

Kenya

Transfer Pricing Country Profile

February 2022

		SUMMARY	REFERENCE
The Arm's Length Principle			
1	Does your domestic legislation or regulation make reference to the Arm's Length Principle?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Income Tax Act cap 470 Laws of Kenya and the Transfer Pricing Rules in the Income Tax Act
2	What is the role of the OECD Transfer Pricing Guidelines under your domestic legislation?	<p>There is a case law in Kenya that makes reference to the OECD TPG.</p> <p>Kenya uses the current OECD TPG as supplementary guidance but not as a legally binding instrument.</p>	Unilever Kenya Limited V Commissioner Of Domestic Taxes (Income Tax Appeal Case No:753 Of 2003)
3	Does your domestic legislation or regulation provide a definition of related parties? If so, please provide the definition contained under your domestic law or regulation.	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <p>Section 18(6) of The Income Tax Act provides as follows:</p> <p>“For the purposes of subsection (3), a person is related to another if—</p> <p>(a) either person participates directly or indirectly in the management, control or capital of the business of the other;</p> <p>(b) a third person participates directly or indirectly in the management, control or capital of the business of both; or</p> <p>(c) an individual, who participates in the management, control or capital of the business of one, is associated by marriage, consanguinity or affinity to an individual who participates in the management, control or capital of the business of the other.”</p> <p>Moreover, paragraph 2 of the Transfer Pricing Rules 2006 provides as follows:</p> <p>““Related enterprises” means one or more enterprises whereby- (a) one of the enterprises participates directly or indirectly in the management, control or capital</p>	Section 18(6) of The Income Tax Act cap 470 Laws of Kenya.

	<p>of the other; or (b) a third person participates directly or indirectly in the management, control or capital or both.”</p> <p>In Section 2 of the Income Tax Act, “control” in relation to a person means:</p> <p>(a) that the person, directly or indirectly, holds at least twenty per cent of the voting rights in a company;</p> <p>(b) a loan advanced by the person to another person constitutes at least seventy per cent of the book value of the total assets of the other person excluding a loan from a financial institution that is not associated with the person advancing the loan;</p> <p>(c) a guarantee by the person for any form of indebtedness of another person constitutes at least seventy per cent of the total indebtedness of the other person excluding a guarantee from a financial institution that is not associated with the guarantor;</p> <p>(d) the person appoints more than half of the board of directors of another person or at least one director or executive member of the governing board of that person;</p> <p>(e) the person is the owner of or has the exclusive rights over the know-how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of a similar nature, on which another person is wholly dependent for the manufacture or processing of goods or articles or business carried on by the other person;</p> <p>(f) the person or a person designated by that person— (i) supplies at least ninety per cent of the supply of the purchases of another person; and (ii) upon assessment, the Commissioner deems influence in the price or other conditions relating to the supply of the purchases of another person;</p> <p>(g) the person purchases or designates a person— (i) to purchase at least ninety per cent of the sales of another person; and (ii) upon assessment, the Commissioner deems influences in the price or any other conditions of the sales of another person;</p> <p>(h) the person has any other relationship, dealing or practice with another person which the Commissioner may deem to constitute control.</p>	
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Transfer Pricing Methods

4	<p>Does your domestic legislation provide for transfer pricing methods to be used in respect of transactions between related parties?</p>	<p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p>If affirmative, please check those provided for in your legislation:</p> <table border="1" style="width: 100%; border-collapse: collapse; text-align: center;"> <thead> <tr> <th style="width: 15%;">CUP</th> <th style="width: 15%;">Resale Price</th> <th style="width: 15%;">Cost Plus</th> <th style="width: 15%;">TNMM</th> <th style="width: 15%;">Profit Split</th> <th style="width: 20%;">Other (<i>If so, please describe</i>)</th> </tr> </thead> <tbody> <tr> <td><input checked="" type="checkbox"/></td> <td><input checked="" type="checkbox"/></td> <td><input checked="" type="checkbox"/></td> <td><input checked="" type="checkbox"/></td> <td><input checked="" type="checkbox"/></td> <td><input checked="" type="checkbox"/></td> </tr> </tbody> </table> <p>Paragraph 7 of Transfer Pricing Rules cited in the Income Tax Act Cap 470 Laws of Kenya provides for the transfer pricing methods accepted in Kenya.</p> <p>The transfer pricing rules provide for such other method as may be prescribed by the Commissioner from time to time, where in his opinion and in view of the nature of the transactions, the arm's length price cannot be determined using any of the methods contained in these guidelines.</p>	CUP	Resale Price	Cost Plus	TNMM	Profit Split	Other (<i>If so, please describe</i>)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<p>The Transfer Price Rules are in Legal Notice No:67 of 2006 within the Income Tax Act</p>
CUP	Resale Price	Cost Plus	TNMM	Profit Split	Other (<i>If so, please describe</i>)										
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>										
5	<p>Which criterion is used in your jurisdiction for the application of transfer pricing methods?</p>	<p>Please check all that apply:</p> <p><input type="checkbox"/> Hierarchy of methods</p> <p><input checked="" type="checkbox"/> Most appropriate method</p> <p><input type="checkbox"/> Other (<i>if so, please explain</i>)</p> <hr/> <p>This is in line with the OECD TPG.</p>	<p>Paragraph 8(2) of the Transfer Pricing Rules 2006 under the Income tax Act Cap 470</p>												
6	<p>If your domestic legislation or regulations contain specific guidance on commodity transactions, indicate which of the following approaches is followed.</p>	<p><input checked="" type="checkbox"/> For controlled transactions involving commodities, the guidance contained in paragraphs 2.18-2.22 of the TPG is followed.</p> <p><input type="checkbox"/> Domestic legislation mandates the use of a specific method for controlled transactions involving commodities (<i>if so, please explain</i>)</p> <p><input type="checkbox"/> Other (<i>if so, please explain</i>)</p> <hr/> <p>Kenya's domestic legislation does not contain specific guidance on commodity transactions. However, Kenya follows the OECD TPG.</p>													

