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Withholding Taxes, Losses and Territoriality – Opinion Statement ECJ-TF 3/2025 on the Decision of the CJEU of 19 December 2024 in *Credit Suisse Securities (Europe) Ltd v. Diputación Foral de Bizkaia* Case (C-601/23)

In this CFE Opinion Statement, submitted to the EU Institutions in September 2025, the CFE ECJ Task Force comments on the CJEU's decision of 19 December 2024 in *Credit Suisse Securities (Europe) Ltd v. Diputación Foral de Bizkaia Case* (C-601/23), in which the Sixth Chamber of the Court of Justice of the European Union held that the imposition of Spanish dividend withholding tax violated the freedom of capital movement, considering the non-resident's overall loss situation.

1. Background, Facts and Issues

The *Sofina* (Case C-575/17) ruling[1] caused great astonishment among experts.[2] Based on the free movement of capital, the Court of Justice of the European Union (CJEU) ruled that corporations receiving dividends from another EU Member State must be refunded the withholding tax in that other EU Member State if they suffer losses in their residence country (and dividends in a domestic setting are netted against losses at the level of the recipient), even if these losses are unrelated to the dividends. The CJEU required equal treatment with dividends received by companies resident in the same EU Member State. In the event of a loss, in a purely domestic situation, the tax levied on the dividends was refunded.

In *Credit Suisse Securities (Europe) Ltd v. Diputación Foral de Bizkaia Case* (C-601/23),[3] more or less the same legal questions were brought before the CJEU.

Credit Suisse Securities (Europe) Ltd concerns a company resident in the United Kingdom that had invested in Spain without having a permanent establishment (PE) there. In 2017, it received dividends from a company resident in the Biscay, an autonomous region of Spain. Under domestic law, such dividends are subject to a 19% withholding tax. Given the applicability of the Spain-United Kingdom Income and Capital Tax Treaty (2013),[4] however, the rate was reduced to 10%.

Under domestic law, withholding tax levied on dividends received by resident companies could be reimbursed insofar as the resident companies were loss-making, treating the withholding as an advance of corporate income tax. In contrast, non-resident companies were not entitled to a refund even if they were in a comparable financial position.

Since Credit Suisse recorded losses for the relevant tax year and could not credit the Spanish withholding tax against UK corporation tax, the withholding tax should have been reimbursed considering that the difference in treatment constitutes an infringement of the free move-

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1. CJEU, 22 Nov. 2018, *Sofina and Others*, C-575/17, EU:C:2018:943.
2. *See*, for instance, CFE ECJ Task Force, "Opinion Statement ECJ-TF 3/2019 on the ECJ Decision of 22 November 2018 in Sofina (Case C-575/17) on Withholding Taxes, Losses and Territoriality", *Eur. Taxn.* 60, no. 2/3 (2020), https://doi.org/10.59403/29twha7 and Georg Kofler, "Foreign Losses and Territoriality: Did Sofina Revolutionize Source State Taxation?", in *CFE Tax Advisers Europe: 60th Anniversary Liber Amicorum*, eds. Servaas van Thiel, Piergiorgio Valente and Stella Raventós-Calvo (IBFD, 2019), 147-168.
3. CJEU, 19 Dec. 2024, *Credit Suisse Securities (Europe) Ltd v. Diputación Foral de Bizkaia Case*, C-601/23, EU:C:2024:1048.
4. *Convention between the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (11 Dec. 2013).

ment of capital (article 63 of the Treaty on the Functioning of the European Union, TFEU).[5]

The Biscay Provincial Treasury rejected the reimbursement request, which was upheld by the Provincial Tax Tribunal. Credit Suisse then appealed to the High Court of Justice of the Basque Country. This Court noted that, under the laws of the autonomous region, resident companies benefit from a reimbursement mechanism in loss-making years, while non-resident companies are taxed definitively on the dividends received. Accordingly, it asked the CJEU whether this difference in treatment was compatible with EU law.

This placed the CJEU in a position to indicate whether *Sofina* was an "outlier" and whether it would back away from the position it had taken therein. It also allowed the Court to address the criticism against *Sofina*.[6] In this case, there was no Opinion from the Advocate General.

