TRANSFER PRICING IN ECOWAS

Background paper and recommendations on ECOWAS member states' legal and administrative frameworks for the enforcement of transfer pricing rules.

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ABBREVIATIONS:

APA – Advance Pricing Agreement

ATAF – African Tax Administration Forum

BEPS - Base Erosion and Profit Shifting

CIT – Corporate Income Tax

ECOWAS – Economic Community of West African States

EU – European Union

FDI- Foreign Direct Investment

GDP – Gross Domestic Product

IMF - International Monetary Fund

MAP – Mutual Agreement Procedure

MNE – Multinational Enterprise

NAFTA - North American Free Trade Agreement

OECD – Organisation for Economic Co-operation and Development

OSIWA - Open Society Institute for West African States

WBG – World Bank Group

WAEMU – West African Economic and Monetary Union

EXECUTIVE SUMMARY AND RECOMMENDATIONS

This background paper provides a summary and analysis of Economic Community of West African States (ECOWAS) approaches to transfer pricing. The Report has been prepared in the context of the ECOWAS conference on Transfer Pricing from October 11th-13th, 2016 and is intended to:

- Survey ECOWAS countries' current approach to transfer pricing regulation and implementation
- Share experience and good practice in adopting effective measures in protecting the corporate tax base while maintaining an attractive investment climate
- Recommend ways in which transfer pricing regimes in ECOWAS countries can be strengthened
- Share, and invite comment on, a number of tools that have been developed to support ECOWAS countries adopt and implement effective transfer pricing rules.

The Report is an output of the World Bank Group (WBG)'s ECOWAS Transfer Pricing Project, a component of a broad ECOWAS Investment Policy and Tax Project. The Transfer Pricing Project is an example of the World Bank's initiative to support domestic resource mobilization and is conducted in partnership with the Organization for Economic Co-operation and Development (OECD); it has also benefited from close co-operation with the African Tax Administration Forum (ATAF).

Transfer Pricing Project

The ECOWAS Transfer Pricing Project aims to support countries strengthen their transfer pricing rules. The Project recognizes that, for developing countries, the adoption of the requisite rules is not enough – they often face severe challenges in implementation, arising from capacity issues or inadequate access to information. The Project thus focuses as much on implementation and administrative issues as it does on pure legislation. This Report recognizes that countries need to strike a balance between, on the one hand ensuring that rules are effective in preventing profit-shifting, and, on the other hand, the need for them to be clear, predictable and in line with international standards. At the same time provisions have to be implementable in a way that avoids excessive compliance or enforcement costs and their design needs to take into account capacity and resource constraints and of tax administrations in ECOWAS countries.

Structure of the paper

Chapter 1 discusses the background to the report, and raises the context in which this Project is conducted. It discusses the significance of transfer pricing to developing countries, and the challenges that developing countries face in implementing these rules. It also stresses the current global political focus on transfer pricing and similar issues concerned with the taxation of multinational enterprises, in particular, the OECD/G20 Base Erosion and Profit Shifting (BEPS) initiative, which impacts on developing countries. The chapter also discusses the ongoing development of 'Toolkits' which are designed to assist developing countries to introduce effective BEPS measures, as these are likely to be relevant to ECOWAS countries.

An important general message is that while a precise quantification tax revenue losses due to transfer pricing abuse is challenging, a number of indicators exist that can be expected to indicate the extent of risk for a country. With reference to these indicators the chapter discusses the variation of the (type of) transfer mispricing risk, among ECOWAS countries.

Lastly, the chapter raises potential benefits available to ECOWAS countries through co-operation and coordination. Benefits of cooperation may arise through mutual support such as peer training and learning, sharing of experience and joint development or acquisition of tools. Alignment of taxpayer compliance requirements, such as a transfer pricing annual return schedule, or documentation requirements, would be expected to reduce the taxpayer compliance burden, while alignment of safe harbors would reduce the risk of tax competition between countries.

Chapter 2 describes policy considerations for countries introducing or upgrading their transfer pricing regime. The chapter outlines the essential features of legislation required to introduce, and then enforce, transfer pricing rules in accordance with internationally accepted standards. Central to these features are the arm's length principle and the concept of comparability. It then describes international experience of a number of administrative aspects – including information gathering, documentation and penalties as well as measures to reduce compliance and enforcement burdens, such as safe harbors, advance pricing agreements (APAs), dispute resolution measures, and exemptions or lower administrative burdens for smaller taxpayers.

Lastly, the chapter discusses the importance of an administrative structure that encourages the most effective use of resources (for both the tax administration and the taxpayer) as well as consistency, fairness and best practice. There are three elements that are essential in this context: a risk assessment process, the building of a team of experienced specialists, and a centralized oversight and management system.

Chapter 3 surveys the main features of transfer pricing regimes in ECOWAS countries. It reveals a wide spectrum of legal approaches – some countries have introduced detailed rules that match international standards; others still have relatively basic rules. This is not to say that countries need all take the same approach – indeed no 'one size fits all' and country rules must reflect the county policy priorities, risks they face and their administrative structure. Countries belonging to the West African Economic and Monetary Union (WAEMU), have adopted similar wording in their primary legislation, though there are significant differences between them. To the extent that these countries choose to modernize their rules, it would make sense to take a coordinated approach. The chapter summarizes the approach taken by ECOWAS countries with regard to: regulatory provisions, rules on the deductibility of interest, documentation, annual return schedules, penalties and dispute resolution (including advance pricing agreements).

Chapter 4 considers the approaches revealed in the previous, and makes a number of recommendations and suggestions. These are summarized below.

ISSUES AND RECOMMENDATIONS

Legislation

1. In a majority of ECOWAS countries, primary rules on transfer pricing lack clarity and risk being ineffective in addressing complex transfer pricing arrangements. Lack of clarity in the rules can create an unfavorable investment climate, and may hinder the tax authorities' ability to enforce them.

   We recommend that those ECOWAS countries that have not modernized their rules consider amending or replacing them in line with the detailed suggestions in this report in order to clearly enforce the arm's length principle and create clear obligations on taxpayers to comply.

2. Some ECOWAS countries have adapted a definition of 'related party' that has the potential to either not deem a relationship to be related in circumstances that pose a transfer pricing risk, or deem a relationship in circumstances where there is little or no realistic risk.

   We recommend that ECOWAS countries review their definition of related parties (for the purpose of defining the scope of the transfer pricing rules), and amend if needed.

3. Some ECOWAS countries apply their transfer pricing rules to transactions between purely domestic related parties (in addition to cross-border related party transactions). Such rules address a risk of transfer pricing abuse through transactions between related parties subject to different tax treatment, but also have the potential to create unnecessary uncertainty and compliance costs in relation to domestic transactions subject to the same tax treatment.

   We recommend that ECOWAS countries assess the risks arising from domestic related party transactions, and, where there is a risk, consider extending the scope of the transfer pricing rules to cover such transactions. Transfer pricing rules should, however, not cover domestic transactions between taxpayers subject to the same tax treatment

4. Some ECOWAS countries require taxpayers to use arm's length pricing in their actual related party transactions. This poses compliance difficulties for some taxpayers.

   We recommend that ECOWAS countries consider clarifying that, whether or not taxpayers use arm's length pricing in their actual transactions, taxpayers must calculate their profit subject to tax in accordance with the arm's length principle.

5. The OECD/G20 Base Erosion and Profit Shifting project (BEPS) introduced clarifications to the OECD Guidelines on transfer pricing in order to increase the effectiveness of transfer pricing rules to deal with high tax risk issues: risk shifting; intangibles; transactions that make no commercial sense; highly capitalized/low substance entities.

We recommend that ECOWAS countries consider upgrading their transfer pricing rules to ensure that they are able to address these BEPS issues, which pose substantial risks to base erosion and profit shifting.

6. Some countries make a cross-reference in their rules or their guidance stating that they should be interpreted in accordance with the relevant Articles in the UN and OECD Model Conventions, and the OECD Guidelines on Transfer Pricing (except where there is a divergence between these instruments and the domestic rules, in which case the latter prevail). This approach effectively imports internationally developed approaches into the domestic regime and signals that the tax authority intend to apply their rules in accordance with international norms.

   We recommend that ECOWAS countries consider introducing such references in their rules and/or their guidance.

7. Most tax authorities allow the use of the 'arm's length range'. In cases where a reliable arm's length range cannot be established, many tax authorities also employ, and multinationals MNEs use, statistical techniques (typically, but not always, an 'interquartile range'). Within ECOWAS countries, practice is mixed, but some countries make no mention of statistical techniques in their rules and guidance, leaving taxpayers uncertain over whether they are accepted, and, if so, how they are to be used.

   We recommend that ECOWAS countries clarify in their rules and guidance that a statistical technique to establish a range is accepted, and provide clarity on how the range is to applied.

8. Some ECOWAS countries apply the principles and methods contained in the transfer pricing legislation to the attribution of profit to a permanent establishment. This can be a useful mechanism to clarify the application of the arm's length principle to the attribution of profit.

   We recommend that ECOWAS countries consider whether to apply the principles and methods contained in the transfer pricing legislation to the attribution of profit to a permanent establishment.

Related base erosion challenges

1. Some ECOWAS countries have no measures in place to protect against excessive interest deductibility. Others have legislation in place that may not fully address this risk, posing a major risk to income tax revenue of some ECOWAS countries.

   We recommend that ECOWAS countries review their current rules for countering excessive interest deductibility, and, where necessary amend existing rules or introduce new rules. We suggest that countries consider adopting the approach recommended by the OECD/G20 in the outcome of action 4 of the BEPS project.

2. Some ECOWAS countries have indicated a concern about treaty abuse, in particular concerning risks of 'treaty shopping'.

   We recommend that ECOWAS countries review their treaties and domestic law in order establish the extent of risk that they face, and to introduce measures suggested in the outcome of Action 6 of the OECD/G20 BEPS project.

Access to information

1. Some ECOWAS countries have introduced a requirement for affected taxpayers to submit annual transfer pricing return schedules, normally with the annual tax return. The information in such schedules provides a high-level picture of related party transactions, and is used for risk assessment and case-selection. Moreover, there may be substantial benefits for both tax authorities and taxpayers if ECOWAS countries harmonized such schedules.

   We recommend that ECOWAS countries consider introducing annual transfer pricing return schedules and to consider the harmonization of the content of transfer pricing return schedules.

2. Most ECOWAS countries have introduced some form of transfer pricing documentation requirement, although there are significant variances of approach. The OECD/G20 BEPS project has introduced new guidance on documentation, which is designed to provide comprehensive information about both local and global transfer pricing.

   We recommend that ECOWAS countries consider introducing (in domestic law) the approach to transfer pricing documentation contained in the outcome of BEPS Action 13.

3. The OECD/BEPS project has introduced a requirement for the largest MNEs to submit 'Country-by-Country' returns, which provide a high-level overview of those MNEs' global operations.

   We recommend that ECOWAS countries establish the extent to which large MNEs (those with annual global consolidated turnover of €750m or more) operate in their jurisdictions. ECOWAS countries could also consider making changes to domestic rules to require submission of the return and to establishing the requisite international exchange of information provisions. In addition, we suggest that ECOWAS countries review the level of global consolidated turnover threshold, with a view to providing input into future discussions on a revision of the mandatory threshold level.

4. International exchange of information is a key tool for enforcing domestic transfer pricing rules, and countering tax avoidance and evasion.

   We recommend that ECOWAS countries continue to strengthen the competent authority function and consider establishing the legal instruments that allow exchange of information i.e.tax information exchange agreements, and multilateral instruments. However, with respect

to signing broader double tax treaties we advise to proceed with caution as associated costs often risk outweighing its benefits, including the exchange of information.

5. Tax administrations and taxpayers in ECOWAS countries face significant challenges in identifying data on 'comparables' often needed in order to conduct a transfer pricing analysis. Commercially available databases (at present available in just one ECOWAS country) provide only a partial solution to this issue.

   We recommend that ECOWAS countries consider acquiring a commercial database. In view of the costs involved, we recommend that ECOWAS countries consider the feasibility of acting together to acquire, and operate, such a database. In addition, ECOWAS countries could consider other potential approaches that may mitigate the challenges of identifying reliable comparables (including safe harbors and guidance on foreign comparables).

Simplification measures

1. Compliance with transfer pricing rules can create considerable burdens on taxpayers. At the same time, enforcement of the rules creates a large cost for tax administrations. It is important that costs are not disproportionate to risks.

   We recommend that ECOWAS countries consider introducing measures to exempt the smallest taxpayers from the transfer pricing rules, and to exempt, or provide a reduced burden of documentation requirement for these taxpayers [is that what is meant?].

2. Some ECOWAS countries have introduced 'Advance Pricing Agreements', which allow them to enter into prospective agreement with taxpayers on the transfer pricing approach for related-party transactions.

   While recognizing APAs may not be a priority for many countries, we recommend that ECOWAS countries consider whether to introduce such measures in cases where the administration has sufficient capacity to manage them effectively.

3. 'Safe harbors' can provide significant benefits for both tax administrations and taxpayers, including the need for identifying comparables for every transaction. The OECD/G20 BEPS project has proposed a basis for a safe harbor regarding low value-added services.

   We recommend that ECOWAS countries consider developing safe harbors for key low-value transactions, such as services, basic manufacturing and distribution. There are benefits of regional co-operation with the introduction of safe harbors, and we recommend that ECOWAS countries consider working together to develop and align safe harbor rules.

Administrative issues

1. International experience shows that careful consideration need to be given to the administration of transfer pricing audits.

   We recommend that ECOWAS countries introducing a new or enhanced transfer pricing capacity consider the administration of this capacity, including the formation of a team of specialists, a systematic risk assessment process, and centralized management and oversight.

Capacity development and skills building

1. The implementation of a transfer pricing regime requires an investment in building a regulatory framework, an effective administrative structure and requisite skills.

   We recommend that, as well as taking advantage of international and regional capacity-development programs, ECOWAS countries consider continued collaboration with ATAF and CREDAF on international tax issues, as well as establishing a mechanism for cooperation to allow sharing of experience and expertise, joint development of tools (such as model rules) and peer-learning.

CHAPTER 1: INTRODUCTION

1.1 TRANSFER PRICING IN THE INTERNATIONAL CONTEXT

Transfer pricing has taken a central role in the global debate on international tax. Transfer pricing relates to setting of prices in cross-border transactions of goods, services, and intangible property between related parties – typically members of the same MNE group. These prices have a direct impact on the amount of profits that the MNEs report, and the tax they pay, in each country in which they operate. Increased globalization and tax competition among countries to attract mobile capital have provided opportunities for MNEs – often by means of transfer pricing - to greatly reduce their global tax burden by artificially shifting profits across borders to take advantage of tax rates that are lower than in the country where the "real" business activity takes place.

The tax foregone due to transfer pricing abuse and other means of BEPS is a challenge for developed and developing countries alike. According to OECD estimates, between $ 100-240 Billion annually is being lost due to BEPS schemes, an equivalent of 4-10% of global corporate income tax (CIT) revenues[1]. Developing countries, which rely heavily on corporate income tax, are even more affected by this global phenomenon. Crevelli, de Mooij and Keen (2015), for instance, assess the size and significance of tax base and strategic rate spillovers[2]. Their findings suggest that avoidance associated with tax havens has a larger impact relative to GDP in developing countries. They provide a tentative estimate of long term revenue losses in non-OECD countries amounting to $ 200 Billion. UNCTAD (2015) estimates that 30% of global cross-border corporate investment stocks have been routed through offshore hubs. The estimated annual tax revenue losses for developing countries amount to approximately $100 Billion. Notwithstanding, many developing countries still lack adequate legal and regulatory frameworks for the effective enforcement of transfer pricing rules. Those that have transfer pricing legislation in place often have limited administrative capacity, insufficient experience and inadequate access to necessary information, to conduct effective audits, especially when faced with large and well-advised MNEs.

The OECD with G20 endorsement launched the BEPS Project, which – in 15 action points – aims to revise international tax rules to tackle underlying causes of corporate tax avoidance. The final package of the BEPS reports was released in October 2015 and provide guidance on international tax reform to help

[1] www.oecd.org/beps

[2] Crivelli E., de Mooij R., Keen M.: *Base Erosion, Profit Shifting and Developing Countries*, IMF Working Papers, WP/15/118, 2015.

countries align their tax practices in order to curb transfer mispricing and other BEPS schemes[3]. Having been initially aimed at a set of specific OECD priorities, the BEPS agenda does not aim to cover all relevant challenges for developing economies. In particular for low-capacity countries, a broader look at base erosion risks and countermeasures commensurate with administrative capacity is needed. In order to support developing countries implement the BEPS recommendations, international organizations, including the WBG, OECD and International Monetary Fund (IMF) have also agreed to develop further guidance in the form of practical toolkits. These include toolkits to assist developing countries implement transfer pricing documentation requirements and to address the practical issue of the scarcity of information needed to carry out a transfer pricing audit. These guidelines will be relevant to those ECOWAS member states which plan to introduce or strengthen transfer pricing rules in their country.

ECOWAS member states will need to consider which elements of the BEPS project are of most immediate concern to them, in the light of their needs and circumstances, and to weigh up both the benefits and the costs of implementing BEPS measures[4]. In some instances, it could be beneficial to consider how BEPS outcomes could be adapted or supplemented to meet ECOWAS country needs.

1.2 Relevance of transfer pricing and risks of transfer mispricing in the ECOWAS region

It is very difficult to estimate with any accuracy the amount of tax revenue at risk from transfer pricing. Evidence of loss of tax revenue due to transfer pricing abuse across ECOWAS member states is thus largely anecdotal. Nevertheless, a number of studies have tried to assess the magnitude of the tax revenue forgone by African economies from transfer mispricing. Based on a broad set of assumptions, the Open Society Institute for West African States (OSIWA) provides estimates of the ECOWAS region's losses due to transfer mispricing amounting to $ 78 bn by 2018 and leading to losses in government revenues of around $ 14 bn[5]**.**

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[3] http://www.oecd.org/ctp/beps-about.htm

[4] A more recent OECD initiative (the 'inclusive framework') invites non-OECD members, including some of the ECOWAS member states, to collaborate on the further development of the BEPS initiative, and on implementation of the OECD/G20 BEPS recommendations.

[5] OSIWA: *Domestic Resource Mobilization in West Africa: Missed Opportunities*, February 2015.

World Bank data indicates that the size and nature of the transfer pricing risk is likely to vary between ECOWAS countries. This is partly due to the ECOWAS region being economically diverse. Nigeria is largest economy in Africa, while Cape Verde, Guinea Bissau, Liberia and Gambia are amongst the smallest on the continent. Ten countries in ECOWAS are categorized by the United Nations as 'least developed countries' (Benin, Burkina Faso, The Gambia, Guinea, Guinea Bissau, Liberia, Mali, Niger, Senegal, Sierra Leone, Togo), with a GDP per capita ranging from $255 to $1060 (2014 figures). At the other end of the spectrum are Cape Verde ($3641), Cote d'Ivoire ($1545), Ghana ($ 1442) and Nigeria ($2978).

At the most basic level, Foreign Direct Investment (FDI) may be an indicator of potential vulnerabilities through transfer mispricing. Inwards FDI comes in many forms, including the establishment of local subsidiary enterprises that are likely to transact with other members of the multinational group to which they belong. Net FDI inflows grew across ECOWAS from $ 7bn in 2006 to $ 18.8 bn in 2011. Since 2012, investment into the region has slowed down and dropped sharply to the level of $ 9.4 bn in 2015 as the Ebola outbreak, security threats and falling commodity prices (particularly in oil and gas) negatively affected several ECOWAS countries.

Similarly, the level of imports and exports provides an initial indication of the potential relevance of transfer pricing risks. Trade statistics do, however, typically include both imports and exports from and to non-related parties (for which there is very little transfer pricing risk) as well as between related parties.

Over the last decade, West African economies have been growing rapidly - during the period from 2006 to 2015, ECOWAS countries performed strongly, with an average annual GDP growth rate of 4.96 with an increase in activity involving multinational enterprises.

Most of the ECOWAS trade takes place with countries outside of the region including European Union (EU) and North American Free Trade Agreement (NAFTA) countries (23% and 34% of exports respectively[6]), most of which have mature transfer pricing regimes in place. This creates an additional risk in that, in the absence of a proper transfer pricing framework in place, MNEs may have an incentive to over-comply in countries with advanced transfer pricing regimes and under-comply where the transfer pricing enforcement is weak. The risk of profit shifting is likely to be reinforced by the relatively high rate of CIT in the region:

[6] ECOWAS.int

Figure 1: CIT rates across ECOWAS (2015)

Benin	30%	Liberia	25%
Burkina Faso	28%	Mali	30%
Cape Verde	25%	Niger	30%
Cote d'Ivoire	25%	Nigeria	30%
Gambia	31%	Senegal	30%
Ghana	25%	Sierra Leone	30%
Guinea	35%	Togo	30%
Guinea Bissau	25%		

As West African economies are expected to grow in the next years and MNEs continue to expand their footprint, there is a growing need for the countries in the region to develop sound transfer pricing legislation and audit capacity.

1.3 Existing legal frameworks and administrative frameworks

ECOWAS countries are at varying levels of readiness to enforce transfer pricing. The majority are still at the early stages and have very limited experience with conducting transfer pricing audit. Some administrations, including Nigeria, Ghana, Liberia, Cape Verde, have introduced transfer pricing legislation and compliance requirements while others only have general provisions on the arm's length principle in the legislation without detailed guidance (for instance Benin, Burkina Faso, Gambia, Guinea). Senegal is in the process of putting in place comprehensive legal and regulatory frameworks. Out of all ECOWAS countries, only Nigeria and Ghana have dedicated teams of transfer pricing specialists within their tax administration. Liberia and Senegal are currently setting up transfer pricing units. Ghana, Nigeria, Liberia have also commenced their first transfer pricing audits. Others have not yet started the enforcement due to lack of awareness and capacity amongst auditors. Without adequate transfer pricing legislation and enforcement mechanisms, there is a risk that ECOWAS member states are not collecting the appropriate amounts of tax revenue.

1.4 Risks arising in the natural resource sector

A significant risk for some ECOWAS countries arise in the natural resource sector[7]. Many of the risks are shared with those found in other sectors, but a specific, and high-value, issue arises from the valuation of natural resources sold to foreign related parties, for the purposes of both determining taxable profit for corporate income tax purposes and for determining rent royalties payable to the relevant jurisdiction. Both these issues frequently involve transfer pricing rules (forthcoming: WBG toolkit on transfer pricing in extractives).

It is essential that the affected governments build the capability to ensure that production from the natural resources sector is valued according to the arm's length principle. Some countries (mostly in South America) have adopted a specific transfer pricing approach to address this issue – sometimes referred to as a 'sixth method' or 'reference pricing' method. Such methods can be a very blunt in their application. It is expected that regional and international organizations will work to refine such rules and adapt them to the circumstances seen in ECOWAS. This might involve, for example, developing a specific 'method' tailored to each type of commodity. Input from ECOWAS countries into the development of such approaches would be encouraged and welcome.

Another issue is the source of data needed to value production. A number of international industry databases are available, as is data from international commodity exchanges. It is important for the relevant ECOWAS countries that such information is made available to tax administrations, and, again, this is an issue that can be addressed at a regional and international level – through, for example, co-operation in acquiring and using data sources.

[7] Countries with significant oil sector include: Cote d'Ivoire (3.6%), Ghana (6.2%), Niger (8%), and Nigeria (13.6%). Countries with significant mineral sector include: Burkina Faso (13.7%), Ghana (5.7%), Guinea (9.9%), Senegal (2%) and Togo (2%). In addition, Liberia has a significant rubber sector and has the world's highest 'Forest Rent' as a % of GDP (World Bank Data, 2014).

Chapter 2: Transfer pricing reform across ECOWAS – key elements of an effective transfer pricing regime

2.1 Policy Considerations

Implementation of a sound transfer pricing regime can contribute to enhance countries' ability to effectively mobilize domestic resources,[8] and improve the business climate for foreign and domestic investors. This two-fold objective can be achieved through putting in place well designed transfer pricing legislation and ensuring it is adequately administered.

The policy objectives of establishing a transfer pricing thus regime include:

- Protecting the tax base from profit shifting - primarily cross-border, but also domestically between related parties subject to different tax treatments;
- Incentivizing taxpayers to use arm's length pricing in their transactions with related parties, and requiring them to calculate taxable income in accordance with arm's length conditions;
- Maintaining a 'level playing field' between MNEs and domestic businesses, and between countries in the region, for example, by avoiding 'tax competition' between countries;
- Fair and consistent application of the rules in line with international norms embodied in tax treaties;
- Keeping the tax administration's costs of implementation, and taxpayers' cost of compliance, to the minimum needed to effectively achieve the above objectives.

This chapter discusses the core elements of an effective and efficient transfer pricing regime designed to achieve these objectives. It includes both regulatory and administrative considerations. Countries within ECOWAS will of course have different legal systems, legislative conventions, policy objectives and administrative capacity. These will influence the design of their respective transfer pricing regimes. For example, countries with relatively low administrative capacity may wish to introduce rules that are relatively formulaic (with more emphasis on safe harbors/fixed margins, for example). Some countries may be focused on revenue collection, and devote resources towards investigation and audit, while others

[8] Introducing effective transfer pricing regimes and related measures (thin capitalization) has been shown to reduce observable profit shifting (Beer and Loeprick 2015).

may wish to emphasize taxpayer service and certainty of treatment and devote resources towards an 'advance pricing agreement'[9] facility.

2.2 Designing a domestic legal framework

Countries have adopted different approaches to drafting transfer pricing legislation. Some countries have adopted very detailed transfer pricing provisions in the primary law while others have introduced only the basic principles in the law, elaborating on them in secondary legislation or administrative guidance. There is no established international norm or practice on this balance between primary and secondary legislation.

For the transfer pricing legal framework to be effective, as a minimum, it should include the following key elements:

a. Adoption of the arm's length principle as the benchmark for transfer pricing
b. Requirement for taxpayers to compute taxable profit in line with the arm's length principle and authority for the tax administration to make adjustments in cases where taxpayers do not adopt arm's length conditions
c. Clear statement of the scope of the rules and related party definitions
d. Adoption of the principle of comparability
e. Adoption of internationally accepted methods for establishing arm's length principle
f. A requirement on the taxpayer to document their transfer pricing
g. Penalties for non-compliance.

The importance of each of these elements is discussed below:

a. Adoption of the arm's length principle as the benchmark for transfer pricing

The transfer pricing legislation of nearly all countries follow the global standard of arm's length principle. This principle, as applied to transactions between associated parties, requires that the conditions in those transactions do not differ from the conditions that would have prevailed in the comparable transactions

[9] Given the non-negligible costs and risks associated with an APA program it often seems advisable to not start out with an APA program at the beginning of the introduction of new TP regimes, however.

between independent parties. The principle was initially adopted by the OECD in its original 1979 Guidelines on Transfer Pricing, and expanded upon in the 1995 and 2010 versions.

The principle is also found in the associated enterprises articles of the OECD and United Nation's Model Tax Conventions, which together form the basis for nearly all double taxation treaties currently in force. The United Nations Practical Manual on Transfer Pricing for Developing Countries and the WBG's Transfer Pricing Toolkit for Policymakers and Practitioners (forthcoming, 2016) are similarly based on the arm's length principle.

