

Statistical Intervals in Transfer Pricing: An Analysis of *EET*

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In this article, Kelstrup reviews the recent *EET* ruling from the Danish Supreme Court, in which the court allowed the use of a full range in a database analysis, and compares this holding with the general OECD guidance and other selected case law.

Introduction

*EET*¹ is a transfer pricing dispute between the Danish Ministry of Taxation and EET Group A/S concerning income years 2010, 2011, and 2012. After having been tried at the Danish Tax Tribunal and the high court,² the Supreme Court issued its ruling on May 21, 2025. Parts of the Danish transfer pricing community have since discussed the case extensively because it allows the use of a full range in a database analysis prepared by the taxpayer. This is interesting but also a potential point of conflict.

The case also addressed the burden of proof, because the Ministry of Taxation claimed that the documentation was insufficient and a discretionary assessment therefore was allowed. This was especially related to two subsidiaries, for which profits related to controlled transactions and

third-party transactions were aggregated when compared with the results of the database analysis. Contrary to the two subsidiaries, most of the other subsidiaries purchased most of the products from EET Group A/S, which made a segmentation (apart from the two subsidiaries) less decisive when assessing the arm's-length price. The Supreme Court ruled that there was no basis for concluding that the documentation was insufficient, because of the aggregation, to such a substantial extent that it could be assessed as insufficient documentation. This article does not focus on the burden of proof, but rather examines the use of a full range versus a narrower range, including the interquartile range, and how the judgment assessed the legal relevance as well as the theoretical and practical weight of statistical intervals in the comparability analysis.

Facts of the Case

EET Group A/S is a Danish company and the parent company of EET Europarts Group, a European distribution network for electronic components. The business of the EET Europarts Group is the purchase of products from independent suppliers, primarily well-known Asian and American manufacturers of electronic components. The products were transported via third-party logistics partners to one of EET Europarts' warehouses. From the warehouses, the products were resold and shipped to the customers, who were mainly independent resellers of electronic components. These resellers then sold the products to their customers, typically the users of the products. The EET group added no value to the products.

During the period under audit, EET Group A/S sold products to its subsidiaries at the same price, with no consideration for the market or the resale price of the subsidiary. The price was calculated as the third-party product cost plus a

¹ *Skatteministeriet v. EET Group A/S*, Danish Supreme Court BS-35371/2024-HJR (May 21, 2025).

² *Skatteministeriet v. EET Group A/S*, Eastern High Court BS-6035/2021-OLR (June 19, 2024).

Table 1. Results of Database Analyses

	Period	No. Comparables	Minimum	First Quartile	Median	Third Quartile	Maximum
2010	2005-2007	16	7.79%	11.9%	16.4%	24.44%	37.04%
2010 update	2007-2009	9	9.04%	12.35%	16.71%	26.86%	32.19%
2011*	2008-2010	16	9.2%	17.6%	20.1%	22.6%	34.5%
2012	2010-2012	7	2.2%	8.3%	11.6%	15.9%	28.9%

* The analysis is a financial update, and it is assumed that all comparables were still available.

markup to cover several additional costs, like freight, obsolescence, insurance, handling and storage, and a profit for EET Group A/S.

A subsidiary would purchase products from EET Group A/S after it had secured a sale with a customer. The products were typically shipped directly from EET Group's central warehouse to the customer. The sales subsidiaries managed local costs like staff, marketing, and office facilities. The subsidiaries also had autonomy when setting the resale price and negotiating with customers.

The subsidiaries were allowed to source products from third parties, and specifically two subsidiaries had significant purchases from third parties. Most of the subsidiaries maintained minimal or no inventory.

In other words, the subsidiaries had significant autonomy, and therefore the profitability varied between them. These variances were caused by general market conditions, resale price, sourcing, and product mix, not the product price from EET Group A/S, because these did not vary between subsidiaries, or at least the pricing method was the same.

The group applied a cost-plus policy and tested outcomes primarily by comparing gross margins for the controlled transactions with gross margins found between independent distributors. These independent distributors were identified through database studies and qualitative screening. Although database studies for gross margins are perhaps not as common as database studies for net margins, it is a known approach.

The EET transfer pricing documentation presented full-range database analysis for gross margins, including the interquartile range. Three analyses were prepared: 2010, 2011 financial data

update, and 2012. The 2010 analysis was updated with newer data at the request of the tax authorities. The results of the database analyses are shown in Table 1.