2. The Decision of the Court of Justice

The CJEU followed its settled case law and confirmed that a restriction on the free movement of capital exists, inter alia, if a national measure is liable to discourage non-residents from investing in a Member State or residents of a Member State from investing in another Member State. In this specific case, the prohibited restriction related to the less favourable treatment by a Member State of dividends paid to a non-resident company compared to dividends paid to a resident company, which is likely to deter companies established in another Member State from undertaking investments in that first Member State.[7]

The Court clarified that, under the legislation of the autonomous Province of Biscay (Spain), dividends paid to a non-resident company are taxed by means of a withholding tax at a rate of 10% in the context of the tax treaty rate, without reimbursement in loss situations, while a resident company in the same situation would benefit from using the withholding tax as an advance payment towards their corporate tax liability and could take advantage of a reimbursement in a loss situation.[8]

Referring to earlier CJEU case law, the Court stated that the applicable regime is likely to establish an advantage for resident companies subject to corporate taxation compared to non-resident companies in deficit situations.[9] The assessment of whether a potentially less favourable situation existed must be carried out separately for every tax year in which the dividends are distributed.[10]

Although the Spanish government argued that a higher withholding tax is levied on dividends paid to resident companies in comparison to non-resident companies, the CJEU countered that such a circumstance cannot eliminate the less favourable treatment of dividends. The Court reaffirmed that an unfavourable tax treatment violating a fundamental freedom cannot be compensated for by potential other advantages.[11] Furthermore, the Court clearly stated that a disadvantage for non-residents cannot be neutralized by non-discrimination in other situations.[12]

After the CJEU concluded that the relevant rules constitute a restriction on the free movement of capital, the Court further examined the comparability of the situations and possible justifications for the restriction.

For tax legislation to be in accordance with the TFEU, differences in treatment must concern situations that are not objectively comparable or must be justified by an overriding reason in the public interest. Referring to previous CJEU case law, the Court concluded that the relevant case can be described as an objectively comparable situation. As soon as a Member State imposes a charge to tax on income in respect of both resident and non-resident taxpayers from dividends received from a resident company, the situation becomes comparable.[13]

Regarding the justification based on effective tax collection, the regional government of Bizkaia argued that immediate tax payment by non-resident companies receiving dividends is necessary. This is because the lack of a genuine and permanent link to the source country increases the risk of non-payment.[14] While the Court recognized that this aim is legitimate and that withholding tax is a suitable tool, it stressed that restrictions on free capital movement must be appropriate. Non-resident loss-making companies are treated less favourably than resident ones but granting them equal treatment would not hinder tax collection, especially since they must provide the necessary information and cross-border administrative cooperation ensures verification. Thus, the measure cannot be justified by the need for efficient tax collection.[15]

Concerning the justification based on the balanced allocation of the power of taxation between the Member States and on preventing a risk of losses being used twice, the CJEU pointed out that a possible deferral of taxation of dividends received by a loss-making non-resident company did not mean that the Biscay regional government would have to waive its right to tax income generated in its territory.[16] Indeed, dividends distributed by a resident company would be taxed as soon as the non-resident company makes a profit in a subsequent tax year, as would be the case for a resident company in a similar situation. Furthermore, the CJEU maintained that the potential loss of tax revenue resulting from the taxation of dividends received by non-resident companies in a loss-making year cannot serve as justification for their immediate and definitive taxation. This is particularly the case given that

5. Treaty on the Functioning of the European Union, OJ C 202, 59 (2016).
6. *See* the critical remarks articulated in CFE, "Opinion Statement ECJ-TF 3/2019", in particular para. 18.
7. C-601/23, *Credit Suisse Securities*, paras. 30-31.
8. Id., paras. 33-34.
9. Id., para. 35.
10. Id., para. 38.
11. Id., paras. 44-45.
12. Id., para. 46.
13. Id., para. 53 et seq.
14. Id., para. 57.
15. Id., para. 59 et seq.
16. Id., para. 75.

such losses are recognized and accepted in respect of resident companies subject to taxation in Bizkaia.[17]

Regarding the last justification based on maintaining the cohesion of the tax system, the Court reiterated that a direct link must exist between the tax advantage granted and a corresponding compensatory tax charge. In the present case, the Court negated this, and this justification thus also failed.[18]

