



Overview

Bech-Bruun, Taxand Denmark

Bech-Bruun is a full-service law firm based in Copenhagen and Aarhus and deals with both domestic and cross-border matters. Bech-Bruun's tax department advises on all aspects of corporate tax and is one of the leading tax teams in Denmark. Our advisers are highly specialized in transfer pricing matters, and their expertise extends to all matters regarding intragroup transactions, including compliance and reporting, planning and strategy, and disputes.

General: Transfer Pricing Framework

The OECD Transfer Pricing Guidelines have a significant impact on how Danish transfer pricing regulations are interpreted. Article 9 of the OECD Model Convention serves as the fundamental framework for transfer pricing standards within Danish legislation.

Central to the Danish transfer pricing rules is the concept of "arm's-length" transactions. The legal framework of the arm's-length principle in Danish tax law is found in section 2 of the Tax Assessment Act. This provision states that:

Taxpayers:

- ❖ over whom natural or legal persons exercise a controlling influence (i.e., directly or indirectly own more than 50% of the share capital or control more than 50% of the votes in another country),
- ❖ who exercise a controlling influence over legal persons,
- ❖ who are associated with a legal person,
- ❖ who have a permanent establishment abroad,
- ❖ who are foreign natural or legal persons with a permanent establishment in Denmark, or
- ❖ who are foreign natural or legal persons with hydrocarbon-related business as defined in the Hydrocarbon Tax Act section 21 (1) and (4)

shall, for the purpose of determining their income for tax and dividend purposes, use prices and terms in relation to commercial or financial transactions with the parties specified above (controlled transactions) that are equivalent to those that could have been obtained had the transactions been conducted between independent parties.

Transactions between companies meeting the above-mentioned tests are referred to as controlled transactions. The rules contained in section 2 of the Tax Assessment Act not only apply to transactions between Danish and foreign companies but also to transactions between a Danish head office and its foreign permanent establishment, as well as to transactions between two or more Danish companies.

Accepted Transfer Pricing Methodologies

As outlined in the Danish Legal Tax Guide provided by the Danish Tax Agency, the assessment of pricing and contractual terms by the Danish Tax Agency should align with the OECD Guidelines. This aligns with the underlying legislative historical development of Danish transfer pricing regulations. The OECD Guidelines are, however, not directly incorporated into Danish tax law, but the Danish Parliament, relying on the principles set forth by the OECD Guidelines, harmonized Danish transfer pricing provisions with those of the OECD.

To determine whether a price meets the arm's-length standard according to section 2 of the Tax Assessment Act, the Danish Tax Agency generally applies the methods described in chapters II and III of the OECD Guidelines.

The Danish Tax Agency indicated in the Legal Tax Guide that other approaches may be accepted provided that they are duly justified and that the price set is compliant with the arm's length principle.

The choice of the most appropriate transfer pricing method depends on:

- 1) The strengths and weaknesses of each method concerning the pricing of the specified controlled transaction.
- 2) The availability of information regarding internal or external comparable transactions, as required to apply the methods.
- 3) The identified key comparability factors for the controlled transaction and the ability to make adjustments for any differences.

Transfer Pricing Documentation Requirements

Denmark has a statutory documentation and reporting requirement regarding transfer pricing between related entities.

In accordance with section 38 of the Tax Control Act, taxpayers are required to provide comprehensive information regarding the nature and extent of controlled transactions in their tax return. Additionally, they must indicate in their tax return whether they are subject to the transfer pricing provisions.

Taxpayers subject to transfer pricing documentation are required to provide information on the commercial operations of their group, a detailed description of the controlled transactions, any conducted comparability analyses, the adherence to the arm's-length standard, and a copy of any written agreements related to the controlled transactions.

It is important to note that the Danish documentation requirements apply to several types of entities, including Danish subsidiaries, branches, and permanent establishments.

However, different transfer pricing documentation rules and deadlines apply depending on whether a company is considered a small or large business.

Small businesses:

Taxpayers who alone or on a consolidated group* basis have

❖ less than 250 employees

and either

1) a net worth of less than DKK 125 million (approx. EUR 16.75 million)

or

2) a yearly turnover of less than DKK 250 million (approx. EUR 33.5 million)

are subject to the Danish limited transfer pricing documentation rules.

A consolidated group includes companies where the same shareholders directly or indirectly hold more than 50% of the shares or the voting rights (controlling influence cf. above).

If the taxpayer alone or on a consolidated group basis falls within the scope of the limited transfer pricing documentation rules, the taxpayer shall only prepare, maintain, and submit documentation if they are involved in:

- 1) Controlled transactions with individuals and legal persons resident in a country with which Denmark has not concluded an income tax treaty and which is not a member of the EU or EEA;
- 2) Controlled transactions with a permanent establishment located in a country with which Denmark has not concluded an income tax treaty and which is not a member of the EU or EEA; and
- 3) Controlled transactions with a permanent establishment in Denmark provided the taxpayer is resident in a country with which Denmark has not concluded an income tax treaty and which is not a member of the EU or EEA.

