EDITORIAL

Société Générale and Cross-Border Loss-Relief for Non-Residents: CJEU, Please Don't Get It Wrong!

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In the Société Générale case, the CJEU's Grand Chamber has to decide on cross-border loss relief for non-residents. The court should take a restrictive approach, limiting the Sofina case law to the elimination of discriminatory treatment. Otherwise, it would put severe pressure on Member States' budgets. It would also jeopardize the coherence of the case law and reach a logically untenable decision. The CJEU should therefore clarify that the case law applies at most to losses arising in the source state and to foreign losses that would have had to be taken into account had they been incurred by a resident of the source state.

1 Introduction

Over the last decades, cross-border loss-relief has become a recurrent topic for both CJEU decisions and scholarly literature critically engaging with them. Ever since the seminal ruling in Marks & Spencer,[1] a particular focus has been the relief for foreign losses granted to residents. Despite persistent doubts among scholars,[2] the Court's Grand Chamber decision in W-AG seems to have calmed the issue.[3] By contrast, the question of loss relief for non-residents has recently become more prominent. The issue started in 2018 with the decision in Sofina[4] and has gained momentum through the 2024 Credit Suisse[5] decision. Currently, the Société Générale case,[6] a referral for a preliminary ruling by the Swedish Högsta förvaltningsdomstolen (the Supreme Administrative Court) is pending before the Court's Grand Chamber. So far, no opinion by the Advocate General has been rendered.

Several contributions in the scholarly literature have expressed doubts on the CJEU's decisions on cross-border loss relief for non-residents. The CFE ECJ Task Force have severely criticized the Sofina decision as incompatible with the territoriality principle and pushing administrative feasibility to its limits.[7] Regarding Crédit Suisse, the Task Force raised the questions whether the line of case-law was limited to dividend withholding taxation and whether the territoriality principle was still a valid principle of EU law.[8] They doubted whether the repair legislation in the Netherlands, which limits corporate tax refunds for residents and allows a tax credit carry forward for them, but not for non-residents, is compatible with

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1 ECJ, 13 Dec. 2005, C-446/03, ECLI:EU:C:2005:763, Marks & Spencer plc v. Halsey (HM Inspector of Taxes).

2 Georg Kofler, *Curia Locuta, Causa Finita: Some Further Conclusions from WAG*, 32(5) EC Tax Rev. (2023), doi: 10.54648/ECTA2023024; Szudoczky; Axel Cordewener, *We Need to Know When Previous Case-Law Has Been 'Overruled'! A Plea for More Legal Certainty in EU Tax*, 32(4) EC Tax Rev. (2023), doi: 10.54648/ECTA2023019.

3 CJEU, 22 Sep. 2022, C-538/20, ECLI:EU:C:2022:717, *W AG v. Finanzamt Hannover Nord.*

4 CJEU, 22 Nov. 2018, Case C-575/17, *Sofina SA* et al. *v. Ministre de l'Action et des Comptes publics*, ECLI:EU:C:2018:943.

5 CJEU, 29 Feb. 2024, Case C-405/22, ECLI:EU:C:2024:144, *Credit Suisse Securities (Europe) Ltd.*

6 C-241/25.

7 CFE ECJ Task Force, Opinion Statement ECJ-TF 3/2019 on the CJEU decision of 22 Nov. 2018 in Case C-575/17, Sofina, on withholding taxes, losses and territoriality, European Taxation 2020, 91; also available at https://taxadviserseurope.org/project/opinion-statement-ecj-tf-3-2019-on-the-cjeu-decision-of-22-november-2018-in-case-c-575-17-sofina-on-withholding-taxes-losses-and-territoriality/. *See also* Georg Kofler, *Grenzüberschreitende Verlustverwertung im Quellenstaat: Stellt Sofina die beschränkte Steuerpflicht auf den Kopf?*, in 389, 402 (Gosch et al. eds, Festschrift für Jürgen Lüdicke 2019).

