Handelshøyskolen BI

GRA 19703 Master Thesis

Final Thesis Master of Science 100%

Predefinert informasjon

Startdato:	08-01-2024 09:00 CET
Sluttdato:	01-07-2024 12:00 CEST
Eksamensform:	T
Termin:	202410
Vurderingsform:	Norsk 6-trinns skala (A-F)
Flowkode:	202410||11436||IN00||W||T
External assessor:	External assessor 1
Internal assessor:	Internal assessor 1

Deltaker

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Informasjon fra deltaker

Tittel *:	Threshold for acceptable tax planning illustrated with exchange of shares
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Inneholder besvarelsen konfidensielt materiale?:	Nei	**Kan besvarelsen offentliggjøres?:**	Ja

Gruppe

Gruppenavn:	(Anonymisert)
Gruppenummer:	60
Andre medlemmer i gruppen:	Deltakeren har innlevert i en enkeltmannsgruppe

Master thesis in Law & Business at BI Norwegian Business School

Title:

Threshold for acceptable tax planning illustrated with exchange of shares

Exam code and name:

GRA 19703 – Master Thesis

Advisor:

Yvette Lind

Due date:

01.07.2024

Campus:

BI Oslo

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Acknowledgements

This thesis marks the end of a two-year master program at BI Norwegian Business School. The process has been challenging but mostly educational. The knowledge I have gained these past couple of years will stay with me moving forward.

I would like to offer special thanks to my advisor, Yvette Lind. Thank you for all the advice throughout the process. I appreciate the time you have put in to help me this semester. I want to thank you for all the good discussions that have helped guide me in the right direction.

I would also like to thank my professor in Tax Law, Eivind Furuseth, who through his dedication sparked my interest in tax and helped me with insight when needed.

Finally I would like to thank my friends for mental support and keeping me company this semester. I greatly appreciate that you were willing to proofread my thesis.

Abstract

The purpose of this thesis was to try to see if one can draw a line between acceptable and unacceptable tax planning based on the application of the General Anti-Avoidance Rule (GAAR).

Traditional Norwegian legal method was applied in order to determine the legal regulation of anti-avoidance issues. I compared two binding advanced rulings on share exchanges from the tax authorities, analyzing the differences before and after implementation of the GAAR in 2020. I also looked at international perspectives and the political dimension of anti-avoidance to see their impact on the line between unacceptable and acceptable tax planning.

The analysis of GAAR's evolution highlighted the necessity for a legislated general rule in 2020. Comparing two BFU cases revealed how anti-avoidance assessments have changed, with a post-implementation that focuses on individual rules' legislative purpose. International aspects demonstrate that the line for unacceptable tax planning on cross-border transactions is influenced by a transaction's purpose and substance. The line between acceptable and unacceptable tax planning is challenging to draw. Increased legal practice that interprets the threshold for GAAR is likely necessary to create more clarity. However, a correlation between unacceptable tax planning and the application of GAAR can be seen when assessing anti-avoidance issues.

1 Introduction

1.1 Theme and actuality

Tax planning, a strategic legal practice, is growing increasingly important in today's diverse society. Companies, that are often driven by the commitment to shareholder value, actively employ a diverse array of strategies incorporated through tax planning. By participating in tax planning the companies can strategically optimize and proficiently manage the assets of their shareholders.[1] These strategies help ensure the most advantageous outcomes within the taxation landscape and manage the value of the shareholders assets. Tax planning encompasses a wide range of strategies and is a subject that can be challenging to define within legal boundaries. Arranging financial operations may involve methods such as exchange of shares. While these procedures can be beneficial, they may also serve as a potential source of legal disputes.

This thesis takes a closer look at the relationship between tax planning and tax avoidance. The aim is to illustrate the line between acceptable and unacceptable tax planning and if it has changed over time after the non-statutory anti-avoidance norm was implemented into law in 2020. This is illustrated by cross-border exchange of shares between companies. The thesis delves into the international dimension of tax planning, exploring situations where tax planning challenges the boundaries and transition into tax avoidance. The relationship between tax planning and tax avoidance can be hard to identify due to the different nature of transactions and differences in countries' inclination towards the wording. Some countries are stricter in their assessment of tax regulation, while other countries take more into account object and purpose when interpreting tax law.

This thesis will focus on the area of tax planning where one must assess whether the actions can be seen as operating outside the purpose of the taxation policies and cross into unwanted tax planning. The central research question of the thesis is:

[1] Russo (2007) p. 73

> "Where is the line between acceptable tax planning and unacceptable tax planning drawn ?"

The first traces of the anti-abuse norm can be traced back to the 1920s.[2] Over the last century the norm has gone through some changes prior to the implementation in 2020. It would be hard to argue that the norm was not current law based on legal practice. Consequently, it is important to look at why the norm was legislated, and how it has evolved. In order to try and identify the threshold for unacceptable tax planning I will also look at how the General Anti-Avoidance Rule (GAAR) has been assessed and applied after 2020.

While tax planning is relevant at the domestic level, companies and individuals also partake in international tax planning to organize their financial activities. The cross-border nature of tax planning adds an additional layer of complexity when considering the limit of unwanted aggressive tax planning. Different countries may have varying perspectives on what qualifies as tax planning and what constitutes tax avoidance. Consequently, when trying to look at what can be considered tax planning, one must also take into consideration its international dimension. Looking at the international dimension can help create similar rules and definitions. This is beneficial for maintaining economic stability and can ensure social equity. Furthermore, it helps strengthen Norway's position in the global economy and contributes to a more predictable international tax environment.

1.2. Further presentation

To better navigate the central research question I have divided the thesis into different parts. Initially the thesis will be limited and a closer look at the relevant legal sources. Further there is a short account of tax planning before the role of the GAAR is presented in the second part. The thesis uses case comparison of two binding advanced rulings (BFU) on exchange of shares in order to try and illustrate the distinction between acceptable and unacceptable tax planning. These cases are presented in the third part. Part four presents a comparison of pre- and post-legislative anti-avoidance considering the two cases. International

[2] Rt. 1921 s.462

perspectives and the political dimension on unacceptable tax planning is presented in the fifth part before final reflection in part six.

1.3 Delimitation

The topic of unacceptable tax planning, a form of tax avoidance, is a broad subject and requires limitation. There is a difference between general anti-avoidance rules like the GAAR and the specific anti-avoidance rule (SAAR) that can be found throughout the tax legislations. SAAR targets specific tax planning transactions that the authorities are aware of, giving SAAR a limited scope of application. This thesis takes a closer look at the legal developments that could influence the threshold for unacceptable tax planning and the application of the GAAR. The specific anti-avoidance provisions found in the Norwegian Tax Act (NTA) are not part of the scope of this thesis.

Furthermore, the distinction between acceptable and unacceptable tax planning will be portrayed through the application of the General Anti-Avoidance Rule. This definition rests on the principle that acceptable tax planning remains within the bounds of what tax laws allow, whereas unacceptable tax planning crosses into exploitation of loopholes that the GAAR aims to close.

It is important to differentiate tax avoidance from tax evasion. Tax evasion involves deliberate misrepresentation or omission of information by the taxpayer. Such actions result in an incorrect basis for taxation and are considered fraudulent.[3] While delineating between tax avoidance and evasion can be challenging, this distinction lies beyond the scope of the thesis.

1.4 Method

In this thesis I will use the traditional Norwegian legal method where sources of law are used as a way of determining the legal regulation of anti-avoidance. When determining the legal regulation of anti-avoidance there are several legal sources to consider, Legal text, preliminary work, legal practice, international obligations and more. The different sources of law are weighted differently, where the legal

[3] Zimmer (2018) p. 64 & Skar (2017) p. 19: : See further about the distinction between tax avoidance and tax evasion

text takes precedence. Consequently, when determining the legal regulation of anti-avoidance the primary source for analysis is the legal text in NTA. § 13-2.

When interpreting legal text one normally starts with looking at the wording of the paragraph. In the beginning of interpreting legal text, natural linguistic understanding of the Norwegian language and legal terminology is normally the main guidance. In cases where the text is vague or ambiguous one supplement with a contextual interpretation,[4] or with purpose assessments. In Norwegian law purposive assessments are often used to determine if a case is in line with current legislation. When assessing the threshold for application of the GAAR, purposive assessments have been highlighted. Consequently, purposive assessments surrounding legislation are an important point moving forward.[5]

Even though the main source when determining the content of a legal rule is the legal text, it is normally necessary to consider several legal sources.[6] In the preliminary work for NTA.§ 13-2 it is stated that the results from the GAAR should generally be the same as for the non-statutory norm.[7] Consequently, legal sources that are relevant for the non-statutory rule are of relevance when interpreting the legislated rule. The Supreme Court has assessed the non-statutory rule in a number of cases. From the early 2000s the rule was recognized as a non-statutory rule on the matter of avoidance issues based on Supreme Court practice. The importance of legal practice prior to legislation makes legal practice important for my thesis when determining the scope of anti-avoidance after the non-statutory rule and the evolution of anti-avoidance measures. The rule was widely acknowledged as part of current law making it relevant to look at why it was legislated and implemented in 2020.

