



KENYA

KENYA
RECOMMENDATIONS
FOOD DONATION
LAW AND POLICY

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Authors

This report was written by Esther Akwii, Emily M. Broad Leib, Melissa Shapiro, Nadia Haile, Tori Oto, Ali Nayfeh at the Harvard Law School Food Law and Policy Clinic with contributions from Douglas O'Brien at The Global FoodBanking Network.

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About The Global Food Donation Policy Atlas

The Global Food Donation Policy Atlas is a first-of-its-kind initiative to promote better laws on food donation to help address food loss and food insecurity. This project maps the laws affecting food donation in countries across the globe to help practitioners understand national laws relating to food donation, compare laws across countries and regions, analyze legal questions and barriers to donation, and share best practices and recommendations for overcoming these barriers. The project is a collaboration between the Harvard Law School Food Law and Policy Clinic (FLPC) and The Global FoodBanking Network (GFN). To learn about and compare the food donation laws and policies for the countries FLPC has researched to date, visit atlas.foodbanking.org.

About the Harvard Law School Food Law and Policy Clinic

FLPC serves partner organizations and communities by providing guidance on cutting-edge food system legal and policy issues, while engaging law students in the practice of food law and policy. FLPC focuses on increasing access to healthy foods; supporting sustainable food production and food systems; and reducing waste of healthy, wholesome food. For more information, visit chlpi.org/food-law-and-policy.



About The Global FoodBanking Network

The Global FoodBanking Network supports community-driven solutions to alleviate hunger in more than 40 countries. While millions struggle to access enough safe and nutritious food, nearly a third of all food produced is lost or wasted. GFN is changing that. GFN believes food banks directed by local leaders are key to achieving Zero Hunger and building resilient food systems. For more information, visit www.foodbanking.org.



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ABOUT THESE RECOMMENDATIONS

This document is a product of The Global Food Donation Policy Atlas project, a partnership between the Harvard Law School Food Law and Policy Clinic (FLPC) and The Global FoodBanking Network (GFN). The Atlas project is an innovative partnership designed to map the laws and policies affecting food donation in several countries over the course of two years across the globe and to provide a comparative legal analysis based on these findings. For each of these countries, the Global Food Donation Policy Atlas project will produce a legal guide to identify the laws relevant to food donation in that country. While the landscape differs across geopolitical borders, the legal guides recognize universal issues that impact efforts to reduce food loss and waste and increase food recovery. These issues include food safety, date labeling, liability, taxes, donation requirements and food waste penalties, and government grants or funding programs.

In-country interviews with relevant stakeholders, including food banks and other food recovery organizations, food donors, government officials, and legal experts, further informed the content of the legal guides and revealed priority actions for law and policy change. Based on these findings, FLPC has developed specific recommendations for each country. These recommendations are intended to serve as a companion to the legal guides, though both documents may stand alone. The purpose of these recommendations is to highlight select actions for improving upon laws, policies, and programs relevant to food loss, waste, and donation.

This document sets forth recommendations focused on Kenya, where approximately 36.5% of the population is food insecure,¹ about 40% of food produced is wasted,² and an estimated 36.1% of the population lives in poverty.³ The discussion below provides a brief overview of the legal issues most pertinent to food donation, which the Kenya Legal Guide explains in more detail. The recommendations included in this report are not exhaustive but offer select best practices and policy solutions to reduce food loss and waste and combat food insecurity through stronger food donation laws and policies in Kenya.



SUMMARY OF RECOMMENDATIONS

The recommendations contained in this document aim to provide a starting point for stakeholders in Kenya to strengthen the legal and policy framework relevant to food donation. Food banks and other organizations whose mission is to reduce food waste and increase food donation (collectively referred to as “food recovery organizations”), donors, and policymakers should consider additional opportunities to advance food donation and reduce food waste. In summary, the recommendations are as follows:

To ensure that food is donated safely and does not pose risks to recipients and to provide clarity to encourage food donors, the government should:

- Amend the Food, Drugs and Chemical Substances Act (FDSCA) to feature a donation-specific chapter.
- Draft regulations related to the FDSCA that elaborate on food safety for donations.
- Produce and disseminate clarifying guidance on food safety requirements relevant to donation.