Choice of Transfer Pricing Method for Testing

The tax authorities attempted to replace the gross margin approach with a transactional net margin method (TNMM) approach. Using the TNMM, the tax authorities adjusted the sales companies, arguing they were limited-risk distributors that had been overcompensated.

It is notable that apparently EET, in the transfer pricing documentation, defined the subsidiaries as limited risk distributors, which led the tax authorities to suggest that EET was applying the use of hindsight when arguing otherwise during litigation. Regardless, the Supreme Court allowed the facts and conclusions as presented by the taxpayer and simultaneously did not find the transfer pricing documentation insufficient. It therefore seems that although it is understandable that the tax authorities may have been somewhat misled by the wording of the transfer pricing documentation, there still is an obligation for the tax authorities to investigate facts and circumstances and not merely rely on the wording of the transfer pricing documentation. This is not a surprise, and although not quite the same topic of conflict, it is aligned with the OECD guidance,³ which says that when the characteristics of a transaction are inconsistent with the written contract between the associated enterprises, the actual transaction

³ OECD, "Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022," para. 1.45 (2022).

should be delineated for the analysis in accordance with the characteristics of the transaction reflected in the conduct of the parties. While it is reassuring that a wrongly used definition cannot be used against the taxpayer, it is understandable that the authorities attribute weight to documentation provided by the taxpayer when assessing transactions. It is also likely that, in a different scenario, if other elements of the documentation were similarly imprecise or even incorrect, or if the actual conduct of the parties was not unequivocal, the courts might reach a different conclusion. No doubt the quality of the agreements, the supporting documentation, and other materials provided by the taxpayer can prove decisive for the outcome of a case.

Apart from EET itself defining the sales companies as limited-risk distributors, for which a net margin is often applied, the tax authorities raised several valid concerns for the prepared database analyses. The database study for the income year 2012 stated that when a gross profit was unavailable in the database the gross margin was calculated as revenue less material costs. The tax authorities investigated the 2010 and 2011 analyses and found the same to be the case for these years.

Material costs is a data point that is found for some companies in the typically used databases. In the widely used database from Moody's, material cost is defined as the costs of raw materials, consumables and supplies, and the purchased merchandise. These data points require detailed accounting information, which again requires information on accounting principles — for example, changes in inventory and the inclusion of services. All these differences create potential noise in the comparability analysis. The next step for Moody's databases is to convert the received accounting information into a standard global accounting format in which process choices must be made. Finally, it is commonly known that not all companies provide this detailed information, which reduces the potential population of comparable companies and shifts the comparability analysis strongly toward a data availability bias. All these objections are valid, but it does not entirely disregard the use of the data for statistical

benchmarking, range analysis, and trend evaluation; however, the data is likely flawed for the use of precise transaction pricing. Nonetheless, because of the objections, using the data point material cost should rightly be challenged by the tax authorities.

Further, the tax authorities did not address the search strategy for the database analysis but did comment that some of the accepted independent distributors had stock and some intangible assets. They raised the valid point that the calculation of the gross margin for the EET subsidiaries and the calculation of the gross margin for the independent distributors was likely not comparable, while the calculation of the operating margin would be comparable. The illustration in Table 2 was used.

Table 2. Calculation of Gross Profit and Operating Profit

EET Subsidiaries	Independent Distributors
Revenue	Revenue
Cost of goods sold	Material costs
Other external cost	
Gross profit	Gross profit
	Other external cost
Employee cost	Employee cost
Depreciation	Depreciation
Other cost	Other cost
Operating profit	Operating profit

All else equal, the illustration in Table 2 clearly shows that there is an increased risk of comparing gross margins that are potentially not as comparable as when comparing operating margins. This may of course not be the case when using internal comparable data. Specifically in EET, the tax authorities questioned why there was no accounting manual for the group, meaning the gross profit could be different even between the subsidiaries. While this may be true, it does not seem to strongly support the argument for consistently using the operating margin instead of the gross margin. The tax authorities also found differences between the gross margins used in the transfer pricing documentation and the annual

accounts of the subsidiaries, but this was not the case for operating profit. EET rebutted this argument, as it had made the necessary adjustments for other external costs when calculating the gross margin. This was also why the gross margins in the transfer pricing documentation did not always reconcile with the gross margins in the annual report. Had EET not performed these adjustments, the tax authorities may have had a better chance of shifting the courts toward using an operating margin.

The Use of a Range

In parallel with the argument about the choice of transfer pricing method, the tax authorities presented a well-known argument that the results of the subsidiaries, which were above the third quartile in the database analysis of comparable independent entities, should be adjusted to the median.

