**Scandinavian Law through the Looking Glass**

**A comparative study on the historical development of GAARs in Sweden, Denmark, and Norway**

Work in progress – do not disseminate outside of conference

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Sections 3, 4, and 5 are very much work in progress. Will add a lot more historical, and non-legal, context in all sections during the fall

**Abstract**

The paper explores the pre-war era of the 1920s and the BEPS era have influenced the international tax systems in the Scandinavian countries (Sweden, Denmark, and Norway) through the example of general anti-avoidance rules (GAARs). As a result, the study offers insights into the (international) tax systems of the Scandinavian countries by challenging the traditional conceptions of the strong Scandinavian legal culture and consequently provides strands for future debate based upon the historical development of the GAARs. The discrepancies between the Scandinavian countries have rarely been addressed by tax scholars despite such studies having the potential to provide us with deeper insights into the development of international tax rules. The identified differences between Sweden, Denmark, and Norway are of great importance when contemplating the international tax system and how external influencing over the last 100 years have 1. dictated technical tax rules, and 2. transformed underpinning legal traditions.

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# 1. Introduction and research approach

In the pre-war era, in the 1920s, the foundation for our current tax treaty networks and the manner in which states decide to divide and allocate taxing rights between themselves was laid forth. This undertaking has been successful if one considers the longevity of these tax principles. However, over the last decades phenomena commonly referred to as aggressive tax planning, tax avoidance, and tax evasion have set the tone for both tax policy and tax legislation at national, EU, and international level. Globalization in conjunction with digitalization has naturally provided the platform for increased personal and operational mobility. States engaging in tax competition among themselves through manipulation of effective tax burdens and the extension of various tax incentives have often been argued as a growing, and unsustainable, concern. Or as Dagan expresses it:

“…*for states, tax rules and tax rates have become, to a large extent, the currency of competition*.”[[1]](#footnote-1)

This development has translated into significant revenue losses from high-tax[[2]](#footnote-2) jurisdictions which subsequently has led to the initialization of the OECD/G20 Base Erosion and Profit Shifting (BEPS) project and an increased harmonization of corporate taxation, as well as intensified application of adjacent areas of law such as EU state aid provisions, at EU level.[[3]](#footnote-3) The actions of these supra-national organizations have naturally trickled down to national level through concrete revisions and/or additions to their domestic tax systems.

As a response, the OECD launched an initial chartering and subsequent response plan to of these fiscal challenges. Consequently, we entered what is often referred to as the BEPS project era. An era which has had a significant impact on both the international tax system and domestic tax systems as the OECD and the EU are currently implementing a wide range of concrete tax tools to combat identified fiscal challenges. Consequently, there has been a harmonization of substantial areas of the international tax system and domestic corporate tax systems.

The paper explores how the two above-described eras have influenced the international tax systems in the Scandinavian countries (Sweden, Denmark, and Norway) through the example of general anti-avoidance rules (GAARs). As a result, the study offers insights into the (international) tax systems of the Scandinavian countries by challenging the traditional conception of a strong Scandinavian legal culture and consequently provides strands for future debate based upon the historical development of the GAARs. The discrepancies between the Scandinavian countries have rarely been addressed by tax scholars despite such studies having the potential to provide us with deeper insights into the development of international tax rules. The identified differences between Norway, Denmark, and Sweden are of great importance when contemplating the international tax system and how external influencing over the last 100 years have 1. dictated technical tax rules, and 2. transformed underpinning legal traditions.