Comparability Analysis

7	Does your jurisdiction follow (or largely follow) the guidance on comparability analysis outlined in Chapter III of the TPG?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No This is implemented as a best practice as a result of the Unilever Kenya Limited case.	Unilever Kenya Limited V Commissioner Of Domestic Taxes (Income Tax Appeal Case No:753 Of 2003)
8	Is there a preference in your jurisdiction for domestic comparables over foreign comparables?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
9	Does your tax administration use secret comparables for transfer pricing assessment purposes?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
10	Does your legislation allow or require the use of an arm's length range and/or statistical measure for determining arm's length remuneration?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No The OECD TPG are followed in the application of an arm's length range.	
11	Are comparability adjustments required under your domestic legislation or regulations?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Intangible Property			
12	Does your domestic legislation or regulations contain guidance specific to the pricing of controlled transactions involving intangibles?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Kenya's transfer pricing domestic law or regulations do not contain specific guidance to pricing of controlled transactions involving intangibles. However, Kenya follows the OECD TPG in this respect.	
13		<input type="checkbox"/> Yes	

	Does your domestic legislation or regulation provide for transfer pricing rules or special measures regarding hard-to-value intangibles (HTVI)?	<input checked="" type="checkbox"/> No Kenya follows the OECD TPG on HTVI.	
14	Are there any other rules outside transfer pricing rules that are relevant for the tax treatment of transactions involving intangibles?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Under paragraph 13 of the ninth schedule to the Income Tax Act Cap 470, there are guidelines on how to value mining rights in the case of a farm out.	Ninth Schedule to the Income Tax Act Cap 470
Intra-group Services			
15	Does your domestic legislation or regulations provide guidance specific to intra-group services transactions?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Kenya's transfer pricing domestic law or regulations do not contain specific provisions on intra-group services transactions. However, Kenya follows the OECD TPG in this respect.	
16	Do you have any simplified approach for low value-adding intra-group services?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Kenya follows the OECD TPG.	
17	Are there any other rules outside transfer pricing rules that are relevant for the tax treatment of transactions involving services?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Section 18(4) and (5) of the Income Tax Act Cap 470 Laws of Kenya provides for rules limiting the deductibility of intra-group services expenses.	Section 18(4) and (5) of the Income Tax Act Cap 470 Laws of Kenya
Financial Transactions			
18		<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

	[NEW] Does your domestic legislation or regulations provide guidance specific to financial transactions?	Kenya's transfer pricing domestic law or regulations do not contain specific guidance to financial transactions. However, Kenya follows the OECD TPG in this respect.	
19	[NEW] Are there any other rules outside transfer pricing rules that are relevant for the tax treatment of financial transactions?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
		Section 16(2)(j) of the Income Tax Act introduced interest restriction rules using EBITDA through the Finance Act 2021 which subsequently removed the thin capitalisation rules. This is limited to 30% of EBITDA.	
Cost Contribution Agreements			
20	Does your jurisdiction have legislation or regulations on cost contribution agreements?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
		Kenya follows the OECD TPG.	
Transfer Pricing Documentation			
21	Does your legislation or regulations require the taxpayer to prepare transfer pricing documentation?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <i>If affirmative, please check all that apply:</i> <ul style="list-style-type: none"> <input type="checkbox"/> Master file consistent with Annex I to Chapter V of the TPG <input type="checkbox"/> Local file consistent with Annex II to Chapter V of the TPG <input checked="" type="checkbox"/> Country-by-country report consistent with Annex III to Chapter V of the TPG <input type="checkbox"/> Specific transfer pricing returns (separate or annexed to the tax return) <input type="checkbox"/> Other (specify): 	<p>Paragraph 10 of the Transfer Pricing Rules</p> <p>Section 18(B) of the Income Tax Act Cap 470</p>
		Paragraph 10 of the Transfer Pricing Rules provides a requirement of preparation of a transfer pricing policy by a taxpayer.	

