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Comparative Law Considerations on the Norwegian Wealth Tax

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Executive Summary

I. The Norwegian government which took office in 2021 **increased the wealth tax** in the State Budget for 2022 by a combination of increased tax rates and reductions in the valuation rebates, further aggravated by various measures in the 2023 State Budget. The maximal nominal tax rate was set to 1.1 per cent. In addition, dividend tax was increased by approx. 20%, which amplifies the effects as wealth tax often has to be financed by taking out dividends. As a result, around 80 affluent business owners **left Norway** and moved to Switzerland, and some other countries.

The former Swedish Finance Minister *Anders Borg* who oversaw the abolition of the wealth tax in his country in 2007 stated in this regard:

> "As a Swede, you get the feeling that you are experiencing the same thing we did in the 70s and 80s, when business owner after business owner left the country - at great cost to Sweden."

Norway has lost several billion NOK in tax revenue due to this emigration. **Infrastructure** is also being damaged. Numerous small, medium-sized and large enterprises are affected negatively. This is primarily a consequence of the fact that the wealth tax is calculated on values tied up in the company (so-called working capital), without taking into account the company's earnings or losses. In addition, the wealth tax only affects Norwegian private business owners/investors, but not foreign investors. Many Norwegian-owned companies are drained of capital year after year to pay the tax, which foreign-owned companies avoid. The resulting **distortion of competition** forces companies that cannot or do not want to move out of Norway to decrease their investments and sometimes to sell at an inopportune time or close down. This may be tackled under the Norwegian Constitution.

Our study approaches the topic of wealth tax from a comparative law perspective. It analyses how **other OECD countries** deal with the problem. In particular, a distinction is made between countries with a wealth tax, countries that had a wealth tax in the past but have abolished it and countries that are considering the (re-)introduction of a wealth tax.

The work does not include a final legal assessment of the European Convention on Human Rights, the EEA Agreement, the EU Charter on Fundamental Rights, or the Norwegian Constitution. It is intended to lay the foundations for a class action before a Norwegian court.

The study is drafted by Professor Dr. Dr. h.c. Carl Baudenbacher and Dr. Laura Melusine Baudenbacher with contributions by Professor Dr. Dr. Mads Andenas. All three agree on the conclusions.

II. The Norwegian Government has reacted to the departure of so many important business owners (including entrepreneurs, investors and heirs) in two ways. On the one hand, it has tightened the **exit tax**, the permissibility of which is questionable from the point of view of the free movement of capital. On the other hand, it has used a rhetoric to discredit the renegades. At the centre of this is the accusation that the emigrants have **broken the social contract**. A social contract is an actual or hypothetical agreement between the ruled, or between the ruled and their rulers, setting out the rights and obligations of each. The question is whether it is the government that may have broken the social contract. But as far as can be seen, there are no plans to abolish the wealth tax or at least to reverse the increase.

III. According to the view taken here, the rigid stance of the current government is essentially due to two reasons: Firstly, the executive in Norway is **powerful**. However, although the trust of the governed in those who govern is still relatively high, it is declining. Prominent university professors criticise the **arrogant** behaviour of the state. The private sector is increasingly dissatisfied.

IV. The second reason why the Government is unperturbed by the crisis it has caused, with numerous business owners moving away and so many small, medium-sized and large businesses suffering, is the fact that the government finds itself in a permanent **moral hazard**. The country's enormous oil and gas wealth acts like a comprehensive insurance policy. The government is not forced to be economically prudent. Whatever mistakes it makes, it does not have to bear the consequences, at least not in the short term. In addition, the government can appeal to a motive: **Envy**. There are even those who suspect that the current Norwegian Government is trying to benefit from the exodus on a political level. By agitating against the supposedly selfish "traitors to the country" who move to Switzerland, it may profit from the situation with the voters.

VI. **Comparative law** is the study of legal systems by relating them to each other, specifically, the consideration of foreign law in the creation, application and interpretation of one's own law. This requires the identification of similarities and differences. Comparative law as a discipline has been developed especially in countries such as Germany, Austria, France, the UK, the USA and Switzerland. But it is also relevant for Norway. As for the question of whether legal institutions such as a tax system or parts of it can be transferred from one jurisdiction to another, we tend to believe that **all OECD countries** are basically comparable. Therefore, all of them can be considered potential exporters of their law or parts thereof. There are basically two ways in which solutions to legal problems can be transferred from one legal system to another: Through **judicial interpretation** of existing law or by an act of the **legislature**.

