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# BEPS Action 13: Standardized Transfer Pricing Documentation

Does one size fit all?

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program  
30 higher education credits

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Semester of graduation: Fall 2015

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# Summary

In Action 13 of the OECD/G20 Base erosion and profit shifting project, the Organization for Economic Co-operation and Development (OECD) re-examines transfer pricing documentation requirements and updates Chapter V of the Transfer pricing guidelines. Action 13 recommends a new three-tiered transfer pricing documentation structure that includes a master file, a local file, and a country-by-country report. Together, these three documents are intended to simplify taxpayers' compliance burden, provide tax administrations with more relevant information, and increase transparency. In regulating transfer pricing, Sweden follows the Transfer pricing guidelines and requires transfer pricing documentation. This thesis examines a pending Swedish implementation of Action 13 and addresses the following themes in connection with transfer pricing documentation: (1) proportionality; (2) relevant information; (3) confidentiality; (4) compliance; (5) the factors countries should consider when formulizing new transfer pricing documentation requirements; and (6) the immediate consequences Action 13 has on multinational enterprises. As will be shown, regardless of when Sweden implements Action 13, the majority of Swedish multinational enterprises will already be compelled to compile three-tiered transfer pricing documentation that complies with the transfer pricing requirements in other jurisdictions.

While the OECD contends that Action 13 strikes a balance between taxpayers' compliance costs and tax administrations information needs, this thesis reveals that the new three-tiered transfer pricing documentation structure increases compliance costs for taxpayers as well as the administrative burden for tax administrations. Since taxpayers have struggled with what constitutes relevant information for the purposes of transfer pricing documentation, Action 13 specifically outlines the contents of the master file, local file, and country-by-country report. The Swedish transfer pricing documentation requirements are not aligned with this list of information and consequently, this thesis recognizes a clear discrepancy between the OECD's new recommendations and Swedish legislation. Furthermore, the country-by-country report has unleashed a debate about public disclosure of financial information; however, this thesis finds that the country-by-country report should remain confidential. Finally, this thesis analyzes compliance issues from three different perspectives accordingly: taxpayers' compliance with transfer pricing documentation requirements, tax administrations compliance with following their administrative authority, and Sweden's compliance with the OECD and the EU. Ultimately, this thesis questions the plausibility of standardized transfer pricing documentation, i.e. 'one size fits all'.

# Sammanfattning

I ljuset av OECD/G20:s 'Base erosion and profit shifting'-projekt har 'Organization for Economic Co-operation and Development' (OECD) undersökt internprissättningsdokumentation i Punkt 13 i handlingsplanen och har följaktligen publicerat ett reviderat Kapitel V i Transfer pricing guidelines. I Punkt 13 rekommenderas en ny tredelad struktur för internprissättningsdokumentation som inkluderar en master file, en local file och ett land för land-rapport. OECD menar att dessa tre dokument tillsammans kommer att minska skattebetalarnas börda att uppfylla dokumentationskraven, att tillförse skattemyndigheterna med relevant information, och öka transparens. I internprissättning följer Sverige Transfer pricing guidelines och verkställde dokumentationskrav för prissättningen mellan företag i intressegemenskap i 2007. Syftet med denna uppsats är att undersöka den pågående svensk implementering av Punkt 13 samt belyser följande huvudfrågor i anslutning till internprissättningsdokumentationen: (1) proportionalitet; (2) relevant information; (3) sekretess; (4) förenlighet; (5) vad som bör beaktas när länder formulerar nya reglerna om dokumentationsskyldighet vid internprissättning; och (6) de omedelbara konsekvenserna som punkt 13 får för multinationella företag. Denna uppsats kommer att visa, att oavsett när Sverige implementerar Punkt 13 kommer de flesta svenska multinationella företag att redan ha utarbetat tredelad internprissättningsdokumentation som följer av regleringen i de andra länder där företaget är verksamt.

Medan OECD påstår att Punkt 13 ger en balans mellan skattebetalarnas börda att uppfylla dokumentationskraven och nyttan av informationen till skattemyndigheterna, framhäver denna uppsats att tredelad internprissättningsdokumentation i verkligheten ökar både skattebetalarnas börda att uppfylla dokumentationskraven och skattemyndigheternas administrativa börda. Eftersom skattebetalarna tycker att det är svårt att avskilja vad som utgör relevant information, Punkt 13 specificerar vad som ska ingå i master file, local file och land för land-rapporten. Sveriges dokumentationsregler skiljer sig från OECD:s riktlinjer och därför görs det gällande att det föreligger en tydlig oförenlighet mellan OECD:s nya rekommendationer och svensk lagstiftning. Därutöver har land för land-rapportering öppnat en offentlighetsdebatt, trots debatten anser denna uppsats att land för land-rapportering borde vara sekretessbelagd även fortsättningsvis. Slutligen analyseras förenlighetsproblemet utifrån tre perspektiv. Den första är skattebetalarnas uppfyllelse av internprissättningsdokumentation, den andra är skattemyndigheternas administrativa auktoritet och den tredje är Sveriges enlighet med OECD och EU. I slutändan problematiseras möjligheten till att införa standardiserad internprissättningsdokumentation, med andra ord; om verkligen 'one size fits all'.

# Preface

I moved to Sweden nine years ago and attaining my law degree is something that I have always felt passionate about. My Swedish teacher, Lena Bruzaeus, encouraged me to pursue my dream in Sweden and prepared me for the challenges at law school. Even though I was the first person on the waiting list the first time I applied to the Faculty of Law at Lunds University; I was not accepted into the program. I felt discouraged and assumed that destiny had other plans in store. The following year I spontaneously reapplied and was accepted into the program. After four years of hard work I am proud to publish my Graduate Thesis.

First, I would like to thank my supervisor, Professor of Fiscal Law, Christina Moëll, for her encouragement and continuous feedback throughout the writing process. I looked forward to our interesting discussions and am thankful that I received the opportunity to attend the Transfer Pricing Tax Conference at Copenhagen Business School. I would also like to thank my mentor, Mikael Burlin, for his support and inspiration over the past two years. In addition, I would like to thank my father, David, and Eric Jorgensen for assisting me in the final editing of this thesis. Finally, I would like to thank my other-half, Jonas Lindstrand, for believing in me and not letting me give up. Last, I would like to thank my friends at Juridicum for all their pep-talks and my family for their continuous support.

Elise Krumholz  
Lund, 31 December 2015

# Abbreviations

Action Plan	Action plan on base erosion and profit shifting
Action 7	Action 7 – Preventing the artificial avoidance of permanent establishment status
Actions 8-10	Actions 8-10 – Aligning transfer pricing outcomes with value creation
Action 13	Action 13 – Re-examine transfer pricing documentation
BEPS	Base erosion profit shifting
BEPS Report	Addressing base erosion and profit shifting
CbC	Country-by-country
CCCTB	Common consolidated corporation tax base
Code of conduct on TPD	Resolution on a Code of conduct on transfer pricing documentation for associated enterprises in the European Union
Discussion Draft	Discussion draft on transfer pricing documentation and CbC reporting
EU JTPF	European Union Joint Transfer Pricing Forum
EU	European Union
EUTPD	European Union transfer pricing documentation
Final Report	Transfer pricing documentation and country-by-country Reporting, Action 13 – 2015 Final Report
HFD	Swedish Supreme Administrative Court
IL	Income Tax Act ( <i>Inkomstskattelag</i> , (1999:1229))
LSK	Tax Return and Statements of Income Act ( <i>lag (2001:1277) om självdeklarationer om kontrolluppgifter</i> )

Memorandum	Memorandum on transfer pricing documentation and country by country reporting
MNE	Multinational enterprise
Model Legislation	Model legislation related to Country-by-Country Reporting
OECD	Organization for Economic Co-operation and Development
OECD Model	OECD Model tax convention on income and on capital
Public Comments	Comments received on discussion draft on transfer pricing documentation and CbC reporting
Prop.	Government bill ( <i>Proposition</i> )
RF	Instrument of Government ( <i>Regeringsform</i> (1974:152))
RÅ	Regeringsrättens årsbok
SFF	Tax Procedures Ordinance ( <i>Skatteförfarandeförordning</i> , (2011:1261))
SFL	Tax Procedures Act ( <i>Skatteförfarandelag</i> , (2011:1244))
SKV	Swedish Tax Agency ( <i>Skatteverket</i> )
SKVFS	Swedish Tax Agency Statute Book ( <i>Skatteverkets författningssamling</i> )
SKV M	Swedish Tax Agency Memorandum ( <i>Skatteverkets meddelanden</i> )
TPD	Transfer pricing documentation
TP Guidelines	Transfer pricing guidelines 2010
White Paper	White paper on transfer pricing documentation
WP6	OECD Working Party 6 of the Committee of fiscal affairs



# 1 Introduction

“What the BEPS are we talking about?” symbolizes the hallmark logo of the OECD/G20 Base Erosion and Profit Shifting (BEPS) project and on October 5, 2015, the Organization for Economic Co-operation and Development (OECD) informed the public about, “What the BEPS have we done?”<sup>1</sup> Indeed, the BEPS project signifies the largest change in international tax standards within the past century and these changes are occurring right now.<sup>2</sup> In order to prevent double non-taxation and the shifting of incomes to low-tax jurisdictions, the BEPS project develops fifteen action plans. Together, these fifteen action plans create coherence between different interactions in domestic law, realign substance and taxation, and increase transparency.<sup>3</sup> Unsurprisingly, transfer pricing is one area of concern. Transfer pricing rules generally follow the arm’s length principle, which requires that the pricing of a transaction between two associated entities equates to the price that two independent entities would agree to. In order to verify compliance with the arm’s length principle, multinational enterprises (MNE) document their intra-group cross-border transactions, i.e. transfer pricing documentation (TPD). Further guidance about the arm’s length principle and TPD resides in the *OECD Transfer pricing guidelines for multinational enterprises and tax administrations*<sup>4</sup> (TP Guidelines).

*Action 13 – Re-examine transfer pricing documentation* - (Action 13) of the BEPS project focuses on enhancing transparency and updates Chapter V of the TP Guidelines on TPD. In contrast to the previous provisions, the OECD clearly stipulates three objectives of TPD requirements: the taxpayer’s assessment of its compliance with the arm’s length principle, the provision of information for the tax administrations risk assessment, and the provision of information for a transfer pricing audit. In order to fulfil these three objectives, the OECD establishes a new three-tiered TPD standard, which includes a master file, a local file, and a country-by-country (CbC) report. The master file provides tax administrations with a high-level overview of the MNE group, the local file specifies the relevant transactions, and the CbC report assembles the global allocation of income. The OECD’s attempt to

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<sup>1</sup> Saint-Amans, Pascal & Russo, Raffaele: *What the BEPS are we talking about?*, OECD Forum 2013, <http://www.oecd.org/forum/what-the-beps-are-we-talking-about.htm>, (Accessed: 2015-10-07). [cit: Saint-Amans & Russo 2013].

BEPS webcast #8: Launch of 2015 BEPS reports, 6 October 2015, <https://www.youtube.com/watch?v=AFtUOMVmovk>, (Accessed: 2015-10-06). [cit: Technical Presentation 2015].

<sup>2</sup> See Sect. 8 in OECD, *Explanatory statement*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, 2015, <http://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf>, (Accessed: 2015-10-12). [cit: Explanatory statement].

<sup>3</sup> OECD, *Action plan on base erosion and profit shifting*, OECD Publishing, 19 July 2013, <http://dx.doi.org/10.1787/9789264202719-en>, (Accessed: 2015-10-12). [cit: Action plan on base erosion and profit shifting], pp. 13-14.

<sup>4</sup> *OECD Transfer pricing guidelines for multinational enterprises and tax administrations 2010*, OECD Publishing 2010, Paris, <http://dx.doi.org/10.1787/tpg-2010-en>. [cit: OECD Transfer pricing guidelines 2010].

standardize TPD requires new legislation and/or amendments to tax administration's regulations in the majority of countries and Sweden is no exception.

## 1.1 Purpose

This thesis examines the OECD's amendment to Chapter V of the TP Guidelines and more specifically explores the impact these amendments will have on an international level and locally in Sweden. Even though the OECD has reached a consensus about TPD's three-tiered structure, some countries appear reluctant about implementing the OECD's recommendations. While other countries began implementing the new documentation standards, specifically CbC reporting, before the OECD published the final reports. In the near future, MNEs face the administrative burden of preparing TPD that meets the new documentation standards, with the understanding that their countries of operation will implement/apply the new TPD requirements either through legislation or through the tax authority's regulations.

In Sweden, TPD requirements became mandatory in 2007. According to Prop. 2005/05:169, *Effektivare skattekontroll*<sup>5</sup>, mandatory TPD permits the Swedish Tax Agency (*Skatteverket*, SKV) to accomplish more effective control and provides a foundation for evaluating if the MNE's transfer pricing coheres with the arm's length principle. In addition, TPD increases MNE's foreseeability, encourages awareness, and creates more uniformity.<sup>6</sup> In order to clarify the Swedish TPD rules, the SKV adopted *Skatteverkets föreskrifter om dokumentation av prissättning mellan företag i intressegemenskap*<sup>7</sup> (SKVFS 2007:1), which specify TPD's content. As acknowledged above, the OECD recommends a new three-tiered TPD standard that significantly defers from the current Swedish legislation. Sweden usually follows the OECD's recommendations, but there remains uncertainty over to what extent the Swedish legal system will implement the updated Chapter V of the TP Guidelines.

This thesis seeks to analyze a pending Swedish implementation of the updated Chapter V of the TP Guidelines and the subsequent impact Action 13 has on Swedish MNEs. More specifically, this thesis examines four central themes in relation to TPD requirements: proportionality, relevant information, confidentiality, and compliance.

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<sup>5</sup> More effective tax control.

<sup>6</sup> Prop. 2005/06:169 p. 102.

<sup>7</sup> Skatteverkets författningssamling – *Skatteverkets föreskrifter om dokumentation av prissättning mellan företag i intressegemenskap* (Regulations on the documentation of transfer pricing between associated enterprises), SKVFS 2007:1.

## 1.2 Method and material

This section describes the selected sources, their respective value, as well as their utilization throughout this thesis. In addition, the author shares the steps of her research process in further detail. The legal dogmatic method<sup>8</sup> formally categorizes the selected method for this thesis. Professor Emeritus, Nils Jareborg describes the legal dogmatic method as a reconstruction of a legal system and emphasizes the importance of contributing to predictability and effective control within a legal system.<sup>9</sup> Accordingly, the author has studied the current Swedish transfer pricing rules from a domestic and international perspective. Since TPD has many practical components, law journals provide a practitioners perspective of the current Swedish TPD requirements. In particular, articles from the *Svensk Skattetidning* conceptualize the responses to the 2007 Swedish implementation of TPD requirements and exemplify their ambiguity in guidance.<sup>10</sup>

The research process began with a comprehensive study of the 2010 TP Guidelines, the Swedish rules about TPD, as well as the BEPS project. In order to highlight different perspectives and maintain a neutral position, the author studied an array of sources. Some of these sources are considered less traditional sources of information; however, they enhance the authenticity of this thesis. For example, YouTube showcases the OECD's News Conference<sup>11</sup> that publically released the BEPS project. The News Conference provides unique insight about the expectations and projections of the BEPS project. While webcasts from consultancy firms elaborate on the foreseen impact of BEPS on a more practical level. These electronic sources of information add unique perspectives that were simply not found in scholastic sources. Although, the recent publication of the finalized BEPS package also contributes to the sparsity of articles from academia and practitioners.

The next step entailed chronologically organizing the developments of Action 13 from initial proposal to the finalized report, *Transfer pricing documentation and country-by-country reporting, Action 13- 2015 Final report*<sup>12</sup> (Final Report). During this stage of the process, the author analyzed

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<sup>8</sup> See Kleineman, Jan: "Rättsdogmatisk metod", in *Juridisk metodlära*, Studentlitteratur, Lund 2013, pp. 21-45. [cit: Kleineman 2013].

<sup>9</sup> Jareborg, Nils: *Rättsdogmatik som vetenskap*, Svensk Juristtidning, 2004, pp. 1-10. [cit: Jareborg 2004], pp. 4-5.

<sup>10</sup> In Sweden, there are two main legal journals that focus on tax issues, *Svensk Skattetidning* and *Skattenytt*. While both journals provide substantial information about transfer pricing, *Svensk Skattetidning* contains articles that were more suitable for this thesis.

<sup>11</sup> News Conference – launch of the 2015 BEPS package, 6 October 2015, <https://www.youtube.com/watch?v=dVRVfIz9c64>, (Accessed: 2015-10-06). [cit: News Conference 2015].

<sup>12</sup> OECD, *Transfer pricing documentation and country-by-country reporting, Action 13-2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241480-en>, (Accessed: 2015-10-09). [cit: Action 13, Final Report 2015].

commentary received by the OECD as well as scholarly articles in order to problematize the materialization of a new TPD standard. One struggle that emerged early on in the research process was the difference between the OECD's and the Swedish sources of law. The OECD's documents in this thesis constitute soft law and consequently, they do not have a legally binding status. The OECD utilizes discussion drafts as a literal 'rough draft' and as a venue for stakeholders to express their comments. In contrast, Sweden has a strong tradition in respect to the hierarchy of legal sources and recognizes legislative preparatory works as a source of law. However, the OECD drafts and the Swedish preparatory works do share some similarities. For instance, both document types make initial proposals and give the opportunity for constructive feedback prior to issuing the finalized document.

One issue that complicated and delayed parts of the writing process pertained to the uncertainty over the outcomes of the BEPS project. Even though countries and practitioners already considered Action 13 finalized prior to the official publication in October 2015, it remained impossible to foresee when and how fast Sweden would respond. In 2014, the SKV published a report<sup>13</sup> that contains a survey about the industries opinions of the Swedish TPD rules. This report provides insightful reflections over the effectiveness of the Swedish TPD rules, as well as the SKV's analysis of Action 13. However, it was not until December 1, 2015 that the SKV held an official BEPS seminar for the public and formalized the consequences of Action 13 for Swedish MNEs and the SKV.<sup>14</sup> Fortunately, the SKV's BEPS seminar did not cause any drastic changes to this thesis. In the article, *BEPS- Implementering i svensk skatterätt*, Professors of Law, Anders Hultqvist and Bertil Wiman, reflect over the Swedish implications of BEPS.<sup>15</sup> Their article is the only article that specifically addresses the implementation of the BEPS project into the Swedish legal system. As a result, their article plays a central role in the author's analysis of a pending Swedish implementation of Action 13 in section 4.3. The next section clarifies the scope of this thesis, as well as the author's choice of theme.

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<sup>13</sup> Skatteverkets rapport – *Utvärdering av reglerna om dokumentationsskyldighet vid internprissättning*, 13 October 2014, dnr: 131 662842-13/113.

[cit: Skatteverkets rapport 2014-10-13].

<sup>14</sup> Skatteverkets seminarium om BEPS- projektet - Skattebaserodering och vinstförflyttning, Powerpoint, 1 December 2015,

<https://www.skatteverket.se/download/18.3810a01c150939e893f8165/1448976174430/Seminarium+p%C3%A5+Skatteverket+om+BEPS+151201.pdf>, (Accessed: 2015-12-01).

[cit: Seminarium om BEPS 2015, Powerpoint].

Skatteverkets seminarium om BEPS, Webcasts, 1 December 2015, <https://www.skatteverket.se/omoss/press/presseminarier/seminariumombeps.4.3810a01c150939e893f7d63.html>, (Accessed: 2015-12-01). [cit: Seminarium om BEPS 2015, Webcast].

<sup>15</sup> Hultqvist, Anders & Wiman, Bertil: *BEPS – Implementering i svensk skatterätt*, Svensk Skattetidning, vol. 4, 2015, pp. 309-324. [cit: Hultqvist & Wiman 2015].

