G.A.A.R. OR S.A.A.R.? EFFECT OF THE *NORDCURRENT* DECISION IN BELGIUM, THE NETHERLANDS, AND LUXEMBOURG

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INTRODUCTION

On April 3, 2025, the Court of Justice of the European Union (C.J.E.U.) issued its anticipated judgment in the *Nordcurrent* case (C-228/24). The judgment concerns the application of the anti-abuse rule in the E.U. Parent-Subsidiary Directive ("P.S.D.") to national participation exemption mechanisms.

The ruling has significant implications and resonance in Belgium, the Netherlands, and Luxembourg, where similar issues have been the subject of ongoing debate. This article provides a clear summary and analysis of the case, explores its practical implications in each of these countries, and offers a perspective on its broader impact.

FACTS AND C.J.E.U.'S ASSESSMENT

Background

In 2009, Nordcurrent Group UAB, a Lithuanian video game developer, established a U.K. subsidiary to distribute games internationally. In 2017 and 2018, the functions and risks of the U.K. subsidiary were transferred back to the parent corporation in Lithuania. After this relocation, Nordcurrent received dividends from its U.K. subsidiary and claimed exemption from Lithuanian corporate tax under the national participation exemption rules in Lithuania, implemented when the P.S.D. was transposed into national law. The U.K. subsidiary was then liquidated.

The Lithuanian Revenue Service denied the exemption for the U.K.-source dividends, arguing that the U.K. subsidiary was a non-genuine arrangement lacking sufficient substance. It employed one person who served as the sole director, owned no tangible assets, and shared an address with 97,110 other corporations. The Lithuanian Revenue Service claimed that the arrangement was set up to obtain a tax advantage, thereby constituting abuse under the P.S.D.'s General Anti-Avoidance Rule ("G.A.A.R.").

Nordcurrent argued that its U.K. subsidiary provided a real commercial advantage as an intermediary between Nordcurrent and various advertising and game distribution platforms until direct agreements could be concluded with such platforms. Following an agreement with Google in 2017, distribution functions and associated risks were gradually transferred from the U.K. subsidiary to Nordcurrent, leaving the U.K. subsidiary responsible only for distribution until its winding-up at the end of 2019. Nordcurrent emphasized that the U.K. subsidiary was formed and operated for valid commercial reasons since establishment in 2009 and was not merely a conduit entity. This was further evidenced by the fact that the Lithuanian Revenue Service never questioned the U.K. subsidiary's activities nor the reasons for its formation prior to the years 2018 and 2019. Nordcurrent also claimed there was no actual tax advantage. The U.K. subsidiary was profitable and subject to a 24% tax rate.

Legal Issues and C.J.E.U. Response

In the course of the litigation, the Lithuanian Tax Dispute Commission (*Mokestinių ginčų komisija prie Lietuvos Respublikos Vyriausybės*) adjourned the hearing of the case in order to refer the following preliminary questions to the C.J.E.U.:

- Can Lithuania deny the participation exemption if the subsidiary is not a conduit corporation but is still deemed a non-genuine arrangement?
- Should the abuse assessment focus only on the circumstances at the time of dividend distribution, or must all relevant facts and circumstances be considered?
- Is the mere categorization of a subsidiary as a non-genuine arrangement sufficient to deny the exemption, or must there also be a tax advantage that defeats the P.S.D.'s purpose?

In its April decision, the C.J.E.U. responded as follows:

- The anti-abuse rule of the P.S.D. is not limited to conduit corporations. It applies to any non-genuine arrangement, even if the subsidiary generated its own profit.
- A holistic assessment is required when evaluating whether an arrangement is non-genuine. Accordingly, all relevant facts and circumstances must be considered, including the reasons for the subsidiary's creation and its activities over time.
- To deny the exemption, a non-genuine arrangement must exist, and its main purpose must be the allowance of a tax advantage that is inconsistent with the object of the P.S.D. These factors may exist at the creation of a corporation or at a later date, as facts may change over time.