The main function of the Supreme Court is legal clarification and legal development.[8] The Supreme Court are the ones that interpret current law. This helps with clarifying and determining current law. The Supreme Court also establishes principles and precedents by addressing situations that are not

[4] Blandhol (2015) pkt 3.2
[5] See further assessment in part 4.2
[6] Blandhol (2015) pkt. 2.5
[7] Prop. 98 L (2018-2019) p. 6
[8] Sunde (2024)

explicitly affected by law or have not previously been addressed.[9] The relevance of Supreme Court rulings in establishing a line between tax planning and unacceptable tax planning lies in the Courts ability to create non-statutory rules in the Norwegian legal system. However, not all Supreme Court rulings establish non-statutory rules. The non-statutory rules are established over time by several similar assessments, making legal practice important for the application of the non-statutory anti-avoidance norm. To better understand the scope of the GAAR it is necessary to look at the legal practice for the non-statutory norm.

In order to better understand the line between acceptable tax planning and unacceptable tax planning I will use a case study where I will look at two different BFU cases on share exchange. The case-studies include two cases that are systematically compared.[10] The cases are assessed separately, but in a similar way so they can be easily compared, in order to get a better understanding of the topic that is studied.[11] The two cases are both binding advanced rulings from the Tax Administration and are actual situations that the administration has assessed. The BFU cases are administrative cases of law that are of value for tax regulations. The taxpayer can ask for an assessment from the tax authorities regarding a transaction prior to it taking place in the form of a binding advanced ruling.[12] This helps with predictability and is a useful source of law when determining unacceptable tax planning.

1.5 Defining fundamental concepts

It is important to have a consistent understanding of important wording for the cross-case comparison.

1.5.1 Tax planning

Tax planning generally involves adjusting and structuring financial activities to reduce tax liabilities. Depending on its outcomes and strategies, tax planning can be categorized into basic, intermediate, and aggressive approaches. The scope of

[9] Pedersen (2009)
[10] Store Norske Leksikon (2020)
[11] Store Norske Leksikon (2020)
[12] Innst. 24 L (2019-2020) p. 6

tax planning within these categories differs from one another and evolves over time in response to countermeasures implemented by local tax authorities.[13]

Basic tax planning focuses on compliance with explicit provisions of tax laws. These are normally simple strategies that utilize commonly available deductions, exemptions, and credits. They are widely accepted, generally uncontroversial strategies that offer little risk for the taxpayer. *Intermediate tax planning* focuses on optimizing tax outcomes through more sophisticated strategies. These types of strategies can involve structuring transactions and financial decisions to achieve tax benefits. One example of this kind of strategy could be structuring mergers and acquisitions to maximize tax benefits while adhering to tax rules. Intermediate tax planning strategies are often defendable, but they might attract some sort of scrutiny from tax authorities if they are not business related. This increases the risk of anti-avoidance measures for taxpayers that use these types of strategies.

Lastly, *aggressive tax planning* focuses primarily on minimizing tax liabilities through highly complex and potentially controversial strategies. These kinds of strategies often involve exploiting loopholes or interpretations of tax legislation. Examples can be engaging in complex cross-border transactions and shifting profits to low-tax jurisdictions. This form of tax planning often treads a fine line between acceptable and unacceptable tax planning, the so-called “gray areas” of the law. This makes the risks higher for the taxpayer engaging in aggressive tax planning, as these strategies might be legally permissible but are viewed as pushing the boundaries of acceptable tax planning.

In the preliminary work for implementing the Organization for Economic Co-operation and Development’s (OECD) plan against Base Erosion and Profit Shifting (BEPS) action 12 it is pointed out that aggressive tax planning often exploits the differences in countries' legislation or countries that have beneficial tax regimes.[14] Aggressive tax planning is an international phenomenon, making international definitions relevant when looking at what is considered unacceptable tax planning. The European Union Commission (EUC) describes this more aggressive form as “taking advantage of the technicalities of a tax system or of

[13] Russo (2007) p. 63-64
[14] NOU 2019: 15 p. 140

mismatches between two or more tax systems for the purpose of reducing tax liability".[15] The European Parliament supplements the definition of aggressive tax planning as "exploiting loopholes in tax law".[16] The difference in definitions shows that aggressive tax planning can also be used to exploit the loopholes in tax laws in general. It does not have to be between two or more countries.

Basic and intermediate tax planning strategies are generally aligned with the intended purpose of tax legislation. Aggressive strategies tend to prioritize tax saving over economic substance. This exploitation of the legal system can undermine the fairness and integrity of tax systems when international businesses can use BEPS to create an advantage over the businesses that operate on a domestic level. Countries have not agreed upon one international tax system and penalizing a taxpayer for utilizing existing loopholes can be controversial. However, if the company has a valid business reason for the transactions that take advantage of the loophole, countries normally do not apply anti-avoidance measures. As long as the loophole is there, and the action is not perceived as disloyal or aggressive, the loophole can be exploited. It is the legislator's job to plug the loophole.

By understanding these different levels of tax planning, one can better differentiate instances of acceptable tax planning and when it is unacceptable tax planning. The understanding of this difference can make it easier for authorities to assess the transactions. Moving forward, aggressive tax planning emerges as a prominent area of focus.

1.5.2 Consequences of aggressive tax planning

Businesses and individuals that engage in aggressive tax planning can adversely impact society, primarily manifesting in reduced government revenue. Aggressive tax planning on this level frequently centers around exploiting legal loopholes or utilizing tax havens in order to artificially reduce a firm's taxable income. It extends beyond just exploiting loopholes and can involve the use of double taxation avoidance agreements (DTAs), otherwise known as "treaty shopping". While these agreements are primarily intended to prevent the double taxation of

[15] 2012/772/EU (2)
[16] Mileusnic (2023) p.2

income in cross-border transactions, individuals and companies engaging in aggressive tax planning can exploit gaps and mismatches to reduce their tax obligations in both the source and residence countries.

2 Role of the Norwegian General Anti-Avoidance rule

Understanding the role of the GAAR is important for several reasons when analyzing the line between acceptable and unacceptable tax planning. The GAAR represents an attempt at limiting aggressive tax strategies through legislation. Exploring the background for the GAAR can help with understanding the historical context in which these rules were enacted. By understanding why the GAAR was introduced, one can better understand the regulatory intent and the specific abuses the legislation aims to address. When defining tax planning as unacceptable by looking at how the rule is applied it is beneficial to look at why the rule was developed. This provides insight into the wanted scope and interpretation of the rule.

The preliminary work states that the main function of the GAAR is to draw the line between acceptable and unacceptable tax planning.[17] The wording of the statutory GAAR offers little insight into its intended purpose and provides few clues about the key considerations for the evaluation[18]. This might be because there is no clear line or common perception of what is considered acceptable and unacceptable tax planning. However, considerations can have a great influence when assessing application and ultimately the threshold of the rule. Therefore, the absence of explicit indications regarding considerations, such as the purpose of the legal text, can be problematic. The scope of application is quite broad, and a clearly defined boundary can be hard to pinpoint. This broad scope presents a challenge for both taxpayers and authorities in discerning when the rule should be applied. Providing a clear emphasis on how the considerations in NTA § 13-2 should be weighted, cold have helped enhance the clarity and predictability regarding the threshold of the GAAR. Furthermore, the problem lies in better clarifying the application threshold for the GAAR

[17] My translation of statement in Prop. 98 L (2018-2019) p.5; “Trekke grensen mellom akseptabel skatteplanlegging og uakseptabel skatteplanlegging”
[18] Prop. 98 L (2018-2019) p. 28

2.2 Background for legislation

In Zimmer's proposed bill from 2015 it is commented on how tax avoidance was a problem within legal application due to how it arises from inconsistent laws or laws that suffer from technical weaknesses.[19] However, even with good and consistent legislation, problematic tax avoidance could still be due to interpretations and loopholes.

When arguing for the GAAR, the relationship between the norm and the legality principle was highlighted. The legality principle is a central legal principle which states that the authorities need legal basis to intervene in an individual's legal position.[20] Legislating the GAAR would provide the authorities legal basis to intervene in circumstances of tax planning they found as unacceptable. Additionally, the proposition pointed out that even though it is unlikely for anyone to dispute the norm as current law, legislation would clarify the relationship which would in principle have a significant meaning.[21]

One problem with tax planning is when the result of a transaction contradicts the rules purpose in a way that the question to intervene occurs. Based on this another argument for legislation was how the GAAR could help with clarification surrounding the scope of application. A clarification would increase the predictability for taxpayers but would also offer more clear lines on when the government could intervene.[22] Predictability is important in tax legislation, ensuring stability and fairness for the taxpayers.

Legislating the GAAR faced some criticism from the private sector.[23] The regard for legal certainty was highlighted. The legislation would mean that any future application and development would be linked to the interpretation of phrasing and expressions. This could lead to a stagnation of the rule.[24]

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[19] NOU 2016: 5 p. 11
[20] Store Norske Leksikon (2005 - 2007)
[21] Prop. 98 L (2018-2019) p. 11
[22] Prop. 98 L (2018-2019) p. 5
[23] NOU 2016: 5 p. 23
[24] NOU 2016: 5 p.12

2.3. Need for a general anti-avoidance rule

The proposition pointed out that it was unlikely that anyone would dispute that the norm was a part of current law. However, a legislation would clarify the scope. This would in principle have a significant meaning for application.[25] However, even with good and consistent legislation, problematic tax planning could still be possible. The application and threshold determination depends on the purpose of the rule. Generating a more general circumvention rule would reduce the predictability surrounding threshold given how broad the possibility for application could become. Justification for a general rule was therefore grounded in the considerations for legislation.

