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To:  
The Cabinet Secretary  
The National Treasury and Economic Planning  
Treasury Building, Harambee Avenue  
P.O. Box 30007-00100  
Nairobi, Kenya

**Subject: The impact of the OECD Pillar Two ‘side-by-side’ agreement on Kenya’s Domestic Minimum Top-Up Tax and implications for domestic resource mobilisation and the realisation of economic and social rights.**

Dear Cabinet Secretary,

The Committee on Fiscal Studies writes to draw attention to developments in the international tax landscape that have significant implications for Kenya’s fiscal capacity and the realisation of economic and social rights. This letter concerns the January 2026 ‘side-by-side’ agreement under the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, and its practical implications for Kenya’s Domestic Minimum Top-Up Tax enacted through the Tax Laws (Amendment) Act, 2024.<sup>1</sup> We commend Kenya for its proactive efforts to align domestic legislation with international tax standards, and seek to express concern about the external constraints that now limit the practical effectiveness of these measures. Kenya has demonstrated commendable initiative in addressing the fiscal challenges posed by digitalisation and base erosion. The enactment of the Domestic Minimum Top-Up Tax, effective 1 January 2025, represented a significant step towards ensuring that large multinational enterprise groups with consolidated revenues exceeding €750 million pay a minimum effective tax rate of 15% on profits generated within Kenyan territory.<sup>2</sup> The Finance Act, 2025 further operationalised this tax by establishing payment timelines aligned with OECD guidance.<sup>3</sup> These legislative measures reflect Kenya’s recognition that domestic resource mobilisation is essential for fulfilling constitutional obligations and realising economic and social rights. Kenya has done what was asked of it under the Pillar Two framework.

<sup>1</sup>OECD/G20 Inclusive Framework on BEPS, Tax Challenges Arising from Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two) (December 2021).

<sup>2</sup>Tax Laws (Amendment) Act, 2024 (Kenya), inserting Section 12G into the Income Tax Act Cap. 470, effective 27 December 2024.

<sup>3</sup>Finance Act, 2025 (Kenya), amending Section 12G of the Income Tax Act to provide for payment timelines; gazetted 27 July 2025.

It bears emphasis that Kenya adopted one of the three GloBE rules: the Qualified Domestic Minimum Top-Up Tax.<sup>4</sup> Kenya did not enact the Income Inclusion Rule, which would allow a parent jurisdiction to top up tax on undertaxed foreign subsidiaries, nor the Undertaxed Profits Rule, which serves as a backstop allowing other jurisdictions to collect when the IIR does not apply. Kenya's QDMTT is designed to ensure that profits earned within Kenya by in-scope multinationals are taxed at a minimum 15% rate, giving Kenya first claim to that revenue before any foreign jurisdiction could assert taxing rights under IIR or UTPR. We note with concern the 'side-by-side' agreement announced in January 2026, under which United States-headquartered companies are exempted from Pillar Two's Income Inclusion Rule and Undertaxed Profits Rule.<sup>5</sup> The OECD maintains that Qualified Domestic Minimum Top-Up Taxes remain formally applicable to US multinationals.<sup>6</sup> However, this formal position obscures a harder practical reality.

Kenya's DMTT applies only to entities that are 'resident persons or persons with a permanent establishment in Kenya.'<sup>7</sup> American technology enterprises, including those whose services are deeply embedded in Kenyan commerce and daily life, have structured their operations precisely to avoid such taxable presence. Profits are booked in Ireland, the Netherlands, Singapore, and other jurisdictions; value is extracted from Kenyan users and Kenyan data; but there is no taxable nexus within Kenya. The DMTT cannot top up tax on profits Kenya was never entitled to tax in the first place. **The impact of the US exemption on Kenya is therefore indirect but still real.** Three mechanisms have failed simultaneously. First, Kenya's QDMTT cannot reach US technology companies because they maintain no taxable presence here. Second, Pillar One of the OECD framework which was designed to reallocate taxing rights to market jurisdictions like Kenya regardless of physical presence has stalled indefinitely, and the United States has withdrawn from those negotiations entirely. Third, the IIR and UTPR rules that other jurisdictions enacted would have served as backstops: if Kenya could not collect top-up tax because it lacked taxing rights, the United Kingdom, France, Germany, or other implementing jurisdictions could have collected instead. Those backstops have now been switched off for American companies under the side-by-side agreement.

Kenya wrote the law. The exemption was written elsewhere. And the taxing rights we were promised under Pillar One will not arrive. The fiscal context renders this development particularly consequential. Africa loses approximately \$89 billion annually to illicit financial flows, including corporate tax avoidance facilitated by base erosion and profit shifting.<sup>8</sup> Kenya's Medium-Term Revenue Strategy targets raising the tax-revenue-to-GDP ratio from 13.5% to 20% by 2027.<sup>9</sup> That target becomes correspondingly harder to achieve when a significant category of economic activity through digital services provided by the world's most valuable corporations is effectively insulated from taxation by the geopolitical position of the enterprises conducting it.

The scale of digital engagement in Kenya underscores what is at stake. According to the July 2025 Global Digital Report, 42.1% of Kenyan internet users aged 16 and above used ChatGPT, the highest adoption rate

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<sup>4</sup>PwC Tax Summaries, 'Kenya - Corporate - Taxes on corporate income' (2025): 'Out of the three GloBE rules, Kenya has so far adopted only one, the {Qualified} Domestic Minimum Top-Up Tax (QDMTT). This represents partial adoption of the GloBE rules by Kenya.'

