



NINETIETH ORDINARY SESSION OF THE COUNCIL OF MINISTERS

BISSAU, 6 - 7 July 2023

DIRECTIVE C/DIR.6/07/23 ON THE HARMONISATION OF TRANSFER PRICING RULES WITHIN ECOWAS MEMBER STATES

THE COUNCIL OF MINISTERS,

MINDFUL of Articles 10, 11 and 12 of the ECOWAS Revised Treaty establishing the Council of Ministers and defining its composition and functions;

MINDFUL of Articles, 35, 37 and 40 of the ECOWAS Treaty on liberalization of trade, the Common External Tariff, Customs Duties and Internal Taxation;

MINDFUL of Directive C/DIR.1/12/13 adopting the ECOWAS Tax Transition Programme;

MINDFUL of Supplementary Act A/SA.1/06/08 adopting Community Competition Rules and the modalities of their application within ECOWAS;

MINDFUL of the Supplementary Act A/SA.6.12/18 adopting community rules for the elimination of double taxation with respect to taxes on income, capital and inheritance and the prevention of tax evasion and avoidance within the ECOWAS;

RECOGNIZING the need to protect the tax base of Member States against the risks of profit shifting, mainly cross-border but also domestic, between associated enterprises subject to different tax treatments on the one hand, and on the other hand to encourage taxpayers to apply arm's length prices in their transactions with associated enterprises, and to require them to calculate their taxable income in accordance with the arm's length principle;

TAKING INTO ACCOUNT the United Nations Practical Manual on Transfer Pricing for Developing Countries July 2021 edition, which addresses the need for clearer guidance on the policy and administration aspects of applying transfer pricing rules to multinational enterprises transactions;

TAKING INTO ACCOUNT ALSO that this guidance assists tax administrations in dealing with complex transfer pricing issues, but also taxpayers in dealing with tax administrations;

DESIROUS of establishing a standardized approach on transfer pricing rules within ECOWAS Member States;

UPON THE RECOMMENDATION of the eighth meeting of ECOWAS Ministers of Finance held by Video Conference on Tuesday 9th May 2023;

UPON THE OPINION of the Parliament at its First Ordinary Session held in Abuja, Nigeria from 08th to 26th of May 2023;

PRESCRIBES:

**CHAPTER I
GENERAL PROVISIONS**

ARTICLE 1: OBJECTIVE AND SCOPE

1. The aim of this Directive is to harmonize transfer pricing rules within ECOWAS Member States in accordance with the latest international standards and to improve legal certainty and the investment climate in the Community.
2. The Directive relates to:
 - a) the arm's length principle and its application;
 - b) transfer pricing documentation; and
 - c) the annual transfer pricing disclosure schedule.

ARTICLE 2 : DEFINITIONS

1. For the purposes of this Directive the following definitions shall apply:
 - a) **"The Arm's Length Principle (ALP)"** is an international standard that compares the transfer pricing charged between related entities with the price of similar transactions carried out between independent entities at arm's length. An adjustment may be made to the extent that profits of a related party differ from those that would be agreed between independent entities in similar circumstances;
 - b) **"Associated enterprises"** refers to two enterprises where one such enterprise fulfils the conditions laid down in Article 5 of this Directive in respect of the other enterprise;
 - c) **"Controlled transaction"** means a transaction between two or more associated enterprises;
 - d) **"Enterprise"** means the carrying on of any business;
 - e) **"Multinational enterprise group"** means two or more associated enterprises, the tax residence for which is in different Member states, or

includes an enterprise that is resident for tax purposes in one Member state and is subject to tax with respect to the business carried out through a permanent establishment in another Member state;

- f) **“Tax administration”** means the structure, institution or body responsible in each Member State for the administration of taxes;

2. Any term or expression not defined in this Directive shall unless the context otherwise requires, have the meaning under the national laws of that member states within the applicable tax laws.

CHAPTER II

ARM’S LENGTH PRINCIPLE

ARTICLE 3: ARM’S LENGTH PRINCIPLE

Where:

- a) an enterprise participates directly or indirectly in the management, control or capital of another enterprise, or
- b) the same persons or enterprises participate directly or indirectly in the management, control or capital of two enterprises,

and, in either case, conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

ARTICLE 4: RELEVANT TRANSACTIONS

- 1. The provisions of Article 3 of this Directive shall apply to all transactions between associated enterprises, where one of them is located in a Member State and the other one is located outside that Member State, whether carried out for returns or not.
- 2. Member States may extend the scope of paragraph 1 of this Article to transactions between associated enterprises located in the same Member State.