Consequently, the CJEU concluded its decision by answering the question referred. Accordingly, article 63 of the TFEU must be interpreted as precluding national legislation under which dividends distributed by a company established in a fiscally autonomous region of a Member State are subject to withholding tax where such tax is credited against corporation tax and fully reimbursed in the case of a resident company that incurs a loss, but no equivalent reimbursement is available to a non-resident company in an identical situation.[19]

3. Comments

With its decision in *Credit Suisse*, the CJEU confirmed the highly controversial *Sofina* ruling. The facts of the case were very similar: it again concerned a withholding tax levied on dividends paid to residents and non-residents. In respect of residents, the dividends could be offset against losses and thus reimbursed, whereas this was not the case for non-residents in a loss situation. In its reasoning, the CJEU referred throughout to *Sofina*. It is now clear that *Sofina* is not an outlier decision and that the CJEU is sticking to this line of reasoning despite all the criticism it has received.

While *Sofina* concerned a French company that paid dividends to its Belgian shareholders, *Credit Suisse* concerned a Spanish company whose shareholders were resident in the United Kingdom. This decision, however, concerns distributions from years when the United Kingdom was still an EU Member State. The *Credit Suisse* ruling, therefore, does not provide specific guidance on how to proceed in relation to third countries to which the free movement of capital also applies and the extent to which the different legal context plays a role.

In line with its established case law, the CJEU held that the situation of non-resident taxpayers is comparable to that of resident taxpayers with regard to dividends paid by a resident company. The comparability arose from the fact that the residence country of the paying company taxed not only dividends paid to resident taxpayers but also dividends paid to non-resident taxpayers. Although the CJEU only referred to dividends, it nevertheless included losses suffered by shareholders in the comparison, as it had already done in *Sofina*, even if the losses arose from activities unrelated to the dividends and were not attributable to activities in the country where the company paying the dividends was resident. In any event, the decision does not contain any restriction whatsoever about the origin of the losses.

With regard to comparability, the CJEU commented on the objection that the principle of territoriality, considered relevant in the *Futura Participations and Singer* case (),[20]case (C-250/95) *Centro Equestre* case (C-345/04)[21] and *Miljoen* (Joined Cases C-14/14, and C-17/14) decisions,[22] allows for losses originating outside the residence country of the distributing company to be ignored. The CJEU merely pointed out that this objection had already been raised in *Sofina* and that it nevertheless assumed that the situations were comparable.[23] However, neither in *Sofina* nor now in *Credit Suisse* is there any reasoning regarding why the CJEU does not consider this objection to be justified.

It must be admitted, however, that the CJEU has never seriously explained why it resorts to the principle of territoriality in the first place. In *Futura*, the principle was introduced using a few words:[24]

> [...] for the purpose of calculating the basis of assessment for non-resident taxpayers, only profits and losses arising from their Luxembourg activities are taken into account in calculating the tax payable by them in that State. […] Such a system, which is in conformity with the fiscal principle of territoriality, cannot be regarded as entailing any discrimination, overt or covert, prohibited by the Treaty.

In *Centro Equestre*, the reasoning is only slightly longer:[25]

> It is clear from the Court's case law that a tax system under which, for the purposes of calculating the basis of assessment for non-resident taxpayers in a particular Member State, only profits and losses arising from their activities in that State are taken into account is consistent with the principle of territoriality enshrined in international tax law and recognized by Community law (see, to that effect, Futura Participations and Singer, paragraphs 21 and 22).

The CJEU does not provide any indication as to why and to what extent this principle is "enshrined in international tax law" or which provisions of EU law "recognize" it.

It cannot, however, be concluded from the case law (i.e. *Sofina* and *Credit Suisse*) that the principle of territoriality will now play no role at all. In *Keva* (Case C-39/23), the CJEU mentioned that the Swedish government referred to "the principle of territoriality combined with the need to preserve a balanced allocation of powers between the Member States as regards the general income-based old-age pension scheme".[26] In its response, however, the CJEU avoided explicitly mentioning the principle of territoriality:[27] "In so doing, the Swedish Government submits that, in reality, the restriction on the free movement of capital at issue is justified by the need to preserve

