

Bergen, 5 October 2023



Nordic General Anti-Avoidance Rules – A Comparative Study

Tax Law Conference – Contemporary Tax Issues

Professor Peter Koerver Schmidt, CBS
& Professor II, UiB

Associate professor Henrik Skar, UiB



General Anti-Avoidance Rule

Image source: The Economic Times



"The underlying legal conditions are similar in the different Nordic countries. Not only with respect to the tax regulation itself, but also, and this is of particular importance in this context, when it comes to the civil law regulation and the view of the relationship between civil law and tax law. At the same time, however, the Nordic countries show a number of differences when it comes to solving the avoidance problem"

G. Lindencrone, General report for the Nordic Tax Research Council on Circumvention of Tax Rules, 1975.



- A currently on-going research project
- Four Nordic colleagues:
 - Richard Croneberg, Lund
 - Reijo Knuutinen, Turku
 - Henrik Skar, UiB
 - Peter Koerver Schmidt, CBS/UiB
- Preliminary observations and conclusions

Interpretation and Application of General Anti-avoidance Rules in the Nordic Countries – a Reassessment after five Decades of Domestic and International Tax Developments

Richard Croneberg, Reijo Knuutinen, Peter Koerver Schmidt, and Henrik Skar¹

[abstract]

1 Introduction

At the annual seminar of the Nordic Tax Research Council, held in [Södertälje](#), (Sweden) in 1976, tax avoidance was the main topic. Based on national reports from Denmark, Finland, Norway, and Sweden, General Reporter Gustaf Lindencrone among other things concluded that the topic of tax avoidance was very well suited for a comparative assessment, as the basic legal conditions were sufficiently similar, but the applied solutions considerably different. More precisely, the General Reporter stated:²

"The underlying legal conditions are similar in the different Nordic countries. Not only with respect to the tax regulation itself, but also, and this is of particular importance in this context, when it comes to the civil law regulation and the view of the relationship between civil law and tax law. At the same time, however, the Nordic countries show a number of differences when it comes to solving the avoidance problem."

Obviously, a lot has happened in the almost 50 years that have passed since the Nordic tax experts of the time met to discuss how to mitigate tax avoidance. Hence, case law in all four countries has developed tremendously and various anti-avoidance rules have made their way into the countries' tax regimes. Today, all four countries thus have a whole plethora of general anti-avoidance rules (GAARs), specific anti-avoidance rules (SAARs), and targeted anti-avoidance rules (TAARs) embodied into their tax legislations.³

Against this background, and since all four countries recently have had to reconsider their GAARs, the aim of this paper is to compare and reflect on how these Nordic states have applied and developed their GAARs, and to discuss whether recent developments in international tax law have contributed to driving the Nordic countries further together or apart. Hence, all four countries are members of the OECD, and

¹ Richard Croneberg is Associate Senior Lecturer at Lund University, Reijo Knuutinen is Professor at University of Turku, Peter Koerver Schmidt is Professor WSR/II at Copenhagen Business School and University of Bergen, and Henrik Skar is Associate Professor at University of Bergen.

² G. Lindencrone, *Generalrapport i Kringgående av skattelag, rapporter och inlägg vid Nordiska skattvetenskapliga forskningsrådets seminarium om kringgåendeproblemen i nordiska skattelagstiftning i Södertälje i oktober 1976*, pp. X-X (Libor 1979). See also F. Zimmer, *In Defiance of General Anti-Avoidance Rules*, 74 Bulletin for International Taxation 4, p. X-X, who recalls his participation in the seminar how it struck him how great a difference in approach there was even among the Nordic countries.

³ While SAARs are promulgated to counter a specific type of abusive behaviour, GAARs are used to support SAARs and to cover transactions that are not covered by SAARs. Hence, a GAAR typically relies on criteria of general application and tend to be rather broad and vague. See e.g. R.S. Avi-Yonah & O. Halabi, *U.S. Treaties, Anti-Avoidance Rules: An Overview and Assessment*, University of Michigan Law & Economics Working Paper no. 45, p. 2 (2012), and G.S. Cooper, *The Design and Structure of General Anti-tax Avoidance Regimes*, 63 Bulletin for International Taxation 1, p. 26-32 (2009). A TAAR can be seen as something in between a GAAR and a SAAR. It may share many of the characteristics of a GAAR but is limited to a specific set or type of transactions. See E. Foruseth, *The Interpretation of Tax Treaties in Relation to Domestic GAARs*, sec. 1.1 of the online version (IBFD 2018).



Agenda

Primary objective: Analyse and compare key features of the Nordic GAARs (Norway, Denmark, Sweden, and Finland).

Additional objective: Discuss the impact of the EU Anti-Tax Avoidance Directive (ATAD) on the application of Nordic GAARs.

What is a GAAR



- Legal standards or flexible rules designed to tax individuals/entities under ordinary tax regulations when attempts have been made to avoid or exploit the ordinary rules.
- Introduced to safeguard the tax system and its integrity, including ensuring equal treatment of comparable transactions, upholding the purpose behind tax laws, and preserving tax revenue.
- An aim is to discourage taxpayers from deliberately seeking loopholes, a practice which otherwise tends to spread.