8 CFE ECJ Task Force, Withholding Taxes, Losses and Territoriality – Opinion Statement ECJ-TF 3/2025 on the Decision of the CJEU of 19 Dec. 2024 in Credit Suisse Securities (Europe) Ltd *v.* Diputación Foral de Bizkaia Case (C-601/23); also available at https://taxadviserseurope.org/project/opinion-statement-ecj-3-2025-on-withholding-taxes-losses-and-territoriality-in-the-decision-of-the-cjeu-in-case-c-601-23-credit-suisse-securities-europe-ltd/.

EU law.[9] They also asked if the decision also applied to third country losses given that the free movement of capital is applicable to these constellations.[10] Finally, it deplored that the decision means a heavier burden on source states than that placed on residence states.[11] AG Kokott has recently pointed to several difficulties and adverse consequences of the judgments in Sofina and Crédit Suisse. In particular, she considers that this line of case law likely deals a fatal blow to the territoriality principle. She even quotes Kofler who thought that the decisions could usher in a revolution regarding the compatibility of withholding tax with the fundamental freedoms.[12] In a similar vein, Hummel pointed to several inconsistencies and deficiencies in the court's reasoning and bluntly called the decisions 'simply wrong'.[13] Ismer and Kandel,[14] by contrast, have tried to argue that while the Sofina decision did not explicitly specify the territorial origin of the losses, they could potentially only come from the state that has to grant the loss relief.[15] Lazarov, who deals comprehensively with withholding taxes in the EU, points to the fact that the CJEU failed to mention Sofina in a situation where the recipient of cross-border dividends was in a loss-position.[16]

Against this background, we will argue in the following that the *Société Générale* case may well mark a watershed moment for the CJEU's case law on cross-border loss-relief: if the court is not mindful, it is running the acute danger of erroneously granting relief in a situation where it is not due. Such decision could adversely affect Member States' budgets that are already under severe strain following recent crises. Even more importantly, it would seriously jeopardize the coherence of a crucial strand of its case law and thus raise questions on the precedential value of CJEU decisions beyond the parties of the respective case. Therefore, the CJEU should clarify that the Sofina case law applies only to relevant losses, i.e., those that are either domestic losses (those arising in the source state) or foreign losses that would have had to be taken into account had they been incurred by a resident of the source state.

For that purpose, we will start by presenting the recent case law on loss-relief for non-residents including the pending *Société Générale* case (II.). We will then show that the case-law seems to run into a contradiction to the Court's own case-law on cross-border loss-relief for residents (III.). Such a contradiction would be problematic. On the one hand, this is because the *effet utile* of Union law requires coherence. On the other hand, the contradiction would be also be incompatible with the character of the fundamental freedoms as non-discrimination rules. Therefore, the CJEU should clarify the limited portent of the Sofina case-law (IV.). A short summary with a brief outlook on the way forward for the CJEU concludes this contribution (V.).

2 Recent decisions on loss-relief for non-residents

The court's case law forming the background for the pending Société Générale case has been shaped by two decisions. We will briefly present these cases, namely the potentially seminal *Sofina* ruling (1.) and the far less important Crédit Suisse case (2.), before we come to the referral in Société Générale (3.).

2.1 *Sofina*

The Sofina ruling,[17] which was decided shortly after the CJEU's Grand Chamber *Bevola*[18] case on cross-border loss-relief for residents, followed a request for a preliminary ruling by the French Conseil d'État. It dealt with the parallel situation for non-residents: The Belgium resident companies Sofina SA, Rebelco SA and Sidro SA were in a loss situation in the relevant financial years. When they received portfolio dividends as shareholders in French companies, they applied for a full reimbursement of the withholding tax. They argued that French resident companies would be able to offset the dividends against any losses.

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[9] CFE ECJ Task Force, *supra* n. 8, at 484. *See also* Eric Kemmeren, *Tax Deductible Expenses Regarding Dividend Withholding Taxes: CJEU (Implicitly) Repeals Outlier Société Générale (C-17/14)*, 34(6) EC Tax Rev. 210, 219 (2025), doi: 10.54648/ECTA2025037.

[10] The issue had previously also been raised by Aurora Ribes Ribes, *Comentario a la Sentencia del TJUE (Sala Quinta) de 22 de noviembre de 2018* 158, 162 (Revista Técnica Tributaria 2019).

