade Policy, 2016**
The Policy outlines its mission as to facilitate Kenya’s transformation into a competitive export led economy, enhance regional integration and widen participation in both domestic and international trade. It enumerates one of its objectives as creation of an enabling environment for trade and investment to thrive. KEBS plays a critical role in facilitating trade through development of standards that are used by the industry to support production of quality products that can compete effectively in the local and international market.

**The Draft National Quality Policy, 2021**
The draft Policy recognizes that quality infrastructure is required for the effective operation of domestic markets, and quality infrastructure’s international recognition is important to enable access to foreign markets. Further, it is a critical element in promoting and sustaining economic development, as well as environmental and social wellbeing. The National Quality Infrastructure (NQI) system comprises of Standardization, Metrology, Accreditation, Conformity Assessment and Market Surveillance. In addition, to overcome technical barriers to trade, Kenya needs to adopt and implement the internationally recognized and accepted quality standards of international markets. The specific objectives of this policy are to: enhance capacity within NQI, strengthen the NQI skills and technical expertise, create understanding and awareness on NQI, provide a conducive legal and regulatory framework. The Draft Policy acknowledges that KEBS is the designated National Standards Body as well as National Metrology Institute.

KEBS supports manufacturing, commerce and trade which are key drivers to the growth of the Kenya’s economy and contribute greatly to the country’s Gross Domestic Product, employment creation as well as linkages to other sectors requiring SMCA services. Manufacturing is thus a critical component to the country’s development and its impact is felt
nationally, regionally and globally.

3.2: Domestic Context

KEBS plays a central role in consumer protection and trade facilitation. Standards Levy Order is a key component in financing KEBS activities. It sets out the provisions that specify the amounts of levies payable to KEBS by the manufacturers. For an effective model, the Standards Levy Order should have legal status and should be capable of enforcement so that all manufacturers can fully comply with it.

Standards Levy Order provides minimum and maximum levies that manufacturers should remit to KEBS at prescribed timelines. This levy supports KEBS activities, hence, facilitation of trade and protection of health and safety of consumers. Further, the Standards Levy Order provides general information as well as specific information such as the scope and classification of the eligible manufacturing sectors and provisions of refund for overpayments among others.

The current Standards Levy Order came into operation on 1st July 1990. The Order was revised in 1999 to increase the ceiling of levy payable from KES. 200,000 to KES. 400,000. The 1990 Order has been applied in Kenya for over 30 years.

By way of an overview, the Proposed Order provides for the process of application for registration of a manufacturer, it defines the period within which the levy must be paid and provides grounds for penalties. The Order further prescribes the issuance of a Standards Levy Compliance Certificate to the entities that have demonstrated compliance.

3.3: International Context

KEBS operations and services are aligned and contribute to the delivery of Africa Agenda 2063 and United Nation’s Sustainable Development Goals (SDGs). KEBS participates in the implementation of the Standardization, Quality Assurance, Metrology and Testing (SQMT) strategy in the East African Community (EAC), where it plays a key role in the harmonization of standards, measurements and conformity assessment regimes for regional integration. KEBS is an active member of the Africa Organization for Standardization (ARSO) and other international standards bodies such as International Standards Organization (ISO), International Electrotechnical Commission (IEC), Bureau International des Poids et Mesures (BIPM) and Codex Alimentarius. KEBS is the National Enquiry Point (NEP) in support of the WTO Agreements on Technical Barriers to Trade (TBT) and facilitates trade in accordance with the Common Market for Eastern and Southern Africa (COMESA) treaty.

Further, the East African Community Standardization, Quality Assurance, Metrology and Testing Act, 2006 provides in Section 21 that each Partner State shall appoint public regulatory authorities to administer compulsory standards whose duties shall inter alia be to collect fees and levies payable in respect of products, and processes to which a compulsory standard applies. KEBS is the institution charged with this role in Kenya.
Chapter 4: EVALUATION OF THE PROBLEM

This chapter states the pain points, problems and challenges of KEBS with the 1990 Order as it stands by giving evidence of its nature and magnitude, and explaining why these challenges have arisen.