The tax authorities emphasized that applying the interquartile range is common practice. The same approach is found in the Danish legal guidance,⁴ which states that when using a database analysis for the profit-based methods, only the observations in the middle interval, meaning the interquartile range, are used when determining the arm's-length range. The approach was not explicit in the guidance for 2010, 2011, and 2012. The Danish preworks to the law introducing the arm's-length principle does not specifically deal with using databases and ranges but does make a general reference to the OECD guidelines.

The Danish legal guidance is unclear on the use of definitions, because the term "profit-based methods" is not defined. However, it undoubtedly refers to transactional profit methods — in other words, the TNMM and the profit split. Consequently, there is no obligation in the Danish legal guidance to use the interquartile range for other methods. In this case, the cost-plus method using gross margins was applied by EET and not rejected by the Supreme Court.

With the general reference to the 2010 OECD guidelines, these should also be used when

interpreting the arm's-length principle. The Danish Tax Tribunal and the high court referenced section 3.57 for limiting the applicable range from the full range of the database analysis to the interquartile range. Section 3.57 states:

It may also be the case that, while every effort has been made to exclude points that have a lesser degree of comparability, what is arrived at is a range of figures for which it is considered, given the process used for selecting comparables and limitations in information available on comparables, that some comparability defects remain that cannot be identified and/or quantified, and are therefore not adjusted. In such cases, if the range includes a sizeable number of observations, statistical tools that take account of central tendency to narrow the range (e.g. the interquartile range or other percentiles) might help to enhance the reliability of the analysis.

It is important to notice that every effort has been made to exclude observations with a lesser degree of comparability. This means that as a starting point, all observations are equally good. Then, only if some comparability defects remain (which cannot be adjusted for) should statistical tools be applied — and, it seems, only if the range includes a sizeable number of observations. In this case, the tax authorities did not object to the comparability of the observations in general, and the comments on stock and intangible assets were rebutted by EET because some of the subsidiaries also had stock.

Therefore, referencing section 3.57 alone does not support the use of the interquartile range as suggested by the Tax Tribunal and the high court. The Supreme Court correctly states in its judgment that when statistical methods are applied to increase the reliability of a comparability analysis, caution is necessary, especially if the analysis does not include a significant number of observations. The court continued to state that the fact that the results of several of the subsidiaries are outside the interquartile range of the database analysis is not in itself sufficient to prove that the transactions were not at arm's length. In this case, it is because data on gross profit and net profit are only available for a

⁴Danish legal guidance, version 3.15, section C.D.11.5.9 (in Danish).

limited number of observations and the tax authorities were unable to prove that applying the interquartile range would remedy this data deficiency.

The Supreme Court is claiming not that a full range is always applicable but that under specific circumstances, when every effort has been made to identify the highest degree of comparability and only a limited number of observations remain, it may be possible to use a full range. For the preparer and user of database analysis, this increases the analysis involved when arguing for a data point outside of the relevant range.

Another relevant issue was whether to adjust to the median or to the nearest point in the range. Because the full range was found applicable, this question became irrelevant, and the arguments were not considered by the court.

Time Perspective

EET covers income years 2010, 2011, and 2012, meaning that more than a decade has passed since the final relevant year. The Supreme Court correctly used interpretations available for the income years, including the OECD guidelines 2010. Although we use case law, even older cases, in this situation it is worth considering what may have changed.

There are no substantive changes between sections 3.55 and 3.66 in the OECD guidelines 2010 and the OECD guidelines 2022. Across both editions, the OECD suggests using statistical ranges when comparability defects or measurement errors mean that no single point in the set of comparables can be considered demonstrably most reliable. Both editions also accept the interquartile range as a common way to narrow the full range to its most reliable portion in database benchmarks, but neither edition makes ranges, including the interquartile range, mandatory. The starting point remains whether a single price or profit indicator can be shown to be the most reliable.

When a range is used and a tested result falls outside the interquartile range, both editions allow an adjustment to a point within the range that best reflects the circumstances of the controlled transaction.

The OECD guidelines 2010 and the OECD guidelines 2022 are aligned and do not mandate

the use of a specific range in every case, nor do they mandate an adjustment to the median by default. It is notable, however, that during the amount B discussions,⁵ the OECD did discuss the use of specific ranges for the database analysis supporting the amount B pricing matrix. The use of a range, narrower than the full range, was not as a compliance range, where the OECD wanted a pricing matrix, but rather a research tool to analyze differences in the datasets and rejecting observations. The OECD⁶ also considered that it may be appropriate to use measures of central tendency, for example, the median or a narrow range for the amount B.