## 1.3 Delimitation

The BEPS project encompasses 15 Action Points and while they do integrate with each other, this thesis concentrates on Action 13. The author deliberately chose Action 13 due to the unanimous consensus at such an early stage in the BEPS project. Still, the domestic implementation of Action 13 has varied between countries and Sweden has not been an early adopter of the OECD's new guidance on TPD. Thus, the author cannot account for the forthcoming changes of the Swedish transfer pricing rules. The addition of CbC reporting to TPD raises multiple aspects, such as information exchange and plausible amendments to double tax conventions. Even though these ramifications bear significance, they are not the core of this thesis. Instead, this thesis concentrates on the pending implementation of the updated Chapter V of the TP Guidelines within the Swedish legal system. Due to the CbC reporting threshold of annual consolidated group revenue over EUR 750 million, the author excludes small and medium enterprises from the domain of this thesis. Thus, this thesis focuses solely on enterprises that will probably encounter CbC reporting. Lastly, the author has practical experience in writing TPD, which contributes to the authenticity of this thesis.<sup>16</sup>

## 1.4 Terminology

The BEPS project contains an extreme amount of abbreviations and reports that characterize the area of international tax law and especially the OECD. Therefore, the author recommends that readers whom are less familiar with the BEPS project have the abbreviations list readily available. While reading this thesis, the two most important abbreviations to remember are transfer pricing documentation (TPD) and Country-by-Country (CbC) reporting, since these terms embody the core of Action 13. In connection to Action 13, the author simplifies the title of important documents in order to keep the text fluent. This list can be seen in Figure 2. In addition, the Final Report is simply a compilation of the previous three Action 13 reports: *Guidance on transfer pricing documentation and country-by-country reporting*<sup>17</sup>, *Action 13: Guidance on the implementation of transfer pricing documentation and country-by-country reporting*<sup>18</sup>, and *Action 13: Country-by-country reporting implementation package*<sup>19</sup>. Another important point to clarify regards the

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<sup>16</sup> I would like to especially thank the Tax Department at Stena for giving me invaluable practical experience in transfer pricing.

<sup>17</sup> OECD, *Guidance on transfer pricing documentation and country-by-country reporting*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, 16 September 2014, <http://dx.doi.org/10.1787/9789264219236-en>, (Accessed: 2015-10-12).

[cit: Guidance on transfer pricing documentation and country-by-country reporting].

<sup>18</sup> OECD, *Action 13: Guidance on the implementation of transfer pricing documentation and country-by-country reporting*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, 2015, <http://www.oecd.org/ctp/beps-action-13-guidance-implementation-tp-documentation-cbc-reporting.pdf>, (Accessed: 2015-10-12). [cit: Guidance on the implementation of transfer pricing documentation and country-by-country reporting].

<sup>19</sup> OECD, *Action 13: Country-by-country reporting implementation package*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, 2015, <http://www.oecd.org/ctp/transfer->

reference to Chapter V of the TP Guidelines. In order to avoid redundancy, Chapter V always refers to Chapter V of the TP Guidelines. Since the OECD has not issued new TP Guidelines, the ‘updated Chapter V’ can be found in the Final Report and in *Guidance on the implementation of transfer pricing documentation and country-by-country reporting*<sup>20</sup>.

Writing about the Swedish legal system in English may create some confusion for Swedish readers about what legal term or authority is being referred to. In order to avoid misunderstandings, the author includes the Swedish translation in parenthesis for specific Swedish legal terminology or bodies of government. The author also intentionally utilizes the Swedish abbreviation for the Swedish Tax Agency (SKV).

## 1.5 Disposition

In order to evaluate Sweden’s pending implementation of the updated Chapter V of the TP Guidelines, the remainder of this thesis is organized accordingly. *Chapter 2* establishes the basic principles behind the arm’s length principle and TPD. The chapter introduces the reader to the TP Guidelines and the TPD standard prior to the BEPS project. *Chapter 3* highlights the BEPS project and shows the development of Action 13. The implications of the updated Chapter V of the TP Guidelines will also be analyzed on a more international scale. In *Chapter 4*, the focus shifts to TPD within the context of the Swedish legal system. Chapter 4 begins with exploring the responses to the 2007 implementation of Swedish TPD requirements and then examines the effectiveness of these requirements. The chapter ends with an analysis about the implementation of Action 13 into the Swedish legal system. *Chapter 5* presents a case study about the Paradise Cruises group, which illustrates the immediate effects of three-tiered TPD requirements. This leads into a deeper analysis of TPD in light of Action 13 and the forthcoming Swedish implementation. Finally, four central themes - proportionality, relevant information, confidentiality, and compliance - reoccur throughout this thesis and section 5.2 examines these themes more thoroughly.

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pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf, (Accessed: 2015-10-12). [cit: Country-by-country reporting implementation package].

<sup>20</sup> Guidance on transfer pricing documentation and country-by-country reporting.

## 2 Transfer pricing documentation

In simple terms, transfer pricing refers to the pricing of business transactions between *related* entities. It is assumed that *unrelated* entities behave according to the market and seek to maximize their own profit. While other behaviors or objectives can influence related entities business decisions, which can *hypothetically* lead to a disproportionate division of profits between different tax jurisdictions. In order to avoid a skewed division of global profits between countries, tax authorities require that MNEs calculate their intra-group cross-border transactions as if they were two *unrelated* entities.<sup>21</sup> The remainder of this chapter familiarizes the reader with the arm's length principle within the context of the OECD and the Swedish legal system. This chapter also examines the purpose and content of TPD from three perspectives: the TP Guidelines, the European Union (EU), and Sweden.

### 2.1 The arm's length principle

The 1927 League of Nations addressed the allocation of profits and the 1935 draft model convention referred to an arm's length methodology.<sup>22</sup> The OECD adopted the arm's length principle and the first paragraph of Article 9 of the *OECD Model tax convention on income and on capital*<sup>23</sup> (OECD Model) states that:

[When] conditions are made or imposed between...two [associated] 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.<sup>24</sup>

In 1979, the OECD issued the TP Guidelines, which clarify the application of the arm's length principle.<sup>25</sup> In the Commentaries to Article 9 of the OECD Model, the Council of the OECD reiterates that the TP Guidelines represent internationally agreed principles and provide recommendations for the application of the arm's length principle.<sup>26</sup> Some OECD Members have incorporated the TP Guidelines into domestic legislation, while other

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<sup>21</sup> Henshall, John: *Global transfer pricing: principles and practice*, 2. ed., Bloomsbury Professional, Haywards Heath, 2013. [cit: Henshall 2013], pp. 1-5.

<sup>22</sup> Henshall 2013, p. 11. Miller, Angharad & Oats, Lynne: *Principles of international taxation*, 4. ed., Bloomsbury Professional, Haywards Heath, 2014. [cit: Miller & Oats 2014], p. 356.

<sup>23</sup> *OECD Model tax convention on income and capital, condensed version 2014*, OECD Publishing 2014, Paris, [http://dx.doi.org/10.1787/mtc\\_cond-2014-en](http://dx.doi.org/10.1787/mtc_cond-2014-en). [cit: OECD Model Convention 2014].

<sup>24</sup> Article 9.1 of the OECD Model Convention 2014.

<sup>25</sup> Henshall 2013, p. 6. Miller & Oats 2014, p. 357.

<sup>26</sup> Sect. 1 of the Commentaries on Article 9 of the OECD Model Convention 2014.

jurisdictions, such as Sweden, utilize the TP Guidelines as a means for interpreting the domestic legislation of the arm's length principle.<sup>27</sup>

Professor of International Tax Law, Michael Lang, at Vienna University of Economics and Business emphasizes that the TP Guidelines provide an international interpretation of the arm's length principle. According to international public law, double tax conventions can only limit tax liabilities, but they cannot generate them.<sup>28</sup> Similarly, the TP Guidelines do not justify a legal basis for a transfer pricing adjustment; instead, tax authorities apply the domestic rules when performing transfer pricing adjustments.<sup>29</sup> The next section presents the TP Guidelines with a focus on Chapter V, since Action 13 amends this chapter.

## 2.2 Transfer pricing guidelines 2010

The OECD published the most recent version of the TP Guidelines in 2010 and it is this version that section 2.2 describes. Chapter I of the TP Guidelines explains the arm's length principle more explicitly and emphasizes that it promotes the growth of international trade and investment. The TP Guidelines clarify that the arm's length approach treats the members of the MNE group as separate entities, as if they were independent entities. More specifically, a comparability analysis focuses on whether the nature of controlled transactions, i.e. between associated entities, differs from comparable uncontrolled transactions, i.e. between independent entities. Since transfer pricing is not an exact science, the OECD recognizes the challenges of finding comparable transactions. As a result, transfer pricing necessitates that both taxpayers and tax authorities utilize sound judgment. For example, associated enterprises may engage in transactions that reflect other circumstances, such as group synergies. Thus, finding adequate information that shows that the controlled transactions fulfil the arm's length principle can be challenging for taxpayers.<sup>30</sup>

Chapter II of the TP Guidelines describes the different transfer pricing methods: comparable uncontrolled price, resale price, cost plus, profit split, and transactional net margin method. The chapter begins with clarifying the selection of the most appropriate method and reiterates that no one method is suitable in every possible situation. Due to the complexity and nature of certain transactions, the TP Guidelines permit the application of more than one method. Taxpayers also have the option of selecting a non-OECD

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<sup>27</sup> Henshall 2013, p. 12.

<sup>28</sup> In the Swedish legal system, Gustaf Lindencrona has coined the expression, 'gyllene regeln.' See Hultqvist & Wiman 2015, p. 315 for a further explanation.

<sup>29</sup> Lang, Michael: *Introduction to the law of double taxation conventions*, 2. ed., Linde, Wien, 2013. [cit: Lang 2013], Sect. 46 & 478.

<sup>30</sup> Chap. 1, Sect. B, Sects. 1.6-1.13 of the OECD Transfer pricing guidelines 2010. Kindly note that Chap. 1, Sect. D of the TP Guidelines has recently been replaced in its entirety. Please see, OECD, *Aligning transfer pricing outcomes with value creation, Actions 8-10: 2015 Final Reports*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241244-en>, (Accessed: 2015-11-15). [cit: Actions 8-10, Final Reports 2015].



recognized transfer pricing method, as long the chosen method fulfils the following two conditions. The selected method cannot substitute the OECD-recognized methods and it must comply with the arm's length principle.<sup>31</sup>

After selecting the most appropriate transfer pricing method, the next step entails applying the selected method through a comparability analysis. Chapter III of the TP Guidelines explains the comparability analysis, which involves the identification of potential comparables. In addition, the comparability analysis contains a conclusion about whether the controlled transactions are consistent with the arm's length principle referred to in Article 9.1 of the OECD Model. In order to verify that the controlled transactions comply with the arm's length principle, taxpayers document information, i.e. TPD, which then facilitates tax administrations transfer pricing inquiries.<sup>32</sup>

## 2.2.1 Chapter V of the Transfer pricing guidelines 2010

In order for the reader to grasp the differences between the previous and updated version of Chapter V of the TP Guidelines, this sub-section solely reviews Chapter V of the 2010 TP Guidelines.<sup>33</sup> Chapter V provides general guidance about TPD for tax administrations and taxpayers. More specifically, it outlines what tax administrations should take into account when developing TPD rules and what type of information taxpayers should include in their documentation. Since tax administrations generally bear the burden of proof, TPD supplies them with adequate information and allows them to perform transfer pricing assessments. The TP Guidelines even suggest that incomplete TPD may shift the burden of proof to the taxpayer.<sup>34</sup> Thus, taxpayers have a good incentive to complete TPD.

The following sections in Chapter V, elaborate on the formation of TPD rules and procedures. When taxpayers assess their transfer pricing, the OECD refers to utilizing 'prudent business management principles'. This principle entails that taxpayers should be able to provide a written explanation about the nature of their business activities and transfer pricing upon the tax administration's request. The TP Guidelines also articulate that there should also be a *balance* between the tax administration's need for the documents and the taxpayer's administrative burden of creating or obtaining them. At the time of filing tax returns, the TP Guidelines suggest that information disclosure about transfer pricing should be limited to what is necessary to determine the need for a further transfer pricing inquiry. Therefore, tax administrations should not require TPD at the commencement of the tax return filing stage. As long as the costs are not disproportionately high, taxpayers should provide tax administrations with reasonable documents for transfer pricing assessments. Thus, Chapter V encourages taxpayers to keep adequate records, especially since the voluntary provision of TPD increases

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<sup>31</sup> Sects. 2.1-2.11 of the OECD Transfer pricing guidelines 2010.

<sup>32</sup> Sects. 3.1-3.3 of the OECD Transfer pricing guidelines 2010.

<sup>33</sup> Section 3.3 discusses the updated Chapter V of the TP Guidelines.

<sup>34</sup> Sects. 5.1-5.2 of the OECD Transfer pricing guidelines 2010.

the likelihood that tax administrations will accept their transfer price. Correspondingly, tax administrations should request documents that are reasonably accessible after the relevant transaction has incurred. Finally, tax administrations should ensure confidentiality of the taxpayer's information.<sup>35</sup>

The next section in Chapter V clarifies what constitutes relevant information for assessing transfer prices and suggests what should be included in TPD. First, the TP Guidelines acknowledge that the extent and nature of information in TPD depends on the individual circumstances. Therefore, the TP Guidelines recommendations should not be interpreted as a minimum level of compliance or as an exhaustive list of information. Chapter V makes the following suggestions for the content of TPD.

- A *company analysis* that includes information related to each associated enterprise involved in the controlled transaction under review, such as an organizational and operational structure of the business.
- An *industry analysis* that explains the market conditions that affect the taxpayer, this could include regulations and competitors.
- A *functional analysis* that explains the functions performed, risks assumed and assets owned.
- Any *financial information* that may be useful for comparing profit and loss between the associated enterprises.
- An explanation of the *selection and application of the transfer pricing method* used to establish the transfer price and its consistency with the arm's length principle. This should also reflect the OECD's recommendations in Chapter II and III of the TP Guidelines.<sup>36</sup>

Chapter V concludes with reiterating the balance between taxpayers' costs for producing TPD and the tax administrations' need for the documents. 'Prudent business management principles' steer the extent of the documentation process and reflect the same sound principles when enterprises evaluate a business decision. Finally, to ensure that taxpayers provide tax administrations with adequate information for a transfer pricing assessment, while at the same time avoiding excessive documentation requirements, the TP Guidelines encourage cooperation between tax administrations and taxpayers.<sup>37</sup>

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<sup>35</sup> Sects. 5.3-5.15 of the OECD Transfer pricing guidelines 2010.

<sup>36</sup> Sects. 5.16-5.27 of the OECD Transfer pricing guidelines 2010.

<sup>37</sup> Sects. 5.28-5.29 of the OECD Transfer pricing guidelines 2010.

## 2.3 EU Joint Transfer Pricing Forum

While the OECD focuses on tax treaty law and allocating taxing rights between countries, the EU works towards establishing a Single Market.<sup>38</sup> This important difference means that the EU focuses on establishing greater harmony between Member States than the OECD does.<sup>39</sup> Since mutual agreement procedures in tax treaties failed to eliminate double taxation, the European Commission formed the EU Joint Transfer Pricing Forum (EU JTPF) in 2002. The EU JTPF consists of representatives from the tax administrations of the fifteen Member States and ten representatives from the European business community. The original intent of the EU JTPF was to ratify the Arbitration Convention<sup>40</sup>, which only applies to transfer pricing disputes and guarantees the elimination of double taxation.<sup>41</sup>

In regards to TPD, businesses struggled with fulfilling country specific documentation requirements in the different Member States. Therefore, the EU JTPF originally believed that a single documentation package would alleviate the compliance costs for businesses. The EU JTPF agreed upon a two-part package, consisting of a master file and a country-specific file. In 2006, the Council issued a *Resolution on a Code of conduct on transfer pricing documentation for associated enterprises in the European Union*<sup>42</sup> (Code of conduct on TPD). Contrary to EU directives, which Member States have to implement into national law by a specific deadline, a Code of conduct signifies a political commitment. Therefore, Member States are not obligated to incorporate a Code of conduct into legislation.<sup>43</sup>

The Code of conduct on TPD states that Member States will accept European Union transfer pricing documentation (EUTPD). Thus, MNEs can follow the EUTPD format in the majority of cases within the EU. EUTPD also allows tax administrations to perform risk assessments and select which inter-company transactions require further review. When requesting information, the Council advises against Member States imposing an unreasonable administrative burden on MNEs.<sup>44</sup>

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<sup>38</sup> Miller & Oats 2014, p. 130.

<sup>39</sup> Author's observation.

<sup>40</sup> Code of conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 28 July 2006, C176/8. [cit: 2006/C176/02].

<sup>41</sup> Gillett, Philip: "Transfer pricing disputes in the European Union", in *Resolving transfer pricing disputes: a global analysis*, Cambridge University Press, Cambridge, 2012, pp. 165-187. [cit: Gillett 2012], pp. 170-171.

<sup>42</sup> Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, on a Code of Conduct on transfer pricing documentation for associated enterprises in the European Union, 20 June 2006, nr. 9738/06. [cit: 2006/C 176/01]. For more information about the Code of conduct on transfer pricing documentation see: [http://europa.eu/rapid/press-release\\_MEMO-05-414\\_en.htm](http://europa.eu/rapid/press-release_MEMO-05-414_en.htm), (Accessed: 2015-10-01).

<sup>43</sup> Gillett 2012, pp. 173-175.

<sup>44</sup> 2006/C 176/01.

EUTPD consists of a master file and a country-specific file. The master file contains standardized information that seems relevant for all Member States and provides a ‘blueprint’ of the MNE group.<sup>45</sup> While the country-specific file supplements the master file and addresses the specific transactions under review.<sup>46</sup> In contrast to Chapter V of the TP Guidelines, EUTPD contains concise information about the content of TPD. Even though the Code of conduct on TPD is a soft-law initiative, the EU JTPF encourages the application of EUTPD within the EU. At a recent meeting, the EU JTPF recognizes that the structure and contents in the Code of Conduct on TPD largely reflects the OECD’s development of TPD in Action 13.<sup>47</sup> The EU-JTPF continues to monitor the BEPS project, evaluate strategies that allow tax administrations to perform effective assessments, and develop information technology tools to minimize taxpayers’ compliance burden.<sup>48</sup>

## 2.4 Swedish legal system

Even though the TP Guidelines do not formally constitute Swedish legislation, the Swedish Supreme Administrative Court (*Högsta förvaltningsdomstolen*, HFD) declares in the Shell-case<sup>49</sup> that the TP Guidelines present a fair and well-balanced view of transfer pricing issues that provide guidance for the application of the arm’s length principle. In Prop. 2005/06:169, the Ministry of Finance (*Finansdepartementet*) reiterates the HFD’s statement and pronounces that the TP Guidelines represent international principles within the area of transfer pricing, where the SKV as well as taxpayers can retrieve invaluable guidance.<sup>50</sup> This entails that the Swedish courts, the SKV, and taxpayers can apply and retrieve guidance from the TP Guidelines. The following two sub-sections describe the context of the arm’s length principle in Swedish law, in addition to providing background information about the 2007 Swedish implementation of TPD requirements.

### 2.4.1 Arm’s length principle

Sect. 19 of Chap. 14 of the Income Tax Act (*Inkomstskattelag*, (1999:1229), IL) articulates the arm’s length principle, also known as the correction rule (*korrigeringsregeln*). According to Sect. 19 of Chap. 14 of the IL, if an enterprise has reduced taxable income due to conditions that differ from what two independent enterprises would have agreed to, then the SKV may adjust the enterprise’s income. However, this only applies if the enterprise fulfils the following three conditions:

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<sup>45</sup> Sects. 4.1-4.2, 2006/C 176/01.

<sup>46</sup> Sects. 5.1-5.2, 2006/C 176/01.

<sup>47</sup> Section 3.2 of this thesis also demonstrates how EUTPD influenced the OECD’s development of the updated Chapter V of the TP Guidelines.