It should be underlined that this is not a comprehensive comparative study. Instead, the selected comparative example of the GAAR is included to assist in the identification, description, and analysis of the historical developments that have influenced these Scandinavian tax systems. The reader should consider that highly individual circumstances within each jurisdiction will have had a natural impact on the design of the included tax instrument examples despite the prevalence of a strong Scandinavian legal culture. In this study there is an emphasis on these individual circumstances and the differences between Scandinavian tax systems to recognize that the purpose of comparative law is not to find common denominators between these legal systems but to appreciate their complexity and to gain an enhance understanding of the development of the individual systems.[[4]](#footnote-4)

Furthermore, the general anti-avoidance doctrine is subject to a variety of labels according to its class or variant applied in each individual country. For instance: the principle of economic reality, of economic interpretation, substance over form, the reason for business, the principle of profit, legitimate nature of the business, doctrine of economic substance, simulation, of multiple acts, fraud of the law, abuse of legal forms, abuse of the law, theory of the new realism, theory of valid economic motives, etc. Comparative law theory stresses that although it is the same doctrine, it has different characteristics in each jurisdiction and subsequently the concept may have evolved differently over time depending on the jurisdiction in question.[[5]](#footnote-5) This study emphasizes the broader, historical narratives rather than the technicalities of the studied tax provisions. Consequently, technical descriptions and analyses are excluded and only included if and when they may add to the historical narratives.

Consequently, two lines of inquiry are pursued in this study:

1. How, and to what extent, the general anti-avoidance rules in the individual Scandinavian countries have been historically developed through jurisprudential creation and/or through codification.
2. If, and to what extent, the pre-war era of the 1920s and the BEPS era have influenced the individual developments in the Scandinavian countries.

The study encompasses traditional Scandinavian legal sources (legislation, preparatory works, case law, and legal doctrine) in addition to an inclusion of EU law (primary and secondary law which in this specific case comprises the treaties, the European Convention on Human Rights, EU directives and case law from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR) when necessary. Soft law stemming from the OECD, primarily material related to the OECD/G20 Base Erosion and Profit Shifting (BEPS) project in addition to guidelines and recommendations attached to the OECD model tax treaty convention (OECD MTC) play an important role in international tax law and these sources of law are inherently included.

Additionally, the comparative study also includes a historical dimension. Will elaborate on material and comparative historical approach

This paper initially provides in introduction to Scandinavian law and the Scandinavian tax systems in particular in section 2. This introduction is mainly undertaken from a comparative law viewpoint and provides the foundation for understanding the historical development of the systems. The introduction also contains a description of the historical development of anti-avoidance rules in the three jurisdictions. This is followed (sections 3-5) by a description and analysis of the development of general anti-avoidance rules in the three jurisdictions through the inclusion of legal, political, and historical considerations. As this study emphasizes the historical development of these rules, the technical features of the tax instruments are only dealt with less extensively and merely when supplementing the historical discussions. Finally, section 6 provides the reader with some concluding reflections over the preliminary findings of the study. The reader contributes with comparative insights and by doing so provides some food for thought concerning ongoing global tax developments and the individual Scandinavian tax systems.

# 2. Introduction to Scandinavian law and the Scandinavian tax systems in particular

## 2.1. Scandinavian law and legal culture

Traditionally, comparative law scholars classify and subsequently analyse jurisdictions in accordance with the traditional division between common law and civil law.[[6]](#footnote-6) However, Nordic scholars, nor practitioners, rarely relate or identify to the features of common law or civil law.[[7]](#footnote-7) Consequently, Nordic scholars do not classify their legal systems in accordance with this simplified dichotomy.

Norwegian Professor Peter Lødrup (scholar and judge) argued the following in 1961:

*Here in the United States there is a widespread tendency to classify legal systems as either common law or civil law. By “civil law” is meant law which derives from the Roman law; to a Scandinavian jurist, this division of legal systems into two parts is a surprising over simplification. And if Norwegian law is classified as “civil law” and thereby declared to be based on Roman law, the labeling is simply incorrect.[[8]](#footnote-8)*

Legal formalism is fundamental to the Swedish legal system and the state applies a strong belief in the principle of legality and is subsequently highly formalistic by nature. [[9]](#footnote-9) This entails that only the lawmaker (the Parliament) may enact laws and the role of the judge is merely to strictly apply and interpret the law. There are several underpinning reasons for this Swedish legal tradition. Initially, all taxes need to be introduced and supported with statutory support as a result of the strict application of the principle of legality.[[10]](#footnote-10) Furthermore, the Swedish Parliament (the legislator) holds, when compared to other jurisdictions, a very strong position within the Swedish legal system. Consequently, Swedish courts are not in the position to create precedents or doctrines. Instead, the role and function of the courts is to interpret and apply the already existing legislation by using the sources of law provided by the Parliament (legislative text and accompanying preparatory works). This approach is evident when considering the development and application of Swedish tax instruments.

