



..... Legal Notice No. _____

**THE INCOME TAX ACT (COUNTRY-BY-COUNTRY REPORTING
STANDARD FOR MULTINATIONAL ENTERPRISES) REGULATIONS, 2021**

(No. ___ of 2021)

IN EXERCISE of the powers conferred by Section 112 of the Tax Procedures Act 2015, for the better carrying out of Section 18B of the Income Tax Act, Cap 470, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations:

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| Citation | 1. These Regulations may be cited as the Income Tax Act (Country-By-Country Reporting Standard for Multinational Enterprises) Regulations, 2021 |
| Interpretation | 2. In these Regulations, unless the context otherwise requires – “Act” the Income Tax Act cap 470; “Group” means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange. A group for Country-by-Country reporting purposes includes a single enterprise with one or more foreign permanent establishments. “Multinational Enterprise Group” means a group that includes two or more enterprises which are resident in different jurisdictions, including an enterprise that carries on business through a permanent establishment or through any other entity in another jurisdiction. “Excluded MNE Group” means, with respect to any Fiscal Year of the Group, a Group having total consolidated group revenue of less than [20 million Euro] or [Kshs. 2.5 Billion as of January 2022] during the Fiscal Year immediately preceding the Reporting Fiscal Year as reflected in its Consolidated Financial Statements for such preceding Fiscal Year. “Constituent Entity” means (i) any separate business unit of an MNE Group that is included in the Consolidated Financial Statements of the MNE Group for financial reporting purposes, or would be so included if equity interests in such business unit of an MNE Group were traded on a public securities exchange; |

(ii) any such business unit that is excluded from the MNE Group's Consolidated Financial Statements solely on size or materiality grounds; and

(iii) any permanent establishment of any separate business unit of the MNE Group included in (i) or (ii) above provided that the business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes.

“Reporting Entity” means the Constituent Entity that is required to file a country-by-report conforming to the requirements in Paragraph 5 in its jurisdiction of tax residence on behalf of the MNE Group. The Reporting Entity may be the Ultimate Parent Entity, the Surrogate Parent Entity, or any entity described in Paragraph 3(2).

“Ultimate Parent Entity” means an entity that –

- (a) is resident in Kenya for tax purposes;
- (b) is not controlled by another entity; and
- (c) Owns or controls a multinational enterprise group.

“Surrogate Parent Entity” means one Constituent Entity of the MNE Group that has been appointed by such MNE Group, as a sole substitute for the Ultimate Parent Entity, to file the Country-by-Country Report in that Constituent Entity's jurisdiction of tax residence, on behalf of such MNE Group, when one or more of the conditions set out in subparagraph 2(ii) of Paragraph 3 applies.

“Fiscal Year” means an annual accounting period with respect to which the Ultimate Parent Entity of the MNE Group prepares its financial statements.

“Reporting Fiscal Year” means that Fiscal Year the financial and operational results of which are reflected in the Country-by-Country Report defined in Paragraph 5 of these Regulations.

“Qualifying Competent Authority Agreement” means an agreement

- (i) that is between authorized representatives of those jurisdictions that are parties to an International Agreement and
- (ii) that requires the automatic exchange of Country-by-Country Reports between the party jurisdictions.

“International Agreement” shall mean the Multilateral Convention for Mutual Administrative Assistance in Tax Matters, any bilateral or multilateral Tax Convention, or any Tax Information Exchange Agreement to which Kenya is a party, and that by its terms provides legal authority for the exchange of tax information between jurisdictions, including automatic exchange of such information.

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| | <p>“Consolidated Financial Statements” means the financial statements of an MNE Group in which the assets, liabilities, income, expenses and cash flows of the Ultimate Parent Entity and the Constituent Entities are presented as those of a single economic entity.</p> <p>“Systemic Failure” with respect to a jurisdiction means that a jurisdiction has a Qualifying Competent Authority Agreement in effect with Kenya, but has suspended automatic exchange (for reasons other than those that are in accordance with the terms of that Agreement) or otherwise persistently failed to automatically provide to Kenya Country-by Country Reports in its possession of MNE Groups that have Constituent Entities in Kenya.</p> |
| Filing Procedure | <p>3.</p> <ol style="list-style-type: none"> 1) Any Ultimate Parent Entity of an MNE Group with a turnover of 20 Million Euros (including extraordinary and/or investment income) that is resident in Kenya for tax purposes shall file a Country-by-Country Report conforming to the requirements provided in these Regulations, with the Commissioner with respect to its Reporting Fiscal Year on or before the date specified in Paragraph 7. 2) A Constituent Entity which is not the Ultimate Parent Entity of an MNE Group shall file a Country-by-Country Report conforming to the requirements of Paragraph 5 with the Commissioner with respect to the Reporting Fiscal Year of an MNE Group of which it is a Constituent Entity, on or before the date specified in Paragraph 7, if the following criteria are satisfied: <ol style="list-style-type: none"> (i) the entity is resident for tax purposes in Kenya; and (ii) one of the following conditions applies: <ol style="list-style-type: none"> a. the Ultimate Parent Entity of the MNE Group is not obligated to file a Country-by-Country Report in its jurisdiction of tax residence; or, b. the jurisdiction in which the Ultimate Parent Entity is resident for tax purposes has a current International Agreement to which Kenya is a party but does not have a Qualifying Competent Authority Agreement in effect to which Kenya is a party by the time specified in Paragraph 7 for filing the Country-by-Country Report for the Reporting Fiscal Year; or, c. there has been a Systemic Failure of the jurisdiction of tax residence of the Ultimate Parent Entity that has been notified by the Commissioner to the Constituent Entity resident for tax purposes in Kenya. 3) Where there are more than one Constituent Entities of the same MNE Group that are resident for tax purposes in Kenya and one or more of the conditions set out in subparagraph 2(ii) above apply, the MNE Group may designate one of such Constituent Entities to file the Country-by-Country Report with the Commissioner with respect to any Reporting Fiscal Year on or before the date specified in Paragraph 7 and to notify the Commissioner that the filing is intended to satisfy the filing requirement of all the Constituent Entities of such MNE Group that are resident for tax purposes in Kenya. |

