

Transfer Pricing (TP)

Documentation requirements in Denmark

Transfer Pricing of controlled transactions of goods and services is a matter that most companies must deal with, as most companies are part of a group where there are transactions between the various companies. These transactions are called controlled transactions, as they take place between companies that are ultimately owned and thus dominated by the same shareholder or group of shareholders.

In Denmark, documentation requirements for intercompany transactions were introduced as early as 1998, and most of the world's countries have since introduced documentation requirements. The requirements have been changed and tightened several times. The most recent significant change took place in 2016 and 2017, when Denmark, like many other countries, introduced the recommended documentation requirements that followed from the OECD's project - Base Erosion and Profit Shifting (BEPS).

An amendment has been adopted for the accounting period of 2021 and subsequent years, which means that those required to provide documentation must automatically and compulsorily submit the entire TP documentation no later than 60 days after the deadline for submission of the information form. This means that those required to provide documentation with the calendar year as accounting period must submit the TP documentation for 2021 no later than 29 August 2022.

It is our experience that the TP documentation obligation is a large and unfamiliar task, and that most companies rarely have the resources or the knowledge to have the various statutory documentation reports prepared. The documentation includes a great deal of facts about the group and the functions and risks of the individual group companies. This description must be supplemented with documentation that the intercompany transfer pricing complies with the arm's length principle.

The companies know their actual business and conditions best, while Beierholm as advisor knows the documentation requirements best. Therefore, it is our experience that the best documentation process lies in the collaboration between you and us.

Tax Department, August 2021

Beierholm

State Authorized Public Accountants

IMPORTANT TERMS

Controlled transactions

Controlled transactions are defined as all economic or commercial transactions between two or more (natural or legal) persons, where one party exercises a controlling influence over the other.

Typical transactions in groups are goods and service transactions. In addition, there are often financial transactions and service transactions of a more supportive nature, typically provided by the parent company.

Controlling influence is understood in this context as direct or indirect ownership of more than 50% of the shares or the right to dispose of more than 50% of the votes.

In addition, transactions between consolidated legal entities are considered controlled transactions. Likewise, transactions between the above-mentioned taxpayers and their permanent establishments, in Denmark or abroad, are also considered controlled transactions.

The customer must document that these controlled transactions are in accordance with the arm's length principle. In relation to the documentation obligation, it is irrelevant whether the controlled transactions take place between Danish companies or between a Danish and a foreign group company.

The Arm's Length Principle

The arm's length principle says that prices and terms for controlled transactions must correspond to the prices and terms that would have been agreed between independent parties under comparable conditions, such as market conditions and time of transactions.

The arm's length principle in Danish law applies to all controlled transactions. This means that both national and international transactions are subject to the arm's length principle.

DUTIES

Duty of disclosure

Taxpayers who have had controlled transactions during the accounting period must state this on the information form and provide the additional information under the form's section for controlled transactions.

Documentation requirement

TP documentation must be prepared for the controlled transactions if:

- The group employs more than 250 employees
- If the group employs less than 250 employees, the group is exempt from preparing full TP documentation if at least one of the following two conditions is met:
 1. Group revenue is less than DKK 250 million or
 2. Group balance sheet is less than DKK 125 million.

It is determined at the end of the accounting period whether the group meets the conditions for exemption. I.e. either the group revenue is below the amount limit and/or the group balance sheet is below the amount limit. It does not matter whether it is condition 1 or 2 or both that are met in bullet 2. If just one of the conditions is met, the group is exempt.

Limited documentation requirements

However, companies must always prepare documentation for transactions with group companies in countries where Denmark does not have a double taxation agreement and where the countries are not members of the EU or EEA. For example, transactions with a group company in Hong Kong.

However, taxpayers are always subject to the duty of disclosure on controlled transactions, regardless of the taxpayer being exempt from preparing TP documentation in accordance with the above conditions.

Group definition

It is important to be aware that the TP "group definition" is significantly more comprehensive than the accounting and company law group definition and among other things includes companies that are not part of a joint taxation. Companies that are dominated by parties related to a principal shareholder are also considered "group-consolidated". The definition also includes other types of "entities" like a Permanent Establishment (normally of a company but also individually owned). Be aware that in some situation transactions with a related taxable transparent company like a partnership are also included.