Denmark can be seen as a hybrid between Sweden and Norway, having a firm belief in the principle of legality while providing the courts with some level of influence yet not in the same capacity as the Norwegian or common law courts. The Danish legal system is supported, like Sweden, by a strong formalistic tradition and reliance in the principle of legality.[[11]](#footnote-11) Unlike Sweden, there is also a belief among scholarship in the existence and promotion of a pragmatic approach among Danish judges.[[12]](#footnote-12) This belief is often linked to the inclusion of non-legal factors referred to as broader considerations (reele hensyn or forholdets natur in Danish) occasionally referred to as the principle of reality.[[13]](#footnote-13) However, the existence of such a principle within the Danish legal system is controversial. It should be emphasized that the Danish courts are, like its Swedish counterparts, not activist or dynamic despite the inclusion of these broader considerations. The legal act remains central to the court’s interpretation and application yet there seems to be, to a certain extent, a possibility for the Danish judges to establish doctrines.

The Norwegian legal system is old and originates from customary law passed on by regional assemblies. Gulatingsloven is thought to have been written down as early as 1100.[[14]](#footnote-14) The first national law (landslov), applicable to the whole kingdom, was introduced 1274-1276 and was based on older regional law rather than Roman law. The Norwegian legal system has naturally been influenced by Danish law due to Norway historically being under Danish ruling. The influencing of Danish law is evidently stronger than that of German, Roman, or Canon law.[[15]](#footnote-15)

The Norwegian legal system resemblances to some extent Anglo-American common law systems. This is particularly evident when considering the acceptance of precedents.[[16]](#footnote-16) Norway applies a pragmatic approach when applying the sources of law. Consequently, the Norwegian doctrine is dominated by guidelines rather than rules (Eckhoff´s doctrine).[[17]](#footnote-17) This approach offers a flexible framework that reflects the Norwegian Supreme Court´s interpretation. Legislation is often drafted with the expectation that the rule in question will be clarified and further developed by the courts.[[18]](#footnote-18) Rule of law is still upheld, yet in a more flexible fashion than is the case of its Scandinavian neighbors. This is evident when considering the broad scope of sources of law in the Norwegian context. In practice, anything that can be deemed relevant for establishing the correct understanding of law can be considered a source of law. The Norwegian pragmatic approach bears a resemblance to the second wave of American legal pragmatism which was most prominently promoted by Richard Posner.[[19]](#footnote-19)

Applying a pragmatic approach is noteworthy as it enables longevity in the legislation which is evident when considering that the Norwegian Tax Act that is currently applied originates from 1911. Furthermore, the approach offers more flexibility to the involved actors (judges, and the legislator primarily). With a more flexible legal framework, there is less need for the Norwegian legislator to frequently revise the tax legislation as is often the case with tax rules, especially so when considering the international tax dimension. Moreover, the approach naturally extends an amount of flexibility to judges when making their rulings as it enables the judge to lay the foundation for future legal developments through precedents rather than merely providing a limited ruling in a specific situation.

As mentioned, this has been discussed by Danish legal scholarship as a potential approach to be applied by Danish judges in tax cases.[[20]](#footnote-20) It could also greatly benefit the Swedish tax situation where legal formalism is prevalent. Swedish judgements are often narrow in scope and difficult to use as precedents due to Swedish judges having a severely restricted role which leaves little room for interpretation by the courts. The interpretation limitations are commonly linked to the judge being bound to the law or the expressed intention of the legislator at the time the law was made which entails a static interpretation model.

However, while a pragmatic approach benefits the judges and the legislator it may impact the taxpayer in differing ways. On the one hand, a pragmatic approach enables the judge to consider the tax case before them in a more holistic fashion which may benefit the taxpayer. On the other hand, such an approach may also weaken legal certainty and the situation of the taxpayer as it may be more difficult to predict the outcome beforehand when conducting the tax act that is being considered for judgment.