<sup>48</sup> JTPF Program of Work 2015-2019, EU Joint Transfer Pricing Forum, Meeting 25 June 2015, DOC: JTPF/005/FINAL/2015/EN. [cit: JTPF/005/FINAL/2015/EN], pp. 8-9.

<sup>49</sup> RÅ 1991 ref. 107.

<sup>50</sup> Prop. 2005/06:169, p. 89.

- the enterprise, which due to the conditions made between the enterprises receives an increased income will not be liable to tax in Sweden according to IL or according to a tax treaty;
- it can be reasonably established that the enterprises are associated; and
- it is not evident from the circumstances that the conditions were made for other reasons than for the reason of the enterprises being associated.

Sect. 20 of Chap. 14 of the IL defines when enterprises are associated and requires that the enterprise satisfy one of the following conditions:

- an enterprise participates directly or indirectly in the management, control or capital of another enterprise, or
- the same persons participate directly or indirectly in the management, control or capital of both enterprises.

As noted in the above stipulations, enterprises are not obliged to document their transfer prices or submit documentation to the SKV. The IL requires that enterprises acknowledge and follow the arm's length principle when they assess their pricing of intra-group cross-border transactions. Therefore, in Prop. 2005/06:169, the Ministry of Finance recommends implementing formal TPD requirements in the Tax Return and Statements of Income Act (*lag om självdeklarationer och kontrolluppgifter*, (2001:1277), LSK). Prop. 2005/06:169 recognizes the complexity of transfer pricing and acknowledges that other countries require MNEs to compile documentation for the tax agencies transfer pricing controls. Furthermore, Swedish TPD rules should not have an adverse effect on the application of the Swedish correction rule or the SKV's initial burden of proof. The Ministry of Finance postulates that TPD alleviates double taxation and permits a thorough analysis of an enterprises transfer prices. Therefore, the Ministry of Finance conceives that obligatory TPD requirements would benefit both the SKV and Swedish enterprises. In conclusion, formal documentation requirements: increase the effectivity of tax controls, contribute to enterprises foreseeability, and create more uniformity.<sup>51</sup>

The Ministry of Finance proposes that the regulations follow an acceptable international standard and only require essential information for performing a transfer pricing assessment. Since TPD regulations seek to expedite a thorough transfer pricing risk assessment, it deems sufficient for enterprises to send in their TPD upon the SKV's request. In addition, Prop. 2005/06:169 articulates enforcing stricter demands on the documentation of complex, higher valued transactions in comparison to simple everyday transactions.<sup>52</sup>

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<sup>51</sup> Prop. 2005/06:169 pp. 88, 99-102.

<sup>52</sup> Prop. 2005/06:169 pp. 103, 110.

In accordance with Chapter V of the TP Guidelines<sup>53</sup>, Prop. 2005/06:169 recommends that TPD consist of five main parts:

- a legal and operational description of the company, including an industry analysis and relevant business strategies;
- a description of the relevant intra-group cross-border transactions, for example services, products, intangible assets, financial transactions;
- a functional analysis which serves as a basis for identifying comparable transactions and selecting an appropriate transfer pricing method;
- a description of the applied transfer pricing method; and
- a comparability analysis.<sup>54</sup>

## 2.4.2 Swedish transfer pricing documentation requirements

Prop. 2005/06:169 led to the stipulation of Sects. 2a-2b of Chap. 19 of the LSK, which require that MNEs have written documentation explaining the MNE's transfer pricing, i.e. TPD. Sect. 2b of Chap. 19 of the LSK outlines the contents of TPD and these correspond to the five previously named components in Prop. 2005/06:169. In addition, the government, or whom the government authorizes, could decide on additional regulations (*föreskrifter*) that specify the required content of TPD.

There remains controversy over the extent in which the SKV can implement regulations that complement legislation, i.e. fill out the law. Professor of Tax Law, Robert Pålsson at the University of Gothenburg analyzes the depth of the SKV's authority to stipulate regulations in his book, *Konstitutionell Skatterätt*. It is crucial to remember that the right to tax has to be based on legislation (*föreskriftskravet*), in simplified terms no law, no tax. Sect. 2 of Chap. 8 of the Instrument of Government (*Regeringsform* (1974:152), RF) states that legislation about the relationship between the private and public sector has to be implemented through legislation. Thus, in the area of tax law, the Riksdag (*Swedish Parliament*) exercises absolute legislative power and cannot delegate their legislative authority to the Government (*Regeringen*).<sup>55</sup> However, Sect. 7 of Chap. 8 of the RF contains an exception, which allows the Government to delegate certain regulations to authorities (*verkställighetsföreskrifter*), including the SKV. The Government exercises the authority to delegate two categories of regulations; the first category pertains to administrative discrepancies and the second category encompasses materialistic supplements to legislation.<sup>56</sup> This infers that the Government can delegate the SKV the authority to clarify legislation through administrative regulations. Based on the preparatory works, the SKV's regulations should

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<sup>53</sup> See Sects. 5.16-5.27 of the OECD Transfer Pricing Guidelines 2010.

<sup>54</sup> Prop. 2005/06:169 pp. 103-107.

<sup>55</sup> See Sect. 3 of Chap. 8 of the RF.

<sup>56</sup> Pålsson, Robert: *Konstitutionell skatterätt*, 3. ed., Iustus, Uppsala, 2013. [cit: Pålsson 2013], pp. 29-32.

not add something essentially new to the law or anything that a taxpayer perceives as a new enforcement.<sup>57</sup>

Professor Pålsson presents SKVFS 2007:1 as an example of when the SKV has received criticism for going outside the scope of their administrative authority. However, the courts have never taken a stance to this position.<sup>58</sup> Professor of Financial Law, Anders Hultqvist, at Stockholm University, questions the SKV's regulations on TPD. Professor Hultqvist notes that if the SKV's regulations go outside their delegation authority, then taxpayers can interpret the regulations as guidelines rather than obligations. Consequently, Professor Hultqvist is a proponent of formal legislation, since it increases taxpayers' foreseeability.<sup>59</sup> This thesis considers that SKVFS 2007:1 remains inside the scope of the SKV's authority. Prop. 2005/06:169 specifically postulates that the TP Guidelines provide guidance for the SKV as well as taxpayers. In addition, SKVFS 2007:1 signifies a Swedish translation of Chapter V of the TP Guidelines; consequently, the author perceives the administrative regulations as a Swedish codification of the TP Guidelines.

The reader needs to distinguish between the SKV's regulations (*föreskrifter*) and memorandums (*meddelanden*). The SKV's regulations are legally binding rules that the SKV receives the authority to implement. In contrast, memorandums send signals to taxpayers about what the SKV accepts and clarifies how the SKV interprets their regulations. Memorandums build upon the SKV's administrative praxis, but they are not legally binding.<sup>60</sup> In the area of transfer pricing, the SKV has produced the memorandum, *Skatteverkets information om dokumentation av prissättning av transaktioner mellan företag i intressegemenskap*<sup>61</sup> (SKV M 2007:25) about how to interpret SKVFS 2007:1.<sup>62</sup> Professor of Tax Law (Emeritus), Sven-Olof Lodin, adds that the SKV's memorandum represents how tax officials would like taxpayers to format TPD, but not how they have to.<sup>63</sup>

Lastly, SKVFS 2007:1 and SKV M 2007:25 remain applicable, but Sects. 15-16 of Chap. 39 of the Tax Procedures Act (*Skatteförfarandelag* (2011:1244), SFL) have replaced Sect. 2a of Chap. 19 of the LSK. The new stipulations require that enterprises document international transactions between associated enterprises, as defined in Sect. 20 of Chap. 14 of the IL. Furthermore, TPD needs to contain adequate information for a transfer

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<sup>57</sup> Prop. 1973:90 p. 211.

<sup>58</sup> Pålsson 2013, pp. 32-33.

<sup>59</sup> Hultqvist, Anders: *Om föreskriftsregleringen angående dokumentationskravet vid internprissättning*, Svensk Skattetidning, vol. 6-7, 2007, pp. 404-411. [cit: Hultqvist 2007], pp. 406-407.

<sup>60</sup> Pålsson 2013, pp. 106-107.

<sup>61</sup> Skatteverkets meddelanden – *Skatteverkets information om dokumentation av prissättning av transaktioner mellan företag i intressegemenskap*, (Information on the documentation of transfer pricing between associated entities), SKV M 2007:25.

<sup>62</sup> Section 4.1 of this thesis examines the specific stipulations in SKVFS 2007:1 in connection to the legal doctrine from the time era.

<sup>63</sup> Lodin, Sven-Olof: *En kommentar till en kommentar om internprissättningsdokumentation*, Svensk Skattetidning, vol. 5, 2007, pp. 315-319. [cit: Lodin 2007], pp. 318-319.

pricing assessment, such that an adjustment in accordance to Sect. 19 of Chap. 14 of the IL can materialize. In addition, Sect. 9 of Chap. 9 of the Tax Procedures Ordinance (*Skatteförfarandeförordning* (2011:1261), SFF) has replaced Sect. 2b of Chap. 19 of the LSK. Sect. 9 of Chap. 9 of the SFF complements the stipulations in SFL and explicitly allows the SKV to issue further regulations about the information in TPD.

## 2.5 Summary

In summary, the TP Guidelines provide recommendations for the application of the arm's length principle as stipulated in the Commentaries to Article 9 of the OECD Model. Accordingly, MNEs document their intra-group cross-border transactions as evidence of their compliance with the arm's length principle. Chapter V of the TP Guidelines clarifies the content and purpose of TPD. In addition, Chapter V briefly explains what constitutes relevant information and advises taxpayers to use their 'prudent business management principles' when compiling TPD. The EU JTPF has adopted EUTPD as an alternative for Member States in the EU. In contrast to the TP Guidelines, EUTPD divides documentation into a master file and a country-specific file; thereby, providing an overview of the MNE group and specifics of the relevant transactions respectively.

In the Swedish legal system, Sect. 19 of Chap. 14 of the IL declares the arm's length principle and is also known as the correction rule. The Shell-case and Prop. 2005/06:169 confirm that the TP Guidelines provide guidance about the application of the Swedish correction rule. According to Sects. 15-16 of Chap. 39 of the SFL, associated enterprises are obliged to document intra-group cross-border transactions. Sect. 9 of Chap. 9 of the SFF specifies the five components of TPD – a legal and operational description of the company, information about the relevant transactions, a functional analysis, a description of the applied transfer pricing method, and a comparability analysis. In addition, the SKV provides further guidance about TPD in SKVFS 2007:1 and SKV M 2007:25. It remains controversial whether SKVFS 2007:1 goes outside the scope of the SKV's authority. According to Professors Pålsson and Hultqvist, the regulations have nevertheless created some uncertainty.



## 3 Action 13

This section begins with background information about the OECD/G20 BEPS Project and highlights the development of Action 13. In contrast to other action points<sup>64</sup>, Action 13 was relatively finalized at an early stage in the BEPS Project; thus, indicating the strong international consensus to make CbC reporting an international standard. The comments in response to the *Discussion draft on transfer pricing documentation and CbC reporting*<sup>65</sup> (Discussion Draft) demonstrate the industries major issues and concerns about Action 13; therefore, sub-section 3.2.1 elaborates specifically on the Discussion Draft. In addition, sub-section 3.2.2 examines the effectiveness of CbC reporting and the possibility of public disclosure. Chapter 3 concludes with an overview of the Final Report and expectations about local implementation.

### 3.1 Base erosion and profit shifting

The OECD defines BEPS<sup>66</sup> as tax planning strategies that reduce corporate taxes by optimizing the interaction of domestic tax systems to achieve double non-taxation or by shifting profits to jurisdictions with low taxation. It is crucial to remember that the gaps between two tax systems exist within the domestic tax rules; thus, many tax planning strategies are technically legal. Just as a collusion of two jurisdictions tax rules can lead to double taxation, they can also lead to double *non-taxation*.<sup>67</sup> The following example highlights this issue:

The interaction of withholding tax rules in one country, the territorial taxation system in another country, and the entity characterisation rules in a third country may combine to make it possible for certain transactions to occur in a way that gives rise to no current tax and have the effect of *shifting* income to a jurisdiction where, for various reasons, no tax is imposed.<sup>68</sup>

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<sup>64</sup> For example, the transactional profit split methods will not be finalized until the first half of 2017. See Sect. 67 in OECD, *BEPS - frequently asked questions*, OECD, <http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm#DCs>, (Accessed: 2015-10-08). [cit: BEPS – frequently asked questions].

<sup>65</sup> OECD, *Discussion draft on transfer pricing documentation and CbC reporting*, Public consultation, OECD, 30 January 2014, <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-transfer-pricing-documentation.pdf>, (Accessed: 2015-09-24). [cit: Discussion draft 2014].

<sup>66</sup> If you would like to read more about the implications and measuring of BEPS, please see: OECD, *Measuring and monitoring BEPS, Action 11 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241343-en>, (Accessed: 2015-10-09). [cit: Action 11, Final Report 2015].

<sup>67</sup> OECD, *Addressing base erosion and profit shifting*, OECD Publishing, 12 February 2013, <http://dx.doi.org/10.1787/9789264192744-en>, (Accessed: 2015-10-12). [cit: Addressing base erosion and profit shifting], p. 39. BEPS – frequently asked questions contains a similar in Sects. 117-119.

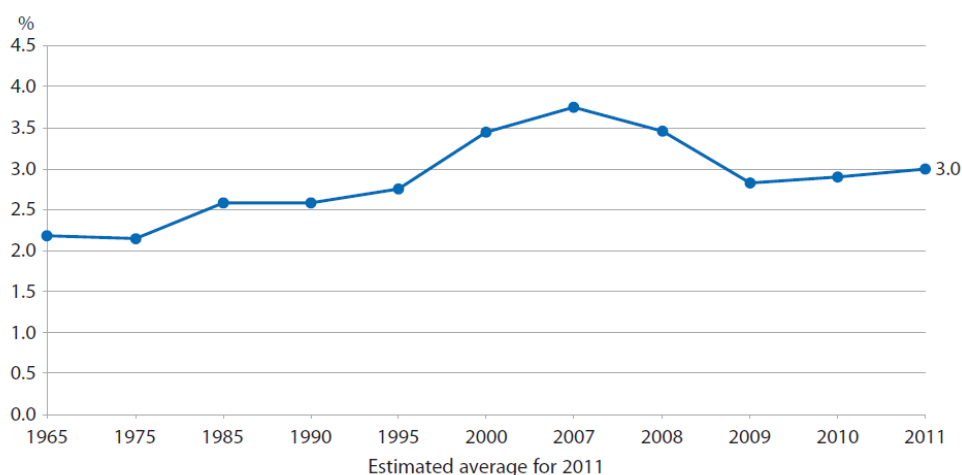
<sup>68</sup> Addressing base erosion and profit shifting, p. 44.

As this example demonstrates, BEPS results from the interaction of different jurisdictions, which is why a domestic, unilateral approach would not combat BEPS. The OECD estimates that BEPS accounts for revenue losses of USD 100 to 240 billion annually. In addition, the OECD recognizes that unilateral approaches may exacerbate the situation by undermining international tax principles and deterring international trade and investment. Since taxation stands as a national sovereignty, international coordination deems necessary to effectively protect domestic tax bases.<sup>69</sup>

### 3.1.1 OECD/G20 BEPS project

During 2012, the G20 Leaders<sup>70</sup> agreed upon the urgent need to prevent BEPS and the necessity of strengthening international tax standards. The G20 Leaders called upon the OECD to investigate the existence and cause of BEPS. This led to the OECD's report, *Addressing base erosion and profit shifting* (BEPS Report), which stresses the need for a comprehensive action plan that provides countries with instruments to align taxation with real economic activity. The BEPS Report observes that even though corporate income tax rates decreased between 2000 and 2011 in OECD member countries, this did not correspond to a decline in the corporate tax burden. The OECD measures the corporate tax burden as corporate income tax receipts as a percentage of GDP. Figure 1 exemplifies the OECD's observation.<sup>71</sup>

**FIGURE 1<sup>72</sup>. TAXES ON CORPORATE INCOME AS A PERCENTAGE OF GDP IN OECD COUNTRIES**



Note: Estimated average for 2011.

Source: OECD (2012), Revenue Statistics 1965-2011.

In addition, the BEPS Report reconsiders transfer pricing issues and questions the practicality of contractual risks. Therefore, the BEPS report focuses on

<sup>69</sup> Sect. 2 & 5, Explanatory statement.

<sup>70</sup> The G20 is a forum of 19 countries plus the European Union, see the following link for more information: <http://www.oecd.org/g20/about.htm>, (Accessed: 2015-10-14).

<sup>71</sup> Addressing base erosion and profit shifting, pp. 8, 16.

<sup>72</sup> Figure 2.1 in Addressing base erosion and profit shifting, p. 16.

risk allocation and economic substance, i.e. the managerial capacity to control risks and the financial capacity to bear risks.<sup>73</sup> Due to the complexity of BEPS, the OECD suggests an internationally co-ordinated approach in order to protect tax bases. The BEPS Report encourages all stakeholders, especially G20 economies, to participate and proposes the delivery of an action plan that identifies the necessary actions to address BEPS.<sup>74</sup>

As promised on July 19, 2013, the OECD issued a second report, *Action plan on base erosion and profit shifting* (Action Plan). In the Action Plan, the OECD recognizes the need for new international standards, realignment of taxation and relevant substance, increased transparency, and greater predictability for business. As a result, the OECD proposes fifteen action points and Action 13 focuses on enhancing *transparency* for tax administrations while simultaneously reconsidering the compliance costs for MNEs. Furthermore, the Action Plan advocates implementing a common template that presents information on MNE's global allocation of income, economic activity, and taxes paid among countries. This common template is the CbC report in later drafts. Another important component of the Action Plan pertains to a timeline of deliverables. The Action Plan states that the OECD will deliver Action 13 by September 2014 and foresees changes to Chapter V of the TP Guidelines, as well as recommendations for domestic legislation.<sup>75</sup> In order to meet this deadline, the OECD has issued a series of documents within a short time span. The next section guides the reader through the steps that ultimately led to the Final Report.

### **3.2 Action 13 – Re-examine transfer pricing documentation**

In order to understand the local and international impacts of Action 13, it deems necessary to analyze the development of the Final Report. Especially since the Discussion Draft and the *Comments received on discussion draft on transfer pricing documentation and country-by-country reporting*<sup>76</sup> (Public Comments) reveal the OECD's objectives and stakeholders concerns. The diagram below chronologically depicts the key documents pertaining to Action 13.

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<sup>73</sup> Addressing base erosion and profit shifting, pp. 42-43.

<sup>74</sup> See Executive Summary in Addressing base erosion and profit shifting, pp. 5-11.

<sup>75</sup> Action plan on base erosion and profit shifting, pp. 13-14, 23, 34.

<sup>76</sup> OECD, *Comments received on discussion draft on transfer pricing documentation and country-by-country reporting published today*, 3 March 2014, <http://www.oecd.org/tax/transfer-pricing/comments-discussion-draft-transfer-pricing-documentation.htm>, (Accessed: 2015-10-14). [cit: Public Comments 2014].