[11] CFE ECJ Task Force, *supra* n. 10, at 483.

[12] Juliane Kokott, *La giurisprudenza delle Corti quale fattore propulsivo dell'ordinamento costituzionale e dell'ordinamento eurounitario: l'esempio del diritto tributario*, 35(2) Rivista di Diritto Tributario 45 (2025).

[13] David Hummel, *Quellenbesteuerung quo vadis? – Zum weltweiten Verlustausgleich à la EuGH bei der Dividendenbesteuerung* 37, 47 (Internationales Steuerrecht 2026).

[14] Roland Ismer & Harald Kandel, *A Finale Incomparabile to the Saga of Definitive Losses? Deduction of Foreign Losses and Fundamental Freedoms after Bevola and Sofina*, 47 Intertax 573 (2019), doi: 10.54648/TAXI2019058.

[15] Somewhat ironically, it later turned out that Sofina did not incur a loss at all, *see* de Waal & Castarède, *La saga Sofina: tragédie shakespearienne ou vaudeville français?* 407 (Droit fiscal n° 48 1 Décembre 2022).

[16] Ivan Lazarov, *Case Law Trend: Withholding Taxation Under the Fundamental Freedoms*, 51 Intertax 524, 530 (2023), doi: 10.54648/TAXI2023047.

[17] CJEU, 22 Nov. 2018, Case C-575/17, *Sofina SA* et al. *v. Ministre de l'Action et des Comptes publics*, ECLI:EU:C:2018:943.

[18] CJEU, 12 Jun. 2018, C-650/16, ECLI:EU:C:2018:424 – *Bevola*.

The CJEU's Fifth Chamber found a violation of the free movement of capital under Article 63 TFEU. It held that the fact that residents could offset dividends against losses, whereas non-residents were prevented from doing so, constituted a restriction on the free movement of capital, for the purposes of Article 63(1) TFEU. Moreover, it saw no justification. It considered the situation of residents and non-residents to be comparable.[19] Unlike in *Truck Center*, the differences in taxation do not merely concern arrangements for the collection of tax, but can give rise to substantial and permanent differences in the amount of tax paid. The justification could not be based on the balanced allocation of taxing rights either.[20] The court argued that once the non-resident company became profitable again, the loss-offset could be recaptured.[21] In this context, it seems noteworthy that the argument is based on the prohibition of discrimination. This becomes clear from paragraph 61, which reads:

> *The French Government cannot claim that the loss of tax revenue associated with the taxation of dividends received by non-resident companies in the event of their ceasing trading is of such a nature as to justify a withholding tax on that income so far as concerns solely those companies, when the French State consents to such losses when resident companies cease trading without returning to profitability.*

Finally, the court rejected justification on the grounds of the effective collection of tax.[22] It gave three reasons why that ground was not applicable to the case. First, it considered the situation of loss-making exceptional. Second, it referred to the obligation of the taxpayer to provide the relevant evidence. Finally, it pointed to the possibilities offered by mutual assistance under the directive.

The court did not specify where the losses originated. This has led to speculation in the scholarly literature that the losses must have arisen in France.[23] The reasoning behind this was that the court seemed to assume not only the obligation to take the losses into account at all, but to do so contemporaneously. Under the Marks & Spencer strand of case law, such obligation would only have been conceivable for domestic losses.

2.2 *Crédit Suisse*

The 2024 Crédit Suisse decision[24] dealt with cross-border loss-relief for non-residents. Credit Suisse Securities (Europe) is a company established in the United Kingdom which has no permanent establishment in Spain. In 2017, it received dividends from a company established in Biscay, Spain. The withholding tax was reduced to 10% pursuant to the Spain-UK tax treaty. The company sought a full refund of the withholding tax as it had sustained losses in that year. It argued that a Spanish resident company could have offset the dividend income with the losses, leading to a refund of the withholding tax. By contrast, as a non-resident, it was unable to recover the amount retained as withholding tax in Spain. Neither could offset it against an amount of tax payable in the UK as its state of residence. Moreover, there was no carry-forward or carry-backward of excess credits under the tax treaty. The Spanish Tribunal Superior de Justicia del País Vasco saw a potential discrimination and referred the matter to the CJEU for a preliminary ruling. Again, there was no specification as to the origin of the losses.