For instance, one good example of such legal uncertainty can be seen when reviewing the Norwegian approach of accepting and applying OECD transfer pricing guidelines automatically and as equal to any other Norwegian legal source. Norwegian tax scholars have for long debated whether, due to the open formulation of the OECD transfer pricing guidelines, the provision can be extended to internal situations and not only those involving cross-border elements.[[21]](#footnote-21)

Furthermore, considering the strong position of the principle of legality (no tax without statutory support) in the Nordic countries it is less ideal to rely on case law-based tax doctrines. A formalistic approach may be rigid, yet it offers less room for interpretation and application which subsequently strengthens predictability and legal certainty. This argument is often brought forward in discussions involving anti-avoidance measures such as the GAAR.

It should be noted in this context that while the diligent Swedish legislative process on the one hand provides the courts, tax administration, and taxpayer with comprehensive guidelines through the preparatory works this diligent approach can also be seen as a weakness within the Swedish tax system. While some areas of law benefit from a rigorous and lengthy legislative process, as it provides the foundation for a coherent and durable framework, it is less than ideal for tax law, international tax law in particular, due to the dynamic and rapidly changing nature of taxes.

## 2.2. Scandinavian tax systems and the development of tax avoidance rules in Scandinavia

Tax-avoidance rules in the Scandinavian and Anglo-American countries are often classified in two differing groups: (1) case-law created anti-avoidance doctrines, and (2) statutory anti-avoidance rules.[[22]](#footnote-22)

In the first category, the domestic courts take an active role in combatting tax avoidance. When doing so the Courts employ a liberal interpretational style alternatively case law based anti-avoidance rules. Norway and the United States are classical representatives for this category. Both jurisdictions are characterized by a liberal tradition when considering statutory interpretation. This is evident when, for instance, considering to what extent courts in these jurisdictions haven taken into account arguments based upon economic effects and the intention of the legislation. Furthermore, these courts have shown a clear tendency to curb tax avoidance and have, when doing so, created extensive anti-avoidance doctrines. In Norway, the case law based anti-avoidance rule is analogous to the American business purpose- and step transactions tests.[[23]](#footnote-23)

In the second category, the domestic courts have instead taken on a passive, alternatively restrictive, approach which has enabled the legislator to enact anti-avoidance rules instead. The main representatives for this category are Australia, Canada, and Sweden. Sweden has taken on a strong formalistic approach and consequently the courts interpret the tax statutes strictly and in accordance with the written word. The passivity of the Swedish courts to create an anti-avoidance doctrine of its own in the lack of such legislation eventually instigated the Swedish legislator to enact a GAAR in 1981.

This entails that Swedish, Australian, Canadian, and earlier English law have followed a restrictive approach which have prevented the development of case law based anti-avoidance doctrines in these jurisdictions. This is in contrast with Norwegian, Danish, American and newer English law that have followed a liberal interpretative tradition which provided the necessary pre-condition for the development of case law based anti-avoidance doctrines.[[24]](#footnote-24)

This difference in legal traditions between Norway, Denmark, and Sweden is of great importance when contemplating their tax systems. Sadly, this discrepancy in legal traditions is rarely addressed by tax scholars despite it having the potential to provide us with deeper insights into the development of current international tax regimes. A more detailed description of these developments in the three Scandinavian jurisdictions are detailed below.

# 3. The Swedish GAAR

Countering tax avoidance before the introduction of the GAAR

The Swedish tax system historically employed substantive technical provisions through SAARs.

During the 1970s a decade long political and scholarly debate arguing for the introduction on a GAAR preceded the introduction of the tax provision. Sweden, following its strong formalistic approach, enacted a GAAR in 1981 via the Swedish Income Tax Act and the courts subsequently applied this tax rule on a case-to-case basis.[[25]](#footnote-25) The provision was aimed at supplementing the pre-existing SAARs, yet it was early on discovered that the GAAR, mainly due to its subjective nature, introduced unexpected problems associated to impact and legality.