Based on previous experiences, domestically and internationally, opportunities for aggressive tax planning would be used as long as the law's wording makes it possible.[26] A specialized rule would aim towards countering specific types of tax planning. These kinds of specialized rules can prove to be useful, however they often target already known transaction patterns. With specialized legislation the legislature would always be a step behind, and a comprehensive set of specialized rules would result in an overly complicated taxation system. Imagination around tax planning has proven to be broad, and the legislator has no way of knowing every way that a taxpayer can plan out their transactions. Even though generating a more general rule would reduce the predictability surrounding application, it would help with capturing a larger scope of cases. Consequently, the committee argued for the fact that the statutory norm should be general so that it would also apply to also not already known transactions.[27]

[25] Prop. 98 L (2018-2019) p. 16
[26] NOU 2016:5 p. 10
[27] Prop. 98 L (2018-2019) p. 29

3 Exchange of shares as a case study

In the landscape of corporate finance, exchange of shares is a strategy for companies engaged in corporate restructuring. An exchange of shares occurs when a firm's shareholders in an acquired company transfers shares to the acquiring company and receives consideration shares in the acquiring company.[28] This maneuver can play an important role when determining the financial and strategic outcomes of the transaction. Further it offers substantial tax implications for the shareholders in the acquired company.

This case comparison delves into the intricacies of share exchange, examining their relevance in the broader context of tax planning. By analyzing specific instances of share exchanges, the thesis aims to see if a line between acceptable tax planning and unacceptable tax planning can be drawn. The case analysis will look at two scenarios where an exchange of shares has been utilized, looking at the legal and financial dimensions involved. One scenario occurred prior to the implementation of the GAAR and the other took place after the implementation in 2020.

It is worth noting that neither of these cases triggered the application of the Anti-Avoidance rules. However, the pre-legislation case will offer insight into strategies employed when regulatory frameworks were not as firm. This can highlight the level accepted for tax planning. Conversely, the post-legislature case will illustrate how the landscape has evolved, even in situations where the GAAR was not directly invoked.

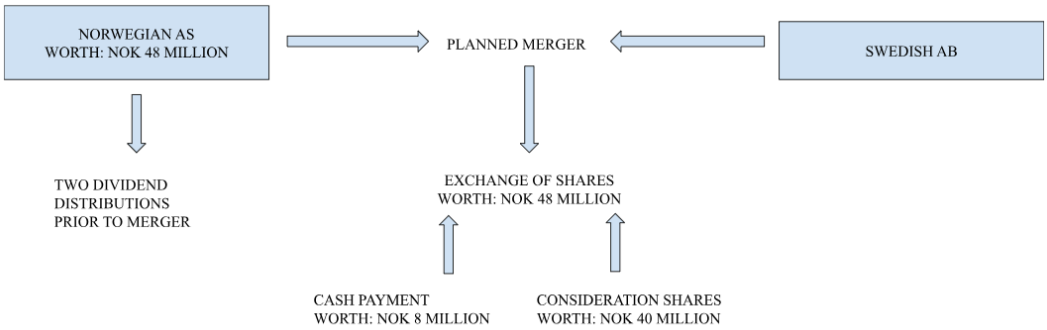
3.1 Case: BFU 8/2019 - Pre legislation

The facts of the case involved a planned merger between a Norwegian AS and a Swedish AB. The Norwegian AS was valued at NOK 48 million. The total consideration was settled by the shareholders receiving shares to the value of NOK 40 million and a cash payment of NOK 8 million. Prior to the merger the Norwegian AS had also handed out two dividend payouts to their shareholders.

[28] Prop. 98 L (2018-2019) p. 28

The case concerned whether the exchange of shares between the Norwegian AS and the Swedish AB could be done without subjecting the shareholders to tax. There was also a question on whether the two dividend payments would make the non-statutory anti-avoidance norm applicable if seen as a way of circumventing the limit of 20 %

Figure 1: Illustration of case BFU 8/2019



An exchange of shares against consideration shares is considered a realization after NTA.§ 10-31. A realization entails that the taxpayer can be subjected to tax on potential profits from the realization of the original companies' shares. Therefore, the suggested cross-border reorganization would normally trigger a taxation of the Norwegian shareholders. However, the tax act § 11-11 (4) presents an exception to the general rule. The paragraph allows for an "exchange of shares" to be exempt from taxation when the acquired company is located in Norway and the acquiring company is located in another country as long as the set conditions are met.

Paragraph § 11-11 (4) presents four conditions for tax exemption: (1) at least 90 % of the shares in the acquired company must be transferred to the acquiring company. (2) the acquiring company belonging to another company has to have limited responsibility. (3) rules on fiscal continuity for shareholders that are liable to tax in Norway, and lastly (4) there is a maximum additional consideration of 20 %.[29] The additional consideration that is not shares shall be taxed according to standard tax regulations.[30]

[29] My translation of NTA.§ 11-11 (4)
[30] Skatte-ABC 2024 p.2

For the case of the exchange of shares between the Norwegian AS and the Swedish AB the Directorate considered the first condition fulfilled because enough shares would be transferred to the Swedish company. The Swedish AB, acquiring company, is located in another state and has limited responsibility, fulfilling the second condition. Furthermore, they assumed that Sweden has rules for fiscal continuity and fulfilling the third demand. In regard to the fourth demand on the 20 % limit on additional consideration the taxpayer requested the Directorate assess whether the non-statutory anti-avoidance norm would be applicable.

Based on statements from the Supreme Court the Directorate presumed that the norm consisted of two conditions: basic condition and one overall assessment. The base condition implies that the primary purpose of the transaction has to be tax-saving purposes. This condition is necessary, but not sufficient enough on its own to conclude that there is avoidance. The overall assessment bases itself on the transaction's effects, taxpayers' purpose for the transaction and if the circumstances appeared conflicting with the purpose of the tax legislation.

The assessment on non-statutory anti-abuse was based on the two dividend payouts by The Norwegian AS prior to the merger. The Tax Directorate did not find that the two dividend payouts alone could justify an application of the anti-abuse norm. For the Directorate the determining matter was whether the transaction should be seen contextually. If seen together with the exchange of shares, the primary purpose for the transaction could be viewed as tax saving measures given how the transaction would then "circumvent" the limit on 20 %

Norwegian AS stated that the dividend exchanges were not part of a joint transaction or related to the exchange of shares. These payouts were separate from the agreed consideration of the merger and were two independent equity transactions. They further stated that the dividend payout were not conditions of the exchange of shares and were funded by the company's capital, not by the acquiring company or the shareholders. The payouts were based on the independent need for equity, and the degree to which this need for equity would affect the pricing of the company. Based on the submitted facts and statements regarding the dividend payout the Tax Directorate ruled that the two dividend

payouts did not seem to have the character of being part of a compensation from the acquiring company. Consequently, the Tax Directorate assessed that the two dividend payouts were not in conflict with the purpose of the 20 % conditions and could not be considered as a way to circumvent the condition.

The Tax Directorate concluded that the exchange of shares from the Norwegian AS and the Swedish AB could be done without subjecting the shareholder to tax in accordance with NTA.§ 11-11 (4) for the part of the consideration regarding stocks. Furthermore, they concluded that the dividend payouts could not be seen in contact with the exchange of shares, and the non-statutory anti-avoidance rule was not applicable.

3.1.1 Anti-avoidance assessment

A closer examination of the base condition established by the Supreme Court reveals two key questions: What is meant by the "primary purpose" and what is the taxpayers' motivation for the transaction. The Supreme Court stated in Rt. 2007 s.209 that it was a necessary condition that tax saving appeared to be the clearly most important motivator for the transaction.[31] The court had also stated in Rt. 2006 s. 1232 that when determining what is the primary purpose for the transaction it was the subjective purpose of the taxpayer that should be considered.[32] By basing the assessment on this, the legislator could include aspects that are not business orientated. This can affect the threshold due to how these aspects rarely show up in business transactions.

Regarding the overall assessment, the Supreme Court stated that the deciding factor regarding the application of the anti-avoidance norm was to what extent the transaction had business motives or other motives that were not tax saving purposes.[33] This shows that significant weight was placed on how the transaction appeared in the context of a business assessment. The facts submitted by Norwegian AS stated that the two dividend payouts were based on the company's need for equity, and not a condition of the compensation the shareholder received

[31] My translation of the Supreme Court statement in Rt. 2007 s.209 paragraph 41; "et nødvendig vilkår for gjennomskjæring at skattebesparelse fremstår som den klart viktigste motivasjonsfaktoren for disposisjonen.
[32] Rt. 2006 s. 1232 paragraph 50: "Hva skattyter må antas å ha lagt vekt på"
[33] Rt 1999 s. 946

from the acquiring company as part of the exchange of shares. Considering this the two payouts did not seem to be unnatural from a business point of view. When given the option a company can choose the one that is the most tax favorable, if it is a real business transaction. This is supported by the statement the Court made in Rt. 2008 s.1510 that as long as the option the taxpayer chose was real, and does not seem unnatural business-wise, it is legal to adjust to the tax beneficial option.[34] The two dividend payouts could be done the way they were even if they were tax beneficial as long as the action was valid from a business perspective.

The Directorate also thought that the payouts did not look to be a part of one larger compensation from the acquiring company. When evaluating the dividend payouts, it is evident that the Tax Directorate placed significant emphasis on the purpose of the transactions. This approach aligns with the Supreme Court's directive that the deciding factor is the business motives behind the transaction. The business purpose for the two dividend payouts was in the end the reason that the Directorate did not think the conditions presented by the anti-abuse rule were fulfilled. The two conditions of the non-statutory anti-avoidance norm both must be fulfilled in order for the rule to become applicable. When the “primary purpose” of the two dividend payouts were perceived to be business motives the condition was not fulfilled, and consequently the anti-avoidance rule was not applicable in the case. Due to the non-statutory anti-avoidance norm not being applicable, the suggested “tax planning” done in this case was viewed as acceptable.