The CJEU's Sixth Chamber followed its reasoning in Sofina and found a restriction on the free movement of capital under Article 63(1) TFEU[25] which could not be justified.[26] Again, it found the domestic and the cross-border case comparable.[27] It rejected a justification on the grounds of effective collection of tax,[28] on the balanced allocation of taxation rights and preventing a risk of losses being used twice,[29] as well as on the cohesion of the tax system.[30]

The portent of the decision in Crédit Suisse should therefore not be overestimated: The arguments by the court closely followed the reasoning in Sofina. Moreover, it seems noteworthy that the decision was rendered by the Chamber without Opinion by an Advocate General.

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19 CJEU, 22 Nov. 2018, Case C-575/17, *Sofina SA* et al. *v. Ministre de l'Action et des Comptes publics*, ECLI:EU:C:2018:943, paras 47 et seq.

20 CJEU, 22 Nov. 2018, Case C-575/17, *Sofina SA* et al. *v. Ministre de l'Action et des Comptes publics*, ECLI:EU:C:2018:943, paras 55 et seq.

21 CJEU, 22 Nov. 2018, Case C-575/17, *Sofina SA* et al. *v. Ministre de l'Action et des Comptes publics*, ECLI:EU:C:2018:943, para. 59.

22 CJEU, 22 Nov. 2018, Case C-575/17, *Sofina SA* et al. *v. Ministre de l'Action et des Comptes publics*, ECLI:EU:C:2018:943, paras 65 et seq.

23 Ismer & Kandel n. 14.

24 CJEU, 29 Feb. 2024, Case C-405/22, ECLI:EU:C:2024:144, *Credit Suisse Securities (Europe) Ltd.*

25 CJEU, 29 Feb. 2024, Case C-405/22, ECLI:EU:C:2024:144, *Credit Suisse Securities (Europe) Ltd*, paras 30 et seq.

26 CJEU, 29 Feb. 2024, Case C-405/22, ECLI:EU:C:2024:144, *Credit Suisse Securities (Europe) Ltd*, paras 50 et seq.

27 CJEU, 29 Feb. 2024, Case C-405/22, ECLI:EU:C:2024:144, *Credit Suisse Securities (Europe) Ltd*, paras 53 et seq.

28 CJEU, 29 Feb. 2024, Case C-405/22, ECLI:EU:C:2024:144, *Credit Suisse Securities (Europe) Ltd*, paras 57 et seq.

29 CJEU, 29 Feb. 2024, Case C-405/22, ECLI:EU:C:2024:144, *Credit Suisse Securities (Europe) Ltd*, paras 68 et seq.

30 CJEU, 29 Feb. 2024, Case C-405/22, ECLI:EU:C:2024:144, *Credit Suisse Securities (Europe) Ltd*, paras 79 et seq.

Under Article 20(5) of the Statute of the Court, this means that it must be understood as not raising new points of law.[31]

2.3 *Pending Case: Société Générale*

The pending Société Générale case[32] concerns a French resident company. The company formed part of the French tax group Société Générale, which is subject to consolidated taxation in France. The company held shares in Swedish limited companies. When they paid dividends, Swedish withholding tax was deducted at source. The French company requested a refund of the withholding tax as it was loss-making. The refund was refused on the ground that the French company failed to show that it was loss-making by recalculating its taxable profit or tax loss in accordance with Swedish rules.

Relying on *Sofina* and *Crédit Suisse*, the Swedish court sought clarification on the applicable rules for determining the foreign losses: is it acceptable under Article 63 TFEU to apply rules of the state of taxation at source to taxation on the revenue of resident companies. Moreover, it wondered whether the state of taxation at source require that such profit be determined for the foreign tax group as a whole of which the entity deriving the source income forms part and whether the outcome to that question was affected if the state of taxation at source did not have a group consolidation regime, but made profit and loss compensation within the group possible in certain circumstances through intra-group transfers.