As a result, the Swedish legislator added a sunset clause to the GAAR, resulting in the provision to only be applicable for five years and then subject to review before rendered permanent.[[26]](#footnote-26) The GAAR of 1981 was finally abolished in 1993 but shortly thereafter, in 1995, it was re-introduced in a slightly revised format. The Swedish GAAR only applies to municipal and state income tax and is not applicable to other taxes such as VAT.

Over time, the Swedish Tax Agency started to apply the GAAR on a more common basis which arguably exacerbated the inherent problems of its maintained subjective design. Swedish tax scholars, such as Sven-Olof Lodin and Robert Påhlsson, has argued that subjective criterion within tax law should not be considered as real subjective criterion that may be applied within other areas of law. Påhlsson argues that the subjective criterion in the Swedish GAAR should be applied and interpretated through the inclusion of externally (objective) circumstances. He supports his argumentation on the case law and argues that tax judges determine the subjective criterion based on what an external observer would make of the tax situation at hand. In other words, would it be reasonable to assume from this observatory lens that the tax transaction at hand had been done solely with the intention of gaining a tax benefit. If the imaginary observer would agree in this, the subjective criterion is fulfilled.

# 4. The Danish GAAR

How has Denmark tackled tax avoidance historically as there is no GAAR? Does Denmark want to tackle tax avoidance, or are there differing needs and tax policies compared to Sweden and Norway?

Unlike most other jurisdictions, Denmark had until 2015 no statutory GAAR. The introduction of the Danish GAAR was done in connection to the EU introducing the Anti-Tax Avoidance Directive (ATAD). ATAD offers five differing tax instruments aimed at preventing tax avoidance and aggressive tax planning. Among the instruments we find a GAAR. It appears that Denmark has introduced the GAAR as a way of complying with the minimum standards offered by ATAD and not as a result of domestic politics or needs.

The GAAR of 2015 only applies to cross-border transactions and the international tax dimension. Consequently, there is still no Danish GAAR applicable to domestic tax transactions. This underlines the argument of Denmark merely complying with ATAD standards.

Academic discussion on the existence of a case law based anti-avoidance doctrine. Highly controversial elaborate

# 5. The Norwegian GAAR

The Norwegian courts initialized the development of a case law based anti-avoidance doctrine between the early 1920s and 1960s.[[27]](#footnote-27) Initially the courts introduced a substance over form approach to sales motivated by tax benefits (so called tax sales).**[[28]](#footnote-28)** This anti-avoidance doctrine applied to both purely domestic situations and cross-border transactions in addition to covering individual and corporate taxpayers. The doctrine was applied to primarily domestic tax situations in the 1920s and was over time extended to cross-border transactions as these became more common.

Norway also introduced its first statutory anti-avoidance rule in 1921 as a response to the amount of court cases involving sales of shares. At this time, a prevalent domestic tax planning scheme involved the sale of shares before selling of the company itself as this type of income was at the time exempted from taxation while the incomes stemming from the sale of the company would have been subject to taxation at the time. The statutory anti-avoidance rule of 1921 applied to this specific type of tax planning and was later abolished in connection to the Norwegian tax reform of 1992.

The case law based anti-avoidance doctrine was initially applied to domestic situations where income shifting from special tax regimes to the ordinary corporate income tax regime was done. The most common tax planning schemes involving such income shifting involved the Norwegian petroleum tax with its current 78 per cent tax rate in addition to hydro plant production where the marginal tax rate is currently 50 per cent. In the case of individual taxpayers, the most common tax planning scheme, where the anti-avoidance doctrine has been applied, concerns the shifting of income from employment taxation with a marginal tax rate of 47,8 per cent at present day to that of capital or business which is currently taxed at 22 per cent.