17. Id., para. 76 et seq.
18. Id., para. 79 et seq.
19. Id., para. 84.
20. CJEU, 15 May 1997, *Futura Participations and Singer*, C-250/95, EU:C:1997:239.
21. CJEU, 15 Feb. 2007, *Centro Equestre da Lezíria Grande Lda*, C-345/04, EU:C:2007:96.
22. CJEU, 17 Sept. 2015, *Miljoen and Others*, C-10/14, C-14/14; and C-17/14, EU:C:2015:608.
23. C-601/23, *Credit Suisse Securities*, para. 54.
24. C-250/95, *Futura Participations and Singer*, para. 21.
25. C-345/04, *Centro Equestre da Lezíria Grande Lda*, para. 22.
26. CJEU, 29 July 2024, *Keva and Others*, C-39/23, EU:C:2024:648, para. 65.
27. C-39/23, *Keva and Others*, para. 71.

a balanced allocation of the power of taxation between the Member States". In *XY v. Finanzamt V* (Case C-394/20), which followed *Sofina*, the CJEU explicitly confirmed that territoriality continues to be relevant:[28]

> The German Government claims, secondly, that a difference in treatment such as that at issue in the main proceedings may be justified by the principle of territoriality and by the need to ensure a balanced allocation of the Member States' powers to impose taxes, which is indeed a legitimate objective recognized by the Court (judgment of 8 June 2016, *Hünnebeck*,C-479/14, EU:C:2016:412, paragraph 65).

It is also interesting that the CJEU addressed the issue of territoriality at the level of comparability. In *Hornbach*, it explicitly rejected this:[29]

> It should be noted that those arguments do not relate to the comparability of the situations but rather to the justification derived from the principle of territoriality, whereby Member States are entitled to tax income generated on their territory, [...], which is a legitimate objective recognized by the Court.

Credit Suisse did not present any new arguments in comparison to *Sofina* regarding the justification of "effective collection of tax": The CJEU confirmed its case law, according to which:[30]

> the need to ensure the effective collection of tax is a legitimate objective capable of justifying a restriction on fundamental freedoms, provided, however, that that restriction is applied in such a way as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose.

Following this, it also assumed once again "that retention at source is a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation". This argument, however, was again unsuccessful:[31]

> the restriction on the free movement of capital arising from the rules at issue in the main proceedings lies in the fact that, unlike loss-making resident companies which are subject to tax in Biscay, non-resident companies, which are themselves loss-making, benefit neither from reimbursement of the withholding tax nor from a potential deferral of taxation.[…] Granting the benefit of such treatment to non-resident companies, while necessarily eliminating that restriction, would not undermine the achievement of the aim of the effective collection of the tax owed by those companies when they receive dividends from a resident company established in Biscay.

In *Credit Suisse*, as in *Sofina*, the CJEU then examined the balanced allocation of taxing powers between Member States as a justification and again rejected it. In *Sofina*, the CJEU also stated, in this context, as it had done in earlier judgments,[32] that a reduction in tax revenue cannot be regarded as a compelling reason in the general interest.[33] In *Credit Suisse*, the CJEU used a slightly different formulation, similar in content, which can also be found in its earlier case law:[34]

> Where a Member State has chosen, in certain circumstances, not to tax resident companies on domestic dividends, it cannot rely on the need to ensure a balanced allocation of the power of taxation between Member States to justify the taxation of non-resident companies which receive such income.

In *Credit Suisse*, the CJEU examined the justification of the "balanced allocation of the power of taxation" together with the "need to prevent the risk of losses being used twice".[35] The CJEU rightly pointed out that this risk does not exist because, as a rule, the taxation of dividends is made up for in subsequent profit years.[36]

Unlike in *Sofina*, in *Credit Suisse*, the CJEU had to consider the justification of "coherence".[37] Several governments argued that the provisions:[38]

> serve to maintain the cohesion of the national tax system, since the fact that losses sustained outside the source Member State by a non-resident company are not taken into account in that Member State follows a logic of symmetry and is the counterpart of the fact that the economic activities from which those losses arise are not taxed in that Member State.

The CJEU essentially rejected the coherence argument on the grounds that "resident companies that are subject to corporation tax in Biscay that are loss-making and to which the withholding tax on dividends received is reimbursed are not subject to a particular tax levy to offset that reimbursement".[39] The CJEU looked here in isolation at the dividend and, unlike when determining the restriction, not at all at the income of the resident and non-resident companies. Otherwise, it should have had no problem finding that resident companies are taxable in Spain on all profits earned in their residence state and can deduct the losses incurred therein. In contrast, non-resident companies are not taxable in Spain on profits earned in their residence state under Spanish tax law and, conversely, cannot deduct losses incurred therein in Spain.