**Figure 2. ACTION 13: KEY EVENTS**

Document	Date
Addressing base erosion and profit shifting (BEPS Report)	12 February 2013
Action plan on base erosion and profit shifting (Action Plan)	19 July 2013
White paper on transfer pricing documentation (White Paper)	30 July 2013
Memorandum on transfer pricing documentation and country by country reporting (Memorandum)	3 October 2013
OECD Public consultation on transfer pricing matters	12-13 November 2013
Discussion draft on transfer pricing documentation and CbC reporting (Discussion Draft)	30 January 2014
Comments received on discussion draft on transfer pricing documentation and CbC reporting (Public Comments)	3 March 2014
Guidance on transfer pricing documentation and country-by-country reporting	16 September 2014
Action 13: Guidance on the implementation of transfer pricing documentation and country-by-country reporting	6 February 2015
Action 13: Country-by-country reporting implementation package	8 June 2015
Transfer pricing documentation and country-by-country reporting (Final Report)	5 October 2015

In response to the Action Plan, Working Party 6 of the Committee of fiscal affairs (WP6<sup>77</sup>) published the *White paper on transfer pricing documentation*<sup>78</sup> (White Paper) and invited public comments to instigate a discussion on how to revise TPD in Chapter V of the TP Guidelines. In order to assess the current TPD environment, WP6 consulted with other international organizations that work with transfer pricing. The White Paper seeks to simplify taxpayer’s compliance, while simultaneously providing tax authorities with more relevant information. In addition, the White Paper acknowledges that Chapter V of the TP Guidelines has become obsolete and recognizes the need for an international TPD standard. Finally, the White Paper deduces that country specific requirements place an administrative burden on businesses and that tax authorities often lack a “big picture” perspective of the MNE group.<sup>79</sup>

When reconsidering the purpose of TPD requirements, the White Paper identifies three objectives:

<sup>77</sup> WP6 is responsible for the OECDs work on transfer pricing matters. See under “The Role of the OECD Committee on Fiscal Affairs”, <http://www.oecd.org/ctp/beps-about.htm>, (Accessed: 2015-10-14).

<sup>78</sup> OECD, *White paper on transfer pricing documentation*, Public consultation, OECD, 30 July 2013, <http://www.oecd.org/ctp/transfer-pricing/white-paper-transfer-pricing-documentation.pdf>, (Accessed: 2015-10-07). [cit: White paper 2013].

<sup>79</sup> White paper 2013, pp. 4-12.

- To provide governments with the information necessary to conduct an informed transfer pricing risk assessment at the commencement of a tax audit;
- To assure that taxpayers have given appropriate consideration to transfer pricing requirements in establishing prices and other conditions for related party transactions and in reporting the income derived from such transactions in their tax returns;
- To provide governments with all of the information that they require in order to conduct an appropriately thorough audit of the transfer pricing practices of entities subject to tax in their jurisdiction.<sup>80</sup>

In order to achieve these objectives, the White Paper proposes a two-tiered TPD structure that resembles EUTPD<sup>81</sup> and renames it the ‘Coordinated Documentation Approach’. Similar to EUTPD, the master file emulates a “big picture” perspective of the global business, while the local file focuses on the specific transactions. The White Paper concludes that a global master file supplies countries with relevant information in one document. In turn, this limits the details in the local file and ultimately alleviates the compliance burden. Thus, TPD provides tax authorities with the right kind of information and creates a culture of compliance among taxpayers.<sup>82</sup>

On October 3, 2013, the OECD released a *Memorandum on transfer pricing documentation and country by country reporting*<sup>83</sup> (Memorandum) in order to facilitate the development of a CbC reporting template. The Memorandum proposes two crucial questions:

- 1) What information should be required in the CbC reporting template?
- 2) What mechanisms should be developed for reporting and sharing CbC data?<sup>84</sup>

In regards to the first question, the OECD aims at striking a balance between tax administrations information needs for performing risk assessments and taxpayers’ compliance costs for compiling the data. The Memorandum suggests several central themes, for example: income earned in a country, taxes paid by country, measures of economic activity, reporting per legal entity contra per country basis, and reporting currency. The second question concerns the OECD’s depth of guidance in addition to implementation measures for domestic legislation. Within these aspects, the Memorandum considers an information sharing system as well as confidentiality.<sup>85</sup>

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<sup>80</sup> White paper 2013, p. 13. In contrast to the White Paper, Chapter V of the TP Guidelines solely refers to taxpayer’s ‘prudent business management principles’ and neglects to identify specific objectives of TPD. See sub-section 2.2.1 for more details.

<sup>81</sup> See section 2.3.

<sup>82</sup> White paper 2013, pp. 19-25. See Table 1 and Table 2 in the White Paper for the specific contents of the proposed master file and local file.

<sup>83</sup> OECD, *Memorandum on transfer pricing documentation and country by country reporting*, OECD, 3 October 2013, <http://www.oecd.org/ctp/transfer-pricing/memorandum-transfer-pricing-documentation-and-country-by-country-reporting.pdf>, (Accessed: 2015-10-12). [cit: Memorandum 2013].

<sup>84</sup> Memorandum 2013.

<sup>85</sup> Memorandum 2013.

Shortly thereafter, the OECD released public comments on the White Paper.<sup>86</sup> On behalf of the Confederation of Swedish Enterprises<sup>87</sup>, the Head of the Tax Policy Department, Krister Andersson<sup>88</sup>, submitted comments. He expresses concerns over differences between countries local TPD requirements and anticipates that tax administrations will interpret the master file and local file as a checklist. Andersson also emphasizes that Action 13 should seek to enable risk-assessments rather than identify low tax levels in other countries.<sup>89</sup> Andersson's comments depict one of many apprehensions towards a CbC template and highlight the industries concern that tax administrations will take advantage of the CbC report for transfer pricing adjustments.

Then on November 13, 2013, the OECD held a public consultation on transfer pricing topics where the public comments to the White paper were discussed as well as the adoption of a CbC reporting system.<sup>90</sup> The public consultation demonstrates the level of openness and the extent of interest from business, academia, non-governmental organizations, government officials and the press in these issues.

### 3.2.1 Discussion Draft

In the beginning of 2014, the OECD released a Discussion Draft for public consultation. In the Discussion Draft, the OECD specifically request comments; such as, whether the preparation of the master file should be on a line of business or entity wide basis.<sup>91</sup> Since the EUTPD already applied a master file/local file approach to TPD, the majority of the OECD's questions concentrated on the design of the CbC report.<sup>92</sup> The OECD received nearly one thousand pages in Public Comments! Altogether, various stakeholders submitted roughly 183 comments.<sup>93</sup>

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<sup>86</sup> OECD, *OECD publishes comments received on the White paper on transfer pricing documentation*, 22 October 2013, <http://www.oecd.org/ctp/transfer-pricing/public-comments-white-paper-transfer-pricing-documentation.htm>, (Accessed: 2015-10-13). [cit: OECD publishes public comments].

<sup>87</sup> Visit the following link to learn more about the Confederation of Swedish Enterprises: <http://www.svensktnaringsliv.se/english/>, (Accessed: 2015-10-13).

<sup>88</sup> Andersson has also written an article for the Svensk Skattetidning about BEPS. For further reading see: Andersson, Krister: *Base erosion profit shifting – a new world tax order?*, Svensk Skattetidning, vol. 9, 2013, pp. 659-687. [cit: Andersson 2013].

<sup>89</sup> Andersson, Krister: *The Confederation of Swedish Enterprises Comments on the OECD White paper on transfer pricing documentation*, Confederation of Swedish Enterprises, 30 September 2013, <http://www.oecd.org/ctp/transfer-pricing/Confederation-Swedish-Enterprise.pdf>, (Accessed 2015-10-12). [cit: Andersson, The Confederation of Swedish Enterprises Comments on the OECD White paper on transfer pricing documentation].

<sup>90</sup> OECD, *OECD consults on transfer pricing matters*, 13 November 2013, <http://www.oecd.org/ctp/transfer-pricing/oecd-consults-on-transfer-pricing-matters.htm>, (Accessed 2015-10-13). [cit: OECD consults on public transfer pricing matters].

<sup>91</sup> In Sect. 20 of Action 13, Final Report 2015, p. 15, the OECD recommends that the master file should provide information for the MNE as a whole; however, if justified by the circumstances, then the information can be provided by line of business.

<sup>92</sup> See Discussion draft 2014, pp. 5-6 for the specific questions.

<sup>93</sup> Sect. 111, BEPS – frequently asked questions.

The structure of the Final Report reflects the Public Comments; and therefore this section highlights the key aspects from the Public Comments. In addition, stakeholders' apprehensions and suggestions remain relevant during the current implementation process and future BEPS initiatives. At the same time, the reader needs to remember that the majority of comments portray a critical perspective.

One major issue in the Discussion Draft pertains to whether the CbC report should be a part of the master file, i.e. two-tiered TPD. The Public Comments unanimously propose that the CbC report be a separate component in TPD, i.e. three-tiered TPD including a master file, a local file, and a CbC report. Similar to Andersson, the Public Comments raise concerns about tax authorities using the CbC report for other purposes than a high-level risk assessment. Therefore, the Public Comments stress that the amendments to Chapter V of the TP Guidelines need to delineate between information needed for a transfer pricing risk assessment contra audit. As a means to prevent general information gathering, the Public Comments advocate limiting the amount of information in the CbC report. The Public Comments also postulate that the CbC report contains commercially sensitive information and therefore, it should remain confidential.<sup>94</sup> An additional aspect to confidentiality regards the differences in what national law recognizes as confidential information. The following example illustrates this distinction. Jules AB operates in Country X and in Country Y. The domestic legislation in Country X classifies the CbC report as confidential information, while the domestic legislation in Country Y determines that the CbC report contains unprotected information. If Country Y discloses the CbC report, then this would violate the national laws in Country X. Information that would have otherwise been kept confidential will become publically available.<sup>95</sup> In order to avoid such confidentiality conflicts, the commentaries suggest utilizing tax treaties and tax information exchange agreements for information sharing purposes.<sup>96</sup>

The Public Comments also stress that the magnitude of requested information disproportionately increase MNE's compliance burden. Thus, it appears that the Discussion Draft has lost sight of the objective of Action 13. Action 13 seeks to, "Develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business".<sup>97</sup> In addition, the OECD did not consider the increase in costs for governments to appropriately analyze and apply the information. For instance, if master files contain excessive information, then the tax authorities must spend time understanding the provided information, regardless if it ultimately facilitates their transfer pricing risk assessment process.<sup>98</sup> The

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<sup>94</sup> For example, see EY in Public Comments 2014, vol. 2, pp. 77-78 & KPMG in Public Comments 2014, vol. 3 pp. 21-26.

<sup>95</sup> Author's example.

<sup>96</sup> For example, see EY in Public Comments 2014, vol. 2, p. 88 & KPMG in Public Comments 2014, vol. 3, p. 26.

<sup>97</sup> Action plan on base erosion and profit shifting, p. 23.

<sup>98</sup> For example, see Deloitte in Public Comments 2014, vol. 2, pp. 6-7.

main point pierces through; more information places excessive burdens on both taxpayers and tax authorities. Instead, the focus needs to be on relevant information that the tax authorities can apply when they conduct risk assessments.<sup>99</sup>

Finally, the Public Comments express concerns about how CbC reporting represents a step toward formulary apportionment.<sup>100</sup> In contrast to the arm's length principle, global formulary apportionment<sup>101</sup> allocates the MNE's global profits between countries based on a formula. Some believe that formulary apportionment deems necessary in order to combat BEPS behavior, since it represents a multilateral solution.<sup>102</sup> However, the TP Guidelines disregard the global formulary apportionment system and explicitly state the superiority of the arm's length principle.<sup>103</sup> At the News Conference for the launch of the final BEPS reports, the Director of the OECD's center for Tax Policy and Administration, Pascal Saint-Amans, explains that the formulary apportionment system is still too hypothetical and deems more suitable for academic research. He postulates that not a single country wants formulary apportionment and utilizes the EU's struggle with implementing a common consolidated corporation tax base<sup>104</sup> (CCCTB) as an example. Saint-Amans assures the public that the arm's length principle works in the majority of cases and that the OECD has fixed the TP Guidelines. In conclusion, the OECD will only consider alternative approaches if the amendments to the TP Guidelines fail to combat BEPS.<sup>105</sup>

### 3.2.2 Public disclosure

The previous sub-section has presented criticism from a practitioner's perspective. This sub-section highlights the academic discourse over whether CbC reporting should be disclosed to the public from three unique viewpoints. The first perspective values securing public trust and finds public disclosure necessary for the success of the BEPS project. The second perspective provides a cost-benefit analysis of CbC reporting and proposes a stronger enforcement of transfer pricing rules. Finally, the third perspective focuses on the intercorporate consequences of disclosing CbC reporting.

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<sup>99</sup> Author's comment.

<sup>100</sup> For example, see EY in Public Comments 2014, vol. 2, p. 78 & Deloitte in Public Comments 2014, vol. 2, p. 12 & KPMG in Public Comments 2014, vol. 3, p. 25.

<sup>101</sup> "In a system of formulary apportionment the share of profits of a multinational group that each country may tax is determined not by looking at the accounts of companies operating in each country but by dividing out the total global profits of the group according to a formula." See Miller & Oats 2014, p. 395.

<sup>102</sup> Miller & Oats 2014, p. 568. Professor of Law, Yariv Brauner, at the University of Florida is also a proponent of formulary apportionment. For further reading see: Brauner, Yariv: *Formula based transfer pricing*, Intertax, vol. 42, no. 10, 2014, pp. 615-631. [cit: Brauner 2014, Formula based transfer pricing].

<sup>103</sup> Paragraph 1.16-1.31 OECD Transfer Pricing Guidelines 2010.

<sup>104</sup> For further reading about the common consolidated corporation tax base see, Miller & Oats 2014, pp. 590-602. CCCTB within the EU will be discussed in sub-section 4.3.3.

<sup>105</sup> News Conference 2015.



University of Florida Research Foundation Professor, Yariv Brauner<sup>106</sup>, presupposes that CbC reporting goes beyond the scope of transfer pricing. Therefore, he believes that CbC reporting belongs to *Action 11- Measuring and monitoring BEPS*<sup>107</sup> instead of Action 13. From Professor Brauner's perspective, CbC reporting improves compliance, restores public trust, and encourages legitimacy. However, he considers that achieving these objectives depends on whether the OECD makes CbC reporting publically available. Professor Brauner disagrees with taxpayers and tax authorities arguments *against* CbC reporting. He motivates that the type of information in the CbC report does not affect the competitive position of taxpayers. In addition, Professor Brauner finds it disheartening that the tax authorities claim that the information in CbC reporting would be redundant. Such a claim infers that the tax authorities already have the information they need, but refrain from acting upon it. Lastly, Professor Brauner predicts that CbC reporting will help develop more effective multilateral instruments.<sup>108</sup>

In contrast, researchers from the University of Mannheim question the application of CbC reporting as a means for combatting profit shifting. They argue that the costs of CbC reporting outweigh the benefits. The researchers identify several types of disclosure costs. First, MNEs bear the initial cost of setting up the appropriate system that can extract the right data for CbC reporting. In addition, MNEs endure direct reporting costs associated with maintaining the CbC report on a year-to-year basis. The researchers believe that the public disclosure of CbC reporting would release commercial sensitive information and incur competitive disadvantages. They also anticipate an upswing of double taxation and fear that tax administrations will misinterpret the disclosed information. On the other hand, the researchers also identify several benefits of CbC reporting. For example, CbC reporting encourages taxpayers to pay taxes based on their economic activity, enhances administrative efficiency, supports capital markets, and modifies customers buyer behavior. However, these expected benefits of CbC reporting depend on hypothetical results. For instance, there does not appear to be a direct correlation between the disclosure of more information and a decrease in tax aggressive behavior. Based on empirical evidence, the researchers postulate that enforcing stricter transfer pricing rules reduces tax aggressive behavior.<sup>109</sup>

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<sup>106</sup> The author had the pleasure of attending Professor Brauner's presentation, *Should we abandon the "arm's length" concept?*, at the Transfer Pricing Tax Conference at Copenhagen Business School on November 4, 2015. In summary, Professor Brauner criticizes the OECD for not reconsidering an alternative to the arm's length principle.

<sup>107</sup> If you would like to read the final report see, Action 11, Final Report 2015.

<sup>108</sup> Brauner, Yariv: *What the BEPS?*, Florida Tax Review, vol. 16, no. 2, 2014, pp. 55-115. [cit: Brauner 2014, What the BEPS?], pp. 105-106, 114-115.

<sup>109</sup> Evers, Maria Theresia & Meier, Ina & Spengel, Christoph: *Transparency in financial reporting: is country-by-country reporting suitable to combat international profit shifting?*, Bulletin for International Taxation, Journals IBFD, 2014, pp. 295-303. [cit: Evers, et al 2014], pp. 300-303.

In the article, *Reconsidering corporate tax privacy*<sup>110</sup>, Professor of Tax Practice, Joshua D. Blank, at New York University School of Law, examines the ‘intercorporate perspective’ of tax privacy and tax compliance. Professor Blank analyzes how the privacy of tax returns in the United States affects corporate tax aggressiveness. He claims that public disclosure of tax returns could exacerbate aggressive tax planning, since it makes quantitative data that would otherwise be confidential readily available. Consequently, accounting firms could establish benchmarks, tax directors could reverse engineer strategies, and stakeholders could place pressure on boards. Professor Blank also makes specific comments about the confidentiality of the master file and the CbC report in the new TPD package Action 13 proposes that countries implement. Professor Blank warns that public access to CbC reporting disperses knowledge about which geographic regions corporations are operating in and discloses valuable tax information that competitors could take advantage of. He reminds us that corporations select to operate in jurisdictions for other reasons than tax avoidance. For example, the selected jurisdiction might have preferable corporate laws, better labor standards, or access to specific natural resources. Blank stresses the importance of considering all the consequences of increased awareness and opens the possibility of public disclosure leading to an increase in profit shifting.<sup>111</sup>

In the Final Report, the OECD recommends that all documents in TPD remain confidential and reinforces the importance of ensuring confidentiality.<sup>112</sup> A more analytical discussion about confidentiality continues in section 5.2. The last sub-section studies the initial Swedish doctrinal responses to the OECD’s next report, *Guidance on transfer pricing documentation and country-by-country reporting*, which contains an updated version of Chapter V of the TP Guidelines.

### **3.2.3 Guidance on transfer pricing documentation and CbC reporting**

Transfer Pricing Specialist, Roberth Glansberg, at the SKV published an article<sup>113</sup> that clarifies the OECD’s report, *Guidance on transfer pricing documentation and country-by-country reporting*. He shares several intrinsic observations and reflects over the implications the updated Chapter V endures on MNEs and the SKV. First, he notes that the revisions provide intricate guidelines, increase MNE’s information burden, and present a new way to compose TPD. For example, the updated Chapter V includes a standardized three-tiered TPD package, including a master file, a local file, and a CbC report. Glansberg emphasizes that the master file provides the tax authorities with a high-level overview of the MNE, while the local file complements the master file with specific transactions between the related entities. Together

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<sup>110</sup> Blank, D. Joshua: *Reconsidering corporate tax privacy*, New York University Journal of Law and Business, vol. 11, no. 1, 2014, pp. 31-121. [cit: Blank 2014].

<sup>111</sup> Blank 2014, pp. 37-39, 105-109.

<sup>112</sup> Sect. 44 in Action 13, Final Report 2015, p. 19.

<sup>113</sup> Glansberg, Roberth: *Vägledning för internprissättningsdokumentation och land för land-rapportering*, Svensk Skattetidning, vol.10, 2014, pp. 794-802. [cit: Glansberg 2014].

the master file and local file serve as a foundation for the tax authorities transfer pricing adjustment. In order to detect high-risk areas and perform risk assessments, the CbC report represents the third component of TPD. In contrast to the master file and local file, the CbC report does not create grounds for a transfer pricing adjustment. Thus, the updated Chapter V encompasses more information about the specific content of TPD in addition to the CbC report.<sup>114</sup>

Professor Hultqvist expands on Glansberg's article in *Kommentar till Action 13 – TP dokumentation*<sup>115</sup> and recognizes several themes in the OECD's recommendations, such as: transparency, standardization, information exchange, and confidentiality. Indeed, CbC reporting allows tax authorities to gain access to MNEs operations in different countries and therefore, Professor Hultqvist perceives a need for reconsidering confidentiality. If taxpayers send in more information to tax authorities, then there needs to be insurance that the information remains confidential. The updated Chapter V also substantially increases MNE's information burden; thereby, supplying tax authorities with more concrete arguments for transfer pricing adjustments. From Professor Hultqvist's perspective, the updated Chapter V gives tax authorities the upper hand over MNEs. At the same time, transfer pricing regulations strive to avoid double taxation. Figuratively speaking, there is only one cake to share between jurisdictions and transfer pricing signifies a tool for how jurisdictions can divide the cake. Professor Hultqvist points out that the updated Chapter V does not infer that all jurisdictions will get a larger piece of cake; instead, some will get more and some will get less.<sup>116</sup>

Undeniably, MNEs run the risk of an increase in double taxation (even triple taxation), more disputes with tax authorities and high litigation costs.<sup>117</sup> The next section presents the key aspects of the Final Report. The specific contents of the master file, local file, and CbC report will not be discussed in detail, since this is more of an issue for practitioners. After all, every business area has unique attributes that this thesis cannot account for; yet, the OECD advocates standardized documentation, i.e. a 'one-size fits all' approach.