To ensure that quality-based date labels do not result in the disposal of food that is otherwise safe for consumption and donation, the government should:

- Amend the Labelling of Pre-packaged Foods – General Requirements under the Food, Drugs and Chemical Substances Act to explicitly permit the donation of food after the quality-based date.
- Promote education and awareness on the meaning of date labels.

To ensure that liability concerns related to donating food do not deter potential donors, the government should:

- Enact national legislation that establishes clear and comprehensive liability protection for food donors and food recovery organizations.
- Produce and disseminate clarifying guidance on whether the Competition Act and the Consumer Protection Act apply to free food donations.

To ensure businesses (both donors and distributors) receive proper tax incentives and sufficient information to participate in food donation, the government should:

- Expand Kenya’s Income Tax Act’s income tax deduction to include in-kind donations to food recovery organizations.
- Offer tax credits for food donations made to food recovery organizations and intermediaries.
- Categorize food donation as a zero-rated supply under the Value Added Tax Act.
- Provide a tax deduction for activities associated with the storage, transportation, and delivery of donated food.
- Develop tax guidance for food donors and food recovery organizations clarifying that clarifies exemptions.

To ensure that food donors and food recovery organizations are sufficiently incentivized to know how to engage in food donation, the government should:

- Create government grant opportunities for food donation infrastructure.

INTRODUCTION

Despite having one of the fastest-growing economies in Sub-Saharan Africa,⁴ approximately 36.5% of the Kenyan population is food insecure⁵ and an estimated 36.1% of the population lives in poverty.⁶ To reduce hunger and promote food security, Kenya has adopted several interventions. Notably, Kenya provides for the right to food under the Constitution of the Republic of Kenya.⁷ In 2011, Kenya adopted a National Food and Nutrition Security Policy to improve nutrition and the quality of food available to Kenyans.⁸ The Policy provides for the right to food, and acknowledges that a lot of food is lost at the post-harvest level, and commits to initiating measures to address post-harvest losses.⁹ In 2017, Kenya adopted the National Food and Nutrition Security Policy Implementation Framework to implement the National Food and Nutrition Security Policy to ensure that everyone has access to affordable and nutritious food.¹⁰ The Implementation Framework also identifies interventions to address post-harvest losses, which include promoting appropriate post-harvest handling of produce.¹¹ Further, the government of Kenya instituted Vision 2030 and the Big Four Agenda.¹² The Big Four Agenda relates to Kenya's Vision 2030, the development blueprint aimed at propelling Kenya to a middle-income status by 2030, which prioritizes food security, among other issues.¹³ Under the Big Four Agenda, the Kenyan government aims to achieve 100% of food security by 2022¹⁴ through enhancing small holder productivity, reducing the cost of food, and enhancing large-scale production.¹⁵

At the same time, Kenya wastes about 40% of the food produced, amounting to an estimated KSh.72 billion (USD \$654,545,448) a year.¹⁶ Most of the food loss and waste occurs at the post-harvest level of production.¹⁷ Improper storage of food is the main source of food loss.¹⁸ At the household level, an estimated 5,217, 367 tons of food is wasted annually.¹⁹ However, Kenya's food loss index has steadily decreased from 1,744 metric tons in 2017 to 1,531 in 2018 to 1,446 metric tons in 2019.²⁰ High rates of food waste indicate that Kenya, like much of the world, is falling behind its commitment to cut food waste in half by 2030 under the United Nations' Sustainable Development Goal 12.3.²¹ Nevertheless, Kenya holds initiatives to create awareness about food loss and waste, and discuss the gaps in policy and implementation that are hindering progress in reducing food loss and waste. In 2017, Kenya hosted the first ever All Africa Post-Harvest Congress with the theme "Reducing Postharvest Food Losses: Sustainable Solutions for Africa."²² Furthermore, in 2020, the Ministry of Agriculture, Livestock and Fisheries participated in the first International Day of Awareness of Food Loss and Waste.²³

As Kenya seeks to reduce food loss and waste and mitigate food insecurity, it is critical that various stakeholders, including the private sector and nonprofit organizations, recognize and understand the laws that currently apply to food donation. The following sections briefly summarize some of the most common legal issues relevant to food donation, (as identified and described in more detail in the Legal Guide), and offer policy recommendations to address these challenges.

