



Dear

Sir/Madam,

The CFE ECJ Task Force has prepared an [Opinion Statement](#) on the *Sofina*-case, in which the Fifth Chamber of the Court of Justice of the EU delivered its decision on 22 November 2018. In the decision, the Court held that the imposition of French dividend withholding tax violated the freedom of capital movement in light of the non-resident's overall loss situation.

The CFE Tax Advisers Europe note that the Court's decision in *Sofina* may have extended the standard of comparability, requiring to take into consideration the (foreign) non-dividend income of the recipient when comparing the tax treatment of domestic and outbound dividends. This comparator, however, upsets the principle of territoriality, as accepted by the Court in *Futura* and *Centro Equestre*, by requiring the source State to take into account losses that the non-resident taxpayer has in the residence State.

Taken at face value, *Sofina*'s impact may extend well beyond withholding taxes specifically and dividend taxation more generally by attaching a "no-loss" condition to all source State taxing rights. It may arguably even bar the permanent establishment State from taxing profits attributable to that permanent establishment if the foreign head office is in a loss position.

Moreover, applying *Sofina* to everyday international tax law might also not be an easy task and push administrative feasibility to its limits. The Court effectively seems to propose a non-discriminatory deferral of taxation that is combined with a domestic regime that leads to a subsequent recapture if (and only if) the non-resident taxpayer becomes profitable during a subsequent tax year.

We invite you to read the [Opinion Statement](#), and remain available to discuss any questions or comments.

Kind regards,

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EU Transparency Register No. 3543183647-05
