Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

19 December 2024*

(Reference for a preliminary ruling – Article 63 TFEU – Free movement of capital – Taxation – Taxation of dividends – Withholding tax – Reimbursement of withholding tax, granted to resident dividend recipients that are loss-making at the end of the tax year in which the dividends are received – No reimbursement of the withholding tax to non-resident dividend recipients – Difference in treatment – Restriction – Comparability – Justification)

In Case C-601/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain), made by decision of 19 September 2023, received at the Court on 29 September 2023, in the proceedings

**Credit Suisse Securities (Europe) Ltd**

v

**Diputación Foral de Bizkaia,**

THE COURT (Sixth Chamber),

composed of T. von Danwitz, Vice-President of the Court, acting as President of the Sixth Chamber, A. Kumin (Rapporteur) and I. Ziemele, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Credit Suisse Securities (Europe) Ltd, by S. Paternain Osácar, abogada,

– the Diputación Foral de Bizkaia, by B. Astorquiza del Val, letrada, and M. Durango García, procuradora,

– the Spanish Government, by A. Gavela Llopis, acting as Agent,

* Language of the case: Spanish.

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by A. Maddalo, avvocato dello Stato,

– the European Commission, by S. Pardo Quintillán and W. Roels, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 63 TFEU.

2 The request has been made in proceedings between Credit Suisse Securities (Europe) Ltd and the Diputación Foral de Bizkaia (Provincial Council of Biscay, Spain) concerning the latter's rejection of the application by Credit Suisse Securities (Europe) to be granted reimbursement of the withholding tax levied on the dividends paid to it in 2017.

### Legal context

#### *International law*

3 Article 10 of the Convention between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Spain for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, signed in London on 14 March 2013 ('the Hispano-British Convention') provides:

'1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends:

(a) may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:
(i) 10 per cent of the gross amount of the dividends …

…'

4 Article 22(2) of that convention provides:

‘Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom or, as the case may be, regarding the exemption from United Kingdom tax of a dividend or of the profits of a permanent establishment arising in a territory outside the United Kingdom (which shall not affect the general principle hereof):

(a) Spanish tax payable under the laws of Spain and in accordance with this Convention, whether directly or by deduction, on profits, income or chargeable gains from sources within Spain (excluding in the case of a dividend tax payable in respect of the profits out of which the dividend is paid) shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which Spain’s tax is computed;

(b) a dividend which is paid by a company which is a resident of Spain to a company which is a resident of the United Kingdom shall be exempted from United Kingdom tax, when the exemption is applicable and the conditions for exemption under the law of the United Kingdom are met;

…’

### *European Union law*

5 Article 63(1) TFEU provides:

‘Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.’

6 Under Article 65 TFEU:

‘1. The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

…

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

…’

### *Spanish law*

*Provincial Law 11/2013*

7 Article 68 of Norma Foral 11/2013, de 5 de diciembre, del Impuesto sobre Sociedades (Provincial Law 11/2013 of 5 December 2013 on corporation tax) (*Boletín Oficial de Bizkaia* No 238 of 13 December 2013) ('Provincial Law 11/2013') states:

'1. The following may be deducted from the amount of tax payable:

(a) Withholding tax, with the exception of that corresponding to income which is not included in the taxable base by virtue of the provisions … of the present provincial law.

…

2. Where the total amount of the aforementioned items exceeds the amount of tax payable, the tax authority shall automatically reimburse the overpayment.

…'

8 Article 130(1) of Provincial Law 11/2013 provides:

'Entities, … which pay income subject to the present tax shall withhold the amount determined by regulation, or make payments on account of that amount by way of advance payment, and shall pay it, in the situations and in the manner laid down, to [the Hacienda Foral de Bizkaia (Biscay Provincial Public Treasury)] …'

*Provincial Law 12/2013*

9 Under Article 1 of Norma Foral 12/2013, de 5 de diciembre, del Impuesto sobre la Renta de no Residentes (Provincial Law 12/2013 of 5 December 2013 on non-resident income tax) (*Boletín Oficial de Bizkaia* No 238 of 13 December 2013) ('Provincial Law 12/2013'):

'1. Non-resident income tax is a direct tax levied on:

(a) Income received in Biscay [Spain], on the terms laid down in the present provincial law, by natural or legal persons not residing in Spanish territory that operate in that territory without a permanent establishment.