“We should not regard them as evils, not even as unavoidable evils, but as inherent features of modern tax systems...”



F. Zimmer, Bulletin for International Taxation (2019), p. 218-26.





The Finnish GAAR

- Introduced in 1943 (based on older GAARs from 1920 in tax legislation for municipalities)
- Finnish Law on Taxation Procedure (18.12.1995/1558), section 28:

*“If a transaction has been given a **legal form that does not correspond to the matter's true nature or objective**, taxation shall proceed as if the correct form had been used. If a purchase price, payment, or the timing of the payment has been manipulated or another measure has been adopted with **the intention of escaping taxes**, the taxable income and assets values can be increased”.*

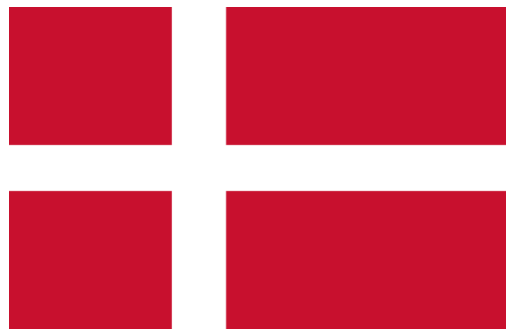


The Swedish GAAR

Introduced in 1981. Now incorporated in Lag (1995:575) mot skatteflykt (Act Against Tax Avoidance), section 2:

“In determining the tax base, no consideration shall be given to a legal action if:

- 1. It alone or together with another legal action, is part of an arrangement that results in a **significant tax benefit** for the taxpayer,*
- 2.*
- 3. Considering the circumstances, the tax benefit can be assumed to have been the **defining reason** for the arrangement, and*
- 4. Determining the tax based on the procedure would be **contrary to the purpose of the legislation** as it appears from the general design of the tax provisions and the provisions that are directly applicable or have been circumvented by the arrangement.”*



The Danish GAAR

Introduced in 2015/2018. Placed in Sec. 3 (1-7) of the Tax Assessment Act (Ligningsloven)

1. *“Taxable corporations and associations etc. shall, when preparing the taxable income and the calculation of taxes, ignore an arrangement or a series of arrangements which, having been put into place **for the main purpose or one of the main purposes of obtaining a tax advantage** that defeats the object or purpose of applicable tax law, **are not genuine having regard to all relevant facts and circumstances**. An arrangement may comprise more than one step or part.*
2. *For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine **to the extent that they are not put into place for valid commercial reasons which reflect economic reality**.*
3. *Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law...”*

The statutory GAAR is complemented by a still existing court-develop (pragmatic) approach.



The Norwegian GAAR

Adopted in 2019 in the Norwegian Tax Act (16 June 1999, nr. 47), section 13-2:

Tax avoidance occurs when one or more related transactions are executed that:

- a. imply that the **main purpose** was to achieve a **tax benefit**, and*
- b. **following a comprehensive assessment**, the transaction is deemed non-recognizable for tax purposes.*

The comprehensive assessment, should take into account

- a. business related **substance and other effects** of the transaction besides tax benefits in Norway or abroad,*
- b. the size of the tax benefit and the **degree of tax purpose**,*
- c. whether the transaction is an **inefficient way** to achieve the economic purpose of the transaction,*
- d. whether the same result, including the tax benefit, could have been achieved in a way not covered by this paragraph,*
- e. the technical design of the tax rules, including whether a rule is strictly limited in time, quantity, or a similar way,*
- f. if **tax rules are exploited contrary to their purpose** or fundamental tax considerations.*