4.1: Outdated Standards Levy Order 1990

The current order was gazetted vide legal notice number 267 of 1990 and came into operation on 1st July 1990. The Order was revised in 1999 to increase the maximum levy payable from KES. 200,000 to KES. 400,000 which amount cannot sustainably support the execution of KEBS mandate- Given the dynamic nature of the manufacturing industry, the provisions of the Order needs to be updated to serve the current needs of KEBS.in promoting trade and protecting the health and safety of consumers and the environment.

The current Order further fails the constitutional principle of equity in taxation. This is because large manufacturers pay maximum levy amount of 400,000 which translates to a percentage way lower that 0.2% of their turnover while smaller manufacturers pay the prescribed 0.2%.

4.2: Sustainability of KEBS:

KEBS is a leading institution as far as National quality infrastructure is concerned and is the designated National Standards Body as well as the designated National Metrology Institute. The cost of acquiring and maintaining quality infrastructure and developing capacity of staff given the evolving industries, has escalated over time due to the expanded and evolving industry demands. The current Levy Order caps the maximum levy amount payable at KES. 400,000 per annum. This amount was set in the Revised edition of 1999, 24 years ago.

KEBS plays a critical role in promoting Micro & Small Enterprises (MSEs). MSEs are the biggest hope for Kenya’s Industrial Development. KEBS subsidizes MSEs to the tune of KES225 Million annually. From 1990 to date, Standards Levy has helped Kenyan industry to grow from 1,200 to over 19,000 companies. At least 12,000 companies have grown from MSEs to large firms since 1990 due to Standards Levy. This means KEBS cannot comfortably sustain the cost of supporting MSEs.

Additionally, inflationary pressure over time and rapid change in exchange rates affects ability to replace testing equipment which are not locally made. For instance, the US Dollar Exchange rate in 1990 was approximately KES 23. Currently, the exchange rate is at KES 146. Further, the cost of Consumer Protection activities has skyrocketed over the years. KEBS tests on average 60,000 products annually to determine suitability for consumption and use; health, safety and consumer protection. Testing is an expensive exercise where a full test per product cost on average KES 25,000 which translates to KES 1.5 Billion per year. The annual budget for Metrology is currently KES. 385 Million for replacement of metrology standards while the
annual budget for Testing is KES. 325 Million for replacement of Testing Equipment. For Product Certification related tests, KEBS subsidizes MSEs to the tune of KES225 Million annually. In addition to the above, Annual Staff costs for 1041 staff is KES 1.3 Billion. There is need for increased funding to support the rising budgetary demands.

KEBS is a self-funding public institution which means that KEBS does not receive any funding appropriated by Parliament be it through the Consolidated Fund, Equalization Fund or any other public fund. Revenue generation as a public entity has its fair share of challenges especially where certain fixed revenue streams have to be continually operational taking into regard dynamic business environment in which KEBS operates. The Standards Levy is a critical component in KEBS Appropriation in Aid (A in A) because it ensures that KEBS realizes its revenue income and therefore sustains its operations. Further, as provided in Section 8 of the Standards Act, the levy is utilized towards executing KEBS mandate.

4.2.1 Lack of classification of industries

Section 10B of the Act empowers the Cabinet Secretary to identify classes of industry for which the order applies. The Standards Levy Order 1990 has not identified classes of industry which makes it difficult for identification and registration of manufacturers and as a result a compromise on compliance and enforcement. The definition of the term manufacture in the Standards Act is broad and not well understood in the industry hence the need for classification.

4.2.2 Use of the terminology “ex-factory price”

The basis for assessing levy payable in the 1990 order is “ex-factory price”. The term ‘factory’ connotes a physical factory setting such as a facility or building that literally houses a factory in it. The net effect of this interpretation is that manufacturers who operate outside a “physical factory” setting consider that the levy order is not applicable to them.

4.2.3 Need to reduce cost of business for Micro Enterprises

The Standards Levy Order, 1990 exempts manufacturers whose annual turnover is below KES. 200,000 from paying levy. This figure is considerably low and therefore bring most micro enterprises within the scope of payment of standards levy. The net effect is that it increases the cost of doing business for Micro enterprises which is not in tandem with incentivizing Micro enterprises as outlined in the Government's strategic blueprint - Bottom-up Economic Transformation Agenda (BETA).

4.2.4 Mechanisms for addressing levy payments made in excess and penalty waivers
There are instances where manufactures make payments in excess of the levy due from them. There are also instances where some manufacturers request for waiver of penalties. The Standards Levy Order, 1990 is silent on how to address these two problems.