One example of domestic tax planning schemes that were dealt with through the anti-avoidance doctrine was so called two-step sales. The scheme was, and still is to some extent, employed by parents when attempting to transfer assets to their children and when doing so reduce the potential capital gains taxation. The court has dealt with this particular scheme on numerous occasions.[[29]](#footnote-29)

In one of its most recent cases on two-step sales*,* the so-called Tangen 7 case,[[30]](#footnote-30) the court ruled in favor of the taxpayer. The ruling itself is not sensational, but the motivation for the decision is of interest when reviewing the development from a case law based anti-avoidance doctrine towards the introduction of a statutory GAAR. The court explicitly acknowledged that the tax benefit was the main reason for the tax planning scheme and as such the doctrine could be applicable. However, the court further argued that the tax planning scheme was very common, and it was up to the legislator to close this gap in the tax framework instead of relying on the courts to apply the ant-avoidance doctrine. This type of argumentation would be more commonly found in formalistic Sweden where the judges don’t fill in these gaps with precedents. The Norwegian tax scholarship critiqued the court for this argumentation as the Norwegian legal tradition has a clear preference for the flexibility offered by the courts through their pragmatic approach compared to rigidity of statutory regulation.[[31]](#footnote-31)

As mentioned, the Norwegian Supreme Court has applied its anti-avoidance doctrine cases since the early 1920s, but it was not until later in time tax schemes involving cross-border transactions became more common.

Court applied pro forma reasoning in its cases during the interwar period. elaborate

OECD developments at the time

Of interest in the Norwegian context is the extent of historical influencing done by tax scholarship. The work by Norwegian tax scholars have had a noticeable effect on the anti-avoidance doctrine on several occasions. For instance, in the late 1960s one of Norway’s most influential tax scholars at the time, Magnus Aarbakke, initialized an academic debate over the existence of a non-statutory GAAR.[[32]](#footnote-32) In his writing, Aarbake argued for the existence of such a GAAR through the support of case law, administrative case law, and legal scholarship. This sparked a new Norwegian GAAR era in which the anti-avoidance doctrine was applied more frequently by the Norwegian Tax Administration. Aarbakke was later in the early 1990 appointed by the Norwegian Ministry of Finance to draft the legislative proposal of a statutory GAAR.

As a result, there were an attempt to formalize the GAAR as the Norwegian government in 1991.[[33]](#footnote-33) The Government argued that this was a mere codification of the already existing case law-based doctrine that Aarbakke had initially identified. However, critique from both politicians and tax scholarship implied that the legislative proposal was an expansion of the existing doctrine and consequently the proposal was voted down by the Parliament.

It is possible that this legislative development is linked to the wave of tax reforms introduced in the early 1990s. The Norwegian tax reform in 1992 followed the same international influences as its Nordic neighbors (Sweden in 1991 and Finland in 1992). In the wake of the US example these Nordic countries reduced their tax rates and widened their tax bases. Similar to its Nordic neighbors, Norway also adopted a dual income tax system which encompassed low nominal tax rates for capital and corporate income while salary and small business income of physical persons became subject to higher tax rates.[[34]](#footnote-34)

It was not until 2016 that there was finally a Norwegian codification of the GAAR. A new debate arose over the statutory GAAR, very similar to the one following the legislative proposal of 1991. In other words, that the statutory GAAR expanded the scope of the anti-avoidance doctrine instead of merely codifying it. And similar to the GAAR proposal of 1991, a tax professor, Fredrik Zimmer, was appointed by the Norwegian Ministry of Finance to draft the proposal.[[35]](#footnote-35) The influence of tax scholarship and academia is particularly noticeable in Norway. Tax professors are, as has been described, often leading the legislative drafting of tax rules and tax scholarship is regularly quoted in preparatory works and case law. To draft future legislations as in the case of Aarbakke and Zimmer does not appear to have been an easy task as they were commonly perceived as responsible for the legislation and subsequently critiqued for its weaknesses or failures.

During the 25 years between the two legislative proposals of 1991 and 2016 the Norwegian Supreme Court upheld its already established anti-avoidance doctrine through its case law. Tax scholars have argued that despite the anti-abuse doctrine often being discussed by the Norwegian Tax Administration, its factual application had diminished over time. Most likely a result of the Tax Administration having lost some important, and high-profile, cases.[[36]](#footnote-36) The above described Tangen 7 case is one such example.