LEGAL CHALLENGES AND POLICY RECOMMENDATIONS

Food safety for donations

Issue overview

In many countries, a key barrier to the donation of surplus food is the lack of knowledge or readily available guidance regarding safety procedures for food donation. Potential donors are often uncertain as to which food safety regulations apply to donated food, as opposed to food offered for sale, as well as the steps necessary to safely donate food in compliance with applicable regulations. As a result, safe, surplus food that could have been redirected to populations in need is instead destined for landfills.

In Kenya, food safety laws are mostly contained in the Public Health Act (PHA), and the Food, Drugs, and Chemical Substances Act (FDSCSA). The PHA prohibits any person from selling or having in their possession any food that is adulterated or food that is unfit for use.²⁴ The PHA defines food as “any article used for food or drink ... and any article intended to enter into or be used in the preparation of such food.”²⁵ The PHA also regulates the buildings and facilities where food is handled,²⁶ which would presumably include food banks. While the PHA does not explicitly reference food donation, a broad interpretation of the Act suggests that the Act would apply to donated food.

In addition, the Food, Drugs and Chemical Substances Act (FDSCSA), which is applicable as an addition to and not in derogation of the PHA,²⁷ includes provisions to prevent adulteration of food, drugs, and chemical substances.²⁸ Of relevance to food donation, the FDSCSA prohibits the sale of unwholesome, poisonous, or adulterated food, or food that consists in whole or in part of any rotten or diseased matter.²⁹ The FDSCSA broadly applies to all food, which it defines as “any article manufactured, sold or *represented* for use as food or drink for human consumption.”³⁰ While the FDSCSA does not explicitly reference food donation, this broad definition suggests that the FDSCSA would apply to donated food offered free of charge.

There is no mention of food donation or guidance on food safety for donated food in either the PHA or the FDSCSA. Attempting to discern which food safety rules apply to food donation is a burdensome and challenging task. As a result, food donors may avoid donating surplus food, and food recovery organizations may refuse to accept food donations that may otherwise be safe. Understanding which food safety requirements apply to donated food is important for minimizing potential harm to donation recipients and ensuring that food safe for consumption is donated rather than discarded. However, the current system lacks clarity for food donors and food recovery organizations as to the applicable provisions.

Recommended policy actions

1. AMEND THE FOOD, DRUGS AND CHEMICAL SUBSTANCES ACT (FDSCSA) TO FEATURE A DONATION-SPECIFIC CHAPTER.

To eliminate the uncertainty, regarding which provisions apply to the safety of donated food, Kenya should amend the FDSCSA to include a donation-specific chapter that clarifies which provisions are necessary to ensure the safety of donated food and which are not necessary, such as those that relate to the ability to market something for sale but do not contribute to safety. For example, the donation-specific chapter could cover whether food can be donated if there is a labeling flaw that prevents it from being sold but does not impact its safety of the food. Creating donation-specific sections in the law would significantly ease the burden on food donors and food recovery organizations seeking to ensure compliance with relevant food safety provisions and may increase food donation.

2. PUBLISH DRAFT REGULATIONS RELATED TO THE FDSCSA THAT ELABORATE ON FOOD SAFETY FOR DONATIONS.

Kenya’s Ministry of Health should draft regulations related to the FDSCSA that elaborate on food safety for donations. Under the FDSCSA, the minister of health has powers to implement and enforce the FDSCSA. Regulations that contain clear and distinct food safety requirements applicable to donated food can enable food donors and food recovery organizations to meet established food safety standards and encourage food donation. For example, India published Surplus Food Regulations, setting standards relevant to leftover food that may be donated.³¹

3. PRODUCE AND DISSEMINATE CLARIFYING GUIDANCE ON FOOD SAFETY REQUIREMENTS RELEVANT TO DONATION.

Differentiating which food safety regulations apply specifically to donated food can be confusing and burdensome for food donors and other stakeholders. Clear guidance from the Ministry of Health (MOH) on what provisions under the FDSCSA, the PHA, or other requirements apply to donated food would ease concerns

of food donors and food recovery organizations and likely lead to increased and safer food donation. For example, in the United Kingdom, the Waste and Resources Action Programme (WRAP), the Food Standards Agency (FSA), and the Department for Environment, Food & Rural Affairs (Defra), have published donation and redistribution guidance.³² Singapore's National Environment Agency also issued Guidelines on Food Donation in 2016. The Guidelines state that they are intended to assist actors in complying with the food regulations and outline the responsibilities of donors and food recovery organizations.³³ Guidance can generally be more informal and detailed than legislation, which often makes it more useful to a broader audience. Donors would have the FDSCA, the PHA, and prevailing guidance to help them understand their food safety obligations with respect to donated food.