IN-DEPTH ANALYSIS

Holistic and Dynamic Assessments

The P.S.D. aims to eliminate double taxation of profits distributed between E.U. corporations. However, the P.S.D. includes a G.A.A.R. to prevent abuse. Article 1, paragraphs 2 and 3 of the P.S.D. deny benefits to arrangements that are not implemented for valid commercial reasons reflecting economic reality, especially if the main purpose is to achieve a tax advantage. The C.J.E.U. clarified that the anti-abuse rule is not restricted to classic "conduit" or "letterbox" corporations. Even subsidiaries with real activities are in the scope of the G.A.A.R. if, in the broader context, their existence or continued operation is primarily tax driven. This builds on earlier case law such as the Danish cases[1] and the Cadbury Schweppes case[2] by extending the principle to a wide range of corporate arrangements.

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1 C-116/16 and C-117/16.

2 C-196/04.

When applying the P.S.D. G.A.A.R. it is imperative to have a holistic and dynamic approach. Consequently, Revenue Services are now required to consider (i) the full history of the arrangement, from its creation to the dividend payment (ii) changes in business purpose or substance over time, and (iii) the overall tax effect, including whether the subsidiary's profits were taxed at a higher rate abroad than they would have been if such activities were not conducted by that subsidiary.

"Holding and finance corporations require less physical presence than operational entities conducting manufacturing or sales activities."

This C.J.E.U.'s holistic approach was foreshadowed by Attorney-General Kokott in the Danish case C-115/16.

> Since companies that focus on asset management, by definition, may carry out little activity, this criteria should not require high demands. When there is a valid incorporation, the company is actually reachable at its registered address and has the necessary material and personnel resources to achieve its objective – in this case, the management of a loan agreement – the structure in question cannot be considered disconnected from the economic reality.[3]

Holding and finance corporations require less physical presence than operational entities conducting manufacturing or sales activities. Instead, the focus is on economic substance. Does the corporation genuinely manage assets, assume risks, and generates income locally, even if some functions are outsourced or physical presence is limited? This means that limited physical substance does not automatically indicate a lack of genuine economic activity, especially for asset management, holding or finance corporations.

Whether the substance is adequate, is determined by the corporation's business purpose and ongoing activities. A contextual and dynamic assessment is required rather than a one-size-fits-all approach. This approach prevents both an overly formalistic denial and an automatic approval in favor of a nuanced, fact-driven analysis.

Objective and Subjective Elements

In order to determine whether abuse of the P.S.D. exists, both an objective element, and a subjective element must be examined. The objective element is met if the arrangement lacks valid commercial reasons or economic reality, and for that reason, is not genuine. The subjective element is met if the main purpose of the arrangement, or one of its main purposes, is to obtain a tax advantage that undermines the P.S.D.'s intent. Both elements must be present.

For example, a subsidiary with little substance is not automatically considered abusive if there is a genuine business rationale or no undue tax benefit. The C.J.E.U. noted that the tax rate in the subsidiary's country is relevant. Consequently, if income is taxed at a higher rate abroad, the unfavorable rate differential may indicate the arrangement was not primarily motivated by tax considerations. Ultimately, it is the overall tax impact, rather than merely the formal structure, that determines whether abuse exists.

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[3] Paragraph 67.

PRACTICAL IMPLICATIONS

Belgium

Belgium has long struggled with the application of anti-abuse rules to the participation exemption and different withholding tax exemptions in complex international structures. Belgium has implemented both a national G.A.A.R. and a specific anti-abuse rule derived from the P.S.D. ("S.A.A.R.") in its tax legislation.

Particularly notable is S.A.A.R. for the dividend withholding tax ("W.H.T.") exemption under the P.S.D., as set out in Section 266, 4th limb of the Belgian Income Tax Code ("B.I.T.C."). This provision transposes the P.S.D. anti-abuse provision into Belgian law. The W.H.T. exemption does not apply to dividends linked to legal acts, or a series of acts, that are artificial and primarily aimed at obtaining a tax benefit. In principle, the formal burden of proof of tax abuse lies with the Belgian Revenue Service. In practice, taxpayers often need to prove the absence of tax abuse.

Meanwhile, Section 344 B.I.T.C. adopts a G.A.A.R., which impacts the application of the participation exemption. Taxpayers are prevented from achieving tax benefits through artificial arrangements that lack valid commercial reasons or do not reflect economic reality. When applying the participation exemption, Section 344 B.I.T.C. permits the Belgian Revenue Service to disregard transactions or structures that are primarily tax-motivated and circumvent the intent of the B.I.T.C. or implementing decrees. As a result, even if the formal requirements for the participation exemption are met, the exemption may be denied if the arrangement is deemed abusive under Section 344 B.I.T.C.

