

DENMARK

LEGISLATION	
Existence of Transfer Pricing Laws/Guidelines	<p>Section 2 of the Assessment Act contains the legal basis for applying the arm's length principle.</p> <p>Following a revision of the statutory transfer pricing documentation requirements in 2005 and the issue of a binding order on documentation requirements in January 2006, a Guidance Note of approximately 100 pages was issued in February 2006, which addresses not only documentation requirements but also a number of substantive transfer pricing matters. There are also an increasing number of court cases dealing with various aspects of transfer pricing.</p> <p>The Danish transfer pricing rules are generally in accordance with the OECD Transfer Pricing Guidelines but it should be noted that the Danish tax administration increasingly formulate their own positions in areas where the OECD has not provided any (precise) guidance.</p>
Related Party Definition	<p>The arm's length principle applies to associated enterprises, which is defined in Section 2(1), (2) and (3) of the Assessment Act. Section 2(1) states that the arm's length principle applies if a taxpayer:</p> <ol style="list-style-type: none"> 1. Is controlled by individuals or legal persons; 2. Controls legal persons; 3. Together with another taxpayer belongs to the same group; 4. Has a permanent establishment abroad; or 5. Is a foreign resident individual or legal person with a permanent establishment situated in Denmark. <p>Section 2(2) of the Assessment Act defines control as:</p> <ol style="list-style-type: none"> 1. A concept based on legal control as opposed to a notion of de facto control; 2. Ownership of more than 50% of the share capital; 3. Control of more than 50% of voting power; or 4. Not only direct but also indirect ownership of share capital or control of voting power is taken into account, also where de facto control is not present; further 5. The above definitions are extended by also including shares and voting power of: <ol style="list-style-type: none"> a. Group related companies (as defined in Section 4(2) of the Act on Taxation of Capital Gains and Losses); b. Individual shareholders and certain of their close relatives; or c. A foundation or trust set up by the above persons. <p>According to Section 2(3), two legal entities belong to the same group if the same shareholders exercise control over the legal entities.</p> <p>It should be noted that Sections 3 B (1)-(3) of the Tax Control Act contain a similar definition of associated enterprises for purposes of applying the transfer pricing documentation and disclosure requirements of Section 3 B of the Tax Control Act.</p> <p>Act No. 408 of 19 April 2006 introduced three changes to the definition of</p>

	<p>associated. The changes are intended to bring private equity funds within the scope of the transfer pricing legislation. The main features of the changes are that (i) fiscally transparent entities can be considered related parties, (ii) agreements about exercising common control can bring (otherwise unrelated) shareholders within the scope of the transfer pricing legislation, and (iii) common management constitutes control. These changes are effective for transactions carried out on or after 1 January 2006.</p>
<p>Transfer Pricing Scrutiny</p>	<p>The audit risk is medium to high. In recent years, audit activity in transfer pricing has been increased and the central transfer pricing team of the tax authorities has become rather experienced as well. Recent audit statistics show an increasing number of transfer pricing cases as well as a significant increase in profit adjustments measured in absolute numbers. For 2006, 38 profit adjustments were made in an aggregate amount of DKK 4.5 billion. For 2007, 27 profit adjustments were made in an aggregate amount of DKK 2.1 billion.</p>
<p>Transfer Pricing Penalties</p>	<p>Penalties apply if non-compliance with documentation requirements is intentional or due to gross negligence. See Section 17 (3) of the Tax Control Act. From a practical perspective, this means that penalties apply if no documentation exists or if documentation is so limited in amount and scope that effectively no documentation exists. Penalties could be the case if one or more of the basic components of good transfer pricing document are missing, e.g. the functional analysis or the choice and justification of transfer pricing method. In assessing whether documentation is sufficient or not, the over-all situation must be examined and a principle of proportionality is applied, taking into account the nature and value of the inter-company transactions.</p> <p>The amount of penalty is twice the cost saved by not preparing transfer pricing documentation or by preparing only insufficient documentation. If the taxpayer subsequently prepares and submits the documentation, the penalty is reduced by 50 percent. It is not a condition for levying penalties that a profit adjustment is made but the penalty is increased by an amount of 10 percent of the profit adjustment if an adjustment is issued. Penalties can also be levied for non-compliance with a request to prepare and submit a benchmark.</p>
<p>Advance Pricing Arrangements (APA)</p>	<p>Sections 21-25 of the Tax Administration Act contain authority for the tax authorities to issue unilateral advance pricing arrangements. The regime is not specifically designed for transfer pricing issues but is a general regime for all requests for (advance) tax rulings. A ruling can address taxation issues related to income tax but not custom duties. A ruling can concern a transaction already undertaken or a transaction that is contemplated. The first unilateral APA was issued in December 2007.</p> <p>A small fee is payable when submitting a request for a ruling.</p> <p>A request for a ruling must be submitted no later than one month after the end of the income tax year to which it relates.</p> <p>A ruling is binding upon the tax administration for a period of 5 years, unless a shorter period is indicated in the ruling. A ruling is, however, not binding if critical assumptions are not met. Critical assumptions include the legislation or orders but not changes in practice.</p> <p>Bilateral APAs may be concluded on the basis of income tax treaties.</p>

