

## Norwegian Ministry of Finance issues bill proposal for statutory general anti-abuse rule

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### Executive summary

On 10 April 2019, the Norwegian Ministry of Finance (the Ministry) published its bill proposal (the proposal) for a statutory general anti-abuse rule (GAAR) for tax purposes.

Since the 1920s, the Norwegian Supreme Court has developed a non-statutory GAAR which must be taken into account when assessing the Norwegian tax consequences of any transaction. The proposal to implement a statutory GAAR is meant to clarify the scope of the rule and to increase predictability for taxpayers.

The proposal is based on the report published by Professor Emeritus Frederik Zimmer on 15 March 2016 that examined whether the GAAR should be codified, and if so, the conditions for its application.

### Detailed discussion

#### Current GAAR

Based on the current GAAR, a transaction can be disregarded/re-characterized for Norwegian tax purposes if both of the following tests are met:

- ▶ The motive test: There is a tax benefit and the transaction is mainly tax motivated (abusive transaction).

- ▶ The abusive test: It can be inferred based on an overall assessment of the actual consequences of the abusive transaction that it will result in the accrual of a tax benefit which would be contrary or disloyal to the purpose of the relevant Norwegian tax provision.

### Main conditions of the new GAAR and key changes

The Ministry states that the proposed GAAR should be similar to the current GAAR with respect to scope, content and threshold for application, except for the following:

- ▶ Under the current GAAR, the transaction has to be mainly tax motivated from the perspective of the specific taxpayer, in order for the GAAR to apply. The proposal suggests amending this to an objective assessment, i.e., to assess what a hypothetical rational taxpayer would have done in a similar situation instead of the specific taxpayer.
- ▶ Under the current GAAR, the assessment of whether the transaction has commercial merit could take into account foreign tax savings. The proposal does not recognize foreign tax savings as a commercial merit in this respect.
- ▶ The fact that an opportunity to circumvent the tax rules is mentioned in the preparatory legislative work without having been followed up with specific circumvention rules, shall not be a factor to the taxpayer's advantage. This entails that transactions that are based on these circumvention methods could be subject to the GAAR going forward.

Similar to the current GAAR, the proposed GAAR includes a motive test and an abusive test. Both tests are required to be fulfilled in order for the GAAR to apply.

The motive test is fulfilled if the objective purpose of the transaction, from the perspective of the hypothetical rational taxpayer, was to obtain a tax benefit. Further, it has to be assessed whether the transaction giving rise to the tax benefit is abusive in accordance with the abusive test. Under this test, the proposal lists several factors that can be taken into account, such as the commercial merit of the transaction, the size of the tax benefit and whether the rules have been applied in accordance with their purpose. Note that this list is not exhaustive, and the application of the listed factors would depend of the specific case.

The scope of the new GAAR will in addition to corporate and personal income tax also cover value added tax, payroll, social contribution and finance tax. The proposed GAAR also codifies the consequences of applying the GAAR to a specific transaction.

It should be noted that the tax authorities have discretionary authority to apply the GAAR on a concrete case. This is based on the wording of the proposed provision that states that in case of an abusive transaction, the tax authorities "can" apply the GAAR.

### Interaction of the proposed GAAR with other specific anti-abuse rules

In addition to the GAAR, Norway has implemented two specific anti-abuse rules to target abusive utilization of tax positions (the *Norwegian Tax Act* Section 14-90) and the breach of the arm's-length principle (the *Norwegian Tax Act* Section 13-1).

The *Norwegian Tax Act* Section 14-90 is considered to have a lower application threshold than the GAAR and it has previously been argued that the provision should be removed. However, the Ministry states that it is important to keep a rule that targets abusive utilization of tax positions. Thus, the provisions is unchanged and moved to a new Section 13-3.

The current wording in the *Norwegian Tax Act* Section 13-1 is proposed to remain unchanged, as the Ministry states that the scope of the provision has been sufficiently clarified in the Supreme Court ruling HR-2016-2165-A («IKEA»).

### Applicability to cross-border transactions

The Ministry states that as the GAAR will apply to both domestic and cross-border transactions, the possibility of conflict with the European Economic Area agreement should be minimal. Further, the Ministry also states that the GAAR could be applied to transactions covered by an applicable double tax treaty, without commenting further whether the treaty could limit the application of the GAAR on cross border transactions.

### Entry into force

The new GAAR is proposed to enter into force from 1 January 2020.

The proposal will now be discussed by the Norwegian Parliament, however it has not yet been announced when the vote will take place.

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