…

2. The provisions of the present provincial law shall apply:

(a) To natural and legal persons not residing in Spanish territory that, without a permanent establishment, receive income in the historical territory of Biscay, in accordance with the provisions of Article 13 of the present provincial law.

…'

10 Article 13(2) of that law provides:

‘The following income, received or generated in the territory of Biscay, shall be treated as income received without a permanent establishment:

…

(g) The amount laid down in paragraph 4 of the present article of dividends and other income arising from holdings in the own funds of Basque public entities that are tax resident in Biscay, and of income arising from holdings in the own funds of private entities.

…’

11 Article 25(1) of that law states:

‘The amount of tax shall be calculated by applying the following rates of tax to the taxable base determined in accordance with the preceding article:

(a) Ordinarily: 24% However, the rate of tax shall be 19% for taxpayers resident in another Member State of the European Union or of the European Economic Area with which there is an effective exchange of information in tax matters …

…’

12 Article 31 of that law is worded as follows:

‘1. The following shall withhold tax at source and make payments on account in relation to income paid by them which is subject to the present tax:

(a) Entities, including entities covered by the rules on attribution of income, resident in Spanish territory.

…

2. The entities subject to that obligation shall withhold at source or pay on account an amount equivalent to that calculated by applying the provisions laid down by the present provincial law for determining the tax payable by taxpayers without a permanent establishment or the provisions laid down by an applicable double taxation agreement …

…

3. The entities required to make a withholding at source or a payment on account shall be responsible for paying that amount to the [Biscay] Provincial Public Treasury. Failure to comply with the latter obligation shall not relieve them of the payment obligation. …’

## The dispute in the main proceedings and the question referred for a preliminary ruling

13 Credit Suisse Securities (Europe) is a company established in the United Kingdom which has no permanent establishment in Spain. In 2017, it received dividends of EUR 2 763 848.73, distributed by a company established in Biscay, on which tax was withheld at source in accordance with Provincial Law 12/2013. That withholding, initially set at 19%, that is to say, the same percentage as that applicable to dividends paid to resident companies, was ultimately reduced to 10% pursuant to the Hispano-British Convention.

14 On 10 February 2021, Credit Suisse Securities (Europe) applied to the Biscay Provincial Public Treasury for rectification of the self-assessments submitted by the company that had distributed the dividends and had withheld tax at source, seeking reimbursement of the withholding tax on the ground that it was an overpayment.

15 By decision of 15 February 2021, Biscay Provincial Public Treasury rejected that application.

16 On 18 March 2021, Credit Suisse Securities (Europe) made an administrative complaint to the Tribunal Económico-Administrativo Foral de Bizkaia (Provincial Tax Tribunal, Biscay, Spain), which dismissed the complaint by a decision of 23 February 2022.

17 Credit Suisse Securities (Europe) lodged an administrative appeal before the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain), which is the referring court.

18 That company submits that, in 2017, it recorded losses and was therefore unable to recover, in its country of residence, the amount retained as withholding tax, by offsetting it against an amount of tax payable in that country. It claims that, in such circumstances, the application of Provincial Law 11/2013 gives rise to discriminatory treatment. The withholding tax levied under that provincial law in relation to a non-resident company is designed to be a definitive tax, with no mechanism for reimbursement in the event of that company sustaining losses, whereas, for a resident company, which is subject to corporation tax in Biscay, it constitutes a payment on account of that tax, and only gives rise to the actual levying of tax if that company has a positive tax base for the tax year in question. By contrast, if that tax base is negative, the tax withheld will be reimbursed.