FORMALITIES

Overall, the purpose of the TP documentation is to give the Danish Tax Agency the opportunity to assess whether prices and terms for the intercompany transactions have been determined in accordance with the arm's length principle.

The taxpayer and the group in which the taxpayer is included must prepare a written TP documentation for each accounting period, in which the group, the company and the controlled transactions and connections are described.

The TP documentation consists of two different types of reports:

1. Common documentation (Master File)
2. Country specific documentation (Local File).

The common documentation is the same for all group companies, regardless of which country the group company is domiciled in. The country specific documentation concerns the individual group company and must be prepared for each group company.

There are specific and mandatory formal requirements in Act No. 401 of 28 April 2016 and No. 1297 of 31 October 2018 (valid for 2019 and onwards) for the structure of the common and national documentation.

The documentation must be prepared on an ongoing basis and at the latest be available in a finished version at the time of the tax return for the accounting period in question. Therefore, the TP documentation is only valid for one accounting period at a time.

Companies subject to documentation should review previously prepared TP documentation to ensure that the TP documentation meets current requirements in the applicable TP Acts.

Deadline for preparation

According to the new Danish Tax Control Act (1.1.2019), TP documentation for 2020 must be completed by the tax return date for 2020, usually 30 June 2021.

We recommend that companies subject to documentation requirements introduce an annual update process following the completion of the annual report.

The Danish Tax Agency often convenes the TP documentation for three to five years at a time. If companies subject to documentation requirements carry out an annual update, it is easier to prove that the documentation has been prepared in time, namely at the time of tax return. In practice, it is also easier to account for special circumstances that have affected intercompany prices closely related to the financial year.

At the same time, annual updates reduce the risk of key employees no longer being employed and able to account for special circumstances.

Content requirements

The Danish Tax Agency (formerly SKAT) has laid down a number of content requirements for a TP documentation in order for it to be considered adequate. These requirements must of course be met in order to avoid the Danish Tax Agency declaring the documentation to be deficient.

The requirements from the Danish Tax Agency are specified in Executive Order no. 401 of 28 April 2016 and No. 1297 of 31 October 2018 and elaborated in the Legal Guide CD11, which is updated twice a year.

See the overview in the Appendix.

Pitfalls

There are various pitfalls regarding formal and content requirements, and ultimately a company can be met with sanctions (discussed below) if the TP documentation does not meet the formal requirements, and the tax authorities therefore cannot assess whether the intercompany transactions have taken place in accordance with the arm's length principle.

SUBMISSION AND SANCTIONS

Deadline for submission of documentation

The Danish Tax Agency may at any time – after the deadline for submission of the previous year's tax return has passed – request anyone, who is subject to TP-documentation, for TP-documentation. The submission deadline is 60 days, i.e. 2 months. There is no possibility at all to extend this deadline.

From the **income year 2021**, a change in the law has been adopted, which requires those companies required to prepare written TP-documentation to automatically (compulsory) submit the entire TP-documentation no later than 60 days after the deadline for submission of the information form (previous the tax return). This means that those companies required to document with the calendar year as the income year are required to submit TP-documentation for 2021 no later than 29 August 2022.

In the bill on compulsory submission, there has been no relaxation in relation to purely Danish groups, i.e. groups consisting solely of Danish companies. Purely Danish groups must therefore also prepare and submit written documentation for their controlled transactions between

the Danish (often jointly taxed) companies. At this point in time, we do not know of any plans to abolish compulsory submission for purely Danish groups (May 2021).

Auditor's statement

The Danish Tax Agency can in certain cases impose on a taxpayer to obtain an auditor's statement from an independent auditor (not the elected auditor) for a review of the company's TP-documentation, providing that:

- The company has realized negative operating income (EBIT) in 4 consecutive years or
- The company has had controlled transactions with group companies in countries outside the EU/EEA, with which Denmark does not have a double taxation agreement

The imposition can be given no earlier than 7 days after the Danish Tax Agency has received the TP-documentation. The auditor's statement must be submitted no later than 90 days after the imposition.

The conclusion in the independent auditor's statement is not binding for the Danish Tax Agency.

Deadline for proposal for a change of the taxable income

If the TP-documentation is deemed inadequate or is missing in total, The Danish Tax Authorities is allowed to estimate the taxable income for the company.

