



REPUBLIC OF KENYA

REGULATORY IMPACT ASSESSMENT

FOR

**THE MERCHANT SHIPPING (MARITIME TRANSPORT OPERATORS)
REGULATIONS, 2023**

JUNE, 2023

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Mining, Blue Economy and Maritime Affairs pursuant to Section 6 and 7 of the Statutory Instruments Act (No. 23 of 2013).

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ABBREVIATIONS

AIMS	—	Africa Integrated Maritime Strategy
AU	—	African Union
BE	—	Blue Economy
DWFN	—	Distant Waters Fishing Nations
EAC	—	East African Community
EEZ	—	Exclusive Economic Zone
FAL	—	Convention on Facilitation of International Maritime Traffic
FLTF	—	Fish Levy Trust Fund
GATTS	—	General Agreement on Tariffs and Trade
HLP	—	High Level Panel for Sustainable Ocean Economy
IMO	—	International Maritime Organization
INMP	—	Integrated Maritime Transport Policy
ISCOS	—	Intergovernmental Standing Committee on Shipping
IUU	—	Illegal Unregulated and Unreported
KeFS	—	Kenya Fisheries Service
KFAC	—	Kenya Fisheries Advisory Council
KFMA	—	Kenya Fish Marketing Authority
KMFRI	—	Kenya Marine and Fisheries Research Institute
LAPPSET	—	Lamu Port, South Sudan, Ethiopia Transport Corridor
LDC	—	Least Developed Countries
MPNCCC	—	Mombasa Port and Northern Corridor Community Charter
MSW	—	Maritime Single Window
MT	—	Metric Tons
MTP	—	Medium-Term Plan
PMAESA	—	Port Management Association of Eastern and Southern Africa
RIA	—	Regulatory Impact Assessment
RIS	—	Regulatory Impact Statement
SDFA&BE	—	State Department of Fisheries and Aquaculture and Blue Economy
SDG's	—	Sustainable Development Goals
SIDs	—	Small Island Developing Countries
TAC	—	Total Allowable Catch
TFA	—	Trade Facilitation Agreement
UN	—	United Nations
UNCLOS	—	United Nations Convention on the Law of the Sea
UNCTAD	—	United Nations Conference on Trade and Development
WIOMSA	—	Western Indian Ocean Marine Science Association
WTO	—	World Trade Organization

1. INTRODUCTION

1.1 WHAT IS A REGULATORY IMPACT STATEMENT?

RIS is a systematic policy tool used to examine and measure the likely benefits, costs, and effects of new or existing regulations. A RIS is an analytical report to assist decision makers. As an aid to decision making RIS 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 RIS should contain the following elements:

- (a) title of the proposal;
- (b) the objective and intended effect of the regulatory policy;
- (c) an evaluation of the policy problem;
- (d) consideration of alternative options;
- (e) assessment of all their impacts distribution;
- (f) results of public consultation;
- (g) compliance strategies, and
- (h) processes for monitoring and evaluation¹.

RIS 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 to assess whether the regulation is likely to achieve the desired objectives. RIS promotes evidence-based policymaking as new regulations typically lead to numerous impacts that are often difficult to foresee. The RIS should confirm whether a proposed regulation is welfare-enhancing, in that, the benefits will surpass costs. RIS 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.

1.2 REQUIREMENTS OF THE STATUTORY INSTRUMENTS ACT

The Statutory Instruments Act, No. 23 of 2013 is the legal framework governing the conduct of RIS 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 regulatory impact statement about the instrument.*

The Act further sets out certain key elements that must be contained in the RIS 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;

¹ Regulatory Policy Division Directorate for Public Governance and Territorial Development: Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers. OECD, 2008

- (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 that 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.

1.3 REGULATORY-MAKING AUTHORITY AND THE LEGAL MANDATE

Section 8(h) of the Merchant Shipping Act, No. 4 of 2009 (hereinafter, *the Act*) provides that the Cabinet Secretary may make regulations for oversight and monitoring of service delivery in the maritime sector, having regard to availability, quality, standards of service, cost, efficiency of production and distribution of such services. Further section 16T of the (Amended) Act states that the Cabinet Secretary may make regulations to provide for:

- (i) conditions of issuance, revocation and cancellation of, and procedures of application for, a license under this Part;
- (ii) the procedure for registration of maritime transport operators licensed by related government agencies;
- (iii) the forms applicable to, and fees payable by maritime transport operators prior to registration;
- (iv) process for the development of performance standards;
- (v) scope of services provided by maritime transport operators;
- (vi) enforcement and compliance mechanisms for maritime transport operators;
- (vii) complaints resolution mechanisms; and
- (viii) any other matter that may be prescribed for the better carrying into effect the provisions of the Act.

In exercise of the above powers, the Cabinet Secretary, in consultation with the Kenya Maritime Authority (hereinafter, *the Authority*), has drafted the Merchant Shipping (Maritime Transport Operations) Regulations, 2023 (hereinafter '*the proposed Regulations*'). These proposed Regulations constitute statutory instruments which seek to give full effect to the Act. The Cabinet Secretary has now prepared this Regulatory Impact Statement (RIS) and undertaken public consultations, in partial fulfillment of the requirements of the Statutory Instruments Act No. 23 of 2013. This statutory instrument seeks to enhance regulation of the maritime transport and logistics operations in Kenya. It is likely to impose costs on the maritime transport and logistics industry which plays a key role in Kenya's economic development.

2. STATEMENT OF THE OBJECTIVES OF THE PROPOSED LEGISLATION AND THE REASONS FOR THE PROPOSED REGULATIONS

2.1 GENERAL OBJECTIVE

The general objective of the proposed regulations is to give full effect to the Merchant Shipping Act, No. 4 of 2009 and the applicable international conventions ratified by Kenya, by providing a framework for effective and efficient regulation of maritime transport operators and logistics service providers.

2.2 SPECIFIC OBJECTIVES

Specifically, the proposed regulations seek to:

- (a) set out the procedure for issuance, renewal, modification, suspension and revocation of licenses;
- (b) set out the registration procedure for maritime transport operators licensed by related government agencies;
- (c) introduce of fees and charges payable by maritime transport operators;
- (d) outline the scope of services for maritime transport operators;
- (e) provide a mechanism for coordination and collaboration for maritime transport and logistics services;
- (f) promote professionalism through continuous capacity building within the maritime transport sector;
- (g) promote the participation of Kenyan citizens in the maritime transport and logistics sector;
- (h) provide a complaints resolution mechanism;
- (i) Provide processes for the establishment of performance standards; and
- (j) provide compliance and enforcement mechanisms in the provision of maritime transport and logistics services.

3. BACKGROUND AND CONTEXT

3.1 BACKGROUND

Blue Economy refers to the sustainable use and economic development of both aquatic and marine spaces including oceans, seas, coasts, lakes, rivers, and underground water. It encompasses a range of productive sectors, including fishing, aquaculture, tourism, transport, shipbuilding, energy, bio prospecting and underwater mining and related activities. Kenya is endowed with rich coastal and maritime resources, which has a huge potential for development of the Blue Economy. These resources are contained within the Kenyan maritime zones which comprise of internal waters, territorial sea, the continental shelf and exclusive economic zone.

The blue economy is the 8th sector of Kenya's development blue print adopted in 2017 under the Kenya's vision 2030 and the Third Medium Term Plan. Kenya's share of the blue economy to the GDP is 2.5% and has contributed an estimated Kshs. 178.8 billion to the economy annually. If fully exploited, it has the potential to generate revenue approaching Kshs. 500 billion each year².

Maritime transport, as a component of the blue economy, is the backbone of international trade and the global economy. The international maritime transportation industry is responsible for the transportation of approximately 90% of commodities produced from world trade activities³. Throughout the last century, the maritime industry has seen a general trend of increases in total trade volume. Increasing industrialization and the liberalization of national economies have further fueled free trade and a growing demand for consumer products.