19 Accordingly, that company takes the view that it cannot fully exercise the free movement of capital and invokes, in that regard, the judgments of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943), and of 16 June 2022, *ACC Silicones* (C-572/20, EU:C:2022:469).

20 That company also claims that, in the event of losses, the Hispano-British Convention does not enable the tax withheld at source to be offset, because under Article 22(2) of that convention there must be profits or chargeable gains in order for such withheld tax to be deductible. The United Kingdom is not obliged to reimburse the tax withheld at source in Spain and, if an amount of tax is payable, allows only a tax credit, and that credit cannot, moreover, be used in the following years.

21 The Provincial Council of Biscay disputes those arguments.

22 The referring court states that, where dividends are paid by a company which is tax resident in Biscay, both resident recipient companies and non-resident companies are subject to a withholding tax calculated at the same rate. However, the corporation tax regime affords a

resident beneficiary company, which is subject to corporation tax in Biscay, full reimbursement of the withholding tax where it is loss-making at the end of the tax year concerned, whereas, for non-resident companies, that withholding is offset only in theory, by virtue of any double taxation agreements. In the present case, the Hispano-British Convention does not enable such offsetting for United Kingdom-resident companies.

23 Consequently, entertaining doubts as to the compatibility of the tax rules at issue with the free movement of capital, the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 63 [TFEU] be interpreted as precluding the fact that the Kingdom of Spain, and, in particular the fiscally autonomous Province of Biscay, despite applying the same percentage to non-residents as to residents, does not reimburse to non-residents the withholding tax levied on the payment of dividends by a resident entity – which cannot be compensated on the basis of the convention on the elimination of double taxation – whereas residents who likewise suffer losses during the financial year are reimbursed that tax in full?'

**Admissibility**

24 The German Government questions the admissibility of the request for a preliminary ruling, in view of the lack of findings of fact relating to the loss allegedly sustained by Credit Suisse Securities (Europe) in its country of residence, that is to say, in the United Kingdom.

25 According to settled case-law, it is solely for the national court before which the dispute in the main proceedings has been brought to assess the need for a preliminary ruling and the relevance of the questions which it submits to the Court, which enjoy a presumption of relevance. Thus, the Court is, in principle, bound to give a ruling where the question submitted concerns the interpretation or the validity of a rule of EU law, unless it is quite obvious that the interpretation sought bears no relation to the actual facts of the main proceedings or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to that question (judgment of 22 February 2024, *Unedic*, C-125/23, EU:C:2024:163, paragraph 35 and the case-law cited).

26 In the present case, it is clear from the order for reference that, according to the information provided by Credit Suisse Securities (Europe), which has not been disputed by the Provincial Council of Biscay or by the referring court, that company recorded tax losses in the financial year in respect of which the withholding tax was levied, since the tax return which it prepared for that year in its country of residence, that is to say, in the United Kingdom, showed a negative taxable base.

27 It is therefore not obvious that the interpretation of Article 63 TFEU sought by the referring court bears no relation to the actual facts of the main proceedings or its purpose or that the problem is hypothetical.

28 The request for a preliminary ruling is therefore admissible.

## Consideration of the question referred

29 By its question, the referring court asks, in essence, whether Article 63 TFEU must be interpreted as precluding rules applicable in a Member State under which dividends distributed by a company established in a fiscally autonomous territory of that Member State are subject to a withholding tax that, where those dividends are received by a resident company, which is subject to corporation tax in that fiscally autonomous territory, serves as a payment on account of that tax and is reimbursed in full if that company is loss-making at the end of the tax year concerned, whereas no reimbursement is provided for where those dividends are received by a non-resident company in the same situation.

### *The existence of a restriction on the free movement of capital within the meaning of Article 63(1) TFEU*

30 It follows from the case-law of the Court that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 23 and the case-law cited).