DOCUMENTATION AND DISCLOSURE REQUIREMENTS	
Tax Return Disclosures	<p>Section 3 B (1) of the Tax Control Act requires taxpayers to provide information on the type and amount of their inter-company transactions.</p> <p>To fulfil these requirements, taxpayers have to complete form 05.021 (Danish version) or form 05.022 (English version) and submit the form as an appendix to the income tax return. In short, the form requires the taxpayer to indicate per type of transaction (sale of goods, loans, services, licensing, transfer of capital assets etc.) whether any inter-company transactions took place and what the level was (amount in million DKK and as a percentage).</p> <p>In addition, a corporate taxpayer has to indicate on the corporate income tax return if the taxpayer is subject to the disclosure requirements of Section 3 B of the Tax Control Act.</p>
Level of Documentation	<p>Section 3 B of the Tax Control Act does not define how transfer pricing documentation should be structured and the information that it should contain. Section 3 B (5) only states that taxpayers are required to prepare and keep written documentation that:</p> <ol style="list-style-type: none"> 1. Explains how the prices in inter-company transactions are determined; and 2. Provides the information necessary to determine if prices are at arm's length. <p>The general requirements of Section 3 B are supplemented by binding Order No. 42 of 24 January 2006. The Order lists the categories of required information and recommends that such information be presented in a structured manner. The "typical" information is required, e.g. company information, market and industry information, inter-company transactions, functional analysis per inter-company transaction, choice of transfer pricing method and information on the implementation of the method, economic analysis and inter-company agreements. However, it should be noted that specific requirements can apply depending on the specific case and the requirements of the Order should be checked in each case. An English translation of Order No. 42 of 24 January 2006 can be requested from Transfer Pricing Associates by e-mail to p.andersen@transferpricingassociates.com.</p>
Record keeping	<p>Transfer pricing legislation does not address the retention period for transfer pricing documentation but Section 10(1) of the Act on Bookkeeping requires taxpayers to keep materials for a period of 5 years after the end of the financial year to which they relate.</p> <p>Given that the statute of limitation for taxpayers subject to the statutory transfer pricing documentation requirements of Section 3 B of the Tax Control Act is 6 years, there is probably an obligation beyond the 5-year period of the Act on Bookkeeping to keep transfer pricing documentation.</p>
Language for documentation	<p>Transfer pricing documentation may be prepared in the following languages: Danish, English, Norwegian or Swedish.</p>

<p>Small- and medium-sized enterprises (SMEs)</p>	<p>Small- and medium-sized taxpayers are exempt from documentation requirements (but not from applying the arm's length principle). The exemption applies where the taxpayer, on a consolidated basis with associated companies, has: (i) less than 250 employees; and (ii) has assets of less than DKK 125 million or a turnover of less than DKK 250 million. The exemption is not applicable for inter-company transactions with associated companies or permanent establishments located in tax havens. From a legal perspective, tax havens are defined as countries outside the European Union and the European Economic Area that have not concluded an income tax treaty with Denmark.</p>
<p>Deadline to Prepare Documentation</p>	<p>Although Section 3 B of the Tax Control Act is silent on this point, the comments submitted to the Parliament together with Bill No. 120 of 2005 mention that transfer pricing documentation must be available at the moment the corporate income tax return is submitted.</p>
<p>Deadline to Submit Documentation</p>	<p>Order No. 42 of 24 January 2006 that states that documentation must be submitted upon request within 60 days.</p> <p>Benchmarks must be submitted upon request within 60-90 days.</p>

STATUTE OF LIMITATIONS

The statute of limitation for taxpayers subject to the statutory transfer pricing documentation requirements of Section 3 B of the Tax Control Act is 6 years.

TRANSFER PRICING METHODS

The five OECD transfer pricing methods, i.e. the comparable uncontrolled price (CUP) method, resale price method, the cost plus method, the transactional net margin method and the profit split method are all accepted. Other methods are also accepted provided the taxpayer can prove that the method is in accordance with the arm's length principle.

COMPARABLES

A comparables search is only required upon request. The taxpayer is required to first check all potential CUPs before functional comparables are used. Pan-European comparables may be used if a sufficient number of national comparables are not available or if markets conditions are comparable.

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