ARTICLE 5: CONCEPT OF DEPENDENCY AND CONTROL

- 1. For the purpose of Article 3 of this Directive, an enterprise is deemed to participate directly or indirectly in the management, control or capital of another enterprise where it:

- a) owns, directly or indirectly, a significant share of the capital or voting rights in the other enterprise as defined by each Member State; or
 - b) by de facto and by any means exercises, directly or indirectly, decision-making, supervisory or managerial power over the other enterprise, or is able to influence its decisions.
2. For the purpose of Article 3 of this Directive, the same persons or enterprises shall be regarded as participating directly or indirectly in the management, control or capital of two enterprises where those persons or enterprises:
- a) own, directly or indirectly, a significant share of the capital or voting rights in both enterprises as defined by each Member State; or
 - b) by de facto and by any means exercise, directly or indirectly, decision-making, supervisory or managerial power over both enterprises, or are able to influence their decisions.

ARTICLE 6: BURDEN OF PROOF

1. In the context of the transfer pricing documentation provided for in Article 7 of this Directive, any enterprises of a Member State referred to in Article 8 of this Directive shall demonstrate that the prices, terms and conditions of transactions entered into with associated enterprises located outside that Member State comply with the arm's length principle.
2. In the context of audits of transactions carried out by an enterprise of a Member State with any associated enterprise located outside that Member State, the tax administration of that Member State shall demonstrate that the said transactions are not in compliance with the arm's length principle so as to conclude that there has been a transfer of profits to the associated enterprise located outside that Member State.
3. Member States may extend the scope of paragraphs 1 and 2 of this Article to transactions between associated enterprises located in the same Member State.

CHAPTER III TRANSFER PRICING DOCUMENTATION

ARTICLE 7: DOCUMENTATION REQUIREMENT

1. The relevant enterprises referred to in Article 8 of this Directive shall submit to the tax administration, in accordance with the arrangements set out in Articles 9 and 11 of this Directive, documentation justifying the transfer pricing policy applied to transactions of all kinds conducted with associated enterprises located outside the Member State in question.

2. Member States may extend the scope of paragraph 1 of this Article to transactions between associated enterprises located in the same Member State.

ARTICLE 8: ENTERPRISES UNDER THE DOCUMENTATION REQUIREMENT

The documentation requirement referred to in Article 7 of this Directive shall apply to an enterprise of a Member State where:

- a) that enterprise has an annual turnover excluding Value Added Tax/Goods and Services Tax or gross assets greater than or equal to an amount defined by each Member State; or
- b) at the end of the financial year, that enterprise holds, directly or indirectly, a significant share of the capital or voting rights as defined by each Member State, in an enterprise satisfying the condition set out in sub-paragraph (a); or
- c) at the end of the financial year a significant share of the capital or voting rights in the other enterprise as defined by each Member State is held, directly or indirectly, by an enterprise satisfying the condition set out in sub-paragraph (a).

ARTICLE 9: FORM OF TRANSFER PRICING DOCUMENTATION

1. The documentation referred to in Article 7 of this Directive shall be prepared in one of the official languages of the Member State that requires such documentation.
2. Documentation must be supplied in paper copy and/or in a paperless format as defined by the Member State that requires it.

ARTICLE 10: CONTENT OF TRANSFER PRICING DOCUMENTATION

1. The documentation referred to in Article 7 of this Directive shall comprise of a master file containing standardized information about all members of the multinational enterprise group in question and a local file containing information on the transactions carried out by the enterprise of the Member State with associated enterprises.
2. The content of the documentation referred to in Article 7 of this Directive shall include, at a minimum, the information set out in the Annexure to this Directive. That documentation shall not replace the supporting information for each transaction.

ARTICLE 11: DATE FOR THE SUBMISSION OF TRANSFER PRICING DOCUMENTATION

Member States shall set the date by which the enterprises referred to in Article 8 of this Directive are required to submit transfer pricing documentation to the tax administration.

ARTICLE 12: PENALTIES

Member States shall provide for proportionate dissuasive penalties in the event of failure by an enterprise to comply with the documentation requirement referred to in Article 7 of this Directive.