31 Specifically, the less favourable treatment by a Member State of dividends paid to non-resident companies, compared to the treatment of dividends paid to resident companies, is liable to deter companies established in a Member State other than that first Member State from undertaking investments in that same first Member State and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 24 and the case-law cited).

32 Under the rules at issue in the main proceedings, companies which hold shares in a company established in Biscay are subject, so far as concerns the dividends paid to them in that capacity, to two different tax regimes, the application of which depends on whether they are resident or non-resident.

33 It is clear from the order for reference that, under Article 25(1)(a) of Provincial Law 12/2013, dividends paid to non-resident companies by a company that has its tax residence in Biscay are subject to a withholding tax at a rate of 19% – which may however be reduced pursuant to a double taxation agreement – of the gross amount of those dividends, irrespective of the financial results of those non-resident companies. In the present case, the dividends received by Credit Suisse Securities (Europe) were subject to a withholding tax of 10% pursuant to such an agreement, that is to say, the Hispano-British Convention.

34 By contrast, although it is true that dividends paid by a company established in Biscay to another resident company which is in other respects in the same situation as Credit Suisse Securities (Europe) are for their part also subject to a withholding tax of 19% of their gross amount, that withholding serves as a payment on account of the corporation tax applicable in Biscay. Where that resident company records losses at the end of the tax year concerned and, accordingly, no corporation tax is payable, the withholding tax levied on those dividends by way of a payment on account is reimbursed, whereas nothing of that nature is provided for where the withholding tax is levied on dividends paid to non-resident companies.

35 It follows that the regime applicable to the taxation of dividends paid by a company that has its tax residence in the historical territory of Biscay is liable to confer an advantage on a resident company, which is subject to corporation tax in that territory, compared with a non-resident company, where those companies are loss-making at the end of a tax year (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 28).

36 In that regard, it is for the referring court to determine, in respect of the dividends received by the resident company, whether that reimbursement means that those dividends are exempt from all liability to tax or whether, as the file before the Court appears to show, the inclusion of 50% of those dividends in the taxable base of the resident company reduces the amount of the losses that can be deducted from net profits in subsequent years, thereby having the effect of deferring the taxation of those dividends.

37 In any event, first, the exclusion of that advantage in a cross-border situation whereas it is conferred in an equivalent situation in national territory constitutes a restriction on the free movement of capital (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 29 and the case-law cited).

38 Second, the assessment of whether there is potentially less favourable treatment of the dividends paid to non-resident companies must be undertaken for each tax year, taken individually (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 30 and the case-law cited).

39 Since the dividends received by a non-resident company are taxed when they are distributed, the financial year in which the dividend distribution occurs must be taken into account in order to compare the tax burden on those dividends and that on dividends paid to a resident company, which is subject to tax in Biscay (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 31).

40 In the present case, that burden would be nil for the latter company where it is loss-making at the end of such a year.

41 Third, any deferral of the taxation of those dividends will constitute a definitive exemption if the resident company records no further profits before it ceases trading (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 33).

42 Accordingly, the rules at issue in the main proceedings are liable to confer an advantage on loss-making resident companies, since they give rise, at the very least, to a cash-flow advantage, or even an exemption, whereas non-resident companies are subject to immediate and definitive taxation irrespective of their results (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 34).

43 The Provincial Council of Biscay and the Spanish Government note, in that regard, that dividends paid to a non-resident company such as Credit Suisse Securities (Europe) are taxed at a rate of 10%, pursuant to the combined provisions of Article 25(1)(a) of Provincial Law 12/2013 and of Article 10(2)(a)(i) of the Hispano-British Convention, whereas dividends paid to a resident company, to the extent that they are included in the taxable base for corporation tax, are taxed at a rate of 28%.

44 However, that fact cannot obviate the less favourable treatment received by the dividends paid to a non-resident company.