Date labeling

Issue overview

A major driver of food waste and an obstacle to food donation is the general misconception about the date labels such as “sell by,” “use by,” or “best by,” affixed to food products. Many donors and consumers interpret these date labels as indicators of the food safety of food. Despite this interpretation, for the vast majority of foods, date labels indicate freshness or quality rather than food safety, and few foods become more likely to carry foodborne illnesses over time. Donors and food recovery organizations, however, being cautious about food safety, may discard food once the date has passed even if the food is perfectly safe to donate and consume.

Kenya's date labeling scheme is set out in the Food, Drugs and Chemical Substances (Food Hygiene) Regulations, 1978;³⁴ the Specification of Products to Be Marked with Last Date Sale, 1988;³⁵ the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations;³⁶ and the Labelling of Pre-packaged Foods – General Requirements³⁷ (hereinafter, General Requirements) under the FDSCA.

The Food, Drugs and Chemical Substances (Food Hygiene) Regulations require any person who owns, operates, or is in charge of a food plant as may be required by the minister of health to indicate “prominently a date-marking, showing the last day, month and year ... the product may be sold.”³⁸ Pursuant to this, the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations require that all foods feature an expiry date, which is defined as the “last day, month and year.”³⁹ The Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations further explicitly prohibit the sale of any foodstuffs past the expiry date.⁴⁰ Further, the Specification of Products to Be Marked with Last Date Sale, 1988 requires certain categories of pre-packaged foods to bear a “date-marking showing the last day, month and year in which the product may be sold. ...”⁴¹ Food products that must bear a date marking include dairy, most prepackaged food, and canned and bottled drinks.⁴² In 2014, Kenya adopted the Labelling of Pre-packaged Foods – General Requirements (hereinafter the General Requirements), establishing a dual-date labeling scheme for prepackaged foods, which distinguishes between safety-based and quality-based labels.⁴³ Specifically, the General Requirements require all pre-packaged foods to feature either a “date of minimum durability” also expressed as a “best before” date, or a “use-by” date (also expressed as the “recommended last consumption date” or “expiration date”), depending on the type of food product.⁴⁴ All the Regulations mentioned above, apply to all food that is offered for sale, which presumably includes food that is donated free of charge, based on the FDSCA's broad definition of sale.

Despite this positive new standard laid out in the Labelling of Pre-packaged Foods – General Requirements, food donors and food recovery organizations may face challenges discerning the date labeling requirements applicable in Kenya because multiple regulations and two different agencies govern date labeling. In particular, the Labelling of Pre-packaged Foods – General Requirements are enforced by the Kenya Bureau of Standards (KEBS),⁴⁵ while the Food, Drugs and Chemical Substances (Food Hygiene) Regulations, 1978; the Specification of Products to Be Marked with Last Date Sale, 1988; and, the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations are implemented by the Ministry of Health.⁴⁶ It is unclear which of the multiple regulations or agencies take precedence regarding date labeling. Also, there is currently no explicit discussion in any of the relevant Regulations on how the date labeling rules apply to donated food or whether food can be donated past the date.

Recommended policy actions

1. AMEND THE LABELLING OF PRE-PACKAGED FOODS – GENERAL REQUIREMENTS UNDER THE FOOD, DRUGS AND CHEMICAL SUBSTANCES ACT TO EXPLICITLY PERMIT THE DONATION OF FOOD AFTER THE QUALITY BASED-DATE.

Kenya should amend the Labelling of Pre-packaged Foods – General Requirements to explicitly permit the donation of food after the quality-based date, also referred to as the “best before” date. Without clear, persuasive language in the regulations, cautious food donors and food recovery organizations may interpret the date label requirement from a food safety perspective. Hence, they may err on the side of caution, and not donate such food after the affixed date has passed. Implementing this amendment may be bolstered by providing technical support to retailers, manufacturers, and other potential donors.