### 3.3 Final Report

Ultimately, the OECD follows some of the Public Comments or at least, stakeholders can consider it a compromise. During the launch of the *BEPS 2015 Final Reports Technical Presentation*, the Head of Tax Treaty, Transfer Pricing and Financial Transactions Division, Marlies de Ruiters, informed us

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<sup>114</sup> Glansberg 2014, pp. 794-802.

<sup>115</sup> Hultqvist, Anders: *Kommentar till Action 13 – TP dokumentation*, Svensk Skattetidning, vol. 10, 2014, pp. 803-806. [cit: Hultqvist 2014].

<sup>116</sup> Hultqvist 2014, pp.803-805.

<sup>117</sup> The OECD has also further developed the mutual agreement procedure to minimize the risks of unintended double taxation. Please see the following report for further reading: OECD, *Making dispute resolution mechanisms more effective, Action 14- 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241633-en>, (Accessed: 2015-10-12). [cit: Action 14, Final Report 2015].

that the Final Report encompasses the three previous reports<sup>118</sup> pertaining to Action 13 and contains no new guidance, with the exception of the executive summary.<sup>119</sup> This exemplifies the strong consensus and political commitment by all members to align to the contents of the Final Report, especially the implementation of CbC reporting.<sup>120</sup> Even though the OECD intends to release an updated version of the TP Guidelines in 2017<sup>121</sup>, the Final Report states that, “The text of Chapter V of the Transfer Pricing Guidelines is deleted in its entirety and replaced with the following language and annexes”.<sup>122</sup> This means that countries can already implement and apply the updated Chapter V.

The remainder of section 3.3 is organized accordingly. First, sub-section 3.3.1 provides a brief overview of the updated Chapter V in the Final Report. The following sub-section elaborates on the *Model legislation related to Country-by-Country Reporting*<sup>123</sup> (Model Legislation). When reading sub-section 3.3.2 it is crucial to bear in mind that this represents model legislation. This infers that countries individually choose the extent of and timeframe for adopting the OECD’s recommendations. Sub-section 3.3.3 concludes with several international observations over the expected implementation of the master file, local file, and CbC report.

### **3.3.1 Chapter V of the Transfer pricing guidelines on documentation**

The updated Chapter V solidifies three objectives of TPD:

- 1) to ensure that taxpayers give appropriate consideration to transfer pricing requirements in establishing prices and other conditions for transactions between associated enterprises and in reporting the income derived from such transactions in their tax returns;
- 2) to provide tax administrations with the information necessary to conduct an informed transfer pricing risk assessment; and
- 3) to provide tax administrations with *useful* information to employ in conducting an appropriately thorough audit of the transfer pricing practices of entities subject to tax in their jurisdiction, *although it may be necessary to supplement the documentation with additional information as the audit progresses*.<sup>124</sup>

The revised objectives of TPD exemplify the focus on proportionality and relevant information. In comparison to the White Paper, the Final report

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<sup>118</sup> Guidance on transfer pricing documentation and country-by-country reporting, Guidance on the implementation of transfer pricing documentation and country-by-country reporting, Country-by-country reporting implementation package.

<sup>119</sup> Technical Presentation 2015.

<sup>120</sup> The G20 finance ministers endorsed the BEPS final package on October 9, 2015. Visit the following website for more information: <http://www.oecd.org/tax/g20-finance-ministers-endorse-reforms-to-the-international-tax-system-for-curbing-avoidance-by-multinational-enterprises.htm>. (Accessed 2015-11-16).

<sup>121</sup> Sect. 115, BEPS – frequently asked questions.

<sup>122</sup> Action 13, Final Report 2015, p. 11.

<sup>123</sup> Action 13, Final Report 2015, pp. 39-43.

<sup>124</sup> Sect. 5 in Action 13, Final Report 2015, p. 12. The cursive sections demonstrate the amendments in comparison to the White Paper.

deletes, “at the commencement of a tax audit” from the second point. Another interesting change regards the order of the tax objectives. The taxpayer’s compliance objective comes first instead of second; which suggests that the primary purpose of TPD is for MNEs to reflect over their compliance with the arm’s length principle.<sup>125</sup> To summarize, the three objectives are about taxpayers’ compliance with the arm’s length principle and tax administrations transfer pricing risk assessment and transfer pricing audit. These three objectives of TPD establish a foundation for the development of domestic rules. In order to meet these objectives, the OECD commends a standardized TPD approach with a three-tiered structure, including a master file, a local file, and a CbC report. The OECD expects that this new approach to TPD will identify transfer pricing risks and facilitate tax administration’s transfer pricing risk assessments.<sup>126</sup>

In the updated Chapter V, Annex I and II disclose the contents of the master file respective local file, Annex III provides a model CbC template, and Annex IV contains an implementation package.<sup>127</sup> Since the CbC report embodies a new addition to previous TPD formats<sup>128</sup> and signifies the most invasive amendment, a more detailed explanation of the CbC report exemplifies the extensiveness of the new recommendations. Supplement A shows the CbC report, which contains three tables. Table 1 shows an overview of allocation of income, taxes and business activities by tax jurisdiction, Table 2 lists all of the constituent entities of the MNE group included in each aggregation per tax jurisdiction, and Table 3 requests additional information. Table 3<sup>129</sup> provides an opportunity for the MNE to disclose any further information that would assist the tax administration’s understanding of the information provided in the CbC report.<sup>130</sup>

The updated Chapter V explicitly explains how the CbC template should *not* be used. For instance, the CbC report does not substitute a detailed transfer pricing analysis nor does it provide sound evidence for a transfer pricing adjustment. Most importantly, it should not be used as a basis to calculate transfer pricing adjustments based on a global formulary apportionment of income. Instead, CbC reporting expedites transfer pricing risk assessments and helps to evaluate other BEPS-related risks.<sup>131</sup> The fact that the OECD permits the usage of the CbC report for other BEPS related risks unleashes doubts about if any boundaries truly exist. The OECD claims that the data

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<sup>125</sup> Author’s reflections.

<sup>126</sup> Action 13, Final Report 2015, pp. 12-14.

<sup>127</sup> Action 13, Final Report 2015, pp. 25-69. Kindly observe that the revised Chap.1, Sect. D, of the TP Guidelines provides complimentary guidance on factors to be included in the master file and information about the economically relevant characteristics of the actual transactions to be included in the local file. See Sects. 1.34-1.36 in Actions 8-10 Final Reports 2015, pp. 15-16.

<sup>128</sup> For example the EUTPD utilizes a master file/local file approach.

<sup>129</sup> Tax consultants as well as the SKV have distinctly pointed out the importance of taking advantage of Table 3 in order to clarify the implications of the CbC report.

<sup>130</sup> Please see Action 13, Final Report 2015, pp. 31-35 for the OECD’s general instructions and specific instructions about how to fill out the CbC report.

<sup>131</sup> Sect. 25 in Action 13, Final Report 2015, p. 16.

permits governments and qualified researchers to perform economical and statistical research as a measure to improve future analyses of BEPS.<sup>132</sup> The next sub-section presents the OECD's guidance on the implementation of TPD and CbC reporting.

### 3.3.2 Implementation package

In the Final Report, the OECD recommends that countries domestically implement the master file and local file components of TPD based on their legal procedures.<sup>133</sup> This allows individual countries to define material thresholds for local file purposes, as well as the timing for filing. Material thresholds can be based on local factors, such as the local economy's market place, or on the size of the MNE group. Implementing material thresholds limits MNE's compliance burden, while emphasizing the most significant transactions for transfer pricing purposes.<sup>134</sup> Pertaining to the filing of TPD, the updated Chapter V proposes a *best practice*<sup>135</sup>, which entails that the local file should be finalized by the due date for the filing of the relevant tax return. Similarly, the master file should be finalized when the ultimate parent entity of the MNE group submits their tax return. The OECD recognizes that MNEs need more time to compile the information for the CbC report and therefore, the provisions recommend that the filing of the CbC report be extended to one year following the last day of the fiscal year of the ultimate parent entity of the MNE group.<sup>136</sup>

In Annex IV, the OECD provides Model Legislation, which suggests how CbC reporting should be implemented into domestic legislation. The Final Report recommends that the filing of the first CbC reports begin on or after January 1, 2016. Since MNEs receive one year from the close of the fiscal year to prepare and file the CbC report, December 31, 2017, is considered the earliest the first CbC reports will be filed. Furthermore, the Final Report advises that countries only require MNE groups with annual consolidated group revenue over EUR 750 million to file CbC reporting. The recommended threshold excludes 85 to 90 percent of MNE groups, while encompassing approximately 90 percent of corporate revenues.<sup>137</sup> At the Press Conference, Saint-Amans clarifies that the EUR 750 million reporting threshold effectively targets core business activity, while only 10 percent of companies. Otherwise, tax administrations would be drowned in CbC reporting. Finally, Saint-Amans reiterates that the OECD will review the effectiveness of the turnover threshold of EUR 750 million during 2020.<sup>138</sup>

It lies outside the scope of this thesis to analyze the government exchange of CbC reporting; however, understanding the dynamics of the CbC report filing

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<sup>132</sup> Sect. 71, BEPS - frequently asked questions.

<sup>133</sup> Sects. 48-62 in Action 13, Final Report 2015, pp. 20-23.

<sup>134</sup> Sects. 32-34 in Action 13, Final Report 2015, p. 17.

<sup>135</sup> Best practice means that a jurisdiction can implement the provisions if they want to. See even Sect. 4, BEPS – frequently asked questions.

<sup>136</sup> Sects. 29-31 in Action 13, Final Report 2015, pp. 16-17.

<sup>137</sup> Sects. 50-53 in Action 13, Final Report 2015, pp. 20-21.

<sup>138</sup> News Conference 2015.

obligation plays a key role in the case study in section 5.1. The Model Legislation stipulates a filing obligation in Article 2. Primarily, the ‘Ultimate Parent Entity’<sup>139</sup> of the MNE group files the CbC report to the entity’s jurisdiction of tax residence. In the case that the jurisdiction of the Ultimate Parent Entity does not require CbC reporting, then a *secondary mechanism* becomes applicable instead. The secondary mechanism permits local filing of the CbC report by a resident subsidiary in the relevant jurisdiction. If there are multiple subsidiaries in the same jurisdiction, then the MNE group can assign a constituent entity to locally file CbC reporting on behalf of the MNE group’s subsidiaries in that jurisdiction. According to the secondary mechanism, MNEs also have the option to appoint a ‘Surrogate Parent Entity’<sup>140</sup> which substitutes the Ultimate Parent Entity. This appointment allows the Surrogate Parent Entity to file the CbC report to the entity’s jurisdiction of tax residence on behalf of the MNE group under the following conditions: the jurisdiction of tax residence of the Surrogate Parent Entity requires CbC filing and that jurisdiction has a Qualifying Competent Authority Agreement. In addition, the Surrogate Parent Entity’s jurisdiction has to be properly notified about the Surrogate Parent Entity and cannot have systematic failure.<sup>141</sup>

Lastly, the OECD praises consistency and a timely implementation of domestic legislation. Consistency involves utilizing the standard template and requiring the Ultimate Parent Entity to file the CbC report.<sup>142</sup> In addition, the OECD mandates countries participating in the BEPS project to assess the implementation of BEPS and to provide feedback by the end of 2020.<sup>143</sup> The last sub-section presents an international perspective over how countries plan to implement the new TPD requirements domestically.

### 3.3.3 Local implementation

Due to the confinements of this thesis, the author could not analyze the current or expected legislative or authoritative amendments in all the countries that have committed to the BEPS project. Fortunately, EY’s Global Tax Desks conducted a survey<sup>144</sup> with all OECD countries and many non-OECD

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<sup>139</sup> According to Article 1.6 of the Model Legislation, ‘Ultimate Parent Entity’ corresponds to the constituent entity in the MNE group who is required to prepare consolidated financial statements. See Action 13, Final Report 2015, pp. 39-40.

<sup>140</sup> According to Article 1.7 of the Model Legislation, ‘Surrogate Parent Entity’ substitutes the ultimate parent entity and files the CbC report to its jurisdiction of tax residence on behalf of the MNE group. See Action 13, Final Report 2015, p. 40.

<sup>141</sup> Action 13, Final Report 2015, pp. 39-41. See even Sects. 60-62 in Action 13, Final Report 2015, p. 23.

<sup>142</sup> Sect. 58 & 62 in Action 13, Final Report 2015, pp. 22-23.

<sup>143</sup> Action 13, Final Report 2015, p. 10.

<sup>144</sup> EY, Country implementation of BEPS Actions 8-10 and 13 – A survey on the implementation of the BEPS Actions on transfer pricing and transfer pricing documentation, August 2015, [http://www.ey.com/Publication/vwLUAssets/ey-country-implementation-of-beps-actions-8-10-and-13-august-2015/\\$FILE/ey-country-implementation-of-beps-actions-8-10-and-13.pdf](http://www.ey.com/Publication/vwLUAssets/ey-country-implementation-of-beps-actions-8-10-and-13-august-2015/$FILE/ey-country-implementation-of-beps-actions-8-10-and-13.pdf), (Accessed: 2015-09-24).

[cit: Country implementation of BEPS Actions 8-10 and 13].

countries<sup>145</sup> that analyzes the dynamics of implementing *Actions 8-10 – Aligning transfer pricing outcomes with value creation* (Actions 8-10) and Action 13 in local countries. Even though EY published the survey prior to the publication of the Final Report, the survey still provides meaningful insight about how fast the new three-tiered TPD requirements can enter into effect. Since Actions 8-10 are outside the domain of this thesis, the following focuses on the survey's results regarding Action 13.

The survey's first question asks, "Can *local tax authorities* implement the OECD standard master file/local file/CbC reporting requirements without legislative action?"<sup>146</sup> First, EY distinguishes between countries that require formal legislative action from those where the tax authorities can independently extend their scope of interpretation. In addition, EY differentiates between situations where the tax authorities request information ad hoc, from situations where taxpayers must fulfil a tax compliance obligation. Prior to the Final Report, none of the countries surveyed required such intricate information from taxpayers. Thus, in the majority of surveyed countries, enforcing three-tiered TPD requires legislative changes. In some cases, the tax authorities have already been requesting information that corresponds to the guidance from the BEPS Project. EY postulates that, "...the general rule of thumb is that tax authorities can request any information that is *foreseeably relevant* to the local country tax base and *reasonably available* to the taxpayer".<sup>147</sup> This implies that tax authorities generally have a flexible margin for the type of information they can request from taxpayers. EY and this author believe that Action 13 enhances tax authorities' arguments for what constitutes 'foreseeably relevant' information.<sup>148</sup>

The following two questions in the survey isolate implementing the master file/local file TPD requirement from CbC reporting. In regards to the implementation of the master file/local file TPD requirement, EY reveals that the majority of countries require legislative amendments. This reflection infers that in the majority of countries surveyed the law itself stipulates the contents of TPD. Of the OECD countries that already have TPD requirements, 82% conceive that legislative action is necessary. In respect to CbC reporting, only 6% of OECD countries report that CbC reporting does not require legislative amendments. As a result, a clear minority of OECD country's tax authorities have the authorization to implement a master file, a local file, and a CbC report.<sup>149</sup>

In addition, the survey assesses if any constitutional obstacles prevent the implementation of Action 13. The results reveal the possibility of constitutional conflicts when tax authorities request information that the local

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<sup>145</sup> See page 20 in Country implementation of BEPS Actions 8-10 and 13 for a full list of all the countries surveyed.

<sup>146</sup> Country implementation of BEPS Actions 8-10 and 13, p. 6.

<sup>147</sup> Country implementation of BEPS Actions 8-10 and 13, p. 6.

<sup>148</sup> Country implementation of BEPS Actions 8-10 and 13, p. 6.

<sup>149</sup> Country implementation of BEPS Actions 8-10 and 13, pp. 8-9, 10-11.



taxpayer cannot access. Finally, the survey displays a map over which countries are expected to implement CbC reporting and unsurprisingly, Sweden is one of them.<sup>150</sup> This thesis agrees with EY's hypothesis, since Sweden generally follows the OECD's recommendations.

In response to the Final Reports, EY publicized an educational webcast<sup>151</sup> to explain the new TPD requirements. The presentation includes a diagram, which the reader can find in Supplement B. The diagram in Supplement B illustrates the international development of the local implementation of Action 13. The diagram gives the reader some perspective over which countries have or are implementing CbC reporting as of October 2015, but it is not an exhaustive list of countries. The diagram also distinctly demonstrates that differences exist between how countries implement the provisions in Action 13. For example, only Denmark and the Netherlands opt to incorporate filing by a Surrogate Parent Entity, while the UK chooses to adopt voluntary local filing. A failure with these coordination attempts implies that tax policies between different countries may differ; thereby, creating a diffuse situation for MNEs. The case study in section 5.1 explores the practical impact of Action 13 in further detail.

### 3.4 Summary

To summarize, the BEPS project seeks to develop new international standards that inhibit double non-taxation and the shifting of profits to low-tax jurisdictions. The OECD identifies three central goals within the Action Plan: coherence, substance, and transparency. Action 13, the focus of this thesis, is about enhancing transparency for the tax authorities. In order to achieve this purpose, WP6 identifies that the guidance on TPD, specifically Chapter V of the TP Guidelines, necessitates modifications. The Public Comments raise apprehensions about MNE's information burden, the confidentiality of commercially sensitive information, and the risks of moving towards formulary apportionment.

The updated Chapter V of the TP Guidelines recommends three-tiered TPD, including a master file, a local file, and a CbC report. In particular, CbC reporting has received additional attention and can be perceived as a monumental change in international taxation. In fact, the extensiveness of CbC reporting could possibly outweigh the expected benefits. Professor Brauner believes that the effectiveness of CbC reporting is contingent on making it publically available; while Professor Blank hypothesizes that public disclosure would only intensify aggressive tax planning and ultimately, increase BEPS. Even though all aspects of TPD are presently confidential, the OECD plans to readdress CbC reporting in 2020 and changes are

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<sup>150</sup> Country implementation of BEPS Actions 8-10 and 13, pp. 12, 16-17.

<sup>151</sup> EY, OECD BEPS project outcomes: New reporting under Action 13, EY Global Tax Webcast, 20 October 2015, [http://www.ey.com/GL/en/Issues/webcast\\_2015-10-20-1400\\_oecd-beps-project-outcomes-new-reporting-under-action-13](http://www.ey.com/GL/en/Issues/webcast_2015-10-20-1400_oecd-beps-project-outcomes-new-reporting-under-action-13), (Accessed: 2015-11-05). [cit: New reporting under Action 13]. The webcast can be publically accessed until October 20, 2016.

expected. Finally, a survey published by EY illustrates that most countries require legislative amendments to enforce three-tiered TPD. In addition, countries have started implementing new TPD rules and differences in CbC reporting are already apparent. After gaining an international perspective, the next chapter focuses solely on TPD in Sweden.