The Swedish court presented arguments both for and against applying the French rules for determining the profit. It pointed to the fact that a calculation in accordance with the rules of the state of taxation at source gives a non-resident company, as far as possible, a taxation treatment which corresponds to that applicable to a resident company. Moreover, it highlighted the limited extent to which taxation has been harmonized in the European Union. Conversely, it stressed the additional administrative burden arising from the double determination of profits which could imply that non-resident companies could refrain from claiming such equal treatment guaranteed by EU law. Regarding the question on group taxation, it referred to the Swedish government's justification of combatting unfair advantages: If the individual legal person was considered even though in the state of residence the profits were determined in a consolidated manner, there is a risk of costs and dividends being allocated so as to minimize foreign tax without impact on domestic taxation.

3 Contradiction to cross-border loss-relief for residents?

The judgments in Sofina and Crédit Suisse seem to be in contradiction with the elaborate line of case-law on cross-border loss relief. Cross-border loss-relief for residents requires comparability as well as definitiveness both in a conditional and a temporal dimension – the loss-relief is confined to foreign losses if and when they have become definite.

3.1 *Cross-Border Loss-Relief for Residents*

The comparability requirement has been intensively discussed. Despite persistent criticism in the scholarly literature, the CJEU considers domestic and foreign losses as generally not comparable. In other words, territoriality of taxation translates into territoriality of loss relief. Thus, comparability needs to be positively established. Such comparability is given, where domestic law eliminates double taxation through the credit method. The same is true, where domestic law allows for a deduction of foreign losses which are recaptured in subsequent years once foreign profits are made. In a group situation, an indirect credit mechanism – i.e., a tax credit for taxes paid by the subsidiary that is made available to the parent entity that receives a dividend – also leads to comparability of domestic and foreign losses.[33] A tax treaty containing the credit method is also sufficient, even if domestic law provides for the exemption of foreign losses. By contrast, where the tax treaty provides for double taxation relief by way of the exemption method and where domestic law heeds this demand, domestic and foreign losses are not comparable.

Even where there is comparability, a balanced allocation of taxing rights means that only definitive losses can be imported. It is still not fully clear what definitive losses are. In any event, the temporal dimension implies that the relief does not necessarily have to be afforded at the time the losses arise. Thus, in Lidl Belgium, the court denied such synchronous relief for foreign losses.

3.2 *Possible Contradiction of the Two Strands of Case-Law*

The Sofina and Crédit Suisse decisions do not follow such an elaborate system. Instead, they seem to suggest that cross-border loss-relief is both free from the comparability and the definitiveness restrictions. The decisions thus seem to apply regardless of whether corresponding profits

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[31] The provision reads: 'Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General'.

[32] C-241/25.

[33] ECJ, 13 Dec. 2005, C-446/03, ECLI:EU:C:2005:763, Marks & Spencer plc v. Halsey (HM Inspector of Taxes).

would be taxable in the source state. Yet residents can only import losses in a very restricted manner. Why should the restrictions then not apply to non-residents? This result has attracted severe criticism in the scholarly literature.[34] Indeed, it seems difficult to explain why the source state should be placed under more stringent requirements that the residence state. In any event, it would not seem to be incumbent on the CJEU to abolish withholding taxes in the EU.

4 Securing coherence of the case-law – or: Taking non-discrimination seriously

Such contradiction, were it really to arise, would indeed be problematic. Forcing importation of worldwide losses would not only seem ill-advised from the perspective of Member States' public finances. More importantly, it would also be extremely questionable from a legal stand point. This is because the functioning of the EU legal order, while it does not explicitly impose a stare decisis obligation on the CJEU, depends on the coherence of its case-law (1.). The contradiction would moreover be incompatible with the nature of the free movement of capital as a non-discrimination provision (2.). Taking these concerns seriously suggests a restrictive understanding of the Sofina case law that would avoid the contradiction. Thus, the court should explicitly state in its upcoming decision in Société Générale: Member States are obliged to grant cross-border loss-relief for non-residents only to the extent that they give it (or have to give it) to residents (3.).

