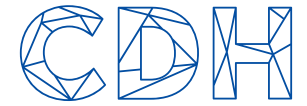


Environmental Law

ALERT | 23 January 2025



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In pursuit of a circular economy: Kenya enacts Extended Producer Responsibility regulations

Extended Producer Responsibility (EPR) is increasingly being adopted by countries to address waste management challenges. EPR holds producers accountable for their product's life cycle and is based on the polluter pays and zero waste principles of environmental law.

Kenya gazetted the Sustainable Waste Management (Extended Producer Responsibility) Regulations, 2024 (Regulations), on 4 November 2024 to operationalise the EPR provisions of the Sustainable Waste Management Act, 2022 (Act). The Regulations apply to producers, stipulated products, product packaging, and designated EPR compliance schemes. In this article we set out the salient provisions of the Regulations.

Producers

Producers subject to the Regulations are entities that introduce goods, products and packaging into the country through authorised means such as manufacturing, importing, converting, filling, refilling, repackaging or rebranding. These producers have a variety of obligations. They are responsible for designing products and packaging them in a manner that minimizes waste, and facilitates reuse, recycling and recovery. They are required to use secondary raw materials where possible, ensure that the materials used are environmentally friendly at their end of life, and establish takeback schemes such as a deposit refund system. Producers must also register with the National Environmental and Management Authority (NEMA) by submitting an application for registration and paying a one off registration fee of KES 5,000. Upon approval of the producer's application, NEMA issues the producer with a registration certificate.

Products and packaging

The First Schedule of the Regulations provides a list of products and packaging that are subject to the Regulations, including:

- Packaging for non-hazardous products (plastics, aluminium, composite, paper and its corrugates, glass, cardboard and cartons).
- Hazardous products' packaging (industrial chemicals, oil and lubricants, pharmaceuticals, agrochemicals, veterinary products, cosmetics, paints and solvents), treated wood and agricultural films.
- Electrical and electronic equipment, mercury auto switches, thermostats, batteries and accumulators.
- End of life motor vehicles, automobiles, aircrafts and locomotives.
- Non-packaging items (plastics, glass, paper, cardboard), furniture (except wooden, metallic), rubber and tyres, textiles, leather, artificial hair, diapers and sanitary towels.

Importers must apply to NEMA for an EPR certificate when importing the finished products listed above and make payment of a corresponding EPR fee of KES 150 per item at the point of importation. The EPR certificate is required for the clearance and inspection of the listed imported items.

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EPR compliance schemes

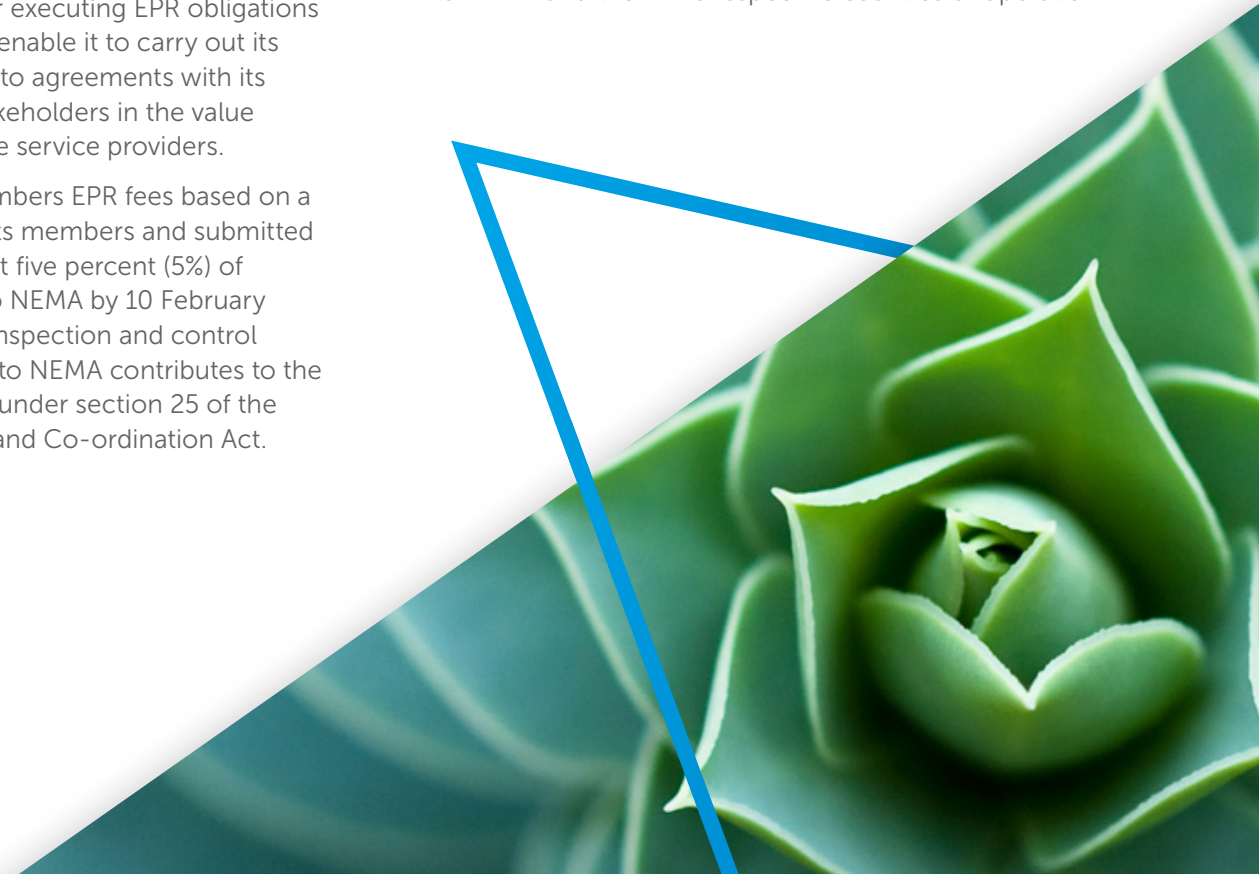
Producers are required to take financial, organisational and physical responsibility for the management, treatment and disposal of their post-consumer products, and establish post-consumer collection and take back schemes. A producer may achieve these obligations either by setting up an individual producer responsibility compliance scheme or by joining a collective EPR compliance scheme that caters to multiple producers with similar products, uses and waste profiles.