The maritime transport sector in Kenya has made significant strides in building a sustainable economy. As a coastal, port and flag State with a pristine coastline, Kenya's strategic location along the East African coast ensures that the country continues to play a critical role in steering global shipping.

The longer-term outlook for the maritime transport sector in Kenya remains very promising. Notwithstanding the current situation in which the industry continues to face challenges such as weak registration and licensing regimes, inadequate maritime sector skills human capital, arbitrary introduction and review of tariffs, inadequate complaint redress and resolution mechanisms, these challenges, along with the absence of an enabling regulation have resulted to unfair competition trade practices among maritime transport operators. These and other challenges have necessitated development of an enabling legal framework to streamline transport and logistics activities and processes at the port and along the Northern Corridor region.

Enforcement of an effective regulatory framework in maritime transport and logistics services will create orderliness and a conducive environment for trade, improve service delivery standards which reduces the cost of doing business, enhances job creation and generates sustainable revenue for the maritime industry. Effective implementation of the regulation

² Sector Plan for Blue Economy, 2018

³ The Organization for Economic Cooperation and Development (OECD), 2021

framework will result in efficiency, reliability, predictability and effectiveness of the transport and logistics chain.

3.2 OVERVIEW OF THE MARITIME TRANSPORT INDUSTRY IN KENYA

Kenya’s maritime domain covers a surface area of approximately 230,000 km² with a Coastline of 600 km, and inland water surface area of approximately 10,700km² which is equivalent to the total land surface area of 31 out of the 47 Counties. Lake Victoria has a shoreline of 3440km and has more than 3000 islands⁴.

The Kenyan coastline lies along major maritime trading routes connecting Africa to Europe, the Far East and the Americas due to its strategic location along the East African coast. The Country is central to regional shipping and the Port of Mombasa in Kenya has remained the largest and strategic gateway to the Eastern and Central Africa region (referred to as Northern Corridor) serving a combined population of over three hundred (300) million. On the other hand, the LAPSSSET Corridor is Eastern Africa’s largest and with an infrastructure project bringing together Kenya, Ethiopia and South Sudan, through the Lamu Port. Kenya has two major seaports and one major inland port at the core of maritime transport industry as described below: -

Port of Mombasa

The total cargo throughput at the port of Mombasa has been increasing steadily from 30.35 million MT in 2017 to 34.55 million MT in 2021. However, in 2020 there was a marginal decline in growth due to effects of the COVID 19 Pandemic. In comparison to 2020, throughput grew by 1.3% in 2021. The growth is attributed to increase in conventional, containerized cargo and liquid bulk which recorded an increase of 0.72 million MT, 0.42 million MT, and 0.28 million MT respectively. Dry bulk cargo reduced by 11.2% in 2021 from 8.73 million MT in 2020. Local freight makes up 65% of cargo throughput, transit cargo makes up 28%, and transshipment cargo makes up 7% of total cargo throughput⁵.

('000' MT)	2017	2018	2019	2020	2021
Containerized Cargo	11,483	12,637	15,390	14,866	15,585
Conventional Cargo	2,136	1,815	2,033	2,142	2,561
Dry Bulk	8,467	8,662	8,386	8,729	7,751
Liquid Bulk	8,259	7,809	8,631	8,378	8,654
Total Throughput	30,345	30,923	34,440	34,115	34,551
Annual % change	10.9	1.9	11.4	-0.9	1.3
Share of Local Cargo	68%	65%	64%	64%	65%
Share of Transit Cargo	28%	31%	29%	30%	28%
Share of Transshipment	3%	4%	7%	6%	7%

Source: (KPA Annual Review and Bulletin of Statistics, 2021)

⁴ Blue Economy Committee Report, “Rediscovering the Road to Prosperity”, 2016
⁵ KPA Annual Review and Bulletin of Statistics, 2021

Port of Lamu

It is expected that the port of Lamu would attract some of the cargo which would traditionally pass through the ports of Sudan, Djibouti and Mombasa. The traffic forecast for this corridor predicts that the demand from both South Sudan and Ethiopia, will increase the Lamu traffic and is expected to reach 23.9 million tons by 2030.

Port of Kisumu

The port of Kisumu is one of the ports on Lake Victoria that offer organized shipping services on the Lake. Inland shipping on Lake Victoria forms an important component of an intermodal supply chain along the Central and Northern Corridor linking to Mombasa and Dar es Salaam ports. It occupies 17.5 hectares of land with a stacking area designed to accommodate a throughput of 15,000 TEUs per annum. Similarly, taking Kisumu's 2014 import figure of 21,943 tons as a starting point, and taking into account all developments and economic growth, Kisumu's local cargo imports are estimated to increase to approximately 130,000 tons by 2025, and further to 180,000 tons by 2035⁶. Consequently, under this scenario, total estimated local cargo demand at Kisumu Port will increase to approximately 290,000 tons by 2025, and further to approximately 410,000 tons by 2035.

Government Initiatives

Over the years the government has invested in the expansion of the country's transport and infrastructure network with a view of reducing the cost of doing business while creating new business and employment opportunities⁷. The cost of doing business and efficiency is highly dependent on the actions of key government agencies, shipping lines, cargo owners among other cargo interveners and the duration within which they execute their actions. The number of players and the level of duplication of roles have over the years largely influenced the time and costs of doing business. Taking cognizance of the Government's effort to reduce duplication of roles and unnecessary bureaucracy, all agencies taking part in clearance processes for cargo were regrouped and categorized following an evaluation for effective operations under the Mombasa Port and Northern Corridor Community Charter.

The ***Mombasa Port and Northern Corridor Community Charter (MPNCCC)*** was established in 2014 and has 53 signatories grouped into 6 categories namely: logistics service providers, cargo interveners and inspectors, shippers, regulatory bodies, trade and commerce associations, the private sector, and other development agencies who have made commitments towards realizing a seamless logistics supply chain⁸. The MPNCCC proclaims the desire of the port and corridor community to realize its full trade facilitation potential. The Charter is a statement of scope, objectives, and participants by the Mombasa community and Northern Corridor community in their efforts to become efficient, reliable and globally competitive. It creates a common framework for the port and northern corridor community to meet obligations and targets.

⁶ Kenya Ports Authority Website: <https://www.kpa.co.ke/>

⁷ World Bank Doing Business Report, 2020

⁸ The Mombasa Port and Northern Corridor Community Charter-Latest Issue

The Authority under the Charter has been charged with various functions among them include the development and implementation of a regulatory framework to support the implementation process. Port productivity and efficiency are critical components of an improved logistics environment that facilitates trade and promotes competitiveness. Efficiency and productivity consider various factors that affect maximization of outputs with the least possible inputs, costs and time. The key performance indicators are categorized into maritime indicators⁹, port indicators¹⁰, and corridor indicators¹¹.

There is a strong desire by signatories of the Charter to comply with their commitments and obligations. However, the Charter is insufficient in terms of providing for an elaborate enforcement framework. The implementation of the enforcement mechanism has experienced challenges which include: non/delay in submission of implementation progress reports and non-compliance with the established performance standards.

The government established the *National Committee on Trade Facilitation*, vide gazette notice No. 7319 of September 2016, pursuant to Marrakesh Agreement and article 23 of the agreement on trade facilitation of the World Trade Organization. The mandate of the Committee includes, among others, to formulate a domestic coordination mechanism for implementation of the Trade Facilitation Agreement and maintain closer contact with international organizations in the field of trade facilitation such as the World Customs Organization with objective of securing the best available advices for implementation and administration of the Trade Facilitation Agreement.

Kenya acceded to the Convention on Facilitation of International Maritime Traffic (FAL Convention) in November 2006 which entered into force in January 2007. Kenya is in the process of implementing the standards and recommendations under the FAL Convention. One of the key mandatory recommendations is the adoption of a National Maritime Single Window system. The purpose of a Maritime Single Window (MSW) system is to enable all the information required by public authorities in relation to the arrival, stay and departure of ships, persons and cargo, to be submitted via a single electronic portal without duplication. In 2021, Kenya developed a Maritime Single Window Module under the Kenya Trade Net System to facilitate clearance of ships, cargo, passenger, crew and baggage in relation to arrival, stay and departure in line with the FAL Convention. The Country is currently developing phase two of the Kenya Trade Net System.