## 4 Transfer pricing documentation in Sweden

Chapter 4 begins with a study of the initial responses to the 2007 implementation of Swedish TPD requirements, with an emphasis on SKVFS 2007:1.<sup>152</sup> Concerns at the time remain relevant in light of the updated Chapter V, which allows the author to draw parallels between the Swedish doctrine and the updated Chapter V. Based on the SKV's report<sup>153</sup>, section 4.2 evaluates the effectivity of the Swedish transfer pricing rules. Chapter 4 concludes with a prognosis about the implementation of the updated Chapter V of the TP Guidelines in the Swedish legal system.

### 4.1 Pre BEPS- relevant information and proportionality

The 2007 implementation of TPD legislation in Sweden led to an array of articles from tax practitioners, advisors, and professors. During 2007 the Swedish doctrine focuses on proportionality and what constitutes relevant information. Sect. 2 of the SKVFS 2007:1 specifically states that:

The information that shall be included in the documentation pursuant to Sections 3-9 shall make it *possible* to assess whether pricing and other terms and conditions applied in intra-group transactions are in accordance with the arm's length principle. The documentation only *needs* to contain information which is *necessary* to make a reasonable assessment in these respects.<sup>154</sup>

Thus, Sect. 2 of the SKVFS 2007:1 articulates the principle of proportionality when stating that documentation only needs to contain the necessary information for an assessment. The broadness of the SKV's regulations opens the door for subjective interpretations by both taxpayers and the SKV. As mentioned in section 2.4, Prop. 2005/06:169 states that the provided information should permit the SKV to perform a transfer pricing assessment.<sup>155</sup> Yet, the question remains, what constitutes relevant information? It is in light of what constitutes relevant information that the SKV delivered SKV M 2007:25. For instance, SKV M 2007:25 clarifies the meaning of relevant financial information and explains that turnover, gross profit, and operating profit signify basic financial information that should be included in TPD.<sup>156</sup>

Krister Andersson from the Swedish Industry and tax expert, Margareta Leijonhufvud, focus on the meaning of proportionality in the new regulations. They both emphasize that TPD increases enterprises costs and that this cost

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<sup>152</sup> See section 2.4 for an overview of the Swedish transfer pricing rules.

<sup>153</sup> Skatteverkets rapport 2014-10-13.

<sup>154</sup> This is the SKV's English translation of the regulation.

<sup>155</sup> Prop. 2005/06:169 p. 103.

<sup>156</sup> SKV M 2007:25 pp. 10-11.

needs to be in proportion to the SKV's usage of the disclosed information.<sup>157</sup> According to Sects. 11-12 of the SKVFS 2007:1, enterprises only need to compile and submit TPD upon the SKV's request. Since the SKV does not enforce contemporaneous documentation, Andersson perceives that these stipulations demonstrate the principle of proportionality in SKVFS 2007:1.<sup>158</sup> On the other hand, Leijonhufvud expresses concerns about the amount and complexity of the documentation required and the corresponding increase in costs for enterprises.<sup>159</sup> Intriguingly, a similar balance between taxpayers costs and tax authorities usage of the information, underscores the updated Chapter V. For example, the updated Chapter V explicitly states that, "An important overarching consideration in developing such rules is to balance the *usefulness* of the data to tax administrations for transfer pricing risk assessment and other purposes with any increased *compliance burdens* placed on taxpayers".<sup>160</sup>

Professor Emeritus Lodin, whom was also involved in the publishing of the 1995 TP Guidelines, published a debate article<sup>161</sup> in the *Svensk Skattetidning* that responds to an article<sup>162</sup> written by EY tax professionals, Mikael Hall and Olov Persson. He reminds us that the Swedish legislation does not require MNEs to send in their TPD to the SKV annually.<sup>163</sup> In addition, the SKV maintains the burden of proof even if the MNE submits insufficient TPD. Professor Emeritus Lodin reflects that MNEs especially need to work with their transfer pricing if they operate in a jurisdiction with stricter TPD requirements. Therefore, he hypothesizes that large MNEs have been intrinsically completing TPD before the 2007 Swedish implementation. Nevertheless, he notices that the new Swedish TPD requirements attract more attention to transfer pricing issues. Finally, Professor Emeritus Lodin reiterates that the TP Guidelines build upon a reasonable assessment of that transfer prices adhere to the arm's length principle and advises from seeing TPD as a one-time fix all solution.<sup>164</sup>

Professor Emeritus Lodin, Hall, and Persson agree that MNEs need to work continuously with well-documented transfer pricing. Yet, their views diverge on the extent in which a MNE needs to be prepared with documentation. According to Sect. 11 of the SKVFS 2007:1, enterprises need routines for compiling TPD upon the SKV's request. Professor Emeritus Lodin advocates

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<sup>157</sup> Leijonhufvud, Margareta: *Dokumentationskrav vid internprissättning*, *Svensk Skattetidning*, vol. 2, 2007, pp. 138-141. [cit: Leijonhufvud 2007], pp. 139-140.

Andersson, Krister: *Skatteverkets föreskrifter om dokumentation av prissättning mellan företag i intressegemenskap*, *Svensk Skattetidning*, vol. 2, 2007, pp. 142-146. [cit: Andersson 2007], pp. 142-143.

<sup>158</sup> Andersson 2007, p. 143.

<sup>159</sup> Leijonhufvud 2007, p. 140.

<sup>160</sup> Sect. 4 in Final Report 2015, p. 11.

<sup>161</sup> Lodin 2007.

<sup>162</sup> Hall, Mikael & Persson, Olov: *Dokumentationsskyldighet avseende internprissättning*, *Svensk Skattetidning*, vol. 2, 2007, pp. 147-156.

[cit: Hall & Persson 2007, *Dokumentationsskyldighet*].

<sup>163</sup> Sect. 12 of the SKVFS 2007:1 states that, "The documentation shall be submitted to the Swedish Tax Agency at the request of the Agency."

<sup>164</sup> Lodin 2007, pp. 315-318.

that it will be sufficient for enterprises to have an organized system with their transfer pricing policy and accounting. This allows MNEs to extract the required data upon the SKV's request.<sup>165</sup> On the contrary, Hall and Persson recommend that enterprises proactively work with their transfer pricing policy on a continuous basis to guarantee consensus with the arm's length principle.<sup>166</sup> At the least, enterprises should abide by the arm's length principle and document their transfer pricing principles when entering into intra-group transactions. It is difficult to determine the timeframe for when a MNE needs to progress with the formal evaluation of their intra-group transactions; thereby, preparing a formalized transfer pricing policy and TPD. In order to avoid transfer pricing adjustments, Hall and Persson recommend that MNEs have a well-documented transfer pricing policy that coheres with the arm's length principle. In addition, the conduct of the parties in the intra-group transactions should reflect the MNE group's transfer pricing policy.<sup>167</sup>

In the introduction of the updated Chapter V of the TP Guidelines, the OECD acknowledges problems within the same topics – relevant information and proportionality. The OECD notices a lack of balance between the costs of composing TPD and the tax authorities' usefulness of the information. In fact, taxpayers' compliance costs continue to increase, even though tax administrations often find TPD inadequate for their risk assessments. The OECD contends that the 2010 version of Chapter V neglects to elaborate on the specific content of TPD and consequently countries have adopted their own TPD requirements in a non-harmonized fashion.<sup>168</sup> Now the updated Chapter V concretely outlines what information needs to be included in the master file and local file.<sup>169</sup> The OECD reiterates that together, the master file, local file, and CbC report, "...balance tax administration information needs, concerns about inappropriate use of the information, and the compliance costs and burdens imposed on business".<sup>170</sup> Accordingly, Chapter V intends to create more balance by issuing additional guidance for taxpayers and tax administrations. In respect to what constitutes relevant information in the master file, the updated Chapter V clarifies that information is relevant if its omission would deter from the reliability of the transfer pricing outcomes.<sup>171</sup> It is too soon to tell if the updated Chapter V actually addresses proportionality and simplifies relevant information in practice.

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<sup>165</sup> Lodin 2007, p. 316.

<sup>166</sup> Hall & Persson 2007, Dokumentationsskyldighet, p. 155.

<sup>167</sup> Hall, Mikael & Persson, Olov: *En kommentar till en kommentar om internprissättnings-dokumentation*, Svensk Skattetidning, vol. 5, 2007, pp. 320-323. [cit: Hall & Persson 2007, En kommentar], pp. 320-323.

<sup>168</sup> Sects. 2-4 in Action 13, Final Report 2015, pp. 11-12.

<sup>169</sup> See Annex I & II to Chapter V in Action 13, Final Report 2015, pp. 25-28.

<sup>170</sup> Action 13, Final Report 2015, p. 10.

<sup>171</sup> Sect. 18 in Action 13, Final Report 2015, pp. 14-15.

## 4.2 Analysis of Swedish transfer pricing documentation requirements

In October 2013, the Ministry of Finance requested that the SKV investigate the effectiveness of the Swedish transfer pricing regulations and analyze the possibility of simplifications. The initiative behind the SKV's assignment was strongly associated with the Ministry of Enterprise (*Näringsdepartementet*); since enterprises complained that the transfer pricing rules were complicated and costly. The SKV's assignment specifically consisted of three parts: an international comparison, a deep analysis of the Swedish transfer pricing rules, and a proposal for how to simplify the regulations.<sup>172</sup> This led to the SKV's report, *Utvärdering av reglerna om dokumentationsskyldighet vid internprissättning*, which contains an external survey with enterprises and interviews with accountant firms, the Swedish Industry and the SKV.<sup>173</sup> Given the time constraints of this thesis, such an extensive interview process would not have been plausible and therefore the author utilizes the surveys and interviews from the SKV's report.

Since Swedish enterprises do not declare their intra-group cross-border transactions in their tax returns, the SKV does not have specific data about how many enterprises or which enterprises apply the transfer pricing rules.<sup>174</sup> Therefore, the SKV selected the enterprises to participate in the survey accordingly. First, the SKV extracted a collection of enterprises that potentially have international transactions. Then these enterprises were divided into four categories: small to medium Swedish enterprises, small to medium foreign enterprises, large Swedish enterprises, and large foreign enterprises. After that a manual review of the enterprises annual report revealed if the selected enterprises actually had international transactions.<sup>175</sup>

The following results from the SKV's report solely highlight the responses from the large Swedish and foreign enterprises, since the OECD recommends that only (large) enterprises with a turnover exceeding EUR 750 million<sup>176</sup> complete CbC reporting.<sup>177</sup> Unsurprisingly, the majority of enterprises agree that the implementation of Swedish TPD requirements did not alter the enterprise's application of the arm's length principle. The following five

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<sup>172</sup> Uppdrag till Skatteverket att utvärdera reglerna om dokumentationsskyldighet vid internprissättning, Fi2013/3755, Finansdepartementet, 2013-10-17.

<sup>173</sup> See Chap. 4 of Skatteverkets rapport 2014-10-13. I would like to especially thank, Senior tax officer, Pom Heimdahl, at the Swedish Tax Agency for her gratitude and support during the initial part of the author's research process. She coordinated a meeting on September 9, 2015 with Jesper Persson and Jan-Eric Wellershaus at the Malmö office. During that meeting the author posed questions about the Skatteverkets rapport 2014-10-13 in addition to general information about transfer pricing.

<sup>174</sup> See Sect. 12 of the SKVFS 2007:1.

<sup>175</sup> Skatteverkets rapport 2014-10-13, pp. 25-27.

<sup>176</sup> See Sect. 52 in Action 13, Final Report 2015, p. 21. It is crucial to bear in mind that this threshold is the OECD's recommendation and will not necessarily be adopted into domestic law.

<sup>177</sup> All the results of the SKV's survey can be found in Annex 5 of Skatteverkets rapport 2014-10-13, pp. 72-76.

questions in the survey focus on the time spent and the cost of completing satisfactory TPD.<sup>178</sup> Question nine in the survey asks, ‘Do you consider that the SKV has supplied sufficient information about how to interpret and apply the transfer pricing rules?’<sup>179</sup> The respondents answered, no, yes, or non-applicable as illustrated in Table 1<sup>180</sup>.

**TABLE 1. SUFFICIENT INFORMATION**

Category	No	Yes	N/A
Enterprises part of a large Swedish enterprise	32%	32%	37%
Enterprises part of a large foreign enterprise	24%	48%	29%

Before proceeding, the reader should note that the following interpretations of this data reflect the author’s observations. The even distribution in response from the enterprises belonging to a large Swedish enterprise suggests that they feel indifferent about the sufficiency of the SKV’s information. Surprisingly, the majority of the enterprises within a large foreign enterprise answered that the SKV’s information suffices for the application of the transfer pricing rules. This can be explained by the Swedish transfer pricing rules coherence with the TP Guidelines and that Sweden does not have any additional country requirements.

The next question in the survey asks, ‘How do you think the TPD rules work?’<sup>181</sup> The respondents chose between: well, poor, and non-applicable. Table 2<sup>182</sup> shows the results.

**TABLE 2. DOCUMENTATION REGULATIONS**

Category	Well	Poor	N/A
Enterprises part of a large Swedish enterprise	53%	21%	26%
Enterprises part of a large foreign enterprise	38%	14%	48%

The majority of the respondents belonging to a large Swedish enterprise answered ‘well’, which implies that the industry feels relatively satisfied with the Swedish TPD rules. Only 38% of the companies within a large foreign enterprise answered ‘well’, although the majority responded non-applicable. This infers that TPD does not affect the majority of enterprises part of a large foreign enterprise. Unfortunately, the questionnaire did not include questions that were more associated to BEPS and the new TPD recommendations. At the same time, the SKV specifically received a mandate to evaluate how the

<sup>178</sup> Skatteverkets rapport 2014-10-13, pp. 72-75.

<sup>179</sup> Skatteverkets rapport 2014-10-13, p. 75

<sup>180</sup> Skatteverkets rapport 2014-10-13, p. 75.

<sup>181</sup> Skatteverkets rapport 2014-10-13, p. 76.

<sup>182</sup> Skatteverkets rapport 2014-10-13, p. 76.

administrative costs for enterprises correlate to the transfer pricing regulations purpose.<sup>183</sup>

The SKV also conducted interviews with accountancy firms<sup>184</sup>, the Swedish Industry, and internally at the SKV. The interviews with the accountancy firms were based on the external survey that the enterprises responded to. The advisors replied that the Swedish regulations do not contain detailed characteristics or require special formats and this keeps the administrative burden of compiling TPD at bay. They concluded that the Swedish transfer pricing regulations are sufficient. In addition, the SKV conducted one interview with a representative from the Swedish Industry. The representative acknowledged that the Swedish transfer pricing rules reflect the OECD's recommendation and therefore, they do not exacerbate enterprises compliance burden. Furthermore, the representative insinuated that large companies need to have a global strategy, which is why BEPS is so important.<sup>185</sup> Thus, it appears that both accountancy firms and the Swedish industry value that Sweden follows the TP Guidelines.

Lastly, the SKV carried out interviews within the SKV<sup>186</sup> that focused on the SKV's tax control function. Due to regulations in other countries, the SKV observed that a large number of enterprises completed TPD prior to 2007. After 2007, the SKV recognized some differences in TPD's quality. For instance, more enterprises have hired external support and utilize conventional outlines to complete TPD. Even though most enterprises seemed to have TPD, most of the documentation had not been updated since 2007. The SKV concluded that TPD appears more standardized and deduced that enterprises appear to have sufficient routines for compiling TPD upon the SKV's request.<sup>187</sup>

The implementation of TPD regulations has induced several positive effects, but has also increased costs for enterprises. The SKV observes that SKVFS 2007:1 increases enterprises transfer pricing awareness and that TPD contributes to more correct transfer prices. In addition, TPD eases the SKV's audit process by facilitating the SKV's understanding of the enterprise's intra-group cross-border transactions. TPD also depicts a good first impression over the enterprise's transfer prices. However, TPD often contains irrelevant information; therefore, the SKV stresses the importance of applying the facts to the business at hand. The costs for compiling TPD vary between enterprises, but the majority of costs attribute to calculating the transfer price rather than compiling TPD. Enterprises and accountant firms generally combine the costs of determining the transfer price and completing documentation. Therefore, the SKV could not estimate enterprise's actual costs for compiling TPD.<sup>188</sup>

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<sup>183</sup> Author's interpretations.

<sup>184</sup> PwC, KPMG, EY, Deloitte, Grant Thornton, and BDO.

<sup>185</sup> Skatteverkets rapport 2014-10-13, pp. 28-31.

<sup>186</sup> Transfer Pricing Department in Malmö, Göteborg, Stockholm.

<sup>187</sup> Skatteverkets rapport 2014-10-13, pp. 31-33.

<sup>188</sup> Skatteverkets rapport 2014-10-13, pp. 13, 33-36.



One of the challenges the SKV faces pertains to their access to relevant information from the enterprise under review. The SKV considers various options for enforcing TPD compliance, such as: penalties, sanctions, or a reversed burden of proof.<sup>189</sup> Coincidentally, the updated Chapter V of the TP Guidelines advocates utilizing penalties to reinforce compliance. As a method of positive reinforcement, the updated Chapter V also commends using compliance incentives, such as penalty protection or a shift in the burden of proof. At the same time, the OECD recognizes that imposing penalties falls within the scope of national law.<sup>190</sup> In reference to the Swedish legal system, the SKV believes that a reward system for timely TPD submission would be meaningless, since taxpayers only submit TPD upon the SKV's request. Instead, the SKV proposes lowering their burden of proof threshold as an incentive for enterprises to compose more comprehensive TPD.<sup>191</sup> Sub-section 3.3.1 of this thesis has already specified that the updated Chapter V intends to fix tax administrations difficulties in obtaining relevant information. If this is the case, then the SKV should have an easier time fulfilling their burden of proof, which would make lowering their burden of proof threshold unnecessary.<sup>192</sup>

Before continuing with a deeper analysis about an implementation of Action 13, the issue of “permanent establishments” deserves some comments. In Prop 2005/06:169, the Ministry of Finance excludes Swedish permanent establishments from TPD requirements. At the time, the OECD contemplated over developing international principles regarding the allocation of profits to permanent establishments. Consequently, the Ministry of Finance decided to wait and observe the international development of permanent establishments before adopting legislation.<sup>193</sup> Then in 2008, the OECD published a report that encourages the analogous application of Chapter V of the TP Guidelines to permanent establishments. In the report, the OECD emphasizes that TPD for permanent establishments reinforces the usage of the arm's length principle.<sup>194</sup> Sweden still does not have documentation requirements for permanent establishments, which the SKV now consider appropriate to implement into legislation.<sup>195</sup> Recently, the OECD has readdressed permanent establishments in *Action 7 – Preventing the artificial avoidance of permanent establishment status* (Action 7). Action 7 recognizes that profit allocations to permanent establishments require further work, especially in connection to Actions 8-10.<sup>196</sup> However, it may be worth considering to what

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<sup>189</sup> Skatteverkets rapport 2014-10-13, p. 37.

<sup>190</sup> See Sects. 40-43 in Action 13, Final Report 2015, p. 19.

<sup>191</sup> Skatteverkets rapport 2014-10-13, p. 37.

<sup>192</sup> Author's conclusion.

<sup>193</sup> Prop. 2005/06:169 p. 110.

<sup>194</sup> See Sects. 260-262 in OECD, *Report on the attribution of profits to permanent establishments*, 17 July 2008, <http://www.oecd.org/tax/transfer-pricing/41031455.pdf>, (Accessed: 2015-09-29).

[cit: Report on the attribution of profits to permanent establishments], p. 162.

<sup>195</sup> Skatteverkets rapport 2014-10-13, pp. 12, 37-38.

<sup>196</sup> Sects. 19-20 in OECD, *Preventing the artificial avoidance of permanent establishment status, Action 7 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241220-en>, (Accessed: 2015-10-12). [cit: Action 7, Final Report 2015], p. 45.

extent the updated Chapter V will eventually apply to Swedish permanent establishments.