Under a collective scheme, producers operate under the umbrella of a producer responsibility organisation (PRO) which is responsible for executing EPR obligations on behalf of its members. To enable it to carry out its obligations, the PRO enters into agreements with its members as well as other stakeholders in the value chain, such as approved waste service providers.

The PRO also charges its members EPR fees based on a fee structure agreed among its members and submitted to NEMA. The PRO must remit five percent (5%) of collected membership fees to NEMA by 10 February of each year for monitoring, inspection and control audits. The PRO's remittance to NEMA contributes to the Restoration Fund established under section 25 of the Environmental Management and Co-ordination Act.

The Regulations set out the requirements for registration of individual and collective EPR compliance schemes and the issuance of annual licences to the schemes, with the fees payable by applicants. While the operating licence is annual, the registration of an EPR scheme is valid for a maximum period of four years and is renewable once the producer or the PRO demonstrates their EPR capacity to meet their obligations and contribution to attainment of national targets. These national targets are yet to be defined.

For monitoring purposes, every EPR compliance scheme must keep and maintain records, and submit annual reports to NEMA and the EPR's respective counties of operation.



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Implications of the Regulations

The Regulations introduce new requirements for carrying out business in Kenya with various implications, as highlighted below:

- **Transition:** The Regulations establish a transition period for producers, requiring those in operation before the Regulations come into force to apply to NEMA for registration within six months of the commencement of the Regulations, and ensure full regulatory compliance. Businesses have a narrow window of time within which to address compliance requirements and this will require a collaborative approach to put the necessary modalities in place to enable compliance.
- **Offences and penalties:** The Regulations provide binding EPR obligations and set out offences and penalties which must be taken note of, as highlighted below:

Offence	Penalty
An individual EPR compliance scheme or PRO knowingly neglecting its duties under the Regulations.	An order to cover costs associated with managing their neglected responsibilities.
Introducing a product to the market on behalf of a producer not listed in the authority's register.	The general penalty under section 32 of the Act, which is set out to be a fine of not less than KES 2 million and not more than KES 4 million or to imprisonment for a term not exceeding four years, or to both.
Providing false or misleading information about quantities handled within the EPR scheme.	
A producer operating outside of a relevant PRO, acting as a free rider, and failing to meet their individual obligations.	
A collective EPR compliance scheme that fails to charge the EPR fee as set out in the Regulations and submit the required per-centage of fees collected to NEMA.	



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- **Approvals and authorisations:** NEMA is the issuing authority for any licences and certificates under the Regulations and has the power to revoke, suspend or cancel an EPR certificate of registration of annual operating licence where the producer or PRO is not compliant with its obligations. Any person or entity aggrieved by any decision of NEMA under the Regulations may appeal to the National Environment Tribunal.
- **Obligations:** Producers need to map their obligations and develop a robust compliance strategy that minimises risks and enhances benefits of implementing the Regulations. Producers may carry out their EPR obligations individually or opt to join a collective scheme, such as the Kenya Extended Producer Responsibility Organization, the Packaging Producer Responsibility Organization, the E-Waste Producer Responsibility Organization, and the Kenya Hazardous Waste Producer Responsibility Organization.

These are the existing PROs in Kenya. Regardless of the EPR approach selected, producers will need to undertake a study to determine the baseline for products and packaging handled, as prior to registration, every individual and collective EPR compliance scheme is required to develop and submit to NEMA a four-year EPR plan containing this information.

- **Costs and benefits:** The Regulations have the potential to play a key role in advancing a circular economy in Kenya by promoting better management of environmental pollution and utilising waste as a resource. They also offer opportunities for increased awareness and knowledge of waste management while fostering job creation across the waste value chain. However, the Regulations introduce various costs and fees, including registration, licensing and import fees, which may have significant socio-economic implications given the broad range of goods and products they cover. For instance, EPR fees require importers to pay per item, raising concerns about how these fees will be calculated and their potential impact on consumers.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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