4.3 Lack of incentives for manufacturers

The Standards Levy Order, 1990 has no incentives to manufacturers to encourage compliance. It is considered that components such as issuance of compliance certificates, waiver of penalties and rolling over of payments made in excess would go a long way to encourage future compliance and ease the cost of doing business by relieving manufacturers of penalties.

4.4 Need to harmonize statutory obligations compliance dates

The Standards Levy Order, 1990 requires levy payments to be made on or before the 30\textsuperscript{th} day of the succeeding month. Notably, the levy is collected by Kenya revenue Authority on behalf of KEBS through the KRA itax system. The prescribed timeline for paying Standards levy appears to be outside the customary practice of filing certain statutory returns, on or before 20\textsuperscript{th} day of the succeeding month, such as the VAT returns provided for under the Value Added Tax Act. It is observed that this has contributed to low compliance rates because manufacturers reiterate that they would prefer to file monthly returns at once. As such hence the date needs to be reconsidered.

Based on the shortcomings above, the proposed Order intends to repeal the Standards Levy Order, 1990 and to give way to a new Order that solves the problems identified above.
Chapter 5: LEGAL AND POLICY FRAMEWORK FOR THE PROPOSED STANDARDS LEVY ORDER. 2023

An evaluation of the legal and policy framework related to Standards Levy Order is intended to answer the question whether there a legal basis for developing the proposed Order. It is also intended to bring out the context and legal environment within which the proposed Order is being developed. Statutory instrument proposals should be structured so that all regulatory decisions rigorously respect the principles of ‘rule of law’ that is, there must be explicit responsibility demonstrating that a proposed Statutory Instrument is authorized by the respective Act of Parliament and is consistent with the Constitution as well as any treaty or international convention obligations that Kenya has acceded to. In addition, a proposed Statutory Instrument must complement other legal requirements and be in statutory harmony with the entire statute book.

5.1. Regional Legislation

The East African Community Standardisation, Quality Assurance, Metrology And Testing (SQMT) Act was enacted in 2006 with the objective of making provision for ensuring standardisation, quality assurance, metrology and testing of products produced or traded in the Community in order to facilitate industrial development and trade; to make provision for ensuring the protection of the health and safety of society and the environment in the Community and to establish the East African Standards Committee and the East African Accreditation Board. Pursuant to Section 6, KEBS is the designated National Standards Body and National Metrology Institute. To discharge the mandates as enumerated, KEBS needs to enhance its quality infrastructure.

5.2. Constitutional Basis

Article 46 of the Constitution of Kenya, 2010 has robust provisions on consumer protection. All consumers have a right to quality goods and services, access all information necessary to derive full benefit of the goods and services; and protection of their health, safety as well as that of the environment.

Article 201 has robust provisions on the principles of public finance which are enumerated as follows:

a. there shall be openness and accountability, including public participation in financial matters;

b. the public finance system shall promote an equitable society, and in particular—
   i. the burden of taxation shall be shared fairly;
   ii. revenue raised nationally shall be shared equitably among national and county governments; and
   iii. expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;

c. the burdens and benefits of the use of resources and public borrowing shall be shared
equitably between present and future generations; and
d. public money shall be used in a prudent and responsible way.

**Article 209** of the Constitution empowers the national government to impose any tax or duty while **Article 210** requires that any tax or licensing fee imposed, waived, or varied is provided for in a Legislation.

### 5.3. Standards Act, Chapter 496

Section 4 of the Standards Act stipulates the mandate of KEBS which encompasses development of standards for use by the industry, provision of testing and calibration facilities, product and system certification, undertaking educational work in standardization and practical application of standards, and maintenance & dissemination of International System of Units (SI) of measurements.

Section 10B of the Standards Act empowers the Cabinet Secretary to make a standards levy order for the purpose of giving effect to proposals submitted by the Council and approved by the Cabinet Secretary.; and the order may provide for the amendment of a previous standard levy order and may make different provisions in relation to different classes or description of industry.

### 5.4. Public Finance Management Act No. 18 of 2012

The Act defines “national government revenue” to mean all taxes imposed by the national government under Articles 206(1)(a) and (b) and 209 of the Constitution, excluding county government revenue.