In 2014, Kenya established the National Maritime Facilitation Committee comprising of maritime administration, customs, public health, plant health, fisheries, immigration, security, port authority, quality standards, trade facilitation interveners, regional bodies, associations, port facility operators and maritime transport operators. The Committee has been mandated to implement the national facilitation programme which include the review of policy in relation to clearance formalities applied to international maritime transport services, make recommendations to competent authorities and other organizations concerned with the national facilitation programme and to keep competent authorities and other organizations concerned,

⁹ (Ship waiting time & ship turnaround time)

¹⁰ Containerized cargo dwell time at the port, KRA One-Stop center time, Delay after release

¹¹ Weighbridge compliance at Mariakani, Weighbridge daily traffic at Mariakani, Weighbridge compliance at Busia

informed of significant development in the field of international maritime traffic, in so far as they affect operations into and out of Government.

The *Merchant Shipping Act, 2009* describes a maritime transport operator to mean a person engaged in the movement of cargo or passenger from the point of origin to destination or provides a service that facilitates the movement at any given point and includes—

- (a) port facility operators licensed under the Kenya Ports Authority Act, 1978. They provide vessel traffic services, pilotage, berthing facilities, terminal operations, and stevedoring services. Whereas they are licensed to trade by the port Authority, aspects on matters pertaining to the establishment and compliance with performance standards are inadequate. In the year 2021, 8 port facility operators were licensed to trade.
- (b) clearing and forwarding agents licensed by Kenya Revenue Authority under section 145 of the East African Customs Community Management Act, 2004. They act as custom brokers, transport and warehousing agents. Whereas they are licensed to trade by the revenue Authority, aspects on matters pertaining to the establishment and compliance with performance standards is inadequate. In the year 2021, 868¹² clearing and forwarding agents were licensed to trade.
- (c) container freight station agents licensed by the Kenya Revenue Authority under section 14 of the East African Customs Community Management Act, 2004. They act as storage facilities offering services for handling and temporary storage of import laden containers and/motor vehicles under customs control. Whereas they are licensed to trade by the revenue Authority aspects on matters pertaining to the establishment and compliance with performance standards is inadequate. In the year 2021, 22 container freight stations were licensed to trade.
- (d) empty container depots are issued trading licenses under the County Government Act, 2012. They undertake storage and handle empty containers. Whereas they are issued with a trading permit by the county governments, aspects on matters pertaining to the establishment and compliance with performance standards is inadequate. In the year 2021, 12 empty container depots were issued with trade permits.
- (e) shipping lines, shipping agents and cargo consolidators who are licensed by the Authority under the Merchant Shipping Act and the Kenya Maritime Authority Act. Shipping lines provide liner and tramp services for cargo carriage. Shipping agents provide ship husbandry, while cargo consolidators undertake consolidation and deconsolidation of cargo. The Authority has oversight in relation to the establishment and compliance of performance standards of these operators. In the year 2021, 20 shipping lines, 45 shipping agents, and 38 cargo consolidators were either registered or licensed.

¹² Source: KRA website

4. EVALUATION OF THE PROBLEM

4.1 STATEMENT OF THE PROBLEM

The enactment of the Kenya Maritime Authority Act and the Merchant Shipping Act provided a regulatory framework for maritime service providers. The Act obliges the Cabinet Secretary to make regulations for purposes of operationalization of the provisions on maritime service providers. Maritime transport operators are a category of operators under maritime service providers. Over the years, the Authority has put in place several measures to assist in coordination, regulation and oversight of the maritime transport industry. These include, the establishment of performance standards under the Mombasa Port and Northern Corridor Community Charter and the implementation of the FAL Convention in respect of trade facilitation. Despite these milestones, Kenya's maritime transport sector still faces a myriad of challenges as discussed below.

4.2 ANALYSIS OF THE PROBLEM

4.2.1 Inadequate regulatory framework

Following the enactment of the Merchant Shipping Act, No.4 of 2009, the Cabinet Secretary in exercise of powers under section 8 of the Merchant Shipping Act, 2009 made the Merchant Shipping (Maritime Service Providers) Regulations, 2011. These Regulations provided for the regulation and oversight of the maritime service providers, including the maritime transport operators, in Kenya. However, in *Constitutional Petition No. 76 of 2012*, the High Court in Mombasa declared the regulations *ultra vires*, unconstitutional and therefore null and void. The court decision has since left a void in the regulation of maritime service providers hence the Authority is unable to sufficiently regulate and oversee maritime service providers' operations. This has affected the implementation of the Merchant Shipping Act, 2009 and subsequently compliance with international instruments ratified by Kenya.

The Report on Strengthening of KMA's Oversight Capacity on Maritime Transport Services in Kenya by HPC Hamburg Port Consulting GmbH and Institute of Trade Development, 2017 established that:

- (a) the MPNCCC could not be used as a regulatory instrument due to its non-binding nature and therefore the Authority could not be able to enforce the obligation of the parties;
- (b) the existing legal and regulatory framework was inadequate following the declaration of the 2011 regulations null and void;
- (c) the MPNCCC was insufficient in terms of providing for an elaborate enforcement framework for compliance with performance standards; and
- (d) there were no agreed key performance standards for the maritime transport industry.

The report therefore recommended a review of existing legal and regulatory framework taking into account the findings.

4.2.2 Inadequate implementation and enforcement mechanisms for the performance standards for maritime transport operators and related-government agencies

Fragmented licensing and registration regime for the maritime transport operators occasioned by the different enabling legislation makes the development, adoption, implementation and enforcement of performance standards for maritime transport operators a challenge. The different enabling legislation that provides for licensing do not have requisite provision on establishment and monitoring of performance standards. Hence, the Authority is unable to enforce compliance with performance standards for maritime transport operators, logistic service providers and related-government agencies. Further, the inadequacy of the enforcement mechanisms leads to increased unfair competition practices, arbitrary introduction or review of tariffs in the maritime industry. This increases the cost of doing business and makes our exports uncompetitive in the international market.

4.2.3 Loss of Revenue

Inefficiencies in the cargo clearance process results in delays, increase in total trade costs and loss of revenue. Delays attract penalties in terms of storage charges, demurrage charges and customs warehouse rent among other charges which are transferred to the final consumer products. Consequently, inefficiency results in loss of revenue to the government and affects the bottom-line of the private sector and ultimately affects economic growth of both the county and region.

4.2.4 Inadequate domestic participation in the maritime transport sector

Involvement of Kenyans in commercial maritime services is minimal. Many Kenyans are providing auxiliary maritime services as opposed to mainstream maritime services due to financial constraints. Historically, the maritime transport sector in the east African region has been largely driven by non-nationals. In addition, the practice of vertical integration by non-nationals in the transport and logistics chain affects the participation of domestic investors due to inadequate capacity to compete. Currently, the industry does not have a framework for the transfer of technology and technical know-how to the domestic workforce, a situation that has denied the local expertise opportunities to invest and work in the mainstream maritime transport sector. Opportunities for continuous skill and professional development for domestic workforce remains a challenge.

4.2.5 Inadequate complaint resolution mechanism

The Authority receives complaints in respect of provision of maritime transport and logistic services notwithstanding that there is no elaborate framework on handling of complaints. The nature of some of the complaints received require a dispute resolution

mechanism embedded in a legal framework. WTO-TFA provides that a member State is required to provide an administrative appeal or review process mechanism to any person dissatisfied with the decision issued by the public authorities. These measures will enhance efficiency in service delivery.

5. POLICY AND LEGAL FRAMEWORK FOR THE PROPOSED REGULATIONS

The policy and legal framework for the provision of maritime transport operations and logistics services has been captured and incorporated under various legal and policy documents.