2. PROMOTE EDUCATION AND AWARENESS ON THE MEANING OF DATE LABELS.

Kenya should also promote business and consumer education and awareness on the meaning of date labels. Potential food donors often erroneously perceive “best before” dates and any other dates included on food products as indicators of safety, as such, increasing the sale, consumption, or donation of food after these dates will require a change in behavior. National education is critical to inform donors, food recovery organizations, and consumers that these dates are not regulated to convey safety, but are more likely indicators of quality. Joint public- and private- sector initiatives may help to ensure that stakeholders understand that date labels should not stand as barriers to donation. For example, in the United Kingdom, Waste and Resources Action Programme (WRAP) has partnered with government agencies to publish updated guidance on the meaning of United Kingdom date labels and issued additional guidance on the ability to donate food past its quality date food.⁴⁷ In addition, the United Kingdom has adopted several consumer awareness campaigns to educate on the difference between quality-based and safety-based date labels, including the “Love Food Hate Waste”⁴⁸ and “Look, Smell, Taste, Don’t Waste” campaigns.⁴⁹

Liability protection for food donations

Issue overview

A significant barrier to food donation is the fear among donors that they will be found liable if someone becomes sick after consuming donated food. This fear is particularly heightened when the applicable law provides for “strict liability,” (i.e., a donor or food recovery organization that did not act maliciously or intend to inflict harm may still be held legally and financially responsible for any resulting damage). Other countries, including Argentina and the United States, have established Good Samaritan protections for food donors and food recovery organizations so that these actors will not be held legally or financially responsible for resulting harm, provided that they acted in good faith and in accordance with relevant laws.⁵⁰ Kenya does not provide explicit legal protections for food donors and food recovery organizations.

The Constitution of the Republic of Kenya provides for consumer rights, which includes the right to goods of reasonable quality, the protection of health and safety, and compensation for loss or injury.⁵¹ Generally, claims of harm arising from goods, including food may be brought under the Consumer Protection Act⁵² or the Competition Act.⁵³

The Consumer Protection Act (CPA) is mainly concerned with protecting consumers from unfair trade practices, promoting ethical business practices, ensuring a fair and efficient consumer market, and providing a dispute resolution mechanism.⁵⁴ The CPA gives consumers authority to file claims against a supplier of goods or services pursuant to a consumer agreement.⁵⁵ A consumer agreement is defined as an agreement

for the “supply of goods or services for *payment*.”⁵⁶ Most donated food in Kenya is offered free of charge to beneficiaries. Food donated free of charge by food donors or food recovery organizations likely does not fall under the Consumer Protection Act.

In addition, the Competition Act promotes the rights and safety of consumers in Kenya and governs liability in respect to defective or unsafe goods.⁵⁷ The Act applies to persons who engage in trade⁵⁸ which it defines as including commerce.⁵⁹ Although the Competition Act does not define commerce, commerce generally is defined as requiring the exchanging of goods for value.⁶⁰ The Competition Act establishes a strict liability scheme, holding any person who engages in trade liable for any loss or injury to an individual resulting from the supply of defective goods.⁶¹ The Consumer Protection Guidelines published by the Competition Authority of Kenya elaborate that strict liability is concerned with “the product and not the conduct of the manufacturer.”⁶² For strict liability to apply, the “sale of the product,” such as food, must occur as part of the supplier’s usual course of business.⁶³ Though the application of the Act to food donation is somewhat unclear, if the food donor is a food business that regularly produces food, then the donor may be able to be held strictly liable under the Competition Act if someone fell sick after consuming donated food, because production and sale of such food is a food donor’s usual course of business. The same is likely not true for food donors who are not themselves in the practice of producing food (for example, if the food was purchased by a company for an event and then the company donated the surplus after the event). It is not clear whether food recovery organizations would fall under the scope of the Act because the Competition Act and Consumer Protection Guidelines do not reference donation.