The adoption of transfer pricing legislation embodying the arm's length principle and aligned with internationally accepted transfer pricing standards ensures a consistent basis for profit allocation.

b. Requirement for taxpayers to compute taxable profit in line with the arm's length principle and authority to allow the tax administration to make adjustments in cases where taxpayers do not adopt arm's length conditions

The introduction of the arm's length principle into a country's tax legislation typically imposes on taxpayers the requirement to compute their taxable profit in accordance with the arm's length principle. This means that taxpayers should determine their actual transfer prices in accordance with the arm's length principle, or, where they do not, there may be a need for adjustments to the taxpayer's taxable income with respect of the transactions falling within the scope of the legislation. These adjustments may be made by the taxpayer in certain instances, and where permitted by the domestic law, or, as is more commonly the case, by the tax authority. As regards the latter, the legislation needs to provide an authority for the tax authority to make adjustments to a taxpayer's computation of taxable income where that taxpayer has entered into transactions that are within the scope of the transfer pricing legislation and the conditions of those transactions are not consistent with the arm's length principle.

Most country rules allow adjustments to taxable profit only where the effect is to increase taxable profit or decrease losses.

c. Clear statement of the scope of the rules and related party definitions

The arm's length principle incorporated in transfer pricing rules requires related parties to deal with each other as if they were independent of each other. The concept of related party is therefore essential for the application of the arm's length principle and needs to be precisely defined.

The international standard for establishing that parties are related requires that one party controls the other, or that both are controlled by the same person or persons. There is no international standard, however, for the definition of 'control' in this context.

Most countries with transfer pricing rules in place have based their definition of control through shareholding or voting rights. In addition to such "de jure" approaches, countries often include within their definition a more general "de facto" approach, concentrating on an actual ability to control business decisions of another enterprise.

The provisions on the definition of related parties may also take into account: situations involving ownership and control by family members, trusts or nominees (to catch the indirect control that these factors may allow for); control-relationships involving individuals and partnerships. Some countries have also included a provision which deems as a related party any party to a transaction situated in a low tax jurisdiction, whether or not control is otherwise demonstrated.

In addition, the scope of the rules in countries is typically limited to cross-border transactions only. However some countries include within the scope of the rules purely domestic transactions between two country residents. The latter is intended to counter profit shifting between two resident parties subject to different tax rates.

d. Adoption of the principle of comparability

The application of the arm's length principle requires a comparison of the conditions in the transaction between related parties with the conditions in a comparable transaction between parties that are unrelated. The notion of comparability is thus at the heart of transfer pricing analysis and the principle should be clearly stated in the transfer pricing legislation.

It is important to note that the transactions compared do not always have to be identical, but rather none of the differences between those transactions should materially impact the price or profit margins compared.

Per OECD Transfer Pricing Guidelines and UN Manual recommendations, most countries make a reference to the five comparability factors in their legislation that are critical when undertaking a comparability analysis. These include: characteristics of the product or service, functional analysis, contractual terms, economic circumstances, and business strategies.

e. Adoption of internationally accepted methods for establishing arm's length principle

Country legislation typically specifies the methodology taxpayers and tax authorities must use in order to assess and establish arm's length pricing. This typically includes the 5 OECD transfer pricing methods: Comparable Uncontrolled Price, Cost Plus Method, Resale Price Method, Transactional Net Margin Method and Profit Split Method. Some countries also allow for the use of other methods as long as the outcome is consistent with the arm's length principle. In addition, some countries have introduced a method often referred to as a 'sixth method', which applies to the pricing of the export of goods for which a publicly available exchange price is available ('commodities'). This type of method has been introduced in a number of South American countries, and, within Africa, by Liberia and Zambia.

f. A requirement on the taxpayer to document their transfer pricing

Most countries require taxpayers whose transaction fall within the scope of the transfer pricing rules to keep documentation to support their transfer pricing.

Many countries introduce specific rules on transfer pricing documentation, under which taxpayers are normally required to compile the documentation contemporaneously, or by the time the tax return is filed. In most cases, they are then required to submit it on request of the tax authority (normally at the early stages of an audit).

Other countries apply existing general rules on documentation and information to transfer pricing. Countries that take this approach often introduce regulations, or provide guidance, on how the general provisions apply to transfer pricing.

g. Penalties for non-compliance

Most countries apply penalties for failure to comply with transfer pricing rules. Some countries have introduced specific penalties relating only to transfer pricing; others rely on the application of existing general penalty provisions, together with regulations or guidance on how those general provisions apply in the case of transfer pricing.

2.3 PROMOTING TRANSFER PRICING COMPLIANCE

Countries have adopted various approaches to collecting information from taxpayers on their transfer pricing practices. The most commonly used are obligations to submit a transfer pricing schedule together with the annual tax return and to prepare and maintain transfer pricing documentation (with penalty impact). The disclosure requirements also play an important role in raising awareness and promoting taxpayers' compliance with the transfer pricing rules.

2.3.1 Transfer pricing return schedules

Many tax administrations require taxpayers to report information related to transfer pricing as part of their annual tax return. Countries can either ask for limited information in the general tax return form or require to submit a separate, more comprehensive transfer pricing schedule. If the former approach is adopted, countries often supplement it with targeted transfer pricing questionnaires sent out to selected taxpayers at the later stage. The more comprehensive schedules typically require information related to taxpayer's ownership information, business activities, related party transactions, transfer pricing methods used, and whether or not the taxpayer has prepared transfer pricing documentation. The information obtained from the transfer pricing schedules is a critical first step in the risk assessment process, but is rarely sufficient to support an adjustment.

2.3.2 Transfer pricing documentation requirements

A requirement on relevant taxpayers to maintain documentation of their transfer pricing is normally considered to be an essential component of a transfer pricing regime. This is because:

- The requirement provides taxpayers with the opportunity to justify their transfer pricing and demonstrate its compliance with the arm's length standard;
- And reinforces their obligation to apply the transfer pricing rules;
- And provides the tax authority with relevant information to allow it to assess a taxpayer's transfer pricing for both risk assessment and audit purposes.

The documentation envisaged by this type of requirement goes beyond source documents typically reviewed during a tax audit (such as invoices and contracts) and requires a detailed explanation of the transfer pricing practices of the taxpayer (details of the transaction and the related business, comparability analysis and method applied etc.).

The comprehensive information included in the transfer pricing documentation package can also play an important role in avoiding and resolving transfer pricing disputes. As requirements to prepare transfer

pricing documentation can impose a significant compliance cost on business, the scope of this obligation should be carefully considered.

In 2015, OECD released guidance on a single uniform standard to transfer pricing documentation which is based on a three-tiered approach:

- A ‘masterfile’ which provides tax administrations with high-level global information regarding global business operations. This would be made available to all relevant country tax administrations.
- ‘Local files’, which are specific to each relevant tax administration. These identify relevant related party transactions, the amounts involved in each transaction, and the company’s analysis to determine that the conditions of those transactions meet the requirements of the country transfer pricing rules.
- A ‘country by country’ report, which details in tabular form for each tax jurisdiction in which the MNE does business, information regarding revenue, profit and tax payable. It also provides details of the number of employees, and capital and assets employed, in each jurisdiction, as well as the business activities conducted in each country.

The requirement on MNEs to submit the masterfile and the local file in each country is imposed by country legislation. The OECD’s BEPS Action plan envisages, however, that the country by country report would be legally required to be submitted only to the tax jurisdiction of the ultimate parent or head office company, and then made available to other relevant tax jurisdictions through tax information exchange instruments (such as treaties and the Multilateral Convention). However, some countries may consider requiring local filing of the country by country report. Enforcing such a requirement would, however, be accompanied by a number practical difficulties, starting with difficulties to determine who is actually required to file the report.

Currently, the OECD standard for the country by country report requires CbC reporting only from the largest MNEs – those with a global consolidated turnover in excess of €750m. A review of the threshold is envisaged in 2020. Going forward, and with a view to input into global discussions, it therefore will be important for ECOWAS members to assess whether or not a different (lower) threshold would be better suited for their administrative needs.

2.3.3 Penalties

Penalties play a vital role in ensuring taxpayers' compliance with its obligations. This typically involves imposition of penalties when a transfer pricing adjustment is made as a result of an audit by the tax administration. In such cases, penalties may be based on either the adjustment itself or the tax liability arising from the adjustment.

Many countries have also introduced penalties for non-compliance with transfer pricing documentation requirements in order to provide sufficient incentive for taxpayers to prepare such a documentation. Such penalties would typically be imposed for failure to keep documentation or for failure to submit it to the tax administration following a request. In some countries, adequate compliance with documentation requirement may reduce or exempt from penalties in the case of an adjustment.

2.4 Establishing transfer pricing administrative capacity

A sound legal framework sets the foundations of an effective transfer pricing. For it to become fully operational, an adequate administrative framework needs to be establish for the enforcement of these rules.

The nature of transfer pricing rules gives rise to particular challenges that have a number of administrative implications. In many respects, the auditing of MNEs has much in common with auditing other businesses. The objectives of both, for example, is to ensure the correct amount of taxation is paid according to the law. And both frequently involve similar processes of fact-finding and investigation. There are other features that are unique to, or more acute in, the audit of MNEs. For example:

- A wider range of rules are applicable. Auditing MNEs frequently involve the application of treaty provisions and international standards and guidelines in addition to domestic law.
- A range of specific issues are largely unique to MNEs. In addition to transfer pricing, these include interest deductibility rules (such as thin capitalization), permanent establishments and treaty issues, as well as other BEPS issues.
- Auditing MNEs often raises a number of administrative issues such as safe harbors, exchange of information and APAs.

- A wide range of skills and knowledge is needed. For example, transfer pricing auditing frequently require an understanding of the operations of an MNE, specific sector knowledge and economics and commercial awareness.
- Audit cases are often complex and fact-intensive and there is often room for different interpretations of the same facts.
- MNEs are often well advised by experienced specialists and the amounts involved are often very large.
- MNE audits can be very difficult to settle and are often expensive and time-consuming for both taxpayer and tax administration

All this means that auditing MNEs needs careful administration to ensure:

- selection of right cases
- treaty provisions are correctly administered: including Mutual Agreement Procedure (MAP), bilateral APAs, corresponding adjustments, exchange of information.
- a consistent approach, in line with domestic law and international principles
- cases are closed and settled as appropriate
- the right cases are referred into the judicial processes
- the right skills are available and used.

In order to achieve this, tax administrations frequently implement administrative arrangements specific to the auditing of MNEs. These include:

- the establishment of a single or number of teams of specialists
- a program of skills and experience-building
- a centralized system of monitoring and oversight
- risk assessment and case selection procedures
- clear procedures, and support measures, for auditors.

The type of arrangements implemented by tax administrations vary according to the scale of the MNE audit program and existing structures and processes.

2.4.1 Forming a team of transfer pricing specialists

Countries adopt differing approaches to the administration of transfer pricing, depending on their policy priorities and existing administrative structures. There is thus no one model that fits the requirements of all countries.

However, almost all countries that conduct transfer pricing audits have established a dedicated transfer pricing team to ensure the proper enforcement of transfer pricing legislation. Such teams typically deals with all international issues arising from the audit of an MNE, including permanent establishments, residence, interest deductibility and treaty issues, in addition to transfer pricing. In some tax administrations the specialist team will itself conduct all transfer pricing and related audits, perhaps in co-operation with other parts of the administration. In other cases, the team provides a centralized support, co-ordination and audit-management role.

It is also important that the specialist transfer pricing team establishes links with other relevant functions within the tax administration in order to provide technical support and allow the team to input into policy and legislative developments in the light of experience with implementing the rules. The relevant functions normally include:

a. Treaty functions, in order to facilitate the use of exchange of information provisions within treaties and other international instruments, to provide auditors with access to information often required to undertake audits. It also allows the close cooperation between the treaty and audit functions required if a claim for corresponding adjustment (and MAP discussions) follow an audit conducted by the country or a treaty partner.
b. Legal functions, in order to receive support on interpretations of the legal provisions, and in order to feedback experience of implementing these provisions.
c. Policy functions, in order to feedback experience of implementing the transfer pricing provisions.

2.4.2 Building capacity of transfer pricing specialists

It is critical that the newly established team of transfer pricing specialists is provided with the training and practical experience to build up the necessary skills. A competent, multidisciplinary team of experts equipped with skills and knowledge acquired through various training programs can ensure proper evaluation and management of transfer pricing audits, as well as provide high quality, professional services and guidance to the taxpayers.

The skills-building should focus on transfer pricing, but also include other international tax issues including permanent establishments, residence, thin capitalization and treaty issues as frequently they arise in the same audits as transfer pricing issues. Building skills on such a wide spectrum of international tax issues

takes time, as does building the needed experience. It is also important that the specialist auditors are given the incentives to remain in the team for an extended period.

2.4.3 Developing risk assessment mechanism

Implementation of risk-based audits is critical in helping tax authorities strategically target potential transfer pricing abuses and prevent losses in tax revenue. A robust detection mechanism to identify high-risk transfer pricing transactions is crucial for an efficient and effective audit regime, and can improve the outcomes of transfer pricing inspections, specifically: increase the volume of controls conducted, decrease their duration and/or increase revenue generated. An effective risk assessment process also protects taxpayers from compliance costs of inappropriate audits.

It is therefore critical for the tax administration to establish a simple and efficient risk assessment mechanism for the selection of high risk transfer pricing cases. The usual starting point for the tax administration is information obtained through the tax returns and transfer pricing return schedules. This basic data can be supplemented with information obtained through other sources including transfer pricing documentation prepared by the taxpayers, transfer pricing questionnaires, information from other agencies (e.g. Customs), publicly filed accounts, the company's website, news articles.

The tax administration would also need to develop a set of risk indicators specific to transfer pricing to help select the appropriate cases for further investigation and audit. Typically, these risks may include: consistent and continued loss making, business restructuring, poor or non-existent documentation, significant transactions with related parties in low tax jurisdictions, inconsistent profit levels, substantial payment of royalties, services fees, interest to non-resident related parties.

2.4.4 Audit governance and oversight

To ensure quality control and consistency of approach, an audit management process should be established. If the audits are centralized in a relatively small team, oversight of audits can be carried out to a large extent within the team.

In cases where transfer pricing audits are conducted by a number of teams or offices, a centralized audit oversight and management process may be relevant, In such cases, audit cases may be referred to the central team or body for review and approval at key audit stages – for example, when a case is to be open or closed or settled, or at say 12 months' intervals.

2.5 AVOIDING AND RESOLVING TRANSFER PRICING DISPUTES

Transfer pricing disputes can be costly and time consuming. It is thus critical for the tax administrations to promote voluntary compliance and avoid disputes. Clear guidance on the application of the arm's length principle, compliance requirements and other obligations can certainly reduce the risk of a controversy. In addition to domestic tools for the avoidance and dispute resolution, MAP and APAs are mechanism that many countries adopt to avoid and resolve transfer pricing disputes.

2.5.1 Mutual Agreement Procedure (MAP)

MAP is a primarily a mechanism for resolving disputes between tax authorities on the application of a treaty, but it can also be effective in preventing and resolving disagreements arising on audit issues between a taxpayer and a tax authority.

In the international context MAP aims to eliminate double taxation arising from transfer pricing adjustments. Article 25(5) of the OECD Model (2010) and Article 25B of the UN Model (2011) provide model MAP provisions, which are part of most of the tax treaties currently in force. The MAP article provides the legal framework for competent authorities in two contracting countries to endeavour to reach an agreement on international tax disputes by either reducing or eliminating the (primary) adjustment or making a necessary corresponding adjustment to eliminate the double taxation. Some treaties also establish an arbitration process in case of unresolved issues.

Access to MAP that can deal with disputes in a transparent, consistent and timely manner provides taxpayers with certainty and has a beneficial impact on the country's investment climate.

2.5.2 Administrative procedures for dispute resolution

Some tax authorities have introduced internal administrative procedures for resolving disputes between a taxpayer and the tax authority. Such procedures typically give the taxpayer an opportunity to refer a disputed audit issue to a 'board' or 'panel' of senior officers that are able review a case and make a decision or recommendation, with a view to resolving the contended issue. If such bodies fail to resolve disputes, the matter can still be dealt with through the courts.

2.5.3 Advanced Pricing Agreements (APAs)

APAs are ahead of time arrangement between taxpayer and tax administration(s) on a set of criteria (e.g. methods and types of comparables) for the transfer pricing treatment of a specific transactions or group of transactions. These agreements are typically for multiple years and may be either unilateral (an arrangement between a taxpayer and tax administration), bilateral or multilateral (an arrangement

between two or multiple tax administrations). Many countries decide to introduce an APA program after setting the foundations of a well-functioning transfer pricing regime and gaining experience with transfer pricing audits. The taxpayers demand for APA also increases over time as they start to face, and wish to avoid, transfer pricing scrutiny.

A sound APA regime provides taxpayers with predictability of the tax treatment of their cross-border activities. In addition, bilateral and multilateral programs resolve the issue of potential double taxation. Setting up an APA program requires legal basis and establishment of an APA team capable of negotiating terms of agreements with taxpayers and liaising with foreign competent authorities.

There are a number of factors that countries will wish to consider in relation to whether to adopt APAs and, if so, when.

a. Taxpayer certainty

Perhaps the most important role of APAs is to provide certainty to taxpayers on the tax treatment of their cross-border activities. This is an important consideration from an investment climate perspective. Uncertainty of treatment can impact on investment decisions, and may play a role when investors evaluate the risk of a new investment into a country. APAs could potentially alleviate some of that risk.

It is important, however, that APAs are not used to provide preferential or advantageous treatment to individual taxpayers as part of a “tax incentive” strategy. Not only would such an approach undermine tax yield and credibility of the tax system, it would also disadvantage, and lead to uncertainty of treatment in, the country in which is the counterpart to the relevant transaction(s) is located. APAs should thus adopt and implement internationally accepted standards on transfer pricing.

b. Likely tax yield

APAs should not be viewed as a means for increasing tax revenue. As mentioned above, APAs are primarily aimed at providing some certainty to taxpayers on the tax treatment of their cross-border activities.

c. Resource use

There are a number of considerations with regards to the most efficient use of tax authority resources. It is important to note that the negotiation of an APA needs to be carried out by knowledgeable transfer pricing specialists in the tax administration. Such resources are likely to be in short supply, and, of course,

when employed on an APA, will have reduced availability for other compliance activities, including auditing. Tax administrations thus often face a balance between using scarce resources in a) an APA program and b) auditing.

d. Skills building

Taxpayers' incentive to co-operate with the APA process and increased willingness to work with the tax administration often means that involvement in negotiating APAs can help build valuable specialist transfer pricing skills, and build knowledge and intelligence on sectors, industries and/or particular taxpayers.

e. Capacity to conduct an APA program

It is sometimes argued that less experienced tax administrations may lack the knowledge and skills to negotiate fair APAs, especially when faced with large, well-advised multinational enterprises. Similarly, in the case of bilateral and multilateral APAs, there is a perceived risk that less experienced countries may be disadvantaged in negotiations by more experienced countries.

f. Corruption issues.

Care needs to be taken to ensure that APA negotiations are subject to oversight in order to mitigate risks of corruption. It is important, for example, that no taxpayers are given preferential treatment, and that the terms of all APAs are fully in line with the country's transfer pricing rules and with international principles.

2.5.4 Simplification Measures/Safe Harbors

Many countries have introduced some form of transfer pricing simplification measures. This recognizes that implementing transfer pricing rules can be time consuming and costly both for the taxpayer (in producing documentation and in dealing with an audit) and for the tax authority, and that there is thus a need to focus enquiries on the high-risk transactions. The objectives of such measures are typically:

- to prevent unnecessary compliance costs to taxpayers that present little risk of significant tax revenue loss through non-arm's length transfer pricing
- to reduce tax authority's costs in enforcing transfer pricing rules by reducing the need to audit lower-risk taxpayers
- to allow tax authorities to focus its scarce and skilled resources on higher-risk issues
- to provide more certainty and transparency to taxpayers.

The most frequently seen simplification measures are:

a. Exemptions from transfer pricing rules for smaller taxpayers or smaller transactions
b. Exemption from the rules for purely domestic transactions
c. Simplified transfer pricing methods - for example, 'safe harbor' provisions
d. Exemptions from, or simplified, transfer pricing documentation requirements
e. Simplified APA procedures.

These are each considered below.

a. Exemptions from transfer pricing rules for smaller taxpayers or smaller transactions.

Such rules typically exempt smaller taxpayers from transfer pricing rules. The definition of 'small' may be in terms of turnover, value of assets, or number of employees. Some countries do not extend an exemption from the rules to a transaction with a low-tax jurisdiction.

Where taxpayers are exempt from the transfer pricing rules, this normally extends to an exemption from the associated documentation requirements. However, for countries that require the submission of a transfer pricing schedule with a tax return, it may be useful to require all taxpayers to submit such schedules, regardless of whether they are exempt from the transfer pricing rules. Such a requirement would provide the tax authority with an opportunity to verify that the taxpayer meets the exemption criteria.

b. Exemption for purely domestic transactions

Many countries apply their transfer pricing rules to transactions between related entities that are both locally resident. This recognizes the risk of tax loss due to non-arm's length transactions between entities that are subject to different tax treatment. (For example, by shifting profit towards a group company that is subject to a tax exemption or to a lower rate of tax). Such measures can, however, lead to unnecessary compliance costs, and uncertainty of treatment, for taxpayers that conduct transactions with related parties that are subject to the same tax treatment. An option to counter this is to restrict the domestic application of the transfer pricing rules to transactions between related parties that are subject to the same rate of income tax in the relevant year.

c. Simplified transfer pricing methods - for example, 'safe harbor' provisions

'Safe harbors' normally take the form of a regulation or ruling that specifies that a particular transfer pricing method or transfer price would be considered acceptable to the tax authority in specified circumstances.

A safe harbor provides a mechanism to allow the tax administration to specify financial indicators that it considers acceptable for transfer pricing purposes. For example, it may specify that a cost-plus margin of, say, 5% is considered an acceptable margin for the provision of certain types of services.

Safe harbors have a number of potential benefits:

- They reduce taxpayer compliance costs
- They provide taxpayers with certainty of treatment for some transactions
- They reduce the enforcement costs of tax administration, releasing resources away from auditing more routine and low risk issues. Auditing such case would be restricted to checking that the transaction in point meets the safe harbor condition.

Safe harbors typically have the following features:

- They apply to a specified category of transaction
- They specify a method that the tax authority considers appropriate and acceptable to such transactions
- They specify a level of a financial indicator considered acceptable. This may be, for example, a price, gross profit margin or a net profit margin, or a range of such margins
- They are most suitable for transactions which are able to be benchmarked - normally involving functions that do not involve using valuable intangibles or assuming exceptional risk.

Care needs to be taken in setting a 'safe harbor' price or margin to ensure it approximates an arm's length price:

- If it is too low, then tax revenue may be lost, and MNEs will gain a competitive advantage over independent enterprises
- If it is too high, taxpayers may choose not to adopt it. In cases where a taxpayer adopts such a safe harbor, counterparty tax administrations may seek an adjustment.

Confidential data in the hands of the tax administration may be useful in setting a safe harbor price or margin. Such data would not need to be published or revealed to taxpayers using the safe harbor.

In order to ensure that a safe harbor is not used inappropriately, and does give rise to double taxation or double non-taxation, it is important that:

- Taxpayers are able to opt out of the safe harbor in cases where they consider that the safe harbor does not give rise to an arm's length result for their specific circumstances. In such cases, the taxpayer would be required to return and justify (and document) an arm's length result.
- A safe harbor price or margin is subject to discussion, and potential revision, in cases where the transaction in question is the subject of discussions under a treaty (for example, where the treaty partner seeks a transfer pricing adjustment in respect of the transaction).
- Safe harbors may be appropriate in respect of a wide range of transactions, including the following types:
    - Manufacturing, especially in cases where the manufacturer does not have a right to valuable intangibles, or take extraordinary risk
    - Sales and distribution, including sales agents, again in cases where the function does not exploit valuable intangibles, or non-routine risks
    - Provision of services

c. Exemptions from, or simplified, transfer pricing documentation requirements

Recognizing that the preparation of transfer pricing documentation can be time consuming and costly, some countries exempt specified classes of taxpayers from this obligation. Such taxpayers remain subject to the transfer pricing rules, so that an audit of their transfer pricing remains possible. A number of criteria for exemption could be used. Singapore, for example, provides a documentation exemption for taxpayers whose value of related-party transactions are below specified limits, or in relation to domestic transactions between taxpayers subject to the same tax rate. An alternative is to provide that smaller or low-risk taxpayers may prepare simplified or reduced transfer pricing documentation.

d. Simplified APA procedures

Some countries (e.g. Australia) implement simplified procedures for unilateral APAs with smaller taxpayers, which provides them with certainty of treatment. However, it should be borne in mind that agreeing an APA is often a time consuming process, even with a smaller taxpayer. It is also likely that only

more compliant taxpayers will be willing to enter into an APA. Given this, the resource implications of offering APAs to smaller taxpayers should be considered.

CHAPTER 3: KEY FEATURES OF TRANSFER PRICING REGIMES IN ECOWAS

This Chapter surveys, and comments on, the key features of transfer pricing regimes in ECOWAS countries. It also includes a section on rules to counter excessive interest deductibility. It is divided into 5 Sections:

a. Regulatory provisions
b. Rules to address excessive deductions of interest
c. Documentation
d. Penalties
e. Dispute Resolution.

3.1 REGULATORY PROVISIONS

This section surveys and discusses the transfer pricing legislative provisions adopted by ECOWAS countries.

ECOWAS countries use a combination of primary legislation (contained in the relevant Act, Code etc), and secondary legislation (such as regulations). Some countries have also issued explanatory notes. The table at the end of this section summarizes the various approaches that have been adopted.

3.1.1 Application of the arm's length principle.

The core provision of country transfer pricing rules is to require taxpayers to compute taxable profit (i.e. the measure of profit to be subject to corporate income tax) in accordance with the arm's length principle, and in cases where taxpayers do not, and the effect is to reduce the measure of taxable profit, the tax authority is authorized to adjust profits accordingly. The box below illustrates how this core provision is included within the country transfer pricing rules.

The countries that belong to West African Economic and Monetary Union (WAEMU), have adopted similar wording in their primary legislation, and we have grouped these together in the analysis below.

ECOWAS TRANSFER PRICING RULES – CORE PROVISIONS

Cape Verde

The core provision of Cape Verde's transfer pricing rules can be found at Article 65.1. of the Corporate Income Tax Code.

'In commercial transactions, including transactions or series of transactions involving goods, rights or services, and also in financial transactions, undertaken between a taxpayer and any other entity with which it is in a situation of special relationship, whether or not subject to IRPC, terms or conditions must be contracted, accepted, and practiced that are substantially identical to those that

would normally be contracted, accepted, and practiced between arm's-length entities in comparable transactions.'

Ghana

Until 2015, the primary legislation was to be found in Section 70, of the Internal Revenue Act 2000. In 2015, this rule was replaced by the provisions of Section 31 Income Tax Bill 2015, which includes:

' (1) Where an arrangement exists between associated persons, the persons shall calculate their income and tax payable according to the arm's length standard.'