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| | <p>4) Notwithstanding the provisions of paragraph 3(2), when one or more of the conditions set out in subsection (ii) of paragraph 3(2) apply, an entity described in paragraph 3(2) shall not be required to file a Country-by-Country Report with the Commissioner with respect to any Reporting Fiscal Year if the MNE Group of which it is a Constituent Entity has made available a Country by-Country Report conforming to the requirements of Paragraph 5 with respect to such Fiscal Year through a Surrogate Parent Entity that files that Country-by-Country Report with the tax authority of its jurisdiction of tax residence on or before the date specified in Paragraph 7 and that satisfies the following conditions:</p> <ul style="list-style-type: none"> (i) the jurisdiction of tax residence of the Surrogate Parent Entity requires filing of Country-by-Country Reports conforming to the requirements of Paragraph 5; (ii) the jurisdiction of tax residence of the Surrogate Parent Entity has a Qualifying Competent Authority Agreement in effect to which Kenya is a party by the time specified Paragraph 7 for filing the Country-by-Country Report for the Reporting Fiscal Year; (iii) the jurisdiction of tax residence of the Surrogate Parent Entity has not notified the Commissioner of a Systemic Failure; (iv) the jurisdiction of tax residence of the Surrogate Parent Entity has been notified in accordance with Paragraph 4(1) by the Constituent Entity resident for tax purposes in its jurisdiction that it is the Surrogate Parent Entity; and (v) a notification has been provided to the Commissioner in accordance with Paragraph 4(2). |
| <p>Notification procedure</p> | <p>4.</p> <ul style="list-style-type: none"> 1) Any Constituent Entity of an MNE Group that is resident for tax purposes in Kenya shall notify the Commissioner whether it is the Ultimate Parent Entity or the Surrogate Parent Entity, no later than the last day of the Reporting fiscal year of such MNE Group 2) Where a Constituent Entity of an MNE Group that is resident for tax purposes in Kenya is neither the Ultimate Parent Entity nor the Surrogate Parent Entity, it shall notify the Commissioner of the identity and tax residence of the Reporting Entity, no later than the last day of the Reporting fiscal year of such MNE Group. 3) The notification referred to in subparagraph (1) and (2) of this paragraph may be made to the Commissioner in such form and manner, including by electronic means, as maybe specified by the Commissioner from time to time. |
| <p>Content of the Country-by-Country Report</p> | <p>5.</p> <ul style="list-style-type: none"> 1) For purposes of these Regulations, a Country-by-Country Report with respect to an MNE Group is a report containing: <ul style="list-style-type: none"> (i) Aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction (including entity information) in which the MNE Group operates; (ii) An identification of each Constituent Entity of the MNE Group setting out |

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| | <p>the jurisdiction of tax residence of such Constituent Entity, and where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such Constituent Entity is organized, and the nature of the main business activity or activities of such Constituent Entity.</p> <p>2) The Country-by-Country Report shall be filed in a form identical to and applying the definitions and instructions contained in the standard template set out in these Regulations.</p> |
| Form and manner of delivery | 6. Information required to be provided or notifications required to be made to the Commissioners under these Regulations shall be delivered in such form and manner, including by electronic means, as may be specified by the Commissioners from time to time and to such office of the Commissioners as is so specified. |
| Time for filing | 7. Country-by-country report shall be filed not later than 12 months after the last day of the fiscal year of the (Ultimate Parent Entity of an) MNE Group. |
| Use and Confidentiality of Country-by-Country Report Information | <p>8.</p> <p>1) Kenya Revenue Authority shall use the Country-by-Country Report only for purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting related risks in Kenya, including assessing the risk of non-compliance by members of the MNE Group with applicable transfer pricing rules, and where appropriate for economic and statistical analysis. Transfer pricing adjustments by Kenya Revenue Authority may not be based on the Country-by-Country Report.</p> <p>2) Kenya Revenue Authority shall preserve the confidentiality of the information contained in the Country-by-Country Report at least to the same extent that would apply if such information were provided to it under the provisions of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.</p> |
| Offences and Penalties | 9. A person who fails to comply with the provisions of these Regulations shall be subject to the penalties prescribed under the Tax Procedures Act 2015. |
| Effective Date | 10. These Regulations are effective for Reporting Fiscal Years of MNE Groups beginning on or after 1 January 2022. |

Dated the _____ 2021

Hon. Amb, Ukur Yattani,
Cabinet Secretary for the National Treasury and Planning.