The documentation requirements in relation to the limited transfer pricing documentation are generally similar to the requirements in relation to the full scope transfer pricing documentation as detailed below. However, it is essential to note that the obligation to submit transfer pricing documentation only applies to the abovementioned specified controlled transactions.

While small businesses are typically exempt from the documentation requirements it is important to emphasize that all intra-company transactions must comply with the arm's-length principle.

As specified in the Danish Legal Tax Guide, the Danish Tax Agency has the authority, during a tax audit, to request that the taxpayer substantiate that the prices and terms for a transaction not subject to formal documentation requirements have indeed been determined in accordance with the arm's-length principle.

Large businesses:

Taxpayers who alone or on a consolidated group basis have more than 250 employees are subject to the Danish full scope transfer pricing documentation rules.

If the taxpayer alone or on a consolidated group basis falls within the scope of the full scope transfer pricing documentation rules, the taxpayer shall prepare, maintain, and submit documentation if they are involved in the following transactions:

- 1) One party to the controlled transaction is a foreign individual or legal entity, cf. the Danish Tax Control Act, section 37(4), or constitutes a permanent establishment located in the Faroe Islands, Greenland, or a foreign state, including under the provisions of a double taxation treaty. However, the written documentation does not need to be prepared if all parties to the controlled transaction are permanent establishments in Denmark of companies located in the Faroe Islands, Greenland, or a foreign state, including under the provisions of a double taxation treaty, or head offices of companies resident in Denmark.
- 2) One party to the controlled transaction is taxed under the Tonnage Tax Act unless all parties to the controlled transaction are taxed under the Tonnage Tax Act. The written documentation must also be prepared where the taxpayer calculates income covered by the Danish Tonnage Taxation Act, section 13(2).
- 3) One party to the controlled transaction is taxed under the Hydrocarbon Tax Act unless all parties to the controlled transaction are taxed under the Hydrocarbon Tax Act.
- 4) One party to the controlled transaction is subject to the Corporation Tax Act, section 1(1)(3), unless all parties to the controlled transaction are subject to the Corporation Tax Act, section 1(1)(3).
- 5) One party to the controlled transaction is subject to the Corporation Tax Act, section 17 A, unless all parties to the controlled transaction are subject to the Corporation Tax Act, section 17 A.
- 6) One party to the controlled transaction is subject to the Corporation Tax Act, section 1(1)(6).
- 7) One party to the controlled transaction is covered by the Corporation Tax Act, section 3.
- 8) Where the taxpayer's income is to be calculated in accordance with the Withholding Tax Act, section 2(8), the Corporation Tax Act, section 2(7), or the Corporation Tax Act, section 8(6).

The taxpayer is not required to prepare written documentation for controlled transactions that are immaterial in size and frequency.

As per point 1 above, it is specified that cross-border transactions need to be detailed in the transfer pricing documentation as well as some domestic controlled.

Documentation requirements:

According to Regulation No. 468 of 19 April 2022 (the "Transfer Pricing Documentation Regulation"), the transfer pricing documentation must contain two parts: the Master File and the country-specific reporting Local file.

Both the Local file and the Master File requirements align with Annexes I and II to Chapter V of the OECD Guidelines.

Deadlines:

Starting from income years commencing on or after 1 January 2021, transfer pricing documentation, whether limited or full scope, needs to be submitted to the Danish Tax Agency within 60 days following the corporate tax return deadline.

If a company uses the calendar year as its fiscal year (from 1 January to 31 December), the corporate tax return must be filed by 30 June of the year immediately following the relevant income year. The tax return for the income year 2024 should therefore be submitted by 30 June 2025.

Consequently, for companies using the calendar year as their fiscal year, the deadline for submitting transfer pricing documentation is 29 August in the income year following the relevant income year.

The documentation must be submitted through the company's E-tax system, known as "TastSelv-Erhverv." Failure to submit adequate transfer pricing documentation to the Danish Tax Agency within the deadline as a starting point result in penalties ranging from EUR 15,000 to EUR 30,000, plus an additional 10% of any potential income increase.

It is generally not possible to obtain an extension of the deadline for filing the transfer pricing documentation.

However, it is under specific circumstances possible to submit the Master File from the previous income year as preliminary documentation.

The documentation may be prepared in either the Danish, Norwegian, Swedish, or English language.

Country-by-country reporting (CbCR):

Danish businesses that are either the ultimate parent company or the surrogate parent entity of a group subject to CbCR must submit a CbCR to the Danish Tax Agency.