These primary rules are supplemented by Transfer Pricing Regulations, 2012 (L.I. 2188). These Regulations are made under section 114 (1) (d) of the Internal Revenue Act. The key Regulation (2(1)) states:

'*A person who engages in a transaction with another person with whom that person has a controlled relationship, shall compute the profit or loss arising from that transaction on the basis that it is conducted at arm's length'.*

Liberia

The relevant statutory provisions are contained in Revenue Code of Liberia Act of 2000, as Amended by the Consolidated Tax Amendments Act October 15, 2011 ('Liberia Revenue Code' - 'LRC').

Section 211 LRC provides the legislative foundation for Liberia to enforce the arm's length principle in transactions between related parties. This states:

'In any transaction or arrangement between persons who are related persons within the meaning of Section 208, the Minister may distribute, apportion, or allocate amounts to be included or deducted in calculating income and credits granted under this Part between the persons, or determine the source of income, as is necessary to reflect the taxable income or tax payable which would have arisen for the persons if the arrangement had been conducted at arm's length.'

Section 211 LRC is also applicable to: Income Tax of Agriculture and Renewable Resources (S 620 LRC); Income Tax of Natural Resources (S713 LRC); Petroleum (S751 LRC).

Nigeria

Nigeria's primary law is found at Section 22 Companies Income Tax Act, 2004, (as amended by Companies Income Tax (Amendment) Act 2007). This includes

'Where the Board is of the opinion that any disposition is not given effect to or that any transaction which reduces or would reduce the amount of tax payable is artificial or fictitious, it may disregard

any such disposition or direct that such adjustments shall be made as regards liability to tax … and any company concerned shall be assessable accordingly'

' Transactions between [related persons] shall be deemed to be artificial or fictitious if in the opinion of the Board those transactions have not been made on terms which might fairly have been expected to have been made by persons engaged in the same or similar activities dealing with each other at arm's length'.

Nigeria supplemented these rules in 2012 with detailed regulations: The Income Tax (Transfer Pricing) Regulations No 1, 2012. These rules explicitly apply the arm's length principle in line with international standards, and include an explicit reference to the OECD Transfer Pricing Guidelines.

Regulation 4 (1) states *'Where a connected person has entered into a transaction or series of transactions to which these Regulations apply, the person shall ensure that the taxable profit resulting from the transaction or transactions is in a manner that is consistent with the arm's length principle.'*

Sierra Leone

Sierra Leone has put in place the legislative building blocks to implement a comprehensive transfer pricing regime in line with internationally accepted principles.

Section 95 of The Consolidated Income Tax Act, 2000 (as updated 2015) includes:

(1) 'Where an arrangement exists between associated persons, the persons shall calculate their income and tax payable according to the arm's length standard.
(2) The arm's length standard requires associated persons to qualify, characterize, apportion and allocate amounts to be included or deducted in calculating income to reflect arrangements that would have been made between independent persons.

Benin, Burkina Faso, Cote d'Ivoire, Guinea, Mali, Niger, Senegal, Togo.

These countries (all members of WAEMU) incorporate similar provisions in their primary legislation, although there are some minor differences between countries. The provision below is taken, as an example, from Benin's legislation, General Tax Code, 2014.

Article 37. *'To establish the income tax or the corporation tax owed by enterprises that are managed by or that manage enterprises outside of Benin, profits transferred indirectly to the latter, either by increasing or reducing the purchase or sale prices, or by another means, shall be included in the earnings shown in the accounts.'*

It can be seen that **Cape Verde**, **Ghana, Liberia, Nigeria and Sierra Leone** all explicitly adopt the arm's length principle in their legislation, and provide for adjustments to profits in cases where the taxable income is not computed in line with that principle.

Ghana, Nigeria and Sierra Leone explicitly require taxpayers to compute their taxable income in accordance with the arm's length principle. By contrast, **Cape Verde's** rules appear to require the actual controlled transactions to be conducted using arm's length pricing. However, the rules also require taxpayers to make tax return adjustments when arm's length prices are not in fact used in actual transactions.

The legislation of the **WAEMU countries** requires adjustments to be made in the event of an 'indirect transfer of profit', but there is no explicit mention of the arm's length principle, although it could be argued that this is implied in the wording. Senegal is developing regulations that explicitly interpret such language in terms of the 'arm's length principle'.

3.1.2 Transfer Pricing Methods and the Principle of Comparability

At the present time, **Cape Verde, Ghana and Nigeria** are the only countries to have introduced details in their legislation or Regulations relating to comparability and comparability analyses (including a functional analysis), transfer pricing methods, and the choice of such methods, although **Liberia** and **Senegal** are in the process of developing detailed guidelines.

The box below describes how Cape Verde, Ghana and Nigeria rules specify the methods that may be used by taxpayers or the tax authority to establish and test whether transfer prices accord with the arm's length principle, and adopt and expand upon the principle of comparability.

ECOWAS Transfer Pricing Rules – Methods and Comparability

Cape Verde

Cape Verde's rules incorporate the principle of comparability and specify the methods that may be employed.

'To define the terms and conditions that would normally be agreed upon, accepted, or practiced between independent entities, the taxpayer must adopt the method or methods that are likely to ensure the highest degree of comparability between the transactions or series of transactions undertaken, and others that are substantially identical, in normal market situations, or, in the absence of special relations, specifically bearing in mind the characteristics of the goods, rights, or services, market position, economic and financial situation, business strategy, and other relevant characteristics of the taxpayers involved, the functions performed by them, or the assets used and the way risk is shared.' (Article 65.1. Corporate Income Tax Code)

Ghana's 2012 Regulations clearly apply the principle of comparability, and specify methods that may be used to establish arm's length pricing and test whether they accord with the arm's length principle**.**

Regulation 2(2) specifies that:

(*2) A transaction is conducted at arm's length between persons in a controlled relationship, if the terms of the transaction do not differ from the terms of a comparable transaction between independent persons.*

The regulation then goes on to specify the factors that should be taken into account in a comparability analysis.

Regulation 3 specifies the use of transfer pricing methods in accordance with those contained in the OECD Transfer Pricing Guidelines:

3. (1) For purposes of these Regulations, the transfer pricing methods approved by the Commissioner-General are

(a) the comparable uncontrolled price method;

(b) the resale price method;

(c) the cost-plus method;

(d) the transactional profit split method; and

(e) the transactional net margin method

The Regulation also specifies that another method may be used '*if the Commissioner-General is of the opinion that considering the nature of the transaction, the arm's length price cannot be determined by use of a method specified in sub-regulation (1)'.*

Ghana's Regulations include annex that describes each of the methods above in more detail.

Nigeria's Transfer Pricing Regulations also specifies the same methods and allows the use of another method *'which may be prescribed by regulations made by the Service from time to time.'*

The Regulations also adopt the principle of comparability, and specify the factors that should be taken into account in in conducting a comparability analysis. Regulation 9 states:

An uncontrolled transaction is comparable to a controlled transaction within the meaning of this regulation –

(a) where there are no significant differences between the uncontrolled transaction and a controlled transaction under comparable circumstances which could materially affect the conditions being examined under the appropriate transfer pricing method; or

(b) where such differences exist, reasonably accurate adjustments are made in order to eliminate the effects of such differences, or reduce the effects of such differences, to the extent that all material differences are eliminated.

(4) In determining whether two or more transactions are comparable the following factors shall be considered to the extent that they are economically relevant to the facts and circumstances of the transactions –

(a) the characteristics of the goods, property or services transferred or supplied;

(b) the functions undertaken by the person entering into the transaction taking into account the assets used and risks assumed;

(c) the contractual terms of the transactions;

(d) the economic circumstances under which the transactions were undertaken; and

(e) the business strategies pursued by the connected taxable persons to the controlled transaction.

Nigeria's Regulations also go on to specify the factors to be considered in determining the most appropriate method.

As can be seen, **Cape Verde**, **Ghana and Nigeria** have firmly adopted internationally agreed methods and core principles. In fact, **Nigeria** explicitly states that Regulations are to be applied in accordance with the arm's length principle as described in treaties and the OECD Transfer Pricing Guidelines (see box below).

Nigeria Regulations to be applied in accordance with internationally agreed principles.

Regulation 11

'Subject to the provisions of regulation 12 of these Regulations, this regulation shall be applied in a manner consistent with –

(a) the arm's length principle in Article 9 of the UN and OECD Model Tax Conventions on Income and Capital for the time been in force; and

(b) the OECD Transfer Pricing Guidelines for Multi-national Enterprises and Tax Administrations approved by the Council of the OECD approved for publication on 22 July, 2010 .. .'

The Regulations go on to specify that Nigeria's laws and regulations prevail in any case in which there is an inconsistency between them and the international principles described above.

Sierra Leone explicitly adopts the arm's length principles in its law, and it could be argued that the adoption of the core principle of comparability is implied. This is not explicit, however.

Benin, Burkina Faso, Cote d'Ivoire, Guinea, Mali, Niger, Senegal and Togo, provide no explicit reference to comparability in their rules, nor do they specify transfer pricing methods. Their rules do, however, specify that, in some circumstances, taxable profits are to be computed by comparison to 'normally operated enterprises'. (see example below, taken from Mali's rules). There is no definition of what is

meant by 'normally operated enterprises', and there is some uncertainty about how this is to be interpreted.

> **Malian** rules specify that:
>
> *'In the absence of specific evidence to support the adjustments* [in relation to the indirect transfer of profit] *set forth in the previous paragraph, taxable profits shall be determined by comparison with those of similar normally operated enterprises.'*

Overall, **Cape Verde, Ghana and Nigeria** are the only countries which currently include explicit provisions on comparability and transfer pricing methods in their rules. **Liberia and Sierra Leone's** rules explicitly adopt the arm's length principle, and it is arguable that the principle of comparability is thus implied.

For other ECOWAS countries, there is considerable uncertainty about whether the principle of comparability, in line with internationally agreed standards, is adopted into the law.

The adoption of the arm's length principle, the principle of comparability and the specification of methods can be considered essential and core to elements of country transfer pricing rules. Without these, there remains some uncertainty about how transfer pricing rules are to be interpreted and applied. Typically, these can be included in country legislation or regulations. An alternative approach (which has been adopted by **Nigeria**) is to explicitly specify that the country rules are to be interpreted in line with the internationally accepted principles contained in OECD and UN model treaties, and the OECD Transfer Pricing Guidelines.

3.1.3 Scope of the rules

There are four aspects to the scope of transfer pricing rules:

i. The types of transactions included within the rules
ii. The relationship between the parties to the transactions ('related party' provisions')
iii. Whether they apply to purely domestic transactions as well as to cross-border transactions.
iv. Application to specific types of transactions

i) The types of transactions included within the rules

Transfer pricing rules typically include all types of transactions or commercial activity within their scope. Generally, the domestic rules of ECOWAS countries achieve this. The legislative options to achieve this are:

- specify a comprehensive list of types of transactions. This approach makes the extent of the reach of the rules clearer to taxpayers. This approach is illustrated in the box below by that taken by **Nigeria. Ghana** takes a similar approach and uses similar wording. Both countries include a 'catch all' clause – (g) in the example below.

- specify a very broad 'catch all' definition of the term 'transaction'. This approach is illustrated below by the extract from **Sierra Leone's** rules. **Cape Verde** takes a similar approach, but specifies certain types of transactions and also includes the notion of 'series of transactions'.

Country legislation on this varies, but, typically, it is designed to catch within scope any kind of commercial arrangement, including verbal arrangements, no matter whether or not they are legally enforceable.

Liberia's transfer pricing rules (Section 211 LRC) take a transactional approach – referring to a 'transaction or arrangement between persons who are related persons'. The term transaction, however, is not defined.

Other than **Ghana, Liberia, Nigeria and Sierra Leone**, currently ECOWAS country rules do not take an explicit transactional approach, and thus do not define the term 'transaction' or equivalent.

It should be noted that transfer pricing rules nearly always include interest (and equivalent payments) in scope, but very rarely include the amount of any loan. For this reason, countries typically introduce separate measures to address excessive interest deductions arising from the amount of a loan, in addition to the pricing of a loan. This is discussed in Section B below.

Types of transactions included within the rules

Cape Verde

'In commercial transactions, including transactions or series of transactions involving goods, rights or services, and also in financial transactions …'

Nigeria

'Scope.

(1) These Regulations shall apply to transactions between connected taxable persons carried on in a manner not consistent with the arm's length principle and includes –

(a) sale and purchase of goods and services;

(b) sales, purchase or lease of tangible assets;

(c) transfer, purchase, licence or use of intangible assets;

(d) provision of services;

(e) lending or borrowing of money;

(f) manufacturing arrangement; and

(g) any transaction which may affect profit and loss or any other matter incidental to, connected with, or pertaining to the transactions referred to in (a) to (f) of this regulation.'

Sierra Leone

'(6) For the purpose of this section, "arrangement" means a transaction including a course of conduct, dealing or understanding, whether expressed or implied, whether or not enforceable by legal proceedings and whether unilateral or involving more than one person.'

ii) The relationship between the parties to the transactions ('related party' provisions)

Transfer pricing rules apply to transactions between associated enterprises (or related persons). It is thus necessary for transfer pricing rules to specify what is meant by this. Internationally accepted rules (including those in treaties) define two enterprises to be associated where:

- one enterprise participates directly or indirectly in the management, control or capital of the other, or
- the same persons participate directly or indirectly in the management, control or capital of both enterprises.

In the corporate context this intended to ensure that companies that are members of the same 'group' (including direct or indirect parent, subsidiary and sister companies) are considered to be related, so that transactions between them fall within the scope of the transfer pricing rules.

ECOWAS countries achieve this is a number of ways:

- **Guinea's** rules, for example, explicitly adopt the approach above, and defines and specifies that one enterprise controls the other if one 'holds, directly or through an intermediary, the majority of the other company's capital stock or exercises decision-making powers in this company'. (See extract in box below). **Liberia's** rules (also included in the box below) take a similar approach, defining 'control' as holding 50% or more of income, distribution or voting rights.
- **Ghana's** regulations use the term 'controlled relationship' to define the scope of the rules. In this case 'controlled relationship' is fairly widely defined, to include (in specified circumstances) the relationship is able to influence the transfer price set in a transaction. (See extract in box below).
- **Ghana's** rules potentially apply to individuals as well as to companies. For example, in situations where one enterprise owned by an individual transacts with an enterprise owned by a relative. Also, the rules would include in scope a loan by an individual to a company that individual controls.

Most other ECOWAS take the approach illustrated in the box below by **Cote d'Ivoire** (although there are variations between countries.) These rules are fairly straightforward and appear to apply to corporate relations only. They aim to establish a control relationship between a local enterprise, its parent, subsidiaries and sister companies. There appears to be no definition of the term 'managed' so there is some uncertainty about whether the rules would apply to a less than 50% shareholding relationship.

Some countries include within the scope of their transfer pricing rules all transactions between a local taxpayer and an enterprise in a low tax jurisdiction, irrespective of whether other control criteria are fulfilled. In ECOWAS, **Cape Verde**, **Guinea** and **Senegal** appear to be the only countries that uses this approach (see extract from legislation in the box below, which includes a definition of a low tax regime for these purposes). **Senegal** extends the treatment to countries that are deemed to be 'non-cooperative', defined as 'states and territories which do not comply with international standards on transparency and the exchange of information for tax purposes, so as to further the administrative assistance needed to implement tax legislation of Senegal'. (Article 18 (4) General Tax Code 2013).

Senegal extends the concept further by applying specific rules to payments in respect of interest, intangibles and services to persons established in a territory outside Senegal and subject to a favorable tax regime, or in a non-cooperative country. Such expenses are only accepted as deductible charges for the determination of taxes if the debtor provides evidence that the expenditure in question 'relates to genuine transactions and is not of an abnormal or exaggerated nature'. (Article 18 (1) General Tax Code 2013).

A further issue to be considered is whether to adopt transfer pricing rules for the purpose of determining the attribution of profit to a permanent establishment. Many countries do this – an example (from **Ghana's** transfer pricing regulations) is contained in the box below. This makes sense, given that the arm's length principle applies to the attribution of a profit to a permanent establishment. Where countries adopt this approach, it is generally necessary to recognize that, when a permanent establishment engages in commercial relationship with other parts of the enterprise (such as other parts of a company), this is not a transactions between two persons – rather, it is relationship within the same person (such as a company). For that reason, when transfer pricing rules are employed in the attribution of profit to a permanent establishment:

- it is useful to refer to a 'dealing' between the permanent establishment and the rest of the enterprise
- and it is useful also to deem the permanent establishment to be a separate enterprise for this purpose.

Nigeria's transfer pricing regulations uses the following approach with regards to permanent establishments:

'For purposes of applying these Regulations, Permanent Establishments (—PE) are treated as separate entities, and any transaction between a Permanent Establishment (—PE) and its head office or other connected taxable persons shall be considered to be a controlled transaction.' (Regulation 3 (2))'.

'Related party' provisions

Guinea

Article 97 B: Two enterprises are deemed to be affiliated: If one enterprise holds, directly or through an intermediary, the majority of the other company's capital stock or exercises decision-making

powers in this company, or if both enterprises are placed under the control of a same third-party enterprise, under the conditions defined above.

Ghana (Extract from 2012 Regulations)

'(1) These Regulations apply to

(a) a transaction between persons who are in a controlled relationship;

(b)dealings between a permanent establishment and its head office;

(c) dealings between a permanent establishment and other related branches of that permanent establishment;

(d) a transaction between a taxpayer and another taxpayer who are in a controlled relationship; and

(e) a transaction between a taxpayer and another taxpayer who are in an employment relationship'.

"Controlled relationship" means a relationship between one person and another person by the terms of which, the relationship is able to influence the transfer price set in a transaction, and in which that other person is

(a) an associate of the first person;

(b) a relative of the first person;

(c) a person in a trust relationship with that first person;

(d) a person who is in a partnership relationship with that first person;

(e) a holding company, a subsidiary or a subsidiary of a holding company to which that first person is a subsidiary;

(f) a member of a closed corporation together with that first person; and

(g) a relative of a person who is member of a closed corporation together with that first person.

Liberia

S208 '(4) a person who is a legal person and—

(A) a person who, either alone or together with a related person or related persons under another application of this Section, controls or may benefit from fifty per cent or more of the rights to income

or capital or voting power of the legal person, as the case requires, either directly or through one or more interposed legal persons; or

(B) a person who, under another application of this Section, is a related person of a person to whom subparagraph (A) applies.'

Cote d'Ivoire

Art. 38 - *'To establish the tax on industrial and commercial profits owed by enterprises managed by or that manage enterprises located outside of Côte d'Ivoire, profits indirectly transferred to the latter, whether by increasing or reducing the purchase or sales price or by any other means, shall be incorporated into the earnings. The same applies to enterprises that are managed by an enterprise or group that also manages enterprises located outside of Côte d'Ivoire.'*

Guinea

Article 14/ To re-establish their profit or corporation tax, enterprises established in Guinea, in accordance with Article 117-A of this Code, shall reincorporate the following into their taxable profits …

… - profits indirectly transferred, by an increase or reduction of the purchase or sales price or by any other means, to enterprises located in a foreign country with a preferential tax system.

Enterprises are deemed to be established in a country with a preferential tax system if they are subject, in this country, to corporation or income taxes, the amount of which is more than 50 percent less than the amount of the corporation or income taxes for which they would have been liable under ordinary law in Guinea, had they been established in Guinea, in accordance with Article 117-A of this Code.

Senegal (Extracts from Articles 17 and 18 General Tax Code 2013

Article 17 (2.) The condition of dependency or control is not required when the transfer is made to enterprises established in a foreign State or in a territory located outside Senegal which has a favourable tax regime, or in a non-cooperative country within the meaning of Article 18.

Article 18 (3). Persons are deemed to be subject to a favourable tax regime in the State or territory in question if they are not taxable there or if they are they are subject there to taxes on profits or income the amount of which is less than half of the taxes on profits or income to which they would have been liable under common law in Senegal, had they been domiciled or established in Senegal.

iii) Whether they apply to purely domestic transactions as well as to cross-border transactions.

As discussed earlier, purely domestic transactions between two resident taxpayers have the potential for tax loss through transfer pricing. For this reason, some countries apply their transfer pricing rules to such rules.

Within ECOWAS, **Cape Verde**, **Ghana, Liberia, Nigeria and Sierra Leone** apply their rules to domestic transactions as well as to cross-border transactions. Other countries, **Benin, Burkina Faso, Cote d'Ivoire, Guinea, Mali, Niger, Senegal and Togo,** apply their rules only to transactions that are cross-border. The extract from Togo's legislation in the box below illustrates the legislative approach taken by a number of countries to achieve this.

Application of rules only to cross-border transactions.

Togo

'*Art. 112 - To establish the corporation tax owed by enterprises that are managed by or that manage enterprises located outside of Togo, profits transferred indirectly to the latter, either by increasing or reducing the purchase or sale prices, or by any other means, shall be incorporated into the earnings shown in the accounts. The same applies to enterprises that are managed by an enterprise or group that also manages enterprises located outside of Togo.*'

A key policy issue to consider is whether the costs incurred by taxpayers and tax authorities in relation to domestic transfer pricing is proportional to the risk of tax loss. Where transfer pricing rules are applied to purely domestic transactions it is likely that smaller businesses will fall within scope, as will transactions between taxpayers subject to the same rate of tax. In such cases, it may make sense to limit the scope of the rules (in relation to domestic transactions) to include only larger taxpayers, or only transactions between taxpayers subject to different tax treatment.

iv) Application to specific types of transactions

Some countries specify specific in their regulations how the transfer pricing rules apply to specific types of transactions – typically those involving services and intangibles, which are have specific coverage in the OECD Transfer Pricing Guidelines. Revised guidance on these have been issued by the OECD in 2015, under the BEPS initiative (Action 8-10).

Within ECOWAS, **Ghana** has developed specific regulations on these (reproduced in the box below for information.). **Cape Verde** has also developed rules that apply specifically to services and cost contribution arrangements.

As mentioned above, revised guidance on both intangibles and services has been issued by the OECD, and countries wishing to update or revise their legislation on these issues will want to take that guidance into account.

Ghana Regulations on Services and Intangibles.

'Services between persons in a controlled relation

5. (1) The Commissioner-General shall consider a service charge between persons in a controlled relationship to be consistent with the arm's length principle, if

(a) the charge is for a service that is actually rendered,

(b) the service provides economic or commercial value to the recipient of the service, and

(c) an independent person in a comparable circumstance will pay that charge for the service.

(2) A charge for a service paid by a person to another person who is in a controlled relationship with that person is not consistent with the arm's length principle, if it is paid by that person

(a) for a service specified in subregulation (3), and

(b) because of the ownership interest of the shareholder of the person in one or more of the companies in the group

(3) The service referred to in subregulation (2) (a), includes

(a) a service rendered in relation to the juridical structure of the parent company of the person, for example meetings of shareholders of the parent company, issuing of shares in the parent company and costs of the supervisory board of the parent company;

(b) a service rendered in relation to reporting requirements of the parent company of the person, including the consolidation of reports; and

(c) a service rendered in relation to the raising of funds for the acquisition of participation, except where the participation is directly or indirectly acquired by the person and the acquisition benefits the person or is expected to benefit the person.

(4) Subject to these Regulations, where it is possible for the Commissioner-General or a taxpayer to identify

(a) specific services rendered by the taxpayer to other persons with whom that taxpayer is in a controlled relationship, or

(b) specific services rendered to the taxpayer by other persons with whom the taxpayer is in a controlled relationship the Commissioner-General shall determine whether the charge for each service rendered is consistent with the arm's length principle.

(5) The Commissioner-General shall use a reasonable allocation criterion to allocate among the persons in a controlled relationship, the total charge for a service rendered by a person to other persons in the controlled relationship, where the Commissioner-General cannot identify the specific service rendered to each of the persons in the controlled relationship.

(6) For purposes of subregulation (5), an allocation criteria is reasonable if it is based on a variable that

(a) takes into account

(i) the nature of the services;

(ii) the circumstances under which the services are provided; and

(iii) the benefit derived or expected to be derived by the persons in the controlled relationship, from the service;

(b) relates exclusively to a transaction between independent persons, and allows cost to be shared at arm's length; or

(c) is capable of being measured in a reasonably reliable manner'

Transactions involving intangible property.

6. (1) In respect of a transaction that involves an intangible property, the Commissioner-General shall, in determining the arm's length conditions between persons who are in a controlled relationship, take into account

(a) the perspective of both the transferor of the property and the transferee, including the price a comparable independent person will pay for the transfer of that property, and

(b) the usefulness of that intangible property to the business of the transferee.

(2) The Commissioner-General shall in applying the comparability principle to a transaction, consider special factors relevant to the comparable transaction, including

(a) the benefit expected from the intangible property;

(b) any geographical limitation on the exercise of a right to the intangible property;

(c) the character of the right transferred, whether exclusive or non-exclusive; and

(d) Whether the transferee has a right to participate in a further development made by the transferor to the intangible property.

TRANSFER PRICING RULES IN ECOWAS COUNTRIES

The table below outlines how ECOWAS countries employ primary and secondary legislation to introduce their transfer pricing rules into law. It also identifies those countries that have issued explanatory note.

The boxes summaries the key issues covered in the respective law or regulation.

COUNTRY	PRIMARY LEGISLATION	SECONDARY LEGISLATION	GUIDANCE
Benin	Obligation on taxpayer, and authority of tax administration, to make adjustments in case of 'indirect transfer of profits' to related parties. Right of tax authority to request documents.		
Burkina Faso	Obligation on taxpayer, and authority of tax administration, to make adjustments in case of 'indirect transfer of profits' to related parties. Right of tax authority to request documents.		
Cape Verde	Arm's length principle, comparability, transfer pricing methods, obligation on taxpayer to make an adjustment, definition of related parties, requirement to submit information with tax return.	***Official Order on Transfer Pricing*** Arm's length principle, adjustments, selection of method, comparability, methods, cost-sharing agreements, services, documentation.	
Cote d'Ivoire	Obligation on taxpayer, and authority of tax administration, to make adjustments in case of 'indirect transfer of profits' to related parties.		
Ghana	Requires that taxable income is calculated in accordance with arm's length principle. Defines 'arm's length'	**2012 TP Regulations** TP methods, and selection of methods	**Practice Note** Measures to eliminate double taxation.