5.1 INTERNATIONAL INSTRUMENTS

Kenya is party to various international instruments that regulate the maritime transport sector. These international instruments call on member States to develop policies and implement them to the fullest extent possible. The implementation of these policies contributes to the achievement of the objectives at the international level.

The WTO - Trade Facilitation Agreement calls for expedited movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues among other aspects. The WTO Agreement on Trade in Services confers rights to member States to regulate matters on trade in services to meet their national policy objectives taking into account the different levels of development for the developing Countries.

UNCTAD Minimum Standards for Shipping Agents, 1988, serve as guidelines for national authorities and professional associations in establishing and maintaining a sound professional shipping agency system standard. Other objectives of the standards include combating maritime fraud by ensuring improved services by better qualified shipping agents and encouraging operation of financially sound and stable shipping agents.

The International Maritime Organization, had developed a myriad of international instruments enumerating minimum standards for ships engaged in international maritime traffic or international trade by sea. These standards have been enshrined in various instruments such as the Convention on Facilitation of International Maritime Traffic (FAL), 1965 as amended, the International Maritime Dangerous Goods (IMDG) Code, the 1972 Convention for Safe Containers (CSC 1972), the International Convention for the Safety of Life at Sea, 1974 as amended among others.

The FAL Convention seeks to facilitate maritime transport by simplifying and minimizing the formalities, documentary requirements and procedures associated with the arrival, stay and departure of ships engaged on international voyages. The Convention further provides for co-operation between contracting governments in the formulation and application of measures for the facilitation of the arrival, stay and departure of ships. While implementing the FAL Convention, Contracting Governments are expected to taking into account other existing international frameworks related to security and illicit activities that may interfere with international trade.

The International Labour Organization as a United Nations agency whose mandate is to advance social and economic justice through setting international labour standards has for the maritime transport sector developed a number of standards related to occupational health and safety measures at workplace including operation of equipment on board vessels, fundamental rights of a labourer to fair treatment be it a seafarer or a labourer on land such as dock workers

among others. These include Maritime Labour Convention 2006 as amended and the related guidelines, dock workers' convention among others.

At the continental level, the *African Union* adopted various strategies to promote the sustainable development and growth of the continent's maritime transport sector. The *African Maritime Transport Charter* and the *2050 African Maritime Strategy (AIMS 2050)* have provisions for harmonization of policies which seek to address Africa's maritime challenges and promote sustainable development and competitiveness through job creation, international trade, maritime infrastructure, information, communication technology and logistics. The objectives of the *African Continental Free Trade Agreement (AfCFTA)* is to simplify and harmonize international trade procedures and logistics to expedite the processes of importation, exportation and transit and to expedite the movement, clearance and release of goods including goods in transit across borders within State Parties.

Africa Blue Economy Strategy Implementation plan 2021-2025 in summary provides recommendations including modernization of ports to increase port traffic. It recommends the creation of sub-region maritime shipping companies, of cabotage companies, the development of transport corridors which in the end will allow African shippers to transport cargo at reasonable costs.

Africa's Blue Economy handbook is a policy handbook which guides member States to better mainstream the blue economy into their national development plans, strategies, policies, and laws. It provides that the largest sectors of the blue economy are transport and ports among other ocean-based economies.

5.2 REGIONAL INSTRUMENTS

The East African Community (the Community) was formed to promote regional political, economic and social integration. Kenya is a member of the Community. The Community has developed the following legal and policy frameworks to address trade facilitation matters:

East African Community Customs Management Act 2004 which provides for the Management of Customs for the East Africa Community in terms of exports and imports by sea.

EAC Elimination of Non-Tariff Barriers Act 2017 whose objective is to enhance and facilitate trade by providing a legal framework for the removal of non-tariff barriers in the Community and provide for a mechanism for identifying and monitoring the removal of non-tariff barriers within the Community and removing restrictions that make importation or exportation within and outside the Community difficult or costly.

EAC One Stop Border Post Act 2016 whose objective is to enhance trade through the efficient movement of goods, persons, and services within the community through the One Stop border post.

The Northern Corridor Transit and Transport Coordination Authority (NCTTCA) which facilitate transit trade to the land linked countries through the Kenyan port and the hinterland of member States. The NCTTCA is mandated by its member States to transform the Northern

corridor into an economic development corridor making it a seamless, efficient and smart Corridor.

The Intergovernmental Standing Committee on Shipping (ISCOS) is a regional Organization mandated with the promotion, protection, and coordination of the shipping and maritime interests of its members and the region at large with a mandate to take care of its members' common shipping, maritime and logistics interests.

The Port Management Association of Eastern and Southern Africa (PMAESA) is an intergovernmental organization whose primary objective is to strengthen relations among member ports with a view to promoting regional cooperation and subsequently regional integration.

The Lamu Port, South Sudan, Ethiopia Transport (LAPSSET) Corridor Program, was established through the Presidential Order, Legal Notice No. 58 of March 2013, under the LAPSSET Corridor Development Authority Order 2013 to plan, coordinate and manage the implementation of the Lamu Port-South Sudan-Ethiopia Transport Corridor.

5.3 NATIONAL LEGAL AND POLICY FRAMEWORK

5.3.1 National policy framework

At the national level, the *Kenya Vision 2030* seeks to transform Kenya into a newly industrializing, “middle-income country providing a high-quality life to all its citizens by the year 2030. The Third Medium Term Plan (MTP III) outlined the main policies, legal and institutional reforms as well as programmes and projects that the Government plan to implement and build upon. Within the framework, the Government identified the blue economy sector as one of the emerging economic sectors with the potential to significantly contribute to the country's economic growth and development in line with Vision 2030.

The *Integrated National Transport Policy, 2009*, recognizes the maritime transport sector as one of the key economic pillars under the Kenya Vision 2030 and a key enabler of the achievement of the strategies adopted by the Government. The Policy enumerated challenges faced in the sector include among other things, the poor quality of maritime transport services, inappropriate modal split and institutional deficiencies. The Policy recommended among other aspects:

- (a) promote public/private partnerships in maritime transport operations and infrastructure development;
- (b) develop an awareness of maritime transport issues in Kenya amongst the policy makers, the stakeholders and the general public;
- (c) strengthen the framework for the co-ordination of activities of service providers in line with the established policies, rules and regulations targeting among others code of conduct, cost and quality of services; and,

- (d) strengthen Kenya Maritime Authority to enable it to fully carry out its regulatory functions in commercial maritime services through enhancement of legislation/regulations.

The Mombasa Port and Northern Corridor Community Charter as a voluntary framework of collaboration seeks to bind the port community operators committed to undertake specific actions, collective obligations, targets and time lines to avoid unnecessary delay in operations at the port and facilitate expedited clearance of ships and cargo. The Authority as the regulator for the maritime sector has been empowered within the framework to undertake and coordinate the monitoring and evaluation on performance standards of the players vis-à-vis the set targets.

The Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works Strategic Plan for the period 2018- 2023, projected the need for the Country to promote provision of commercial maritime services, enhance its regulation and encourage investments within the sector among other aspects of maritime safety and security.

The Kenya Maritime Authority Strategic Plan 2018- 2023, incorporates Kenya's obligations within the international and regional fora, the government's Big Four Agenda, Medium Term Plan 3 (MTP III) and Vision 2030. Among the targeted priority undertakings are the improvement of maritime education and training, creation of decent jobs for our seafarers, improvement of safety and security of shipping in Kenyan waters, creation of a conducive and regulated environment for maritime trade and investment and use of technology and innovation in improving service delivery in the sector.

The report of the ***Blue Economy Committee, "Rediscovering the Road to Prosperity,"*** further recommended the establishment of a regulated framework for supporting private investments in the provision of maritime operations and support services.