Standards levy is therefore considered a national government revenue in the context of the Act. The Act further requires that public finances are managed according to the principles laid down in the Constitution.

### 5.5. Statutory Instruments Act, No.23 of 2013

The Act defines a statutory instrument to mean any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued. The Standards levy Order is therefore a statutory instrument under the Standards Act, cap 496.

Where the proposed statutory instrument is likely to impose significant costs on the community or a part of the community, Section 6 of the Act requires the regulation making authority to prepare a regulatory impact statement about the instrument prior to the enactment of the instrument.
Chapter 6: PUBLIC CONSULTATIONS

6.1: Legal requirements relating to public participation and consultation

Participation of the people, inclusivity, transparency, and accountability are constitutional requirements whenever a state or public officer applies the Constitution, enacts any law, or makes or implements public policy. This requirement is premised on the sovereignty principle which vests all sovereign power to the people of Kenya. This power entitles the people to unfettered access to the process of making public decisions through their involvement.

Further, the values and principles of public service requires the involvement of the people in the process of policymaking and participation, transparency and provision to the public of timely and accurate information.

With regard to the subsidiary legislation making process, the Statutory Instruments Act requires that the regulation making authority shall make consultations before making the statutory instrument in question in particular where the proposed Order is likely to have a direct, or a substantial indirect effect on business or restrict competition. The Act provides that in determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to all relevant matters, including the extent to which the consultation:

(a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and

(b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

The Statutory Instruments Act further requires that the persons to be consulted should either directly or by advertisement through representative organizations be invited to make submissions by a specified date, which should not be less than 14 days or be invited to participate in public hearings concerning the proposed instrument.

| Article 1: Sovereignty                  | All sovereign power belongs to the people of Kenya and may be exercised by them directly or through their elected representatives. |
| Article 10: National Values and Principles of Governance | 10(2) (a) —The national values and principles of governance include— … participation of the people |
| Article 27: Equality and Non-Discrimination | Public participation should ensure equality and non-discrimination |
| Article 33: Freedom of Expression       | Public participation should respect the freedom of expression of all participants |
### Article 35: Access to Information

35 (1) (a) — Every citizen has the right of access to information held by the State.

35 (3) — The state shall publish and publicize important information.

### Article 232: Values and Principles of Public Service

232 (1) (d) — The values and principles of public service include the involvement of the people in the process of policymaking.

#### 6.2: The Process of public consultation

The review process began in September of 2022 to comply with the Statutory Instruments Act No.23 of 2013) on enactment of Statutory Instruments.

An internal committee was constituted to review and consolidate challenges regarding implementation on the current order and to develop a draft order and roadmap for implementation. Approval to proceed with the draft order based on the road map was given by the management.

The draft levy order was presented to senior management on 26th June 2023 and the committee reviewed and incorporated the comments on 10th July 2023.

The draft levy order was presented to the technical committee of the Council and the full Council on: **Industry Stakeholders**

The consultations will be done physically in Nairobi, Nakuru, Mombasa, Garissa, Nyeri, Eldoret and Kisumu. The consultations will also be done through scheduled virtual sessions. The criteria for the identification of stakeholders will depend on their interest, contribution and their role in the implementation of the Order. The committee plans to consult key stakeholders including manufacturers, associations representing manufacturers, Government agencies, the private sector, professional associations, and other persons likely to be affected by the proposed Order for their input and views from the broad categories listed below.

1. Ministry of Investments Trade and Industry,
2. Ministries, Departments and Agencies
3. Micro, Small and Medium Enterprises
4. Large Manufacturing Enterprises
5. County Governments
6. Universities/Research Institutions
7. Kenya Private Sector Alliance
8. Kenya Association of Manufacturers
9. Non-Governmental Organizations
10. Consumer Associations  
11. Other Industry associations

6.3: Public Notice and awareness

KEBS shall issue a notice of at least twenty-one days and which shall contain:

1) a statement summarizing the levy order;
2) ways in which the documents relating to the levy order shall be accessed;
3) invitation for the public to submit written comments or representations;
4) mode of conducting public participation;
5) venue, date, and time; and
6) Contacts of KEBS.

KEBS shall give the public adequate opportunity to make their input on the levy order by establishing a mechanism to enable the widest reach which may include social media, websites, public meetings, and at least two daily newspapers with wide circulation.

