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Master Thesis

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Which changes to the anti-avoidance rule have impacted the precedent effects of ConocoPhillips III as a result of the legislation?

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Preface

This master thesis is the result of many hours' worth of hard work, cooperation, and dedication. Working on the thesis has been both exciting and frustrating, and with a steep learning curve.

Thank you to our supervisor, Eivind Furuseth, for guiding us through the process, all the while being supportive and optimistic on our behalf. It was also his expertise and pedagogical abilities that evoked our interest in tax.

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Abstract

This master thesis has aimed to gain an understanding of how the enactment of the general anti-avoidance rule in the Tax Act has affected Norwegian taxpayers. To do so, we have dissected elements from Rt-2014-227, also known as ConocoPhillips III, to exemplify which changes the legislation brings with it. We have chosen this case because its precedent effects created uncertainty in the tax world, where a demerger conducted almost simultaneously to selling immovable property in the form of shares became accepted practice.

Our interest in tax avoidance was prompted by the legislation itself, as we wanted to write about current affairs in the tax world. Part I includes a presentation of the topic and the thesis structure. Part II, analysis, starts off with a review of ConocoPhillips III and an examination of the changes to the general anti-avoidance rule as a result of the legislation, as well as an assessment of the relationship between the legislated anti-avoidance rule and ConocoPhillips III, with a conclusion of where the law currently stands. Furthermore, part II includes an analysis of arguments from the case that speak both for and against tax avoidance, where we have made conclusions as to whether the legislated anti-avoidance rule has had any impact on predictability for taxpayers, their need for legal expertise, the threshold for counteraction and if the time between demerging and selling shares is a factor that has lost its value. Our findings show that the precedent effects of the case have not changed as a result of the legislation, although the Ministry of Finance's interpretation of the anti-avoidance bill created a plethora of uncertainty regarding whether the transaction chain in the case would remain accepted practice within the bounds of legal tax planning.

Lastly, we have included three additional components; an assessment of whether the outcome of the case would be different after the legislation, the ethical and socio-economic consequences of the legislation, and whether the rule is in conflict with any international law.

Glossary[1]

Binding ruling – Bindende forhåndsuttalelser

Business value – Forretningsmessig egenverdi

Case law – Rettspraksis

Circumvention – Omgåelse

Counteraction – Gjennomskjæring

General anti-avoidance rule – Den generelle omgåelsesregelen

Immovable property – Fast eiendom

Main condition – Grunnvilkåret

Motive test/assessment – Formålsvurdering

Non-statutory anti-avoidance rule –

Omgåelsesnormen/gjennomskjæringsnormen

Overall assessment – Totalvurderingen

Participation exemption rule – Fritaksmetoden

Plot – Tomt

Premise – Domspremiss

Tax avoidance – Skatteomgåelse

[1] See Appendix 1 for Glossary Commentary and sources

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PART I – INTRODUCTION

1. Introduction

1.1 Research question

This master thesis analyses the general anti-avoidance rule in the Norwegian Tax Act §13-2, which entered into force on the 1st of January 2020. The Norwegian authorities have since the 1920s used a non-statutory general anti-avoidance rule when the main motive of a chosen transaction has been to achieve a tax benefit (exemption, deduction, favorable timing), i.e. when the taxpayer has attempted to avoid tax.

The need for a legislated general anti-avoidance rule has been discussed a lot in the recent decade. In 2016, Fredrik Zimmer was appointed by the Ministry of Finance to evaluate certain aspects of the non-statutory general anti-avoidance rule, and propose a legislated general anti-avoidance rule (NOU 2016:5 "The anti-avoidance rule in the Tax Act")[2]. One of the main controversies mentioned in the report is Rt-2014-227 (hereafter referred to as ConocoPhillips III), where the taxpayer used the opportunity to avoid tax by using the participation exemption rule in the Tax Act §2-38. This was done by conducting a demerger almost simultaneously to selling immovable property through shares. In the Supreme Court's ruling, they focused on the purpose behind the participation exemption rule, rather than the avoidance of the capital gains tax rule. Before the case, the business world was of an understanding that there needed to be a sufficient amount of time between the two transactions. Thus, after the Supreme Court ruled ConocoPhillips III as outside the scope of tax avoidance, this led to divided opinions regarding the current rule, which will be thoroughly evaluated in subsection three of the thesis.

Although §13-2 in the Tax Act is mainly a continuation of the non-statutory anti-avoidance rule, we will in subsection 2.3 of the thesis investigate the three

[2] Gjeruldsen & Herde, (2016)

central changes. These are: 1) tax benefits abroad are no longer to be seen as a business motive, 2) the assessment of the taxpayer's motive is to now be wholly objective and tied to what a rational taxpayer typically would do, and 3) avoidance opportunities in preparatory works are no longer to benefit the taxpayer. For a more practical approach, we will use ConocoPhillips III to exemplify the impact of the legislation.

The mentioned changes have led us to raise several question, such as whether a taxpayer's predictability is preserved, or if this is dependent on case law. Furthermore, seeing as the legislation encompasses an objective motive assessment, we wonder whether the need for legal expertise has decreased, as the Ministry of Finance used this argument as one of the reasons for the legislation.[3] In ConocoPhillips III, the Supreme Court refrained from seeing the timing between the transactions as an important element. Due to this, we will look into whether this decision has had a precedent effect beyond the concrete circumstances. This leads to our main research question; *Which changes to the anti-avoidance rule have impacted the precedent effects of ConocoPhillips III as a result of the legislation?*

1.2 Delimitation

The thesis is delimited to tax law-related considerations that are directly tied to tax avoidance according to the Tax Act §13-2, and the participation exemption rule in the Tax Act §2-38. Other tax areas like VAT will therefore not be covered. Even though tax avoidance related to VAT is relevant and the same arguments could apply, we have decided not to investigate this area further. We will also forbear writing about corporate and company law issues that arise along the way relevant to ConocoPhillips III, such as investigating a company's structure and whether a demerger is carried out in accordance with company law regulations. But we will briefly look into the contractual issues, in which we want to investigate the timeline of when a contract becomes binding due to formal requirements, such as fixed price and transferred rights, etc.

[3] Finansdepartementet, (2019)

As the thesis focuses on tax avoidance, the topic of tax evasion, which is where the taxpayer provides incorrect information to the tax authorities with the intention of evading tax, falls outside our scope. This is because tax evasion is tied to illegal transactions, such as under-reporting income, while tax avoidance is where companies use legal provisions creatively, and often against the purpose behind the regulations.

Furthermore, we wish to delimitate the thesis against the special anti-avoidance rule found in the Tax Act §13-3 (previously § 14-90). This rule encompasses the counteraction of transactions regarding acquisitions of empty companies with an economic deficit, and is therefore not relevant to ConocoPhillips III or our analysis.

In ConocoPhillips III, there is also an issue related to the Petroleum Tax Act §3 letter f, fourth paragraph, concerning withdrawals from the oil business and the tax consequences this entails. As the thesis is delimited to only concern tax avoidance, we will not investigate this further.

The Tax Act §2-38 also encompasses other matters, such as tax-free dividend, but this thesis is exclusively related to the use of the participation exemption rule subsequent to a demerger.

Concerning demerger regulations in chapter 14 of The Companies Act, the consequences of their use will only be considered against the anti-avoidance rule.

Lastly, we wish to clarify that the mention of the tax law exclusively refers to Norwegian legislation, and where the thesis discusses international law, this will be specified throughout the thesis.

1.3 Thesis structure

In the second part of the thesis, there is an introduction of ConocoPhillips III that gives insight into which arguments the Supreme Court used in their ruling of the case. We have decided to use this case for a more practical approach when looking at specific changes in anti-avoidance regulation. Part II then progresses with an explanation of the anti-avoidance rule's main components, followed by a description of the alterations to the rule after the legislation. The legislated rule is mainly a continuation of the non-statutory anti-avoidance rule, but there are certain changes worth looking into. The legislation states a change related to conducting an objective motive assessment rather than looking at the subjective motive from the taxpayer's perspective, a change in how to assess the purpose behind provisions in preparatory works in the Tax Act, and the weighing of achieved tax benefits abroad.

Part II further focuses on the precedent effects of ConocoPhillips III, the elements of the case that have resulted in accepted practice today, and how the business world had to argue with the Ministry of Finance to uphold the practice. Thereafter we will investigate the effects of ConocoPhillips III for taxpayers after the legislation. We are looking into whether the legislation has made the general anti-avoidance rule more predictable, and if so, for who. There have been discussions in the tax world regarding the necessity of the legislation, and whether it has caused more uncertainty after a long established practice.

Secondly, there is a subject matter of whether taxpayers with access to legal expertise are in a better position to avoid taxes. The Minister of Finance at the time, Siv Jensen, stated that since the legislation changes the overall assessment to focus on objective motives, this will reduce the advantage of taxpayers with legal advisors[4], but this is a disputable statement.

Thirdly, we find it interesting to see if the enactment of the Tax Act §13-2 has altered the discussion of the time aspect between demerging and selling shares.

[4] Jensen, (2019)

There have previously been discussions related to whether the timeline of the demerger and sale has had any impact on the authorities' possibility to apply the anti-avoidance rule on a transaction. The discussion is still relevant, but after ConocoPhillips III, the Supreme Court opened up for companies to demerge almost simultaneously with the actual sale.

Fourthly, we are looking into whether the threshold for anti-avoidance has been lowered as a result of the legislation. NOU 2016:5 claims that the legislation will give the authorities a better legal ground for applying the anti-avoidance rule on transactions they deem as disloyal, and the Supreme Court will now have the law on their side rather than just a non-statutory rule.

To gain a deeper understanding of our research question, we have conducted qualitative research through interviews with relevant business representatives in Norway. We have embedded arguments from experienced tax lawyers in our thesis to better understand the practical effects of the legislation on the business world, which have been included in part II of the thesis. However, as the interviews were conducted more as informal conversations, we have used the understanding we gained to formulate and enhance our arguments, and the interview subjects are therefore never quoted.

Furthermore in part II, after dissecting and analyzing the central factors of the case, we will create a comparison of the relevant arguments both before and after the legislation to see if the outcome might have been different had the case occurred today.

Subsequent to this, we are looking into whether there are any socio-economic or ethical consequences as a result of the legislation, especially looking into transactions that lead to different costs for society, like effective allocation of resources and transaction costs.

Lastly, we will briefly look into the enactment of the general anti-avoidance rule's potential conflicts with EU regulations or international tax treaties.