	Authorizes GRA to make adjustments.	Services, Intangibles Documentation Penalties.	Comparability. Services. TP Methods (including examples)
Guinea	Obligation on taxpayer, and authority of tax administration, to make adjustments in case of 'indirect transfer of profits' to affiliated enterprises or to enterprises located in a preferential tax regime. Definition of related parties, requirement to provide documentation, authority of tax administration to request documentation and information		
Liberia	Introduction of arm's length principle. Authority of tax administration to make adjustments	***Draft Regulations (in Consultation)*** arm's length principle, comparability, methods, arm's length range, documentation, penalties	**LRA is planning to introduce a Practice Note**
Mali	Obligation on taxpayer, and authority of tax administration, to make adjustments in case of 'indirect transfer of profits' to related parties.		
Niger	Obligation on taxpayer, and authority of tax administration, to make adjustments in case of 'indirect transfer of profits' to related parties.		
Nigeria	Authority of tax administration to make adjustments in cases where there is a loss of tax due to non-arm's length pricing	***2012 Regulations*** Requirement on taxpayers to calculate taxable profit in accordance with arm's length principle.	Guidelines for completing TP Declaration Form Guidelines for filing TP Returns

		Arm's length principle, methods, comparability, documentation, definition of related parties, penalties.	'Frequently Asked Questions on Transfer Pricing'
Senegal	Obligation on taxpayer, and authority of tax administration, to make adjustments in case of 'indirect transfer of profits'. Definition of related parties Documentation requirements	***Administrative instrument (in draft)*** Arm's length principle, definition of controlled transactions, comparability analysis, transfer pricing method, comparability, documentation, APAs, eliminating double taxation.	
Sierra Leone	Definition of arm's length standard Requirement to calculate taxable profit in line with ALP Authorization to make adjustments APAs		
Togo	Obligation on taxpayer, and authority of tax administration, to make adjustments in case of 'indirect transfer of profits'.		

3.2 RULES TO ADDRESS EXCESSIVE DEDUCTIONS OF INTEREST

Although this report focuses on transfer pricing, in the audit context it is difficult to ignore other international taxation issues. This is because audit reviews of MNEs frequently need to consider issues such as interest deductions, permanent establishments, residence, controlled foreign companies (CFCs) and treaty issues, in addition to transfer pricing.

Many countries throughout the world have introduced specific rules to limit the amount of interest that may be deducted in order to determine taxable profits. This recognizes that interest-bearing debt is a relatively simple tool for multinational enterprises to shift profit between tax jurisdictions. It also recognizes that transfer pricing rules are often able only to address excessive interest deductions arising from excessive rates of interest, but not excessive interest deductibility arising from an excessive amount of debt.

The potential for excessive interest deductibility as a profit shifting risk has been recognized in the OECD/G20 BEPS project (Action 4), which has recommended a best practice approach to regulating interest deductibility.

OECD best practice approach – summary

The OECD's, 'best practice approach' includes a number of elements (although there is room for variation). The main elements are:

- A restriction on the deductibility of interest expense in excess of a stipulated net interest/EBITDA ratio.
- For these purposes, net interest is interest expenses, less interest income. Interest includes items equivalent to interest.
- EBITDA (earnings before interest, taxation, depreciation and amortisation) should be based on tax figures, so that non-taxable income (such as exempt branch income or dividends) should be excluded
- A recommendation that the net interest/EBITDA ratio falls within a corridor of 10-30%.
- This is supplemented by a 'group ratio' which would apply to an entity whose interest expense is above that which would be deductible by reference to the country stipulated ratio, but is a member of a group with a higher group-wide net interest/EBITDA ratio. Such entities would be allowed to deduct interest up to the net interest/EBITDA ratio of the world-wide group.
- A carry-forward of disallowed interest (or unused interest capacity)
- A de-minimis provision that would exempt entities with a low net interest expense from the rules.

Within ECOWAS, a number of countries have introduced specific interest-deductibility rules.

Three countries have existing rules that broadly follow the OECD/G20 BEPS approach summarized above. These are Cape Verde, Guinea and Sierra Leone.

Cape Verde's rules (main provisions copied in the box below) combine the EBITDA approach with an overall absolute limit to borrowing expenses. These rules also provide a fairly generous carryforward of disallowed interest, or unused interest capacity, for seven years.

Guinea combines an 'income ratio' approach with a 'thin capitalization' approach (in this case employing a 1.5/1 debt equity ratio). In this case, rather than employ an EBITDA approach, the limit on interest deductibility is based on a percentage (in this case 25%) of net income before interest deduction. (See text in box below).

Sierra Leone employs a measure similar to that of Guinea, but employs a limit of the sum of 50% of chargeable income before interest, and interest receipts. Non-deductible interest from one year may be carried forward to the next year. (Section 35 CITA)

Cape Verde (Article 68)

1. Net borrowing expenses are deductible up to the higher of the following limits:
    a. 330,000,000$00 (three hundred and thirty million escudos); or
    b. 30 percent of income before depreciation, net borrowing expenses, and taxes.
2. Net borrowing expenses that are not deductible under the terms of the foregoing paragraph may also be considered when assessing taxable profit in one or more of the seven subsequent taxation periods, along with the financial expenses of that same period, subject to the limitations specified in the foregoing paragraph.
3. Whenever the amount of borrowing expenses deducted is less than 30 percent of earnings before depreciation, net borrowing expenses and taxes, the unused portion of that limit is added to the maximum deductible amount, under the terms of the same provision, in each of the seven subsequent fiscal years, until it has been fully absorbed.

Guinea Article 97A

A company subject to corporation tax is considered to be undercapitalized when the advances made by affiliated enterprises …. to this company exceed, at any time during its fiscal year, by one and a half times the value of its equity capital at the end of this fiscal year.

The portion of the interest paid, which exceeds the sum of:

- the interest received from affiliated enterprises; and
- twenty-five percent (25%) of its taxable profits previously increased by the amount from the deductions for interest paid to the affiliated enterprises, shall be reincorporated into the taxable profits of this undercapitalized company.

Ghana has enacted 'thin capitalisation' rules, employing a 3:1 debt/equity ratio. (See box below). Otherwise, we are not aware of comprehensive 'thin capitalisation' rules in ECOWAS countries – that is, rules that impose a limit on interest deductibility by reference to a debt/equity ratio. Nevertheless, two counties appear to have legal support for such an approach.

Senegal's general transfer pricing provision (Article 17) refers to 'profits indirectly transferred to the latter by either increasing or decreasing purchase or selling prices, <u>by thin capitalisation</u>, or by any other means, will be incorporated into the results reported in their accounts.' This appears to support

a denial of interest deductibility by reference to a debt/equity ratio. We have not identified any further rule that expands on this – for example, specifying how a company is determined to be thinly capitalized. We understand that Senegal is considering introducing specific rules to address interest deductibility.

Similarly, **Sierra Leone's** primary legislation (Section 95(4) (a) CITA) provides the Commissioner-General with the authority to 'recharacterise an arrangement made between associated persons, including re-characterising debt finance as equity finance'. We assume that this applies in circumstances where debt is in substance equity (although we have been unable to confirm this). We assume that, where this provision is applied, interest on any such debt would be disallowable for tax purposes.

Ghana, Income Tax Bill, 2015

33. (1) Where a resident entity which is not a financial institution and in which fifty percent or more of the underlying ownership or control is held by an exempt person either alone or together with an associate has a debt-to- equity ratio in excess of 3-to-1 at any time during a basis period, a deduction is disallowed for any interest paid or foreign currency exchange loss incurred by that entity during that period on that part of the debt which exceeds the 3-to1 ratio being a portion of the interest or loss otherwise deductible but for this subsection.

3.3 Documentation

This section considers the provisions in place in ECOWAS countries for requiring taxpayers to submit information to tax authorities relevant to risk assessment, case selection and audit. It considers**:** a) documentation; b) information schedules; c) international exchange of information.

3.3.1 Documentation - basic requirements.

Many countries that adopt transfer pricing rules include in those rules a requirement for taxpayers to maintain documentation of their related party transactions and of their reasons for considering the terms (including pricing) of those transactions fulfil the arm's length standard. The objectives of such requirements are typically:

1. to ensure that taxpayers give appropriate consideration to transfer pricing requirements in establishing prices and other conditions for transactions between associated enterprises and in reporting the income derived from such transactions in their tax returns;
2. to provide tax administrations with the information necessary to conduct an informed transfer pricing risk assessment; and
3. to provide tax administrations with useful information to employ in conducting an appropriately thorough audit of the transfer pricing practices of entities subject to tax in their jurisdiction, although it may be necessary to supplement the documentation with additional information as the audit progresses.

[OECD – October 2015]

The approach to transfer pricing documentation varies considerably between ECOWAS countries. We have seen specific transfer pricing documentation requirements in the rules of Burkina Faso, Cote d'Ivoire, Ghana, Guinea, Nigeria and Senegal and we understand that other countries (including Cape Verde and Liberia) are in the process of developing such requirements. We have not seen similar requirements in rules of other ECOWAS countries. However, it is possible that general record-keeping and documentation requirements may be employed in respect of transfer pricing, even if there are no specific requirements.

There are a number of aspects to this.

a. What documentation are taxpayers required to keep? There

are two regulatory options.

The first is to specify general criteria concerning the purpose and objectives of the documentation, without specifying particular documents or items of information. This approach is employed by **Guinea and Nigeria**, illustrated in the box below. Under this approach, responsibility is left to the taxpayer to decide the specific documentation and information that should be kept in order to fulfil the requirements. This approach provides some flexibility and allows taxpayers to create and maintain only the documentation they consider necessary in their circumstances.

Guinea

'….. [specified taxpayers] *shall provide the authorities with documentation to justify their transfer pricing policy used for transactions of any kind with affiliated enterprises located outside of Guinea.'*

Nigeria

'1) A connected taxable person shall record, in writing or on any other electronic device or medium, sufficient information or data with an analysis of such information and data to verify that the pricing of controlled transactions is consistent with the arm's length principle and the connected taxable person shall make such information available to the Service upon written request by the Service'.

Other countries specify a list of documents that are required to be maintained. Within ECOWAS, **Cape Verde (in draft regulations), Ghana** and **Senegal** take this approach. Ghana's 2011 Regulations specify the general rule (copied in the below), and a separate Practice Note lists the documents that should be maintained (copied in the box below). This approach provides the taxpayer with some certainty on how to ensure compliance with the rules, but may also be considered inflexible, and creates a risk that some taxpayers create unnecessary documents that are not relevant to their individual circumstances. **Senegal** provides a comprehensive list in its primary legislation (reproduced below).

Burkina Faso, Benin, and Cote d'Ivoire include a list of documents and information that the tax authority may ask for during the course of an audit, but the request may be made only if the tax authority has already gathered evidence of transfer pricing abuse. Although this list may provide an indication to taxpayers of the sort of information they may be required to submit in the event of an audit, this does not appear to amount to a requirement for taxpayers to maintain documentation at any point of time before a request. This approach is unusual in that the tax authority is able to ask for

documentation only if it has ‘gathered evidence indicating that an enterprise has performed an indirect transfer of profits’. If the documentation is not available to the tax authority prior to that, then the tax authority may be hindered in gathering the requisite evidence. (See extract from Burkina Faso rules in box below).

Ghana

7. (1) A person who engages in a transaction with another person with whom that person has a controlled relationship shall maintain contemporaneous documentation of the transactions engaged in by that person for each tax year. [Regulation 7(1) 2011 Regulations]

Extract from Ghana **Practice Note**:

These include

- a. *A general description of the organisational, legal, and operational structure of the group of associated enterprises of which the taxpayer is a member, as well as any relevant change therein during the taxable period.*
- b. *The group's financial report or equivalent annual report for the most recent accounting period.*
- c. *A description of the group's policy in the area of transfer prices, if any.*
- d. *A general description of the nature and value of the controlled transactions in which the taxpayer is involved or which have an effect on the income of the taxpayer.*
- e. *A description of the functions, assets and risks of group companies to the extent that they affect or are affected by the controlled transactions carried out by the taxpayer, including any change compared to the preceding period.*

With respect to each material controlled transaction carried out by the taxpayer,

- a. *A description of the transfer pricing method used by the taxpayer to demonstrate that the prices and other financial indicators associated with the transaction satisfy the requirements of the arm's length principle and a description of why such methods are the most appropriate transfer pricing methods within the meaning of Regulation 3 of Transfer Pricing Regulation 2012 (LI 2188).*
- b. *A comparability analysis supporting the taxpayer's application of the most appropriate transfer pricing method prepared in accordance with the provisions of Section 3.*
- c. *Financial data showing the results of controlled transactions sufficient to demonstrate the taxpayer's compliance with Section 1 applying the most appropriate transfer pricing method within the meaning of Section 4, paragraph 1.*

Burkina Faso *(Article 1085 M.L.F. 2013)*

When, during the course of an account audit, the authorities have gathered evidence indicating that an enterprise has performed an indirect transfer of profits, within the meaning of the provisions of Article 82 on corporation taxes, they can request from this enterprise information and documents specifying the following:

1. *The nature of the relationships under the provisions of Article 82 cited above, between this enterprise and one or several enterprises operated outside of Burkina Faso or companies or groups established outside of Burkina Faso;*

2. *The method used to determine the prices of transactions of an industrial, commercial, or financial nature conducted with the enterprises, companies, or groups referred to in 1 and the supporting evidence as well as the agreed compensation, if any;*
3. *The activities carried out by the enterprises, companies, or groups referred to in 1, linked to the transactions referred to in 2;*
4. *The tax treatment of transactions referred to in 2 and carried out by the enterprises operated outside of Burkina Faso and by the companies or groups referred to in 1 for which it is, directly or indirectly, a majority shareholder or holds majority voting rights.*

The requested information referred to in paragraph 4 above shall be specific and state explicitly, by the nature of the activity or by the product, the country or territory concerned, the enterprise, the company, or the group referred to as well as the amounts involved, if any.

Senegal (Article 638 II, General Tax Code)

1. *general information on the group of associated companies and in particular:*

    - *a general description of the exercised activity , including any changes that have taken place in the course of the financial years audited;*
    - *a general description of the legal and operational structures of the group of associated enterprises, including identification of the associated enterprises in the group undertaking controlled transactions;*
    - *a general description of the functions performed and risks assumed by the associated enterprises insofar as they affect the audited enterprise;*
    - *a list of the main intangible assets held, in particular patents, trademarks, trade names and know-how, in relation to the audited enterprise;*
    - *a general description of the group's transfer pricing policy;*

2. *information relating specifically to the audited enterprise, in particular:*

    a. *a description of the activity undertaken, including any changes that have taken place in the course of the financial years audited;*
    b. *a description of the transactions undertaken with other associated enterprises, including the nature and amount of flows, including royalties;*
    c. *a list of cost contribution arrangements as well as a copy of advance pricing arrangements and transfer pricing adjustments that affect the results of the audited enterprise;*
    d. *a presentation of the method or methods used to determine the transfer price in conformity with the arm's length principle, including an analysis of the functions performed, assets used and risks assumed, as well as an explanation regarding the selection and application of the chosen method or methods;*
    e. *when required by the method chosen, an analysis of elements of comparability deemed to be relevant by the enterprise.*

Senegal has also adopted a supplementary documentation provision applying to transactions associates enterprises in a non-co-operative state or in a favorable tax regime. In such cases additional documentation is required to include 'all the documents that companies subject to corporate tax are required to produce, including the balance and profit and loss statement..'. (Article 639 General Tax Code).

b. When the documentation should be in place.

Nigeria's rules require relevant taxpayers to have their transfer pricing in place by the time that the relevant tax return is filed. (see extract from Nigeria's Transfer Pricing regulations below).

Ghana's regulations are less specific, and simply specify that documentation must be 'contemporaneous' (see exert from the 2011 Regulations above – '*shall maintain contemporaneous documentation of the transactions engaged in by that person for each tax year'.)*

Cape Verde's rules also require documentation to be in place at the time at which the transaction took place.

This approach may in practice be problematic, as many taxpayers will find it difficult to carry out a benchmarking exercise – and document that exercise and any adjustments made - before the end of the relevant tax period.

Other ECOWAS countries do not specify when documentation must be in place.

Nigeria *(5) The documentation referred to in sub-regulation (1) of this regulation shall be in place prior to the due date for filing the income tax return for the year in which the documented transactions occurred.*

c. When the documentation is to be submitted.

Most tax authorities specify that documentation should be submitted to the tax authority on request. This would normally be during the course of a risk assessment or an audit. This approach is taken by **Ghana, and Nigeria** (see examples in the box below).

As can be seen, **Ghana'**s Regulations speak of a 'request made by the Commissioner-General <u>in the course of the tax year'</u>.

The regulations of **Burkina Faso, Benin and Cote d'Ivoire** allow the tax authorities to require taxpayers to submit specified documents during the course of an audit. However, this authority is conditional upon the authorities having gathered evidence 'indicating that an enterprise has performed an indirect transfer of profits'. (See extracts in box below). As noted above, there does not appear to be a requirement in these cases for taxpayers to have documents in place before this time.

Ghana 'Regulation 7(6) *'that person shall <u>upon a request made by the Commissioner-General in the course of the tax year,</u> submit contemporaneous documentation regarding the transactions engaged in by that person in that tax year'*. **Nigeria** *'A connected taxable person shall record, in writing or on any other electronic device or medium, sufficient information or data with an analysis of such information and data to verify that the pricing of controlled transactions is consistent with the arm's length principle and the connected*

taxable person shall make such information available to the Service upon written request by the Service.'

Burkina Faso, Benin and Cote d'Ivoire (example wording)

'When, during the course of an account audit, the authorities have gathered evidence indicating that an enterprise has performed an indirect transfer of profits, within the meaning of the provisions of Article 82 on corporation taxes, they can request from this enterprise information and documents specifying the following….'

d. Mitigating the documentation compliance burden.

The creation and updating of transfer pricing documentation has the potential to be costly and time-consuming for taxpayers. For this reason, some countries take measures to ensure that costs of compiling documentation are not excessive, given the size, complexity and importance of the related-party transactions.

Within ECOWAS, **Ghana** includes a provision in the 2011 Transfer Pricing Regulations making it clear that there should be some proportionality between the amount, depth and complexity of documentation and the size, value and complexity of the documented transactions. (See extract in box below). **Nigeria** has a similar provision (see extract in box below).

Guinea requires transfer pricing documentation only from enterprises in Guinea that are above a certain size (in terms of turnover or assets on balance sheet, or that control, or are controlled by, companies of a certain size). Furthermore, documentation only of cross-border transactions are required. (See extract in box below). **Senegal** has a very similar provision in Article 638 (1) General Tax Code.

Cape Verde's draft regulations adopt the approach of requiring only specific categories of taxpayers to maintain comprehensive documentation. These include large taxpayers, those transacting with an entity in a privileged tax regime, and permanent establishments of non-resident entities.

Ghana

'The CG recognizes that compiling and maintaining transfer pricing documentation is potentially costly and burdensome for the taxpayer. The depth and complexity of analysis that taxpayers must undertake to support their transfer pricing, and the amount of documentation to be maintained, should not be out of proportion to the size, value and complexity of the transaction. For example, a relatively simple and low-value transaction between two related Ghanaian taxpayers subject to the same rate of tax may require relatively simple analysis and documentation. On the other hand, large value and/or complex cross-border related-party transactions will require in-depth documentation and analysis.'

Guinea

Article 13 *'Enterprises established in Guinea with annual sales, excluding taxes, or gross assets on the balance sheet exceeding GF 175,000,000,000;*

Or that hold or control directly or indirectly, at the closing of the fiscal year, more than half the capital or voting rights of an enterprise with annual sales, excluding taxes, or gross assets on the balance sheet exceeding GF 175,000,000,000;

Or that have more than half of their capital or voting rights held or controlled, directly or indirectly, at the closing of the fiscal year, by an enterprise with annual sales, excluding taxes, or assets on the balance sheet exceeding GF 175,000,000,000;

shall provide the authorities with ***documentation to justify their transfer pricing policy used for transactions of any kind with affiliated enterprises located outside of Guinea.'***

Nigeria

(3) The documentation referred to in this regulation must be prepared taking into account the complexity and volume of transactions

3.3.2 Information schedules

Many countries that have adopted transfer pricing rules require taxpayers to submit a transfer pricing information schedule, normally on an annual basis. This type of requirement typically differs from documentation requirements described above in that:

- Information schedules are normally required to be submitted annually, often with the income or corporate tax return, whereas transfer pricing documentation is normally required to be submitted only on request.
- Information schedules normally require only summary information about the value and nature of related party transactions, and the relevant related parties to the transactions
- They are designed for use in screening cases for risk assessment and case selection purposes.

Within ECOWAS, such schedules have been introduced by **Ghana, Nigeria and Liberia**, and copies are included in Annex 1, 2, 3. The legislation introducing these schedules is copied into the box below.

Nigeria utilizes two forms. The first is the Transfer Pricing Declaration Form, which is required to be included in the first Transfer Pricing return and updated in future years only where there are material changes. The Transfer Pricing Disclosure Form, on the other hand, is to be completed annually with the annual tax returns whether or not there are transactions between connected entities. This form is used to make a disclosure of transactions that are carried out by a taxable person with a connected person, and shows details of inter-company transactions.

Nigeria provides guidance notes on making the annual transfer pricing returns.

Neither **Nigeria** nor **Ghana** impose specific penalties for failure to submit a transfer pricing schedule. In such cases, general penalty provisions apply.

Cape Verde *(*Article 66 Corporate Income Tax Code) requires the taxpayer to indicate whether there have been controlled transactions in the annual statement of accounting and tax information, and, if there have been any, to:

'a. *Identify the entities in question;*

b.　　Identify and declare the value of the transactions undertaken with each one;

c.　　State that, at the time at which the transactions took place, documentation on the transfer prices practiced was organized and is maintained'.

This approach provides less comprehensive information than a full transfer pricing return schedule, but does provide information useful for initial screening, and sub-paragraph c. also provides the taxpayer with an incentive to develop and keep documentation.

Ghana (Regulation 7, 2011 Regulations)

''7. (1) A person who engages in a transaction with another person with whom that person has a controlled relationship …

(2) That person shall for purposes of these Regulations file returns on income in accordance with section 72 of the Act.

(3) The form prescribed by the Commissioner-General for purposes of filing returns on income shall include a requirement to provide information …'

Nigeria (Regulation 6, 2012 Regulations)

(6) The TP Declaration Form as set out in the Schedule to these Regulations shall be appended to the tax return for the year to which it relates.

(11) For each year of assessment a connected taxable person shall, without notice or demand, make a disclosure on the TP Disclosure Form or on any other form as may be prescribed by the Service, details of transactions that are subject to these Regulations.'

3.3.3 International Exchange of Information

International exchange of information is important to enable tax authorities to share information needed in order to implement transfer pricing rules. Such information is shared using the following international instruments:

- Bilateral tax treaties
- Bilateral 'tax information exchange agreements' (TIEAs).
- Multilateral instruments (including the Multilateral Convention on Mutual Administrative Assistance), and regional instruments.

Although many ECOWAS countries have a strong treaty network, practical experience of exchange of information provisions is very mixed, with some countries reporting that they lack the administrative platform to implement the procedures, and others reporting experience of treaty partners not responding to requests.

The following countries are members of the Global Forum on Transparency and Exchange of Information: Burkina Faso, Cote d'Ivoire, Ghana, Liberia, Niger, Nigeria, and Senegal.

The following countries are signatories to the Multilateral Convention on Mutual Administrative Assistance: Ghana (2013), Nigeria (2015), and Senegal (signed 2016, not ratified at time of drafting this report).

3.4 Penalties

Countries that have introduced transfer pricing rules typically apply penalties for failure to comply with those rules. These often cover:

- Failure to create and maintain documentation
- Failure to submit documentation either at a specific time, or on request
- Failure to provide requested information during the course of an audit
- Failure to submit a transfer pricing information schedule
- Failure to make a complete return (including, in some cases, failure to include a transfer pricing information schedule that constitutes part of a return)
- The making of an incorrect return
- Specific penalties for fraud.

Practices vary between countries. Some countries introduce specific penalties for transfer pricing offences. Others rely on existing general penalty provisions. Some countries also provide guidance on application of these penalties.

No ECOWAS country has introduced specific penalties relating to transfer pricing offences, and all rely on general penalty provisions.

Ghana and Nigeria clarify in their respective regulations that general penalty provisions apply in respect of transfer pricing.

Ghana (Regulation 9, 2011 Regulations)

'9. (1) A tax due and unpaid as a result of an adjustment made by the Commissioner-General under regulation 8(4) is deemed to be an additional tax for purposes of section 79 of the Act.

(2) The provisions, of the Act on fraud, failure to file returns, penalty for under-payment of tax and offences, apply to these Regulations.'

Nigeria (Regulation 13, 2012 Regulations)

'13. A taxable person who contravenes any of the provisions of these Regulations shall be liable to a penalty as prescribed in the relevant provision of the applicable tax law.'

3.5 DISPUTE RESOLUTION

Transfer pricing disputes can be very difficult to resolve. This is because:

- The subject can be very complex
- The amounts of tax involved can be very large
- Transfer pricing is an 'inexact science', sometimes leaving room for differing interpretations
- An adjustment to profit can create a risk of double taxation.

The issue of resolving disputes is relevant in two arenas:

- Disputes between a taxpayer and a tax authority in the context of an audit (domestic disputes)
- Disputes between tax authorities arising from audits undertaken by one or more authorities (international disputes).

This sections also considers APAs, which are designed to avoid, as well as resolve transfer pricing disputes, in both the domestic and international contexts.

a. Domestic disputes

Some tax authorities have introduced specific procedures to aid the resolution of domestic disputes on transfer pricing. Within ECOWAS, we understand that Nigeria is the only country to have introduced such processes. Nigeria's approach is to set up a panel of senior officers within the tax administration to which taxpayers subject to a transfer pricing adjustment may refer. The panel is authorized to make a decision on the case. However, if the taxpayer does not agree with this decision, the normal judicial procedures may be used.

Nigeria

14. Dispute Resolution.

(1) The Service shall set up a Decision Review Panel (the Panel) for the purpose of resolving any dispute or controversy arising from the application of the provisions of these Regulations.

(2) The Panel, referred to in sub-regulation (1) of this regulation, shall comprise of–

(a) the Head of the Transfer Pricing Department of the Service; and

(b) two other employees of the Service who shall be at least of the rank of Deputy Director.

(3) A taxable person may, within thirty days of the receipt of the assessment on the adjustment refer the assessment to the Panel.

(4) The Panel shall in rendering a decision on a matter presented before it take into consideration–

(i) the adjustment or assessment issued;

(ii) the basis on which the adjustment or assessment was issued;

(iii) the taxable person's objection; and

(iv) the evidence presented to it by the parties.

(5) The Panel shall issue a formal adjustment or assessment –

(a) based on the decision rendered by it on a matter presented by the parties; or

(b) where taxable person fails to communicate its decision to refer the assessment or adjustment to the Panel within thirty days of the receipt by the taxable person of the assessment or adjustment.

(6) The decision of the Panel on any adjustment or assessment before it shall be final and conclusive without limiting the right of a taxpayer to refer the matter, where dissatisfied with the decision of the Panel to a court of competent jurisdiction.

b. International Disputes

International disputes arise between tax authorities where an MNE makes a claim in country, for a 'corresponding adjustment' in respect of a transfer pricing adjustment to profit made in the other country. Such claims are made under the terms of a Double Taxation Agreement (Treaty) between the two countries (and so are not relevant where there is no such agreement).

When a claim is made, the treaty partner will consider whether the adjustment is made in accordance with the arm's length principle. In some cases, this process can give rise to discussion and/or dispute between the treaty partners, which they will endeavor to resolve under the Mutual Agreement Procedure typically embodied in treaties.

Nigeria and Cape Verde are the only countries within ECOWAS that has embodied this process in its regulations (see extract in the box below). This is not strictly necessary – treaties typically override domestic law in any case and thus treaty partners are authorized (and required) to apply these provisions without specific domestic law (other than treaty implementation provisions). However, it does provide a clear signal that the tax authority will implement the terms of a treaty as envisaged.