6.4:

6.5: Public participation forum

All public participation forums shall be open to all members of the public who desire to participate and shall be allowed to contribute personally or through representatives.

In conducting public participation, KEBS shall ensure that:

1) All participants, including their representatives and all respondents, shall be courteous, respectful, and civil during public participation processes.
2) Disruptive individuals shall be given a warning and, may, if necessary, be removed from a meeting.
3) Freedom of expression is limited to the subject matter.
4) All reasonable measures have been taken to facilitate the participation of persons with disabilities in the forum.
5) The language used is widely understood by the persons present at the forum.

6.6: Analysis and Feedback

KEBS shall ensure —

a) that all responses are carefully and independently analysed;
b) the final decision on the levy order is made widely available to the public through KEBS website and/or interactive fora, including the reasons for the decisions taken; and
c) the disclosure of reasons for the public to understand and evaluate the decision made.

6.7: Credibility and integrity of the Process
To ensure that the process of public participation will be credible and will pass the integrity test, KEBS shall:

1) not engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or discrimination and avoid relationships or actions, which could be legitimately interpreted as a conflict of interest; and,
2) take into consideration the social and economic status, religious beliefs, ethnicity, and other social diversities of those engaging in public participation.

Complaints arising from public participation process shall be referred to the Director through the Cabinet Secretary for resolution.
Chapter 7: COST-BENEFIT ANALYSIS

7.1. : Costs and Benefits Generally

The analysis of the expected costs and benefits of the proposed Order in this part seeks to answer the question whether the benefits justify the projected costs. This would enable KEBS to estimate the total expected cost and benefit of every aspect of the Order. This will in turn inform the decision makers since the cost of government action should be justified by its benefits before action is taken.

However, given the nature of SMCA and the available information, the costing will be both qualitative and quantitative. The task of comparing the benefits and costs associated with the proposed Levy Order and determining whether, and to what extent, there would be a net benefit associated with its adoption is a difficult one.

The approach taken in this section is to draw together the discussion of benefits and costs, indicate the relative magnitude of these where possible and draw conclusions as to the likely overall impact of the proposed Levy Order where possible.

Table1: Benefits and Costs arising from the new features of the Standards Levy Order, 2023

<table>
<thead>
<tr>
<th>PROBLEM</th>
<th>PROPOSED REFORM</th>
<th>BENEFITS</th>
<th>COST</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outdated Standards Levy Order</td>
<td>To enact a new Standards Levy Order in line with Section 4 (e) of the Statutory</td>
<td>To abide by the public finance principle of equity in taxation To enact up to date provisions that reflect current state of industry</td>
<td>1,200 firms currently remitting Kshs 480m will generate additional Kshs 1b. The deficit budget (see annex) necessitate additional funding as Kshs 400,000 in 1999 is currently equivalent to Kshs 2.7million</td>
</tr>
<tr>
<td>1990</td>
<td>Instruments Act</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sustainability of KEBS</td>
<td>Provide for compulsory payment of standards levy To remove the ceiling for maximum</td>
<td>To enable KEBS discharge its SMCA mandate as the levy forms part of KEBS Appropriation in Aid.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>levy payable</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>PROBLEM</th>
<th>PROPOSED REFORM</th>
<th>BENEFITS</th>
<th>COST</th>
</tr>
</thead>
</table>
| Lack of classification of industry | To give clarity on the classification of manufacturers to whom the Standards Levy Order applies.  
To give clarity on the basis for determination of the levy | Enhance compliance to the Standards Act.  
For ease of interpretation by stakeholders  
To provide adequate information to manufacturers for their decision making.  
Ease in collection of the levy | Reduced litigation costs for both manufacturer and KEBS  
Enforcement costs since manufacturers will understand when and from whom levy is due. |
| Use of the terminology “ex-factory price” as the basis upon which levy is paid | Use of the term 'turn-over' which is simpler to comprehend to enable all manufacturers understand the basis of paying levy | Easier understanding  
Increase uptake of the Order |  |
| Need to reduce cost of business for MSEs | To increase the lower limit of manufacturers who are subject to standards levy from annual turnover of KES. 200,000 to KES. 1,000,000. | The net effect is reducing the cost of doing business for MSEs. | • Currently 1,247 firms with annual turnover below KES 200,000 are exempted from paying levy the new proposal additional 2,814 firms under MSEs will be exempted from paying levy. This has been increased to KES 1 Million in support of the Bottom Up Economic Transformation Agenda (BETA). This will release a further KES 50 Million to 4061 |
### PROBLEM | PROPOSED REFORM | BENEFITS | COST
---|---|---|---
Lack of mechanisms for addressing levy payments made in excess and penalty waivers | To provide for mechanisms for addressing levy payments made in excess and penalty waivers | To provide clarity of procedures to be followed and ease cost of doing business | MSEs for use in building their enterprises.
Lack of incentives for manufacturers | To provide for waivers of penalties and levy compliance certificates | Manufacturers will be encouraged to comply with the standards levy order |  
Need to harmonize statutory obligations compliance dates | Harmonize the date of filing standards levy returns with payment obligations under other statutes | Harmonized return filing system for increased convenience to manufacturers. Ease of doing business. Enhanced compliance. | 