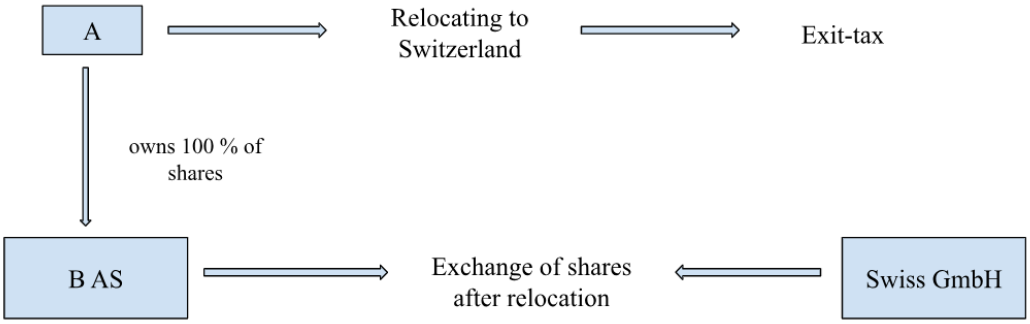
3.2 Case: BFU 6/2023 - Post legislation

The facts of this case were related to individual A, who owned 100 % of the shares in B AS, which is a Norwegian holding company overseeing underlying investments. A was relocating to Switzerland, and there the plan was to sustain the current business operations in Norway through a Swiss GmbH situated in Zürich. The Swiss GmbH would offer advisory services. A wanted to transfer the ownership of B AS to the Swiss GmbH through an exchange of shares. The shares of B AS would be transferred to the Swiss company in exchange for A receiving

[34] My translation of the Supreme Court statement in Rt. 2008 s.1510 paragraph 62: “Så lenge det alternativet som blir valgt, er reelt og ikke fremstår som forretningsmessig unaturlig, er det fullt lovlig å innrette seg slik at skatten eller avgiften blir minst mulig.”

consideration shares in the Swiss company. The exchange of shares would include the issuance of new considerations shares in the acquiring company. Given that the proposed exchange of shares was to be done after relocation it was imperative to elucidate the fiscal conditions related to the exchange of shares and the added value associated with the shareholding in the Norwegian holding company.

Figure 2: Illustration of case BFU 6/2023



An exchange of shares where the shareholder transfers their personal shares in a Norwegian AS for consideration shares in a Swiss GmbH is considered a realization of the Norwegian shares by NTA.§ 9-2. When shares are considered realized it is calculated as a gain or loss that is liable to tax, see NTA.§10-31. In order for the exchange of shares not to be subject to tax for A, it has to fulfill the conditions for tax exemption in NTA.§ 11-11. Lastly the paragraph presents the following four conditions; (1) At least 90 % of the shares must be transferred, (2) acquiring company has to be a limited liability company, (3) maximum limit for addition consideration is 20 %, lastly Norwegian tax positions has to be transferred with continuity on the consideration shares. With Switzerland being located outside the EEA-area there is an additional condition that Switzerland cannot be considered a low-taxation country.

The two questions raised in this case was whether the exchange of shares could be done without subjecting A to tax, and if the exchange of shares can be done without the deferment of payment being forfeited see NTA.§ 10-70 (7). The Directorate concluded that, based on the submitted facts, that the exchange of shares could be done without subjecting A to tax, and that the deferment of payment would be forfeited according to NTA.§ 10-70. However, the Directorate also assessed whether the payment on deferral still did not lapse on cross-border exchange of shares in accordance with NTA.§ 11-11 (4).

The regulation on payment deferral in the context of relocation is regulated by NTA.§ 10-70. The seventh paragraph provides the option of payment deferral when satisfactory security is provided. However, this possibility is contingent on the asset being deemed intact.[35] The legislative history of the paragraph also indicates that the payment deferral lapses upon realization of the asset.[36] The exchange of shares with the Swiss GmbH resulted in the shares being owned by the Swiss company rather than by A himself. Based on a natural linguistic understanding of the wording in NTA.§ 10-70, the Directorate did not regard the assets as intact due to the exchange of shares. In the legislative preparatory it is further stated that payment deferral extends until the point where the stocks are realized abroad.[37] In accordance with the definition of "realization" provided by NTA.§ 9-2 the Directorate found it evident that the assets had indeed been realized. The question of concern for the Directorate was whether the deferred payment on the exit-tax would be transferred unchanged on the exchanged shares in the Swiss GmbH.

The Directorate found that the phrasing in NTA.§ 11-11 (4) gave limited guidance on whether the paragraph also gave an exemption from FSFIN § 10-70-1 (2). The paragraph states that deferred exit-tax, in accordance with 10-70 lapses if the shares are no longer deemed intact. They found that NTA.§ 11-11 (4) was ambiguous on how the legal text should be understood. The phrasing could also be understood to include previously determined exit-tax, ensuring that the exit-tax does not lapse in the instance of the exchange of shares. Due to lack of guidance from the paragraph itself, and its preliminary work, three unpublished BFU cases were referenced as a grounding point for their expanding interpretation of the law. In all three of the unpublished statements it was concluded that deferred exit-tax did not lapse upon implementation of the tax-exempt reorganizations. The purpose of the legislation was significant in concluding against the laps of deferred exit-tax in all three cases. Consequently, the directorate focused on the purpose for NTA. §§ 10-70 and 11-11 also in this case.

[35] FSFIN § 10-70-1 (2)
[36] Ot.prp nr. 1 (2006 - 2007) punkt 6.10.3
[37] Ot.prp. nr. 1 (2006 - 2007) pkt 6.10.3

It is evident from the preliminary work for NTA.§ 10-70 that the purpose for legislation was to maintain the regard for taxpayers' liquidity.[38] The Directorate further specified that the liquidity regards that the rules on payment deferral are based on implies that the exit-tax should not be due for payment in cases like these. The tax claim could be unchanged and transferred with continuity on the consideration shares. Furthermore, the background for tax exempt reorganizations were looked at. The rules were designed to accommodate business operations in an optimal manner.[39] The Directorate thought that if the deferred exit-tax lapses in the case of tax-exempt reorganization it would prevent appropriate reorganizations that the legislator wants to facilitate. Considering the purpose for legislation, the Directorate concluded that the deferment of payment should be transferred on the consideration shares in the Swiss GmbH. The Directorate was in accordance with the exemption put forward in NTA.§ 11-11 (4)

3.2.1 Anti-avoidance assessment

The Directorate has not explicitly assessed the general anti-avoidance rule in the post-legislation case. However, there are aspects of their assessment that are similar to assessments done in anti-avoidance. When deliberating on whether the tax payment for A could be deferred, the Directorate considered the intended purpose behind the legislation surrounding tax exempt reorganizations. They emphasized the rules' role in curbing customization possibilities associated with realizing assets post-relocation under the exemption method.[40] The assessment surrounding the paragraph' "intended purpose" is similar to the one found when assessing the application of the GAAR. Both require an understanding of the legislative intent to ensure that potential tax benefits are granted only when the transactions adhere to the true purpose of the law, rather than exploiting technicalities.[41]

GAAR was not considered in this case suggesting that the level of "tax planning" done by A with the exchange of shares was seen as acceptable by the tax

[38] Ot.prp.nr.1 (2006-2007) pkt. 6.10.2.1
[39] Prop. 78 L (2010 - 2011) ch. 3
[40] Ot.prp. nr. 1 (2005 - 2006) pkt 11.4.1
[41] See further assessment in point 4.2

authorities. Therefore, it was not necessary to consider intervening in the transaction.

4 Comparing pre- and post-legislation of anti-avoidance

4.1 Application of anti-avoidance

When discerning the distinction between tax planning and aggressive tax planning based on application of the GAAR, it is crucial to observe the context in which the norm was previously applied versus when the GAAR is applied now. It can also be relevant to look at how it has evolved in light of anti-avoidance measures

The base of application for both the anti-avoidance norm and the GAAR lies in the fulfillment of the underlying conditions. In the assessment surrounding anti-avoidance in the BFU 8/2019 one can see that the non-statutory rule consists of two conditions: one basic condition and one overall assessment. The basic condition implies that the "primary purpose" for the transaction has to be tax-saving purposes. On its own this condition is not sufficient enough for the anti-avoidance to be applicable. There is also an overall assessment on the effects of the transactions, taxpayers' purpose and if the other circumstances appeared conflicting with the purpose of the tax legislation. The legislative GAAR also consists of two conditions where (1) the primary purpose of the transactions has to be tax advantages and (2) after a comprehensive assessment the transaction cannot be used as a basis for taxation.[42] Included in the overall assessment the third paragraph introduces a number of aspects to consider. The transactions "business purpose" are highlighted as a central moment in the assessment. This is in reference to the aspects of a transaction that are not related to tax and seem probable at the time of the transaction.[43] Both in pre- and post-legislation the two conditions seem quite similar. This could imply that the threshold for application would be somewhat similar as well. However, anti-avoidance has only been addressed in the case of pre-legislation.