5.3.2 National legal framework

The ***Constitution of Kenya, 2010*** remains the supreme law of the Republic and binds all persons and all State organs at both the national and county government. The Constitution recognizes and assimilates general principles of international law as well as international instruments which Kenya has ratified as forming part of the laws of Kenya but under the Constitution of Kenya. In terms of the maritime transport sector, the Constitution recognizes international instruments ratified by Kenya related to the sector, delineates Kenya territory in terms of its waters into defined maritime zones, promotes trade, utilization of marine resources among other aspects.

The ***Kenya Maritime Authority Act, 2006*** empowers the Authority as a regulatory administration for the Kenyan maritime industry in accordance with national and international standards. The principal object of the Authority as provided under section 4 is to regulate, coordinate and oversee maritime affairs. Section 5(1) of the Act empowers the Authority with various functions and more particularly in respect of the provision of commercial maritime services. Section 5 (2) of the Act further provides that the Authority may do anything and enter into transactions which in the opinion of the Authority is necessary or incidental to its functions. The same provision further empowers the Authority to impose fees or charges for the use of any of the services it provides.

Under the *Merchant Shipping Act, 2009* In terms of the provision of commercial maritime services, section 2 broadly defines the term maritime service provider which captures various service providers within the maritime industry which include the maritime transport operators. The Act further under section 8(1), (2) provides that the Cabinet Secretary may make regulations for specific purposes including:

- (d) prescribing fees, stamp duties and all other payments required under this Act;
- (g) the granting and withdrawal of licenses for maritime service providers;
- (gg) prescribing the requirements for licensing as a maritime services provider, the conditions subject to which a maritime services provider should operate and the standards to be maintained in the provision of services;
- (h) oversight and monitoring of service delivery in the maritime sector, having regard to availability, quality, standards of service, cost, efficiency of production and distribution of such services.

Pursuant to the provisions listed above, the *Merchant Shipping (Maritime Service Providers) Regulations 2011* were enacted and published under Legal Notice No. 112 of 2011 and during the implementation, the regulations were challenged in the *High Court under Constitutional Petition No. 76 of 2012, SDV Transami Kenya Limited and 19 Others v Attorney General & 2 Others & another [2016]*. The Petitioners among other aspects challenged the constitutional validity of various provisions of the regulations and following presentation by both parties, in respect of the regulations, the Court ordered that the regulations were generally inconsistent with the Constitution, for want of procedure, and were void to the extent of their inconsistency and further that they were *ultra vires* of the provisions of the Merchant Shipping Act. On the basis of the foregoing the Court issued a prohibition order restraining the implementation, jointly or severally, or coming into force or continuing of the operation of the regulations. The Court noted and appreciated that there was no evidence that the regulations were ill-motivated.

The *Merchant Shipping Act, 2009 Part III* – Restriction on trading in Kenyan waters also applies to commercial maritime services. Section 14 provides the type of vessels permitted to trade and/or engage in local trade within Kenyan waters. Vessels registered by foreign registries may be permitted to trade, however these are subject to meeting the requirements and/or circumstances provided within regulations. These regulations are due to be developed as part of the regulations on a cabotage regime. Section 14 has further prescribed an offence for an operator in contravention of any of the provisions of section 14.

Section 15 provides a requirement that Kenyan ships/vessels and foreign vessels anchoring, trading within Kenyan waters or entering Kenyan ports must carry a valid insurance against risk of loss or damage to third parties. The provision further creates an offence for being in contravention.

Further section 16 sought to regulate the provision of commercial maritime services within Kenya taking into account the need to boost local investment and the local industry. The provision was however challenged at the *Mombasa High Court under Petition No. 18 of 2010, Maersk Kenya Limited & Others vs. The Hon. Attorney General & Others, [2020]*, where the

parties by consent agreed that section 16 of the Merchant Shipping Act, 2009 is inconsistent with Article 40 and 50 of the Constitution of Kenya 2010 and was therefore unconstitutional, null and void ab initio. *Section 16 of the Merchant Shipping Act, 2009* is therefore undergoing its deletion through a statutory miscellaneous amendment. The 2023 amendments to the Merchant Shipping Act, 2009 deletes and substitutes section 16 with a provision promoting participation of Kenya citizens in the maritime sector.

The proposed regulations, besides invoking the provisions enumerated above also invokes provisions within the new part (Part IIIA – MARITIME TRANSPORT OPERATOR) provided within the Merchant Shipping (Amendment) Bill, 2023.

The *Maritime Zone's Act, Cap 371*, consolidates the law relating to the territorial waters, the continental shelf of Kenya, provides for the establishment and delimitation of the exclusive economic zone of Kenya, the exploration and exploitation and conservation and management of the resources of the maritime zones and for connected purposes. The determination of the maritime zones is based on principles enumerated under the United Nations Convention on the Law of the Sea. The Kenyan cabotage regime will be determined based on the specified maritime zones.

The *Marine Insurance Act, Cap 390*, consolidates provisions related to marine insurance against risks of loss or damage or third-party liability following an incident or accident during a marine adventure or voyage. This can be the ship, freight, cargo, wages of crew among other aspects.

The *Insurance Act, Cap 487*, consolidates the Law relating to insurance and regulates the business of insurance and for connected purposes. The Act under section 20 prohibits the placing of risks with insurers and reinsurers not registered under the Act and provides for certain exceptions.

It is on the basis of the foregoing provisions that there was a need to review the legal framework for the Authority to fully incorporate the policy recommendations and directives, strengthen the regulatory capacity of the Authority as well as meet the Country's obligation and effectively and efficiently regulate the Kenya maritime transport and logistics services sector.

6. PUBLIC PARTICIPATION AND CONSULTATIONS

Public participation refers to the process by which citizens, as individuals, groups, or communities (also known as stakeholders), take part in the conduct of public affairs, interact with the state and other non-state actors to influence decisions, policies, programs, legislation and provide oversight in service delivery, development and other matters concerning their governance and public interest, either directly or through freely chosen representatives.

An evaluation of the public consultation process is necessary to ascertain whether all interested parties had the opportunity to present their views. Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses, interest groups, professional bodies and other government ministries, departments and agencies and counties.

6.1 LEGAL BASIS FOR PUBLIC PARTICIPATION AND CONSULTATIONS

According to Article 10 of the Constitution of Kenya, 2010, participation of the people, inclusivity, transparency, and accountability are constitutional requirements whenever the State or public officer applies the Constitution, enacts any law, or makes or implements a 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.

Transparency of public finances and performance is ensured through rules, mechanisms, and capacities for sharing information on government programs, budgets, expenditures, and results with citizens.¹³ Participation mechanisms enable citizens to participate in setting budget priorities and monitor expenditures and assess service delivery performance. They also include feedback systems, which provide citizens with the opportunity to provide comments and grievances.¹⁴ Accountability mechanisms include both direct and indirect relationships, where service providers are sanctioned if they fail to meet an established standard.¹⁵

The objects of devolution give powers of self-governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them and recognize the rights of communities to manage their own affairs and to further their development. The values and principles of public service contained in Article 232 (1) of the Constitution require the involvement of the people in the process of policymaking and include transparency and provision to the public of timely and accurate information.

Regarding the subsidiary legislation making process, the Statutory Instruments Act, 2013 requires that the regulatory making authority shall undertake public consultations before

¹³ Constitution of Kenya, 2010: Articles 35, 201 and 132; County Governments Act, 2012: Sections 94, 95 and 96; Public Finance Management Act, 2012, Section 207.

¹⁴ Constitution of Kenya, 2010: Articles 174, 201 and 232; County Governments Act, 2012: Sections 47, 91, 99 and 100; Public Finance Management Act, 2012: Sections 125, 128, 131 and 137; Urban Areas and Cities Act, 2011: Sections 21 and 22.

¹⁵ Constitution of Kenya, 2010: Articles 174 and 201; County Governments Act, 2012: Section 89.

making statutory instruments (Regulations), and particularly, where the proposed Regulations are 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: drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and 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 lesser than fourteen days or be invited to participate in public hearings concerning the proposed instrument.