Ghana describes this process in its 'Practice Note' but has not made specific provision in its transfer pricing law.

Cape Verde (Article 65 6. Tax Code)

'The Tax Administration may .. make the sequential adjustment [referred to in the foregoing paragraph] hen this arises from international conventions entered into by Cape Verde under the terms and conditions provided therein'.

Nigeria (Regulation 8, 2012 Regulations)

'Where –

(a) an adjustment is made to the taxation of a transaction or transactions of a connected taxable person by a competent authority of another country with which Nigeria has a Double Taxation Treaty; and

(b) the adjustment results in taxation in that other country of income or profits that are also taxable in Nigeria;

the Service may, upon request by the connected taxable person subject to tax in Nigeria, determine whether the adjustment is consistent with the arm's length principle and where it is determined to be consistent, the Service may make a corresponding adjustment to the amount of tax charged in Nigeria on the income so as to avoid double taxation.'

c. Advance Pricing Agreements

APAs are agreements between a tax authority and a taxpayer (and, in some cases, another tax authority) regarding the transfer pricing method to be used in respect of specified related-party transactions. APAs are normally made under the authority of specific rules in primary or secondary legislation, and, in the case of APAs involving an agreement between tax authorities, double taxation agreements.

Within ECOWAS, Liberia, Nigeria and Sierra Leone have introduced rules enabling APAs. As far as we are aware, Liberia is the only country to have entered into an APA to date. (Liberia has one APA currently in force). The main clauses of the enabling legislation are copied in the box below.

Liberia (Section 18 LRC)

(a) *General Rule. The term "advance pricing agreement" ("APA") means an agreement with the Government of Liberia establishing a transfer pricing methodology ("TPM") intended to reflect transactions between related parties as they would be if they had been between unrelated parties dealing at arm's length. If a person who has entered into an APA complies fully with its terms and conditions, the Ministry of Finance will not contest the application of the TPM to the subject matter of the APA.*

Nigeria (Regulation 7, 2012 Regulations)

(1) *A connected taxable person may request that the Service enter into an Advance Pricing Agreement (APA) to establish an appropriate set of criteria for determining whether the person has complied with the arm's length principle for certain future controlled transactions undertaken by the person over a fixed period of time provided that such agreement shall be consistent with the requirements established by this regulation.*

Sierra Leone (Section 168 (c))

168. (1) The Commissioner may, under procedures prescribed in paragraph 13 of the Ninth Schedule, issue to a taxpayer a private ruling setting out the Commissioner's position regarding the application of this Act to a transaction proposed by the taxpayer.

(2) Where the taxpayer has made a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling and the transaction proceeds in all material respects as described in the taxpayer's application for the ruling, the ruling shall be binding on the Commissioner and the taxpayer with respect to the law as it stood at the time of the ruling.

(3) A ruling issued under subsection (1) may–

….. (b) apply to multiple transactions, whether concluded in the same year or proposed to be concluded over a number of years; and

(c) take the form of an agreement with the taxpayer as to the appropriate pricing of the arrangement according to the arm's length standard under section 95.

The APA rules of Liberia and Nigeria provide some detail on their application. In both cases the approach is broadly in line with that described in the OECD Transfer Pricing Guidelines. The table below describes the main features of the two regimes.

Feature	**Liberia**	**Nigeria**
Details of information to be submitted with an application	No	Yes ((a) a description of the activities of the taxable person to be addressed by the Advance Pricing Agreement, including – (i) a detailed description of the controlled transactions to be included within the scope of the Advance Pricing Agreement; (ii) an analysis of functions to be performed, assets to be employed and risks to be assumed by the parties to the covered transactions; and (iii) the proposed duration of the Advance Pricing Agreement. (b) a proposal by the taxable person for the determination of the transfer prices for the transactions to be covered by the Advance Pricing Agreement, including the following information – (i) an analysis of the comparability factors; (ii) the selection of the most appropriate transfer pricing method to the circumstances

		of the controlled transactions; and (iii) the critical assumptions as to future events under which the determination is proposed. (c) the identification of any other country or countries that the person wishes to participate in the Advanced Pricing Agreement; (d) the cumulative amount resulting from the transaction in every year of assessment not less than N250,000,000.00 (two hundred and fifty million Naira) of a connected taxable person's total deductible costs or total taxable revenues; and (e) any other relevant information that the Service may require to complete its analysis of the Advance Pricing Agreement request.
Details of the content of an agreement.	Yes. (May include critical the related party transactions or transfers the agreement covers ("covered transactions"), the APA term, operational and compliance provisions, appropriate adjustments, critical assumptions regarding future events, mandatory recordkeeping, annual reporting responsibilities)	
Effect of an APA	Yes. LRA will not contest the application of the TP method to the covered transactions	Yes. No TP adjustment to be made in respect of covered transaction.
Bilateral APAs possible	(Not addressed)	Yes
Record keeping requirements	Yes	No (Not detailed, but implicit)
Limit on size of transactions to be covered by an APA	No	Yes. (Annual revenue or cost at least 250m Naira)

Circumstances requiring or allowing cancellation	No	Yes
Reference to international guidance	Yes, required to take OECD Guidelines and UN Manual into account in agreeing a method.	Yes, UN and OECD Model Tax Conventions, and OECD Guidelines.
Time limit		No more than three years to be covered in an APA

Chapter 4: Recommendations

This chapter provides an overview of the key features of country transfer pricing regimes in ECOWAS countries, and makes a number of suggestions for enhancing the effectiveness of the rules or improving the efficiency of their implementation.

4.1 Regulations and guidance

4.1.1 Primary and secondary legislation – core provisions

The overview contained in the previous chapter shows that all ECOWAS countries that we were able to contact have existing transfer pricing rules. There are considerable variances, however, between these rules, in respect of their age, scope, effectiveness and the extent to which they accord with internationally agreed principles.

A number of countries have comprehensive rules, achieved through a combination of primary and secondary legislation. These are: Cape Verde, Ghana, Nigeria, and Sierra Leone. Although we have provided these countries with detailed comments on their rules, we consider that they are broadly in line with international principles and likely to be effective in countering profit shifting by means of transfer pricing. Other countries, such as Liberia and Senegal, are in the process of modernizing and upgrading their rules.

Although there are some differences between them, the rules in place in the ECOWAS Francophone countries broadly follow the same approach, which we understand is based on wording contained in France's legislation. At least one country (Senegal) has supplemented this provision with detailed regulations. Countries that rely only on the basic provision, however, may find that there is uncertainty over their application that may give rise to a number of risks:

- the lack of clarity in the rules gives rise to a risk that taxpayers do not comply with them, and/or that the tax authority will be unable to enforce them. This gives rise to a tax revenue risk;
- taxpayers may be unsure of how the rules will be applied, and their obligations and responsibilities. This creates a risk of creating an unfavorable investment climate;
- taxpayers may also be concerned about the risk of double taxation arising from a mismatch between these rules and those generally applied by other countries. This, again, gives rise to a risk of creating an unfavorable investment climate;
- the lack of clarity in the rules also increase the risk of inconsistent application, or of corruption.

ECOWAS countries that have not enacted comprehensive transfer pricing rules may wish to consider updating them to bring them up to date with current international best practice, including the outcomes of the OECD/G20 BEPS project. As this affects a number of countries, those countries may wish to consider the merits of a coordinated approach, possibly using similar or the same wording. To this end, we attach in Annex 4 a 'template legislation' that might be used as a starting point.

4.1.2 Scope of rules – domestic transactions

The summary in Chapter 3 demonstrates that there is considerable variation between ECOWAS countries in the scope of their rules, and we have provided detailed comments on this issue to countries on a bilateral basis.

A key issue in this respect is the application of transfer pricing rules to purely domestic transactions between taxpayers resident in the same country. Some countries (Ghana, Liberia, Nigeria) apply their rules to such transactions in order to prevent profit shifting between domestic entities subject to different rates of tax. One issue arising from this is that such rules are likely to affect transactions between domestic entities subject to the same rate of tax, and which pose very limited risk of tax loss. This has the potential to create uncertainty of treatment, and additional compliance costs, to taxpayers that in reality pose very limited risk of tax loss.

We would suggest that countries that apply the rules to domestic transactions include a provision that exempts from the scope of transfer pricing rules transactions between two resident entities subject to the same rate of tax on their profits.

4.1.3 Scope of rules – smaller taxpayers and transactions

Some ECOWAS countries do not apply their rules to smaller taxpayers or to smaller transactions. This recognizes that compliance with transfer pricing rules can be costly for taxpayers, and enforcement of those rules employs scarce resources in tax administrations. For these reasons, it makes sense for countries that currently do include small entities under the scope of their TP rules, to exempt from the rules smaller taxpayers or smaller transactions, or to impose lower compliance burdens on such taxpayers (for example, by introducing lower documentation obligations).

4.1.4 Taxpayer obligations

A number of ECOWAS countries appear to require taxpayers to use arm's length pricing in their actual transactions. As noted in that Chapter, this could cause practical implementation issues for taxpayers.

This is because MNEs frequently assess the arm's length nature of their related-party transactions during the course of an accounting period, or even at the end of an accounting period, and then make pricing adjustments (which are reflected in the accounts) at intervals during the year, or at the end of the year. These sorts of adjustments are reflected in the accounts (which form the basis of the tax return), and are sometimes referred to as 'balancing adjustments' or 'true-up adjustments'. Most tax authorities consider such adjustments to be acceptable, provided that they result in an arm's length measure of profit.

In other cases, MNEs make an adjustment to the computation of income or profit to be subject to income tax. Such adjustments, which are normally acceptable to tax authorities, are made only in the tax computation – they are not reflected in accounts.

For this reason, we suggest that transfer pricing rules make it clearer that taxpayers are required to file (or return) a measure of taxable profit in line with arm's length principle, rather than use arm's length pricing in their actual transactions.

4.1.5 Ability of rules to address more complex transfer pricing issues

Multinational enterprises sometimes use complex business structures, and sophisticated tax planning techniques. These may involve using structures that shift risk and rights in intangibles to low tax jurisdictions. In exceptional circumstances, MNEs might engage in tax-motivated transactions that

otherwise make little or no commercial sense. It is important that transfer pricing rules are able to address these scenarios.

There is some uncertainty over whether all ECOWAS country transfer pricing rules are able to fully address these issues. A review should take the following into account:

- Rules should not be restricted to making adjustments based on price only. We suggest that they are able to enforce arm's length 'conditions' rather than simply 'price'. The term conditions suggests that the rules are able to consider whether a transaction would have taken place at all at arm's length under comparable circumstances.
- Rules could also make specific reference to the ability to disregard a transaction in specified circumstances. (See box below for updated guidance under the OECD/G20 BEPS initiative). Some countries are able to recharacterise or disregard a transaction under general anti-avoidance regulations.
- Some countries include specific provisions in their rules on risk and intangibles. (We have included illustrative wording in the 'Template Legislation' contained in Annex 4)
- Some countries refer to the OECD Transfer Pricing Guidelines in their rules, specifying that the rules are to be interpreted in accordance with the Guidelines (in cases where they do not contradict the specific provisions of the country law). Such an approach makes it clearer that the rules are intended to deal with issues such as intangibles, risk and disregarding a transaction, in a way envisaged in the Guidelines. Within the ECOWAS region, Nigeria's regulations take this approach.

The Report on **BEPS Actions 8-10** make the point that *'The transaction .. may be disregarded, and if appropriate, replaced by an alternative transaction, where the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner in comparable circumstances,*

thereby preventing determination of a price that would be acceptable to both of the parties

taking into account their respective perspectives and the options realistically available

to each of them at the time of entering into the transaction'

4.1.6 Distinction between 'arm's length range' and 'statistical techniques'

Some ECOWAS country transfer pricing rules make reference to the 'arm's length range', but do not fully clarify what this means in practice, and do not distinguish it from a 'statistical approach'. Country transfer pricing rules frequently make a distinction between these concepts.

The first – 'arm's length range' - is normally applicable where the comparability analysis identifies a number of comparables that are all reliable, and equally reliable. In this case the full range is normally adopted. It is often the case that such a range contains relatively few comparables (financial indicators), and the range is quite small.

The second - statistical approach - is normally applicable where the comparability analysis identifies a number of comparables, but there is some uncertainty about their relative reliability, due to information shortfalls. Such an approach is often relevant where a database search is used, and a relatively large number of comparables are identified. This approach frequently applies an 'interquartile range', and specifies that if the financial indicator of the tested transaction falls within

the range, no adjustment is needed. If it falls outside, an adjustment to somewhere within the range is required – often to the median or to an appropriate point. It should be noted that there is no international standard that specifies an 'inter-quartile range' although this is commonly seen.

Generally, certainty is enhanced if the method specifies that an adjustment to a point in the range should be to a 'median' or 'mid-point'. We have suggested a potential legislative approach in the illustrative transfer pricing rules in Annex 4.

There are a number of policy issues that need to be considered. The first arises from a concern expressed by some countries that an 'arm's length range' can be overly large. One way in which might be addressed is to specify some limit on the breadth of the range. For example, it could be specified that the range may not be any wider than 25% above the lowest point. This approach reflects a concern that a wider range suggests that the identified comparables may be unreliable.

Another concern is over the specification of the range to be used in a statistical approach. An 'interquartile range' is most commonly seen, but this is not an international standard, and some countries adopt different approaches. (India, for example, has recently specified a range of 35th to 65th percentile).

4.1.7 Defining the scope of the transfer pricing rules – definition of related parties

It is important that the scope of transactions within transfer pricing rules is defined clearly. If the rules are unclear, businesses will be left with some uncertainty concerning their tax obligations. If they are or too wide, businesses will be faced with unnecessary compliance costs, and tax administrations with higher enforcement costs.

There are a number of approaches that can be taken towards this – as can be seen by the variety of approaches used by ECOWAS countries.

There are a number of issues that are useful to consider:

a. Countries typically use either (or both) a 'de jure' or 'de facto' approach in defining the scope of transfer pricing rules. The former refers to an approach that defines 'control' according to legal criteria such as level of shareholding or voting rights. 'De facto' approaches use a criterion based on whether one party can in practice, by whatever means, manage, control or influence the affairs of another. As can be seen from the examples in Chapter 3, both variations are used by ECOWAS countries (Ghana uses both).

b. There is no international standard on the level of control (for example, the proportion of shareholding) needed to establish control. A level of '50% or more' should be considered as the minimum, but many countries choose a lower level. It is important, however, that where a de jure approach is adopted, country rules specify the level of shareholding (or rights or voting power) needed to establish control. Without this, taxpayers will be left with some uncertainty over whether the rules apply. It is of concern that many ECOWAS country rules define the scope of the rules in terms of 'managing' without indication of the how this is defined or level of management required.

c. In any definition of control using a de jure approach, it is useful to specify 'direct or indirect' control, to ensure that indirect shareholdings are taken into account.

d. Some countries (including Guinea) deem a control relationship where a transaction is with a low tax jurisdiction, whether or not any further control criteria are fulfilled. This approach takes into account potential difficulties encountered in obtaining the information needed to establish whether there is a control relationship.

e. It is useful, also, to employ transfer pricing rules for the attribution on profit to a permanent establishment (as Ghana and Nigeria do).

f. In our review we noted that some country rules appear to include parent companies and subsidiaries within scope, but not sister companies. This should be clarified and corrected if necessary.

g. It is important to ensure that the transfer pricing control rules take into account family and other 'connected party' issues. One way in which countries address this is to specify that the rights or powers attributed to a person includes the rights or powers of any family member or partners. As an example, this would cover a) transactions between a company owned by an individual and a relative of that individual, or b) transactions between a company owned by an individual and another company owned by a relative of that individual.

h. We noted that the definition of control employed by at least one ECOWAS country used criteria that could potentially bring within scope transactions between independent parties, which can realistically be considered to be conducted at arm's length. Such rules may create unnecessary compliance and enforcement costs, and may also create issues with treaty partners.

4.2 OTHER RELATED ISSUES

4.2.1Deductibility of interest

In the ECOWAS context, perhaps one the biggest base erosion risks is excessive deductibility. Transfer pricing rules are normally able to address excessive deductibility due to non-arm's length interest rates. They do not always, however, address excessive interest deductibility arising from the amount of debt. For this reason, countries often introduce specific measures. Our analysis in Chapter 3 showed that some ECOWAS countries have specific measures, but many do not.

It should be noted that, internationally, countries employ a number of alternative measures to counter excessive interest deductions by multinational companies.

Some countries apply a pure **'arm's length' approach**. Under this approach, the restriction on interest is by reference to the amount of debt that a taxpayer would be able to raise from a third party independent lender (such as a bank). This approach is used by United Kingdom and South Africa. The application of such a rule requires advanced technical capacity, as the auditor needs to place himself/herself in the position of a bank, and take a view of the amount that bank would be willing to lend to the entity, on the assumption that it was 'stand alone' (i.e. not part of a group). In addition, the subjective nature of this approach reduces the certainty of its application from the perspective of taxpayers, and increases the risk of inconsistent application.

Other countries restrict interest by reference to a level of debt determined by a ratio such as a **debt/equity ratio ('thin capitalisation')**. Such an approach is less subjective and thus simpler to implement than that described in the paragraph above, and it is relatively easy for tax administrations to obtain information on the level of debt and equity in an entity (although there may be an issue concerning the definition of debt and equity for these purposes). On the other hand, a ratio such as this may not reflect the economic reality, and it is open to manipulation by varying the amount of equity in a particular entity.

In addition, some countries supplement general rules on interest deductibility with **'targeted rules'.** Such rules apply to specific situations that carry the risk of tax loss. For example, countries may disallow an interest deduction if the interest receipt, in the hands of the lender, is not subject to tax. (Anti-hybrid rules).

The recent OECD/G20 report under the BEPS initiative describes an **international 'best practice'** approach, which, broadly, employs a ratio of interest to EBITDA.

We would recommend that ECOWAS countries consider adopting rules along these lines. Illustrative legislation is included in Annex 5.

4.2.2 Treaty Abuse

ECOWAS countries have reported to us that they face a significant risk from treaty abuse – in particular, through 'treaty shopping'. This is an issue partly discussed in the OECD/G20 BEPS initiative, under Action 6. For many countries debate on tax treaties, however, needs to go beyond the avoidance of treaty abuse and involve a more structured analysis of what a desirable treaty network would look like. In many countries, tax treaty policy has often not been subject to a proper analysis of cost and benefits and improving treaty networks, including revisions of lopsided treaties is an important policy area for developing countries (IMF 2014).

4.3 Rules to ensure availability of information necessary for risk assessment, case selection and audit

Information is key to effective transfer pricing audit, as well as efficient risk assessment and case selection. Most ECOWAS countries report that they face significant challenges in obtaining necessary information, including information in the hands of taxpayers or their affiliates.

4.3.1 Transfer pricing return schedules

A number of ECOWAS countries have introduced transfer pricing information requirements that are submitted by affected taxpayers with, or as part of, their annual tax returns. Such schedules are used to assist the tax administration monitor and assess the level and nature of transfer pricing risk, and to select the most appropriate cases for audit. Examples of schedules are included in Annex 1, 2, 3.

We recommend that ECOWAS countries adopt the use of this type of schedule and that, as far as it is possible, ECOWAS countries take a common approach to such schedules. Taxpayer compliance costs would be reduced if they are able to submit the same, or similar, schedules to a number of tax

administrations. At the same time, a common approach to such schedules enables countries to work together to develop a best practice. An illustrative schedule is provided in Annex 4.

4.3.2 Transfer pricing documentation

Most ECOWAS countries have introduced transfer pricing documentation, although there are very significant differences in approaches between ECOWAS countries.

An important development in this area is the recent revised guidance issued by the OECD as an outcome of the OECD/G20 BEPS initiative. This recommends that countries introduce rules that require affected MNEs to maintain two levels of documentation:

- A 'master-file' containing information about the global structure, operations and businesses of the MNE
- A 'local file' containing information about the local operations of the MNE, including details of the transfer pricing and the method used to ensure the application of the arm's length principle.

This provides an opportunity for ECOWAS countries that wish to upgrade their transfer pricing documentation rules to use this outcome of the BEPS initiative as a template.

We would also recommend that, as far as it is possible, ECOWAS countries take a common approach to transfer pricing documentation. As with the filing schedules discussed above, a common approach has the potential to reduce taxpayer compliance costs, and to share best practice. With this in mind, illustrative template regulations are contained in Annex 4 below.

We would also suggest that countries wishing to upgrade their transfer pricing documentation rules adopt a 'best practice' approach, including:

- A requirement that the documentation is in place no later than the date of the filing of the corporate tax return.
- Specification that the documentation is to be submitted on the request of the tax authority within a specified number of days.
- Penalties for failure to maintain or submit documentation.
- Exemption, or reduced requirements, for smaller taxpayers or low risk transactions.

These elements are adopted in the illustrative rules in Annex 4.

4.3.3 Country by country reporting

The OECD/G20 recommendations mentioned above also include a provision to require MNEs to prepare 'country by country' schedules, containing details of the countries in which the MNE operates, the type of operations conducted in each of those countries, and the financial results (including tax paid) in each country. This information is expected to be maintained by MNEs whose consolidated global third party turnover exceeds €750m.

Under the international reporting framework for this it is envisaged that affected MNEs (i.e. those with consolidated turnover in excess of €750m) submit the report to the tax administration of the ultimate parent company, which then distributes to the tax administration of subsidiaries through exchange of information mechanisms.

However, the Report also envisages local filing in specific circumstances. These are where a jurisdiction fails to provide information to another jurisdiction that fulfils the 'confidentiality' 'consistency' and 'appropriate use' conditions, because:

a. it has not required Country-by-Country Reporting from the ultimate parent entity of such MNE groups, or
b. no competent authority agreement has been agreed in a timely manner under the current international agreements of the jurisdiction for the exchange of the Country-by-Country Reports, or
c. it has been established that there is a failure to exchange the information in practice with a jurisdiction after agreeing with that jurisdiction to do so.

Where these conditions are fulfilled, the BEPS Report (Action 13) allows a jurisdiction to require local filing of a country-by-country report from an MNE that is not ultimately headed in that jurisdiction.

Notwithstanding these Action 13 conditions, ECOWAS countries may wish to consider requiring the local filing of a country-by-country report in a wider set of circumstances.

ECOWAS countries will need to consider introducing new legislation to:

a. require MNEs which are ultimately headed in their countries to submit the report to the relevant tax administration; and
b. allow tax authorities to require the local filing of a country-by-country report from an MNE that is not ultimately headed in the local country.

4.3.4 International Exchange of Information

We recommend that ECOWAS countries continue to put in place the mechanisms to allow exchange of information between tax authorities. These are:

- Tax Information Exchange Agreements
- Multinational agreements, including the Multilateral Convention for Mutual Administrative Assistance. (Currently Ghana, Nigeria and Senegal are signatories to this convention).

4.4 Specific challenges in identifying data for comparability analyses

A challenge to the effective implementation of transfer pricing rules is the difficulty in accessing reliable data for comparables searches and benchmarking. This challenge is shared by taxpayers and tax authorities alike, and, although an issue in many regions of the world, is particularly acute in regions such as ECOWAS, where publicly available data is scare or non-existent.

We would recommend that ECOWAS countries consider a number of measures to mitigate these challenges.

4.4.1 Use of databases

Many tax administrations and all major tax accounting firms typically rely on commercial searchable electronic databases to identify financial data on companies that conduct potentially comparable

transactions. Commercial databases are developed by private-sector providers and the information contained in them may be regional or global in reach. Information included in such databases is based on publically available information, including company financial data submitted to government or stock exchange registers. In many countries, including many in ECOWAS, this information might be very limited or non-existent. In such cases, a database might still be a useful source for identifying comparables, but this it should be recognized that such data is likely to be drawn from other markets or other regions (i.e. 'foreign comparables').

Within Africa, as far as we are aware, databases have been acquired by the tax authorities of Kenya, Malawi, Nigeria and South Africa.

Despite their limitations, databases can be a practical, reliable and cost-effective way of identifying external comparables. They are typically used by tax authorities to

- conduct analyses for risk assessment and case selection
- check benchmarking searches submitted by taxpayers – both where tested party is in the local jurisdiction or in another country
- carry out benchmarking searches for use in audits.

Tax authorities using such databases need to consider a number of issues. The first is the very high cost of subscription. The second is the need to build skills in using the databases and analyzing results – this is best concentrated centrally, ideally within the transfer pricing team. The third is availability of IT and reliable internet connections.

Given these issues, ECOWAS countries may wish to consider ways in which they could co-operate to acquire and use a database (or databases) jointly.

4.4.2 Expanding the scope of a comparables search

Where close comparables are difficult to identify, a strategy is to expand the breadth of a benchmarking search. This can be achieved by considering comparables:

- derived from products that differ (in varying degrees) to those which are the subject of the tested transaction, or
- derived from sectors other than that of the tested transaction, or
- derived from countries or regions outside that of the party being tested.

Where the scope of a benchmarking search is widened, it makes sense of course, to keep economically relevant differences between the comparables and the tested transaction or the tested party as small as possible.

Where the scope of a benchmarking search is expanded, it may be possible to make comparability adjustments to compensate for those differences. It should be noted, however, that tax administrations have found it very difficult to identify and apply reliable adjustments.

ECOWAS countries may wish to consider adding regulations, or providing guidance, on expanded comparability searches. A potential approach is illustrated in the box below.

As an example, rules could specify that, where, for example, a Country X entity is the tested entity, data to carry out a benchmark should be derived from comparable transactions or data in the following order (highest priority first).

I. Internal transactions of Country X entity

II. Comparable entities in Country X

III. Similar entities in Country X (applying comparability adjustments where possible)

IV. Comparable or similar entities in ECOWAS countries

V. Comparable or similar entities in Africa

VI. Comparable or similar entities elsewhere in world.

It would also make sense to specify that, where 'similar entities' (e.g. those with functional comparability) or foreign entities, are used, a statistical approach must be used.

4.4.3 Taking a realistic approach - Recognizing that perfect information is unlikely to be available

Although it is important that taxpayers and the tax administration both make efforts to identify the most reliable comparable data in each case, it must also be borne in mind that perfectly reliable data is not always available, and that the use of less-than-perfect data may be inevitable. In some cases, an ideal amount of information is unavailable; in other cases there may uncertainties about the reliability of comparables. The significance of such issues will vary from case to case, and depend both on the nature of the controlled transaction and the method adopted.

It should be remembered that comparability data does not normally require data on actual prices. In practice the use of cost-plus, resale price method, transactional net margin (TNMM) and profit split methods require information concerning the profits derived by enterprises conducting comparable transactions (expressed, for example, as a mark-up on costs or a return on revenue).

As discussed below, the use of statistical techniques may be appropriate in cases where there is a relatively large number of identified comparables, and, at the same time, uncertainties about their relative reliability. This is frequently the case where databases are used to identify comparable transactions and extract financial data deriving from them.

These considerations mean that, while tax authorities and taxpayers should always make best efforts to identify the most reliable comparables, they need also to recognize that data will often give no more than an indication of arm's length pricing rather than an exact measure.