Court Cases

The criteria for tax abuse or for establishing the existence of genuine business reasons developed by the Belgian courts are the same in relation to the P.S.D. and various withholding tax exemptions.

On December 1, 2020, the Ghent Court of Appeals applied the G.A.A.R. in line with the E.U. anti-abuse principle, emphasizing the need to assess all relevant facts and circumstances. This approach was confirmed by the Court of Cassation on November 30, 2023, in which the court observed that the artificial nature of a structure and the intentions of the ultimate beneficiaries become apparent when all the relevant transactions carried out by related corporations are taken into account.

The Court clearly outlined the criteria to establish tax abuse (*fraus legis*). The Belgian Revenue Service must demonstrate that (i) the acts are primarily or substantially tax-driven, which is the subjective condition and (ii) the tax advantage frustrates the purpose of the P.S.D., which is the objective condition. The ruling also implied that a taxpayer could counter allegations of tax abuse by applying a look through approach, under which the subjective condition cannot be met if the taxpayer demonstrates that the tax benefit would have been granted without the interposition of the challenged structure.

The *Nordcurrent* ruling confirms this two-pronged test but makes it more difficult for a taxpayer to demonstrate the subjective test has not been met by the tax authorities. While the look-through defense remains available, it is no longer sufficient to show that the ultimate shareholder would have been entitled to the tax benefit if the transaction were carried out in a simplified manner. Rather, the taxpayer must demonstrate that the entire structure, in its context and over its lifetime, was not aimed primarily at obtaining an improper tax advantage.

Belgian courts have occasionally ruled in favor of taxpayers. On October 30, 2023, the Constitutional Court issued a landmark ruling stating that the Belgian G.A.A.R. complies with the constitutional principle of legal certainty in tax matters, if interpreted as follows:

- The Belgian Revenue Service bears the burden of proof. It must demonstrate the existence of tax avoidance that frustrates the objectives of a precisely identified tax provision. Merely demonstrating that a taxpayer's activity is not aligned with a specified provision of tax law does not meet that burden.
- In order to prove that the objectives of a tax provision have been frustrated by a particular transaction, the Belgian Revenue Service must demonstrate that the objectives of the tax provision are clear and understandable from a plain reading of the text of the law or from the legislative history.
- Also, the Belgian Revenue Service must consider provisions already in place to combat the asserted abuse of law in question.

On October 26, 2023, the Court of Cassation ruled that tax abuse can be established only if the objectives of the tax provision are clear from the statute or, where applicable, from the legislative history. In an earlier decision of November 25, 2021, the Court of Cassation confirmed that although artificial arrangements designed to avoid dividend withholding tax by characterizing a transaction as a tax-exempt return of paid-up capital can be reclassified as a dividend distribution under the anti-abuse rules, any return of paid-up capital made pursuant to a valid capital reduction decision adopted in accordance with the Code on Corporations and Associations remains tax exempt.

In one case regarding holding company structures, a shareholder sold all of the shares of Corporation A to Corporation B, which was jointly owned by the seller's son and a private equity fund. Unless the sale of shares is deemed not to be normal management of private assets or takes place after December 31, 2025, Belgium does not tax capital gains on shares realized by private individuals.[4] To finance the purchase of the shares, Corporation B obtained a bank loan, which was quickly refinanced through a loan granted by Corporation A and one of its subsidiaries.

On September 6, 2022, the Antwerp Court of Appeals clarified that a taxpayer's involvement in a series of transactions and its decision to engage in the structure is sufficient to establish tax abuse even if the taxpayer did not formally participate in every legal act that comprised the overall transaction. On January 11, 2024, the Court of Cassation confirmed the judgment of the Court of Appeals that unity of intent does not require formal participation in any and all legal acts. The Antwerp Court of Appeals further emphasized that, to successfully rebut allegations of tax abuse, non-tax motives behind the transactions must be more than negligible and cannot be purely artificial – a position the Court of Cassation endorsed.

[4] From January 1, 2026, capital gains on shares and other financial assets will be subject to a capital gains tax of up to 10%. The basis in appreciated assets subject to the tax will be revalued to ensure that existing unrealized gains as of that date are not taxed.