		Moreover, Section 18(B) of the Income Tax Act Cap 470 of the Laws of Kenya introduced the CbCR legislation. This is still a work in progress.	
22	Please briefly explain the relevant requirements related to filing of transfer pricing documentation (i.e. timing for preparation or submission, languages, etc.)	Transfer pricing documentation should be prepared in English and submitted upon request (and the taxpayer is given between 14 and 21 days to submit the documents). Moreover, the proposed CbCR regulations are fully in line with the BEPS Action 13 three-tier approach. Further, the proposed CbCR regulations provide that notification will be due six months prior to the filing upon attaining the threshold set by the Commissioner. The threshold is at the discretion of the Commissioner. Currently it is set at EUR 750 million.	Paragraph 9(3) of the Transfer Pricing Rules in the Income Tax Act
23	Does your legislation provide for specific transfer pricing penalties and/or compliance incentives regarding transfer pricing documentation?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No There are no specific transfer pricing penalties, however a general penalty in sections 82 and 83 of the Tax Procedures Act, 2015, may apply.	Sections 82 and 83 of the Tax Procedures Act, 2015
24	If your legislation provides for exemption from transfer pricing documentation obligations, please explain.	Kenya does not have provide for exemption from transfer pricing documentation obligation.	
Administrative Approaches to Avoiding and Resolving Disputes			
25	Which mechanisms are available in your jurisdiction to prevent and/or resolve transfer pricing disputes?	Please check those that apply: <input checked="" type="checkbox"/> Rulings <input checked="" type="checkbox"/> Enhanced engagement programs <input type="checkbox"/> Advance Pricing Agreements (APA) <ul style="list-style-type: none"> <input type="checkbox"/> Unilateral APAs <input type="checkbox"/> Bilateral APAs <input type="checkbox"/> Multilateral APAs <input checked="" type="checkbox"/> Mutual Agreement Procedures <input type="checkbox"/> Other (<i>please specify</i>):	Kenya's MAP Profile
		Detailed information is available at the OECD MAP Profile of Kenya.	

Safe Harbours and Other Simplification Measures

26	Does your jurisdiction have rules on safe harbours in respect of certain industries, types of taxpayers, or types of transactions?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
27	Does your jurisdiction have any other simplification measures not listed in this questionnaire? If so, please provide a brief explanation.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Other Legislative Aspects or Administrative Procedures

28	Does your jurisdiction allow/require taxpayers to make year-end adjustments?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
		Kenya follows the OECD TPG.	
29	Does your jurisdiction make secondary adjustments?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
		This arises in specific instances where there are deemed dividends arising after an adjustment as per section 7(1)(b)(v) of the Income Tax Act or where there is an existing Double Tax Agreement requiring the adjustments to be done.	

Attribution of Profits to Permanent Establishments

30	[NEW] Does your jurisdiction follow the Authorised OECD Approaches for the attribution of profits to PEs (AOA)?	<input checked="" type="checkbox"/> Yes <i>In how many tax treaties?</i> 15 Treaties. <i>If yes, how do you implement it in cases, where the old tax treaties do not contain the new version of Article 7 (OECD MTC 2010 and later)</i> Kenya applies the procedures required in the Business Profit Articles as defined in the Double Tax Agreements.	
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		<input checked="" type="checkbox"/> No <i>In how many tax treaties?</i> Please see above. For treaties containing the old version of Article 7, Kenya would follow the pre-AOA approach in those treaties.	
31	[NEW] Does your jurisdiction follow also another approach?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Other Relevant Information			
32	Other legislative aspects or administrative procedures regarding transfer pricing	N/A	
33	Other relevant information (e.g. <i>whether your jurisdiction is preparing new transfer pricing regulations, or other relevant aspects not addressed in this questionnaire</i>)	The Finance Act 2021 introduced part of the CbCR provision (see section 18B of the Income Tax Act). More work is being done on the same.	Section 18B of the Income Tax Act

For more information, please visit: <https://oe.cd/transfer-pricing-country-profiles>