6.2 THE PROCESS OF PUBLIC PARTICIPATION AND CONSULTATIONS

In line with the Constitutional requirements on public participation and the Statutory Instruments Act which obligates a regulation making authority to undertake appropriate consultations with persons likely to be affected by the proposed instruments, the Ministry continuously engaged the public and private stakeholders in the provisions of the draft Regulations.

Pursuant to section 5 of the Statutory Instruments Act, the Ministry identified specific stakeholders whom it engaged in a consultative process. These include the main institutions and individuals who will be directly or indirectly affected by the proposed statutory instrument.

6.2.1 The Maritime Transport and Logistic Services Stakeholders

The stakeholders identified for engagement for purposes of developing the proposed Regulations included:

- | | |
|---|--|
| 1. Alpha Group - Mombasa; | 34. OGEFREM |
| 2. Anti-counterfeit Authority. | 35. Kenya Trade Network Agency |
| 3. Bandari Maritime Academy | 36. Intergovernmental Standing Committee on Shipping (ISCOS) |
| 4. Beach Management Units from Turkana, Lamu and Mombasa; | 37. TUREDO |
| 5. Competition Authority of Kenya (CAK) | 38. Kenya Ports Authority |
| 6. Container Freight Station Association (CFSA) | 39. Kenya Private Sector Alliance (KEPSA) |
| 7. County Governments; Lamu, Mombasa, Kisumu, Turkana, Kilifi, Tana River, Kwale. | 40. Kenya Groupage Cargo Handling Association |
| 8. Freight Logistix Limited | 41. Institute of Chartered Shipbrokers (ICS) |

- | | |
|--|---|
| 9. Globology Limited | 42. Seafarers Union of Kenya (SUK) |
| 10. Helma Freight Limited | 43. Blue Economy Network |
| 11. Kapulir Resource Management Organization – Turkana | |
| 12. Kenya Association of Manufacturers (KAM) | 44. PIL Kenya Limited |
| 13. Kenya Bureau of Standards (KEBS) | 45. Empty Container Depot Association |
| 14. Kenya Coast Guard Service | 46. Kenya Bureau of Standards |
| 15. Kenya International Freight and Warehousing Association (KIFWA) | 47. Natogo Self Help Group; |
| 16. Kenya Investment Authority | 48. National Youth Service |
| 17. Kenya National Police Service; | 49. Ministry of ICT |
| 18. Kenya National Shipping Line (KNSL) | 50. Northern Corridor Transit and Transport Coordination Authority |
| 19. Kenya Pipeline Corporation | 51. Kenya Shipyard Limited |
| 20. Kenya Revenue Authority | 52. National Transport Safety Authority |
| 21. Kenya Ships Agents Association (KSAA) | 53. Burundi Revenue Authority |
| 22. Kenya Transport Association (KTA) - Mombasa; | 54. Kenya National Chamber of Commerce and Industry (KNCCI); |
| 23. KEPHIS | 55. WOMESA |
| 24. Maritime Freight Company Limited | 56. James Finlay Limited |
| 25. Mediterranean Shipping Company (MSC) | 57. Kenya Marine and Fisheries Research Institute (KEMFRI) |
| 26. National Police Service | 58. Judiciary |
| 27. National Treasury | 59. Express Shipping and Logistics |
| 28. Port Health Services | 60. Maersk Kenya Limited |
| 29. Seaway Maritime Limited | 61. Hapag Lloyd Kenya Limited |
| 30. Shippers Council of Eastern Africa (SCEA) | 62. Rwanda Revenue Authority |
| 31. Technical University of Mombasa | 63. Turkana University College |
| 32. Ufanisi Freighters Limited | 64. Car Importers Association of Kenya (CIAK) |
| 33. Uganda Business Community | 65. Kenya Long Distance Truck Drivers |

6.2.2 Public Consultation Approach and Methodology

The Ministry adopted the following methodology for purposes of public participation:

- (a) posting of draft copies of the Draft Merchant Shipping (Maritime Transport Operators) Regulations, 2023 and the Regulatory Impact Statement onto the Ministry's website inviting representations generally and specifically from the identified stakeholders;
- (b) notification of the stakeholders of the ongoing process and invite them to give their submissions on the draft regulations within a specified reasonable period;
- (c) publication of a notice of the intended stakeholder engagement in the Kenya Gazette;
- (d) posting of an advertisement in a newspaper with national circulation inviting any person or institution to make their submissions within a specified date and directing them on where they can get copies of the regulations;
- (e) advertisement in other electronic media; and
- (f) virtual meetings with select stakeholders where possible.

The Ministry identified the following regions that were earmarked for public participation being at the core of maritime transport and logistic services and being geographically representative of the people of Kenya:

- (a) Nairobi;
- (b) Mombasa;
- (c) Lamu;
- (d) Kilifi;
- (e) Kisumu; and
- (f) Turkana.

Based on the above approach, a total of eight (8) meetings were held between the Ministry and key stakeholders. The Ministry also received several written representations. The following shows a cluster of persons and institutions consulted between November 2021 and May, 2023.

Table: Meetings Maritime Transport and Logistic Services Stakeholders

No	Targeted Stakeholders	Dates
1.	Maritime Transport Operators	23rd November, 2021 in Mombasa.
2.	Partner Government Agencies	1st December, 2021 in Mombasa.
3.	Public stakeholder engagements	3rd December, 2021 virtually, 17th December, 2021 in Nairobi,

		9th February, 2022 in Kisumu, 4th March, 2022 in Lamu and; 10th March, 2022 in Lodwar.
4.	Leadership Forum	1st March, 2022 in Kilifi town.

N/B: Attached to this Regulatory Impact Statement is the final report of stakeholder consultations on the the Merchant Shipping (Marine Transport Operator) Regulations, 2023.

7. OVERVIEW OF THE PROPOSED REGULATION

This Part is intended to assess whether the proposed regulation is clear, consistent, comprehensible, and comprehensive enough to address the identified problem. The regulation should be understood by likely users, and to that end the Regulator should take steps to ensure that the text and structure of the regulation is clear as possible.

7.1 SCOPE OF THE MARITIME TRANSPORT OPERATORS

Maritime Transport Operator means a person who engages in the movement of cargo or passenger from the point of origin to destination or provides a service that facilitates the movement at any given point. Services to be performed by maritime transport operators are outlined in the First Schedule of the proposed regulations and include port facility operator services, clearing and forwarding services, cargo consolidator services, shipping agents service, shipping lines services, empty container depot services and container freight station services.

7.1.1 Role of the Authority over related government agencies

The regulations propose that Authority shall play the collaboration and coordination function of other related government agencies. The role shall entail:

- (a) advise on strategic policy direction;
- (b) monitor and evaluate the implementation of the performance standards; and
- (c) enhance establishment of linkages between related government agencies, maritime transport operators, shipper's organizations and inter- governmental organizations performing cargo clearance functions.

7.1.2 Registration and licensing of maritime transport operators

The proposed regulations provide that, a foreign shipping line shall be eligible for registration in Kenya if such a company is a foreign company duly incorporated under the relevant laws of that Country. Upon application, the foreign shipping line will be issued with a certificate of approval after the application is approved and upon payment of fees prescribed in the Third schedule of the Regulation. If the application is rejected, the Authority is required to notify the applicant within 30 days of application.

Local shipping lines, shipping agents and cargo consolidators operating in Kenya, the proposed regulation requires them to apply for a license from the Authority using a prescribed form set out in the second schedule. The applicant shall be issued with a license by the Authority upon approval and payment of prescribed fee within fourteen days of receipt of the application. If the application is rejected, the Authority will notify the applicant of its decisions together with reasons for refusal within thirty days from the date of lodging the application.

The proposed regulations require maritime transport operators licensed by related government agencies to be registered by the Authority. The registration of related government agencies will be granted upon application and payment of fee prescribed in the regulation. The Authority is required to notify the application of its decision to reject the application within thirty days from the date of the lodge of the application.