According to section 48 of the Danish Tax Control Act, a Danish ultimate parent company of a multinational group must submit a CbCR if the group on a consolidated basis has a turnover of more than EUR 750.4 million in the income year prior to the relevant reporting year.

The deadline for submitting the CbCR is 12 months after the last day of the income year concerned.

A Danish group company that is not the ultimate parent company of a multinational group (surrogate parent entity), is required to submit a CbCR if the company is tax resident in Denmark and if the following conditions are met:

- 1) The ultimate parent company is not obligated to file a CbCR in the country where it is domiciled.
- 2) There is no automatic exchange of CbCR since there is no agreement between the competent authorities in Denmark and the jurisdiction where the ultimate parent company is domiciled, even though there is an international agreement on the exchange of tax information.
- 3) There is a systematic error regarding the jurisdiction where the ultimate parent company is domiciled, and the Danish Tax Agency has informed the Danish surrogate parent entity of this.

However, a Danish group company is not obligated to file a CbCR to the Danish Tax Agency if the multinational group files a CbCR to the competent tax authorities through another surrogate parent entity. The following conditions must be met:

- 1) The country where the surrogate parent entity is domiciled requires submitting of CbCR.
- 2) The country where the surrogate parent entity is domiciled has entered into an international agreement with Denmark on the automatic exchange of CbCR.
- 3) There is no systematic error regarding the jurisdiction where the surrogate parent entity is domiciled, or the Danish Tax Agency has not informed the Danish group company of this.
- 4) The jurisdiction where the surrogate parent entity is domiciled has received a message from another group company, which is tax resident in the same jurisdiction as the surrogate parent entity, stating that the group company is considered the surrogate parent entity.
- 5) The group company has informed the Danish Tax Agency that it is obligated to file a CbCR.

Local Jurisdiction Benchmarks

On 30 November 2021, Act no. 2194 introduced a relatively minor change to section 39(4), first sentence of the Danish Tax Control Act concerning the preparation of database studies. However, this seemingly minor amendment has significant implications for how taxpayers should approach their transfer pricing documentation.

The amendment now requires that taxpayers must incorporate benchmark studies into their transfer pricing documentation to substantiate the comparability analysis. Failure to include benchmark studies in the documentation could result in the Danish Tax Authority deeming the documentation insufficient. This exposes the taxpayer to potential penalties and discretionary arm's length adjustments, with a reversed burden of proof.

This provision became effective starting from the 2022 income year, impacting transfer pricing documentation submissions to the Danish Tax Agency for the first time in 2023.

According to section 7 of the Transfer Pricing Documentation Regulation, a benchmark study should encompass the following elements:

- 1) Identification and determination of the controlled transaction or activity and the selection of the transfer pricing methodology, including Profit Level Indicator (PLI).
- 2) An outlined selection process, which involves both quantitative and qualitative selection criteria.
- 3) The incorporation of comparability adjustments.
- 4) The utilization of statistical methodologies.

Advance Pricing Agreement "APA"/Bilateral Advance Pricing Agreement "BAPA" Overview

In Denmark, it is in theory possible to obtain a unilateral Advance Pricing Agreement in the form of a binding tax ruling. However, in practice the authorities are not interested in unilateral agreements.

Under Danish legislation initiation of a bilateral Advance Pricing Agreement procedure can be requested by the and reached based on provisions in Danish treaties equivalent to Article 25 of the OECD Model Convention (Mutual Agreement Procedure).

The Danish competent authority can thus enter into a mutual agreement with the competent authority in another treaty state.

Transfer Pricing Audits

There are no specific audit procedures or guidelines that provide the Danish Tax Agency with details of controlled transactions concerning group companies. While the Danish Legal Tax Guide includes a dedicated section on transfer pricing matters, it does not offer a comprehensive guide.

To determine the need for a transfer pricing audit, the Danish Tax Agency may depend on the information provided in the tax return concerning controlled transactions.

In general, an audit must be initiated no later than six years after the end of the income year during which the controlled transaction took place.

Burden of Proof in Transfer Pricing: Theory versus Practice

A series of rulings from the Supreme Court make it very clear that the mandatory transfer pricing documentation is of great importance in practice for the burden of proof.

When the taxpayer has prepared sufficient transfer pricing documentation, the Ministry of Taxation must, in principle, demonstrate that the taxable income is not in accordance with what could have been achieved if the transactions had been concluded between independent parties. Conversely, the tax agency has direct authority to determine the income based on an estimate if the mandatory transfer pricing documentation is inadequate. Any estimate must be justified and based on the

information to which the tax authority has reasonable access. Thus, among practitioners, such estimate is often referred to as an "discretionary assessment".

It is the tax authorities that must demonstrate that transfer pricing documentation is so deficient that it must be equated with a lack of documentation.