A proposal of an income adjustment must be sent by the Danish Tax Agency no later than 1 May in the 6th income year after the end of the income year in question. The income year 2015 is therefore open for proposals until 1 May 2021. The ruling regarding a proposed income adjustment for the income year 2015 must be dispatched by The Danish Tax Agency no later than 1 August 2021.

Sanctions

The Danish Tax Agency can impose a fine if the company has not correctly stated whether they are covered by the obligation to provide TP-documentation. Violation of the duty to provide this information is considered critical, as it is the authorities' way of assessing whether the rules in this regard have been complied with. Therefore, the fine can be significant.

The Danish Tax Agency may also impose a fine of DKK 250,000 per income year per individual Danish company if the TP documentation is either not submitted in time, or if the submitted documentation - in the opinion of the Danish Tax Agency - is considered lacking. If the documentation is subsequently prepared and submitted in sufficient quality, the basic amount of the fine per income year per Danish company can be reduced to DKK 125,000.

If The Danish Tax Agency makes an upward adjustment of a company's taxable income on the basis of the prices of the controlled transactions not being deemed compliant with the arm's length principle, the documentation penalty will be increased by 10% of the total upward income adjustment.

Fines are also charged for late submission of TP-documentation. Furthermore, any interest accrued on the estimated residual tax based on the increased estimated taxable income will accrue starting from the income year, in which the Danish Tax Agency adjusts the taxable income.

All in all, sanctions for non-compliance with the documentation rules are costly and are intended to make it very "expensive" if a company fails to prepare documentation in a timely manner and in the appropriate and sufficient form.

APPENDIX

Elaboration of, and references to, the new TP executive order

Subject no.	Formal TP Documentation requirements from 2016 (2017), Executive Order Nr. 401 of 28 April 2016 and Order no. 1297 of 31. October 2018 (from 2019)	Ref. in order
	TP-documentation consist of two separate reports:	§ 2
	1. Master file (common for the whole group)	§ 4
	2. Local file (specific per entity)	§ 5
1	Master file	§ 4
1.1	MNE group overview/chart	
1.1.1	- Legal (countries where subs or PE)	
1.1.2	- Organisational	
1.2	General description of the MNE groups' business, including:	§ 4, 2
1.2.1	The significant profit drivers (drivers of business profit) in the MNE group.	4, 2, 1
1.2.2	A description of the MNE groups' supply chain for the five largest products and /or services measured on revenue, as well as all products and /or services that represent more than five percent of the MNE groups' consolidated revenue.	4, 2, 2
1.2.3	A list of the important service agreements between the related parties in the Group, with the exception of research and development services agreements , and a description of the important services that the Group's main service centers maintain or can handle and the transfer pricing policies applied for the allocation of service costs and determination of settlement prices for intra-group services.	4, 2, 3
1.2.4	A description of the largest geographic markets , based on sales of products and services, cf. 1.2.2.	4, 2, 4
1.2.5	A brief functional analysis , which describes the primary contributions to the Group's total value creation, with information about which of the associated parties in the Group contributes to this in relation to significant functions, risks and assets .	4, 2, 5
1.2.6	A description of significant restructuring, acquisitions and divestments during the income year (if any)	4, 2, 6
1.3	The MNE groups' intellectual properties (IP)	§ 4, 3
	The Master File must contain:	
1.3.1	A general description of the MNE groups' overall strategy for the development, ownership and exploitation of intangibles, including geographical location of principal R&D facilities and location of R&D management.	4, 3, 1