The Competition Act broadly applies to any goods.⁶⁴ Where goods fall under the jurisdiction of another agency or regulator, the Competition Authority of Kenya collaborates with the responsible agency or regulator.⁶⁵ To ensure there are no regulatory gaps regarding consumer protection, the Competition Authority of Kenya will also become involved in “specialist matters” that a responsible agency cannot adequately address due to limited powers.⁶⁶ As such, although most donated food in Kenya is offered free of charge to beneficiaries and thus likely does not qualify as “trade” as defined by the Competition Act⁶⁷ or qualify as a “sale of product” as stated in the Consumer Protection Guidelines⁶⁸ – the Competition Authority of Kenya may still become involved in a liability issue regarding food donation.

In summary, there is no explicit liability protection for food donation under Kenyan law, and it is unclear how the Competition Act and Consumer Protection Act would apply to free food donation. Food donors and food recovery organizations should ensure that donated food complies with applicable laws, including those discussed in this Legal Guide, and should keep records of their compliance with these laws in order to reduce their liability risks as much as possible.

Recommended policy actions

1. ENACT NATIONAL LEGISLATION THAT ESTABLISHES CLEAR AND COMPREHENSIVE LIABILITY PROTECTION FOR FOOD DONORS AND FOOD RECOVERY ORGANIZATIONS.

Kenya should enact new legislation that creates robust liability protections for food donors and food recovery organizations so that these actors will not be held legally or financially responsible for resulting harm from donated food. In Argentina, for example, the Food Donation Law offers protection for both food donors that offer food for free to populations in need and food recovery organizations that distribute that food to those in need. Liability protection under the Food Donation Law only extends to food donors and intermediaries that comply with necessary food safety, labeling, and other relevant requirements.⁶⁹ Argentina also affords donors and food recovery organizations a presumption of good faith absent any willful misconduct or negligence resulting in harm to a beneficiary.⁷⁰

Kenya should adopt similar protections for food donors with a broad and clear grant of protection. This protection should not be absolute; the law could maintain that food donors are not shielded from protection

if they demonstrate gross negligence or willful misconduct when handling the donated food prior to distribution. The expanded protections should also cover food recovery organizations that comply with the same requirements imposed on food donors.

2.

PRODUCE AND DISSEMINATE CLARIFYING GUIDANCE ON WHETHER THE COMPETITION ACT AND THE CONSUMER PROTECTION ACT APPLY TO FREE FOOD DONATIONS.

To eliminate uncertainty regarding the Competition Act and the Consumer Protection Act and whether they apply to food donated free of charge, Kenya should issue clarifying guidance on whether the Competition Act and Consumer Protection Act apply to free food donations. As described above, the Competition Act establishes a strict liability scheme, but it is unclear how the Act would apply to food donations.⁷¹ Also, under the Consumer Protection Act, it seems that consumers may only file claims pursuant to a consumer agreement for the “supply of goods or services for payment.”⁷² The uncertainty may make food donors and food recovery organizations wary of food donation. If these do indeed apply, guidance can still help to lay out best practices for businesses to follow to reduce liability risks, unless or until any liability protection is enacted.

Tax incentives and barriers

Issue overview

Food donation helps mitigate the costs of hunger and stimulate the economy: food banks and intermediaries provide jobs or sponsor community development, while recipients of donated food can spend limited financial resources on other basic goods and services. However, food donation can also be expensive, as food donors must allocate time and money to recover, package, store, and transport surplus food that otherwise would be discarded, usually at no cost. Tax laws can either help offset these expenses and incentivize donation, or they can create an additional barrier, contributing to greater food loss and waste. Corporate donors may be more likely to donate surplus food to food banks if they receive a charitable deduction or credit to offset the cost of transportation and logistics.

Under Kenya’s Income Tax Act (Cap. 470), corporate and individual donors are eligible to claim a deduction for any cash donation in that year of income to a registered, qualifying charitable organization whose income is exempt from tax under the Act.⁷³ Unfortunately, the Income Tax (Charitable Donations) Regulations only apply to cash donations,⁷⁴ and not in-kind donations. Further, donors and charitable organizations rarely benefit from this incentive because the process of applying for and getting an exemption under the Income Tax Act is lengthy and unclear.