Support for Use of Specific Range in Other Case Law

For EU state aid cases involving transfer pricing, the courts have had opportunities to consider the use of a range.

The General Court in *Starbucks*⁷ recorded that the European Commission itself had computed an interquartile arm's-length range of return on sales. While the court seemed to accept the use of a range, it found the commission's use of the range flawed, because it was derived from operating profits while the commission compared it with taxable profit.

In *Amazon*,⁸ the General Court expressly discussed an arm's-length range, described by the commission as an interquartile range. The court commented that, when a tested party's result falls within such a range built on appropriately selected comparables, it must, in principle, be regarded as arm's length. The court found that the commission challenged neither the arm's-length range nor the selection of comparables but only the inclusion of a pricing corridor that, in the commission's view, further reduced the taxable

⁵ OECD, "Public Consultation Document: Pillar One — Amount B," at para. 73 (2022); and OECD, "Public Consultation Document: Pillar One — Amount B," at Annex C (2023).

⁶ OECD, "Public Consultation Document: Pillar One — Amount B," at paras. 71-73 and para. 79 (2023).

⁷ *Kingdom of the Netherlands v. European Commission*, joined cases T-760/15 and T-636/16 (2019) (*Starbucks*).

⁸ *Luxembourg and Amazon v. Commission*, joined cases T-816/17 and T-318/18 (2021).

base. Therefore, the court seemed to accept the use of a range. On appeal,⁹ the EU's Court of Justice did not question the findings of the General Court.

In *Apple*,¹⁰ the General Court acknowledged that Ireland and Apple had submitted ad hoc TNMM analyses to show that profits fell within an arm's-length range. Again, the court's review focused on the commission's methodological choices. On appeal¹¹ the EU's Court of Justice did not challenge the General Court's treatment of ranges.

It seems reasonable to conclude that at least the General Court and EU's Court of Justice will accept the interquartile range as a valid expression of the arm's-length outcome, when the analysis is methodologically sound and there are no errors in comparability, profit indicator selection, or inconsistent metrics. While an interquartile range is clearly acceptable, uncertainty still exists regarding a full range. All the referenced cases refer to the OECD guidelines, and the EU's Court of Justice in *Fiat*¹² confirms the OECD guidelines' practical significance, although it stressed the primacy of domestic law. Moreover, the General Court focused on method and application of the analysis, not specifically on the use of a range. One conclusion would therefore be that both the General Court and the EU's Court of Justice would not disregard a full range by itself nor expect the interquartile range to be mandatory.

In *Avery Dennison*,¹³ the tax authority had adjusted the profitability of the company's marketing operations by applying an interquartile range to a set of comparable companies prepared by the taxpayer. The taxpayer argued that this statistical adjustment was arbitrary and lacked a legal basis under the applicable Chilean tax rules. The court ruled in favor of the taxpayer and noted that the tax authorities had failed to demonstrate why the full range of results was unreliable. The

court found that unless there were specific and identifiable defects that could justify the application of the interquartile range, the full range was obtained from a valid database analysis and should be respected.

In *Netherlands v. Tobacco*,¹⁴ the court dismissed the use of a full range because the taxpayer did not demonstrate that the functional profile warranted benchmarking across the entire range. The court found that the lesser functions with the taxpayer justified a narrower range.

In a Finnish case¹⁵ the court accepted that a full range may be applicable but dismissed the use of the full range because of the overall dispersion from -0.2 percent to 13.5 percent and not all observations being equally reliable. The court consequently found a narrower range more comparable.

Returning to the Danish courts, *EET* is not the first case for which the use of a full range versus the use of a narrower range is discussed, nor is it the first time the Danish courts hesitated to accept a narrower range per default. In *Viking Life Saving Equipment*,¹⁶ the court reviewed an analysis prepared by the tax authorities. The tax authorities had identified 58 potential comparables, which they had reduced to eight comparables, and for these eight comparables the tax authorities applied an interquartile range, leaving only four comparables. The court stated that the tax authorities had not justified why it was acceptable to use only the four companies in the interquartile range. Importantly, the court further stated that another analysis prepared by the taxpayer had used an interquartile range, which did not change the conclusion for dismissing the use of the narrower range. The case is a district court case and was overturned by the high court,¹⁷ which ruled that the application of the interquartile range must be regarded as a customary method, suitable and supported by objective considerations when the final population in the analysis are not perfect

⁹ *Commission v. Luxembourg and Amazon*, C-457/21 P (2023).