#### 7.2. Consideration of Alternatives to the Levy Order

This Part considers the question whether the proposed Order is the best form of government action. The Statutory Instruments Act requires a regulator to carry out, early in the regulatory process, an informed comparison of a variety of regulatory and non-regulatory policy
measures, considering relevant issues such as costs, benefits, distributional effects and administrative requirements.

The options considered under this part are the following:

7.2.1. Option one: Maintenance of the Status Quo

Maintaining the status quo means retaining the current Standards Levy Order, 1990 with all its attendant inadequacies. These include:

- a. Outdated provisions in the Standards Levy Order 1990
- b. Inability of KEBS to meet the cost of developing and maintaining quality infrastructure
- c. Challenges of interpretation in respect of scope of application
- d. Need to reduce cost of business for MSMEs
- e. Lack of mechanisms for addressing levy payments made in excess and penalty waivers
- f. Lack of incentives for manufacturers
- g. Need to harmonize statutory obligations compliance dates

7.2.2. Option two: Administrative measures.

Use of administrative measures to implement Section 10B of the Standards Act would be against the letter and spirit of Article 201 and 209 of the Constitution. Notably, Section 10B requires that the Cabinet Secretary makes a Standards Levy Order being the instrument to enable collection of levies.

7.2.3. Option three: Promulgating a Standards Levy Order, 2023

Given the shortcomings of the Standards Levy Order, 1990, there is need to issue a new Standards Levy Order to address the challenges posed by the current one.

As noted throughout this RIS report the current Standards Levy Order has many gaps and weaknesses which the proposed Standards Levy Order seeks to address.
### 7.3.: Impact analysis of the Options

Table 2: Regulatory and non-regulatory options

<table>
<thead>
<tr>
<th>Impact on sectors</th>
<th>Option one: Maintaining the Status quo</th>
<th>Option two: Administrative measures</th>
<th>Option three: Promulgating a Standards (Standards Levy) Order, 2023</th>
</tr>
</thead>
</table>
| **Impact on Private sector** | • Difficulty in accessing international markets which leads to trade imbalance.  
• unethical conduct and unfair business practices;  
• poor trade facilitation  
• KEBS will not be in tandem with the Bottom-up Economic Transformation Agenda (BETA)  
• Access to SMCA services will be limited. | • Unethical business practices  
• corruption | • enhanced access to international markets;  
• increased capacity building opportunities and exposure levels of stakeholders to international best practices;  
• improved level of compliance to standards and regulations;  
• promote ethical conduct and fair business practices;  
• promote skilled and competent workforce. |
| **Economic Impact** | • Unsustainability of the demands of quality infrastructure | • lost foreign earnings due to lack of standardized goods that meet international requirements.  
• Loss of tax revenue by the Government.  
• Unemployment | • Increased foreign earnings through access to international markets.  
• Sustainability of KEBS operations  
• Enhanced tax revenue  
• Employment opportunities  
• Thriving economy |
| Social Impact | • Disproportionate taxation of the people at the bottom  
• Inadequate protection of the consumers due to ineffective SMCA | • Consumption of substandard goods and services by the citizenry.  
• Poverty | Enhanced health and safety of the public |
| Human Rights Impact | Consumers will not have adequate assurance of access to goods and services of reasonable quality as is their right under Article 46 of the Constitution. | No guarantee to adequate access to goods and services of reasonable quality as is their right under Article 46 of the Constitution. | Consumers will have better access to goods and services of reasonable quality as is their right under Article 46 of the Constitution. |
| Impact on business | • Lack of adequate support to MSMEs and strategic industries  
• Low penetration to international markets. | There is a risk of collapse due to inability to access local and international markets. | • Likely to spur the growth MSMEs  
• Contributes to ease of doing business at local and international level by providing SMCA infrastructure. |
| Impact on environment | Inadequate protection of the environment due to insufficient SMCA infrastructure. | Exposure of the environment to hazards in the absence of SMCA. | Protection of the environment through enhancement of SMCA infrastructure. |
### Impact on sectors