4.1 *Why is there a Need for Coherence?*

The full impact of CJEU decisions depends on their relevance beyond the specific case in which the decision was rendered. Member States' courts are thus obliged under Union law to follow CJEU case law in other similar cases[35] or, where they do not find it convincing, to present a further referral for a preliminary ruling.[36] Admittedly, there is no explicit rule or case-law that would oblige the CJEU to stand by previous decisions in the sense of a *stare decisis.*[37] Nevertheless, the CJEU is rightly very reluctant to explicitly set aside previous decisions. Even beyond that, the court should strive for coherence. Only when domestic courts can understand the rationale underlying CJEU decisions, can they confidently follow in the CJEU's footsteps. By contrast, where case-law contradicts several Grand Chamber decisions in related areas, Member States' courts can be expected to either increase the number of referrals or, which would be far worse, claim greater freedom in assuming acte clair/acte éclairé and decide the cases as they see fit.

The coherence requirement is, of course, not without limits. The court may confine the portent of previous case-law, even if it does not explicitly set a previous decision aside. For that purpose, it has two instruments at its disposal. First, it can always distinguish previous case-law. Second, and this is specific to the EU legal order, it can argue that a previous decision has not necessarily implicitly answered what are logically prior questions. The court threaded this fine line e.g., in *DNB Banka, Aviva* and *Commission/Germany*[38] on cost sharing groups under Article 132 (1)(f) VAT Directive. In the 2003 *Taksatorringen* decision[39] in the context of a referral for a preliminary ruling regarding insurance companies, the court had elaborated at length on the requirements of distortions of competition under that provision.[40] Some fourteen years later, it found the provision inapplicable to tax exemptions under Article 135 VAT Directive and thus to insurance companies and banks in the first place. Thus, it all but disregarded the previous ruling in Taksatorringen. Yet there was no formal contradiction as the referring court in Taksatorringen had not specifically asked on the applicability of Article 135 to insurance companies.

4.2 *Legal Argument: Fundamental Freedoms as Non-Discrimination Provisions*

Obliging the source state to grant cross-border loss relief that goes beyond the obligations of a state of residence would moreover not only be incoherent, but dogmatically untenable. It would be incompatible with the nature of the free movement of capital as a non-discrimination rule. In its constant jurisprudence, the court has rightly rejected an obstacle-based approach to applying the fundamental freedoms to direct taxation. As any tax measure may hinder cross-border economic activities, the court has

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[34] *See* e.g., CFE ECJ Task Force, *supra* n. 10, at 483; Hummel, *supra* n. 13; Kokott, *supra* n. 13.

[35] *See* expressly Advocate General *Warner*, Opinion of 20 Sep. 1977, Case 112/76, *Manzoni.*

[36] On the admissibility of such references, *see* ECJ, 6 Oct. 1982, Case 283/81 – CILFIT, para. 15.

[37] *See* the discussion in *see* Jacob, *Precedents and Case-based Reasoning in the European Court of Justice*, 2014, pp. 243 ff. with further references.

[38] CJEU of 21 Sep. 2017, C-326/15, ECLI:EU:C:2017:719 – *DNB Banka*; of 21 Sep. 2017, C-605/15, ECLI:EU:C:2017:718 – Aviva; of 21 Sep. 2017, C-616/15, ECLI:EU:C:2017:721 – *Commission/Germany.*

[39] CJEU of 20 Nov. 2003, C-8/01, EU:C:2003:621 – *Taksatorringen.*

[40] Or, more precisely, to Art. 13B(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes as the predecessor of the VAT Directive.

limited the fundamental freedoms in this area to non-discrimination rules. It assesses tax cases only on the basis of a discrimination analysis.[41] There is no indication that the court has departed from this approach in the Sofina line of case law. Quite on the contrary, the court has based the obligation to take into account the loss-situation suffered by non-residents on the equal treatment with residents.[42]

The court's reasoning was thus based on the reasoning that because losses were taken into account for residents, they would also have to be taken into account for non-residents, given the absence of a grounds of justification. As long as the non-discrimination dimension of the free movements is concerned, the 'because' in the previous sentence must be read as 'to the extent'. Otherwise, non-residents would not get equal treatment, but better treatment than residents, which is not warranted by non-discrimination provisions.