<sup>5</sup>U.S. Department of the Treasury, Press Release sb0350, 'Treasury Secures Agreement to Exempt U.S.-Headquartered Companies from Biden Global Tax Plan', January 2026.

<sup>6</sup>OECD, Side-by-Side Package (January 2026): 'Qualified Domestic Minimum Top-up Taxes (QDMTTs) are unaffected by the new guidance and, where implemented in relevant jurisdictions, will continue to apply to US-parented groups.'

<sup>7</sup>Section 12G, Income Tax Act Cap. 470: the DMTT applies to 'a resident person or a person with a permanent establishment in Kenya who is a member of a multinational group.'

<sup>8</sup>UNCTAD estimates that Africa loses approximately USD 89 billion annually to illicit financial flows, including corporate tax avoidance. See UNCTAD, Economic Development in Africa Report 2020: Tackling Illicit Financial Flows for Sustainable Development in Africa.

<sup>9</sup>Kenya's Medium-Term Revenue Strategy (2024/25–2026/27) targets raising the tax-revenue-to-GDP ratio from 13.5% to 20% by 2026/27.

of any country globally.<sup>10</sup> Kenya is not a peripheral market for American technology enterprises. Kenyan users, Kenyan data, and Kenyan engagement generate substantial value for these firms. Yet the profits flow offshore, beyond the reach of Kenya's tax system. The significance of domestic resource mobilisation is amplified by the current trajectory of official development assistance. Aid budgets in major donor countries are being constrained or redirected towards military expenditure and geopolitical priorities. In this environment, the capacity to tax economic activity where it occurs is not merely a matter of fiscal policy but of developmental necessity. Every shilling not collected from profitable multinational enterprises is a shilling that must come from Kenyan workers, Kenyan small businesses, or Kenyan consumers or a shilling not spent on schools, hospitals, and infrastructure.

These developments engage Kenya's obligations under international human rights law. The International Covenant on Economic, Social and Cultural Rights requires States parties to take steps, to the maximum of their available resources, to achieve progressively the full realisation of the rights recognised in the Covenant.<sup>11</sup> The right to development encompasses both the right of States to formulate appropriate national development policies and the entitlement of every human person to participate in and benefit from economic development.<sup>12</sup> The Constitution of Kenya, 2010 enshrines both principles of public finance that require equitable sharing of the tax burden and justiciable economic and social rights.<sup>13</sup> We recognise that the constraints Kenya now faces arise primarily from extraterritorial conduct by other States. The Maastricht Principles on Extraterritorial Obligations provide that States must refrain from conduct which impairs the ability of another State to comply with its human rights obligations.<sup>14</sup> Trade measures that coerce developing countries into accepting frameworks that exempt profitable enterprises from effective taxation, accompanied by threats of retaliation against countries exercising legitimate fiscal sovereignty, may constitute such impairment.

We note that negotiations are proceeding under United Nations auspices towards a Framework Convention on International Tax Cooperation, with the Intergovernmental Negotiating Committee scheduled to submit final text to the General Assembly in 2027.<sup>15</sup> Kenya's active engagement in this process including hosting the third session of the Intergovernmental Negotiating Committee in Nairobi in November 2025 reflects commendable commitment to multilateral approaches to international tax governance. The Framework Convention and its early protocols may offer mechanisms to address some of the challenges that the OECD framework has proven unable to resolve, including more inclusive governance structures and stronger protections for source country taxing rights.

In light of these developments, we request the National Treasury to consider the following questions, which we believe warrant careful policy attention:

1. Given that US technology companies typically lack taxable presence in Kenya, what are the practical revenue implications of the current framework, and how might this affect Kenya's capacity to achieve the targets set out in the Medium-Term Revenue Strategy?
2. What alternative measures might be strengthened to ensure that large digital enterprises contribute fairly to the Kenyan fiscus, including through the Significant Economic Presence

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<sup>10</sup>DataReportal, Global Digital Report (July 2025). Kenya ranked first globally, with 42.1% of internet users aged 16 and above using ChatGPT in the preceding month.

<sup>11</sup>UN General Assembly, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966, Article 2(1).

<sup>12</sup>UN General Assembly, Declaration on the Right to Development, A/RES/41/128, 4 December 1986, Article 1.

<sup>13</sup>Constitution of Kenya, 2010, Article 201 (principles of public finance) and Article 43 (economic and social rights).

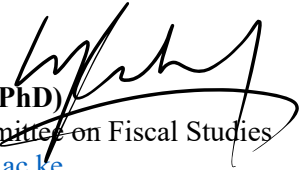
<sup>14</sup>ETO Consortium, Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), Principle 21.

<sup>15</sup>UN General Assembly Resolution 79/235, adopted 24 December 2024, approving Terms of Reference for the UN Framework Convention on International Tax Cooperation.

- tax, expanded withholding taxes on digital services, or other mechanisms that do not depend on physical presence?
3. How can the burden of any revenue shortfall be distributed so as not to fall disproportionately on Kenyan workers, small businesses, or consumers, and to avoid retrogression in the realisation of economic and social rights?
  4. What role might the UN Framework Convention on International Tax Cooperation play in addressing the structural constraints that limit developing countries' fiscal policy space, and what priorities should Kenya advance in the ongoing negotiations?

The Committee on Fiscal Studies stands ready to provide technical analysis and research support on these matters. We would welcome the opportunity to engage with the National Treasury and the Kenya Revenue Authority on policy options for navigating this challenging landscape.

Sincerely,

  
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