4.5 CLEAR PROCEDURES

When the administrative framework for transfer pricing auditing is in place, it is good practice to ensure that procedures for the management of the audit program are clearly communicated to relevant auditors. For some tax authorities, the development of a manual for auditors of MNEs would make sense, especially if such auditing is decentralized. The WBG is currently working with Senegal to

develop such a manual, which may be able to serve as a model for other ECOWAS countries. Typical objectives of such a manual would be:

- Implementing a risk assessment and case selection process to ensure that the right cases are selected for audit
- Implementing a process of review and oversight to ensure consistency and high quality of approach, and avoid the dangers of corruption
- Ensuring that cases are settled, and interest and penalties imposed, in a consistent manner in accordance with the law
- Ensuring that auditors are aware of requirements to submit cases to relevant offices or divisions, and that they do so when required
- To ensure that auditors are aware of the support and assistance available to them, and that they know how to access that support
- To ensure that transfer pricing audits are conducting using internationally accepted principles, in order to avoid dispute with treaty partners
- To provide auditors with practical advice on applying domestic and international transfer pricing rules (for example on the selection of an appropriate method, the identification of data on comparables or the use of transfer pricing documentation).
- To provide auditors with advice on conducting an audit efficiently and fairly.

4.6 Simplification and customer service measures

There are a number of measures that tax authorities can put in place in order to reduce their enforcement costs, or the compliance costs of taxpayers, or to assist taxpayers to comply with transfer pricing rules. The main measures are discussed below.

4.6.1. Safe Harbors

As discussed in Chapter 2, safe harbors provides a mechanism to allow the tax administration to specify financial indicators that it considers acceptable for transfer pricing purposes.

Well-designed safe harbors may bring substantial benefits for tax authorities and taxpayers alike. One of these advantages is that they reduce the need for taxpayers and tax administrations to carry out comparability and benchmarking analyses in every case and thus the need to find comparability data. This is an especially significant factor in regions (including ECOWAS) where comparability data is hard to find.

We recommend that ECOWAS countries consider the advantages of introducing safe harbor rules. If such rules are introduced in the region, there would be advantages in a coordinated approach. In particular, co-ordination would:

- Prevent ‘tax competition’ if all counties adopt the same safe-harbor measure

- Reduce taxpayer compliance costs, and increase clarity and consistency, if the same approach is used in a number of ECOWAS countries.

Draft indicative safe harbor legislation is included in Annex 4 below.

4.6.2 Measures to reduce the compliance burden of small taxpayers

As discussed in Chapter 3, a number of ECOWAS countries have introduced exemptions, or lighter compliance obligations, for smaller taxpayers.

A number of approaches are possible:

- Exemption for smaller taxpayers. Such an exemption may be based on total turnover of the taxpayer, together with affiliate entities in the country; or on the total turnover of the worldwide group of companies to which the taxpayer belongs. Where such measures are introduced, the exemption may be denied in cases where the taxpayer conducts any transaction directly or indirectly with a low tax jurisdiction (as defined).
- Reduced documentation requirements for smaller taxpayers.

We recommend that ECOWAS countries update their transfer pricing rules, or introducing new rules, consider introducing provisions to ensure that smaller taxpayers, or low-risk transactions, are subject to exemption or reduced compliance burden.

4.6.3 Advance pricing agreements (APAs)

As discussed in Chapter 3, some tax authorities have introduced the facility to enter into APAs with taxpayers (and, in the case of bilateral or multilateral APAs, with other tax administrations also). Within ECOWAS, Liberia, Nigeria, Senegal and Sierra Leone have introduced rules enabling APAs. We recommend that ECOWAS countries consider whether the introduction of an APA facility would assist in meeting their policy objectives.

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GHANA REVENUE AUTHORITY

ANNUAL RETURN ON TRANSFER PRICING TRANSACTIONS

GHANA REVENUE AUTHORITYANNUAL RETURN ON TRANSFER PRICING TRANSACTIONS

This return forms part of Form 22A & 22B

Part I – Corporate information

1. **Name of company:**

   …………………..........…………………..

2. **TIN Number:**

   …………………………………………………..........................

3. **Postal Address:**

   …..……………………………………………………………...

4. **E-mail Address:**

   ....……………………………………………………………

5. **Telephone number:**

   ……………………………………………………….........…

6. **Contact person:** ……………….…… **Cell phone number** …………...………

7. **Provide the name and country of residence of immediate Parent Company and direct and indirect subsidiaries. (Attach schedule, if necessary).**

   ……………………………………………………………………

   ……………………………………………………………………

8. **Particulars of related parties with which the taxpayer has conducted any form of transaction or dealing within the year**

Name of related party	Nature of relationship	Country of incorporation	Location/ Residence	Description of Transactions

Part 2 - Related Party Transactions

1. (a) **State the amount of purchases/expenditure in second column and the amount of sales/revenue in third Column in respect of related party transactions.**

(Persons permitted to file returns in foreign currency should complete this form in that currency).

Item	Purchases/Expenditure (GH¢)	Sales/Revenue (GH¢)	Related party
Stock-in-trade and raw materials			
All other goods			
Royalties related to Intellectual Properties			
Other Royalties			
Rent and lease payment			
Other intangibles			
Management and Administration			
Marketing			
Human Resource Development and Training			
Technical Services			
Research and development			
Interests			
Discounts			
Commission			
Insurance			
Guarantee fees			
Other financial services			
Reimbursement of expenses			

Cost sharing/Cost contribution arrangement			
Employment Cost			
ll other payments, expenses sales and revenue not included elsewhere			
Total value of transactions with related parties			

(b) **Loans and Guaranteed Loans with interest from direct/indirect related parties**

Name of Related Party	Opening balance	Additions	Repayment	Closing Balance	Interest Rate

© Loans from related parties and guaranteed loans with no interest

Name of Related Party	Opening Balance	Additions	Repayment	Closing Balance

1. (a) Have you received from or provided to a related party any non-monetary consideration for the performance of services, transfer of property (tangible or intangible), processes, rights or obligations during the year of assessment?

Yes [ ] **No [ ]**

If yes, provide details (attach schedule, if necessary)

...

...

...

...

...

(b) Have you provided to a related party any services, transfer of property (tangible or intangible), processes, rights or obligations for which the consideration was nil during the year of assessment?

Yes [ ] **No [ ]**

If yes, provide details (attach schedule if necessary)

1. The Transfer Pricing Regulations L. I. 2188 sets out five methods (listed below) for calculating an arm's length consideration for setting transfer prices. Please place against each of the methods the value of transactions where prices have been confirmed by that method (i.e. "tested transactions"). Where more than one method was used, allocate the value to the predominant method.

In addition to the method fields, an additional field has been included for untested prices. The "Total Transactions" value below must equal the value for "Total Value of Transactions with related parties" in 9a above.

	Tested Transactions	Supplied by Related Parties	Supplied to Related Parties
		GH¢	GH¢
	Comparable Uncontrolled Price		
	Method		
	Resale Price Method		
	Cost Plus Method		
	Transactional Profit Split Method		
	Comparable Profits Methods		
	*Any Method other than the above		
	Untested Transactions		
	Total Transactions		

**Any other method used requires prior approval of the Commissioner-General*

1. (a) Did you have any related party dealings of capital nature in which you acquired interest in asset(s)?

Yes [ ] No [ ]

If yes, state the transfer pricing method(s) used.

....

....

....

....

(b) Did you have any related party dealings of capital nature in which you disposed of asset(s)?

Yes [ ]   No [ ]

If yes, state the transfer pricing method(s) used.

..

..

1. .... (a) Did a related resident person participate directly or indirectly in your capital, finance, management or control during the year of assessment?

Yes [ ]   No [ ]

If yes, provide details. (Attach schedules, if necessary).

..
..
..
..
..

(b) Did a related non-resident person participate directly or indirectly in your capital, finance, management or control during the year of assessment?

Yes [ ]   No [ ]

If yes, provide details. (Attach schedules, if necessary).

..
..
..
..
..

1. List the entities in which you had either a direct or indirect interest within the year. State the nature of interest.

Name of Entity	Residence of Entity	Nature of Transaction

1. Has there been any change in your ownership structure?

Yes [ ]   No [ ]

If yes, please provide details. (Attach schedules, if necessary)

..
..
..
..

Name of authorized officer...

Designation: ....

Signature:.. Date: ....

THE INCOME TAX (TRANSFER PRICING) REGULATIONS NO 1, 2012

TRANSFER PRICING DISCLOSURE FORM

(**Please refer to the attached guidelines to complete this form*
***complete the form based on the audited financial statements for the year*
***In responding to the questions, you may provide separate written comments*)

PART A: PARTICULARS OF REPORTING COMPANY OR ENTITY

A1: Name of Reporting Company or Entity

A2: Incorporation Number

A3: Country of Incorporation:

A4: Country of Tax Residence:

A5: Tax Identification Number

A6: Registered Address

City

Postcode

State

Country

A7: Web Address

A8: TP Contact Person:

i. Name:

ii. Tel. No

iii. E-mail Address

A9: Principal Business Activities:

A10: Did business restructuring occur during the year or last five years for company or other connected parties? (*Place "X" in all applicable boxes*):

Yes		No	

A11: If yes, brief description of the restructuring(s) with respect to the reallocation of risk, asset and function

PART B: INCOME FROMCONTROLLED TRANSACTIONS

***Record all values in the reporting currency used in the financial statements*

***Support the values stated with a copy of the audited financial statements for the year*

Ref.	Particulars	Income from Connected Persons in Nigeria**(A)**	Income from Connected Persons Overseas (**B**)	Total Income from Connected Persons**(A+B)**	Total Income Reported for the year
B1:	Tangible Property				
B11	Raw Materials				
B12	Processed Goods or Finished Stocks				
B13	Fixed Assets				
B14	Others (Specify)				

	Sub-Total				

B2: Services

B21	Management Services				
B22	Technical Services				
B23	Commissions				
B24	R & D				
B25	Others (Specify)				
	Sub-Total				

B3: Rents, Royalties and Intangible Property

B31	Rent				
B32	Royalties				
B33	Licence Fees				
B34	Franchise Fees				
B35	Intangible Property				
B36	Rights & Options				
B37	Others (Specify)				
	Sub-Total				

B4: Financial

B41	Interest				
B42	Dividends				
B43	Lease Income				
B44	Insurance				
B45	Loan Guarantee Fee				
B46	Others (Specify)				
	Sub-Total				

Ref.	Particulars	Income from Connected Persons in Nigeria **(A)**	Income from Connected Persons Overseas (**B**)	Total Income from Connected Persons**(A+B)**	Total Income Reported for the year
B5:	Others				
B51	Reimbursements of Expenses				
B52	Inward Cost Sharing or Contribution Arrangements				
B53	Income from Joint Projects				
B54	Others (Specify)				
	Sub-Total				
	Grand Total				

B6: Loans, Advances and Other Intercompany Receivables

Ref	Particulars	Opening Balance **(A)**	Increase Amount **(B)**	Decrease Amount **(C)**	Closing Balance **(A+B-C)**

B61	Interest Bearing Loans				
B62	Interest Bearing Trade Credits				
B63	Other Interest Bearing Intercompany Receivables				
B64	Interest-Free Loans				
B65	Interest-Free Trade Credits				
B66	Other Interest-Free Intercompany Receivables				
B67	Others (Specify)				
	Total				

PART C: COSTS OF CONTROLLED TRANSACTIONS

***Record all values in the reporting currency used in the financial statements*

***Support the values stated with a copy of the audited financial statements for the year*

Ref.	Particulars	Charged By Connected Persons in Nigeria**(A)**	Charged By Connected Persons Overseas**(B)**	Total Costs Charged By Connected Persons**(A+B)**	Total Costs Reported forthe Year
C1:	Tangible Property				
C11	Raw Materials				
C12	Processed Goods or Finished Stocks				
C 13	Fixed Assets				
C 14	Others (Specify)				
	Sub-Total				
C2:	Services				
C 21	Management Services				
C 22	Technical Services				
C 23	Commissions				
C 24	R & D				
C 25	Other (Specify)				
	Sub-Total				
C3:	Rents, Royalties and Intangible Property				
C 31	Rent				
C 32	Royalties				
C 33	Licence Fees				
C 34	Franchise Fees				
C 35	Intangible Property				
C 36	Rights & Options				

C 37	Other (Specify)				
	Sub-Total				

C4: Financial

C 41	Interest				
C 42	Dividends				
C 43	Lease Payments				
C 44	Insurance				
C 45	Loan Guarantee Fee				
C 46	Others (Specify)				
	Sub-Total				
Ref.	Particulars	Charged By Connected Persons in Nigeria **(A)**	Charged By Connected Persons Overseas **(B)**	Total Costs Charged By Connected Persons **(A+B)**	Total Costs Reported for the Year

C5: Others

C 51	Reimbursements of Expenses				
C 52	Outward Cost Sharing or Contribution Arrangements				
C 53	Costs of Joint Projects				
C 54	Others (Specify)				
	Sub-Total				
	Grand Total				

C6: Loans, Advances and Other Intercompany Payables

Ref	Particulars	Opening Balance**(A)**	Increase Amount**(B)**	Decrease Amount**(C)**	Closing Balance**(A+B-C)**
C 61	Interest Bearing Loans				
C 62	Interest Bearing Trade Credits				
C 63	Other Interest Bearing Intercompany Payables				
C 64	Interest-Free Loans				
C 65	Interest-Free Trade Credits				
C 66	Other Interest-Free Intercompany Payables				
C 67	Others (Specify)				
	Total				

C7: Is any of the transactions included above with a company or entity located in a low tax jurisdiction? (*Please refer to the guidance note for definition of low-tax jurisdiction)*

Yes		No	

PART D: TRANSFER PRICING METHOD AND DOCUMENTATION

D1: TP Method(s) used for tested transactions:

**Specify the transaction value for each of the transactions identified in Parts B & C above against each of the methods used in determining the appropriate transfer price.*

***Record all values in the reporting currency used in the financial statements*.

TP Method	Supplies to Connected Persons (Per Part B)	Receipts from Connected Persons (Per Part C)
Comparable Uncontrolled Price (CUP) Method		
Resale Price Method (RPM)		
Cost-Plus Method (CPM)		
Transactional Profit Split Method (TPSM)		
Transactional Net Margin Method (TNMM)		
Other Method (Specify)		
Total Value of Tested Transaction		
Total Value of Untested Transactions		
Total Value of Controlled Transactions		

D2: Did the company provide or receive any good or service (including financial assistance) to or from anyone for no consideration?

Yes		No	

If yes, provide particulars of supplies and market value:

Supplies	Supplied to or by Connected Persons Resident in Nigeria	Supplied to or by Other Connected Persons	Supplied to or by Other Independent Persons
Total Value of Supplies for no Consideration			

D3: Has the company complied with the TP Regulations? (*Indicate 'X' in the appropriate box*)

Yes		No	

If no, state reason(s) for non-compliance:

D4: Is contemporaneous TP Documentation in place?

(*Indicate 'X' in the appropriate box*)

Yes		No	

If no, state reason(s) for non-compliance:

D5: Is any of the controlled transactions included in Part B or C subject to a subsisting advance pricing agreement (APA) in Nigeria?

Yes		No	

If yes, have you complied with the terms of the APA?

Yes		No	

If no, state reason(s) for non-compliance:

D6: Is any of the controlled transactions included in Part B or C subject to a subsisting advance pricing agreement (APA) in another tax jurisdiction?

Yes		No	

D7: Is any of the controlled transactions included in Part B or C covered by a subsisting pricing regime set or approved by other government agencies in Nigeria?

Yes		No	

D8: If yes, name of the agency: ………………………………………………………………………………………

D9: Location of TP Documentation:

City																
Postcode																
State																
Country																

PART E: BASIC FINANCIAL INFORMATION

**Record all values in the reporting currency used in the financial statements*

Particulars	Reporting Entity	Group Consolidated
Fixed (Non-current Assets)		
Current Assets		
Current Liabilities		
Net Current Assets (Working Capital)		
Loans (Exclude those taken to current liabilities)		
Shareholders' Funds (Net Assets)		
Total Revenue from core business (*Exclude incidental interest or other income*)		
Gross Profit		
Total Expenses (*Exclude any item taken into account in calculating gross profit*)		
Profit before interest		
Interest Income(*Incidental interest income only*)		
Interest Expense (*Exclude interest taken into account in calculating gross profit*)		

PART F: PARTICULARS OF THE PERSON MAKING THISDISCLOSURE

F1: Name

F2: Address

City

Postcode

State

Country

F3: Incorporation Number (*If not an individual*)

F4: Tax Identification Number

F5: Telephone:

F6: E-mail Address

F7: Web Address

F8: Designation:

F9: Signature: .... **F10**: Date.....................................

PART G: DECLARATION

(To be completed by a Director or the Company Secretary)

I,

with Identity Card No. /Passport No.

(* *delete appropriately*)

hereby declare that this form contains information that is true, correct and complete as at .... 20.....................

Designation

Signature

Date

FOR OFFICE USE

Date (DDMMYYY)

Name of Officer

Designation

Signature

FIRS FEDERAL INLAND REVENUE SERVICE

THE INCOME TAX (TRANSFER PRICING) REGULATIONS NO 1, 2012

TRANSFER PRICING DECLARATION FORM

(*Please refer to the attached guidelines to complete this form*)

PART A: PARTICULARS OF REPORTING COMPANY OR ENTITY

A1: Name of Reporting Company or Entity

A2: Incorporation Number

A3: Country of Incorporation:

A4: Tax Identification Number

A5: Registered Address

City

Postcode

State

Country

A6: Correspondence Address In Nigeria

City

Postcode

State

A7: Busine s Locations

City

Postcode																
State																

Country																

(Use separate sheets for additional business activities sited in different locations)

A8: Telephone Numbers

A9: E-mail Address

A10: Web Address

A11: Address Where Company'srecords are kept (*Please mark appropriate box with "X"*)

Address as in A5 above ☐ Address as in A6 above ☐

Address as in A7 above ☐

Other address (*Please specify*)

City																
Postcode																
State																
Country																

A12: Principal Business Activities:

A13: Ownership of Company (*Place "X" in all applicable boxes*):

Entity of a Nigerian Government	Entity of a Foreign Government	Subsidiary or Associate of a Foreign Company	Subsidiary or Associate of a Nigerian Company	Parent of foreign subsidiary	Parent of Nigerian subsidiary	Branch or PE of a foreign Company

A14: Profit Sharing Business Arrangements(*Place "X" in all applicable boxes*):

Partnership	Joint Venture	Consortium	Others (Please specify)

A15: Procurement Centre (*Place "X" in all applicable boxes*):

Operational Headquarters	Charitable Organisation	Investment Holding Coy	Closed-end Fund	Others (Specify)

A16: Sources of Fund (*Place "X" in all applicable boxes*):

Foreign Fund	Nigerian Fund	International Institutions	Regional Institutions	Others (Specify)

PART B: PARTICULARS OF IMMEDIATE PARENT COMPANY

B1: Name of Parent Company

B2: Incorporation Number

B3: Tax Identification Number

B4: Registered Address

City

Postcode

State

Country

B5: E-mail Address

B6: Web Address

B7: Country of incorporation

B8: Country of Tax Residence:

B9: Principal Business Activities:

B10: Contact Person:

i) Name:

ii) Designation:

iii) Address:

City

Postcode

State

Country

iv) Telephone Number:

v) E-mail Address:

PART C: DIRECTORS OF THE REPORTING COMPANY

C1: Number of Directors:

C2: Provide summary of director's particulars as indicated below:

SN	Name	Nationality	TIN	Tel. No.	% Shareholding

(*Expand table or use additional sheets if more space is required)*

PART D: MAJOR SHAREHOLDERS OF REPORTING COMPANY

(Persons owning 10% or more of Reporting Company)

D1: Number of major shareholders:

D2: Provide summary of major shareholders' particulars as indicated below:

SN	Name	Nationality	TIN	Tel. No.	% Shareholding
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					

PART E: OWNERSHIP STRUCTURE OF REPORTING COMPANY

E1: Foreign portion of paid-up capital (*Place "X" in the appropriate box*)

Above 75% ☐ 51% - 75% ☐ 26%-50%, ☐

10%-25% ☐ Below 10% ☐

E2: Minority Interest (Non-Control Interest) in paid-up capital
(*Place "X" in the appropriate box*)

Above 40% ☐ 31%-40%, ☐ 21%-29% ☐

11%-20% ☐ Below 10% ☐

PART F: SUBSIDIARIES AND OTHER CONNECTED PERSONS

F1: Number of subsidiaries ☐

F2: Provide summary of particulars of subsidiaries as indicated below:

SN	Name	Country of Tax Residence	TIN	Principal Business Activity	% Shareholding

(Expand table or use additional sheets if more space is required)

F3: Provide summary of particulars of other connected persons as indicated below:

SN	Name	Country of Tax Residence	TIN	Principal Business Activity	Nature of Relationship

(Expand table or use additional sheets if more space is required)

PART G: PARTICULARS OF EXTERNAL AUDITORS OF REPORTING COMPANY

G1: Name of Auditors:

G2: Address:

City

Postcode

State

G3: E-mail Address:

PART H: PARTICULARS OF TAX CONSULTANTS OF REPORTING COMPANY

H1: Name of Consultants

H2: Address:

City

Postcode

State

H3: E-mail Address:

PART J: PARTICULARS OF COMPANY SECRETARY OF REPORTING COMPANY

J1: Name of Consultants

J2: Address:

City

Postcode

State

J3: E-mail Address:

PART K: PARTICULARS OF THE PERSON MAKING THIS DECLARATION

K1: Name

K2: Address

City	
Postcode	
State	
Country	

K3: Incorporation Number (*If not an individual*)

K4: Tax Identification Number

K5: Telephone:

K6: E-mail Address

K7: Web Address

K8: Designation:

K9: Signature: ……………………………………………………….. J10: Date………………………………

PART L: DECLARATION

(To be completed by a Director or Company Secretary)

I,

with Identity Card No. /Passport No.

(* *delete appropriately*)

hereby declare that this form contains information that is true, correct and complete as at .... 20.....................

Designation

Signature

Date

FOR OFFICE USE

Date (DDMMYYY)

Name of Officer

Designation

Signature

FEDERAL INLAND REVENUE SERVICE
FIRS

THE INCOME TAX (TRANSFER PRICING) REGULATIONS NO 1, 2012

SCHEDULE C:
PARTICULARS OF DIRECTORS OF REPORTING COMPANY

i. *This is an attachment to TP Declaration Form*
ii. *Complete a separate schedule C for each director of the company*
iii. *Enter all information in the English Language*
iv. *Indicate the reporting company's name and TIN on the spaces provided*)

Reporting Company:

Tax Identification Number:

SC1: Director

Name:

Address:

City

Postcode

State

Identity Card
or
Int'l Passport No:

Telephone No:

% of Company's shares held by the director:

FIRS FEDERAL INLAND REVENUE SERVICE

THE INCOME TAX (TRANSFER PRICING) REGULATIONS NO 1, 2012

SCHEDULE D:
PARTICULARS OF MAJOR SHAREHOLDERS OF REPORTING COMPANY

i. *This is an attachment to TP Declaration Form*
ii. *Complete a separate Schedule D for each major shareholder*
iii. *Any person holding up to 10% of the company's paid-up capital is a major shareholder*
iv. *Enter all information in the English Language*
v. *Indicate the reporting company's name and TIN on the spaces provided*)

Reporting Company:

Tax Identification Number:

SD1: Major Shareholder:

Name:

Address:

City

Postcode

State

Identity Card or Int'l Passport No:

Telephone No:

Total % of Reporting Company's shares held:

THE INCOME TAX (TRANSFER PRICING) REGULATIONS NO 1, 2012

SCHEDULE F:
PARTICULARS OF SUBSIDIARY OR OTHER CONNECTED PERSON

i. *This is an attachment to TP Declaration Form*
ii. Complete a separate schedule F for every subsidiary of the company
iii. *Any company in which the reporting company owns more than 50% of its paid-up capital is its subsidiary*
iv. *Enter all information in the English Language*
v. *Indicate the reporting company's name and TIN on the spaces provided*)

Reporting Company:

Tax Identification Number:

SF1: Particulars of Connected Person:

Name:

Incorporation Number:

Tax Identification Number:

Address:

City

Postcode

State

E-mail Address:

Web Address:

Nature of Relationship:

Ultimate Parent Coy	Common Parent Coy	Common Director	Common Management	Dependent Agent	Principal of Reporting Coy

If subsidiary, % of ownership:

Principal Business Activities of subsidiary:

Contact Person:

i) Name:

ii) Designation:

iii) Address:

City

Postcode

State

Country

iv) Telephone Number:

v) E-mail Address:

TRANSFER PRICING RETURN FORM

Filling instructions

1. Complete the form based on the audited financial statements and accounts returns for the year.
2. This return is due by the due date for filing your annual income tax return and must be accompanied with the annual income tax return for the year of income.
3. In responding to the questions, you may provide separate written comments and/or schedules.
4. The form should be filled in soft copy and printed off for signature and submission by any person with related party transactions in a year of income who is eligible to file an Income Tax return in accordance with Regulation 14(1) of the Liberia Income Tax Transfer

PART A: PARTICULARS OF REPORTING COMPANY OR ENTITY

A1: Name of Company or Entity: ……………………………………………………………………….

A2: Tax Identification Number: ……………………………………………………………………….

A3: Country of Incorporation: ……………………………………………………………………….

A4: Country of Tax Residence: ……………………………………………………………………….

A5: Registered Address: ……………………………………………………………………………….
City/ State/ Country

A6: Web Address: ………………………………………………………………………………………….

A7: TP Contact Person: ……………………………………………………………………………………

iv. Name: ……………………………………………………………………………………………………

v. Tel. No: ……………………………………………………………………………………………………

vi. E-mail Address: ………………………………………………………………………………………

A8: Principal Business Activities:

A9: **Directors of the Reporting Entity**

Please provide below a summary of the particulars of the directors of the company

SN	Name	Nationality	TIN*	% Shareholding	Has the director filed his individual income tax return for the year*? Y/N

**all resident directors are required to have TIN and to file annual income tax returns. Non-resident individual are obliged to file only if they elect to file income tax returns in respect of their Liberian sourced income.*

A10: Is the reporting entity publicly listed?

Yes		No	

A11: Please provide details of the major shareholders of the entity (P*rovide details for only persons with at least 10% shareholding*)

SN	Name	Nationality	TIN*	Tel. No.	% Shareholding
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					

**all resident directors are required to have TIN and to file annual income tax returns. Non-resident individual are obliged to file only if they elect to file income tax returns in respect of their Liberian sourced income.*

A12: Provide summary of particulars of subsidiaries as indicated below:

SN	Name	Country of Tax Residence	Principal Business Activity	% Shareholding

A13: Please attach the current group structure (The group *structure should* show all *entities that are members of the group of companies to which the entity belongs)*

A14: Did any business restructuring[10] occur during the year or last five years for the company/group of companies or other connected parties? (*Tick appropriate box*):

Yes		No	

A15: If yes, has the restructuring been reported in any prior period Transfer Pricing return (s)?

Yes		No	

A.16: If no, provide a brief description of the restructuring(s) in the space below. Please attach a detailed description of the restructuring including the updated company/group structure showing the updated transaction flows with both related and unrelated persons.