Furthermore, the Finance Act, 2017 amended the Income Tax Act to allow tax payers to deduct expenditures incurred on donations for relieving distress during a national disaster declared by the president. However, only donations made to the Kenya Red Cross, county governments, and any institution responsible for the managing of national disaster relief qualify for the deduction.⁷⁵ Presumably, donations to food recovery organizations such as Food Banking Kenya will not be tax deductible, as they do not meet the criterion established in the Finance Act. While Kenya provides some tax incentives for donors, the restrictive application to only cash donations means that these incentives do not apply to in-kind donations, such as donations of food. Thus, there is no economic incentive to directly support the donation of food products.

In Kenya, for most commercial transactions, the Value Added Tax Act (1993) requires vendors to incorporate VAT for zero-rated supplies, 8% on local supply of certain petroleum products or 16% for local taxable supplies and imported taxable goods and services.⁷⁶ Kenya’s VAT system also has two categories of taxable supplies that directly impact food donation, which include exempt and zero-rated supplies.⁷⁷ The first category is exempt supplies—supplies for which VAT is not added to the selling price of the product.⁷⁸ In Kenya these mainly include food and agricultural products such as meat, fish, water, maize flour, unprocessed milk, vegetables,

fruits, nuts, cereals, beans, lentils, peas, sweet corn, seeds, bread, rice, eggs, potatoes, cassava, tomatoes, nuts, millet, rice, flour and other cereal flours, and any other unprocessed foodstuff.⁷⁹ In general, when foodstuff is VAT exempt, the government does not tax the transfer of that food.⁸⁰ However, a food business cannot reclaim the input VAT it paid on business purchases along the value chain to produce it, placing a financial burden on food donors.⁸¹

The second category is zero-rated supplies, which refers to supplies that are taxable, but the tax rate is zero percent. The VAT Act lists certain unprocessed agricultural products as zero-rated goods. These include, milk and milk products, bulbs, tubers and tuberous roots, corms, crowns, rhizomes, coffee, maize, rice, wheat flour, and bread.⁸² Foodstuff that is zero-rated is essentially exempt from the taxation scheme. In addition, a business or individual is entitled to claim a refund on any input tax paid throughout the supply chain.⁸³ Kenya's categorization of food as both an exempt and zero-rated supply may create some confusion for businesses. Despite some opportunities to avoid VAT, the Kenya's complex VAT system as it applies to food may stand as a barrier to donation. Many countries have carved out exemptions to the standard VAT scheme that confers benefits on nonprofit organizations that are promote a public good, such as receiving and distributing food donations.

Recommended policy actions

1. EXPAND KENYA'S INCOME TAX ACT'S INCOME TAX DEDUCTION TO INCLUDE IN-KIND DONATIONS TO FOOD RECOVERY ORGANIZATIONS.

Kenya's Income Tax Act only provides donors with tax deductions for *cash* donations, not in-kind donations.⁸⁴ This means that food businesses that make in-kind donations of goods cannot claim a deduction on such donations. Without tax deductions, potential donors are incentivized to simply throw away food, given the ease of disposal compared to the costs associated with the handling, storage, and transport of food to be donated.

Kenya should amend section 15 of the Income Tax Act to allow deductions for in-kind contributions of food. Expanding Kenya's income tax deduction to include in-kind donations would incentivize donations of food to food recovery organizations and thereby redirect edible food that would otherwise end up in landfills. For example, Costa Rica's Income Tax Law (*Ley del Impuesto sobre la Renta*) allows the deduction of charitable donations, including in-kind donations, from gross income calculations for tax purposes up to a limit of 10% of the taxpayer's net income.⁸⁵ For in-kind donations, the monetary value of the donation is determined based on its fair market value.⁸⁶ To claim the deduction, donors must present a certification of the donation's value, issued by an authorized public accountant and professional surveyor, and verify that the donee is authorized by the Tax Administration to receive deductible donations.⁸⁷

2. OFFER TAX CREDITS FOR FOOD DONATIONS MADE TO FOOD RECOVERY ORGANIZATIONS AND INTERMEDIARIES.

Offering tax credits instead of or as an alternative to deductions for donated food will help to incentivize donation among a broader group of supply chain actors, particularly small businesses and farms. A tax credit reduces a person's tax liability directly and is often a more suitable financial incentive for businesses with low-profit margins.⁸⁸ A tax credit is a direct shilling-for-shilling subtraction from the taxes owed.⁸⁹ Tax credits also apply evenly across tax brackets and would therefore have a greater impact for small, low-revenue businesses than a tax deduction. For example, the Kenyan government may elect to limit the total credit in a given tax year by setting a percentage of the value of donated food that can be claimed or by setting a cap on the total shilling amount or percentage of income of the credit that can be claimed by a business. Before adopting such limits, the government should balance the benefit with the potential deterrent effect that the limits may have on food donation.