PART II – ANALYSIS

2. ConocoPhillips III and the anti-avoidance rule

2.1 ConocoPhillips III

ConocoPhillips III (Rt-2014-227, also known as Tangen 7), is a Supreme Court case where one of the main questions was whether a demerger followed by a tax-free sale of shares of an immovable property holding company could be reclassified to a direct sale of immovable property. The authorities' central argument was that the company, ConocoPhillips, had conducted an abusive tax avoidance scheme.

ConocoPhillips was a petroleum company who had created a subsidiary that was initially established as a single purpose company with the purpose of renting office space to its parent company. Later on, the subsidiary got involved in projects other than immovable property, which had an impact on the legal dispute. The subsidiary decided to demerge its assets that were unrelated to immovable property right after reaching an agreement with a buyer, so that ConocoPhillips could sell the company as a joint-stock company with only one asset; Tangen 7, rather than selling the immovable property directly.

ConocoPhillips had entered into an agreement with a buyer that consisted of selling the single purpose immovable property holding company in 2005. Instead of selling the immovable property directly, selling shares allowed ConocoPhillips to claim a tax-free share gain, cf. the participation exemption rule in the Tax Act §2-38 (2) a). In addition, the buyer would also avoid document fees.

Although the Supreme Court stated that the tax savings was the main motivating factor for ConocoPhillips, the emphasis was put on the consideration of acting in contrary to the purpose of the tax rules, which they stated that ConocoPhillips had not done. Moreover, the Supreme Court

believed a demerger was an appropriate way to clean up a company before a share sale.[5] The fact that the demerger and sale happened almost simultaneously was not seen as disloyal.

The Supreme Court highlighted that the purpose of the participation exemption rule is to avoid chain taxation of share income in the ownership structure with several Norwegian companies. In connection with this, the Supreme Court pointed out that the immovable property's income is continuously taxed from the company itself, and that the value generation is transferred to the buyer.[6] The share income therefore remained in the company sector, and chain taxation was avoided in line with the purpose behind the participation exemption rule.

In light of ConocoPhillips III, the tax authorities stated that for future cases, they will not apply the general anti-avoidance rule on a transaction where a taxpayer executes a tax-free demerger as an intermediary transaction to come into the position where they can sell immovable property through shares. The tax authorities therefore concluded by stating that pending cases regarding the application of the general anti-avoidance rule on a demerger and a subsequent sale of shares shall be ruled in favor of the taxpayer.[7] Although such a precedent effect is normally only applicable to cases with identical facts, this specific case also had the same impact on situations where other assets than immovable property is being sold. In other words, ConocoPhillips III opened up for companies to sell any asset through a tax-free sale of shares right after conducting a demerger, which was subsequently reflected in several of the tax authorities' binding rulings.[8]

[5] Sticos, (2014)
[6] Rt-2014-227
[7] Skattedirektoraters domskommentar av 31.03.2014
[8] BFU 8/2014

2.2 The anti-avoidance rule's components

Even though there have been several Supreme Court cases on this topic, it is apparent that the line between tax planning and tax avoidance has been a difficult subject to consider, as it is composed of several factors. Since the non-statutory anti-avoidance rule was created through Supreme Court case law and legal theory, the legislation was amongst several reasons motivated by the wish to increase the predictability of the rule, as well as developing an adhering bond to the principle of legality; as the authorities have earlier been able to make costly interventions regarding transactions related to tax avoidance without having a legal basis.[9] According to NOU 2016:5 ("The avoidance rule in the Tax Act"), the fact that the taxpayer has the freedom of action to implement tax planning in addition to the wish to pay the least possible tax, is a challenge to the tax system's equilibrium.[10] The tax law is formulated vaguely and on a general basis to be applicable to a variety of situations. The result of this can be differing discretionary interpretations and disagreements in the business world.

Although tax planning is legal and the taxpayer is under no legal obligation to choose the taxation alternative that results in the highest amount of tax due, not all adjustments to achieve the lowest possible tax will be accepted by authorities. This is due to the fact that tax avoidance will lead to a reduction in tax proceeds.[11] Therefore, the possibility to apply the anti-avoidance rule on a transaction has been important for the authorities in order to ensure that taxation occurs in line with legal tax planning.

Due to a variety of statements regarding tax avoidance from the Supreme Court in previous years, the need for a legal standard concerning the ability to apply the anti-avoidance rule on transactions is dependent on having a fixed frame as to not be too erratic. The main purpose of the legislation is to effectively counteract erosion of the Norwegian tax base, and at the same time safeguard

[9] Innst. 24 L (2019-2020)
[10] NOU 2016:5, p. 10
[11] NOU 2016:5, p. 10

taxpayers' need for predictability and legal safety in a reasonable manner.[12] According to the Parliament, the legislation will provide a more formal and predictable legal development under the control of the legislature, based on democratic processes. And the general anti-avoidance rule is now clarified by formal law and preparatory works, not just legal theory and case law.[13]

NOU 2016:5 states that the legislated anti-avoidance rule should provide an opportunity to base a taxation on an analogous interpretation of burdensome tax regulations, or a restrictive application of favorable tax rules where a reclassification is not possible.[14] An example is given by the rule regarding tax liability of profits from selling immovable property, which will be applied analogously to whoever sells the shares of a company that owns immovable property. Or by the rule regarding tax positions being non-transferable, which will be applied analogously on the company when it is sold, as well as that it further arranges for the authorities' possibility to apply the anti-avoidance rule.[15]

The legislated tax avoidance rule has two main components; the main condition found in the Tax Act § 13-2 (2) letter a, and the overall assessment featured in § 13-2 (2) letter b, and § 13-2 (3). The legislated rule is as earlier mentioned primarily a continuation of the non-statutory anti-avoidance rule, and thus the study of the two components below are explained in their general form, i.e. with no distinction between the former non-statutory rule and the current legislated rule. The changes to the tax avoidance rule that came with the legislation will be reviewed in subsection 2.3.

[12] NOU 2016:5, p. 9
[13] Innst. 24 L (2019-2020)
[14] NOU 2016:5, p. 79
[15] NOU 2016:5, p. 108

2.2.1 The main condition

In Rt-2006-1232 (Telenor), the Supreme Court states the following:

> "*... (51) If the dominant effect of the transaction is that the taxpayer saves tax, and the saving is of considerable size, we can strongly presume that this was the main motivating factor for the chosen transaction. In these cases, it will be up to the taxpayer to prove that the tax savings was not his main motivation.*"[16]

The principal emphasis must therefore be the motive of a transaction versus non-tax related motives for the main condition to apply.[17] However, the denotation of *dominant effect* entails that the motive behind a transaction at the very least must surpass all other motives altogether.[18]

Einar Harboe has in relation to this highlighted the following, "maybe the relevant question then becomes: *would this transaction have taken place at all if it had not been for the achieved tax benefits?*"[19]

The main condition does not alone decide whether the anti-avoidance rule is applicable to a transaction. This can be illustrated by ConocoPhillips III, where the Supreme Court highlighted that the main condition was fulfilled, but concluded that the overall assessment indicated another outcome. According to previous cases, we see that the outcome of the non-statutory anti-avoidance rule is mostly based on the overall assessment.

[16] Our translation. Original text: "Dersom den dominerende virkning av disposisjonen er at skattyteren sparer skatt, og denne skattebesparelse er av noe omfang, er det en sterk presumsjon for at denne har vært den viktigste motivasjonsfaktor. I slike tilfeller må det være opp til skattyteren å godtgjøre at skattebesparelsen likevel ikke har vært den viktigste motivasjonsfaktor for ham."
[17] NOU 2016:5, p. 67
[18] Skar, (2015)
[19] Harboe, (2012), p. 244

2.2.2 The overall assessment

In the overall assessment, the main emphasis is whether the transaction is in line with the purpose of the law, as well as considering the business value of the chosen transaction, and also the taxpayer's loyalty to the law. In ConocoPhillips III, it was essential that the demerger was in line with the purpose behind the participation exemption rule. The Supreme Court emphasized the purposes of the law rather than the business value of the transaction and the achieved tax benefits by selling the company in shares instead of directly as immovable property.

According to NOU 2016:5, there has been uncertainty associated with how the overall assessment should be implemented in formal law. For example, the Supreme Court assessed ConocoPhillips's choice of transaction in ConocoPhillips III to be in line with the purpose behind the participation exemption rule, but did not discuss the purpose behind taxation of immovable property sale.[20] The Supreme Court has used the same argument in other cases as well. For example, in Rt-2008-1510 (Reitan), where the outcome of the case would have been the same if the taxpayer had chosen another tax position, and the anti-avoidance rule was therefore not applicable.

Furthermore, if a transaction is seen as disloyal to the purpose behind tax regulations, this would indicate a ground for applying the anti-avoidance rule. One argument of this assessment is to look at the time period between the business restructure and the time of the transaction, cf. ConocoPhillips III. If the business restructure happens right before a transaction, this can indicate disloyalty to the tax regulations. We will look further into the element of timing later in this part of the thesis.

The legislated tax avoidance rule now non-exhaustively lists six terms in the Tax Act § 13-2 (3), in which the overall assessment is to be based on. These are:

[20] NOU 2016:5, p. 30

a. the business value of a transaction or arrangement, other than tax advantages in Norway or abroad
b. the size of the tax advantage and the extent of tax purpose
c. if the arrangement or transaction is a rational way to achieve the economic purpose of the arrangement or transaction
d. if the same result could have been achieved through alternatives that would not be in conflict with this rule
e. the wording of the relevant tax regulations, including whether the rule is clearly restricted in timing, quantitative or in any other way
f. whether tax rules have been exploited in a way that is contrary to their purpose or fundamental tax considerations.[21]

The weighting of these terms will vary from case to case. This is because the Ministry of Finance has highlighted the importance of the rule having the ability to be applicable to new and unknown instances. It is therefore not possible to list all relevant terms.

As the business value can vary from taxpayer to taxpayer and case to case, although the chosen transaction is the same, a ruling in one case will become less relevant for the decision in another, which will likely lead to less predictability and a larger need for advance statements and binding rulings from the authorities.[22]

2.3 Alterations to the anti-avoidance rule as a result of the legislation

The new law is as previously mentioned based on the non-statutory anti-avoidance rule, but with some specific adjustments. Under the main condition, the judgments being made now have to be based on an objective motive test based on what a rational taxpayer typically would have had as their motive regarding the same transaction, instead of looking at the taxpayer's subjective motives.