A17: Particulars of related entities with which the reporting entity has entered into any kind of transaction during the year of income

SN	Name	Country of Tax Residence	Description of the transaction	Amount

[10] A Business Restructuring means any reorganization of the legal ownership, business processes, or supply chain, contractual terms, invoice flows, which affect the functions, assets and risks of the taxpayer/company.

PART B: INCOME FROM CONTROLLED TRANSACTIONS

Record all values in the reporting currency used in the financial statements and annual tax returns

Ref.	Particulars	Income from Related Persons in Liberia**(A)**	Income from Related Persons Overseas (**B**)	Total Income from related Persons during the year **(A+B)**	Total Income Reported for the year
B1:	**Tangible Property**				
B11	Sale of Goods				
B12	Fixed Assets				
B13	Others (Specify)				
B14	**Sub-Total**				
B2:	**Services**				
B21	Management Services				
B22	Technical/Professional Services				
B23	Commissions				
B24	R & D				
B25	Others (Specify)				
	Sub-Total				
B3:	**Rents, Royalties and Intangible Property**				
B31	Rent				
B32	Royalties				
B33	Licence Fees				
B34	Franchise Fees				
B35	Intangible Property				
B36	Rights & Options				
B37	Others (Specify)				
	Sub-Total				

B4: Financial

B41	Interest				
B42	Dividends				
B43	Lease Income				
B44	Insurance				
B45	Loan Guarantee Fee				
B46	Others (Specify)				
	Sub-Total				

Ref.	Particulars	Income from Connected Persons in Liberia **(A)**	Income from Connected Persons Overseas (**B)**	Total Income from Connected Persons**(A+B)**	Total Income Reported for the year
B5:	**Others**				
B50	Reimbursements of Expenses				
B51	Inward Cost Sharing or Contribution Arrangements				
B52	Income from Joint Projects				
B53	Others (Specify)				
	Sub-Total				
	Grand Total				

B6: Loans, Advances and Other Intercompany Receivables

Ref	Particulars	Opening Balance **(A)**	Increase Amount **(B)**	Decrease Amount **(C)**	Closing Balance **(A+B-C)**
B61	Interest Bearing Loans				
B62	Interest Bearing Trade Credits				
B63	Other Interest Bearing Intercompany Receivables				
B64	Interest-Free Loans				
B65	Interest-Free Trade Credits				
B66	Other Interest-Free Intercompany Receivables				
B67	Others (Specify)				

	Total				

PART C: COSTS OF CONTROLLED TRANSACTIONS

Record all values in the reporting currency used in the financial statements and returns. Support the values stated with a copy of the audited financial statements for the year

Ref.	Particulars	Charged By Connected Persons in Liberia**(A)**	Charged By Connected Persons Overseas**(B)**	Total Costs Charged By Connected Persons**(A+B)**	Total Costs Reported for the Year
C1:	**Tangible Property**				
C11	Raw Materials				
C12	Processed Goods or Finished Stocks				
C 13	Fixed Assets				
C 14	Others (Specify)				
C15	**Transportation Fees**				
	Sub-Total				
C2:	**Services**				
C 21	Management Services				
C 22	Technical Services				
C 23	Commissions				
C 24	R & D				
C 25	Other (Specify)				
	Sub-Total				
C3:	**Rents, Royalties and Intangible Property**				
C 31	Rent				
C 32	Royalties				
C 33	Licence Fees				
C 34	Franchise Fees				
C 35	Intangible Property				
C 36	Rights & Options				
C 37	Other (Specify)				
	Sub-Total				
C4:	**Financial**				
C 41	Interest				
C 42	Dividends				
C 43	Lease Payments				
C 44	Insurance				
C 45	Loan Guarantee Fee				
C 46	Others (Specify)				
	Subtotal				

Ref.	Particulars	Charged By Connected Persons in Liberia **(A)**	Charged By Connected Persons Overseas **(B)**	Total Costs Charged By Connected Persons **(A+B)**	Total Costs Reported for the Year
C5:	**Others**				
C 51	Reimbursements of Expenses				
C 52	Outward Cost Sharing or Contribution Arrangements				
C 53	Costs of Joint Projects				
C 54	Others (Specify)				
	Sub-Total				
	Grand Total				

C6: **Loans, Advances and Other Intercompany Payables**

Ref	Particulars	Opening Balance**(A)**	Increase Amount**(B)**	Decrease Amount**(C)**	Closing Balance**(A+B-C)**
C 61	Interest Bearing Loans				
C 62	Interest Bearing Trade Credits				
C 63	Other Interest Bearing Intercompany Payables				
C 64	Interest-Free Loans				
C 65	Interest-Free Trade Credits				
C 66	Other Interest-Free Intercompany Payables				
C 67	Others (Specify)				
	Total				

C7: Is any of the transactions included above with a related company or entity located in a tax jurisdiction that is subject to an income tax rate that is below 20%?

Yes		No	

C8: If yes, please provide the details in the table below

Name of affiliate	**Country of resident**	**Tax rate**	**Description of payment made during the year**	**Amount**

PART D: TRANSFER PRICING METHOD AND DOCUMENTATION

D1: TP Method(s) used for tested transactions:
Specify the transaction value for each of the transactions identified in Parts B & C above against each of the methods used in determining the appropriate transfer price. Record all values in the reporting currency used in the financial statements and annual returns

TP Method	Supplies to Connected Persons (Per Part B)	Receipts from Connected Persons (Per Part C)
Comparable Uncontrolled Price (CUP) Method		
Resale Price Method (RPM)		
Cost-Plus Method (CPM)		
Transactional Profit Split Method (TPSM)		
Transactional Net Margin Method (TNMM)		
Other Method (Specify)		
Total Value of Tested Transaction (a)		
Total Value of Untested Transactions (b)		
Total Value of Controlled Transactions (a) + (b) = (c)		

D2: Did the company provide or receive any non-monetary consideration for the performance of services (including financial services), transfer of property (tangible or intangible), processes, rights or obligations?

Yes		No	

D3: If yes, provide particulars of supplies and market value:

Supplies	Supplied to or by related Persons Resident in Liberia	Supplied to or by Other related Persons	Supplied to or by Other Independent Persons
Total Value of Supplies for no Consideration			

D3: Has the company complied with the TP Regulations? (*Tick the appropriate box*)

Yes		No	

If no, state reason(s) for non-compliance:

D4: Does documentation in accordance with Regulation 14 (3) of the Liberia Income Tax Transfer Pricing Regulation exist at the time this form is submitted?

Yes		No	

If no, state reason(s) for non-compliance:

D5: Is any of the controlled transactions included in Part B or C subject to a subsisting advance pricing agreement (APA) in Liberia?

Yes		No	

If yes, have you complied with the terms of the APA?

Yes		No	

If no, state reason(s) for non-compliance:

D6: Is any of the controlled transactions included in Part B or C subject to a subsisting advance pricing agreement (APA) in another tax jurisdiction?

Yes		No	

If yes to subsection (D6 part B), provide name of country, APA reference number and contact officer in the other country.

D7: Is any of the controlled transactions included in Part B or C covered by a subsisting pricing regime set or approved by other government agencies in Liberia?

Yes		No	

D8: If yes, name of the agency: ……………………………………………………………………………………

D9: Location of TP Documentation: …………………………………………………………………………….
City/ State/ Country

PART E: BASIC FINANCIAL INFORMATION

Record all values in the reporting currency used in the financial statements

Particulars	Reporting Entity	Group Consolidated
Fixed (Non-current Assets)		
Current Assets		
Current Liabilities		
Net Current Assets (Working Capital)		
Loans (Exclude those taken to current liabilities)		
Shareholders' Funds (Net Assets)		
Total Revenue from core business (*Exclude incidental interest or other income*)		
Gross Profit		
Total Expenses (*Exclude any item taken into account in calculating gross profit*)		
Profit before interest		
Interest Income(*Incidental interest income only*)		
Interest Expense (*Exclude interest taken into account in calculating gross profit*)		

PART F: PARTICULARS OF THE PERSON MAKING THIS DISCLOSURE

F1: Name: …………………………………………………………………………………….

F2: Address: …………………………………………………………………………………….

F3: Tax Identification Number: …………………………………………………………

F4: Telephone: ……………………………………………………………………………………

F5: E-mail Address: ……………………………………………………………..

F6: Web Address: ……………………………………………………………….

F7: Designation: ………………………………………………………………………….

F8: Signature: ……………………………………………………….. **F9**: Date…………………………….

PART G: DECLARATION

(To be completed by the Chief Financial Officer or Chief Executive Officer of the Company)

I, ………………………………………………………………………… with Identity Card No./ Passport No. hereby declare that this form contains information that is true, correct and complete as at .... 20………………….

Designation: ………………………………………………

Signature: ………………………………………………….

Date: ……………………………………………….

FOR OFFICE USE

Date (DDMMYYY): …………………………………………………………..

Name of Officer: ……………………………………………………………

Designation: ……………………………………………………………………..

Signature: ……………………………………………………………………..

Suggested Approach to Drafting Transfer Pricing Legislation

1. Transfer pricing legislation

Section XX

1. For the purposes of this Act, where

i) a person resident in [Country] engages directly or indirectly in one or more transaction, operation or scheme, in this section referred to as a "transaction" with a connected person or

ii) a person not resident in [Country] engages directly or indirectly in one or more transactions with a connected person not resident in [Country] where the transaction is in relation to a permanent establishment in [Country] of one of the two connected persons,

the amount of each person's taxable income shall be determined in a manner that is consistent with the arm's length principle. The amount of such taxable income shall be consistent with the arm's length principle if the conditions of those transactions do not differ from the conditions that would have applied between independent persons in comparable transactions carried out under comparable circumstances.

2. Where, the conditions of a transaction between connected persons ("a controlled transaction") to which paragraph 1 applies are not consistent with the arm's length principle, and the effect of that inconsistency is reducing or postponing the liability to tax of any person for any tax year, then the taxable income of that person shall be computed as though the conditions of the transaction are consistent with the arm's length principle.

3. The determination of whether the conditions of a controlled transaction are consistent with the arm's length principle of paragraph 1, and of the quantum of any adjustment made under paragraph 2, shall be made in accordance with **[Insert relevant secondary legislation/regulation reference]**

[Optional] 4 (i). The provisions of paragraph 1 shall also apply where a person resident in [Country] engages in one or more transactions with a person located in a tax jurisdiction that the Commissioner-General/Commissioner determines provides a beneficial tax regime, whether or not such a person is a connected person. [See Note 1 in Guidance Note on defining 'beneficial tax regime].

4 (ii) The provisions of paragraph 1 shall also apply where a person located in a tax jurisdiction that the Commissioner-General/Commissioner determines provides a beneficial tax regime, engages in one or more transactions that relates to a permanent establishment of a non-resident person in [Country]whether or not such a person is a connected person

[Optional] 5. Notwithstanding the provisions of paragraph 1 and 2 where;

i) a resident person engages directly or indirectly in a transaction with a connected person or

ii) a non-resident person engages directly or indirectly in a transaction relating to a permanent establishment in [Country] with a connected person for

the export or import, involving grains, oil seeds, other products obtained from the land, hydrocarbons and derivatives thereof, and, in general, goods where prices can be obtained at the date of the transaction from an international or domestic commodity exchange market, or from recognised and transparent price reporting or statistical agencies, or from governmental price-setting agencies, or from any other index that is used as a reference by unrelated parties to determine prices in transactions between them [hereinafter referred to as the publicly quoted price]

that quoted price on the date on which the goods are shipped, regardless of the means of transport, shall be, without considering the price that was agreed upon with the connected person, the sale price used for the purposes of computing the taxable income of that person unless the person provides all of the evidence needed to show that adjustments are appropriate to that quoted price to be consistent with the arm's length principle.

Provided that in the case of goods exported from [Country] the price agreed upon between the group and unrelated person is higher than the quoted price at the above-mentioned date, the agreed price in this case will be considered as the sale price for the purposes of computing the seller's taxable income in (Country).

[Optional] 6. Where;

i) a resident person engages directly or indirectly in a transaction or;

ii) a non-resident person engages directly or indirectly in a transaction relating to a permanent establishment in [Country]with a connected person for

the export or import, involving grains, oil seeds, other products obtained from the land, hydrocarbons and derivatives thereof, and, in general, goods with a quoted price, the date of the transaction shall be deemed to be the date of shipment as evidenced by the bill of lading or equivalent document depending on the means of transport unless the person provides evidence of the actual pricing date agreed by the connected persons in the transaction.

[Optional alternative to section 5 and 6 above] 7. Where;

Notwithstanding the provisions of paragraph 1 and 2 where;

i) a resident person engages directly or indirectly in a transaction with a connected person or

ii) a non-resident person engages directly or indirectly in a transaction relating to a permanent establishment in [Country] with a connected person for

the export or import, involving grains, oil seeds, other products obtained from the land, hydrocarbons and derivatives thereof, and, in general, goods where prices can be obtained at the date of the transaction from an international or domestic commodity exchange market, or from recognised and transparent price reporting or statistical agencies, or from governmental price-setting agencies, or from any other index that is used as a reference by unrelated parties to determine prices in transactions between them [hereinafter referred to as the publicly quoted price]

the monthly of that quoted price of the month in which the goods are shipped, regardless of the means of transport, shall be, without considering the price that was agreed upon with the connected person, the sale price used for the purposes of computing the taxable income of that person unless the person provides all of the evidence needed to show that adjustments are appropriate to that quoted price to be consistent with the arm's length principle.

Provided that in the case of goods exported from [Country] the price agreed upon between the group and unrelated person is higher than the above-mentioned quoted price at the above-mentioned date, the agreed price in this case will be considered as the sale price for the purposes of computing the seller's taxable income in (Country).

8. Every person who engages in a transaction to which subsection (1) applies shall keep the documentation required under [Insert Transfer Pricing Documentation Regulation reference]

9. Two persons are considered to be connected where [Countries should refer to their current domestic legislation to determine the definition of connected/related persons]

[Optional] 10. This section shall not apply in respect of transactions between connected persons where the persons are able to satisfy the Commissioner-General that they are members of a group whose total external (consolidated) turnover is less than XXXX.

11. The provisions of this section apply to the attribution of profit to a permanent establishment on the assumption that the permanent establishment and other parts of a legal person are treated as separate enterprises.

12. An enterprise refers to any commercial activity carried on by an individual, partnership or legal person.

[Optional] 13. Where a person engages in a transaction with a connected person that involves the transfer of rights in an intangible the consideration payable in that transaction shall not exceed X% of the [EBITDA + plus royalties payable] derived from the commercial activity conducted by the person in which the rights transferred are exploited.

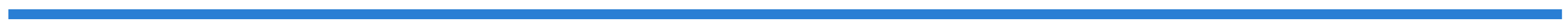
[Optional] 14. The Minster/Commissioner General/Commissioner may, by rules published in the Gazette-

(a) issue guidelines for the determination of the arm's length value of a transaction for purposes of this section; or

(b) specify such requirements as he may consider necessary for the better carrying out of the provisions of this section.

[Optional] 15. The provisions of this section apply to the attribution of profit to a permanent establishment on the assumption that the permanent establishment and other parts of a legal person are treated as separate enterprises. No deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or

for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment.



2. Proposed Transfer Pricing Regulation to be introduced in [Country]

1. Citation
2. Interpretation
3. Arm's length principle
4. Comparability
5. Transfer pricing methods
6. Evaluation of taxpayer's combined controlled transactions
7. Arm's length range
8. Sources of information on comparable controlled transactions
9. Services between associated persons
10. Transactions involving intangible property
11. Capital rich, low function companies
12. Disregarding a controlled transaction for tax purposes
13. Corresponding adjustments for domestic transactions
14. Corresponding adjustments for international transactions
15. Relevance of OECD Transfer Pricing Guidelines
16. Application of Section XXXX to domestic transactions

IN EXERCISE of the powers conferred on the [Minister/ Commissioner-General/Commissioner] by section XXXX of the Income Tax Act, the following Regulations are hereby made -

Citation

1. These Regulations may be cited as the Income Tax (Transfer Pricing) Regulations, 20XX.

Interpretation

2. In these Regulations, unless the context otherwise requires -

"Controlled transaction" is any transaction between connected persons

"Uncontrolled transaction" is any transaction between independent persons

"Comparable transactions" mean transactions that are comparable in accordance with Paragraph 4 of this Regulation

"Financial indicator" means—

(a) in relation to the comparable uncontrolled price method, the price;
(b) in relation to the cost plus method, the mark up on costs;
(c) in relation to the resale price method, the resale margin;
(d) in relation to the transaction net margin method, the net profit margin; or
(e) in relation to the transactional profit split method, the division of profit and loss;

Arm's length principle

3. (1) The determination of whether the conditions of a controlled transaction are consistent with the arm's length principle of Section XXX of the Income Tax Act and of the quantum of any adjustment made under Section XXX (1), shall be made in accordance with the provisions of Regulation….

Comparability

4. (1) An uncontrolled transaction is comparable to a controlled transaction within the meaning of Section XXX (1) -

(a) when there are no differences between them that could materially affect the financial indicator being examined under the appropriate transfer pricing method; or

(b) when such differences exist, if a reasonably accurate comparability adjustment is made to the relevant financial indicator of the uncontrolled transaction in order to eliminate the effects of such differences on the comparison.

(2) To determine whether two or more transactions are comparable, the following factors shall be considered to the extent that they are economically relevant to the facts and circumstances of the transactions -

(a) the characteristics of the property or services transferred;

(b) the functions undertaken by each person with respect to the transactions, taking into account assets used and risks assumed;

(c) the contractual terms of the transactions;

(d) the economic circumstances in which the transactions take place; and

(e) the business strategies pursued by each of the connected persons in relation to the transactions.

(3) For the purposes of determining whether two transactions are comparable, the allocation of risk between connected persons must take into account how economically significant risk is allocated in contracts between those persons; and

a) which person bears the financial risk;

b) which person performs the relevant risk control and risk mitigation functions; and

c) which person has the financial capacity to assume the risk.

In cases where the contractual allocation of risk diverges from the factors described above, risk must be allocated to the persons that perform the relevant risk control and risk mitigation functions, and have the financial capacity to assume the risk.

In cases where the performs that performs the relevant risk control and risk mitigation functions but does not have the financial capacity to assume the risk this is not likely to occur in transactions between third parties. In such cases a rigorous analysis of the facts and circumstances of the case will need to be performed, in order to identify the underlying reasons and actions that led to this situation. Based on that assessment, the Commissioner-General/Commissioner shall determine what adjustments to the transaction are needed for the transaction to result in an arm's length outcome.

Transfer pricing methods

5. (1) The arm's length remuneration of a controlled transaction shall be determined by applying the most appropriate transfer pricing method to the circumstances of the case.

(2) The most appropriate transfer pricing method shall be selected from among the approved transfer pricing methods set out in paragraph 5 (5), taking into consideration the following criteria -

(a) the respective strengths and weaknesses of the approved methods;

(b) the appropriateness of an approved method in view of the nature of the controlled transaction, determined in particular through an analysis of the functions undertaken by each person in the controlled transaction, taking into account assets used and risks assumed;

(c) the availability of reliable information needed to apply the selected transfer pricing method; and

(d) the degree of comparability between the controlled and uncontrolled transactions, including the reliability of

comparability adjustments, if any, that may be required to eliminate differences between them.

(3) It shall not be necessary to apply more than one method to determine whether the conditions of a given controlled transaction are consistent with the arm's length principle.

(4)

(5) The following shall be the approved transfer pricing methods for purposes of paragraph 5 (1) –

(a) the Comparable Uncontrolled Price Method, which consists of comparing the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction;

(b) the Resale Price Method, which consists of comparing the resale margin that a purchaser of property in a controlled transaction earns from reselling that property in an uncontrolled transaction with the resale margin that is earned in comparable uncontrolled purchase and resale transactions;

(c) the Cost Plus Method, which consists of comparing the mark up on those costs directly and indirectly incurred in the supply of property or services in a controlled transaction with the mark up on those costs directly and indirectly incurred in the supply of property or services in a comparable uncontrolled transaction;

(d) the Transactional Net Margin Method, which consists of comparing the net profit margin relative to an appropriate base, such as costs, sales or assets, that a person achieves in a controlled transaction with the net profit margin relative to the same base achieved in comparable uncontrolled transactions;

(e) the Transactional Profit Split Method, which consists of allocating to each associated person participating in a controlled transaction the portion of common profit (or loss) derived from such transaction that an independent person would expect to earn from engaging in a comparable uncontrolled transaction. When it is possible to determine an arm's length remuneration for some of the functions performed by the associated persons in connection with the transaction using one of the approved methods described in paragraphs 5(5) (a) to (d), the transactional profit split method shall be applied based on the common residual profit that results once such functions are so remunerated.

[OPTIONAL] (8) It shall not be necessary to apply more than one method to determine the arm's length remuneration for a given controlled transaction.

(9) A transfer pricing method other than the approved methods contained in paragraph 5(5) may be applied where the [Commissioner-General/Commissioner] is satisfied that -

(a) none of the approved methods can be reasonably applied to determine arm's length conditions for the controlled transaction, and

(b) such other method yields a result consistent with that which would be achieved by independent persons engaging in comparable uncontrolled transactions under comparable circumstances.

(10) When a method other than the approved methods contained in paragraph 5(5) is used it shall establish that the requirements of this paragraph 5(9) have been satisfied.

(11) As regards transactions involving the acquisition of new or used assets by taxpayers from connected persons not resident in [Country], the application of the Comparable Uncontrolled Price

method shall require the invoice for the acquisition of the asset when it was purchased from an independent third party and in case of used asset, the subsequent application of the decline in value already amortised since the asset was purchased, as allowed under accounting principles generally accepted in [Country]. This notwithstanding, and only if the asset in question is sold in a different state from the one in which it was purchased, barring ordinary wear and tear, or if there is no third-party invoice, or in the case of an asset built or assembled using a number of components and thus with several invoices, a technical appraisal may be performed by a third-party expert not employed by the company, providing details of the characteristics, scope and other conditions considered in the appraisal, for the purposes of this point and pursuant to this Regulation.

Choice of Tested Party (12) When applying a cost plus, resale price or transactional net margin method, provided under paragraph 5, it shall be necessary to select the party, hereinafter referred to as the "tested party", to the transaction for which a financial indicator, mark-up on costs, gross margin, or net profit indicator, is tested under the most appropriate transfer pricing method in the circumstance.

(13) The selection of the tested party should be consistent with the functional analysis of the transaction.

14) The tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, i.e. it will most often be the one that has the less complex functional analysis.

15) Where the most appropriate transfer pricing method in the circumstances of the case, determined following the guidance at paragraphs 5, above, is a one-sided method, financial information on the tested party is needed in addition to the information referred to in paragraph 13 irrespective of whether the tested party is a domestic or foreign entity.

16. Where the most appropriate method is a cost plus, resale price or transactional net margin method and the tested party is the foreign entity, sufficient information is needed to be able to reliably apply the selected method to the foreign tested party and to enable a review by the Commissioner the application of the method to the foreign tested party

Evaluation of taxpayer's combined

6. (1) If a taxpayer carries out, under the same or similar circumstances, two or more controlled transactions that are economically closely linked to one another or that form a

controlled transactions

continuum such that they cannot reliably be analysed separately, those transactions may be combined to (i) perform the comparability analysis set out Paragraph 4 and (ii) apply the transfer pricing methods set out in Paragraph 5.

Arm's length range

7. (1) An arm's length range is a range of relevant financial indicator figures (e.g. price, resale margin, cost mark-up, net profit ratio or a split of profit.) produced by the application of the most appropriate transfer pricing method as set out in Paragraph 5 to a number of uncontrolled transactions, that are all comparable, and equally comparable to the controlled transaction based on a comparability analysis conducted in accordance with Paragraph 4.

(2) Where the application of the most appropriate method results in a number of financial indicators for which the degree of comparability of each to the controlled transactions, and to each other, is uncertain, a statistical approach shall be used. Where such an approach is used, the interquartile range shall be considered to be an arm's length range.

[Optional alternative wording for Para 7 (1)]: An arm's length range is a range of relevant financial indicator figures (e.g. prices, margins or profit shares) produced by the application of the most appropriate transfer pricing method as set out in Paragraph 5 to a number of uncontrolled transactions, that are all comparable, and equally comparable to the controlled transaction based on a comparability analysis conducted in accordance with Paragraph 4 provided that the highest point in the range is no more than 25% greater than the lowest point in the range.

[Optional alternative wording for Para 7 (2)] Where the application of the most appropriate method results in a number of financial indicators for which the degree of comparability of each to the controlled transactions, and to each other, is uncertain, or the highest point in the range exceeds 25% of the lowest point in the range, a statistical approach shall be used. Where such an approach is used, the interquartile range shall be considered to be an arm's length range.

(3) A controlled transaction, or a set of controlled transactions that are combined according to Paragraph 6 shall not be subject to an adjustment under ***Section XXX*** where the relevant financial indicator derived from the controlled transaction or set of controlled transactions and being tested under the appropriate transfer pricing method is within the arm's length range.

(3) Where the relevant financial indicator derived from a controlled transaction, or from a set of controlled transactions that are combined according to Paragraph 6, falls outside the arm's length range, the taxable profit of the taxpayer shall be computed on the basis that the relevant financial indicator is the median of the arm's length range.

(4) **[Optional**] For the purposes of paragraph 7(3), the median of the arm's length range shall be the 50th percentile of the financial indicator figures derived from the comparable uncontrolled transactions forming the arm's length range. For this purpose, the 50th percentile is the lowest financial indicator figure such that at least 50 percent of the financial indicator figures are at or below the value of that figure. However, if exactly 50 percent of the results are at or below a financial indicator figure, then the 50th percentile is equal to the arithmetic mean of that figure and the next highest figure.

[optional] Where the relevant financial indicator derived from a controlled transaction, or from a set of controlled transactions that are combined according to Paragraph 6, falls outside the arm's length range, the taxable profit of the taxpayer shall be computed on the basis that the relevant financial indicator equates to the most appropriate point in the arm's length range.

Sources of information on comparable uncontrolled transactions

8. (1) Sources of information on comparable uncontrolled transactions may include –

a. internal uncontrolled transactions, which are uncontrolled transactions where one of the parties to the controlled transaction is also a party to the uncontrolled transaction;

b. external uncontrolled transactions, which are uncontrolled transactions to which neither of the parties to the controlled transaction is a party.

(2) Information concerning a comparable external uncontrolled transaction may not be relied upon by the [Commissioner-General/Commissioner] for the purposes of making an adjustment under Section XXX of the Income Tax Act if the information concerning the transaction is not available to the taxpayer.

(3) Information concerning a comparable uncontrolled transaction may not be relied upon by the taxpayer for the purposes of demonstrating the consistency a transaction with Section XXX of the Income Tax Act if the information on the transaction is not available to the [Commissioner-General/Commissioner].

(4) In the absence of information on uncontrolled transactions from the same geographic market as the controlled transaction, comparable uncontrolled transactions from other geographic markets may be accepted by the [Commissioner-General/Commissioner].

(5) A determination of whether comparables from other geographic markets are reliable has to be made on a case-by-case basis, and by reference to the extent to which they satisfy Paragraph 4 of this Regulation.