4.3 *Implications: Sofina Case-Law Confined to Relevant Losses*

Just as for residents, cross-border loss-relief for non-residents requires comparability. Some doubts may arise from the Truck Centre[43] decision, where the court held that regarding withholding taxes, residents and non-residents were not in a comparable situation. However, the decision can be understood as being limited to the method of levying the tax, rather than any potential deductions. The CJEU's later case law has made it clear that residents and non-residents are in a comparable situation regarding source taxation on dividends, when a Member State taxes not only resident shareholders but also non-resident shareholders in respect of dividends received from a resident company.[44]

Yet this does not imply that worldwide losses (or at least losses originating in the EU/EEA) could be offset against income in the source state. Rather, the loss offset for non-residents based on the fundamental freedoms cannot go beyond what is possible for residents. When and to the extent residents are limited in their loss offset, the same must be true for non-residents. In other words: out of the set of global losses, domestic income can be offset only against relevant losses.

What are thus relevant losses? In order to answer this question, domestic and foreign losses need to be distinguished:

1. Losses arising in the source state (domestic losses) can be offset against domestic income under the rules of that state. Non-discrimination implies that regardless of who incurs losses in a territory, that taxpayer can offset the losses against income from that territory according to the same substantive rules.
2. For losses arising in other EU/EEA Member States, EU law does not require loss-offset for non-residents beyond what is afforded to residents. This means that the first glance goes to domestic law: where it allows importation of foreign losses for residents, such loss import must in principle also be granted to non-residents. As the court stated in Sofina, the loss-relief cannot be denied on the grounds that there is the danger of a double use of losses. Instead, it pointed to the possibility of a recapture – i.e. taxation of the dividends that had been previously offset with foreign losses – once foreign profits arose. Such recapture is of course administratively cumbersome. In particular, the question arises where the data is supposed to come from? Moreover, in practice, verification may be difficult. Keeping track of future foreign profits of non-resident taxpayers who have claimed loss-relief may create additional challenges.

Where domestic law does not contain such rules or where it does not fully meet its obligations under EU law for residents under the Marks & Spencer case law, domestic law is overridden by the EU law requirements. Then the same distinction between importable and non-importable losses must be made for non-residents and for residents. If at all, non-discrimination may require that non-residents be able to import the losses which would have been importable for residents. This implies that the rules developed in the Marks & Spencer line of cases apply. The taxpayers would have to show where the losses come from and that they are importable. Thus, comparability regarding domestic and foreign losses must be positively established. Incidentally, it would be a fallacy to base comparability on the fact that Member States apply the credit method for dividends; for this means only that losses arising from dividends can in principle be importable losses, but that does not imply full offset with any foreign losses. Moreover, loss importation is limited to definitive losses.

A further limit would have to come from the balanced allocation of taxing rights: In a two-country situation, primary responsibility lies with the state where the

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41 *See* Peter Wattel, *General EU Law Concepts and Tax Law*, in *European Tax Law – Volume I: General Topics and Direct Taxation* 37, 82 (Terra/Wattel 8th ed. 2023).

42 *See* CJEU, 22 Nov. 2018, Case C-575/17, *Sofina SA* et al. *v. Ministre de l'Action et des Comptes publics*, ECLI:EU:C:2018:943, para. 61 and above at II.1.

43 ECJ of 22 Dec. 2008 – Case C-282/07, EU:C:2008:762, État belge – SPF Finances v. Truck Center SA.

44 *See* e.g., of 12 Dec. 2006, *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, para. 68); of 14 Dec. 2006, *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783, para. 35); of 8 Nov. 2007, *Amurta* (C-379/05, EU:C:2007:655, para. 38); of 20 May 2008, *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289, paras 78 and 79); and of 10 May 2012, *Santander Asset Management SGIIC* et al. (C-338/11 to C-347/11, EU:C:2012:286, para. 44).