[21] Arntzen de Besche, (2019)
[22] Deloitte Tax & Legal, (2019)

Furthermore, under the overall assessment, tax benefits abroad will no longer be characterized as a business motive, which can be unfortunate for companies that operate with international tax planning. The last main element is that the possibilities of tax avoidance as presented in preparatory works are not to benefit the taxpayer unless it falls under a special tax avoidance rule (SAAR).[23] This would likely have changed the arguments presented in ConocoPhillips III, as it in 2014 was given support by the fact that the preparatory works allowed a demerger as an option for tax planning. We will look further into this towards the end of the thesis (subsection 5).

2.3.1 Transition from a subjective to an objective motive test

One of the biggest changes due to the legislation lies in the assessment of the main condition. In tax avoidance cases, the Supreme Court has in recent years used a more subjective approach where the taxpayer's real motive is used as evidence, which makes the objective circumstances additional matters of evidence. This can be illustrated with the following example: In Rt-2006-1232 (Telenor), the Supreme Court concluded that even though the tax benefit was of a substantial size, which in itself is of significant importance in order to assume that the taxpayer's motive with the chosen transaction was to achieve this, the main condition stating that the tax benefit has to be the primary motivating factor was not fulfilled. This was because the Court estimated other circumstances; a shareholder agreement and a financing scheme, to be of greater importance for the taxpayer's choice.[24] The thesis will not look further into this case, but it is reasonable to assume that if the tax avoidance rule had been legislated at the time of the case as it is today, the achieved tax benefit would have been weighted more heavily based on an objective assessment.[25]

The element of an objective motive test is however not included in the formal wording of the law, and one needs to look at the preparatory works in order to understand how the main condition is to be assessed.

[23] NOU 2016:5, p. 28
[24] Rt-2006-1232
[25] NOU 2016:5, p. 103

An anti-avoidance rule based on a subjective criterion allows the taxpayers to justify their choice of taxation on a moral level, which makes it difficult to conduct motive assessments, as well as to have a clear relationship to general interpretations of the law.[26] An objective assessment will however reduce the taxpayers' possibility to fabricate business motives through emails, notes from meetings, etc., for their chosen transaction. The assessment will be detached from the concrete decision makers and instead attached to what a rational person typically would have had as their motive for such a transaction. The assessment will therefore be based on effects that appear as likely at the time of the transaction.[27] Consequently, an objective assessment results in simpler evaluations of evidence.

The Norwegian Ministry of Finance has stated that the change from a subjective to an objective motive test will serve as a satisfactory basis for increased equal treatment of taxpayers without the need for legal expertise.[28] This was reasoned by the fact that tax experts have a much stronger basis for creating subjective motives that can be used as arguments for business value as opposed to taxpayers without comprehensive knowledge of the relevant regulations. We will look further into the taxpayer's need for legal expertise in subsection 4.2 of the thesis.

A possible consequence of the change from a subjective to an objective motive test is that this lowers the threshold for finding a tax-related main motive, which means that the tax authorities will likely state cases for tax avoidance more often. But the general anti-avoidance rule has since its development had the taxpayers' motives behind the chosen transactions in its main focus. Such a purpose is in reality accounted for by subjective terms. In practice, the establishment of the taxpayers' motives has in earlier court rulings been done by assessing the objective circumstances, and from this assumed what the taxpayer's motive has been, which results in cases being judged based on objective circumstances as evidence. There is therefore a sharp distinction

[26] NOU 2016:5, p. 77
[27] Banoun, (2019)
[28] Revisjon og regnskap, (2019)

between a subjective and an objective assessment, and the tax authorities and taxpayers will likely have different opinions.

Although the change in the motive test is significant in theory, the above argumentation indicates that the change introduced by the legislation will not have a large practical impact in the way the Supreme Court evaluates the underlying motive. With a complete objective assessment however, evidence is detached from the relevant taxpayer and is instead focused on reflecting the real economic content of the transaction. This raises the question of whether taxpayers' opportunity to be creative in their tax planning is diminished.

As the tax law has been under constant development, most areas are highly regulated. This is due to the continuous improvement of the legislature as well as increased international cooperation. This limits the possibility for tax planning, as well as the opportunity for taxpayers to be creative in generating relevant business motives to explain their choice of transaction. With a subjective assessment, two similar cases can have different outcomes, which would make the application of the anti-avoidance rule rather unpredictable. This has however been eliminated now that the motive test is meant to reflect what a rational taxpayer typically would have done.

It is challenging to determine whether the objective motive test restricts the taxpayer's room for tax planning without there having been any legal action yet. Although the creative aspect has been diminished, based on the fact that the anti-avoidance rule is vaguely formulated in order to be applicable to new and unknown situations, we believe that new aspects where the taxpayer can be creative in their arguments will occur as new cases unfold, and that the transition to a complete objective assessment will not have as much of a practical impact even though it has changed in theory.

2.3.2 Regarding opportunities for abusive arrangements presented in preparatory works of the Tax Act

The preparatory works serve as a central source when clarifying what the legislature has meant with tax rules and regulations, as well as to identify what their purposes are. If we only were to assess the transaction in ConocoPhillips III in light of the capital gains tax rule, it would be in opposition to the purpose if the transaction was not treated as a sale of immovable property. But since the demerger- and the participation exemption rule are both special rules that have been implemented in the Tax Act later on, this complicates the motive assessment, and the question of which motive should be considered is raised. The challenge is barely discussed by the tax authorities, but Bettina Banoun's PhD dissertation summarizes the problem, where the motive assessments need to be seen in relation to each other when faced with transaction rows.[29] From this we can say that the Tax Act has gone through some changes, and has to be seen in light of this.

Firstly, in the preparatory works of the demerger rules, the anti-avoidance rule was discussed. It emphasizes that the non-statutory anti-avoidance rule will not be applicable to natural restructures.[30] Tax-free demergers make it possible for a company's operations to change from being organized in one company to an organization in several companies without having to pay tax. This is so that companies can organize themselves freely with tax neutrality. The meaning behind this is to partly hinder assets that could have been invested differently to be locked. Also before the enactment of the Tax Act §11-4, it was clear that demergers could take place tax-free based on certain conditions, cf. Rt-1978-1184 (Grecon).

Secondly, the preparatory works of the Tax Act's participation exemption rule (Tax Act §2-38) states that the non-statutory anti-avoidance rule encompasses that the opportunity to achieve a tax-free demerger will not be applicable if the main motive was to save tax, and that this was dominant in relation to other

[29] Banoun, (2003), p. 343
[30] Ot.prp. nr. 21 (2006–2005)

business motives.[31] It emphasizes that the possibility to apply the anti-avoidance rule to a transaction is present where the choice of transaction is primarily tax-motivated and disloyal to the purpose behind the tax laws, but with conflicting statements.[32] At the same time, the preparatory works state that applying the anti-avoidance rule to a transaction can be difficult to achieve if the transaction has a certain business value.[33] For example, the preparatory works open up for the taxpayer's opportunity to adjust to the law by making certain changes to their business that for example leads to the company's assets being sold as shares is addressed. This is typically done by a demerger, by using the rules regarding demergers with tax continuity, exactly like ConocoPhillips did in Rt-2014-227.

In ConocoPhillips III, the Supreme Court had difficulties seeing the relevant transaction as in opposition to the purpose behind the participation exemption rule based on statements in its preparatory works. One of the points the Supreme Court made was that the underlying values in the immovable property holding company would be taxed anyway at a later point in time. As long as the gain does not leave the company structure, this only means that chain taxation has been avoided in line with the purpose behind the participation exemption rule. This point of view is reasonable, because looking at the sets of rules by themselves and the purpose behind them in preparatory works, the participation exemption rule's preparatory works will by itself not be enough to indicate tax avoidance. This issue is barely discussed by the Supreme Court in ConocoPhillips III, but they comment on the impact of these rules on the transaction:

> *"... (60) The way the participation exemption rule is designed and justified, there is from my general point of view nothing to object to when an immovable property is transferred through the sale of shares of a subsidiary, if the only asset that is meant to be sold is the immovable property. With this in mind, I have difficulty seeing how this*

[31] Ot.prp. nr. 71 (1995–96) p. 22
[32] Ot.prp. nr. 1 (2004–2005) p. 75
[33] Ot.prp. nr. 71 (1995–96) p. 22

should be any different if the situation - like in our case - is achieved through a demerger."[34]

The Supreme Court has also stated that the business world is aligned with the participation exemption rule, and since it allows for this type of structuring, the anti-avoidance rule cannot be applied to a transaction in such a situation. In the overall assessment made in ConocoPhillips III, the Supreme Court stated that seeing as the legislature has consciously introduced a set of rules that allow the use of the organizational structure and approach that the case is an example of, this cannot be overlooked[35], which leads to a lot of immovable property being sold as shares.[36] However, this is no limit in itself, as it is simply an ascertainment of the anti-avoidance rule's main element.

The challenge in a case such as ConocoPhillips III, where both sets of rules have been used, is that there are several preparatory works, and these do not necessarily have the same purpose. The precedent ruling in the case has resulted in disagreements in the business world, and a particular element that has been criticized is the Supreme Court's weighting of the purpose behind the rules related to demergers and participation exemption, which was done at the expense of the capital gains tax rule. In the Tax Act §13-2 (3) f), the assessment emphasizes the purpose behind provisions that are avoided rather than the provision that has been used to avoid tax.[37]

Because the purpose behind different sets of rules have to be seen in light of each other and considered based on an overall assessment relevant to a particular situation, it is difficult to conclude whether this element alone would have changed the outcome of ConocoPhillips III. However, the Supreme Court put the main emphasis in the case on whether the tax rules had been exploited

[34] Our translation. Original text: "Slik fritaksmodellen er utformet og begrunnet, er det etter mitt syn generelt ikke noe å innvende mot overføring av eiendom gjennom skattefritt salg av aksjene i et datterselskap hvis eneste eiendel er den faste eiendommen som ønskes solgt. Med dette som utgangspunkt har jeg vanskelig for å se at det skulle stille seg annerledes om denne situasjonen – som i vår sak – oppnås gjennom en fisjon."
[35] Rt. 2014-277
[36] *(Meld)* St. 11 (2010–2011): Evaluering av skattereformen 2006, p. 103
[37] Prop. 98 L (2018–2019)

in opposition to their purpose, which is why they concluded that the demerger and the participation exemption rule had not been unfairly taken advantage of. The fact that an avoidance opportunity is present in preparatory works of these rules was more of a supportive argument, with the assessment of purpose violation being the main argument. But since the Tax Act is vaguely formulated, application of the general anti-avoidance rule is complicated because the purpose behind different sets of rules is not always clear. Also because different laws have different purposes, it is difficult to determine which purpose one is trying to safeguard and which one tries to circumvent. This is a fluid assessment with different possibilities for interpretation.