[42] NTA.§ 13-2 (2)
[43] Prop. 98 L (2018-2019) p. 95

In BFU 8/2019, the Directorate examined anti-avoidance measures at the taxpayer's request. When companies undergo cross-border restructuring, they may seek to avoid tax liabilities in their home country. Therefore, it is crucial to assess potential anti-avoidance implications before restructuring to prevent complications later on. The Directorate's assessment in BFU 8/2019 focused on whether the two dividend payouts were orchestrated to bypass the 20 % maximum limit on additional consideration, as per NTA.§ 11-11 (4). The payouts could be constructed as an effort to extract company value in a tax-efficient manner prior to restructuring. Given the timing and nature of these payouts, there is reason to question the underlying business motives. In cases of suspicious transactions, it is important to consider applying anti-avoidance measures. The Directorate based their assessment on the business motives behind the transactions. They focused on whether the transactions were primarily motivated by business reasons or tax advantages. In the aforementioned case, the Directorate determined that the two payouts were driven by legitimate business motives rather than tax considerations, thus the conditions for applying anti-avoidance measures were not met. Given the presence of a genuine business purpose, the transaction was not seen as an abuse of the tax legislation, and anti-avoidance was not applicable.

In BFU 6/2023, although the taxpayer did not specifically request an assessment concerning the GAAR, the Directorate still dedicated a significant portion of their evaluation to whether the transactions aligned with the legislative intent behind rules for cross-border restructures. The GAAR typically comes into play when transactions exploit tax laws' purposes. Thus, evaluating whether transactions fulfill the intended objectives of laws help pinpoint instances of aggressive tax planning, where the legal framework is manipulated. If there is evidence of legislation abuse, invoking the GAAR becomes justifiable. However, if transactions align with legislative intent, there is no need for a GAAR assessment. This can be seen in BFU 8/2023 where the Directorate concluded that the planned share of exchange was within the purpose of the law. Therefore, assessing the GAAR was redundant.

Regarding the application of the GAAR in cases like BFU 6/2023 it is stated in the first paragraph of the GAAR that taxation "can" be applied by § 13-2 if the

two conditions are fulfilled. By using "can" it implies that the tax authorities do not have a duty to apply the rule even if the conditions have been fulfilled.[44] Given the costly nature of applying the GAAR it is preferred that it is mostly applied in bigger and more principal cases. However, it is not limited to the bigger cases and can be relevant in applying in other cases as well. In BFU 6/2023 the directorate did not assess the application of the GAAR, but mostly focused on the legislative purpose behind the relevant paragraphs.[45]

4.1.1 Connecting transactions

To determine the threshold for anti-avoidance, it is crucial to identify which transactions are included in the evaluation. According to NTA.§ 13-2 (2), the GAAR can be applied when the taxpayer has engaged in multiple connected transactions.[46] This is a factor that was also included in the anti-avoidance norm prior to legislation in 2020. The term "connected" suggests that there must be a link between the transactions, typically indicating that they are part of the same plan. [47] Prior to the implementation in 2020, the Supreme Court had limited the scope of assessment to what could be considered a natural entity.[48] The assessment surrounding connecting transactions was further specified in the ConocoPhillips-verdict. The Supreme Court stated that a presumption has to be that of a close internal coherence between the transactions, and that they are a part of integrated links in an overall plan.[49] However, the preliminary work recommended discontinuing this phrasing in the statutory rule due to the constraints it imposed on the aspects that could be included in the evaluation.

Determining whether transactions are singular, or part of a plan usually involves an overall assessment of factors such as the degree of determination, timing, risk

[44] Prop. 98 L (2018-2019) p. 92
[45] See further assessment regarding this in point 4.2
[46] My translation of the legal text in NTA.§ 13-2 (2); "flere sammenhengende disposisjoner"
[47] Banoun (2023) § 13-2 note 4
[48] My translation of the Supreme Court statement in Rt. 2006 s. 1232 (49); "(...) naturlig helhet"
[49] My translation of the Supreme Court statement in Rt. 2008 s. 1537 (43); "Føresetnaden for ei slik samla vurdering må likevel då vere at det er ein nær indre sammenheng mellom disposisjonanen og at det går inn som integrerte ledd i en samla plan", jf. Rt. 2004 s. 1331

and various repercussions the transactions have.[50] The transactions that are considered can have an impact on the requirement for intrinsic value.[51]

The determination of which transactions to include was significant in the anti-avoidance assessment in BFU 8/2019 regarding the two dividend payouts. The Directorate did not consider the two payouts as part of the share exchange between the Norwegian AS and the Swedish AB. By treating these as separate transactions, the share exchange fell within the maximum additional consideration allowed by § 11-11 (4), and the payouts were not deemed a means of circumventing this condition. Had the payouts been viewed as part of a connected transaction, they would most likely have been seen as an attempt to bypass the condition, making the anti-avoidance norm applicable.

4.2 Purposive interpretation of the overall assessment

When determining the content of a legal text one normally bases the interpretation on normal linguistic understanding. However, to better understand the law's content one often has to consider more than just the written text. The Norwegian legal system can sometimes emphasize legislative purpose and goals when interpreting the legal text. When interpreting the intended purpose behind a rule it often involves trying to understand the broader legislative objectives. The goal of a purposive assessment is to try and base the assessment on the purpose the legislator had drafting the legislation.[52]

Application of the GAAR will also largely be based on the purpose of legislation. The concept of purpose is essential to identify abuse of the tax system. The GAAR is designed to try and target schemes where transactions are structured in a way which are technically legal, but they can constitute an abuse of the law. Determining the purpose can help distinguish legitimate tax planning and unwanted aggressive tax planning.

[50] Banoun (2003) p.222-238
[51] Banoun (2003) p. 303
[52] Skar (2017) p. 158

The assessment of a rules purpose can be seen as an important aspect of the assessment in BFU 6/2023. In this case the purpose of tax-exempt restructuring rules were important when assessing whether the deferred exit-tax would lapse as a consequence of the exchange of shares. In the case of post-legislation one can see the emphasis the Directorate has on the purpose behind legislating rules for tax exempt reorganization. This emphasis on the purpose behind tax-exempt reorganization rules aligns with the approach required for the GAAR assessments.

A big argument for legislating the GAAR was that the issue of tax planning resulted in situations that were misaligned with the legislative purpose of the legal text. When these situations were deemed unreasonable and unfair, it could lead to a need to intervene.[53] The GAAR is today applied as a way to counteract transactions that, while formally legal, are done primarily to gain tax benefits in a manner that goes against the spirit of the law.[54] The rules for tax-exempt reorganization are designed to facilitate genuine business restructurings without triggering immediate tax liabilities. The legislative intent behind the rule is to allow businesses to adapt and reorganize efficiently while deferring tax liabilities until a later date.[55] In BFU 6/2023 the Directorate considered statements made in BFU 24/14 surrounding continuity. The case states that the Directorate assumes that deviating from the condition on taxation continuity in the tax act § 11-7 would be going against what is a basic demand on tax free mergers and acquisition, and that it takes a lot to deviate from this requirement.[56] Even though the Directorate did not think the quote gave much guidance, it did support an expanded interpretation of the wording of NTA.§ 11-7 (4) on tax continuity. They further anchored the argument in the fact that an expanded interpretation of NTA.§ 11-7 (4) is in line with the purpose of the paragraph.

Both from the assessment in BFU 6/2023, preliminary work and former use of the paragraph one can see how important purpose assessments are in Norwegian law. This can raise the question on how far one can stretch the purpose assessment of a

[53] NOU 2016: 5 p. 10.
[54] NTA.§ 13-2 (2)
[55] Prop. 78 L (2010 - 2011) ch. 3
[56] My translation on statement made by the Tax Directorate in BFU 24/14; "Direktoratet legger som utgangspunkt til grunn at det å fravike vilkåret om skattemessig kontinuitet i skatteloven § 11-7 vil være brudd på helt grunnleggende krav til skattefrie fisjoner og fusjoner, og at skal mye til for å fravike dette kravet."

legal provision. If one accepts that the purpose is significant, there might not be a need for the GAAR. If tax authorities consistently interpret and apply tax laws based on their intended purpose, taxpayers may be less inclined to engage in aggressive tax planning or exploitation of legal loopholes. The purpose of the GAAR is to minimize unwanted tax planning. If the individual rules can do that in of themselves the need for a separate anti-avoidance rule could be diminished because the original rule set the boundary for what is aggressive tax planning on their own. Recognizing the significance of legislative purpose ensures that tax laws operate as intended by lawmakers. It upholds the democratic principle that laws should reflect societal goals and values, rather than being circumvented for individual gain. These assessments normally directly align with the legislative intent behind anti-avoidance given how they seek to uphold the spirit and purpose of tax law. By preventing abusive practices while allowing for legitimate tax planning they can better maintain the integrity of the tax system. These assessments based on the legislative purpose are also similar to the disloyalty standard that evolved from the first mention of an established anti-abuse norm in the 1970s.[57] This was later included as a factor in the overall assessment that we see in the rule today. Purpose assessments, as done in BFU 6/2023 can provide more precise insights into the taxpayer's intentions and the economic substance of specific arrangements. Consequently, tax authorities can achieve the objectives of anti-avoidance legislation without the need for a separate provision like the GAAR.

While focusing on legislated purposes may reduce the need for the GAAR, it does not render the GAAR entirely obsolete. The GAAR can still serve as a safety net to address unforeseen or conspicuous tax avoidance schemes that are not adequately addressed by specific legislative provisions. The GAAR has the possibility to provide tax authorities the flexibility to consider the overall substances and economic effect of arrangements, ensuring that abusive practices are not allowed to circumvent tax laws. This is what the Tax Directorate did in BFU 8/2019 when they considered viewing the two dividend payouts together with the overall exchange of shares. The anti-abuse norm gave the Directorate the possibility to consider these transactions collectively, and determine whether, as a

[57] NOU 2016:5 p. 22

whole, they constituted an abusive practice to circumvent the law. The purpose assessment can reduce the need for the GAAR by considering if it is aggressive tax planning directly through the paragraph, but the GAAR still offers safety by including a broader spectrum of transactions.