(6) Taxpayers or Commissioner using such comparables would be expected to assess the expected impact of geographic differences and other factors on the price and profitability.

Services between connected persons

9. (1) A service charge between a taxpayer and a connected person shall be considered consistent with the arm's length principle where –

(a) it is charged for a service that is actually rendered,

(b) the service provides, or when rendered was expected to provide, the recipient with economic or commercial value to enhance its commercial position,

(c) it is charged for a service that an independent person in comparable circumstances would have been willing to pay for if performed for it by an independent person, or would have performed in-house for itself, and

(d) its amount corresponds to that which would have been agreed between independent persons for comparable services in comparable circumstances

(2) A service charge made to a person shall not be consistent with the arm's length principle where it is made by a connected person solely because of the shareholder's ownership interest in one or more other group members, including for any of the following costs incurred or activities undertaken by such connected person -

(a) costs or activities relating to the juridical structure of the parent company of the first-mentioned person, such as meetings of shareholders of the parent, issuing of shares in the parent company and costs of the parent company's supervisory board;

(b) costs or activities relating to reporting requirements of the parent company of the first-mentioned person, including the consolidation of reports; and

(c) costs or activities related to raising funds for the acquisition of participations, unless those participations are directly or indirectly acquired by the first-mentioned person and the acquisition benefits or is expected to benefit that first-mentioned person.

(3) Where it is possible to identify specific services provided by a taxpayer to a connected person, the determination whether the service charge is consistent with the arm's length principle shall be made for each specific service, subject to the provisions of Paragraph 9(4).

(4) Where services are rendered by a taxpayer jointly to various connected persons and it is not possible to identify specific services provided to each of them, the total service charge shall be allocated among the connected persons that benefit or expect to benefit from the services according to reasonable allocation criteria.

(5) For the purpose of this sub-regulation, allocation criteria shall be viewed as reasonable where they are based on a variable or variables that -

(a) take into account the nature of the services, the circumstances under which they are provided and the benefits obtained or that were expected to be obtained by the persons for which the services are intended;

(b) relate exclusively to uncontrolled, rather than controlled, transactions; and

(c) are capable of being measured in a reasonably reliable manner.

Transactions involving intangible property

10. (1) The determination of arm's length conditions for controlled transactions involving the exploitation of an intangible must take into account the contractual arrangements and the following factors with regard to the development, enhancement, maintenance, protection and exploitation of the intangible asset:

a) The functions performed by the person;

b) The management and control of those functions;

c) The contribution by the person of assets, including financial assets,

d) The management and control regarding the contribution of assets, including financial assets;

e) The risks assumed by that person;

f) The management and control of those risks.

In cases where the contractual arrangements diverge from the factors listed above, regards shall be taken of those factors in determining the arm's length reward from the exploitation of the intangible

(2) The determination of arm's length conditions for controlled transactions involving licenses, sales or other transfers of intangible property between connected persons shall take into account both the perspective of the transferor of the property and the perspective of the transferee, including in particular the pricing at which a comparable independent person would be willing to transfer the property and the value and usefulness of the intangible property to the transferee in its business.

(3) In applying the provisions of paragraph 4 to a transaction involving the license, sale or other transfer of intangible property, consideration shall be given to any special factors relevant to the comparability of the controlled and uncontrolled transactions, including -

(a) the expected benefits from the intangible property;

(b) the commercial alternatives otherwise available to the acquirer or licensee derived from the intangible property

(c) any geographic limitations on the exercise of rights to the intangible property;

(d) the exclusive or non-exclusive character of the rights transferred; and

(e) whether the transferee has the right to participate in further developments of the intangible property by the transferor.

Capital rich, low function companies

11. (1) Capital rich, low function, companies refer to companies that are capitalised with a relatively high amount of equity (or equity-equivalent) capital, but which have limited capacity to carry out risk-management functions. Within multinational groups, such companies may, for example, provide debt funding to associated enterprises, or fund research and development programmes carried out by associated enterprises.

If such a company does not in fact control the financial risks associated with its funding activities, for tax purposes, it shall not be allocated the profits associated with those risks and will be entitled to no more than a risk-free return. The profits or losses associated with the financial risks would be allocated to the entity (or entities) that manage those risks and have the capacity to bear them.

For example, if such a company funds a research and development programme conducted by an associated enterprise, but does not have the capacity to make the key decisions that manage the risks associated with the programme, it will be considered to be conducting a funding function only, and will be allocated a return on that funding on the assumption that the funding is risk-free.

Disregarding a controlled transaction for tax purposes

12. (1) Where the arrangements made in relation to a transaction between connected persons, viewed in their totality, differ from those which would have been adopted by independent persons behaving in a commercially rational manner in comparable circumstances, thereby preventing determination of a price that would be acceptable to both of the parties taking into account their respective perspectives and the options realistically available to each of them at the time of entering into the transaction the actual transaction as structured by the taxpayer may be disregarded for the purposes of these rules, in which case the arm's length position

would be as if the transaction had not occurred. In other cases, if appropriate, the transaction should be replaced by an alternative transaction.

Corresponding adjustments for domestic transactions

13. (1) Where an adjustment is made by the [Commissioner-General/Commissioner] under Section XXX to the taxable income of a taxpayer in relation to domestic transaction, then, the [Tax Authority] shall make an appropriate adjustment to the taxable income of the other party to the transaction

Corresponding adjustments for international transactions

14. (1) Where -

- *(a)* an adjustment to the conditions of transactions between a person resident in(Country) and a connected person is made or proposed by a tax administration in a country other than [Country];
- *(b)* this adjustment results in the taxation in that other country of an amount of income on which the person resident in [Country] has already been charged to tax in [Country];
- *(c)* the country making or proposing the adjustment has a treaty with [Country] that reflects an intention to provide for the relief of economic double taxation,

(2) The [Commissioner-General/Commissioner], shall after a request is made by the person resident in [Country], examine the consistency of that adjustment with the arm's length principle provided for under section XXX, consulting as necessary with the competent authority of the other country.

(3) If the adjustment proposed or made by the other country is consistent with the arm's length principle both in principle and as regards the amount, the [Commissioner-General/Commissioner] shall make a corresponding adjustment to the amount of the tax charged in [Country] to that person on those profits, in order to eliminate the economic double taxation that would result from the inclusion of the same profits in the taxable income of both that person and the connected person.

(4) A request under paragraph 11(1) must include the information necessary for the [Commissioner-General/Commissioner] to examine the consistency of the adjustment made by the tax administration of the other country with the arm's length principle, including –

a. the name, registered address and, where applicable, trading name(s) of the connected person;

b. evidence of the tax residence of the connected person;

c. the year(s) in which the adjusted controlled transaction(s) took place;

d. the amount of the requested corresponding adjustment and the amounts of the adjustment made by the tax administration of the other country;

e. evidence of the adjustment made by the tax administration of the other country and the basis for the adjustment, including details of comparability analysis relied upon and the transfer pricing method applied;

f. confirmation that the related person party will not, or is unable to, pursue any further recourse under the domestic law of the other country that may result in the adjustment made by the tax administration of the other country being reduced or reversed;

g. any other information that may be relevant for examining the consistency of the adjustment with the arm's length principle.

(5) The request must be made within the applicable time period for making a request for the case to be resolved by way of mutual agreement procedure under the applicable tax treaty.

Relevance of OECD Transfer Pricing Guidelines

15. (1) [**First option]** The Organization for Economic Cooperation and Development (OECD) "Transfer Pricing Guidelines for Multinational Persons and Tax Administrations" are a relevant source of interpretation for these Regulations.

[**Second option**] These Regulations shall be interpreted in accordance with the Organization for Economic Cooperation and Development (OECD) “Transfer Pricing Guidelines for Multinational Persons and Tax Administrations” (OECD Guidelines). Where there is any inconsistency between the Act, these Regulations and the OECD Guidelines the Act and the Regulations shall prevail.

Application of Section XXX to domestic transactions

16 (1) Section XXX shall not apply where a person resident in [Country] engages directly or indirectly in any transaction, operation or scheme, with a connected person resident in [Country] except where the following Parts or Sections of the Income Tax Act apply to one or both of those persons:

Part XVI [add relevant sections]

3. Proposed Transfer Pricing Documentation Regulation

ARRANGEMENT OF REGULATIONS

REGULATION

1. Citation
2. Required documents
3. Language of documentation
4. Contemporaneous documentation
5. Time limit for submission of documentation
6. Power to request additional information

IN EXERCISE of the powers conferred on the [Commissioner-General/Commissioner] by section XXXX of the Income Tax Act, the following Regulations are hereby made –

Citation

1. These Regulations may be cited as the Income Tax (Transfer Pricing Documentation) Regulations, [20XX].

Required documents

2. (1) A taxpayer must have in place contemporaneous documentation that verifies that the conditions in its controlled transactions for the relevant tax year are consistent with the arm's length principle.

2. (2) Documentation shall include:

a. an overview of the taxpayer's business operations (history, recent evolution and general overview of the relevant markets of reference) and organizational chart (details of business units/departments and organizational structure);

b. a description of the corporate organizational structure of the group that the taxpayer is a member (including details of all group members, their legal form, and their shareholding percentages) and the group's operational structure (including a general description of the role that each of the group members carries out with respect to the group's activities, as relevant to the controlled transaction(s));

c. description of the controlled transaction(s), including analysis of the comparability factors specified in Paragraph 4 of the Income Tax Transfer Pricing Regulations, 20XX;

d. details of the functions undertaken by the connected parties in relation to the controlled transaction. This should include details of assets in relation to the controlled transaction as well as risk assumed by each party.

e. explanation of the selection of most appropriate transfer pricing method(s), and, where relevant, the selection of the tested party and the financial indicator;

f. financial statements for the parties to the controlled transaction including where the tested party has been selected as a party outside the country.

g. comparability analysis, including; description of the process undertaken to identify comparable uncontrolled transactions; explanation of the basis for the rejection of any potential internal comparable uncontrolled transactions (where applicable); description of the comparable uncontrolled transactions; analysis of comparability of the controlled transaction(s) and the comparable uncontrolled transactions (taking into account Paragraph 4 of the Income Tax Transfer Pricing Regulations, 20XX); and, details and explanation of any comparability adjustments made;

h. detail of any industry analysis, economic analysis, budgets or projections relied on;

i. details of any advance pricing agreements or similar arrangements in other countries that are applicable to the controlled transactions;

j. a conclusion as to consistency of the conditions of the controlled transactions with the arm's length principle, including details of any adjustment made to ensure compliance; and

k. any other documentation or information that is necessary for determination of the taxpayer's compliance with the arm's length principle with respect to the controlled transactions.

Language of documentation

3. Documentation may be submitted in XXXXX or English language.

Contemporaneous documentation

4. Documentation for a relevant tax year is considered to be contemporaneous where it is in place at the statutory tax return's filing date

Time limit for submission of documentation

5. Documentation shall be provided to the [Commissioner-General/Commissioner] within 45 days of the written request being duly issued by the [Commissioner-General/Commissioner].

Power to request additional information

6. The obligation of the taxpayer to provide this documentation is established without prejudice to the power of the [Commissioner-General/Commissioner] to request additional information that in the course of audit procedures it deems necessary to carry out its functions.

Appendix 1 – Option to introduce Low value-added services provisions

Option – Low value-added services
Suggested approach if to adopt the revised OECD guidance on low value added services 1.An amount charged for the provision of a low value-added service between connected persons shall be considered to be arm's length provided that: - the amount is based on an allocation to each person that receives low value-added services of the total group costs of providing the services; and - the allocation of those costs is based on an appropriate allocation method; and - the cost-plus method is applied to those costs; and - the mark-up on those costs is 5%; and - the total amount charged to a COUNTRY taxpayer for all low value-added services within the scope of this paragraph does not exceed USDXXX - the taxpayer maintains the documentation described in paragraph 5 below, and makes that documentation available to the TAX AUTHORITY on request. 2. For the purpose of paragraph 1 above - 'total group cost' means the direct and indirect costs incurred by connected persons in providing the service to members of the group of companies to which a COUNTRY taxpayer belongs. - an 'appropriate allocation method' means a method that allocates a total group cost between members of the group in a way that that is proportional to the benefits or expected benefits to each member of the group. [Note: ***For simplicity, this could specify an apportionment in proportion to, for example, turnover of each member of the group***]. 3. For the purpose of paragraph 1 above, a low value-added service is a service that: - is not provided by any member of the group of companies to unrelated customers, - does not use or create valuable intangible property, - does not involve the assumption, control or creation of significant risk. 4. The documentation referred to in paragraph 2 above consists of: - the identity of the providers and beneficiaries in COUNTRY of the low value-added services; - the reasons justifying that each category of services constitutes low value-adding intra-group services within the definition above; - the rationale for the provision of services within the context of the business of the group; - a description of the benefits or expected benefits to the COUNTRY enterprise of each category of services;

- a description of the selected allocation keys and the reasons justifying that such allocation keys produce outcomes that reasonably reflect the benefits received, and confirmation of the mark-up applied;
- Written contracts or agreements for the provision of services and any modifications to those contracts. Such written contracts or agreements could take the form of a contemporaneous document identifying the entities involved, the nature of the services, and the terms and conditions under which the services are provided;
- Documentation and calculations showing the determination of total group cost, and of the mark-up applied, listing all categories and amounts of relevant costs, including costs of any services provided solely to one group member;
- Documentation and calculations showing the application of the specified allocation keys

Art. 15. Safe Harbor for International Transactions Involving Routine Manufacturing Operations in [Country]

1. This articles applies where:
   a. taxpayer is party to one or more controlled transactions that compensate the taxpayer for 'qualifying manufacturing activities' that it carries on in COUNTRY; and
   b. the conditions in sub-articles 5 and 6 of this Article are met;

2. Where this article applies with respect to one or more controlled transactions:
   a. no adjustment will be made under **[Section XX]** with respect to those controlled transactions; and
   b. the requirements of the Transfer Pricing Regulations will not be applicable

3. A taxpayer carries on a "qualifying manufacturing activity" if:
   a. that activity consists only of:
      i. the performance of manufacturing services on behalf of a connected person, or a number of such persons ("toll manufacturing"); or
      ii. the production of manufactured products for sale only to a connected person, or a number of such persons ("contract manufacturing"); and
   b. the taxpayer does not perform a manufacturing service for any unconnected persons or sell manufactured goods to any unconnected persons; and
   c. the taxpayer has entered into an arrangement with the connected person or persons under which the connected person or persons assume the principal business risks associated with the manufacturing activities of the taxpayer and agrees to compensate the taxpayer for its manufacturing activities at levels consistent with sub-article 5 of this Article; and
   d. the taxpayer does not engage in advertising, sales, marketing and distribution functions, credit and collection functions, or warranty administration functions with regard to the manufacturing service it performs and or products it manufactures;
   e. in the case of contract manufacturing, it does not:
      i. retain title to finished products after they leave its factory;
      ii. bear any transportation or freight expense with respect to such finished products; and
      iii. does not bear any risk of loss with respect to damage or loss of finished products in transit; and

f. the taxpayer does not engage in managerial, legal, accounting, or personnel management functions other than those directly related to the performance of its manufacturing activities; and

g. the taxpayer does not:
   i. own, or share in the ownership, of
   ii. have rights or reasonable claims to ownership, or a share in the ownership, of; or
   iii. share the cost in developing;
   iv. pay royalties for the right to exploit any valuable product, process or marketing intangibles (e.g. designs, patents, formulas, trademarks, brand names), including valuable know-how

4. For the purposes of sub-article 1(a) of this Article, transactions compensating a taxpayer for 'qualifying manufacturing activities' are:

a. in the case of contract manufacturing, sales of manufactured products
b. in the case of toll manufacturing, service fees received for the qualifying manufacturing activity

5. Condition 1 - The compensation received by the taxpayer for transactions related to that activity (but not for any other transactions conducted by the taxpayer) is not less than the applicable minimum amount:

a. In cases where the taxpayer conducts a qualifying manufacturing activity that is contract manufacturing, the minimum amount of total compensation from the sale of the products in respect of the 'qualifying manufacturing activity' is the total costs of the qualifying manufacturing activity, excluding only net interest expense, currency gain or loss and any non-recurring or extraordinary costs, plus a XXX% mark-up.

b. In cases where the taxpayer conducts a qualifying manufacturing activity that is toll manufacturing, the minimum amount of net income for the manufacturing service performed by the taxpayer is the total costs of the qualifying manufacturing activity, excluding only net interest expense, currency gain or loss and any non-recurring or extraordinary costs, plus a XXX% mark-up.

6. Condition 2- Documentation is maintained by the taxpayer and submitted to the Tax Authority within 45 days of a written request being duly issued by the Tax Authority. The documentation must include:

a. a description of the activities of the taxpayer and, in particular, documents the consistency of the activities with sub-article 3 of this Article; and
b. Calculations demonstrating that the transactions compensating a taxpayer for the 'qualifying manufacturing activities' are consistent with sub-article 5 of this Article.

7. Where this article does not apply to controlled transaction, the general rules outlines in this Regulation will apply.

Application of this Article is without prejudice to the application of [Country's] obligations under an applicable international treaty.

8. The mark ups specified in sub-article 6 of this Article may be reviewed periodically by the Ministry of Finance, taking into account Article 3 of this Regulation.

Appendix 2 – Proposed controlled transaction schedule

ANNUAL RETURN ON TRANSFER PRICING

DRAFT

[COUNTRY TAX ADMINISTRATION]

ANNUAL RETURN ON TRANSFER PRICING

This return forms part of Form XXX and must be completed by those taxpayers with aggregate **transactions within [Section XX]** exceeding USDXXXXXX during the relevant fiscal period. In determining the aggregate value of **transactions within [Section XX]** for the relevant fiscal period, loan balances and capital transactions should be included and income and expenses may not be offset.

1. **Name of taxpayer:……………………………………………………………………………….**
2. **TIN Number:…………………………………………………………………………………….**
3. **Contact person:………………………………………………………………………………..**
4. **Describe the taxpayer's principal business activities.**

   ………
   ………
   ………………………………………………………………………………………..

5. **Describe the principal business activities of the ultimate parent company and its consolidated group.**

   ………
   ………
   ………………………………………………………………………………………..

6. **Particulars of connected persons with which the taxpayer had transactions with**

Name of connected person	Nature of relationship	Country of tax residence	Country of incorporation (where applicable)*	Description of transactions	Aggregate value of transactions**

* In the case of a legal person, the country under which laws the legal person was formed
** Income and expenses should not be offset

7. Details of the performance of the [Country] taxpayer and the consolidated group of the ultimate parent company (where applicable).

	[Country] Taxpayer	Holding Company (Consolidated)
Total Assets		
Operating Assets		
Current Liabilities		
Turnover		
Gross profit		
Total expenses		
Operating expenses		
Operating profit		

8. Details of controlled transactions that give rise to taxable income or tax deductible expenses:

Category/Item	Purchases/ Expenditure (ETB)	Sales /Revenue (ETB)	Transfer pricing adjustments (if any)	Percentage (%) for which transfer pricing documentation has been prepared	Transfer pricing method*
Tangible property					
Finished goods					
Goods in process					
Raw materials					
Other					
Rents, Royalties and Intangible property					
Rent					
Royalties					
License or franchise fees					

Other					
Services					
Management					
Administrative					
Marketing					
Engineering, technical, construction, etc.					
Research and development					
Training					
Commissions					
Other					
Financial					
Interest					
Guarantee fees					
Lease payments					
Insurance					
Other					
Other					
Reimbursement of expenses					
Employment cost for expatriate employees					
other (not included elsewhere)					
Total					

* Please select from the following:

CUP – comparable uncontrolled price method

RPM – resale price method

CPLM – cost plus method

TNMM – transactional net margin method

PSM – profit split method

OTH – other method

Note - Where more than one method is applicable for a category of transaction, please specify the transfer pricing method applicable to the largest portion.

9. Details of loans to and from connected persons:

(a) Loans to connected persons

Name of connected person	Opening balance	Closing balance	Interest bearing (Yes/No)

(b) Loans from connected persons

Name of connected person	Opening balance	Closing balance	Interest bearing (Yes/No)

10. Details of transactions with connected persons of a capital nature:

(a) Did you have any transactions with connected persons of capital nature in which you acquired interest in asset(s)? Yes [ ] No [ ]

If yes, state the subject of the transaction (i.e. machinery, shares, intangible asset etc.) and the method(s) used to determine the purchase price.

………
………
………………………………………………………………………………………………..

(b) Did you have any transactions with connected persons of capital nature in which you disposed of asset(s)? Yes [ ] No [ ]

If yes, state the subject of the transaction (i.e. machinery, shares, intangible asset etc.) and the method(s) used to determine the disposal proceeds.

………
………
………………………………………………………………………………………………..

11. Dealings with connected persons involving non-monetary or nil consideration:

(a) Have you received from or provided to a connected person any non-monetary

consideration for the performance of services, transfer of property (tangible or intangible), processes, rights or obligations? **Yes [ ]** **No [ ]**

(b) Have you provided to a connected person any services, transfer of property (tangible or intangible), processes, rights or obligations for which the consideration was nil?

Yes [ ] **No [ ]**

12. Has there been any change in the business structure during the year (changes to ownership structure or other business restructuring)?

Yes [ ] **No [ ]**

If yes, please provide details.

……
……
…………………………………………………………………………………………………..

Name of authorized official…………………………………………………. Designation: ……………………………………………………………………….. Signature: ……………………………… Date :………

ANNEX 5: MODEL - THIN CAPITALIZATION RULES

FRAMEWORK FOR LEGISLATION TO COUNTER EXCESSIVE INTEREST DEDUCTABILITY

Introduction

This note is intended to provide guidance to ECOWAS countries intending to introduce or update rules to counter profit shifting by means of excessive interest deductions. The note contains a 'framework' for rules aimed at:

- countering tax avoidance through excessive interest deducibility (tax revenue protection);

- consistency with internationally agreed standards (to minimize the risk of double taxation, or double non-taxation);

- ease of application (to reduce tax authority enforcement costs);

- clarity, transparency and predictability of application (to assist taxpayers comply with the rules with minimum compliance cost, to ensure they can be applied as objectively and consistently as possible, and to reduce risk of corruption).

These 'framework rules' contain the basic provisions of a rule to counter loss of tax revenue through excessive interest deductibility. They are based on the approach identified by the OECD/G20 BEPS initiative (Action 4)[11] as a 'best practice approach'. There is some experience of this type of approach in ECOWAS countries – Liberia and Sierra Leone existing rules adopt it, although in both cases there are variances with the 'best practice approach'.

Some countries use alternative approaches, which are described briefly below.

The 'framework rules' below should not be regarded in any country as a finalized legislation. It provides a possible structure and content for primary legislation on countering excessive interest deductibility and countries wishing to make use of this guidance will need to adapt its wording to take account of their own tax policy requirements, as well as their statutory conventions.

Alternative approaches

[11] http://www.oecd.org/tax/limiting-base-erosion-involving-interest-deductions-and-other-financial-payments-action-4-2015-final-report-9789264241176-en.htm

It should be noted that countries employ a number of alternative measures to counter excessive interest deductions by multinational companies.

Some countries apply a pure 'arm's length' approach. Under this approach, the restriction on interest is by reference to the amount of debt that a taxpayer would be able to raise from a third party independent lender (such as a bank). This approach is used by United Kingdom and South Africa. The application of such a rule requires advanced technical capacity, as the auditor needs to place himself/herself in the position of a bank, and take a view of the amount that bank would be willing to lend to the entity, on the assumption that it was 'stand alone' (i.e. not part of a group). In addition, the subjective nature of this approach reduces the certainty of its application from the perspective of taxpayers, an increases the risk of inconsistent application.

Other countries restrict interest by reference to a level of debt determined by a ratio such as a debt/equity ratio. Such an approach is less subjective and thus simpler to implement than that described in the paragraph above, and it is relatively easy for tax administrations to obtain information on the level of debt and equity in an entity (although there may be an issue concerning the definition of debt and equity for these purposes). On the other hand, a ratio such as this may not reflect the economic reality, and it is open to manipulation by varying the amount of equity in a particular entity.

In addition, some counties general rules on interest deductibility with 'targeted rules'. Such rules apply to specific situations that carry the risk of tax loss. For example, countries may disallow an interest deduction if the interest receipt, in the hands of the lender, is not subject to tax. (Anti-hybrid rules).

A useful discussion of the various approaches available to countries can be found in an informal OECD Paper[12]. As mentioned above, the 'framework legislation' below adopts the approach recommended by the OECD/G20 BEPS initiative.

12 http://www.oecd.org/ctp/tax-global/5.%20thin_capitalization_background.pdf

Template of Interest Deductibility Rules for ECOWAS Countries

1. In computing the profit subject to tax of an enterprise that is a member of a group of companies, the amount of interest that may be deducted in arriving at that profit shall not exceed Y% x EBITDA.

   [*Alternative wording*

   1. In computing the profit subject to tax of an enterprise that is a member of a group of companies, the amount of interest that may be deducted in arriving at that profit shall not exceed the higher of:

   a) Y% x EBITDA, or

   b) group net interest ratio x EBITDA.]

2. For the purposes of this Article, EBITDA means the sum of:

a) the tax measure of profit before net interest expense, and
b) depreciation, and
c) amortisation.

3. For the purposes of this Article, a group of companies means:

   - the enterprise's ultimate parent company, and all companies that are fully consolidated in the parent's consolidated financial statements, or
   - where the enterprise it itself the ultimate parent company, all companies that are fully consolidated in that enterprise's consolidated financial statements, or
   - where consolidated financial statements are not prepared, any two companies, where one controls the other, or
   - where consolidated financial statements are not prepared, all companies that are under common control of another company, or individual, group of individuals, including family members of such individuals, or a partnership.

4. This Article shall apply also in respect of interest expense incurred in respect of a loan made to an enterprise directly or indirectly from a shareholder who is an individual, or a partner or a family member of that individual.

5. For the purposes of this Article:

a) net interest expense means interest expense *minus* interest income.

b) interest means interest paid on all forms of debt; payments economically equivalent to interest; expenses incurred in connection with the raising of finance, and any other sum in respect of financing which is otherwise deductible in profit subject to tax.

c) group net interest means the total consolidated third party net interest expense of the group of companies to which the enterprise belongs.

6. [*This article shall not apply to an enterprise that is a member of a group of companies composed solely of companies resident in COUNTRY OR*

This article shall not apply to an enterprise that is a member of a group of companies composed solely of companies resident in COUNTRY, and all those companies are subject to income tax on their profit at the same rate of tax].

7. In cases where interest is paid directly or indirectly to an enterprise resident in a low tax jurisdiction [as defined], paragraph 1 above shall apply on the basis that Y is xx%.

8. This article shall not apply to an enterprise if the total net interest expense incurred by members of the group of companies that are resident in COUNTRY is less that CU XXX, unless that total net interest expense is paid directly or indirectly to an enterprise resident in a low tax jurisdiction [as defined].

9. Interest for which a deduction is denied under this Article may be carried forward and treated as incurred during the next year of assessment. Interest so denied may be carried forward for no more than x years. This paragraph shall not apply in respect of interest disallowed under paragraph 7 above.