- ❖ For example, the Supreme Court in its ruling of January 31, 2019 (UfR 2019.1446) established that transfer pricing documentation, which is so significantly deficient that it does not provide the tax authorities with a sufficient basis to assess whether the arm's length principle is adhered to, must be equated with a lack of documentation.
- ❖ Furthermore, the Supreme Court in its ruling of June 25, 2020 (UfR 2020.3156) established that the fact that the tax authorities disagree with or raise justified doubts about the comparability analysis does not in itself mean that the documentation is significantly deficient.

As indicated above, case law shows that taxpayers who have prepared and submitted sufficient transfer pricing documentation are in a strong position in disputes. Consequently, high-quality documentation undoubtedly helps mitigate the risk of an unfavorable shift in the burden of proof.

Transfer Pricing Penalties

Failure to submit sufficient transfer pricing documentation to the Danish Tax Agency within the deadline (cf. above) as a starting point result in fines ranging from EUR 15,000 to EUR 30,000, plus an additional 10% of any potential income increase.

Local Hot Topics and Recent Updates

The transfer pricing rules are expected to be amended in 2025. The proposed rules will take into account the OECD's report from February 2024 ("Amount B Report") on simplifying the determination of arm's length prices for certain distribution transactions, particularly in so-called low-capacity countries. It is proposed that the general arm's length principle be deviated from when a Danish company has controlled transactions with a qualified distributor in countries that have a double taxation agreement with Denmark and have chosen the simplified approach. Additionally, a number of relaxations are proposed regarding determination of taxpayers who must prepare and submit transfer pricing documentation and the delineation of controlled transactions for which documentation must be prepared. The changes, which aim to ensure that there is no requirement to prepare transfer pricing documentation where the risk of errors or aggressive tax planning is minimal, are assessed to result in significant administrative relief, particularly for small and medium-sized enterprises.

In 2021, Denmark implemented stricter regulations regarding transfer pricing documentation. These new provisions entail the mandatory submission of comprehensive transfer pricing documentation, including a Master File and one or more Local Files. The deadline for filing requires that the



transfer pricing documentation is submitted within 60 days following the company's income tax return deadline.

Furthermore, intercompany agreements and benchmarking studies that support the transfer pricing methods applied by the company are now also expected to be included when filing the transfer pricing documentation. These new requirements represent a significant difference from the previous Danish regulations, where the completion of transfer pricing documentation was only necessary at the time of filing the corporate income tax return and was only to be submitted to the Danish Tax Agency upon request.

Non-compliance with the transfer pricing documentation rules will lead to penalties, cf. further above.

It is our experience that the penalty will be automatically imposed on companies and legal entities that fail to submit their transfer pricing documentation within the designated submission deadline. In addition, we have observed that the Danish Tax Agency has started investigating companies that have not submitted their transfer pricing documentation within the deadline, which thus will be subject to a transfer pricing audit.

We have observed that the most common challenges that companies have faced were:

- 1) Recognizing that even small legal entities in Denmark must adhere to the submission requirement because the group meets the threshold for preparing transfer pricing documentation.
- 2) Acknowledging that there is no minimum transaction volume for determining when a controlled transaction is considered insignificant.
- 3) Acknowledging that comprehensive comparability analyses and benchmarking studies – even for relatively small transactions – must be presented to the Danish Tax Agency to comply with the Danish transfer pricing documentation rules.

Given the recent regulatory changes, it is crucial for companies operating in Denmark to conduct an annual review of their procedures and financial practices to guarantee accurate and timely compliance.

Documentation threshold

Limited documentation requirements (Local File + Master File)	Alone or consolidated group basis has less than 250 employees and either a net worth of less than DKK 125 million (approx. EUR 16.75 million) or a yearly turnover of less than DKK 250 million (approx. EUR 33.5 million)
Full scope documentation requirements (Local File + Master File)	Alone or on a consolidated group basis has more than 250 employees
CbCR	Consolidated group turnover over DKK 5.6 billion

Submission deadline

Limited documentation (Local File + Master File)	60 days after the deadline for filing the corporate tax return (30 June if the fiscal year is the calendar year).
Full scope documentation (Local File + Master File)	60 days after the deadline for filing the corporate tax return (30 June if the fiscal year is the calendar year).
CbCR report CbCR notification	12 months after the last day of the income year in question.

Penalty Provisions

Documentation – late filing, incomplete or no filing	A fine of DKK 250,000 (approx. EUR 33,500) is imposed
Reduced fine in case of subsequent satisfactory documentation	A fine of DKK 125,000 (approx. EUR 16,740) is imposed
Increased fine in case of an increase in income	An additional fine of 10% of the income increase, will be imposed
CbCR – late/incomplete/no filing	A fine will be imposed. The amount of the fine will be determined on a case-specific assessment.



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