Rulings

The Office for Advance Tax Rulings ("O.A.T.R.") has issued several rulings[5] clarifying the application of Section 266, 4th limb B.I.T.C. (the S.A.A.R. that is derived from the P.S.D., restricting the exemption from D.W.T. on outbound dividend distributions). These rulings consistently emphasize the need for (i) genuine economic activity, (ii) sufficient substance in the form of personnel, premises, and assets, and (iii) valid business reasons for the structure. The absence of these elements is considered a strong indication of abuse.

Conclusion

The *Nordcurrent* decision reinforces the foregoing approach of Belgian courts. Only structures supported by genuine substance and valid business reasons will withstand scrutiny. A broad and holistic approach must be taken, initially at the time of creation and then at various points during the lifetime of an arrangement as changes in the level of operations occur. Taxpayers should maintain full documentation and must be prepared for a comprehensive, fact-based review by the Belgian Revenue Service and the courts.

The Netherlands

In Dutch tax law, the two-pronged test was already implemented. Therefore, the *Nordcurrent* decision has limited impact on the dividend W.H.T. and the Conditional W.H.T. on interest and royalties.

Participation Exemption

In *Nordcurrent*, the targeted G.A.A.R. of the P.S.D. addresses artificial arrangements at the subsidiary level, which also affects the application of the participation exemption at the parent company level. This applies as long as both the subjective elements (intent and artificiality) and the objective elements (purpose and scope) of the G.A.A.R. are satisfied. An artificial arrangement at the parent level may also affect a participation exemption, just as it may impact a withholding exemption.[6]

The Netherlands has deliberately not implemented the G.A.A.R. as referred to in Article 1(2) and (3) of the P.S.D. into the Corporate Income Tax Act 1969 ("C.I.T.A."), as *fraus legis* – the general G.A.A.R. – is considered sufficient to address artificial arrangements. This year, the G.A.A.R. as referred to in the first European Anti-Tax Avoidance Directive ("A.T.A.D.1") has been implemented in Article 29i of C.I.T.A. This A.T.A.D. G.A.A.R. is interpreted in line with the Dutch doctrine of *fraus legis*.

Consequently, the question is whether Nordcurrent, with guidance on the P.S.D G.A.A.R., would impact the Dutch participation exemption, given that the Dutch G.A.A.R. is applicable and the P.S.D. G.A.A.R. was not implemented in Dutch tax law. This could be debated because of a statement by the European Commission,

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5 For example: Ruling No. 2018.1201 (26 February 2019); Ruling No. 2021.0099 (March 16, 2021); Ruling No. 2021.0767 (October 19, 2021); Ruling No. 2021.1116 (January 18, 2022); Ruling Nos. 2021.1223 and 2021.1224 (January 25, 2022); Ruling No. 2022.0329 (June 14, 2022); Ruling No. 2023.0095 (March 14, 2023); Ruling No. 2023.0321 (June 13, 2023).

6 See C.J.E.U. judgment of February 26, 2019, ECLI:EU:C:2019:135 (T&Y Danmark), V-N 2019/14.11).

which confirmed that the amendments are not intended to affect national participation exemption systems in so far as these are compatible with the Treaty provisions.[7] This has been interpreted by many experts to mean that the Dutch G.A.A.R. was sufficient to prevent abuse and, therefore, the P.S.D. G.A.A.R. is not applicable.

If this were the case, *Nordcurrent* would have had no effect prior to implementation of Article 29i C.I.T.A. Other experts, however, argue that the P.S.D. G.A.A.R. remained applicable, and that the fact that the legislature's failure to explicitly implement Article 1(2) P.S.D. in this context is irrelevant.[8] Finally, given the implementation of the A.T.A.D. G.A.A.R., we believe it is likely that *Nordcurrent* could still have an impact on the Dutch participation exemption – particularly for years prior to 2025. For 2025 and onwards *Nordcurrent* can serve as guidance in interpreting Article 29i C.I.T.A.

Temporal Aspects of Determination

Another question that was addressed by *Nordcurrent* concerns the point at which it is proper to determine whether an artificial arrangement is present. Is it at incorporation, at dividend distribution, or in light of the overall structure? The answer is that an assessment of all relevant facts and circumstances is required. This means that the facts and circumstances at the establishment of the subsidiary corporation must be considered as well as the facts and circumstances at the time of the dividend distribution. However, it remains unclear how the assessment should be made when a situation changes from economically real to artificial, or vice versa. Nonetheless, the C.J.E.U. emphasized that it cannot be ruled out that a structure initially set up for business reasons reflecting economic reality may, at a certain point, be deemed artificial due to the maintenance of the structure despite a change in circumstances. This implies an ongoing assessment. The C.J.E.U. does not elaborate on this statement, possibly because only the European Commission has the right of initiative.