The Supreme Courts of the Nordic countries are openminded when it comes to looking abroad. The **Norwegian Supreme Court** cites judgments from foreign supreme courts. Former Justice *Jens E. A. Skoghøy* has analysed this case law and has concluded that this applies in particular when a legal issue concerns different countries. The Swedish Supreme Court and the Swedish Supreme Administrative Court also cite foreign judgments. The Danish Supreme Court equally refers to foreign verdicts. The Supreme Court of Iceland rarely quotes rulings by courts of other countries, but examples can be found.

VII. Among the few countries that have a wealth tax, **Switzerland** is particularly interesting. It has had such a tax at cantonal and communal level for a long time and still acts as a magnet for Norwegian emigrants. At the same time, it should not be overlooked that many Swiss cantons offer wealthy foreigners the option of taxation according to expenditure, also known as lump-sum taxation, if they are not gainfully employed in Switzerland. As to the rest, the reasons why Switzerland is an attractive location for foreign investment are as follows: The rates for wealth tax are relatively low, there is **competition between the cantons** and high-tax cantons such as Bern or Geneva have the option of capping the total amount by applying a tax brake.

The Swiss Federal Supreme Court established in two landmark judgments that **confiscatory taxation is unconstitutional**. The ownership guarantee and the principle of equal treatment are relevant. It is incumbent on the legislature to preserve the substance of the taxpayer's assets and to allow the taxpayer the possibility of forming new assets. The guarantee of ownership prohibits taxation that erodes existing wealth and prevents the creation of new wealth. It must be possible to pay wealth tax from the income from assets. In the long term, wealth taxes must not be so high that assets have to be used up to pay them. Conversely, this means that such taxation may be permissible on a temporary basis. The question then arises as to what is meant by temporary. If assets have to be liquidated over a longer period of time or even **permanently** so that wealth tax can be paid, this constitutes confiscatory taxation, which is **prohibited** by the constitution. The case law of the Federal Supreme Court is cautious and leaves the cantons room to play.

The sentence that a wealth tax must not lead to the substance of the assets being eroded can also be found in **German, French and Austrian law** as well as in Latin American countries. It underlies the case law of the European Court of Human Rights and the ICSID tribunals. It is actually a matter of course.

VIII. Among the countries that had a wealth tax in the past but have **abolished** it, Germany, France and Sweden are particularly instructive. Everywhere this tax was abolished because it caused more harm than good. The rich, who were to be fleeced, voted with their feet. Even without including emigration, wealth tax on working capital damaged the government's income base. The wealth tax discourages investment and growth also in many companies with owners who do not move, and thus reduces other more important tax revenues such as corporation tax.

Former French Prime Minister and now presidential candidate *Édouard Philippe* has famously said:

> "If you want to make the rich pay, the right solution is **not to make them leave**. It's common sense! The ISF (sc. French wealth tax) led people who paid a lot of tax and had a lot of wealth to leave France. If someone tells me that tax justice means making sure that the rich pay tax in France, then let's make them come to France rather than make them leave".

IX. In certain states that have abolished the wealth tax and in states that have never had a regular wealth tax, left-wing circles regularly make proposals to **introduce** such a levy. This is the case in Germany, Austria and France. In the USA, liberal democrats have presented such plans. It does not look as if any of these initiatives have a chance of being realised.

X. Finally, the question arises as to whether there are more suitable instruments than the wealth tax to control the creation and exercise of economic power. Firstly, there is **competition law** to consider; it is not clear whether the Norwegian Competition Authority was consulted in accordance with the rules as part of its competition advocacy when the law was amended. Secondly, **financial market authorities** in all modern economies have regulatory powers that allow them to control economic power.

XI. Comparative law has shown that a wealth tax must not lead to the substance of assets being eroded. It must not be the case that the taxpayer has to liquidate assets in order to pay the tax. This is also in the long-term interest of the state. This realisation can easily be incorporated into all potentially relevant provisions of **European law** because they are drafted in the form of **general clauses** and are **open-textured**. Such concretisation is particularly necessary in the case of wealth tax because there is an open global system with location competition. This applies to Article 1 of the First Additional Protocol to the ECHR, which contains a guarantee of ownership, as well as to Article 16 of the EU Charter of Fundamental Rights, the provision that enshrines the right to conduct a business and Article 17 of the Charter which guarantees the right to property. All of them are therefore potential **gateways** for the comparative law findings that this study has brought to light.

XII. The same goes for Article 105 of the **Norwegian Constitution**. The **Supreme Court** held in two judgments from the 1950s that the tax measures in question at that time did not contravene the ban on confiscatory taxation but opened up for such a review which today would also be possible from a purposive (teleological) point of view. The leading commentary does not exclude review of tax measures contrary to the constitutional ban on confiscatory taxation.

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