CHAPTER IV ANNUAL TRANSFER PRICING DISCLOSURE SCHEDULE

ARTICLE 13: REPORTING REQUIREMENT

1. Enterprises of a Member State that are dependent on or have control of enterprises located outside that Member State within the meaning of Article 5 of this Directive and whose annual turnover (excluding Value Added Tax/Goods and Services Tax) or gross assets are greater than or equal to an amount defined by each Member State, shall file an annual transfer pricing disclosure schedule.
2. Member States may extend the scope of paragraph 1 of this Article to enterprises of a Member State that are dependent on or have control of enterprises located in that Member State within the meaning of Article 5 of this Directive.

ARTICLE 14: FORM OF THE ANNUAL TRANSFER PRICING DISCLOSURE SCHEDULE

1. The annual transfer pricing disclosure schedule referred to in Article 13 of this Directive shall be drawn up in one of the official languages of the Member State that requires such schedule.
2. The disclosure schedule must be supplied in paper copy and/or in a paperless format as defined by each Member State.

ARTICLE 15: CONTENT OF THE ANNUAL TRANSFER PRICING DISCLOSURE SCHEDULE

The annual transfer pricing disclosure schedule shall, at least, include the following information:

1. Background information on the multinational enterprise group to which the reporting enterprise belongs:
 - a) the name and registered office address of the group's ultimate parent;
 - b) a description of the group's main activities;
 - c) a general description of the transfer pricing policy applied by the group and in relation to the reporting enterprise, as well as of any changes that have occurred during the financial year;
 - d) a list of the intangibles owned by the group, the company names of the enterprises that own or co-own those assets and their state of operation;

- e) a brief description of any restructuring within the group that has affected the reporting enterprise during the financial year and its consequences in terms of reallocation of functions, risks and assets.
2. Specific information on the reporting enterprise:
- a) a description of the activities carried on, including any changes in the course of the financial year;
 - b) a summary statement of the transactions conducted with associated enterprises;
 - c) information on loans and borrowings with associated enterprises;
 - d) information on transactions conducted with associated enterprises that are subject of advance pricing agreements or tax rulings with another State.

ARTICLE 16: FILING DATE FOR THE ANNUAL TRANSFER PRICING DISCLOSURE SCHEDULE

Member States shall set the filing date for the annual transfer pricing disclosure schedule referred to in Article 13 of this Directive.

ARTICLE 17: PENALTIES

Member States shall provide for proportionate dissuasive penalties in the event of failure by an enterprise to comply with the disclosure requirement referred to in Article 13 of this Directive.

CHAPTER V FINAL PROVISIONS

ARTICLE 18: ADMINISTRATIVE PROVISIONS

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by **31 December 2026**.
2. When Member States adopt the provisions referred to in the preceding paragraph, the provisions shall contain a reference to this Directive or shall be accompanied by such a reference at their official publication.
3. Member States shall communicate to the ECOWAS Commission the measures or arrangements they adopt to comply with this Directive.
4. Member States shall notify the difficulties encountered in implementing this Directive to the President of the Commission who shall report to the next session of the Council of Ministers

ARTICLE 13: PUBLICATION

1. This **DIRECTIVE C/DIR.6/07/23** shall be published in the official Journal of the community by the ECOWAS Commission within thirty (30) days of its signature by the Chairperson of the Council of Ministers.
2. It shall also be published within the same time frame by each State in its Official Journal after notification by the ECOWAS Commission.

ARTICLE 14: ENTRY INTO FORCE

This **DIRECTIVE C/DIR.6/07/23** shall enter into force upon its publication.

DONE AT BISSAU, ON 7TH JULY 2023



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H.E. SUZI CARLA BARBOSA
FOR THE COUNCIL
THE CHAIRPERSON

ANNEX TO THE DIRECTIVE: CONTENT OF TRANSFER PRICING DOCUMENTATION

In conformity with Article 10 of this Directive, this annex sets out the contents of the master file and the local file that constitute transfer pricing documentation.

Section 1 – Master file

The master file shall include the following information:

1. Organisational structure

Chart illustrating the multinational enterprise (MNE) group's legal and ownership structure and geographical location of operating entities.

2. Description of Multinational Enterprise group's business(es)

General written description of the Multinational Enterprise group's business (es) including:

- a) important drivers of the group's business profit;
- b) a description of the supply chain for the group's five largest products and/or service offerings by turnover plus any other products and/or services amounting to more than 5% of group turnover;
- c) a list and brief description of important service arrangements between members of the Multinational Enterprise group, other than research and development (R&D) services; the information should include a description of the capabilities of the principal locations providing important services and transfer pricing policies for allocating services costs and determining prices to be paid for intra-group services;
- d) a description of the main geographic markets for the group's products and services that are referred to in point (b);
- e) a functional analysis describing the principal contributions to value creation by individual enterprises within the group, i.e. key functions performed, important risks assumed and important assets used;
- f) a description of important business restructuring transactions, acquisitions and divestitures occurring during the financial year.