The conditions for license or registration of the maritime transport operator are set out in the Fourth Schedule of the Regulations. The validity of the certificate of approval or license shall be valid for a period of twelve months and shall expire on the thirty – first day of December of the year of issue. A certificate of registration issued to a maritime transport operator licensed by a related government agency shall be valid for a period of three years and shall expire on the thirty-first day of December of the third year from the date of issue.

A maritime transport operator shall, two months prior to the expiry of a certificate of approval or license, apply for its renewal. Late application for renewal of certificate of approval or license attracts a fine as prescribed in the Third schedule. The regulation gives the conditions under which a certificate of approval or license may be suspended, cancelled or revoked. Where the Authority suspends, revokes or cancels a certificate of approval/license, the Director General shall notify the maritime transport operator of its decision to revoke or suspend the certificate of approval/license within fourteen days of its decision.

The regulation provides that any person aggrieved by the decision of the Authority in these Regulations may appeal in accordance with the provisions of Merchant Shipping Act, 2009.

7.1.3 Enforcement and compliance

The proposed regulation empowers the Authority to ascertain whether the conditions for licensing and registration have been complied with. The conditions include compliance with the established performance standards and compliance with other relevant laws of Kenya. In the event there is a contravention of this conditions the Authority is empowered to suspense, cancel or revoke license issued or recommend to the related government agency who have issued license to maritime transport operators to consider similar acts until such a time that the contravention will be remedied.

7.1.4 Development and enforcement of performance standards

The proposed regulation empowers the Authority in consultation with interested stakeholders to establish sector performance standards. The provision further empowers the Authority to monitor and evaluate implementation of the set standards and lastly empowers the Authority to enforce where there is non-compliance.

7.1.5 Language for submission of documents

The proposed regulation requires an application for licensing, certificate or registration to be submitted in English language. Where the application is in a foreign language, the applicant is obliged to translate it to English, notarize the document or have it authenticated by the respective Ministry of Foreign Affairs' or Foreign Office.

7.1.6 Marine cargo movement mechanism

The proposed regulation provides that the movement of cargo into any facility shall be in accordance with the instructions of the shipper as contained in the bill of lading. Where the bill of lading does not contain the instructions of the shipper, the relevant port authority is required to nominate the facility for movement of cargo taking into account conditions prescribed in the regulations. It will be an offense for any person who contravenes the Marine cargo movement mechanism and is liable on conviction to sanctions outlined in the Regulation.

7.1.7 Request for information

The proposed regulation empowers the Authority to request for information from any person engaged in the provision of maritime transport and logistic services to facilitate regulatory inspections and implementation of performance standards.

7.1.8 Code of professional conduct

The proposed regulation requires maritime transport operators to uphold their respective code of professional conduct and abide by all national laws while discharging their duties.

7.1.9 Submission of reports

The proposed regulation requires maritime transport operators to submit periodic reports upon request by the Authority in the respect of compliance with various provisions within the Regulations.

8. REGULATORY AND NON-REGULATORY OPTIONS AND REASONS WHY OTHER OPTIONS ARE NOT APPROPRIATE

In this part, possible alternatives to addressing the problem are evaluated. The options are: maintenance of the status quo, putting in place alternative administrative measures and promulgating new Regulations. Based on the evaluation of each option, the best government action is recommended. This is in line with section 7 (c) of the Statutory Instruments Act which provides that other practicable means of achieving the objective, including regulatory and non-regulatory options, are explored.

8.1 THE ALTERNATIVES

8.1.1 Option one: status quo

Maintaining the status quo means that no regulations will be developed and therefore challenges facing the full implementation of the Merchant Shipping Act, 2009, as amended by the Merchant Shipping (Amendment) Bill, 2023 will not be addressed.

The Merchant Shipping (Amendment) Bill, 2023 provides for the registration and licensing of maritime transport operators, the imposition of fees and tariffs in maritime transport and logistics services. The Bill further provides for the settlement of disputes through arbitration as well as the setting up regulatory structures to facilitate efficient trade through the ports of the country. However, it does not provide for the implementation mechanism leaving the same for promulgation of Regulations. If no Regulations are made, the following challenges will persist:

- (a) the Merchant Shipping (Maritime Service Providers) Regulations, 2011 which were declared unconstitutional by the courts. continues to leave a gap on operationalization of the provisions of the Act;
- (b) the weak licensing and registration regime will persist as licensing and registration of maritime transport operators is shared among various entities;
- (c) unfair competition among operators will continue thereby affecting service delivery;
- (d) there are higher instances of noncompliance with national and international standards;
- (e) continued loss of revenue as a result of rampant unlicensed maritime operations;
- (f) inadequate maritime professionals and limited transfer of skills;
- (g) redress of customer enquiries and complaints will remain uncoordinated;
- (h) low investment in the maritime sector;

- (i) enforcement mechanisms in place remain very weak;
- (j) continued lack of awareness of the opportunities available in the maritime sector;
and
- (k) uncompetitive service delivery among maritime transport and logistics service providers.

In the event the status quo is maintained, the identified intention of Parliament to have regulations in place will not be achieved and the identified challenges will not be addressed. Maintaining the status quo will mean that inadequate central oversight capacity will persist.

8.1.2 Option two: Application of administrative measures

Part IIIA of the Merchant Shipping Act, 2009 provides for the registration and licensing of maritime transport operators and related government agencies. Clause 16B provides that the Authority may issue a certificate of registration to any person or issue a license to a maritime transport operator upon application to operate or provide maritime transport and logistic services subject to prescribed conditions.

Clause 16E of the Bill further provides that the Authority shall coordinate the activities of maritime transport operators and related-government agencies responsible for maritime trade and transport to enhance service delivery. That the Authority shall carry out its functions and give effect to the FAL Convention and other international agreements relating to maritime trade facilitation to which Kenya is party to. It further obligates the Authority, in consultation with maritime transport operators and related government agencies to prescribe formalities or procedures to facilitate electronic data exchange for purposes of effective and efficient clearance of passengers, cargo, crew and ships.

The Bill contemplates that the finer details on how this would be actualized shall be through subsidiary legislation. Achieving this through administrative measures would present numerous challenges.

The Authority is required to develop a framework for the rationalization of fees, tariffs and charges of maritime transport operators and related government agencies and any review shall be subject to consultation of the industry stakeholders. To this end, the maritime transport operators are required to file with the Authority the tariffs showing the actual rates, charges and the surcharges applied in terms of all services rendered.

Additionally, maritime transport operators are required to obtain written consent from the Director-General prior to the introduction and review of their tariffs showing the actual rates, charges and surcharges applied in providing services related to maritime transport and logistics. Related-government agencies are required to consult with the Director-General prior to the review of tariffs on services related to maritime transport and logistics. It was for these details that their implementation was contemplated to be through subsidiary legislation and not through ad hoc administrative guidelines.

The trading environment is different in developing and developed countries due to different levels of development. In an ideal trading environment, the market forces of supply and demand prevail. However, in developing countries such as Kenya where the domestic players have inadequate capacity to fully compete with the non-nationals, the administrative measures will not suffice as there will be no level playing ground. Therefore, there is a need for a regulatory framework as opposed to administrative measures in order to meet our policy objectives, create fair competition and a conducive trading environment.

8.1.3 Option Three: Adoption of the Proposed Regulations

Article 94 of the Constitution contemplates circumstances under which Parliament may, through legislation, confer the power on any person or body the authority to make subsidiary legislation. The Statutory Instruments Act, 2013 sets out the way subsidiary legislation may be developed.

The Merchant Shipping Act, 2009 in Clause 16T provides that the Cabinet Secretary may make regulations for the better carrying into effect of the provisions of that Part of the Bill. The Bill then sets out specific areas to be covered by the subsidiary legislation.