<table>
<thead>
<tr>
<th>Option one: Maintaining the Status quo</th>
<th>Option two: Self-regulation</th>
<th>Option three: Promulgating a National Building Code</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Impact on existing legal frameworks</strong></td>
<td><strong>There will be a gap which will hinder full implementation of the Standards Act.</strong></td>
<td><strong>• Addresses all the identified gaps</strong>&lt;br&gt;<strong>• Provides harmony with related legal frameworks</strong>&lt;br&gt;<strong>• No further legal amendments or enactments will be required</strong></td>
</tr>
<tr>
<td>• Regulatory concerns will remain un-addressed.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• The existing legal gaps will not be addressed.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 7.4. Preferred Option

Based on the above analysis it is clear the third option (promulgating a new Standards Levy Order) is the preferred option. The benefits and impact of promulgating a new Standards Levy Order by far outweigh any estimated cost of its implementation. The other two options have little or no impact in addressing the problems outlined above.
Chapter 8: COMPLIANCE AND IMPLEMENTATION

As different aspects of the proposed order are evaluated and analyzed, it is important to determine how compliance and implementation of the actual provisions will be achieved. It is the duty of the regulator to assess the adequacy of the institutional framework and other incentives through which the regulation will take effect, and design responsive implementation strategies that make the best use of them².

In an ideal situation an institution responsible for enforcement a Standards Levy should have the capacity of co-ordination of institutional frameworks from a whole-of-government perspective, independence and sufficient authority, political support at a high political level, and integration into a broad concept of reform³.

KEBS has been implementing the current Order for over 30 years now. KEBS has demonstrated capacity to implement the Proposed Order and has indeed put in place a plan as outlined in the Strategic Plan 2022-2027 of strengthening its institutional capacity to enable it enforce full compliance with the proposed Levy Order.

³ OECD, 2007: Good Governance for Development in Arab Countries Initiative Working Group IV: Public Service Delivery, Public-Private Partnership and Regulatory Reform
Chapter 9: CONCLUSION

Based on the above analysis, the following matters are apparent:

(a) **Regulatory-Making Authority and the legal mandate**: Section 10B of the Standards Act, Chapter 496, empowers the Cabinet Secretary in Consultation with the Council to make regulations generally to give effect to the Act and in particular for the Standards Levy Order. The Council and the Cabinet Secretary therefore have the required legislative powers to propose the Standards Levy Order, 2023.

(b) **Requirements of the Statutory Instruments Act**: Section 5 requires that a regulation-making authority to conduct public consultations and drawing on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and to ensure that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content. Sections 6 and 7 require that a RIS/RIA be prepared where a statutory instrument is likely to impose significant costs on the community. The RIS/RIA must contain certain key elements namely:
   (1) a statement of the objectives of the proposed legislation and the reasons,
   (2) a statement explaining the effect of the proposed legislation,
   (3) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;
   (4) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; and
   (5) the reasons why the other means are not appropriate.

The RIA structure requirements have been fully met. Public consultation requirements will be fully adhered to.

(c) **Other existing legal frameworks**: The draft Standards Levy Order, 2023 proposes to promulgate anew legislation. It is in harmony with other laws making their implementation more effective.

(d) **The draft**: The draft Standards Levy Order, 2023 as drafted is clear, consistent, comprehensible and comprehensive enough to cover all matters.
Chapter 10: Recommendation

In view of the above conclusions, it is recommended that the Standards Levy Order, 2023 be adopted.
Chapter 11: ANNEXURES

1. The draft Standards Order, 2023
2. Stakeholder consultations matrix