3. Multinational Enterprise group's intangibles

- a) a general description of the MNE group's strategy for the development, ownership and exploitation of intangibles; that description should include

the location of principal Research & Development facilities and location of Research & Development management;

- b) a list of intangibles or groups of intangibles of the Multinational Enterprise group that are important for transfer pricing purposes, as well as which enterprises legally own them;
- c) a list of important agreements entered into between associated enterprises in respect of intangibles, including cost allocation arrangements, principal research service agreements and licence agreements;
- d) a general description of the group's transfer pricing policies related to Research and Development and intangibles;
- e) a general description of any important transfers of interests in intangibles among associated enterprises during the financial year, including the relevant enterprises, the state or territory of tax residence and the compensation involved.

4. Multinational Enterprise group's intercompany financial activities

- a) a general description of how the Multinational Enterprise group is financed, including a description of important financing arrangements with unrelated lenders;
- b) the identification of any enterprises of the Multinational Enterprise group that provide a central financing function for the group, including the state or territory under whose laws the relevant enterprise is organised and the place of effective management of such enterprise;
- c) a general description of the group's transfer pricing policies related to financing arrangements between associated enterprises.

5. Multinational Enterprise group's financial and tax positions

- a) the Multinational Enterprise group's annual consolidated financial statement for the fiscal year concerned, if otherwise prepared for financial reporting, regulatory, internal management, tax or other purposes;
- b) a list and description of the Multinational Enterprise group's existing unilateral advance pricing agreements (APAs) and other tax rulings relating to the allocation of income among states or territories.

Section 2 – Local file

The local file shall include the following information:

1. Local entity's organisational structure and business operations

- a) a description of the management structure, an organisational chart for the enterprise, and a list of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices;
- b) a detailed description of the business and business strategy pursued, including an indication of whether the enterprise has been involved in or affected by business restructurings or intangibles transfers in the present or immediate past financial year and an explanation of those aspects of such transactions affecting the enterprise;
- c) a list of the key competitors.

2. Transactions with associated enterprises

For each category of transactions with associated enterprises to which the local entity is party, supply the following information:

- a) a description of the transactions with associated enterprises (procurement of manufacturing services, purchase of goods, provision of services, loans, financial and performance guarantees, licences of intangibles, etc.) and the circumstances in which such transactions take place;
- b) the amounts of intra-group payments and receipts for each category of transactions with associated enterprises involving the local entity each broken down by state of residence of the foreign payor or recipient;
- c) an identification of associated enterprises involved in each category of transactions performed by the local entity, and the relationship they have with the local entity;
- d) copies of all material intercompany agreements concluded by the local entity with associated enterprises;
- e) a detailed comparability and functional analysis of the local entity and associated enterprises with respect to each category of intra-group transactions, including any changes compared to prior tax years;
- f) an indication of the most appropriate transfer pricing method for each transaction and the reasons for selecting that method;
- g) an indication of which associated enterprise is selected as the tested party, if applicable, and an explanation of the reasons for this selection;

- h) a summary of the important assumptions made in applying the transfer pricing methodology;
- i) if relevant, an explanation of the reasons for performing a multi-year analysis;
- j) a list and description of comparable uncontrolled transactions (internal or external), and information on relevant financial indicators for independent enterprises relied on in the transfer pricing analysis, including a description of the comparable search methodology with reference to the source of such information;
- k) a description of any comparability adjustments performed, indicating whether adjustments have been made to the results of the tested party, the comparable uncontrolled transactions, or both;
- l) a description of the reasons for concluding that transactions priced based on the application of the selected transfer pricing method are in conformity with the arm's length principle;
- m) a summary of financial information used in applying the selected transfer pricing methodology;
- n) a copy of existing unilateral and bilateral/multilateral APAs and other tax rulings to which the member state is not a party and which are related to intra-group transactions described above.

3. Financial information

- a) the annual financial statements of the local entity for the relevant tax year;
- b) information and allocation schedules showing how the financial information used in applying the transfer pricing method may be tied to the annual financial statements;
- c) summary schedules of relevant financial data for comparables used in the analysis and the sources from which those data were obtained.