### 4.3 Swedish implementation of Action 13

This section examines how the recommendations in the updated Chapter V of the TP Guidelines can be formally implemented into the Swedish legal system or at least influence how legislation is interpreted. When countries enter into double tax conventions, it is at their disposal to decide how the convention applies in domestic law. *Monistic* countries apply international law directly as if it belongs to their legal system. In contrast, *dualistic* countries perceive international law and domestic law as separate legal systems and therefore, international law needs to be formally implemented into the domestic legal system. Sweden has a dualistic legal system, which entails that international agreements become applicable after they have been incorporated into the legal system through legislation.<sup>197</sup> According to Sect. 3 of Chap. 10 of the RF, if an international agreement indicts legislative amendments or if it otherwise falls within the Riksdag's authority, then the Riksdag must accept the agreement prior to the Government's approval.

Even though the TP Guidelines represent internationally accepted statements, the recommendations do not equate to Swedish legislation per se. In other words, the OECD's recommendations are nothing more than just recommendations. In consideration to Sweden's dualistic legal tradition, the TP Guidelines must be implemented into the Swedish legal system in order to receive legal value or precedence. As mentioned in section 2.4, the Shell-case and Prop. 2005/06:169<sup>198</sup> declare that taxpayers and the SKV can utilize the TP Guidelines as guidance. Consequently, certain provisions in the TP Guidelines about the application and interpretation of the arm's length principle have an immediate impact on taxpayers. While other aspects, such as the submission of TPD, require formal legislation. Sweden already has legislation<sup>199</sup> that requires TPD, but the current stipulations do not cohere with the recommendations in the Final Report.

The remaining part of this section contains four sub-sections each of which discuss different ways the updated Chapter V can become part of the Swedish legal system. A large part of this section builds upon Professors Hultqvist and Wiman's article, *BEPS- Implementering i svensk skatterätt*, which specifically addresses what BEPS elucidates over the Swedish legal system. They analyze the implementation of BEPS from a constitutional and international perspective and thereby, distinguish between documents that have an international binding status from formally binding norms.<sup>200</sup> The

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<sup>197</sup> Pelin, Lars: Internationell skatterätt: i ett svenskt perspektiv, 5. ed., Studentlitteratur, Lund, 2011. [cit: Pelin 2011], pp. 89-90. Professor Mattias Dahlberg has also written about the difference between monistic and dualistic legal systems. See: Dahlberg, Mattias: *Internationell beskattning*, 4. ed., Studentlitteratur, Lund, 2014. [cit: Dahlberg 2014], p. 249.

<sup>198</sup> Prop. 2005/06:169, p. 89.

<sup>199</sup> Sects. 15-16 of Chap. 39 of the SFL. Sect. 9 of Chap. 9 of the SFF.

<sup>200</sup> Hultqvist & Wiman 2015, pp. 309-311.

following sub-sections explore these aspects while simultaneously drawing parallels to the updated Chapter V of the TP Guidelines.

### 4.3.1 Legislation

Professors Hultqvist and Wiman believe that the most effective method of integrating the BEPS project into Sweden is through the Riksdag's implementation of new or altered legislation. Constitutionally, the Riksdag cannot delegate the right to stipulate tax legislation.<sup>201</sup> As a result, neither the Government nor the SKV can bind the Riksdag into tax norms via international agreements and such international agreements are not automatically established law. This means that the SKV and the courts do not have the authority to apply international principles, such as BEPS Actions Plans, that fall outside the interpretative scope of legislation. Consequently, according to Professors Hultqvist and Wiman, the Swedish implications of BEPS depends on the Riksdag's acceptance of the OECD's recommendations.<sup>202</sup>

On the other hand, if the amendments in the TP Guidelines can be interpreted within the context of Sects. 19-20 of Chap. 14 of the IL and within the scope of Sweden's general tax legislations, then the TP Guidelines can receive an immediate effect.<sup>203</sup> For example, according to the SKV, Actions 8-10 are directly applicable, since these actions signify a clarification of the arm's length principle.<sup>204</sup> Rather than addressing Action 13, Professors Hultqvist and Wiman generally analyze the implications of the updated TP Guidelines. Although, Professor Hultqvist postulates in an earlier article that the ambiguity in the current Swedish TPD requirements do not comply with the new TPD standards.<sup>205</sup> Already prior to the BEPS project, Professors Hultqvist and Wiman find that certain aspects of the 2010 TP Guidelines go outside the scope of Swedish legislation. In conclusion, Professors Hultqvist and Wiman recognize a dissymmetry between the updated TP Guidelines and Swedish legislation. Thus, if Sweden wants to follow the OECD's new guidance completely, then Professors Hultqvist and Wiman find legislative amendments necessary.<sup>206</sup>

It is also worth noting that prior to the 2007 implementation of TPD requirements, Prop. 2005/06:169 expresses several concerns about protecting the Swedish tax base. For example, the Ministry of Finance perceives a risk that the Swedish tax base would not be protected against other countries that had already implemented formal TPD.<sup>207</sup> Now Sweden stands in a similar situation. Other countries have been and are implementing three-tiered TPD based on the Final Report. At the same time, the OECD differentiates between

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<sup>201</sup> Sect. 3 of Chap. 8 of the RF. See sub-section 2.4.2.

<sup>202</sup> Hultqvist & Wiman 2015, pp. 312-313.

<sup>203</sup> Hultqvist & Wiman 2015, p. 321.

<sup>204</sup> Seminarium om BEPS 2015, Powerpoint, pp. 18-19.

<sup>205</sup> Hultqvist 2014, p. 806.

<sup>206</sup> Hultqvist & Wiman 2015, p. 322.

<sup>207</sup> Prop. 2005/06:169 p. 102.

revisions that have an immediate effect from those that need to be implemented via tax treaties or through domestic laws. The OECD recognizes that CbC reporting can require amendments in domestic law and consequently, countries adoption of CbC reporting will occur at different rates. In order to not undermine the effectivity of CbC reporting, the OECD signifies CbC reporting as a *minimum standard*. This infers that the first countries to implement CbC reporting will not be adversely effected by other countries.<sup>208</sup> As a result, regardless of how slow or how fast Sweden implements CbC reporting into legislation, it will not prevent other countries from requesting or obtaining the CbC report. This phenomenon will be illustrated more explicitly in the case study in section 5.1. The next subsection examines if the SKV has the authority to obtain three-tiered TPD that the updated Chapter V recommends.

### 4.3.2 Swedish Tax Agency's authority

In the same report that section 4.2 discusses, the SKV takes a stance to BEPS and the SKV's authority to implement new regulations or publish new guidance. The SKV evaluates the Swedish regulations in regards to the updated Chapter V of the TP Guidelines. First, the SKV recognizes that the updated Chapter V contains detailed information about the contents of TPD in addition to CbC reporting. Since the Swedish stipulations do not contain any equivalent requirements for a master file, a local file or a CbC report, the SKV concludes that they lack the authority to request the type of information the OECD recommends. The SKV also addresses the preparatory works to see if there exists a broader scope of interpretation, but reach the same conclusions. As a result, the SKV lacks the authority to implement new regulations that coincide with the OECD's recommendations, which means that amendments in the statutory law deem necessary.<sup>209</sup>

In addition, the SKV encourages legislators to reconsider risk analysis, selection criteria, as well as material thresholds when forming new TPD rules. The updated Chapter V permits tax administrations to perform transfer pricing risk assessments *beforehand*; thereby, facilitating more effective audit selections. In order to emphasize the most important information, the new provisions also encourage local countries to develop their own material standards.<sup>210</sup> Current legislation does not require Swedish taxpayers to disclose information about transfer pricing in their tax return and the SKV lacks the authority to request an enterprise's TPD before an audit. Therefore, the SKV does not have the capacity to perform the type of risk analysis and selection the updated Chapter V recommends.<sup>211</sup> Although, Prop. 2005/06:169 leaves the option open for a future implementation of obligatory

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<sup>208</sup> Explanatory statement, pp. 6-9. The Explanatory Statement states that, "Recognising the need to level the playing field, all OECD and G20 countries commit to consistent implementation in the areas of ... Country-by-Country Reporting." See Sect. 11 in Explanatory statement, p. 6.

<sup>209</sup> Skatteverkets rapport 2014-10-13, pp. 19-23.

<sup>210</sup> See for example Sects. 32-34 in Action 13, Final Report 2015, p. 17.

<sup>211</sup> Skatteverkets rapport 2014-10-13, p. 24.

transfer pricing information in tax declarations.<sup>212</sup> When considering material thresholds, the SKV notices that simplified TPD often equates to the regular TPD. The simplification purpose is often undermined, due to confusion about the contents of simplified TPD for low value transactions. If Sweden wants to follow the OECD's recommendations, then the SKV proposes that legislative amendments occur in these areas as well.<sup>213</sup>

In the SKV's final proposal, the agency suggests that harmonizing the Swedish regulations with the TP Guidelines, increases foreseeability among enterprises and minimizes adjustments to local regulations. Hypothetically, internationally harmonized TPD decreases MNE's compliance burden, since MNEs can follow one format. Presently, the Swedish TPD regulations reflect the 2010 TP Guidelines; therefore, it only seems natural that the Swedish regulations continue to coincide with the TP Guidelines.<sup>214</sup> On December 1, 2015, the SKV officially announced that the Ministry of Finance has called upon the SKV to compose draft legislation that implements Action 13. The SKV predicts that January 1, 2017, is the earliest new legislation will be implemented.<sup>215</sup>

### 4.3.3 European Union

Professors Hultqvist and Wiman identify legislation via the EU as another plausible alternative by which the updated TP Guidelines can influence Sweden. Contrary to the OECD, the EU has the opportunity to stipulate and enforce legislation.<sup>216</sup> EU regulations are directly applicable within Swedish law, while EU directives require implementation.<sup>217</sup> As discussed in section 2.3, the EU and OECD fulfil different purposes. The European Commission emphasizes that the EU embodies unique elements, including the Single Market, single currency, and fundamental freedoms; and therefore, reforms need to align to the dynamics of the EU. In order to protect the Single Market, the European Commission has recently re-launched CCCTB through a Communication<sup>218</sup> to the European Parliament and Council. From the European Commission's perspective, CCCTB provides a holistic solution, eliminates profit-shifting incentives within the EU, and retains transparency between jurisdictions. Contrary to the OECD, the European Commission perceives the current transfer pricing system as ineffective, but supports

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<sup>212</sup> Prop. 2005/06:169 pp. 112-113.

<sup>213</sup> Skatteverkets rapport 2014-10-13, pp. 23-24, 35-36.

<sup>214</sup> Skatteverkets rapport 2014-10-13, pp. 39-40.

<sup>215</sup> Seminarium om BEPS 2015, Powerpoint, pp. 31-38. Seminarium om BEPS 2015, Webcast, Del 2.

<sup>216</sup> Hultqvist & Wiman 2015, p. 316.

<sup>217</sup> Article 288 of the Treaty on the Functioning of the European Union (TFEU) states that, "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

<sup>218</sup> Communication from the commission to the European Parliament and the Council – A fair and efficient tax system in the European Union: 5 key areas for action, 17 June 2015, COM(2015) 302 final. [cit: COM(2015) 302 final].

increasing transparency.<sup>219</sup> For example, the European Commission continues to evaluate the appropriateness of extending CbC reporting to MNEs in other sectors.<sup>220</sup>

Tax Consultants, Isabel Verlinden and Pieter Deré, express concerns over the effect that a CCCTB will have on tax treaties between Member States and between Member States and third countries. Since most tax treaties refer to the arm's length principle, conflicts of interest may arise if the CCCTB results in a profit allocation that differs from the arm's length principle. Consequently, countries would have to amend their tax treaties in order to permit the superiority of using allocation keys under the CCCTB in certain situations.<sup>221</sup> The European Commission reassures us of their support for the BEPS project, but reinforces the need for an EU conform approach to improve the business environment. Indeed, the CCCTB reflects a pro-business initiative, since consolidation allows MNEs to offset profits and losses between Member States. Ultimately, the European Commission seeks to guarantee that profits generated in the EU are taxed in the EU.<sup>222</sup> Verlinden and Deré advise the EU to link their own measures under the OECD BEPS initiatives and fear that a CCCTB conflicts with the existing tax treaty network.<sup>223</sup>

#### 4.3.4 Soft law

The last and possibly the most unavoidable way the updated TP Guidelines will affect Sweden is through the dynamics of soft law. Since the right to tax derives from legislation, it is crucial to differentiate between legal enforcement and behavioral impact. Professor of Law, Jose Calderón, at La Coruna University distinctly qualifies the TP Guidelines as an instrument of soft law. Even though Professor Calderón's article comes from 2007, the progression of TPD requirements and the high-attention transfer pricing has received on an international and national level reinforce the application of the TP Guidelines. Thus, Professor Calderón's conclusions demonstrate the behavioral impact the TP Guidelines have on the implementation of legislation and enterprises aptitude to follow the arm's length principle.<sup>224</sup>

Professors Hultqvist and Wiman criticize international guidelines, since they are a way to circumvent tax treaties and national legislation. They describe

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<sup>219</sup> COM(2015)302 final, pp. 6-13.

<sup>220</sup> See Commission launches public consultation on corporate tax transparency, European Commission-Press release, 17 June 2015, IP/15/5156. [cit: IP/15/5156].

<sup>221</sup> Verlinden, Isabel & Deré, Pieter: The European Commission action plan for a fair and efficient tax system in the European Union: what should be expected?, *International Transfer Pricing Journal*, vol. 22, no. 6, Journals IBFD, 2015. [cit: Verlinden & Deré 2015].

<sup>222</sup> Questions and answers on the action plan for fair and efficient corporate taxation in the EU, European Commission – Fact Sheet, 17 June 2015, MEMO/15/5175. [cit: MEMO/15/5175].

<sup>223</sup> Verlinden & Deré 2015.

<sup>224</sup> Calderón, Jose: *The OECD Transfer Pricing Guidelines as a source of tax law: is globalization reaching the tax law?*, *Intertax*, vol. 35, no. 1, 2007, pp. 4-29. [cit: Calderón 2007], pp. 4, 27-29.

international guidelines as an enforcement fast track that avoid the proper constitutional methods of law enforcement while still maintaining high precedence. If the international guidelines provide clear and precise interpretations of the regulations, then they receive a stronger influence. Furthermore, countries utilize the OECD's international standards on such a broad scale that these standards have become accepted international principles, i.e. soft law. The problem with this soft law approach lies in the uncertainty over application and the lack of concreteness. Since taxation remains a national sovereignty, countries choose their own tax rates, implementation schemes, and models of enforcement. Conflicts and disputes unfold when countries implement international guidelines at different rates with domestic modifications.<sup>225</sup>

## 4.4 Summary

In summary, the initial adoption of Swedish TPD requirements has received significant response from legal doctrine. The primary reactions express concerns about what constitutes relevant information, the principle of proportionality, and the extensiveness of being prepared for the SKV's TPD request. Coincidentally, the Final Report clarifies what constitutes relevant information and seeks to balance taxpayers' compliance costs with the tax authorities need for the information. The SKV's survey depicts a general satisfaction with Sweden's TPDs requirements and even the SKV conceives that they carry out effective controls over transfer prices. However, the SKV proposes lowering their burden of proof as an incentive for taxpayers to write more comprehensive TPD. Even though the OECD analogously applies Chapter V of the TP Guidelines to permanent establishments, Sweden still does not require permanent establishments to compile TPD.

Ultimately, the Swedish implementation of Action 13 is most fathomable through the Riksdag's legislation, since the SKV lacks the authority to implement such invasive amendments as three-tiered TPD. In addition, other issues, such as transfer pricing risk assessments, deserve the Riksdag's reconsideration. It also remains possible that the EU will implement legislation or provide further guidance about transfer pricing. What remains unclear is whether the EU will adopt another approach, i.e. CCCTB, that strides against the arm's length principle. Lastly, soft law influences the practicality of transfer pricing and consequently, Swedish MNEs will need to adjust to the adoption of new transfer pricing rules in other jurisdictions.

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<sup>225</sup> Hultqvist & Wiman 2015, pp. 310-315.

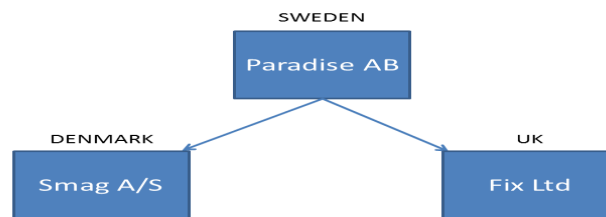
## 5 Analysis

The analysis is comprised of three sections and provides a practical as well as theoretical perspective of TPD. In order to exemplify the impact of three-tiered TPD on Swedish MNEs, the first section portrays a hypothetical case study. This leads to a more theoretical analysis in the second section that focuses on four central themes – proportionality, relevant information, confidentiality, and compliance. Finally, the last section summarizes the findings of this thesis and proposes further areas of research.

### 5.1 Case study

Even though Sweden has not implemented the updated Chapter V formally into legislation, Swedish MNEs will already face the repercussions of the OECD's new guidance during 2016. The following case study illustrates this phenomenon.

**FIGURE 3<sup>226</sup>. PARADISE CRUISES GROUP**



The Swedish company, Paradise AB, is the ultimate parent company of the Paradise Cruises group. Paradise Cruises offers unique, exclusive wedding cruises. The Paradise Cruises group operates worldwide, but the focus of this case study will be on the European operations. Within the EU, Paradise AB has subsidiaries in Denmark and in the UK. The parent company of the Danish group, Smag A/S, organizes the catering on the cruise ships. The parent company of the UK group, Fix Ltd, takes care of the repairs and ensures that the cruise ships are operating in full capacity. In addition, the consolidated turnover of the Paradise group exceeds EUR 750 million.

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<sup>226</sup> Kindly note that this case study is the author's own construction and not based on any particular MNE group.



Paradise AB is registered in Sweden and according to Swedish legislation; Paradise AB is not required to submit a master file, a local file, or a CbC report to the SKV. However, both Denmark<sup>227</sup> and the UK<sup>228</sup> have already issued draft legislations, which require three-tiered TPD. For the purpose of this case study, the author bases the assumptions on the relevant draft legislations. The draft legislation in Denmark enforces three-tiered TPD; consequently, the Paradise group will need to prepare a high-level master file about its wedding cruises. Smag A/S will also need to prepare a local file that specifies the relevant intra-group transactions for transfer pricing purposes. To clarify, transactions between Smag A/S and the Danish subsidiaries are not relevant for transfer pricing purposes, since these transactions occur between two Danish entities. Regardless of when Sweden implements three-tiered TPD, Smag A/S will continue to be responsible for the submission of a master file and a local file.

Since Paradise AB does not submit CbC reporting in Sweden and no automatic exchange of CbC reports exist between Denmark and Sweden, then Denmark can apply the *secondary reporting mechanisms*<sup>229</sup>. Smag A/S will be required to submit CbC reporting locally in Denmark. Smag A/S also has the opportunity to file the CbC report locally in Denmark on behalf of all the Danish entities. If the Paradise group designates a “Surrogate Parent Company,” in another jurisdiction - that requires CbC reporting, has information exchange agreements with Denmark, no systematic failure, and both the tax authorities in the surrogate parent company’s jurisdiction and in Denmark have received notification - then Smag A/S would not be required to locally file CbC reporting. In contrast to Denmark, the draft regulations in the UK propose *voluntary* local filing.<sup>230</sup> This means that Fix Ltd could (but does not have to) file a CbC report in the UK on behalf of the Paradise group. In turn, the UK would have the authority to exchange the Paradise group’s CbC reporting with other tax authorities, which potentially avoids multiple local filing. In an essence, the country with the strictest rules sets the ceiling for compliance. When Sweden implements CbC reporting, then the SKV will bear the responsibility of exchanging CbC reports with other tax authorities.