Subject no.	Formal TP Documentation requirements from 2016 (2017), Executive Order Nr. 401 of 28 April 2016 and Order no. 1297 of 31. October 2018 (from 2019)	Ref. in order
1.3.2	A list of intangibles or groups of intangibles of the MNE group that are important for transfer pricing purposes, including information on which entities legally own them.	4, 3, 2
1.3.3	A list of important agreements among identified associated enterprises related to intangibles, including cost contribution arrangements, principal research service agreements and license agreements.	4, 3, 3
1.3.4	A general description of the MNE groups' transfer pricing policies related to R&D and intangibles.	4, 3, 4
1.3.5	A general description of any important transfers of interests in intangibles among associated enterprises during the income year concerned, including the entities, countries, and compensation involved.	4, 3, 5
1.4	The MNE groups' Financial Activities	§ 4, 4
1.4.1	A general description of how the MNE group is financed , including important financing arrangements with unrelated lenders .	4, 4, 1
1.4.2	The identification of any members of the MNE group that provide a central financing function for the group , including the country under whose laws the entities are organized and the place of effective management of such entities.	4, 4, 2
1.4.3	A general description of the MNE groups' general transfer pricing policies related to financing arrangements between associated enterprises.	4, 4, 3
1.5	The MNE groups' financial and tax positions	§ 4, 5
1.5.1	The MNE groups' annual consolidated financial statement for the income year in question if otherwise prepared for financial reporting, regulatory, internal management, tax or other purposes.	4, 5, 1
1.5.2	A list and a brief description of the MNE group's existing unilateral Advance Pricing Agreements (APA's) and other tax rulings relating to the allocation of income among countries	4, 5, 2
2	Local file	§ 5
2.1.1	A description of the management structure of the local entity , a local organization chart , and a description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their primary offices.	5, 1, 1
2.1.2	A detailed description of the business and business strategy pursued by the local entity including an indication whether the local entity has been involved in or affected by business restructurings or intangibles transfers in the present or immediately past year and an explanation of those aspects of such transactions affecting the local entity.	5, 1, 2

Subject no.	Formal TP Documentation requirements from 2016 (2017), Executive Order Nr. 401 of 28 April 2016 and Order no. 1297 of 31. October 2018 (from 2019)	Ref. in order
2.1.3	Names of the key competitors at the relevant market/country for the local entity	5, 1, 3
2.2	The controlled transactions	§ 5, 2
	For each category of controlled transactions in which the entity is involved, the following information must be provided:	
2.2.1	A description of the material controlled transactions (e.g. procurement of manufacturing services, purchase of goods, provision of services, loans, financial and performance guarantees, licenses of intangibles, etc.) and the context in which such transactions take place.	5, 2, 1
2.2.2	The amount of intra-group payments and receipts for each category of controlled transactions involving the local entity (i.e. payments and receipts for products, services, royalties, interests, etc.) broken down by tax jurisdiction of the foreign payor or recipient.	5, 2, 2
2.2.3	An identification of associated enterprises involved in each category of controlled transactions, and the relation amongst them.	5, 2, 3
2.2.4	Copies of all material intercompany agreements concluded by the local entity.	5, 2, 4
2.2.5	A detailed comparability and functional analysis of the local entity and relevant associated enterprises with respect to each documented category of controlled transactions (counterparties), including any changes compared to prior years.	5, 2, 5
2.2.6	An indication of the most appropriate transfer pricing method with regards to the category of transaction and the reasons for selecting that method.	5, 2, 6
2.2.7	An indication of which associated enterprise is selected as the tested party (if applicable) and an explanation of the reasons for this selection	5, 2, 7
2.2.8	A summary of the important prerequisites and assumptions made in applying the transfer pricing methodology	5, 2, 8
2.2.9	If relevant, an explanation of the reasons for performing a multi-year analysis.	5, 2, 9
2.2.10	A list with a description of selected comparable uncontrolled transactions (internal or external), if any, and information on relevant financial indicators for independent enterprises relied on in the transfer pricing analysis, including a description of the comparable search methodology and the source of such information.	5, 2, 10
2.2.11	A description of any comparability adjustments performed , and an indication of whether adjustments have been made to the results of the tested party, the comparable uncontrolled transactions, or both.	5, 2, 11

Subject no.	Formal TP Documentation requirements from 2016 (2017), Executive Order Nr. 401 of 28 April 2016 and Order no. 1297 of 31. October 2018 (from 2019)	Ref. in order
2.2.12	An account of the reasons for concluding that relevant transactions were priced on an arm's length basis based on the application of the selected transfer pricing method	5, 2, 12
2.2.13	A summary of the financial information used in applying the transfer pricing methodology.	5, 2, 13
2.2.14	A copy of any existing unilateral, bilateral and multilateral APAs and other tax rulings in which the local tax jurisdiction is not a party, but which are relevant to controlled transactions described above (if any)	5, 2, 14
2.3	Economic, financial and accounting information	§5, 3
	The following information must be included as part of the economic, financial and accounting information in the local file:	
2.3.1	Annual local entity financial accounts for the income year in question. If audited statements exist, they should be supplied, and if not, existing unaudited statements should be supplied	5, 3, 1
2.3.2	Data and allocation schedules showing how the financial data used in applying the transfer pricing method can be tied to the annual financial statements.	5, 3, 2
2.3.3	Summaries and schedules showing relevant financial and/or accounting data for comparable uncontrolled transactions used in the transfer pricing analysis, including the source of the data	5, 3, 3

Excerpt from OECD BEPS Action 13

Background information about the Danish TP documentation requirements from FY 2017.