2.3.3 Tax savings abroad

Rt-2002-456 (Hydro Canada) is a case that led to a lot of criticism directed at the Supreme Court related to how they used the anti-avoidance rule, and it was one of the three cases the Ministry of Finance wanted Zimmer to look further into in NOU 2016:5.

The dispute in the case revolved around whether Norsk Hydro ASA could claim deduction in their income for loss by selling shares from one subsidiary to another, cf. the Tax Act § 44 (1) letter d. The case was ruled with a 3-2 dissent. The majority of the Supreme Court representatives stated that there was a definite ascertainable loss because the transfer had resulted in Hydro losing control over the shareholder rights in Hydro Canada.

Although an important motive for the transaction was to save Norwegian tax, the transaction was after the overall assessment not seen as disloyal, because the tax savings in Denmark was weighted heavily as a business motive, and the anti-avoidance rule was therefore not applicable.

After the ruling, several representatives from the business world criticized the fact that a tax benefit abroad was seen as a business motive, i.e. a non-tax related motive.[38] The case is a good example of why the legislature has decided

[38] NOU 2016:5, p. 90

to exempt achieved tax benefits abroad from the assessment of the legislated general anti-avoidance rule altogether, which means that a tax benefit abroad will no longer speak for a taxpayer's business motive.

This change can likely be deemed a disadvantage for companies wanting to establish themselves abroad in order to fall under favorable foreign tax rules. The representatives from the business world that we have interviewed think that there should be a distinction between normal tax planning, for example a company trying to enter the corporate consolidation rules in Denmark, versus more aggressive tax planning. However, NOU 2016:5 states that it is not pertinent for the Norwegian government to restrict taxation in Norway due to a taxpayer's achieved tax benefit abroad. This would entail that the anti-avoidance rule could be difficult to apply in a situation where the taxpayer has exploited the differences between the laws of two (or more) countries. If the taxpayer through a "double dip" has received depreciation deductions in both Norway and abroad, he cannot be taxed in Norway for the tax benefit from the deduction abroad.[39]

[39] NOU 2016:5, p. 82

3. The impact of ConocoPhillips III on transactions subject to the application of the anti-avoidance rule

3.1 The precedent effects of the case up until the legislation

Before ConocoPhillips III, the tax authorities were under the impression that a demerger followed by selling shares and falling under the scope of the participation exemption rule was a transaction subject to the application of the general anti-avoidance rule, and this was stated in several binding rulings.[40]

A taxpayer wishing to use a demerger as an intermediary transaction to sell an immovable property as shares would at the time be advised by legal experts to ask for a clarification through a binding ruling in order to ensure the legality of the transaction chain, especially considering the proximity in timing between the demerger and the sale.

Before the case, it was also seen as more practical to demerge an immovable property and place this in a single purpose subsidiary, but ConocoPhillips III opened up for the possibility to demerge other assets and sell the original subsidiary with the remaining immovable property instead.

A direct sale of the immovable property would as earlier mentioned have triggered capital gains tax, as well as document fees for the buyer. The dispute in the case therefore revolved around whether the latent profit linked to the subsidiary as a result of the demerger and sale of shares was to be taxed as if the immovable property had been sold directly, i.e. if the transaction could be reclassified as a direct sale of immovable property.

The Supreme Court assessed that the transaction was mainly driven by the tax motive, but since the transaction was in line with the purpose behind the participation exemption rule, they refrained from applying the anti-avoidance rule.

[40] BFU 05/2005

The Supreme Court's ruling is reasonable at a macro level, as they do not distinguish between taxpayers who have organized themselves with single purpose companies and taxpayers who make restructures to conduct certain transactions. The underlying values will be taxed, but this tax is now payable by either the new owner, or possibly when the private shareholder receives dividends from his investments. Such a rule will also prevent lock-in effects, i.e. facilitate for an increased level of transactions also reasonable on a macro level. Fredrik Zimmer and the Ministry of Finance have chosen a micro level approach, and believe that the series of transactions should be taxed one more time, in addition to the taxation of the new owner of the immovable property and private shareholders for future dividends.[41]

To ConocoPhillips' organization restructure in Rt-2014-277, the first voter in the case states the following:

> "… (66) *In the overall assessment of tax avoidance, I believe that we cannot dismiss that the legislature consciously has introduced a set of rules that invite having exactly that organizational form and approach that our case is an example of. At the same time, the legislature has - after detailed assessments on two occasions - restrained from legislating rules that can confine the range of tax exemption if desired. The tax authorities and the courts should in such a situation, in my opinion, be cautious to apply the non-statutory anti-avoidance rule. I refer to my previous statement regarding the consideration of predictable rules in the tax law field."*[42]

In this case, The Supreme Court sets the threshold for applying the anti-avoidance rule high by pointing out that the regulations allow for this course of

[41] Deloitte Tax & Legal, (2019)

[42] Our translation. Original text: "I totalvurderingen av om gjennomskjæring skal foretas mener jeg det ikke kan ses bort fra at lovgiveren med åpne øyne har innført et regelverk som innbyr til nettopp den organisasjonsformen og fremgangsmåten som vår sak er et eksempel på. Samtidig har lovgiveren – etter utførlige vurderinger ved to anledninger – avstått fra å lovfeste regler som kunne begrense rekkevidden av skattefritaket dersom det var ønskelig. Ligningsmyndighetene, og domstolene, bør i en slik situasjon etter min oppfatning være varsomme med å anvende den ulovfestede gjennomskjæringsregelen. Jeg viser til det jeg tidligere har uttalt om hensynet til forutberegnelige regler på skatterettens område."

action, that the legislature is aware of the possibility to avoid tax through this but still refrains from introducing a restriction, and that the anti-avoidance rule due to these grounds have to be applied cautiously, based on the fact that the tax system is meant to be predictable.

In the tax authorities' comment on the outcome of ConocoPhillips III, they state the following:

> "*For future practice, the tax authorities assume that the non-statutory rule of anti-avoidance will not be applicable when a taxpayer uses a demerger as an intermediary transaction to come into the position to sell assets by selling shares.*"[43]

To ensure complete predictability, taxpayers requested several binding rulings. In BFU 8/2014, the tax authorities stated the same as in the above quote.

Their statement clearly does not distinguish between different types of assets, and thus demerging parts of a subsidiary and selling either immovable property or other assets was after the ruling of ConocoPhillips III deemed as accepted practice. This was a logical interpretation by the tax authorities, seeing as the Supreme Court's arguments in the case were not delimited to immovable property, as well as there being no reason to give any special treatment to the sale of immovable property rather than other types of assets.[44]

3.1.1 The importance of allowing ConocoPhillips III's transaction chain

If a demerger prior to selling shares was to be a transaction subject to the application of the anti-avoidance rule, many companies would have to spend more time planning a sale in order to demerge well ahead in time. This can however lead to lock-in effects, which are in opposition to the purpose behind

[43] Our translation. Original text: "For fremtiden legger Skattedirektoratet til grunn at den ulovfestede gjennomskjæringsregel ikke kommer til anvendelse når skattyter benytter skattefri fisjon som mellomledd for å komme i posisjon til å selge innmat/virksomhet ved salg av aksjer." Skatteetaten, (2014).
[44] Hemnes, (2020)

the participation exemption rule. In addition, such a rigid frame opens up for discretionary assessments, which can result in decreased predictability and stability – both in opposition to the purpose of the tax reform.[45]

If the tax avoidance rule was to be applicable in these cases, this would be problematic because it would in a way be used to remedy system weaknesses in regulation, which the Ministry of Finance has earlier warned against.[46]

In ConocoPhillips III, the sale of the immovable property Tangen 7 in the form of shares had already been decided before the demerger took place. If this is to be seen as disloyal to the tax law, it would stimulate the business world to establish single purpose subsidiaries with one immovable property in each subsidiary in the means of being able to sell immovable properties through shares at a later point in time. However, this structure is not necessarily very expedient and might result in additional costs related to accounting and auditing fees. Thus, we will in principle have a conflict with equal treatment between those companies who have more than one immovable property or asset placed in a subsidiary. This again results in incongruence with the group contribution rules, where a business can choose to have several subsidiaries should this be appropriate, as well as the ability to drive income equalization by giving group contribution, and being equal with businesses who have all operations in one company.[47]

3.2 Sale of immovable property versus sale of other assets subsequent to a demerger

As a buyer can be expected to want higher depreciation rates, as well as likely not wanting to take over the tax liability (unless this is fairly mirrored in the share price), it is reasonable to assume that they would prefer buying assets and liabilities or an immovable property directly instead of in the form of shares.

[45] Ot. prp. nr. 92 (2004–2005)
[46] Ot. prp. nr 92 (2004–2005)
[47] Deloitte Tax & Legal, (2016)

Selling shares is from a seller's perspective primarily motivated by saving tax, which is why ConocoPhillips III created a lot of controversy regarding the motive test. However, as summarized above, the case set a precedent for similar type cases in which such a transaction chain was allowed by the authorities. But with the Ministry of Finance's attempt to tighten the scope, this raises the question of whether the practice that is set for a sale of immovable property like in ConocoPhillips III, is transferred to demerging and selling other assets and liabilities as well. To clarify where the standard now lies, the business world asked for additional precedent statements from the authorities, a necessity that arose after the Ministry of Finance's poor interpretation of the Finance Committee's official statements.[48]

3.2.1 Statement from the Ministry of Finance

After the enactment of the anti-avoidance rule, taxpayers turned to the Ministry of Finance to clarify whether the precedent effects of ConocoPhillips III would still be classified as current law.

After the legislation, the Committee of Finance's statements in Innst. 24 L (2019-2020) created a widespread understanding in the business world that the result in ConocoPhillips III would remain the same, without changing the practice of allowing this type of transaction pattern for future cases. However, in chapter 20 of Prop. 107 LS (2019-2020) in the Revised National Budget for 2020, the Ministry of Finance stated the following:

> "*The Ministry assumes that the anti-avoidance rule can be used when something other than an immovable property is transferred in the same manner as in Rt-2014-227.*"[49]

The Ministry of Finance has therefore interpreted the Finance Committee's statements as only encompassing transactions that include a transfer of

[48] EY Tax & Law, (2020)
[49] Our translation. Original text: "På denne bakgrunnen legg departementet til grunn at omgåingsregelen kan nyttast på vanleg måte når anna enn fast eigedom vert overdrege på tilsvarande vis som i Rt. 2014 s. 227."

immovable property. Thus, conducting the same transaction pattern and then selling a ship, other assets, or whole/parts of a business, can after a concrete assessment be applicable to the anti-avoidance rule.