Regulation of maritime transport and logistic services is important considering the following factors:

- (a) The Integrated National Transport Policy, 2009 (INTP), Kenya Vision 2030, Third Medium Term Plan, Strategic Plan for the Ministry, and KMA Strategic Plan. These policies establish objectives and policy strategies geared towards effective and efficient regulation of commercial maritime services;
- (b) The UN Sustainable Development Goals 2030, AIMS 2050, African Maritime Transport Charter, Africa Blue Economy Strategy Implementation plan 2021-2025, WTO-TFA Agreement, WTO GATTs, AfCFTA, EAC Act on Non-Tariff Barriers, EAC Act on One-Stop Border Post, East African Community Customs Management Act 2004 geared towards the adoption of an efficient and effective trade facilitation;
- (c) In line with recommendations of The Report on Strengthening of KMA's Oversight Capacity on Maritime Transport Services in Kenya by HPC Hamburg Port Consulting GmbH, and the report of the Blue Economy Committee, "Rediscovering the Road to Prosperity";
- (d) it's important to enhance the use of the Mombasa Port and Northern Corridor Community Charter (MPNCCC), LAPPSET, Northern Corridor Transit and Transport Coordination Authority and PMAESA, ISCOS, as a tool for oversight on efficiency, quality and cost of cargo clearance processes;
- (e) it will facilitate the growth of local entrepreneurs in emerging blue economy opportunities in Kenyan waters;

- (f) the Government directives on commercial maritime services will be implemented;
- (g) it shall give effect to recommendations from the 2018 Blue Economy Conferences in Bomet and Nairobi in regard to revival initiatives of the maritime sector;
- (h) will address the issues brought out in Constitutional Petition No. 76 of 2012 which resulted in the declaration of Merchant Shipping (Maritime Service Providers) Regulations, 2011 unconstitutional; and
- (i) this shall incorporate content from Local Content Bill, 2018 on marine transport and logistic services which have been adopted in other national legislations already enacted.

Based on the above concerns and the evaluation of the first two options, developing Regulations is the most ideal option to address the challenges facing the maritime transport sector in Kenya.

8.2 PREFERRED OPTION

Based on the foregoing and the cost benefit analysis in the next chapter, it is clear the third option (development and adoption of the proposed regulations) is the preferred option. The other two options have little or no impact in addressing the problem.

9. COST- BENEFIT ANALYSIS

9.1 COSTS

The analysis of the expected costs and benefits of the proposed regulation, seeks to answer the question whether the benefits justify the costs. This would enable the Regulator to estimate the total expected cost and benefit of every aspect of the regulation. 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 the industry and the available information, the costing will to a substantial degree, be qualitative rather than quantitative, the estimate may include the following costs;

- (i) cost new license fee;
- (ii) cost of documentation to ensure compliance;
- (iii) cost of Equipment to assist comply with the law;
- (iv) opportunity cost –lost revenue due to non-compliance;
- (v) training cost to comply with the regulation;
- (vi) professional Insurance cost;
- (vii) monitoring and evaluation cost;
- (viii) research and development cost for the appropriate KPI for the player; and
- (ix) sensitization to accelerate compliance cost;

The enactment of the Merchant Shipping Act, 2009, necessitated prescription of fees payable by the maritime service providers, including the maritime transport operators. These fees have remained constant, to date, despite inflation and increase in the cost of living. The proposed regulations, proposes to introduce:

- (a) late renewal fee for operators licensed or registered by the Authority;
- (b) initial license and registration fees for first time applicants;
- (c) application processing fees for (a) and (b) above;
- (d) registration fees for maritime transport operators licensed by related government agencies payable once every 3 years.

It is worth noting that the license cost shall be borne by the operators and that the licensing and registration fees for maritime transport operators currently licensed or registered by the

Authority remains the same as provided under the Merchant Shipping (Fees) Regulations, 2011 except where they submit an application outside the prescribed time would they be required to meet the costs enumerated under para (a). (b) – (d) are applicable to first time applicants.

The projected player in the industry as at the time of implementing the regulation will be as follows;

No.	Description	Number of players
1.	Local Shipping Line	1
2.	Foreign Shipping Line	19
3.	Shipping Agent	45
4.	Cargo consolidators	38
5.	Clearing Agent	868
6.	Empty Container Depot	12
7.	Container Freight Stations	22
8.	Port Facility Operator	9

If all operators comply, they will incur below cost cumulatively;

No.	Description	Amount (Kshs)
1.	One off cost (Initial registration)	20,503,350.00
2.	Triennium (Application processing & License Renewal fee)	10,251,675.00

The Authority shall allocate in the Annual budget approximately Kshs 4.5 million to sustain the monitoring and evaluation expense, sensitization and R&D on KPI.

9.2 BENEFITS

The adoption and implementation of the proposed regulations will lead to the following benefits to the maritime transport industry. It shall:

- (a) outline the scope of services for maritime transport operators;
- (b) provide a mechanism for coordination and collaboration for maritime transport and logistics services;
- (c) promote professionalism through continuous capacity building within the maritime transport sector;

- (d) promote the participation of Kenyan citizens in the maritime transport and logistics sector;
- (e) provide a complaints resolution mechanism;
- (f) provide processes for the establishment of performance standards;
- (g) provide compliance and enforcement mechanisms in the provision of maritime transport and logistics services;
- (h) reduce instances of non-compliance with national and international standards;
- (i) ensure licensing and registration regime, of maritime transport operators, does not exclude other operators from the ambit of the Authority;
- (j) enhance quality of maritime transport services, inappropriate modal split and institutional deficiencies;
- (k) reduce unfair competition among operators thereby promoting quality service delivery;
- (l) reduce continued loss of revenue as a result of rampant unlicensed maritime operations;
- (m) promote maritime professionals and transfer of skills;
- (n) provide platform for redress of customer enquiries and complaints;
- (o) promote investment in the maritime sector;
- (p) create awareness of the opportunities available in the maritime sector;
- (q) outline the scope of services for maritime transport operators;
- (r) eliminate non delay in submission of implementation progress reports and non-compliance with the established performance standards;
- (s) provide adequate implementation and enforcement mechanisms for the performance standards for maritime service providers; and
- (t) create adequate regulatory framework for the transport and logistic;

10. COMPLIANCE AND IMPLEMENTATION

As different aspects of the proposed regulations 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 them.

The implementation and enforcement of the Merchant Shipping (Maritime Transport Operators) Regulations, 2023 will be undertaken through the existing institutional framework, the Director General of the Kenya Maritime Authority in consultation with the Cabinet Secretary responsible for matters relating to transport.

10.1 CONCLUSION

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

- (a) Regulatory-Making Authority and the legal mandate: Sections 8(h) and 16T of the Merchant Shipping Act, 2009 empowers the Cabinet Secretary to make regulations generally to give effect to the Act. The Cabinet Secretary therefore have the required legislative powers to propose the Regulations.
- (b) Requirements of the Statutory Instruments Act: Section 5 requires that a regulation-making authority to conduct public consultations and to 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 an RIA be prepared where a statutory instrument is likely to impose significant costs on the community. The RIA must contain certain key elements namely:
 - (i) a statement of the objectives of the proposed legislation and the reasons;
 - (ii) a statement explaining the effect of the proposed legislation;
 - (iii) statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;
 - (iv) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; and
 - (v) the reasons why the other means are not appropriate.

The public consultation and RIS structure requirements have been fully met.

(c) Other existing legal frameworks: The proposed Regulations does not propose to have any new legislation to be enacted or any of the existing laws to be amended. It harmonizes with other laws making their implementation more effective.

(d) The proposed Regulations as drafted are clear, consistent, comprehensive, and comprehensible enough to cover all matters.

10.2 RECOMMENDATION

This Regulatory Impact Assessment concludes that the proposed Merchant Shipping (Maritime Transport Operations) Regulations are necessary to operationalize sections 8(h) and 16T of the Merchant Shipping Act, 2009. The proposed regulations shall promote growth and development in the maritime transport and logistics sector.

It is recommended that the proposed regulations be adopted.

ANNEXURES

Annexure 1: The Draft Merchant Shipping (Maritime Transport Operators) Regulations, 2023

Annexure 3: Public Notice on Public Participation for the Proposed Regulation

Annexure 4: Report on Stakeholder consultations.