4.2.1 Instrument rule vs. circumvented rule

In the preliminary work for NTA.§ 13-2 a clear separation between the applied rule, the instrument rule and the circumvented rule was suggested.[58] The instrument rule is the rule that the taxpayer uses to circumvent another legislation. The investigation suggested that the purpose of the rule that wanted to be circumvented should have a bigger impact on the assessment than the instrument rule.[59] However, these distinctions are considerably toned down for the legislated rule, and the purpose of the tax legislation is an important factor in the assessment surrounding the GAAR. The emphasis on the instrument rule was also the base in Rt. 2012 s. 1888 and Rt. 2014 s. 227 where the purpose of the instrument rule had a bigger role in the conclusion than the rules that were circumvented.[60] The proposition followed the legal practices and stated that it should be included in the assessment if the taxpayers actions are in conflict with the legislation's purpose. However, the legislative purpose for the circumvented rule should be given greater emphasis.[61]

In BFU 8/2023 one can see how the distinction could be done in the GAAR when it was assessed if the continuation of the deferred payment on exit tax to the consideration shares in the Swiss GmbH was assessed. The Tax Directorate assessed if the deferred payment would be continued in accordance with NTA.§ 11-11 (4) based on the purpose of §§ 11-7 and 11-11 (4). A comparison can be done on §§ 11-11 (4) and 11-7 as instrument rules, and NTA.§ 10-70 as a tried circumvented rule. In this case the Directorate based their assessment on the purpose behind NTA.§§ 11-7 and 11-11 (4) and not on the regulation of exit-tax in NTA.§ 10-70. This shows how the lack of separation could be important when

[58] NOU 2016: 5
[59] Prop 98. L (2018-2019) punkt 7.4.2
[60] Rt. 2012 s.1888 & Rt. 2014 s. 227
[61] Prop 98. L (2018-2019) punkt. 7.4.2

determining the application of the GAAR. A taxpayer can be in conflict with the circumvented rule without being in conflict with the instrument rule and vice versa. By not separating the assessments one can capture both instances.

4.2.2 Objective vs. subjective

One significant change in terms of threshold and application was the shift from a subjective to an objective evaluation of the transaction's purpose and the overall assessment from pre- and post-legislation. When the Supreme Court in 2006 separated themselves from the traditional understanding of the purpose assessment they emphasized the taxpayer's subjective motives for the transactions. The evaluation surrounding purpose was based on the taxpayer's subjective purpose for transactions,[62] until implementation in 2020. A subjective assessment would indicate that discerning the taxpayer's intent or motivation behind a transaction is important. Consequently, a subjective assessment can increase the complexity when determining aggressive tax planning. The tax authorities would need to gather and evaluate evidence that can determine the taxpayer's intention was tax saving.

The subjective assessment from the pre-2020 norm put a greater focus on the taxpayers' subjective motivation. This may cause the taxpayers to experience less certainty about what constitutes acceptable tax planning and what is considered aggressive tax planning. In BFU 6/2019 it would mean that the Tax Directorate would need to prove that the subjective motive for the two dividend payouts were tax saving, even though they were viewed as legitimate business transactions. The subjective assessment led to a more nuanced and case-by-case approach for handling aggressive tax planning and application of the norm pre-legislation.

In the preliminary work the department of finance determined that the assessment should be objective.[63] This approach bases the evaluation on the purpose a rational actor would have for a similar transaction[64] By legislating an objective the GAAR, the rule becomes more verifiable for circumvention transactions. Additionally, an objective the GAAR helps ensure equal treatment by applying

[62] Rt. 2006 s. 1232 (Telenor) - avsnitt 50
[63] Prop. 98 L (2018-2019) p. 53
[64] Prop. 98 L (2018-2019) p. 53

the same standards to similar cases. An objective rule can also better prevent fabricated transactions by considering more tangible factors, avoiding speculations about the taxpayers' motives. An objective assessment can provide clearer guidelines for certain types of aggressive tax planning and has a wider range for application. However, the wide range can make it less predictable for the taxpayers. An objective rule can also not be applied to cases where the transactions are business oriented, but the taxpayers' subjective motives go against the purpose of the law. For BFU 6/2023 the business transaction was seen as sincere and the assessment of the GAAR was not included. Prior to 2020 the motive for A's relocation to Switzerland would have had a larger impact on the Tax Directorate's assessment. This subjective factor could have affected the Directorate's conclusion.

The distinction between objective and subjective purposes is crucial for the application of the GAAR. Exchange of shares are intricate transactions that can benefit taxpayers, influenced by societal and business economic factors that support business restructuring. Evaluating purpose can be challenging, especially when taxpayers present compelling arguments for legitimate business purposes. Subjective motives for tax savings can be cleverly masquerade as genuine business motives. While the shift from subjective to objective motives made the GAAR more reliable and predictable, it no longer captures the true motives of taxpayers. Consequently, the application of the GAAR is limited to the tangible factors that the transactions are based upon.

4.3 Has the threshold changed?

In early assessments surrounding the application of non-statutory anti-avoidance the Supreme Court considered if the transaction could be considered real.[65] This assessment on whether the action was real, could be considered as an assessment on the "business purpose".[66] In 1962 Kvisli formulated the importance of intrinsic value.[67] The Supreme Court further formulated a somewhat intrinsic value in the Kielland-case. The Court stated that the arrangement has to be motivated entirely

[65] See assessments in Rt. 1961 s. 1995 & Rt. 1963 s.478
[66] Also supported by Banoun (2003) p. 299
[67] Banoun (2003) p. 299

or primarily by a desire to save tax.[68] Ever since the statement in the Kielland-case the intrinsic value or the "business purpose" of a transaction has been central in the assessment on anti-avoidance.

Prior to legislation in 2020 the lowest demand for "business purpose" was found in Rt. 1997 s.1580 (Zenith-verdict).[69] The lead justice pointed out that tax benefits were no doubt the leading factor when the shares in Grønvold were sold. However, it was found that the two commercial plots gave the transaction a limited business purpose.[70] When justifying for not applying the non-statutory anti-avoidance rule in this verdict, the lead justice pointed out how an anti-avoidance in this case would lead to uncertainty on the threshold for a tax intervention of this nature.

In the Zenith-verdict the total value of the commercial plots was less than 2 % of the company's value that gave the share sale a business purpose. This indicates that the level of business purpose is low in order for the anti-avoidance rule not be applicable. When the threshold for defining "business purpose" is set low, it results in an increased threshold for applying the norm. This happens because more transactions may seem to lack the level of tax implications required for the norm's application. The Zenith-verdict has later been criticized and many are under the opinion that the line for "business purpose" was considered too low.[71] However, the Supreme Court continued to reference the verdict and thought that the line represented current law. In Rt. 2012 s.1888 (Dyvi-verdict) the Supreme Court pointed out that the statements from the Zenith-verdict had not been put aside in later practice. In later legal practice for the anti-avoidance norm the threshold for "business purpose" has not been assessed as low as the threshold set in the Zenith-verdict.[72] In the Dyvi-verdict the threshold was set to be higher than in the verdict from 1997. It is worth noting that the level of "business purpose" is not enough to determine the threshold alone, but it is a factor that can increase and decrease the number of cases it is applied on.

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[68] My translation of the Supreme Court statement in Rt. 1971 s. 264 p. 267; "ordningen er motivert helt eller hovedsakelig ved ønsket om å spare skatt"

[69] NOU 2016: 5 p. 5

[70] Rt 1997 s. 1580: p 1587

[71] «Overføring av skatteposisjoner – et kritisk blikk på Zenith-dommen»: Skatterett 1998 s. 164-187 – (SR-1998-164)

[72] Se blant annet Rt. 2012 s. 1888 (Dyvi-dommen)

The preliminary work for the GAAR noted a couple of changes to the non-statutory norm that could be made. Some of them were that tax advantages from abroad should no longer be part of the assessment, the subjective purpose assessment should change to objective and the significance of the tax legislation should be limited. A consequence of these suggested changes is that the threshold for application would be lowered.[73] However, the legislation of the GAAR was not meant to generally change the threshold for the rule,[74] and that specific assessment factors should be altered in individual cases. By changing the assessment factors for individual cases, it could lessen the predictability of the GAAR given that the taxpayer cannot say for certain what transactions would make the rule applicable when it changes case by case. By adjusting these assessment factors based on individual cases, tax authorities can tailor the application of the GAAR to target specific aggressive tax planning practices. This would benefit the legislation but put the taxpayer at a disadvantage due to lack of predictability. Cases prior to 2020 were largely following the same factors for similar cases. By considering the factors on a case-by-case basis one can ensure that the threshold is appropriately applied across the different aggressive tax planning scenarios. However, it can indirectly result in a lower threshold for the GAAR due to an increased number of variables originating from the cases.

In NTA.§ 13-2 (3) it is stated that in the overall assessment it should "among other things" be considered factors listed in the following paragraph.[75] The phrasing suggests that this is not an exhaustive list, and that the assessment can include other factors depending on the case. Furthermore, the list is not a representation of how the factors should be weighted, and the emphasis of each factor could vary depending on the case.[76] The legislation opened for more than the listed factors to be assessed and does not create a guideline on what factors are the most important. This lack of guidance from the legislation created the opportunity for interpretation from the authorities when assessing the application of the GAAR. As stated above, by opening for a case-by-case assessment one can

[73] Se tidligere vurdering i kapittel 4.2.1 og 4.2.2
[74] Banoun (2023) § 13-2 note 1
[75] My translation of phrasing in NTA.§ 13-2 (3); "blant annet"
[76] Banoun (2023) § 13-2 note 7

indirectly lower the threshold due to the high number of cases that can potentially be affected.