In addition, the Ministry stated the following:

> "*It is common to place the immovable property in a "single purpose" company. If this was done from the start or some time before the sale, the transaction will be upheld…*"[50]

In Rt-2014-227, ConocoPhillips signed an agreement with a buyer to sell shares before the demerger took place. Hence, the above statement from the Ministry is in direct contradiction to the Supreme Court's assessments and final ruling in the case, as well as being in contradiction with the Committee of Finance who stated that the practice established through ConocoPhillips III is to remain unaltered.[51]

3.2.2 Opposing arguments from the business world

Several representatives from the Norwegian business world took a public stand in which they opposed the Ministry of Finance's statements in regards to increasing the applicable scope of the anti-avoidance rule. They claimed that the Ministry's assessments were unaligned with what the Committee of Finance expressed as their view. This created a new round of uncertainty regarding the legislated rule, that taxpayers thought had already been cleared up. The uncertainty is especially relevant for restructures and sale of assets, and specific questions were then raised as to whether the enactment of the anti-avoidance rule has set aside the precedent effects of ConocoPhillips III where any asset could be sold through shares after a demerger.

The Ministry of Finance was given criticism for creating further uncertainty of how a sale of shares after a demerger will be addressed by the tax authorities.

[50] Our translation. Original text: "Det er vanleg å leggje fast eigedom inn i eit «single purpose» selskap. Vert dette gjort frå starten av eller i ei viss tid før salet, vil transaksjonen stå seg."
[51] EY Tax & Law, (2020)

The arguments from the tax world were that the Ministry's interpretations of the Finance Committee's remarks are restrictive and not very logical. To support this, they said that it did not make sense to interpret the Committee's remarks in Innst. 24 L (2019-2020) to only encompass transactions that include immovable property. This is because the practice that ConocoPhillips III has set, does not distinguish between a "demerger sale" of an immovable property or any other assets. Many pondered upon what the basis for introducing a distinction regarding the sale of shares in a "single purpose" ship owning company and a "single purpose" immovable property company was. If only the immovable property industry was to be able to use this transaction chain, they would have an unintentional competitive advantage.[52]

If the Ministry of Finance wished to expand the scope of tax avoidance, it would be natural to prepare and propose a bill including negative and positive consequences, as well as input from the business world. Imposing stricter regulations through the Revised National Budget is in opposition to the regular legislative process, and the Ministry has thus taken on an unnatural legislator role.[53]

If the Ministry's interpretations were to stand, this would be problematic for companies that have already conducted transactions that up until this point was clarified as legal, as well as companies that have planned to do this in the near future.

Some members of the business world have even gone so far as to prepare documents with counterarguments to the Ministry of Finance's interpretations in Prop. 107 LS (2019-2020) in an attempt to reverse the restriction. In KPMG's two letters to the Ministry, titled "*Comments to Prop. 107 LS (2019-2020) chapter 20",* they challenge the Ministry's understanding. We will use the two mentioned letters to present the three main arguments in a structured way:

[52] Liland, (2020)
[53] EY Tax & Law, (2020)

1. Firstly, KPMG states that it is clearly debatable whether it is more common to place immovable property in "single purpose" companies compared to ships and other assets, as the Ministry of Finance claimed. KPMG is in their response referring to their own vast experience.

2. The statement from the Ministry claiming that the anti-avoidance rule will be less effective if never to be used when other assets than properties are transferred in the form of shares after a demerger is also unsustainable. The Supreme Court assumed that the sale of shares in ConocoPhillips III was undoubtedly motivated by the tax benefits, and there is no closer connection between a demerger and a sale than in this case seeing as the sale was agreed upon before the demerger, with the shares being transferred after the demerger. The Ministry of Finance argues that with such a close proximity between the restructure and the sale, the whole transaction chain seems motivated by tax, and this should be seen as a subject for possible application of the anti-avoidance rule. However, KPMG states that it is not possible to claim that there should be a difference in treatment depending on what kind of asset is involved, and that this was never considered by the Supreme Court.

3. The last aspect that is looked into is the Ministry of Finance's argument regarding a reduction in tax proceeds to the government by allowing restructurings and sale of shares of any type of asset. By using concrete hypothetical examples, KPMG shows how allowing a demerger prior to selling shares has the biggest effect on tax proceeds when the asset being sold is an immovable property. In tables with exemplified numbers, KPMG goes through several different scenarios that show the tax proceeds effects of selling ships, airplanes, and goodwill through shares, which amounts to a smaller reduction in proceeds than what immovable property does. Therefore, the argument from the Ministry of Finance stating that the transaction pattern in ConocoPhillips III has to be restricted to

immovable property due to the risk of proceeds reduction is weak and illogical.

3.2.3 Confirmed current law

As a result of the statements from the Ministry of Finance, there was a demand from taxpayers to clear this up, and the Committee of Finance had to again deliver clarifying statements in order to elucidate taxpayers on current law.

The Finance Committee saw no reason to treat the transfer of various types of assets any differently. With this they decided that today's practice would stay the same for now, consequently counteracting the Ministry of Finance's controversial statements. The Committee concluded by saying that if the development of the rule's usage implies that a change is needed, the government will put forward a bill with any special rules to meet potential requirements.[54]

[54] Hemnes, (2020)

4. The impact of the legislation on current interpretation of ConocoPhillips III

This part of the thesis is centralized around the effects of ConocoPhillips III on taxpayers, and will focus on several issues that have created uncertainty for taxpayers as a result of the legislation. We will look deeper into elements that have been criticized by different parts of the business world, and use elements from the case to exemplify the impact of the legislation.

Firstly, we will look deeper into whether the legislation has made the regulation more predictable for taxpayers. In other words, we are interested in whether the legislated general anti-avoidance rule makes companies more informed or more uncertain regarding their room for tax planning. Secondly, we will investigate if the taxpayer's need for legal expertise is reduced after the change to an objective motive under the tax avoidance rule's main condition. The third element we will look into is the discussion about the time between the demerger and the sale. Here we are focusing on the outcome of ConocoPhillips III, and its development throughout the years. Lastly, we will inspect whether the threshold for counteraction is lowered after the legislation.

4.1 Predictability for taxpayers

Innst. 24 L (2019-2020) from the Committee of Finance argued that the enactment of the anti-avoidance rule is meant to make the market more predictable for business in Norway regarding taxation, as well as clarifying the anti-avoidance rule's relationship with the principle of legality.[55] When Sweden legislated a general anti-avoidance rule, critics believed that it would be a threat to the rule of law as the legislation creates uncertainty of whether valid transactions under private law will become an object for taxation.[56]

On the other hand, claims have been made regarding the courts' open invitation to enter the legislator's territory, when having a non-statutory rule. And they

[55] Innst. 24 L (2019–2020), p. 1
[56] NOU 2016:5, p. 44

are therefore doubtful from a constitutional point of view, as it should be the legislator's responsibility to correct weaknesses in the legislation that enables aggressive tax planning.[57] As the anti-avoidance rule is meant to have a preventive function, predictability is hard to obtain, and it might be necessary to make changes to the rule in order to close any gaps that may be discovered in the future.

In Norwegian jurisprudence, most Supreme Court rulings are normally to only have a precedent effect on the concrete situation that was discussed in the case. However, ConocoPhillips III is an important case because its principled character has resulted in a precedent effect beyond the given case. For cases related to demergers with a subsequent sale of shares, the outcome of the case has set a standard for similar future situations, where the threshold for applying the anti-avoidance rule has increased.

As the outcome of the case is controversial without having been made clearer by the legislation itself, the business world was in need of clarification from the authorities, as written about in part three of the thesis. Even though some of the justifications given in ConocoPhillips III are unlucky according to the Ministry of Finance, they stated after a concrete assessment of the complexity of the case that the practice the ruling has set for these types of cases should not be changed. This is based on an overall assessment of the case circumstances, neutrality properties, and the consideration of ensuring predictability for taxpayers.[58] For example, if a demerger prior to selling shares was not allowed, there would be more companies organized as single purpose companies, and this would create unequal treatment of taxpayers who have organized themselves in groups.

But does the legislation increase predictability for taxpayers? Several members of the Finance Committee (The Socialist Left Party, the Green Party and, the Red Party) wish to point out that although the judgment in ConocoPhillips III can be deemed correct based on the practice at the time of the ruling, this does

[57] NOU 2016:5, p. 44
[58] Innst. 24 L (2019–2020)

not mean that an equivalent case after the legislation shall reach the same conclusion. The members have also commented on the Norwegian Eco-Forum's[59] input, where they state the following:

> *"With the Supreme Court's ruling in Rt-2014-227, a sort of tax amnesty was developed for situations associated with the sale of taxable business property in the form of the tax-free stock sale. The tax authorities had to reconcile several pending cases with a significant loss of tax revenue in the wake of the case, which makes it impossible to take on such cases."*[60]

As taxpayers are in need of certainty regarding whether their transactions will be subject to the application of the anti-avoidance rule or not, several have asked the tax authority for further clarification through binding rulings, to ensure an aligned understanding between the Ministry of Finance and the tax authorities.

The tax authorities have after the judgment and in subsequent requests for binding rulings said that the Supreme Court's view is in sharp contrast to their legal opinion as expressed in Utv. 2008 page 1873[61], and consequently made the following statement:

> *"... for future cases, we assume that the anti-avoidance rule is not applicable when the taxpayer uses a tax-free demerger as an intermediary transaction in order to be in the right position to be able to sell assets by selling shares."*[62]

[59] NØF – Norsk Øko-Forum
[60] Our translation. Original text: "Med Høyesteretts dom i Rt 2014-227 (ConocoPhilips III) ble det innført et slags skatteamnesti for salg av skattepliktig næringseiendom i form av skattefritt aksjesalg. Skatteetaten måtte forlike flere verserende saker med betydelig provenytap i kjølvannet av dommen, og det er umulig å ta opp slike saker."
[61] Skattedirektoratets domskommentar av 31.03.2014
[62] Our translation. Original text: "For fremtiden legger Skattedirektoratet til grunn at den ulovfestede gjennomskjæringsregelen ikke kommer til anvendelse når skattyter benytter skattefri fisjon som mellomledd for å komme i posisjon til å selge innmat/virksomhet ved salg av aksjer."

A clear benefit of the legislation is that the taxpayers now have a concrete formal wording to relate to, which one can assume makes it easier for taxpayers to assess their chosen transaction instead of having to analyze previous rulings by the court.