It remains unclear under which country's tax law the question of whether the non-resident corporation suffers a loss and is therefore entitled to a refund of withholding tax on the dividends from the country in which the dividend-paying company is resident must be assessed. The CJEU did not clarify this in *Sofina* or in *Credit Suisse*. This question has now been referred to the CJEU by a Swedish court in *Société Générale* (Case C-241/25).[40]

It should be emphasized that no reference was made to the *Marks & Spencer* (Case C-446/03)[41] case law, which obliges the residence state to consider final losses of subsidiaries

28. CJEU, 21 Dec. 2021, *XY v. Finanzamt V*, C-394/20, EU:C:2021:1044, para. 70.
29. CJEU, 31 May 2018, *Hornbach-Baumarkt AG v. Finanzamt Landau*, C-382/16, EU:C:2018:366, para. 40.
30. C-601/23, *Credit Suisse Securities*, para. 59, as well as the case law referenced therein.
31. C-601/23, *Credit Suisse Securities*, paras. 61-62.
32. CJEU, 20 Oct. 2011, *Commission v. Germany*, C-284/09, EU:C:2011:670, para. 83.
33. C-575/17, *Sofina and Others*, para. 61.
34. C-601/23, *Credit Suisse Securities*, para. 74; for similar reasoning, *see* C-39/23, *Keva and Others*, para. 73 and in the case law cited therein.
35. C-601/23, *Credit Suisse Securities*, para. 68 et seq.
36. Id., para. 75.
37. Id., *Credit Suisse Securities*, para. 79 et seq. The CJEU uses the term "cohesion" but seems to be referring to the same concept.
38. Id., para. 79.
39. Id., para. 81.
40. Request for a preliminary ruling of 25 Mar. 2025, *Société Générale SA*, C-241/25.
41. CJEU, 13 Dec. 2005, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, C-446/03, ECLI:EU:C:2005:763.

established in other Member States. *Credit Suisse* is in line with *Marks & Spencer*, as, in both situations, a Member State is forced to take into account losses incurred in another Member State, although it does not have tax jurisdiction over the profits generated in that other Member State. However, in *Marks and Spencer*, the obligation concerns only final losses, whereas in *Credit Suisse* (in line with *Sofina*), the obligation concerns any losses, even if they are not final. This is particularly surprising since *Marks & Spencer* concerns the obligations of the residence state, whereas *Sofina* and *Credit Suisse* concern the source state. As a result, the CJEU places a heavier burden on source states than that placed on residence states. By not referring to the *Marks & Spencer* case law (which is also relevant for PEs),[42] the CJEU is also not providing any reasoning that could explain this difference.

Guidance on how to answer the question of whether the benchmark for ascertaining whether the company is in a loss-making position is the law of its residence state or of the source state can be found in *ACC Silicones* (Case C-572/20).[43] That case concerned a German tax provision that, for the purposes of the reimbursement of tax on income from capital:[44]

> requires a company resident abroad which receives dividends [...] to prove, by means of a certificate from the foreign tax administration, not only that neither that company nor a shareholder with a direct or indirect equity holding in that company can offset the tax on income from capital or can deduct it as an operating cost or as work-related outgoings, but also that no offset, deduction or carry-forward has actually taken place either, in the case where such proof is not required, for the purposes of the reimbursement of tax on income from capital, from a company [...] which is resident in national territory.

In any event, the answer to the above-formulated question lies in the underlying rationale. One rationale is to consider the fundamental freedoms as a tool to prevent the double use of profits and losses. Under this approach, it makes sense to ascertain whether or not the company is in a loss position according to its residence state tax rules (in this case, the United Kingdom). The other rationale emphasizes the non-discrimination element of freedoms and equal treatment under the source state rules. Under this approach, the computation of the tax base of the non-resident (in this scenario, the UK resident) would follow the source state tax rules (in this case, the Biscay rules). Consequently, the same tax rules would apply to ascertain the loss-making position of both resident and non-resident companies (as the benchmark would be precisely the same). It is possible that the CJEU will combine both approaches, computing losses both under UK rules and under Biscay rules, to establish that there is a loss position in both states requiring the reimbursement of the source withholding tax.