The difference in assessment can advocate for a lowered threshold after legislation. In BFU 8/2019 anti-avoidance was assessed in line with legal practice that has stated that the extent of "business purpose" was a deciding factor on the application of the anti-avoidance norm and ultimately what arguments against the GAAR's application. In BFU 6/2023 the GAAR was not assessed, and the Tax Directorate focused on the purpose for legislation of the restructuring rules. In this case it looks like the threshold for invoking anti-avoidance might be lower as tax authorities might not need to meet the same burden of proof that is required under the GAAR.[77] This could make it easier for tax authorities to challenge arrangements they perceive as abusive or contrary to the legislative intent.

When legislating the GAAR, it was meant that the threshold set by legal practice should be maintained. Even though the phrasing of NTA.§ 13-2 opens up the possibility that the threshold could be lowered after legislation, decisions where the GAAR has become applicable have been similar to application prior to 2020. This suggests that even though the threshold could be lowered, it is still somewhat equal to the threshold prior to 2020.

From the two BFU cases one can see how anti-avoidance has been assessed both before and after legislation. Even though it was not applied in any of the cases one can still draw conclusions on the threshold from the Tax Directorates assessment. Both cases had a satisfactory level of "business purpose" which indicated that the primary purpose of the transaction(s) was not tax saving measures. The Directorate also thought that the transactions were in line with the purpose of the legislation. They could therefore not apply anti-avoidance based on breach with the legislative purpose. In both instances it could be argued that these were cases of aggressive tax planning due to the nature of the transactions. However, the presence of a "business purpose" and the fact that it was adhering to the legislative purpose could indicate it was not necessarily unacceptable tax planning.

[77] See analysis of purpose in part 4.2

One key difference between the distinction of tax planning and unwanted aggressive tax planning lies in the fact that planning adheres to the legal limits set by the law, whereas unwanted aggressive tax planning operates outside the boundaries defined by the law. The line between tax planning and unacceptable tax planning can be seen in the assessment surrounding purpose and does not necessarily present itself directly from the application of the GAAR.

5 International and political perspectives

Tax avoidance in the form of unwanted aggressive tax planning can often be an international problem. As an effect of the economy becoming more and more globalized, tax planning is becoming a largely cross-border issue. Adopting similar definitions and rules helps ensure harmonized tax policies and prevent discrepancies that could complicate cross-border economic activities. Consequently, anti-avoidance rules are something one can find in numerous international legal systems. Analyzing different versions of the GAAR provides a comprehensive view of different approaches to the anti-avoidance rules. Understanding the similarities and differences between the different approaches can offer deeper insights into what constitutes acceptable tax planning versus unwanted aggressive tax planning.

For Norway, the EU and OECD are highly relevant to look at. Norway is one of OECD's members and a number of Norway's tax treaties are based on OECD's standardized tax convention model.[78] However, Norway is not a part of the EU and their relationship exists through their part in the European Economic Area (EEA) agreement.[79] The EEA agreement does not formally encompass tax policies, consequently Norway has no duty to harmonize domestic tax policies with EU directives and regulations.[80] However, Norway legislation cannot have national rules or execute their taxation in conflict with the four freedoms of the EEA.[81] Furthermore, the EUs role in setting international standards, promoting transparency and facilitating cooperation, and as one of Norway's biggest partners[82], it is relevant to look at their anti-avoidance rules and definitions.

By aligning with guidelines and directives of the OECD and the EU, Norway can more effectively combat aggressive tax planning and ensure fair taxation. An alignment with the OECD and the EU can also help with maintaining strong economic ties with the international community. This enhances Norway's ability

[78] OECD
[79] EEA-agreement
[80] EØS avtalen 8.1.2
[81] Stortinget 2023
[82] NOU 2012: 2 p. 19

to protect its tax base, attract investment and help contribute to a fair and predictable global tax environment.

The Norwegian GAAR is formulated and should be applied in a way that does not conflict with Norway's international obligations. [83] This can suggest that the GAAR has been influenced by international tax norms and practices. Understanding the international context and how different jurisdictions view the GAAR can provide a comparative view that is beneficial for multinational corporations. Furthermore, I will examine anti-avoidance rules in other international settings to look at how the OECD and the EU's assessment of anti-avoidance is similar or different from the Norwegian GAAR.

5.1 OECD

Norway has numerous tax treaties, most of which are based on the OECD's standardized tax treaties. The interpretation of the OECD treaties is regulated by the Vienna Convention (VCLT). Norway has used the multilateral instrument (MLI) as a framework in the BEPS process with the OECD since it was entered into force on November 1st 2019.[84] The MLI introduces minimum standards that modify tax treaties, requiring parties to adhere to these standards for existing treaties that lack a misuse clause.[85] States have the option to choose between a general anti-avoidance rule and the legislation that includes objective terms to counteract aggressive tax planning.[86] Norway has opted for the general anti-avoidance rule known as the Principal Purpose Test (PPT).

5.1.1 Principal Purpose Test

The PPT is implemented in the OECD model agreement from 2017 article 29 (9):

> *"Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was **one of the** principal*

[83] Innst. 24 L (2019-2020) pkt 2.5
[84] Prop. 15 S (2018-2019) p. 77
[85] Prop. 15 S (2018-2019) p. 7
[86] OECD (2017) Commentaries C(29)-1/C(29)-2

purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention."

Similar to the Norwegian GAAR, the PPT rule involves a two-tier assessment. First, it must be determined whether an allocation rule from the tax treaties can be applied ("Notwithstanding the other provision of this Convention"). Second, there is an assessment to determine if the allocation rule is still inapplicable due to the principal purpose test. Like the outcome of applying the Norwegian GAAR, the effect of the principal purpose test is that it overrides the allocation rule.

The Principal Purpose Test is made up of two tests. The first test is subjective and examines whether the transaction has a taxation purpose ("one of the principal purposes"). The choice of using "one of the" indicates that the OECD implies it is sufficient for tax saving to be merely one of the purposes behind the transaction. The paragraph's commentary also assumes this understanding of the phrasing. It is pointed out that even if there are other principal purposes, as long as one of them is tax motivated the rule can become applicable.[87] This is a key difference from the Norwegian GAAR where the tax advantage has to be seen as "the primary purpose". If the line between acceptable tax planning and unacceptable tax planning is based on when the anti-avoidance rules are applied, the difference in application threshold between the Norwegian GAAR and the PPT is evident. This difference in word choice suggests that the Norwegian GAAR has a higher application threshold than the OECD PPT rule.

In the latter part of the paragraph, there is an exception to the application of the PPT. The rule is applicable "unless it is established (...) would be in accordance with the object and purpose of the relevant provisions of this convention". The use of "unless" shows that this is meant as an exception to the application of the rule. The choice of phrasing it "in accordance with" suggests that it is not sufficient to prove that the transaction was simply not in conflict with the purpose. The taxpayer has to prove that the transaction is in accordance with the purpose. This

[87] OECD (2017) Commentaries C(29)-89

choice can imply that the threshold for applying anti-avoidance is lower than if it was sufficient to simply prove non-conflict. In comparison with the Norwegian GAAR this exemption could indicate a lower threshold for application of the OECD anti-avoidance rule. Legislative purpose is only one of several factors included in the overall assessment on whether the transaction is taxed on a wrong basis. The presence of multiple factors in the Norwegian assessment indicates that more is required for the rule to become applicable due to a more comprehensive assessment.

One can see similarities between the OECD PPT rule and the Norwegian GAAR considering that as a base line all transactions that are motivated by tax can make the rule applicable. However, the fields of application are different between the two rules, due to different emphasis on legislative purpose and the extent of the assessment. This suggests that Norway accepts a higher level of tax planning than OECD.

5.2 European union

Unacceptable tax planning is an international problem and by adopting similar definitions and rules as the EU, Norway enhances their ability to cooperate with other jurisdictions in combating unwanted aggressive tax planning. This positions Norway as a proactive participant in global efforts to combat unwanted aggressive tax planning. By better understanding the different approaches to anti-avoidance rules one gets better insights into what constitutes acceptable tax planning and what is unwanted aggressive tax planning in an international environment

5.2.1 Anti-Tax Avoidance Directive

From the EU the most relevant anti-avoidance measures is the *Anti-Tax Avoidance Directive* (ATAD) due to the role the directive has in establishing common anti-avoidance standards. Given how the directive has little legal requirements for Norway, the comparison is done to better understand the difference between acceptable and unacceptable tax planning in an international setting, and not because Norway legally has to adhere to the directive.

For EU member countries ATAD ensures that tax advantages are only granted in presence of genuine economic activity. ATAD was adopted by the EU in 2016. The Directive included a "general anti-abuse" rule in article 6. The first paragraph of the article states that:

> "a Member state shall ignore an arrangement (...) having been put into place for the main purpose, or one of the main purposes of obtaining tax advantage that defeats the object of purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances".[88]

The second paragraph of the article further explains that "an arrangement shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality".[89] The term "valid commercial reasons" is likely intended to establish an objective criterion, even though its interpretation might require some level of subjectivity.