As the legislated rule is primarily based on previous Supreme Court rulings, the way the rule is designed in the Tax Act is well aligned with the elements the Supreme Court typically weigh, which have all been expressed in the wording of the law. This speaks up for the predictability of the legislation. However, seeing as the law is designed to embrace new and unknown cases, it has been vaguely formulated as well as having a non-exhaustive list of conditions related to the overall assessment. And as mentioned, the legislation again made taxpayers question whether the precedent effects of ConocoPhillips III were still valid. Based on this, it can be said that the immediate effect of the legislation created short-time uncertainty for taxpayers regarding the validity of the transaction chain in ConocoPhillips III. Taxpayers were in need of clarification from the authorities in order to again make it clear that for future practice, demerging companies to prepare for stock sale is within the bounds of legitimate tax planning.

4.2 A taxpayer's need for legal expertise

The Ministry of Finance has argued that an objective motive assessment will reduce the advantage of taxpayers who have access to legal expertise.[63] There are however reasonable doubts about the accuracy of this statement.

From our qualitative research, a large number of companies demerge an immovable property or other assets to avoid tax. The only way to certify that their transaction is not counteracted by the authorities is to ensure that the demerger is done in line with the demerger rules in the tax law. A particular aspect in which a lot of companies might need legal expertise is when having to distribute the share capital according to the percentage being demerged, which will result in taxation if not calculated correctly. Although the rules may

[63] Innst. 24 L (2019–2020)

be predictable, they might not be as easy to follow without consulting an expert due to the risk of miscalculation.

The outcome of a case similar to ConocoPhillips III occurring after the legislation could be different, as the total assessments made by the Supreme Court are to reflect the degree of non-conformity to the Tax Act's system. But although a taxpayer has avoided a certain rule, the transaction could still be sufficiently business-motivated and end up with the same result as in ConocoPhillips III. It is in situations like these clearly favorable if one has access to legal expertise, which is not as easily accessible to all companies.

In court cases, the taxpayer's motive has to be substantiated by evidence. As we conclude from case law, it is usually the largest companies with an abundance in resources, like Telenor, ConocoPhillips, Hydro, etc., who are in better positions to present circumstantial evidence to their benefit based on their access to legal expertise. This is because one is much better able to prepare for such a case beforehand with the knowledge of the requirements for tax avoidance. Especially because the tax authorities try to "lock" in facts, i.e. they present what they believe are the facts of the case through questioning the taxpayer. If one in a situation like this has capable legal advisers, one would also have an understanding of the tax authorities' methods and thus the opportunity to customize answers beforehand. This makes smaller companies more bound to the system while larger corporations have the resources to avoid more tax through their broader access to legal competency.

4.3 The time between the demerger and the sale

An argument that has earlier been relevant when assessing tax avoidance is the time period between the business restructure and the time of the transaction. The central point that the tax authorities were trying to make in ConocoPhillips III seemed to be the element of time, which is relevant because the timing factor can be an indication of the underlying motive of the transaction. This is mentioned in the ruling as "*proximity in transaction timing*". If a business restructure happens right before a transaction, this can indicate disloyalty to the tax regulations. And if a transaction is seen as disloyal to the purpose behind

tax regulations, this would indicate a ground for applying the anti-avoidance rule. In ConocoPhillips III, the decision to demerge was taken almost simultaneously as the sale.

The timing principle is not looked further into by the Supreme Court. An explanation for this is probably that the Supreme Court regards the equal treatment of different company structures as natural, and therefore finds it unnatural that the principle of timing should change this. The result of this is that immovable property in practice can be sold tax-free. Our observation is that if the Supreme Court was to discuss the time aspect of the demerger, it would be an argument leaning towards applying the anti-avoidance rule, and therefore decided to exclude it. Criticism should here be given to the Supreme Court based on the fact that they do not discuss whether this was the legislator's purpose. From the case's statements, the time factor does not seem to be disloyal. The Supreme Court states:

"... (61) It is difficult to justify that an otherwise acceptable approach should be deemed disloyal and be a subject for counteraction just because the demerger and the sale happen almost simultaneously."[64]

But this is difficult to reconcile with the premises of previous Supreme Court statements. It was not unusual to assume, as a rule of thumb, that the tax authorities would respect the sale of shares conducted two to three years after the demerger had taken place.[65]

In Rt-2006-1062, where the Supreme Court argues that the transaction is a circumvention of the tax rules due to the fact that they have a planned continuous transaction in several stages that was to be completed in a short period of time. If you were to follow this method, it should be central that the transactions in ConocoPhillips III occurred within such a short period of time.

[64] Our translation. Original text: "Det lar seg da vanskelig begrunne at en ellers akseptabel fremgangsmåte skal bli illojal og gjenstand for gjennomskjæring bare fordi fisjonen og salget skjer tilnærmet samtidig."
[65] KPMG Law, (2020)

In another case, Rt-1994-499 (Gokstad), the Supreme Court ruled in favor of applying the anti-avoidance rule, as they viewed the taxpayer's sale of shares to a shareholder, when the shareholder sold the same shares to an acquirer shortly after, as an intermediate transaction.

In a third case, Rt-1978-60 (Smestad), the taxpayer's children who took over their father's plot were never formally seen as the owners of the plot, as they were to only possess it for 24 hours. The reality was that the taxpayer sold it to the municipalities, but for tax reasons drew the children in as an unnecessary intermediary in a way that according to the circumstances must be described as an unacceptable avoidance of the capital gains tax rules. These situations are different from ConocoPhillips III, as they have an intermediary owner(s), but the principle is the same when seeing the demerger in ConocoPhillips III as an intermediary transaction as well. However, it is still uncertain whether it is essential for tax-free sales of immovable property holding companies subsequent to a demerger, that the immovable property is invested in a "single purpose" company from the beginning, or for a certain period of time before the sale, in order to not be considered as tax avoidance.[66]

From this, we can see that in ConocoPhillips III, when the demerger and the sale of shares took place almost simultaneously, it should probably have been an important factor if one had followed the argumentation pattern reflected in previous rulings.[67] Now there seems to be no uncertainty tied to the time aspect in similar cases, due to the outcome of ConocoPhillips III and binding rulings from the tax authorities, which confirmed the Supreme Court's assessment of the time aspect.

With the decision to abstain from discussing the time aspect, the Supreme Court allows companies to organize themselves as they please. If the Supreme Court had ruled in favor of the tax authorities, companies would have to organize themselves as single purpose companies from the very beginning,

[66] KPMG Law, (2020)
[67] NOU 2016:5, p. 148

even though this might not be optimal for certain companies, which would, as earlier mentioned, discriminate against those who want to have their collective properties in one company. If the demerger is carried out or the ownership structure is established with a single purpose company long in advance, it will manifest itself in more effects than if the demerger is carried out at the last minute, or even more so after a sales agreement has already been reached. This raises the question of whether the agreement between ConocoPhillips and the buyer could encompass the sale of shares of a single purpose immovable property holding company even before the demerger, so that the general rules regarding capital gains tax would still apply.

4.3.1 Reaching a sales agreement prior to a demerger

In ConocoPhillips III, it was after a buyer had been found and the purchase contract entered into that ConocoPhillips chose to carry out a demerger so that they could sell the immovable property Tangen 7 in the form of shares. An interesting question is then what the agreement between ConocoPhillips and the buyer stated? According to the Stavanger district court, the agreement stated that all assets, rights and liabilities in COPINAS, which were not related to the immovable property, were to be demerged into a separate subsidiary, after which the shares in the demerging company were to be sold to Havanacci AS for NOK 176 million.[68] In chapter 1 of the Contract Act, an agreement is considered legally binding when a made offer has been accepted. The question then becomes; did the sale occur before the demerger?

When looking at earlier rulings, such as Rt-2006-1062, the Supreme Court stated that they were faced with a planned continuous transaction in several stages that was to be completed in a short period of time, and which was exclusively tax-motivated and practically without any business value, and the transaction was hence ruled as tax avoidance. Furthermore, the Supreme Court discussed what date the agreement was a binding promise to transfer ideal shares, which relates to the discussion of the question we have raised regarding

[68] TSTAV-2010-150009

whether the sale can be said to have been completed before ConocoPhillips conducted the demerger.

The Supreme Court stated that they did not see the transaction as disloyal even though the demerger and the sale happened almost simultaneously.[69] But would the situation be different if the immovable property had been the asset that was transferred to a new subsidiary instead? This would result in a linear transaction, where the company would be an intermediary, rather than going back to being a single purpose company. Business-wise, it would probably not make much of a difference, but under company law, all obligations and rights would be transferred. Thus, one can simplify it and say that it is the same in practice. The question is whether this should have been taken into account, and furthermore how it will affect similar cases. The Supreme Court only deals with the specific legal relationship, and we can conclude that special significance will probably not be extracted from this.

4.4 The threshold for applying the anti-avoidance rule

In the Ministry of Finance's discussions in Prop. 98 L (2018–2019), regarding the need for a legislated anti-avoidance rule, it was argued that there would be conflicting interests in either raising or lowering the threshold for applying the anti-avoidance rule.

By making the framework of the motive test more fluid, this results in erosion of the anti-avoidance rule to a certain extent. The consequence of this is that the authorities' possibility to counteract a transaction is minimized. This is especially true for cases with intermediary transactions and demergers. For example, the aspect of increasing the possibility to apply the anti-avoidance rule on transactions that do not contribute to the socio-economy, but primarily save tax, has to be weighed against the aspect of not imposing any obstacles on innovation and creativity.

[69] Rt-2014-277, premise 61

Although it seems as if the threshold for applying the anti-avoidance rule in general remains the same after the legislation, there are some elements like tax benefits abroad, the change to an objective motive test, and lastly the fact that it will no longer be in favor of the taxpayer that a possibility of avoidance is mentioned in preparatory works without this being followed up with special anti-avoidance rules.[70] But has the precedent outcome of ConocoPhillips III increased the threshold for applying the anti-avoidance rule?

The most essential effect of the judgment in ConocoPhillips III on future cases is that it is now deemed safe to conduct tax planning around demergers. Taxpayers can receive direct tax deductions based on losses, and defer taxation based on gains from assets with low depreciation rates, without the risk of being sentenced for tax avoidance. These effects from ConocoPhillips III were a good example of pointing to the need for a legislated anti-avoidance rule in order to diminish further future uncertainty.

Another change in the use of the anti-avoidance rule as a result of ConocoPhillips III is that the Supreme Court has used general statements, waiving the motive related to concretely assessing the circumstances for each case. By ruling anti-avoidance cases based on general interpretation of the law, the result of this interpretation will be valid for similar future cases. And by utilizing the anti-avoidance rule on a general basis, this also hollows out the rule. As for some of the other issues we have raised, the general threshold for applying the anti-avoidance rule is in need of case law to determine if the legislation has resulted in a higher or lower threshold.