45 First, unfavourable tax treatment that is contrary to a fundamental freedom cannot be regarded as compatible with EU law because of the potential existence of other advantages (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 38 and the case-law cited).

46 Second, the less favourable rate of tax invoked by the Provincial Council of Biscay and by the Spanish Government is in any case, so far as concerns dividends paid to a resident company, irrelevant, since those dividends are exempt from the tax payable where the resident company ceases trading without having become profitable in the financial years following the receipt of those dividends. The fact that the legislation of a Member State places non-residents at a disadvantage cannot be compensated for by the fact that, in other situations, that same legislation does not discriminate between non-residents and residents (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 39 and the case-law cited).

47 It should also be noted that a difference of that nature in the tax treatment of dividends according to the place of residence of the companies that receive them is liable to deter non-resident companies from investing in companies established in Biscay.

48 It follows that the rules at issue in the main proceedings constitute a restriction on the free movement of capital, which is, in principle, prohibited by Article 63(1) TFEU.

49 It is necessary, however, to examine whether that restriction may be justified in the light of the provisions of the FEU Treaty.

***The existence of justification for the restriction under Article 65 TFEU***

50 By virtue of Article 65(1)(a) TFEU, Article 63 TFEU is without prejudice to the right of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their residence or the place where their capital is invested.

51 That provision, in so far as it constitutes a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly. Therefore, it cannot be interpreted as meaning that any tax legislation which draws a distinction between taxpayers on the basis of their place of residence or of the Member State in which they invest their capital is automatically compatible with the FEU Treaty. The derogation provided for in Article 65(1)(a) TFEU is itself restricted by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]' (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 45 and the case-law cited).

52 A distinction must therefore be made between the differences in treatment authorised by Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. It is clear from the Court's case-law that, before national tax legislation can be regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment resulting

from that legislation must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 46 and the case-law cited).

*Comparability of the situations at issue*

53 According to the case-law of the Court, as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income not only of resident taxpayers but also of non-resident taxpayers from dividends which they receive from a resident company, the situation of those non-resident taxpayers becomes comparable to that of resident taxpayers (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 47 and the case-law cited).

54 The Provincial Council of Biscay and the Spanish and German Governments refer, among others, to the judgments of 15 May 1997, *Futura Participations and Singer* (C-250/95, EU:C:1997:239); of 15 February 2007, *Centro Equestre da Lezíria Grande* (C-345/04, EU:C:2007:96); and of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608), from which they infer that rules such as those at issue in the main proceedings are consistent with the principle of territoriality and that non-resident companies are not in an objectively comparable situation to that of resident companies.

55 In that regard, it should nevertheless be noted that the case-law resulting from those judgments had already been relied on in the proceedings that gave rise to the judgment of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943). In that judgment, the Court nevertheless found there to be objectively comparable situations, on the basis of the settled case-law referred to in paragraph 53 of the present judgment. That finding also applies to the situations of the resident companies and non-resident companies at issue in the main proceedings.

56 Accordingly, the difference in treatment resulting from the rules at issue in the main proceedings concerns situations that are objectively comparable.

*Justification based on the effective collection of tax*

57 The Provincial Council of Biscay claims that an immediately collectable tax charge payable by a non-resident company in receipt of dividends appears to be proportionate to the aim of preserving a balanced allocation of the power of taxation between the Member States, since the risk of the tax not being paid by such a company, which, furthermore, has no permanent establishment, increases over time, in the absence of any genuine and permanent link between that company and the country where the income arises.

58 The Provincial Council of Biscay is thereby arguing, in reality, that the restriction on the free movement of capital at issue in the main proceedings is justified by the need to ensure collection of the tax.

59 According to settled case-law, 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 (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 67 and the case-law cited).

60 Furthermore, the Court has held 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 (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 68 and the case-law cited).

61 In that regard, it should be recalled that, as is clear from paragraph 42 of the present judgment, 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.