The following description are from the OECD report to provide further and more detailed information about the requirements to the master file and local file:

C.1. Master File

18. The master file should provide an overview of the MNE group business, including the nature of its global business operations, its overall transfer pricing policies, and its global allocation of income and economic activity in order to assist tax administrations in evaluating the presence of significant transfer pricing risk. In general, the master file is intended to provide a high-level overview in order to place the MNE group's transfer pricing practices in their global economic, legal, financial and tax context. It is not intended to require exhaustive listings of minutiae (e.g. a listing of every patent owned by members (of the MNE group) as this would be both unnecessarily burdensome and inconsistent with the objectives of the master file. In producing the master file, including lists of important agreements, intangibles and transactions, taxpayers should use prudent business judgment in determining the appropriate level of detail for the information supplied, keeping in mind the objective of the master file to provide tax administrations a high-level overview of the MNE's global operations and policies. When the requirements of the master file can be fully satisfied by specific cross-references to other existing documents, such cross-references, together with copies of the relevant documents, should be deemed to satisfy the relevant requirement. For purposes of producing the master file, information is considered important if its omission would affect the reliability of the transfer pricing outcomes.

19. The information required in the master file provides a "blueprint" of the MNE group and contains relevant information that can be grouped in five categories: a) the MNE group's organisational structure; b) a description of the MNE's business or businesses; c) the MNE's intangibles; d) the MNE's intercompany financial activities; and (e) the MNE's financial and tax positions.

20. Taxpayers should present the information in the master file for the MNE as a whole. However, organisation of the information presented by line of business is permitted where well justified by the facts, e.g. where the structure of the MNE group is such that some significant business lines operate largely independently or are recently acquired. Where line of business presentation is used, care should be taken to assure that centralised group functions and transactions between business lines are properly described in the master file. Even where line of business presentation is selected, the entire master file consisting of all business lines should be available to each country in order to assure that an appropriate overview of the MNE group's global business is provided.

C.2. Local file

22. In contrast to the master file, which provides a high-level overview as described in paragraph 18, the local file provides more detailed information relating to specific intercompany transactions. The information required in the local file supplements the master file and helps to meet the objective of assuring that the taxpayer has complied with the arm's length principle in its material transfer pricing positions affecting a specific jurisdiction. The local file focuses on information relevant to the transfer pricing analysis related to transactions taking place between a local country affiliate and associated enterprises in different countries and which are material in the context of the local country's tax system. Such information would include relevant financial information regarding those specific transactions, a comparability analysis, and the selection and application of the most appropriate transfer pricing method. Where a requirement of the local file can be fully satisfied by a specific cross-reference to information contained in the master file, such a cross-reference should suffice.

DANISH REGULATIONS ETC.

The arm's length principle in Danish tax law:

- The Danish Tax Assessment Act § 2

TP-documentations requirements:

- (Formerly) Tax Control Act § 3 B
- Current Tax Control Act § 37-52 (from income year 2019)
- Executive order no. 42 of 24 January 2006 (up to income year 2016)
- Executive order no. 162 of 8 February 2013 (up to, and including, income year 2018)
- Executive order no. 401 of 28 April 2016 (income years 2017 and 2018)
- Executive order no. 1297 of 31 October 2018 (from income year 2019)
- Executive order no. 1298 of 31 October 2018 (from income year 2019)

TP penalties and deadlines for adjustments of taxable income:

- (Formerly) Tax Control Act § 17 (up to income years 2018)
- Control Act § 84 (from income year 2019)
- Tax Administration Act §§ 26 and 27.

Administrative guidance by DTA:

- OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (latest edition 2017)
- Base Erosion and Profit Shifting (BEPS) reports from 2015, Actions 8-10 and 13
- The Danish Tax Authorities' Legal guide on tax matters, section C.D.11 TP
- The Danish Tax Authorities' valuation guide of 15 January 2013, E nr. 238.



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