Both the EU ATAD and the Norwegian GAAR are based on two assessments, one of them being whether the main objective of the transaction was tax saving. Like the OECD PPT, tax saving only has to be one of the main purposes after the EU standard. The directive also points out that the arrangement has to have "valid commercial reasons" for the tax implications to be considered valid. The Norwegian assessment has several specific factors when considering if the transaction can be considered valid. The lack of factors in the EU article implies that the EU is more flexible, and more principle based. However, with the Norwegian GAAR having predefined factors, it shows that several things have to be considered before concluding that the transaction(s) has "business purpose". This indicates that there is a stricter threshold for applying the GAAR by Norwegian standards than by international standards, given the high level of assessment necessary for application. Consequently, a higher level of tax planning could be said to be acceptable under the Norwegian tax system than what is present under the EU Directive.

[88] Directive 2016/1164 (EU) Art. 6
[89] Directive 2016/1164 (EU) Art. 6

5.3 Political dimension of tax avoidance

Taxation is often linked to the perception of fairness and social justice in today's society. Instances of corporations or individuals using aggressive tax planning as a way of avoiding their tax burdens can cause reactions from the public. What the public perceive as fair tax planning versus unfair tax planning can influence political discourse and pressure politicians in finding rules to stop unwanted tax planning. Politicians can respond by proposing stricter regulation or closing perceived loopholes to demonstrate their responsiveness to the public's concerns.

Tax legislation is often complex and open to interpretations. Political decisions can influence the evolution of tax regulations. Changes in leadership or shifts in public opinion can lead to revisions in tax policies aimed at closing the loopholes. Politicians are responsive to public opinion, and concerns about tax avoidance can result in demands for stricter regulations and enforcement. Politicians may be influenced to create rules to curb tax planning based on moral considerations rather than legal grounds. Addressing loopholes based on public opinion can lower the threshold for acceptable tax planning, making more tax planning strategies deemed unacceptable.

The international scene can also influence the political aspect of unacceptable tax planning. In the same manner public opinion can influence legislation on tax, international pressure and agreements can lead to tax reforms in Norway. As a response to OECD frameworks Norway has introduced measures to prevent base erosion and profit shifting, particularly seen in the tax treaties with the implementation of the PPT-rule. Better media coverage of tax scandals across the world has raised public awareness about tax avoidance in the form of aggressive tax planning. This international awareness can increase the pressure on politicians to create stricter rules on tax avoidance in the same way national awareness can. International politics surrounding tax avoidance is highly important to maintain Norway's diplomatic ties with other countries. Consequently, Norway’s commitment to international tax standards can influence their acceptance of tax planning on a domestic level.

6 Final reflection

6.1 Do we have only one anti-avoidance rule today?

The legislated GAAR was implemented in NTA.§ 13-2 in 2020. Through the GAAR the tax authorities can reclassify transactions that are primarily tax motivated, and that otherwise would not be a basis for taxation.[90] Even though there is a legislated rule, the non-statutory rule could still be relevant. The non-statutory rule is developed through legal practice and has been applied by the Norwegian courts since the 1920s.[91] The legal practice has established principles on what can be considered as unacceptable tax planning. These principles are still relevant for what is considered unwanted tax planning under the legislated rule.

The preliminary work for the GAAR stated that in general there would not be a change in the threshold for the non-statutory norm versus the GAAR.[92] Additionally, the legislated rule is meant to deliver the same outcomes as the non-statutory norm making the prior legal practice still relevant when interpreting the scope of the GAAR.[93] This indicates that even after the implementation of anti-avoidance in NTA.§ 13-2 the non-statutory norm is still relevant. The non-statutory norm is more flexible and can be applied on a broader spectrum than the GAAR, given the difference in assessment basis. Cases that involve complex tax planning structures can therefore still be influenced by the principals determined by the non-statutory rule.

The existence of the GAAR through NTA.§ 13-2 most likely means that the non-statutory rule is no longer applicable in legal situations. Just because the principle from the non-statutory rule still exists does not necessarily mean that the rule still exists. However, the presence of principles determined by the non-statutory rule in the GAAR can affect the determination of what is acceptable and unacceptable tax planning. This is because the non-statutory norm based itself on a more subjective assessment than the GAAR currently does. The presence of the

[90] NTA. § 13-2 (2)
[91] Rt. 1921 s.462
[92] Prop. 98 L (2018-2019) p. 57
[93] Skatte-ABC 2023/2024 T-10-2

principles can therefore indirectly give the assessments in the GAAR subjective characteristics even though it is primarily objective. This can play a role when considering whether tax planning was unwarranted or nor

6.2 Is there a clear line between acceptable- and unacceptable tax planning?

Legislating the anti-avoidance norm was meant to enhance clarity regarding the scope of application. The clarification would provide the taxpayers with predictability towards what the authorities would consider unacceptable tax planning.

The legislation introduced guidelines and criteria for assessing the extent of tax planning, aiming to offer certainty regarding what constitutes acceptable practices. However, despite regulation, the tax system and its principles remain intricate. Tax policies evolve dynamically and are subject to interpretation in response to new cases. Establishing clear and universally applicable guidelines for the GAAR is challenging, given that its wording allows for relative and case-by-case assessments. As a result, defining a precise boundary between acceptable and unacceptable tax planning can be difficult.

The GAAR presents concrete assessment factors that the non-statutory rules did not do. Concrete assessment factors can help provide more transparent and verifiable assessments in the future. This helps clarify the threshold and the scope of the rule. When formulating the rule, the legislator has done material changes. This included changing it to an objective assessment. Objective interpretation gives the legislator more control over the legal development by ensuring that the laws are applied as written and not interpreted in light of subjective motives. The objective assessment of the GAAR also limits judicial discretion which promotes consistency and predictability. This can provide more clarity surrounding the line between acceptable and unacceptable tax planning. In the preliminary work it was stated that the legislator in general would base the assessments on the same threshold as for the non-statutory rule.[94] However, the material changes done by

[94] Prop. 98 L (2018-2019) s. 57

the legislator when developing the GAAR would have an impact on the threshold of the application of the rule.

Political developments influence the application of the GAAR and, consequently, shape the threshold for defining unacceptable tax planning. In Norway, political decisions typically guide the goals of the tax system. Anti-avoidance measures are created to support these objections by curbing abusive tax practices. The difference between acceptable and unacceptable tax planning can shift in response to changes in political priorities. If political viewpoints dictate what is deemed acceptable, defining a clear distinction can become challenging.

Despite the GAAR being rooted in a non-statutory norm, the legislated rule is relatively new and subject to interpretation. As legal precedents accumulate over time, the impact of public perception and political influence on the GAAR's application is likely to diminish.

6.2.1 International influence on unacceptable tax planning

The international aspect of tax planning significantly influences the distinction between acceptable and unacceptable tax planning by introducing additional layers of complexity and legal frameworks. Application of the Norwegian GAAR is primarily applied within Norway's domestic tax framework. However, international consideration can impact applications in cases evolving cross-border transactions. When considering the application of the GAAR on cross-border transactions the authorities have to navigate potential conflicts with other jurisdictions. This has the potential to increase the threshold for application due to the higher level of assessment needed to clarify if the GAAR is applicable.

In line with Norwegian international obligations the GAAR ensures that taxpayers pay their fair share of taxes in Norway. International aspects, such as tax treaties, play a role when determining how income is determined and taxed between jurisdictions, influencing what constitutes acceptable tax planning.

The Norwegian GAAR, the PPT-rule and the EU Anti-Avoidance Directive all emphasize the importance of economic substance over legal form when evaluating tax planning strategies. The rules distinguish between transactions that have

genuine economic and business purpose, and those transactions that are purely designed to achieve tax benefits. This implies that for the tax planning to be acceptable it has to have a certain level of business purpose. However, the Norwegian GAAR phrases it as tax saving having to be "primary purpose", while the PPT and the EU uses "one of" indicating that the Norwegian threshold for unacceptable tax planning is set somewhat higher than the international one.

Seen together, the three rules create a holistic framework that covers both national and international dimensions of tax planning where transactions are assessed on their real economic substance. The interaction between the rulesets provide a more consistent approach to unacceptable tax planning on cross-border transactions. The Norwegian GAAR covers national taxation, the PPT maintains integrity of the tax treaties and the ATAD addresses tax planning in the EU. The different rule sets cover different aspects of tax planning and together ensure that it is more difficult to exploit loopholes or differences in jurisdictions. The interaction between the Norwegian GAAR, the ATAD and the PPT help define the line for unacceptable tax planning by combining national and international standards and rules for assessing transactions "business purpose" and compliance with legislative purpose.

The emphasis on legal certainty and predictability in Norwegian tax law could argue for the presence of a higher threshold. This higher threshold shows a more cautious approach for applying anti-abuse regulation. This could be to ensure that the scope of the GAAR is not seen as too broad or arbitrary, and ensure it only applies to cases where unacceptable tax planning is present.

Even with the legislation of the GAAR there is still a presence of some discretionary assessment in the application of the rule. The tax authorities and courts still have to consider the specific circumstances of each case to decide if the tax planning is in accordance with legislative purpose or designed primarily for tax advantages. The legislation of the GAAR in 2020 gave certain guidelines to the distinction between acceptable and unacceptable tax planning. However, the legal practice and guidance from authorities are important to understand how the GAAR should be interpreted and applied. Therefore, it can be time consuming to develop consensus on where the limit lies. It is most likely necessary to have more

legal practice to achieve greater clarity on the distinction between acceptable and unacceptable tax planning. However, there is a connection between the threshold of the GAAR and the distinction between acceptable and unacceptable tax planning.

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