Norwegian tax scholars argued that the introduction of a statutory GAAR in 2016 was instigated by globalization and expanded cross-border tax planning opportunities in combination with the decline in anti-avoidance doctrine cases.[[37]](#footnote-37) In other words, Norway introduced the statutory GAAR as a way of reducing taxable incomes from being shifted from Norway to foreign jurisdictions while providing the Norwegian Tax Administration with legislative tools. This argumentation is coherent with the otherwise observed defensive tax policy approach applied by Norway. Norway had a few years before the introduction of the statutory GAAR introduced an anti-avoidance rule applicable to shell companies specifically in the tax code.[[38]](#footnote-38)

Additionally, the development of having the GAAR codified has been supported, and possibly also instigated, by the Norwegian Supreme Court. The argumentation from the court in connection to the Tangen 7 case underlines the courts shift from actively considering itself as the lawmaker towards encouraging the Norwegian Government to assume responsibility for the situation and regulate it through hard law.

This argumentation may be supported by the ongoing development where Norway has introduced an array of defensive international tax instruments. Several such tax instruments were introduced in the early 2000s and more is to follow as the Norwegian government has pledged to implement the OECD BEPS actions into Norwegian tax legislation.[[39]](#footnote-39)

OECD developments and significance to Norwegian situation

# 6. Concluding remarks

There appears to be a universal need for anti-avoidance rules due to the changing tax climate over time, tax competition, and increasing base erosion and profit shifting phenomena enabled by cross-border transactions. The general rule would be that if the courts act on their own and create an anti-avoidance doctrine through case law as in the case of Norway and Denmark, there has been no need for codification of the rule in question, while the passivity of the courts/the strong role of the legislator has made it necessary to introduce a statutory clause as is evident in the Swedish case.

There is a universal need for high-tax jurisdictions such as the Nordic countries to protect their tax bases and prevent tax avoidance through either cross-border transactions, circular transactions, or reclassifications of income. This can be affirmed by the early Norwegian development as Norway is rich in natural resources and there was an early need to reduce tax planning schemes involving reclassifications of incoming in a domestic setting. For instance, the shifting of income taxation in accordance with special tax regimes (oil and hydropower) towards the lower corporate income tax. Introducing anti-tax avoidance instruments in such a context is consequently a result of political common sense and best practice.

Interestingly, there has over time been an inclusion of statutory anti-tax avoidance instruments, such as the GAAR, in Norway, Denmark, and Sweden. Norway and Denmark have historically applied case law based anti-avoidance doctrines yet both jurisdictions have as of recently (Norway in 2020 and Denmark in 2015) chosen to codify their GAARs. This development breaks away from the legal traditions within these jurisdictions and it is of importance to analyse why such a change has taken place.

It is possible to argue that the EU harmonization of the GAAR through ATAD facilitated this change as EU Member States have been mandated to formally integrate ATAD (and its five differing tax instruments) into their tax systems. Note that Norway, unlike Denmark and Sweden, is not bound by positive harmonization through EU directives yet has chosen to codify the GAAR nonetheless. Evidently, Norway has often chosen to implement EU tax measures on a voluntary basis most likely due to 1. the EU Anti-Tax Avoidance Package being primarily a way for the EU to coordinate the EU Member State implementation of the BEPS Actions which Norway has already pledged to implement in its tax system, and 2. Norway having a tradition of pursuing a defensive international tax policy.