entity claiming the loss relief is a resident. Only where this state is unable to grant loss-relief can the source state levying the withholding tax be obliged to grant loss relief. This becomes more complicated in three-country constellations. Primary responsibility of the loss-offset then lies with the source state of the activity giving rights to losses, secondary responsibility of the loss-offset residence state. Only where both these states are unable to grant loss-relief can the source state levying the withholding tax be obliged to grant loss relief. Further challenges arise when it comes to conflicting source state obligations: what source state would have to grant loss-relief where a loss-making company derives dividend income subject to withholding tax in more than one State the total amount of which is higher than the overall losses? Surely, the losses can be offset only once. But in which state? Alternatively, the court could require a pro-rata approach, similar to the fractional allocation relied on in *X* for personal deductions.[45]

Even when there are relevant losses in principle, the question arises how the losses are to be calculated.[46] Since it is the equal treatment obligation that underlies the obligation to take into account the losses in the first place, the rules of the state obliged to grant the loss relief must be decisive for establishing the existence of losses. This may be cumbersome in practice and verification may be difficult even relying on the DAC.[47] A different approach would, however, lead to obligations going beyond equal treatment. Instead, it would interpret the fundamental freedoms as prohibitions of non-discriminatory measures, which the court so far has wisely been reluctant to do in the context of taxation.[48] At the same time, the need to show that there was no tax credit in the residence state due to its loss-making situation means that the profits also need to be calculated under the rules of that state.[49]

5 The way forward

The CJEU seems to have four options: first, it could cement the – in light of the above analysis: erroneous – case law by explicitly stating that cross-border loss-relief for non-residents must be immediate and comprehensive. This would lead to an inconsistency, which the scholarly literature would struggle to rationalize. It could even be seen as opening a path for scrutiny of non-discriminatory measures also in the field of taxation, which the Court has thus far been reluctant to undertake. Second, the court could continue its case law, but explicitly confine its portent to withholding taxes or even dividend withholding taxes. This would limit the case law's fiscal impact, but would again be hard to sustain in a dogmatically persuasive manner. Third, it could focus on merely answering the referral questions by the Swedish court. The Court would then have to decide on what rules to base the calculation of losses. Given the nature of the fundamental freedoms as non-discrimination provisions, the calculation of foreign losses should in the view of the authors have to follow the rules of the Member State granting the loss-relief, i.e., the non-residence state. The Court would then retain the flexibility to later argue that neither Sofina nor Crédit Suisse nor Société Générale clearly spelt out which losses the decisions were addressing. And fourthly, it could according to settled case-law answer the prior question now and point to the ambiguity in the previous case law; it could then rule that cross-border loss relief for non-residents should not go beyond the loss-relief afforded to residents.

Then Grand Chamber thus has a choice to make. The choice is far-reaching. A host of adverse consequences would ensue, were the court to open cross-border loss-relief for non-residents beyond that for residents: The impact on public finances would not be foreseeable. More importantly, it would be bad law. It could also open world-wide tax-planning opportunities long deemed unacceptable. Of course, the court may be tempted to ignore these difficulties and take an activist approach, leading to the abolition of source taxation. It might hope thereby to improve the EU's competitiveness. Yet, given the uncertainties, the court seems ill-equipped for starting such a revolution. Moreover, it appears unclear whether Member States have the energy and political capital to take the necessary positive integration measures. In our view, the court should therefore not take that road. Rather, it should seize the opportunity to clarify its case-law. Such clarity would be welcome for tax practice. It would also make good law.

Notes

45 CJEU, 9 Feb. 2017, C-283/15, ECLI:EU:C:2017:10 – X; on this e.g., Hannelore Niesten, *Case X v. Staatssecretaris van Financiën: Fractional Allocation of Personal and Family Tax Benefits for EU Resident Individuals with Multi-State Income*, 26 EC Tax Rev. 201 (2017), doi: 10.54648/ECTA2017022.

46 On this *see* CFE ECJ Task Force, *supra* n. 10, at 483.

47 *See* Emanuelle Cortot-Boucher, *Arrêt Sofina – Commentaire* 52, 54 (Fiscalité Internationale 2019).

48 *See* Wattel, *supra* n. 41, at 82.

49 This is also contemplated by the CFE ECJ Task Force, *supra* n. 10, at 483.