[70] Prop. 98 L (2019–2020)

5. Whether the outcome of ConocoPhillips III would be different after the legislation

To get an overview of the central factors that were used in the ruling of ConocoPhillips III, we have made a table listing the Supreme Court's reasoning in the case on the left side, and the elements from the Tax Act § 13-2 on the right side to compare the arguments presented in ConocoPhillips III with the legislated anti-avoidance rule.

Elements in the Tax Act §13-2	**For or against counteraction**	**Arguments in Rt-2014-227**	**For or against counteraction**
(2) a): Transaction is mainly tax motivated	Fulfilled. For counteraction	Transaction is mainly tax motivated	Fulfilled. For counteraction
(3) a): the business value of a transaction or arrangement, other than tax advantages in Norway or abroad	Too small. For counteraction	Intrinsic business value	Too small. For counteraction
(3) b): the size of the tax advantage and the extent of tax purpose	Fulfilled. For counteraction	The tax savings are significant	Fulfilled. For counteraction
(3) c): if the arrangement or transaction is a rational way to achieve the economic purpose of the arrangement or transaction	Not fulfilled. Against counteraction	Inexpedient way to reach its economic purpose	Not fulfilled. Against counteraction
(3) d): if the same result could have been achieved through alternatives that would not be in conflict with this rule	Fulfilled. Against counteraction	An existing alternative approach	Fulfilled. Against counteraction
(3) e): the wording of the relevant tax regulations, including whether the rule is clearly restricted in timing, quantitative or in any other way	Not fulfilled. Against counteraction	Nearness in time between the demerger and the sale	Fulfilled, but deemed irrelevant. Against counteraction
(3) f): whether tax rules have been exploited in a way that is contrary to their purpose or fundamental tax considerations	Fulfilled. For counteraction	In opposition to the general capital gains tax rule. (In line with the purpose in the preparatory works of the Tax Act §2-38)	Fulfilled. Against counteraction (Not fulfilled. For counteraction)

Table 1: Comparison of §13-2 in the Tax Act and arguments from the Supreme Court in ConocoPhillips III.

The first column of the table displays a restatement of the elements in the anti-avoidance rule, followed by a column that shows if each factor speaks for or against the application of the rule in ConocoPhillips III. Next, we have matched the Supreme Court's arguments in the case with the elements of the legislated rule, with a following summary of whether each argument speaks for or against applying the anti-avoidance rule.

The first row shows the main condition regarding whether the transaction is mainly motivated by saving tax, which is the same in the wording of the new rule and the argument from ConocoPhillips III. From premise 51 in ConocoPhillips III, the Supreme Court labeled the transaction as clearly tax-motivated due to the large amount of tax that was saved, but since the total assessment is what is pivotal in the end, no further assessment was done in the case regarding the main condition. With the legislated anti-avoidance rule, we believe we can expect the same assessment where the size of the tax benefit would likely be given the same weight.[71] The only difference is that the motive is assessed according to what a rational taxpayer typically would do. In our case, ConocoPhillips saved approximately NOK 17.5 million in tax, which gives a strong presumption that the transaction was tax-motivated. Other motives were not addressed by the Supreme Court, such as fulfilling the buyer's wish to save document fees. With the legislated rule, the tax motive must be greater than the cumulated business motives for the authorities to counteract, which we can easily conclude that it is.

Furthermore, regarding whether the transaction is an inexpedient way to reach its economic purpose, there has been an argument from the appellant, i.e. the Norwegian tax authorities, who in premise 28 of the case argued that the transaction was of an artificial form. The Supreme Court on the other hand said that ConocoPhillips followed a known practice that was in line with the purpose behind the participation exemption rule, and thus concluded that the transaction had to be accepted.

[71] Prop. 98 L (2019–2020), p. 94

The biggest difference we can expect from today's hypothetical assessment and the Supreme Court's ruling in ConocoPhillips III, is found in the Tax Act §13-2 (3) f), where the provision states that a transaction cannot be in opposition to the fundamental purpose behind provisions in the Tax Act. In premise 53 of the case, the Supreme Court states that the transaction is in opposition to the purpose behind the general capital gains tax rule, but does not take this further into consideration, seeing as they concluded with the transaction being in line with the purpose behind the participation exemption rule.

Prop. 98 L (2019-2020) states that there will be a difference when looking at the purpose behind the regulation that is avoided rather than the purpose behind the regulation that is used for the transaction. With this argument, ConocoPhillips III could look different today, as the Supreme Court focuses on the fact that the purpose behind the used regulation, participation exemption, is fulfilled. However, this conclusion is beyond our scope, seeing as there are many arguments also speaking for the importance of allowing such transactions, cf. subsection 3.1.1.

6. The anti-avoidance rule's relationship to international law

The relationship between national anti-avoidance rules and tax treaties has been plenty discussed throughout recent years. The anti-avoidance rule is applied to situations that are also regulated by tax treaties. A relevant question that arises is whether tax treaties set any form for limitation for applying domestic anti-avoidance rules. An example of this can be the sale of shares in a foreign company where the tax authorities wish to re-characterize this as a share dividend.[72]

OECD's attitude towards this is that tax treaties will normally not hinder the application of national anti-avoidance rules, although this is disputed. A second issue is what the current application is where the tax treaties' rules are used as a tool in tax planning, i.e. where the taxpayer attempts to avoid domestic law or other tax treaty provisions. An example of this is what is called "treaty shopping", where a company is established in a third state and the payment is sluiced through this to benefit from low or no withholding tax in the tax treaty between this state and the paying state.[73] In principle, the answer to these issues is usually addressed in tax treaties, and not in domestic law. The OECD's attitude towards this is that the states are not committed to giving tax treaty benefits in cases of abuse. It is however clear that the legislated Norwegian anti-avoidance rule also applies to cross-border legal relationships, also where a tax treaty is applied, as far as the tax treaties allow this.

Because tax treaties now also contain a principal purpose test (PPT), this speaks up for the application of domestic anti-avoidance rules. A possibility is that the anti-avoidance rule can be in violation of EEA law when applied in a way that leads to discrimination, or when applied in a cross-border transaction. The anti-avoidance rule is here likely not in violation of any tax treaty, but it needs to be applied correctly and cautiously.

[72] NOU 2016:5, p. 61
[73] NOU 2016:5, p. 62

The Norwegian tax authorities have stated the following:

> "*A stronger weighing of an objectified tax purpose means that the anti-avoidance rule is closer to the tax treaty law's PPT. OECD has in their suggestion to PPT assumed that one of the conditions for counteraction after tax treaties is that "one of the principal purposes" with the transaction was to save tax. It will be a benefit if the assessments after national and international rules are in congruence. The consideration to ensure consistent and equal treatment speaks against establishing two different thresholds."*[74]

As there is no international court for tax treaties, it is ultimately up to individual national courts to interpret the OECD's MC art. 29 (9), which can lead to different interpretations of the PPT rule, but we will not go further into this.

The relationship between EU/EEA law and national anti-avoidance rules has recently also been discussed a great deal, and the enactment of the anti-avoidance rule in Norway is therefore relevant when seen against legal provisions in other countries, seeing as several other countries also have a legislated anti-avoidance rule. Aggressive tax planning is a topic that has been talked about internationally over recent years. In Europe, the EU Commission has recommended its member countries to legislate a GAAR (General Anti-Abuse Rule) to prevent aggressive tax planning. In January 2015, the Council of Europe decided to take GAAR into their action plan. For member countries, this entails that through Directive 2011/96/EU, they are committed to implementing a rule that affects aggressive tax planning as mentioned in the

[74] Skatteetaten, (2016). Our translation. Original text: "En sterkere vektlegging av et objektivisert skatteformål, vil innebære at forslaget legges tettere opp mot skatteavtalerettens principal purpose test (PPT). OECD legger i sitt forslag til PPT til grunn at et av vilkårene for gjennomskjæring etter skatteavtalen er at "one of the principal purposes" med disposisjonen er å spare skatt. Det vil være en fordel om vurderingene etter nasjonale og internasjonale regler er mest mulig sammenfallende. Hensynet til å sikre konsistens og likebehandling taler mot å etablere to ulike terskler."

Directive.[75] The members are however free to implement stricter rules than what is suggested by the EU.

The question that usually arises is whether a discriminating or restrictive rule can be justified based on it having a purpose related to preventing tax avoidance transactions.

Anti-avoidance rules exist in both the area of treaty law (primary law) and the area for regulations and directives (secondary law). It is the development of an anti-avoidance rule in the primary law that is directly relevant for Norway through the EEA agreement. In treaty law, the member states attempt to justify national rules that are considered to have elements of discrimination and/or restriction, through the teaching of overriding reasons relating to the public interest, by referring to their necessity to obstruct comprehensive tax planning.[76] The general guideline is that the Court of Justice of the European Union has accepted such rules, provided that they attack what the court has described as "wholly artificial arrangements". Case law development for this area goes back to C-264/96 (ICI), where the court made a statement that has been restated in several cases later:

> "*... the legislation at issue ... does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits, but applies generally to all situations in which the majority of a group's subsidiaries are established, for whatever reason, outside the United Kingdom.*"[77]

This statement points to two key issues. Firstly, internal legal provisions whose purpose is to prevent tax avoidance, but who are formulated so that they also capture cases that are not related to tax avoidance, will normally not be accepted by EU/EEA law, because it is seen as in opposition to the principle of

[75] Legislation.gov.uk, (w.y.)
[76] NOU 2016:5, p. 54
[77] C-264/96 (ICI), paragraph 26

proportionality. This means that anti-avoidance rules with strict conditions will more easily be in opposition to EU/EEA law, than rules that assume a concrete assessment for each case.

It is plausible to think that the anti-avoidance rule is not applicable to transactions if the parts involved were Norwegian companies, but which it might be interesting to assess from a tax avoidance point of view when only one of the companies involved in the transaction is resident in Norway. To the degree in which the anti-avoidance rule cannot be applied uniformly to both Norwegian companies and EEA companies, so that the EEA companies in reality are being discriminated against, the rule might be in violation of EEA law. An example of this is a transaction that from a Norwegian perspective can seem like it is motivated by tax, but from a group perspective, it might be motivated by a larger need to move equity from one place in the Group to somewhere where the need is bigger, cf. HR-2016-02165-A (IKEA). If the creditor in the IKEA case was Norwegian, there would unlikely be grounds for applying the anti-avoidance rule. This is based on the fact that EEA law as mentioned is restricted to counteract "wholly artificial arrangements", and both parties in the IKEA case agreed that the company structure was motivated by business value and that the pricing as such was in accordance with the arm's length principle.[78]

[78] Revisjon og regnskap, (2019)

7. Ethical and socio-economic consequences of the legislation

The central purpose of taxation is to provide room in the economy for public activity and to redistribute values.[79] When looking at issues deriving from socio-economics, questions of whether the legislation is effective and whether the tax gives society the best distribution of the funds are raised.