In *ACC Silicones*, the CJEU was prepared to accept "the need to avoid withholding tax being taken into account twice" as a justification:[45]

> As regards the justification relating to the need to avoid withholding tax being taken into account twice in the case of companies receiving dividends established in other Member States or their direct or indirect shareholders, it should be noted that the obligation imposed on companies receiving dividends established in other Member States to prove that the withholding tax has not been set off or its set-off carried forward in their favor or in that of their direct or indirect shareholders, and has not been deducted either as work-related outgoings or an operating cost, has no equivalent as regards resident companies. However, nothing precludes those companies from also being held by non-resident shareholders, subject to national legislation that allows the withholding tax levied on the company receiving the dividends to be taken into account at the shareholders' level. The possibility of the withholding tax being taken into account twice cannot therefore be ruled out as regards resident companies, since the fact that the German legislation authorizes withholding tax to be taken into account only at the level of the company receiving the dividends is irrelevant in that regard.

The German provision made the question of whether German withholding tax is refundable dependent on whether the withholding tax can be taken into account under the tax law of the other country.[46] This rule would apparently have been in line with EU law if the German legislature had also excluded the double use of dividends paid to a resident shareholder by other persons. Against this background, there are good reasons to believe that the CJEU will base its calculation of the loss in *Société Générale* on the law of the country in which the company distributing the dividends is not resident.

In *Credit Suisse*, the CJEU did not inquire whether the UK company would be entitled to a rollover of the excess tax credit in the United Kingdom. If that were the case, the company would still have the opportunity to consider the Biscay withholding tax in a later year. To a certain extent, one could draw an analogy with the impossibility of offsetting foreign losses, such as in *Marks & Spencer*. This may result from the fact that the CJEU looks at each tax year separately.

As in *Sofina*, in *Credit Suisse,* the CJEU emphasized that "it is, in any event, for non-resident companies to provide the relevant evidence to enable the tax authorities of the Member State of taxation to determine that the conditions laid down for those companies to benefit from a deferral of taxation have been met".[47] In *Credit Suisse*, it made these remarks in the context of the justification of the "need to prevent the risk of losses being used twice",[48] whereas such wording is found in *Sofina* in relation to the justification of "effective collection of tax".[49] In any event, it would not be necessary for the CJEU to rule on questions of "burden of proof": procedural law is a matter for the Member States and as long as they comply with the principles of equiv-

42. CJEU, 18 July 2007, *Oy AA*, C-231/05, EU:C:2007:439; CJEU, 15 May 2008, *Lidl Belgium GmbH & Co. KG v. Finanzamt Heilbronn*, C-414/06, EU:C:2008:278; CJEU, 23 Oct. 2008, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, C-157/07, EU:C:2008:588; and CJEU, 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424.
43. CJEU, 16 June 2022, *ACC Silicones Ltd*, C-572/20, EU:C:2022:469.
44. C-572/20, *ACC Silicones Ltd*, para. 22.
45. Id., para. 56.
46. Id., para. 56.
47. C-601/23, *Credit Suisse Securities*, para. 77.
48. Id.
49. C-575/17, *Sofina and Others*, para. 72.

alence and effectiveness[50] there should be no further EU law requirements for enforcing EU law claims.

The scope of the case law established in *Sofina* and confirmed in *Credit Suisse* remains unclear. It must be assumed that the same finding that applies to dividends also applies to interest and royalties, as well as to all payments subject to withholding tax. Furthermore, it should also be questioned whether the ruling also holds for any type of income taxed at source, even if not subject to a withholding tax (including, namely, the profits of a PE). In the event of a loss, the non-resident company must have the option of reclaiming the corresponding tax. One could argue that the reasoning could also be transposed to individual taxpayers (e.g. employment or business income from a PE in the source state and unrelated losses, such as rental losses in the residence state).