¹⁰ *Ireland and Apple Sales International and Apple Operations Europe v. Commission*, joined cases T-778/16 and T-892/16 (2020).

¹¹ *European Commission v. Ireland and Others*, C-465/20 P (2024) (*Apple*).

¹² *Fiat Chrysler Finance Europe and Ireland v. Commission*, joined cases C-885/19 P and C-898/19 P (2022).

¹³ Tax Court, *Chile v. Avery Dennison Chile S.A.*, Case No. RUT 96.721.090-0 (Mar. 2021).

¹⁴ Gerechtshof Amsterdam, *Netherlands v. "Tobacco BV"*, Case Nos. 22/2467, 22/2475, 24/40, 24/43, 24/57, and 24/60 (Sept. 2025).

¹⁵ Supreme Administrative Court, *Finland v. A Oy*, Case No. KHO:2021:127 (Sept. 2021).

¹⁶ Esbjerg district court, *Skatteministeriet v. Viking Life Saving Equipment*, BS-50961/2018-ESB (Apr. 2023).

¹⁷ Eastern High Court, *Skatteministeriet v. Viking Life Saving Equipment*, BS-24597/2023-VLR (Feb. 2025).

comparables. While not accepting the full range in the specific case, the high court does not require use of a narrower range.

Although only a few cases have been reviewed, a cautious conclusion seems to be that generally there is no mandatory requirement to use a range when assessing the arm's-length range of a data set. Rather, the courts, in accordance with the arm's-length principle, review the analysis of the dataset and whether there is reason to further narrow the set by statistical methods.

Country Considerations

While Denmark seems to follow the OECD principle of not using a mandatory narrower range, other countries have more detailed guidance.

On one end of the spectrum, similar to Denmark, there is the United Kingdom,¹⁸ which states in its recently updated international manual that when there is a larger number of comparables and comparability defects remain that cannot be identified and adjusted for, the use of the interquartile range is helpful to enhance the reliability of the analysis.

A mandatory approach seems to be the case for Germany¹⁹ and the United States,²⁰ where the interquartile range is the mandated statistical method for establishing the arm's-length range when there are material differences for which adjustments have not been made. This also seems to be the case for the new Brazilian rules. Finally, countries that include India,²¹ Vietnam,²² and Malaysia²³ in their transfer pricing guidelines seem to have strict rules for applying a narrower range.

¹⁸ HMRC International Manual (INTM 485120).

¹⁹ Section 1(3a) FTA.

²⁰ Reg. section 1.482-1(e)(2)(iii)(B).

²¹ Rule 10CA of the Income-tax Rules, 1962.

²² Decree 132/2020/ND-CP, article 4.

²³ Transfer Pricing Guidelines, para. 2.12, cf. subrule 13(5) of the Income Tax (Transfer Pricing) Rules 2023 [P.U.(A) 165/2023].

Conclusion

The *EET* judgment provides a pragmatic, evidence-based approach to statistical ranges in transfer pricing. While interquartile ranges remain a recognized tool to enhance reliability when comparability defects persist, they are not mandatory in all circumstances. In *EET*, the Supreme Court accepted that, given limited observations and data constraints at the gross margin level, the interquartile range had only limited probative weight. Results outside the interquartile range did not, by themselves, demonstrate non-arm's-length outcomes. Under these specific conditions, and after diligent screening for comparability and with no demonstrated defects warranting further narrowing, a full-range assessment could be relied upon.

The court also declined to substitute the taxpayer's gross-margin testing with TNMM solely on general comparability concerns, and it did not treat any divergence from the interquartile range as automatically requiring an adjustment to the median. It certainly seems that methodological discipline, transparent adjustments of the data, and consistency between indicators and datasets were decisive throughout.

As we all know — but sometimes forget — when preparing a comparability analysis, comparability should come first and statistics second. This is supported by the case law and guidance. When it comes to database analysis or any other analysis based on multiple data points, a quality functional profile for the tested party is necessary to prepare a meaningful and resilient search strategy. A resilient search strategy must be supported by a thorough qualitative screening to record why the remaining observations still have comparability defects before invoking any statistical narrowing. This likely does not change the bulk of transfer pricing audits going forward, but for situations when either the taxpayer or the tax authority wants to narrow an applied range, this should be a separate and specific discussion on comparability defects. ■