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<sup>227</sup> L 46 – forslag til lov om ændring af skattekontrolloven, arbejdsmarkedsbidragsloven, kildeskatteloven, ligningsloven og pensionsbeskatningsloven, Lovforslag 2015-16. The author also used the following EY tax alert as guidance: EY, Denmark publishes proposal to introduce Country-by-Country Reporting, Global Tax Alert, 24 September 2015, <http://www.ey.com/GL/en/Services/Tax/International-Tax/Alert--Denmark-publishes-proposal-to-introduce-Country-by-Country-Reporting>, (Accessed: 2015-11-17). [cit: Denmark publishes proposal to introduce Country-by-Country Reporting].

<sup>228</sup> The UK has published draft regulations see: The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations 2015, Draft. Explanatory Memorandum to The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations 2015, Draft.

<sup>229</sup> See sub-section 3.3.2.

<sup>230</sup> See Sect. 4 in The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations 2015, Draft.

## 5.2 Global transfer pricing documentation

Regardless of when Sweden implements the updated Chapter V of the TP Guidelines, Swedish MNEs are already experiencing the impacts of three-tiered TPD internationally, which the case study has illustrated. Even though tax remains a national sovereignty, businesses operate globally and have to comply with local jurisdictions. To a certain extent, it only seems fair that countries have the freedom to implement those international tax policies that 'best-fit' their national scheme. On the other hand, coordination and harmonization ease MNEs compliance burden when it comes to transfer pricing. Now the OECD attempts to harmonize TPD between countries; but is standardized documentation, i.e. 'a one size fits all' approach, in Sweden's best interest?

Four overarching themes – proportionality, relevant information, confidentiality, and compliance - have reoccurred throughout this thesis. These themes overlap each other and will be analyzed in correlation to the Swedish legal system in light of the updated Chapter V of the TP Guidelines. Before looking at these themes, it is crucial to revisit the purpose and objective of TPD. The Final Report provides three objectives of TPD: taxpayers' assessment of their compliance with the arm's length principle, tax administrations risk identification and assessment, and lastly, providing tax administrations with useful information for a transfer pricing audit. In Sweden, Prop. 2005/06:169 states that TPD facilitates tax control, increases taxpayers' foreseeability, and creates uniformity. Especially since Sweden is not obliged to follow the OECD's recommendations, it is with these objectives in mind that Sweden should reconsider legislative amendments.

In the Swedish legal system, Sect. 2 of the SKVFS 2007:1 expresses the principle of *proportionality*. Indeed, TPD only needs to contain the necessary information for the SKV's transfer pricing assessment. Similarly, the Final Report elaborates on balancing taxpayers' compliance costs with tax administrations usefulness of the information. In the case, that Sweden implements the master file and local file outlines as described in Annex I and II of the Final Report, then businesses will have greater *foreseeability* about the expected content and format of TPD. In addition, the OECD proposes that clear and widely adopted TPD rules decrease businesses compliance costs. Yet, the OECD's postulation depends on multi-lateral uniformity and uniformed TPD might not be plausible within a global text. The OECD neglects to remember that in the majority of countries, the TP Guidelines hold soft-law status. Consequently, countries may be committed from a political standpoint, but not from a legal one. For example, the stagnant adoption of EUTPD within the EU exemplifies the difficulties with coordinating TPD formats; therefore, this author questions whether uniformed documentation will ultimately alleviate taxpayers' compliance costs.

Another aspect of proportionality within the Swedish legal system relates to the compilation and submission of TPD upon the SKV's request, which Sects. 11-12 of the SKVFS 2007:1 stipulate. This aspect of flexibility decreases

MNEs compliance burden, since it deems sufficient to have routines in place for compiling TPD. Section 4.1 has illustrated that there exists differing views about the extent of preparation that is necessary to comply with the SKV's request. The SKV's report reveals that Swedish MNEs generally have the routines necessary to fulfil the SKV's request. In addition, the SKV observes that TPD prompts MNEs to reconsider their compliance with the arm's length principle when entering into transactions.<sup>231</sup> The SKV's observations correspond with the Final Report's first objective of TPD requirements – the taxpayer's assessment of their compliance with the arm's length principle. Therefore, this author determines that submitting TPD upon the SKV's request suffices in the Swedish legal system. However, MNEs also need to comply with the transfer pricing rules in other jurisdictions, which the case study has demonstrated. As a best practice, the OECD recommends applying the deadline for filing tax returns to the finalization of the master file and local file. For the Paradise Cruises group, this entails that Paradise AB should complete the master file by the time of their tax returns. Even though Paradise AB is not required to submit a master file to the SKV, Denmark and the UK require a master file and a local file. Since the information exchange agreements<sup>232</sup> only pertain to the CbC report, both Smag A/S and Fix Ltd will need to submit the Paradise group's master file to the Danish tax authorities and HM Revenue & Customs respectively.

As a means for easing taxpayers' compliance burden, the Final Report also establishes material thresholds. For example, the Final Report recommends that countries only require MNEs with a turnover exceeding EUR 750 million to complete CbC reporting. Supplement B shows that countries generally follow the OECD's recommended reporting threshold. Yet, currency differences can fluctuate over time, which may create some practical problems with CbC reporting. Local countries also have the opportunity to determine material thresholds, if any, for local file purposes. Hence, material thresholds can set boundaries on the type and number of transactions to include in TPD, especially in the local file.<sup>233</sup> It is crucial to remember that transfer pricing involves associated enterprises from two different jurisdictions. As a result, differences in material thresholds can occur between jurisdictions. For example, Land X might require that TPD contains all intra-group cross-border transactions, whereas Land Y only requires the three largest transactions. More importantly, local files need to be written from the perspective of the relevant entity; thus, an intra-group transaction might be relevant from a Danish perspective, but not from a British one. Still, material thresholds can potentially ease taxpayers' compliance burden and minimize the number of transactions the tax administrations need to control.

As a final point, the OECD connotes that three-tiered TPD provides tax administrations with more useful information. However, the extent of information appears excessive for both taxpayers and tax administrations. There lies a risk that the administrative burden will increase for both parties.

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<sup>231</sup> See section 4.2.

<sup>232</sup> See Annex IV in Action 13, Final Report 2015, pp. 37-69.

<sup>233</sup> See sub-section 3.3.2.

In addition, providing a list of items that should be included in TPD does not guarantee that tax administrations can utilize the information. Ironically, the background to the SKV's report regards simplifying the Swedish transfer pricing rules, since MNEs find them to be complex and difficult to apply. This author observes that Action 13 encloses intricate guidance that MNEs will need further clarifications on from the SKV.

What constitutes *relevant information* for the purposes of TPD correlates with proportionality. In Sweden, Sect. 9 of Chap. 9 of the SFF requires that TPD contains five specific items: a company description, a description of the relevant transaction, a functional analysis, a description of the selected transfer pricing method, and a comparability analysis. In addition, the SKV has the authority to issue additional regulations to clarify the specific content of TPD. As a guiding principle, Sect. 2 of the SKVFS 2007:1 articulates that the content of TPD shall make a transfer pricing assessment plausible. This coincides with the Final Report's second and third objective of compiling TPD, i.e. providing tax administrations with the necessary information for a transfer pricing risk assessment and with useful information for conducting a transfer pricing audit. According to the OECD, relevant information equates to at least the list of items in Annexes I-III of the Final Report, but countries have the opportunity to specify their own standards. In order to comply with the updated Chapter V, the Swedish legislation could necessitate that TPD comprises of a master file, a local file, and a CbC report. Then the SKV could further specify through regulations what specific information should be included within these three documents. This would create greater flexibility for the SKV and allow the Swedish legal system to evolve in coherence with the TP Guidelines. While the OECD considers that the revisions in Chapter V of the TP Guidelines are complete, not all of the action plans regarding transfer pricing have reached a finalized form. Since the action plans interact with each other, future changes within the area of TPD may indirectly occur. For example, the OECD has not finalized profit allocation to permanent establishments.<sup>234</sup>

Even though the OECD plans to publish a new version of the TP Guidelines in 2017, the amendments in Chapter V are already applicable. It remains unclear to what extent the SKV and even taxpayers should interpret the updated Chapter V as a clarification of what constitutes relevant information. From this author's perspective, the master file and local file impose a new format for submitting TPD. In other words, information that was previously in one document will now be in two separate documents. Furthermore, the suggested content in Annex I and II of the Final Report can still categorize as information that the SKV needs for a transfer pricing assessment. The author questions to what extent the SKV can interpret the updated Chapter V within the scope of Sect. 16 of Chap. 39 of the SFL and Sect. 9 of Chap. 9 of the SFF. Until the Riksdag adopts new legislation, it would be helpful for Swedish taxpayers to know the SKV's position.

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<sup>234</sup> See section 4.2.

Indisputably, MNEs hold the most knowledge about their business and compile TPD for the tax authorities (not for the public). Since the OECD has decided to incorporate CbC reporting as a component of TPD, then the CbC report should remain *confidential*. The author strongly disagrees with Professor Brauner's proposals about publically disclosing CbC reporting. Aspects of legitimacy and restoring public trust in big business emulate political campaigns rather than aspects of taxation. Rather than dampening profit shifting, Professor Blank postulates that public disclosure of CbC reporting could increase aggressive tax behavior. Indeed, public disclosure of CbC reporting releases commercially sensitive information, which runs the risk of being misinterpreted.<sup>235</sup> Going back to the case study, if other cruise companies could assess how the Paradise Cruises group operates, then this may lead to conflicts in competition law. Furthermore, there are other reasons than tax for how a MNE decides to setup their operations. In the case study, the Paradise Cruises group specifically wants to offer their cliental exquisite Nordic food prepared by Danish chefs. Therefore, the location of the Danish company Smag A/S depends on the capacity to offer unique Nordic dining experiences aboard the cruises. In conclusion, this thesis recommends that CbC reporting remain confidential.

The remainder of this analysis examines *compliance* from three different perspectives. The first perspective refers to a taxpayer's compliance with the arm's length principle and submission of TPD. Tax administrations represent the second perspective, since they also have to follow certain standards when applying the rules and remain within their domain of authority. Finally, the third perspective looks at compliance on a broader scale; notably, Sweden's compliance with the OECD and the EU.

Sweden follows the arm's length principle in Sect. 19 of Chap. 14 of the IL, which entails that the transfer price between two associated enterprises must be at arm's length. The TP Guidelines recommend compiling TPD as a means for enterprises to show coherence with the arm's length principle. As noted in section 4.2, the SKV considers that TPD gives a good first impression for the assessment of transfer prices. In order to ensure that taxpayers supply tax administrations with TPD, the updated Chapter V advocates utilizing monetary penalties to make non-compliance more expensive and/or providing compliance incentives, such as a shift in the burden of proof. The SKV determines that neither TPD penalties nor compliance incentives fit the Swedish transfer pricing regime. In addition, Prop. 2005/06:169 clearly states that the implementation of TPD would not affect the SKV's initial burden of proof. Now, the SKV proposes lowering their burden of proof as a positive incentive for MNEs to construct thorough TPD. Due to the complexity of transfer pricing and the challenges of measuring behavioral impact, lowering the SKV's burden of proof may not produce the desired effect.

Another side of compliance resides with tax administrations. Tax administrations also bear the responsibility to respect taxpayers' access to

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<sup>235</sup> See sub-section 3.2.2.

information, be reasonable in their transfer pricing assessments, and utilize TPD for the right purpose. The Final Report diligently clarifies how the CbC report expedites transfer pricing risk assessments and reiterates that tax administrations should not use it for transfer pricing adjustments.<sup>236</sup> However, there remains a risk that CbC reporting will be abused and applied out of context. For instance, the high-level global overview of income may tempt tax administrators to apply formulary apportionment or deduce irrational conclusions. In addition, information exchange entails that tax administrations in different jurisdictions bear obligations against each other. Returning to the case study, if Paradise AB voluntarily files the CbC report in the UK on behalf of the Paradise Cruises group then HM Revenue & Customs is responsible for sharing the CbC report with the Danish tax authorities. Failure to do so, entails that Smag A/S will have to locally file the CbC report with the Danish tax authorities.

In Sweden, the SKV has to stay within their scope of administrative authority, which is why the SKV cannot simply implement Action 13 into Swedish law. In comparison to the previous recommendations, the updated Chapter V of the TP Guidelines contains more information.<sup>237</sup> Since the SKV has received criticism for SKVFS 2007:1, the agency appears more cautious about extending their scope of interpretation. Although, nothing in the current Swedish legislation suggests that the SKV has the authority to request a CbC report or exchange it with other jurisdictions. Therefore, it would be unjust for the SKV to require taxpayers to submit a master file, a local file, and a CbC report.

The TP Guidelines represent soft law and Sweden chooses to follow the OECD's guidance regarding transfer pricing and the arm's length principle. Indeed, Sweden participates in the BEPS project and sends signals that Sweden will implement the Final Report. Even if Sweden decides not to implement or enforce the updated Chapter V, the OECD does not have the authority to penalize Sweden. However, the local implementation in surrounding countries, such as Denmark, creates political peer pressure. After all, the OECD articulates that combatting BEPS requires multilateral efforts. Professors Hultqvist and Wiman also recognize that soft law tends to create ambiguity and therefore, they encourage that Sweden implements new legislation.

Unlike the OECD, the EU can oblige Sweden to implement legislation. The relaunch of CCCTB makes it unclear whether the EU will continue to follow the arm's length principle in the inner market. CCCTB points in another direction and gives the implication that the EU signifies a test pilot for the possibility of formulary apportionment. The European Commission's proposal also insinuates that the EU seeks to protect tax erosion between the EU and third countries. Therefore, it deems difficult to deduce how CCCTB complements the OECD's work on the TP Guidelines.<sup>238</sup> The author hopes

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<sup>236</sup> See sub-section 3.3.1.

<sup>237</sup> Compare sub-section 2.2.1 with 3.3.1-3.3.2 in this thesis.

<sup>238</sup> See sub-section 4.3.3.

that the EU refrains from stipulating rules that differ from the OECD's guidance and leaves the area of transfer pricing to the OECD. This prevents a conflict of rules and interpretations between the OECD and EU, in addition to allowing Sweden to implement its own domestic legislation.

In summary, this section has investigated TPD from four different themes: proportionality, relevant information, confidentiality and compliance. Proportionality focuses on striking a balance between taxpayers' administrative burdens and tax administrations' information needs. Especially since, excessive information may be detrimental for both parties. Relevant information centers on the actual transaction and countries have the opportunity to specify which transactions are significant for TPD. Even though CbC reporting does not look at specific transactions, the CbC report as well as the other components of TPD should remain confidential. Since articles generally focus on the taxpayers' perspective of complying with the arm's length principle, the author has also presented compliance issues from a tax administrators and a Swedish perspective.

### **5.3 Conclusions**

This thesis has analyzed the development of Action 13 as well as its pending implementation in Sweden. The updated Chapter V of the TP Guidelines significantly differs from the previous version; therefore, in the majority of countries domestic changes are necessary. Based on the SKV's announcement on December 1, 2015, it appears that Sweden will implement Action 13 by January 1, 2017. Generally, the new guidance provides more information and promotes more harmonized TPD between countries. CbC reporting creates large expectations and continuous follow up on CbC reporting is needed domestically and internationally. If the updated Chapter V will supersede expectations and combat BEPS remains unknown. Future studies should focus on the effectiveness of the updated Chapter V and whether standardized TPD increases or decreases taxpayers' compliance burden. Even tax administrations should continue to review their satisfaction with standardized TPD. Accordingly, studies could analyze the content of TPD to evaluate the necessity and usefulness of the information.

The author has identified four central themes – proportionality, relevant information, confidentiality, and compliance – that represent the main concerns when formulating transfer pricing rules. Even though Sweden is not an early adopter of Action 13, Swedish MNEs need to cohere with the rules in their operating jurisdictions. Thus, the majority of Swedish MNEs will already be following three-tiered TPD prior to Sweden's implementation. This was also the case when Sweden implemented TPD requirements in 2007. On the other hand, the SKV has the opportunity to observe how other countries implement the new TPD requirements when the agency formulates draft legislation. More than likely, Sweden will implement the new three-tiered TPD that the updated Chapter V recommends, but other aspects such as penalties or notifications in tax returns remain less obvious. It is crucial for Swedish MNEs and the SKV to have an open dialogue in order to make any

transitions as smooth as possible. In the end, the author questions the plausibility of standardized documentation, i.e. 'one size fits all', in a globalized world.



# Supplement A

## FIGURE 4<sup>239</sup>. TEMPLATE FOR COUNTRY-BY-COUNTRY REPORT

### Annex III to Chapter V

#### Transfer pricing documentation – Country-by-Country Report

##### A. Model template for the Country-by-Country Report

Table 1. Overview of allocation of income, taxes and business activities by tax jurisdiction

Name of the MNE group: Fiscal year concerned: Currency used:										
Tax Jurisdiction	Revenues			Profit (Loss) before Income Tax	Income Tax Paid (on Cash Basis)	Income Tax Accrued – Current Year	Stated Capital	Accumulated Earnings	Number of Employees	Tangible Assets other than Cash and Cash Equivalents
	Unrelated Party	Related Party	Total							

Table 2. List of all the Constituent Entities of the MNE group included in each aggregation per tax jurisdiction

Name of the MNE group: Fiscal year concerned:															
Tax Jurisdiction	Constituent Entities Resident in the Tax Jurisdiction	Tax Jurisdiction of Organisation or Incorporation if Different from Tax Jurisdiction of Residence	Main Business Activity(ies)												
			Research and Development	Holding or Managing Intellectual Property	Purchasing or Procurement	Manufacturing or Production	Sales, Marketing or Distribution	Administrative, Management or Support Services	Provision of Services to Unrelated Parties	Internal Group Finance	Regulated Financial Services	Insurance	Holding Shares or Other Equity Instruments	Dormant	Other <sup>1</sup>
	1.														
	2.														
	3.														
	1.														
	2.														
	3.														

1. Please specify the nature of the activity of the Constituent Entity in the "Additional Information" section.

Table 3. Additional Information

Name of the MNE group: Fiscal year concerned:
<i>Please include any further brief information or explanation you consider necessary or that would facilitate the understanding of the compulsory information provided in the Country-by-Country Report.</i>

<sup>239</sup> Action 13, Final Report 2015, pp. 29-30.

# Supplement B

FIGURE 5<sup>240</sup>. CbC REPORTING IMPLEMENTATION SPECIFICS

**CbC reporting  
Implementation specifics**

	OECD	United Kingdom	Spain	Poland	Australia	Denmark	China	Netherlands	Mexico
Status	Implementation packages released in February and June 2015 with model legislation and model competent authority agreements	Draft regulations published	Adopted implementing regulations on 11 July 2015	Draft regulations published	Implementing Bill produced and under review	Draft legislation published	Draft legislation published	Draft legislation published	Draft legislation published
Who	Ultimate Parents of group with revenue of EUR 750 million or greater	Threshold of £566 million (approximately EUR 750 million)			Threshold of AUD 1 billion (approximately EUR 670 million)	Threshold of DKK 5.6 billion (approximately EUR 750 million)	Threshold of RMB 5 billion (approximately EUR 705 million)		Threshold of 12 billion pesos (approximately EUR 650 million)
When	For fiscal years starting in 2016, with filing within 12 months from fiscal year end						To be filed together with the annual tax return (due 31 May). Possible to apply for an extension. Enforcement period not specified.		
Secondary filing rule	1. Local filing or "Surrogate Parent" entity	Voluntary local filing	Local filing	Not required	Local filing		Local filing		No information yet
Penalties	Left to countries	Specific penalty for non-compliance	General penalty for non-compliance	Transfer pricing documentation penalties	General penalty for non-compliance	General penalty for non-compliance		Criminal penalty for non-compliance	General penalty for non-compliance

● Consistent with OECD recommendations

<sup>240</sup> New reporting under Action 13, p. 10.

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