One step further is to consider the possible impact of *Sofina* and *Credit Suisse* in the context of group regimes. Under a group regime, the situation of the subsidiary is very similar to a PE, as, in both instances, the profits of a PE, as well of those of the group member subsidiary, would be taken into account at the head office/parent level in a domestic setting (in a manner in which the profits of the PE/subsidiary could be compensated for by losses at the level of the head office/parent level). If a Member State allows for the netting of profits and losses of group members in a purely domestic context, *Credit Suisse* could lead to the conclusion that such loss compensation must also be allowed in a cross-border context. Consequently, the losses of the foreign parent would reduce the subsidiary's profit. The consequence of applying the reasoning followed by the CJEU in *Sofina* and *Credit Suisse* would disturb the traditional allocation of taxing powers between states because the source state would have to take into account foreign and territorially unrelated losses. Such computation would be significantly burdensome from a compliance and administrative cost perspective.

While the Court accepts a recapture in the source state should the foreign parent return to profit,[51] it only clarified that it should mirror that implemented for domestic situations.

Countries wishing to avoid the consequences of *Credit Suisse* can either introduce a recapture system mirroring domestic law or restrict the possibility of offsetting positive and negative income. In the latter case, if the tax on dividends is final and cannot be offset against losses, non-resident corporations cannot be required to refund the tax in the event of losses from other company activities. Regarding legal policy, the Member States could react to the CJEU decisions by shifting away from synthetic income taxation, which is often linked to the principle of ability to pay, towards taxation according to schedules. This is rather ironic since many academics take the view that some court decisions (e.g. the *Schumacker* (Case C-279/93) case law)[52] are heavily influenced by the ability-to-pay ideology.[53]

Another approach, following the Dutch reaction to *Sofina*, might be to introduce a refund system only up to the amount of the corporation tax due, i.e. not a full refund (*see* section 25a(3) and (4) of the Corporate Income Tax Act).[54] The system allows CIT taxpayers to carry forward the excess tax credit to future years indefinitely, but only in a domestic setting, while in cross-border situations, the dividend withholding tax would be definitive. This different treatment still seems to be discriminatory under EU law.

In conclusion, *Sofina* and *Credit Suisse* have an unclear scope of application beyond cases of dividend withholding taxation. It could be argued that their reasoning also applies to all instances of source taxation. Of course, that would raise similar issues to those under *Marks & Spencer* case law, such as: under which state law the loss is to be calculated, how to implement a recapture mechanism and how the corresponding calculations for such recapture are made (e.g. no loss carry-forward in the residence state, carry-back in the residence state and credit carry-forward in the residence state).

4. The Statement

In its *Credit Suisse* ruling, the Court upheld the case law established in *Sofina* but did not provide any additional significant arguments or address the scholarly criticism of that case law. The scope of this case law, beyond dividend withholding taxation, remains open, and the potential impact on international tax law is immense and warrants close attention.

While the CJEU in *Credit Suisse* at least mentioned the *Futura* decision, it remains unclear whether the principle of territoriality is still considered a viable principle accepted by the Court. The CFE notes that the case law established in *Sofina* and *Credit Suisse* seems to contradict that principle.

CFE Tax Advisers Europe acknowledges that, unlike *Sofina*, *Credit Suisse* has addressed the justification of coherence without reaching a different result. It is hoped, however, that the Court will further develop and explain the arguments rejecting coherence.

50. CJEU, 20 Sept. 2001, *Courage Ltd and Crehan*, C-453/99, EU:C:2001:465, para. 29; and CJEU, 10 July 1997, *Palmisani*, C-261/95, EU:C:1997:351, para. 27.
51. C-575/17, *Sofina and Others*, para. 59; and C-601/23, *Credit Suisse Securities*, para. 75.
52. CJEU, 14 Feb. 1995, *Schumacker*, C-279/93, EU:C:1995:31.
53. *See*, for instance, Ivan Lazarov, "The Relevance of Fundamental Freedoms for Direct Taxation", in *Introduction to European Tax Law on Direct Taxation*, eds. Michael Lang et al. (IBFD, 2024), m.no. 212; Frans Vanistendael, "Ability to pay in European Community Law", *EC Tax Review* 23, no. 3 (2014): 123; and Rishabh Agarwal, in *Justice, Equality and Tax Law*, eds. Nevia Čičin-Šain and Mario Riedl (Linde, 2022), 35.
54. NL: Corporate Income Tax Act (*Wet op de vennootschapsbelasting)*, 1969, of 8 Oct. 1969, as amended.