"Another question that was addressed by Nordcurrent concerns the point at which it is proper to determine whether an artificial arrangement is present."

Finally, the case seems to create some tension with the Dutch Supreme Court's judgment of January 10, 2020.[9] That judgment, concerned the substantial interest scheme referred to in Article 17(3)(b) C.I.T.A. The Dutch Supreme Court considered the time of distribution decisive. However, in line with *Nordcurrent*, we believe that both the time of incorporation and the time of distribution are relevant to determine whether an arrangement is artificial, meaning that the test is applied on a continuous basis.

Potential Impact on D.A.C.6, Pillar 2 and Unshell

The interpretation given by the C.J.E.U. to the concept of a tax advantage may be instrumental for interpreting the similar concept in the main benefit test of the mandatory disclosure rules for cross-border arrangements under D.A.C.6 and the anticipated integration of Unshell[10] into D.A.C.6.

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7 See here.

8 (see C.J.E.U. judgment of November 13, 1990, C-106/89 (Marleasing), Jurispr. p. I-4135).

9 ECLI:NL:HR:2020:21, BNB 2020/80, V-N 2020/4.8).

10 Proposal for a COUNCIL DIRECTIVE laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, COM/2021/565.

It may also preemptively address preliminary questions regarding the E.U. Pillar 2 Directive[11] and the significance of E.C. statements and F.A.Q.s. An example is the relationship between O.E.C.D. Safe Harbours and Article 32 of the E.U. Pillar 2 Directive. With this judgment, these statements may eventually prove to be irrelevant as well.

Luxembourg

For Luxembourg, the decision aligns closely with existing domestic practice and legislation.

Anti-Abuse Framework

Luxembourg's tax framework provides for both general and specific anti-abuse provisions. The P.S.D.'s specific anti-abuse rule ("S.A.A.R.") is transposed into the Luxembourg Income Tax Law ("L.I.T.L.") under (i) Article 147(2) for withholding tax exemptions and (ii) Article 166(2bis) for dividend income exemptions from corporate income tax. It ensures thew following

- The S.A.A.R. applies to corporations established in a Member State.
- The exemption is denied if the dividends are deducted in the Member State of source.
- The exemption is further denied if the dividends result from legal acts or a series of acts that are artificial and primarily aimed at obtaining a tax advantage.
- The tax advantage is inconsistent with the purpose of the P.S.D.

The two last points mirror the P.S.D.'s two-pronged test for abuse.

In parallel, Luxembourg applies a General Anti-Abuse Rule ("G.A.A.R.") under Section 6 of the Tax Adaptation Law (*Steueranpassungsgesetz*). This provision is broader in scope than the E.U. G.A.A.R. and applies to all cases of abuse of law, based on four criteria:

- Use of private law instruments
- Tax reduction due to avoidance of tax law
- Use of an inadequate legal path
- Absence of economic or commercial justification for the chosen path

Luxembourg Case Law

Until mid-2024, it remained unclear which provision – S.A.A.R. or G.A.A.R. – should prevail in cases involving the participation exemption. This ambiguity was resolved by the Luxembourg Administrative Court's landmark decision of July 31, 2024, which ruled on the application of the S.A.A.R. in a participation exemption case. The Court upheld the tax authorities' denial of the exemption, which was challenged under both

[11] Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, ST/8778/2022/INIT, OJ L 328, 22.12.2022, pp. 1–58.

the G.A.A.R. and the S.A.A.R. However, the Court clarified that, under the principle of *lex specialis derogat legi generali*,[12] the S.A.A.R. must be applied first, with the G.A.A.R. serving as a supplementary tool only where the S.A.A.R. lacks precision.

Conclusion

The *Nordcurrent* ruling confirms that Member States can deny the participation exemption under the P.S.D.'s G.A.A.R. However, Luxembourg's legal framework already incorporates a similar two-pronged test under Article 166(2bis) and 147(2) L.I.T.L. Moreover, the substance-over-form approach is well-established in Luxembourg practice. As such, the ruling does not materially alter Luxembourg's tax landscape. Rather, the decision validates the approach currently followed in Luxembourg.

12 A specific statutory rule prevails over a general statutory rule.