	Finland	Sweden	Norway	Denmark
Legal basis	Statutory GAAR	Statutory GAAR	Statutory GAAR	Statutory GAAR
Year of Adoption	1943	1981	2019	2015/2018
Tax advantage	Yes	Yes (“significant”)	Yes	Yes
Motive/purpose test	Yes, the tax benefit must be the “essential purpose”. If the taxpayer can present genuine and sufficient business reasons for his actions, the GAAR cannot be applied. Thin business reasons not enough.	Yes, the tax benefit must be the “defining purpose”. If there are any non-tax reasons for structuring the arrangement in the chosen way, and they appear as the principal purpose, the GAAR is not applicable.	Yes, the transaction must demonstrate that its “main purpose” is to save tax (basic requirement). Yet, non-tax purposes that are secondary to the tax purpose, can combined with other arguments, save the taxpayer under the overall assessment.	Yes, the tax benefit must be “one of the main purposes”. Additionally, the GAAR stipulates that the arrangement must not be genuine. If the transaction is carried out for “valid commercial reasons” that reflect reality it can be genuine, even if one of the main purposes is to obtain a tax benefit.
Objective or subjective motive/purpose test?	Both Under the first requirement, where a conflict between substance and form must be demonstrated, it matters what purposes the transaction objectively promotes. The second requirement delves into the actual motives.	Objective Based on external factors related to the transaction.	Objective Based on how a rational actor would reason in the same situation.	Subjective “One of the main purposes” is normally considered a subjective test, but...
Substance over form argumentation	Application necessitates that the form does not align with the transaction's true nature or objective.	Not recognized under the GAAR, but it has been discussed whether it's relevant within a separate court-based doctrine concerning the true nature of a transaction	Important to demonstrate that the transaction lacks non-tax substance/effects, or that the effects reflect another form that would not result in the tax benefit.	The transaction must not be genuine, when emphasising commercial reasons and economic reality.
Defeating legislative purpose	Relevant, but not required to demonstrate a conflict with legislative purpose.	Only applicable if the tax benefit defeats the purpose of the tax legislation.	Important, but not strictly required to demonstrate a conflict with the purpose of the circumvented tax legislation.	Only applicable if the tax benefit defeats the object and purpose of the tax legislation.
Primary Legal effect	Recharacterization	Recharacterization	Recharacterization	Recharacterization
Who can apply the GAAR?	Ordinary tax authorities	Tax authorities must bring the case before the Administrative Court	Ordinary tax authorities	Tax authorities must bring the case before the National Tax Council



Implications of ATAD article 6 (EU GAAR)

- 1) **Compliance with ATAD Article 6:** Are the GAARs of Sweden, Denmark, and Finland in line with ATAD's Article 6?
- 2) **Influence of ATAD on National GAARs:** How does/may ATAD Article 6 and its associated sources influence the understanding and application of the GAARs in Denmark, Sweden, and Finland?
- 3) **Does the ATAD have implications for Norway,** given its non-EU status?

Anti Tax Avoidance Package: EU to implement new measures against corporate tax avoidance

The European Commission has recently opened up a new chapter in its campaign for fair, efficient and growth-friendly taxation in the EU with new proposals to tackle corporate tax avoidance.

The Anti Tax Avoidance Package contains concrete measures to **prevent aggressive tax planning**, **boost tax transparency** and **create a level playing field** for all businesses in the EU.



The EU GAAR

- Adopted in 2016 (Council Directive 2016/1164 of 12 July 2016)
 - Officially aiming to streamline the BEPS implementation within the EU
- The EU GAAR in ATAD article 6 is based on the ECJ-developed general anti-avoidance
 - A direct codification?
 - Just inspired by?
- ATAD is a minimum directive
 - MS can introduce more strict rules (but not less strict rules)
 - More strict rules must not violate generally applicable EU principles
 - In reality, MS room for maneuver is limited concerning the EU GAAR
 - 12 MS have not formally enacted ATAD article 6 → Consider their already existing GAARs as complying with ATAD



The EU GAAR

Implementation of the EU GAAR in Nordic MS

- Finland/Sweden: Relying on already existing statutory GAARs
- Denmark: “Word-by-word implementation”.

1) Compliance with ATAD? For example: The tax benefit must be the...

- EU/DK GAAR: “Main purpose or one of the main purposes”
- Finnish GAAR: “obvious purpose”
- Swedish GAAR: “Defining purpose”

2) Influence on national GAARs?

- Will the national courts be affected by developments in ECJ caselaw?
 - Former Danish Supreme Court judge J. Stokholm: Implementing the EU GAAR will not change a thing!
 - M. Scherleitner & J. Korving, European Business Law Review (forthcoming): “ Art. 6 can harmonize the process of addressing abuse, but not the result...” & “more impactful than one might think at the outset...”



Does the EU GAAR have implications for Norway?

1. EEA Agreement and Tax Policy:

1. The EEA Agreement does not encompass tax policy.
2. Consequently, ATAD GAAR doesn't directly influence Norway's GAAR interpretation.

2. Norwegian GAAR in the Context of EU Freedoms:

1. Norway's tax rules, including its GAAR, must adhere to the four EU freedoms.
2. Applying anti-avoidance rules that restrict these freedoms must be backed by overriding public interests.
3. Historically, the EU Court of Justice has focused on "wholly artificial arrangements" as the primary basis for tax avoidance justifications, as seen in cases like Cadbury Schweppes.

3. Implications of ATAD on Norway:

1. ATAD grants EU states enhanced measures against tax avoidance.
2. Question: Considering Norway's position outside the ATAD's purview, does the broader mandate provided by ATAD extend to Norway, enabling it to adopt similar anti-avoidance measures despite the absence of formal EEA collaboration on ATAD?



Concluding remarks

- The Nordic GAARs are well-suited for a (new) comparative analysis.
- Definition: Legal standards or flexible rules designed to tax individuals/entities under ordinary tax regulations when attempts have been made to avoid or exploit the ordinary rules.
- Different historical background concerning the Nordic GAARs
- Overlapping criteria for application, but not (always) the same content
- Recent developments have probably brought the Nordic GAARs closer together (or will do so).



Questions