The enactment of the anti-avoidance rule is a safety net for the government to be able to counteract transactions they deem to be outside the scope of reasonable tax planning. Without an anti-avoidance rule, taxpayers would be able to freely choose whichever transaction was most fitting to their goal, even if it is just to save tax.

The point of the legislation is to secure revenue for the state, frame clearer avoidance situations, and to ensure that the right tax subjects are taxed correctly. Provided by the legislation is also a clearer indication for the tax authorities regarding when it is reasonable to apply the anti-avoidance rule. The legislation is therefore advantageous for the business world seeing as it will become more predictable in the long-term, as well as for the courts who now have a formal wording to use, which will hopefully make court processes more effective.

Favorable tax rules can stimulate desired activity, but can in turn lead to unknown effects and open up for new ways within tax planning. The tax itself is part of reducing the total production when looking at the deviation between marginal willingness to pay and the marginal cost, which creates a tax wedge.[80] Favoring due to tax rules can be effective when there are other purposes tied to the legislation, such as environmental issues, etc. But the tax system should, as a starting point, influence companies' priorities to the least possible extent. The participation exemption rule is a good example of a rule set in line with the intention to improve capital mobility.[81]

[79] Zimmer, (2014), p. 30
[80] Riis, (2018), p. 120
[81] NOU 2006:4, chapter 6

In ConocoPhillips III, the demerger was argued to be mainly tax-motivated, but was in line with the purpose behind the participation exemption rule, and therefore not ruled as tax avoidance. If the anti-avoidance rule had been applied to the transaction in the case, taxpayers would be speculating how long before a sale you have to demerge in order for it not to be deemed as tax avoidance. This could result in a locking effect of value in society, as well as less predictability. If the legislated anti-avoidance rule was to be used in this type of situation, it would as earlier mentioned almost be used to remedy system weaknesses in the regulations, something the Ministry of Finance has warned against.[82]

Socio-economic costs can be divided into two costs, where the first is the effects of resource allocation.[83] Tax avoidance can lead to distortions of competition. If only a few of the taxpayers are able to avoid tax, then the other taxpayers will have to pay more tax in order for the proceeds to be kept at the same level. Tax avoidance also leads to a distributional effect, where those who avoid tax are rewarded and have their costs reduced. When looking at legal expertise, resourceful companies have an advantage in which they can reduce their tax payment by restructuring the firm. This is one of the issues the Ministry of Finance wanted to avoid when legislating a more objective assessment with a demand for a clear business motive. Those who cannot afford to make thorough assessments in advance, such as smaller companies without access to legal expertise, are to a greater extent bound to the legal tax system.

And secondly, tax avoidance leads to development- and transaction costs. Transaction costs are costs associated with the transactions themselves, such as remuneration to tax advisers, including remuneration for the development of circumvention schemes, and remuneration to brokers and other expenses for carrying out the transactions. This also relates to the ethical discussion of how smaller companies have to follow the guidelines and court rulings in a different

[82] Ot. prp. nr. 92 (2004–2005)
[83] The general effects of circumvention are particularly pointed out by Shaviro 2000.

way than larger corporations. This is because it is usually larger firms who are financially capable to challenge the authorities and therefore have a higher incentive to make changes that will benefit them, and the resources to take legal action.

And, since there is an obvious asymmetry between selling shares and immovable property, there will be less tax proceeds to society. But this will be balanced with taxes of shareholders, dividends, etc.

8. Conclusion

Until any new special anti-avoidance rule is introduced by the legislator, conducting a demerger in order to sell any type of assets in the form of shares and thus falling under the scope of the participation exemption rule is accepted, and the anti-avoidance rule will thus not apply.

In the same way as for tax treaties, the tax avoidance rule is applicable in EEA-related legal situations as far as this is allowed by EEA law. And because the legislated anti-avoidance rule is applicable in the same way for domestic and cross-border transactions, the possibility for any opposition with EEA law seems to be small.[84]

It is also beneficial for the business world to have the opportunity to structure themselves as they best see fit. Otherwise, companies could be forced to be structured in a way that could become inexpedient for the business world. More importantly, taxpayers would have a better sense of the frames surrounding legal tax planning.

The legislation has been said to give more predictability for taxpayers, courts, and authorities as they have a concrete formal wording to relate to, but it can also be said that the immediate effect of the legislation created short-time uncertainty for taxpayers regarding the validity of the transaction chain in ConocoPhillips III. However, predictability for this exact transaction was settled after clarifying statements from the authorities. On the other hand, complete predictability is no realistic goal, as the formulated provisions in the Tax Act are general and meant to be applicable to new and unknown situations.

After ConocoPhillips III, it has become normal to demerge immediately before selling the shares of either the new or remaining single purpose subsidiary, also where the sales agreement has already been signed. Earlier, a tax advisor would advise the taxpayer to ask for binding rulings in a demerger and share

[84] NOU 2016:5, p. 62

sale situation, considering the timing between the two transactions. Legal expertise can still be an advantage in ensuring that a company's operations and transactions are conducted correctly according to the law, especially opposed to smaller businesses who have not even considered the issue.

As for the threshold being altered, this is directly related to the three mentioned changes to the anti-avoidance rule as a result of the legislation; tax benefits abroad, the objective motive, and the lapse of avoidance opportunities in preparatory works. Although it in practice seems like the threshold for applying the anti-avoidance rule remains the same after the legislation.

Because the purpose behind different sets of rules have to be seen in light of each other and considered based on an overall assessment relevant to a particular situation, it is difficult to conclude whether one element alone would have changed the outcome of ConocoPhillips III. But we have reasons to believe that the Supreme Court would rule in the same favor if the case was brought up with today's regulations, due to the fact that many of the same assessments are adopted into the new regulation, and that binding rulings from the tax authorities have stated that they will use the outcome in ConocoPhillips III as a guideline for future cases.

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Appendix 1 – Glossary commentary

Binding rulings – Bindende forhåndsuttalelser

> *"Binding rulings provide legal certainty for taxpayers, for example by explaining how to interpret and apply national tax legislation on transactions…"*[85]

Business value - Forretningsmessig egenverdi

> *"Based on an overall assessment of the effects of the arrangement or transaction (including the business value)"*[86]

Alternative:

1. Business purpose

> *"Anti-avoidance rules normally emphasize either that transactions are intended to achieve particular tax benefits or that the transactions lack business purpose or effects"*[87]

Case law – Rettspraksis

> *"In this section, you can find case-law of the Court of Justice of the European Union, including:…"*[88]

Circumvention – Omgåelse

> *"The latter rule is called the 'tool rule' to achieve tax avoidance and is used to circumvent the more burdensome capital gains rule in the ConocoPhillips III case."*[89]

Counteraction - Gjennomskjæring

> *«The counteraction that the GAAR permits will be a tax adjustment which is just and reasonable in all the circumstances.»*[90]

[85] Cipek, (2019)
[86] Arntzen de Besche, (2019)
[87] Lovdata, (w.y.)
[88] EUR-Lex, (w.y.)
[89] Deloitte Tax & Legal, (2019)
[90] HM Revenue & Customs, (2020), p. 6

General anti-avoidance rule – Omgåelsesregelen

General anti-avoidance rule

«On April 10 2019, Norway's Ministry of Finance (MoF) published the proposal for a new statutory general anti-avoidance-rule (GAAR).»[91]

Occasionally denoted by us as the "anti-avoidance rule" for simplicity.

Immovable property – Fast eiendom[92]

Main condition – Grunnvilkåret

Alternative:

1. First condition (analogous interpretation)

"The second condition for applying the GAAR is a concrete overall assessment of certain criteria mentioned in the law and preparatory works in order to decide whether the GAAR shall be applied (previously often referred to as the disloyalty condition)."

2. Main reason

"The Swedish rule contain a condition that for the use of the anti-avoidance rule tax purpose must be the main reason for the transaction"[93]

Motive assessment/test - Formålsvurdering

"The MoF has proposed that this subjective test will be replaced by an objective motive test…"[94]

Alternative:

1. Assessment of intentions

"The main objection against the Telenor case was that the Supreme Court, when assessing whether the transaction was mainly tax driven, adjusted the assessment of intention(s) from an objective test deducing

[91] Deloitte Tax & Legal, (2019)
[92] Law Insider, (w.y.)
[93] Lovdata, (w.y.)
[94] Deloitte Tax & Legal, (2019)

intent from documents, to a subjective one, where the decisive is subjective motivation of the taxpayer in question."[95]

2. Business purpose-test

"The various anti-avoidance rules and doctrines – whether case law based or statutory – in Anglo-American and Scandinavian law have several features in common. Firstly, a type of business purpose-test has evolved."[96]

Non-statutory general anti-avoidance rule - Omgåelsesnormen/gjennomskjæringsnormen

«Last year the Ministry of Finance (MoF) appointed professor emeritus Zimmer to evaluate certain aspects of the current non-statutory general anti-avoidance rule (GAAR) and propose a statutory GAAR.»[97]

Denoted in the thesis as the "non-statutory anti-avoidance rule" for simplicity.

Overall assessment – Totalvurderingen

"The second condition for applying the GAAR is a concrete overall assessment of certain criteria mentioned in the law and preparatory works in order to decide whether the GAAR shall be applied (previously often referred to as the disloyalty condition)."[98]

Participation exemption rule – Fritaksmetoden

"Under the participation exemption rules, corporate shareholders are generally exempt from tax on dividends received, on capital gains from qualifying shares, and on derivatives where the underlying object is qualifying shares."[99]

Plot – Tomt[100]

[95] Deloitte Tax & Legal, (2019)
[96] Lovdata, (w.y.)
[97] Deloitte Tax & Legal, (2019)
[98] Deloitte, Tax & Legal (2019)
[99] PwC, (2021)
[100] Oxford Learner's Dictionaries, (w.y.)

Premise – Domspremiss

"The Government's economic policy is based on the premise that wealth needs to be created before it can be shared."[101]

Tax avoidance – Skatteomgåelse

"The latter rule is called the 'tool rule' to achieve tax avoidance and is used to circumvent the more burdensome capital gains rule in the ConocoPhillips III case."[102]

[101] The National Budget, (2019), p. 1
[102] Deloitte Tax & Legal, (2019)