3. CATEGORIZE FOOD DONATION AS A ZERO-RATED SUPPLY UNDER THE VALUE ADDED TAX ACT.

Kenya should amend the Value Added Tax Act to clearly categorize donation of all food items as zero-rated goods. Items or transactions that are zero-rated are essentially exempt from the taxation scheme. In addition, a business or individual is entitled to claim a refund on any input tax paid throughout the supply chain for food donations that are considered zero-rated.⁹⁰ For example, the South African government has introduced 19 categories of “zero-rated” foods.⁹¹ Zero-rating would remove the VAT burden from both the food donors and food recovery organizations.

4. PROVIDE A TAX DEDUCTION FOR ACTIVITIES ASSOCIATED WITH THE STORAGE, TRANSPORTATION, AND DELIVERY OF DONATED FOOD.

In light of the potentially high costs associated with donating food, if the first recommendation is adopted, Kenya also should amend its Income Tax Act to offer a tax deduction for food donors for costs associated with the storage, transportation, and delivery of food. This would increase the financial benefit companies receive when donating food and dissuade food waste. For example, in France, the national tax scheme provides tax credits for costs associated with the transportation and storage of the donated items.⁹²

5. DEVELOP TAX GUIDANCE FOR FOOD DONORS AND FOOD RECOVERY ORGANIZATIONS THAT CLARIFIES EXEMPTIONS.

Uncertainty surrounding the tax system in Kenya disincentivizes donors from donating cash or food. Donors are only eligible to claim a deduction for any cash donation to a registered qualifying charitable organization whose income is exempt from tax under the Income Tax Act.⁹³ However, food recovery organizations express challenges and a lack of transparency around steps they need to take to acquire an exemption certificate for purposes of the Income Tax Act. This prevents food donors from donating to food recovery organizations and food recovery organizations from using the tax exemption provided in the Income Tax Act. Kenya should issue comprehensive, but easily understandable guidance on the Kenyan tax system as it applies to food donors and food recovery organizations.

Government grants and incentives

Issue overview

Grants and incentive programs funded at the national or local level offer another important resource for food donation initiatives. This is particularly true in countries where donors consider tax incentives insufficient to offset the costs of donation or where a lack of infrastructure limits food recovery efforts. For example, government grants can help food donors and food recovery organizations acquire the equipment and resources necessary for recovering, storing, processing, and transporting food for donation. Government funding can also support new innovations and emerging technologies that will make food donation more efficient and sustainable. Kenya does not have any clear government incentive programs to promote food recovery at this time.

Recommended policy actions

1. CREATE GOVERNMENT GRANT OPPORTUNITIES FOR FOOD DONATION INFRASTRUCTURE.

Grants and incentive programs funded at the federal or state level offer an important resource for food donation initiatives, as cost is one of the main barriers preventing food businesses from donating food. For example, in the United States, transportation and storage costs are often cited as the main expenses that manufacturers, retailers, and restaurants need to overcome to donate food.⁹⁴ Kenya should establish government grant opportunities for food donation infrastructure to help food donors and food recovery organizations acquire space and resources for harvesting, storing, processing, and transporting food. Grants should be broad enough to allow food recovery organizations to purchase or lease transportation vehicles (i.e., refrigerated trucks) and storage facilities (i.e., warehouses and, processing facilities), to pay staff and volunteers, and to fund other such activities that reasonably assist the organization in providing apparently wholesome food to food- insecure individuals.

CONCLUSION

While these policy recommendations are intended to help strengthen food donation in Kenya, they are not exhaustive. Those committed to reducing food loss and waste and promoting food recovery should seek the advice of legal experts, policymakers, and other stakeholders to identify the most effective and feasible policy interventions.

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**THE GLOBAL
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