Furthermore, unlike Norway, other Nordic countries do not have the same extent of incomes stemming from natural resources, and this economic characteristic appears to have influenced their international tax policies. Denmark is occasionally referred to as an internationally tax competitive country, mainly a result of its lack in tax transparency and tendency to act as a conduit country due to the Danish hesitance to withhold taxes. Sweden has also shown a predisposition towards a more competitive international tax policy as of recently. This becomes evident when reviewing, for instance, the recent introduction of tax incentives and lower tax rates as a way of attracting Foreign Direct Investments (FDI) and new businesses. A tax competition agenda that has been openly advocated by the Swedish government on several occasions and is evident when looking at recent tax developments.[[40]](#footnote-40)

Additionally, it is possible to assume that the Norwegian pragmatic approach have influenced the hospitable attitude towards external tax influencing. The Norwegian legal method indicates a unique approach to not only the application of law but also the making of law and appears to have stronger similarities to Anglo-American egal traditions than that of its Nordic neighbors.

In conclusion, above summarized differences between the Scandinavian countries should be taken seriously. There is a general assumption that the Scandinavian countries are alike and there are few differences between them due to the historical development of the countries themselves and their individual legal systems. An assumption fueled by the existence of a strong Scandinavian legal culture. It is true that the Scandinavian tax systems share many strong similarities, and this study also proves that they have a tendency to adopt the same tax instruments. However, this study and above argumentation also indicates that the Scandinavian states individual tax systems (through the cases of Norway, Denmark, and Sweden) also are very different despite the strong Scandinavian legal culture and community.

1. Tsilly Dagan, *International Tax Policy*, Cambridge University Press 2017, p. 25. [↑](#footnote-ref-1)
2. The terminology of high-tax is used to describe countries with a comparatively high average tax burden, traditionally represented by developed countries with a strong social welfare system, such as the Scandinavian countries, France, and Germany. Subsequently, low-tax jurisdictions are defined as those countries which do not match this definition (in particular countries with zero or only nominal income and corporate tax rates). This separation between countries became prevalent during 2021 in connection to the agreement on the global minimum tax as light was shed on some EU Member States such as Ireland, Hungary and Estonia who all have corporate tax rates significantly lower than that of the average EU Member State. [↑](#footnote-ref-2)
3. Christiana Panayi, *Advanced Issues in International and European Tax Law*, Hart Publishing 2018. [↑](#footnote-ref-3)
4. See the discussion found in: Mathias Siems, *Comparative Law,* Cambridge University Press 2018, and Roger Cotterrell, *Comparative Sociology of Law,* in Edt. David S. Clark, *Comparative Law and Society*, Edward Elgar Publishing 2014. Pierre Legrand, *Fragments on law-as-culture*, WEJ Tjeenk Willink, 1999. [↑](#footnote-ref-4)
5. Alan Watson, *Legal Transplants: An Approach to Comparative Law*, University of Georgia Press, 1993, pp. 97-99 [↑](#footnote-ref-5)
6. Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law.* Oxford University Press 3rd edition 1998. Mathias Reimann and Reinhard Zimmermann (edt.), *The Oxford Handbook of Comparative Law*. Oxford University Press 2nd Edition 2019 [↑](#footnote-ref-6)
7. Norwegian Justice Clement Endresen underlines this when revealing that never in the 90-year-old history of the Norwegian Supreme Court has the distinction between civil law or common law been referred to in the rulings. [↑](#footnote-ref-7)
8. Peter Lødrup, *Norwegian Law: A Comparison with Common Law*, St Louis University Law Journal vol 6 issue 4 1961. [↑](#footnote-ref-8)
9. Chapter 2, 10§ para 2 Regeringsformen. Also see scholarship: Anders Hultqvist, *Legalitetsprincipen vid inkomstbeskattningen*. Juristförlag 1995. Chapter 19 in Yvette Lind, ***Crossing a Border - a*** *Comparative Tax Law Study on Consequences of Cross-Border Work in the Öresund- and the Meuse-Rhine Regions*, Jure 2017. [↑](#footnote-ref-9)
10. Chapter 2, 10§ para 2 Regeringsformen. Also see scholarship: Anders Hultqvist, *Legalitetsprincipen vid inkomstbeskattningen*. Juristförlag 1995. Chapter 19 in Yvette Lind, ***Crossing a Border - a*** *Comparative Tax Law Study on Consequences of Cross-Border Work in the Öresund- and the Meuse-Rhine Regions*, Jure 2017. [↑](#footnote-ref-10)
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