62 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 (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 70).

63 First, the regime governing the reimbursement of withholding tax in the event of losses constitutes, inherently, a derogation from the principle that dividends are taxed in the tax year in which they are distributed, and that regime is therefore, inherently, intended to apply not to the majority of companies which receive dividends, but only to those which record losses (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 71).

64 Second, it should be noted that it would be the duty of non-resident companies to provide the relevant evidence enabling the tax authorities of the Member State of taxation to determine that the conditions under the law in order to benefit from reimbursement of the withholding tax are met (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 72).

65 Third, and having regard to the Court's observations in paragraphs 74 to 76 of its judgment of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943), the mutual assistance mechanisms existing between the authorities of the Member States are sufficient to enable the Member State in which the dividends are paid to check the accuracy of the evidence put forward by non-resident companies wishing to claim reimbursement of the withholding tax (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 73).

66 Consequently, if the advantage associated with reimbursement of the withholding tax levied and with the potential deferral of taxation were granted to loss-making non-resident companies, the effect would be to eliminate any restriction on the free movement of capital, without thereby impeding the achievement of the aim pursued by the national rules at issue in the main proceedings (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 77).

67 In those circumstances, a justification of the rules at issue in the main proceedings on the basis of the effective collection of tax cannot be accepted.

*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*

68 The German Government submits that, although, under the Hispano-British Convention, the Kingdom of Spain is entitled to levy tax on dividends paid by resident companies to companies established in the United Kingdom, the economic activities of those latter companies are, in all other respects, subject to the power of taxation of the United Kingdom. Accordingly, the rules at issue in the main proceedings serve to preserve the balanced allocation of the power of taxation, given that losses sustained by a non-resident company that have no direct link with the dividends paid to it by a resident company arise from economic activities falling within the powers of taxation of its State of residence, where those losses can be taken into account. Taking additional account of those losses when the dividends are taxed in Spain would lead to double deduction of the losses, contrary to the manner in which the powers of taxation have been allocated.

69 The Spanish Government, also, considers that, in the present case, to uphold the application made by Credit Suisse Securities (Europe) would lead to the losses sustained by it being used more than once.

70 In that regard, the Court has accepted that preservation of the allocation of taxation powers between Member States constitutes a legitimate objective and that, in the absence of any unifying or harmonising measures adopted by the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 56 and the case-law cited).

71 Such a justification can be accepted where, inter alia, the rules at issue are intended to prevent behaviour capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried on in its territory (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 57 and the case-law cited).

72 The Court has held, furthermore, that the prevention of the double use of losses constitutes a legitimate objective capable of justifying a restriction on fundamental freedoms (see, to that effect, judgment of 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424, paragraph 52 and the case-law cited).

73 In the present case, under the rules at issue in the main proceedings, dividends paid to a non-resident company are taxed by means of a withholding tax at a rate set in the context of a double taxation agreement, which is not reimbursed where that company has a loss-making year, whereas a resident company, in the same situation, benefits from such a reimbursement and from deferral of the taxation of the dividends received.

74 However, first, 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 in order to justify the taxation of non-resident companies which receive such income (see, to that effect, judgment of 29 July 2024, *Keva and Others*, C-39/23, EU:C:2024:648, paragraph 73 and the case-law cited).

75 Second, deferring the taxation of dividends received by a loss-making non-resident company would not mean that the fiscally autonomous historical territory of Biscay has to waive its right to tax income generated in its territory. The dividends distributed by the resident company would be taxed once the non-resident company became profitable during a subsequent tax year, in the same way as occurs, subject to verification by the referring court, in the case of a resident company experiencing a similar situation (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 59).

76 In addition, the loss of tax revenue from the taxation of dividends received by non-resident companies in the event of a loss-making year cannot justify taxing the dividends received by those companies immediately and definitively in such circumstances, when such losses are accepted in the case of resident companies that are subject to tax in Biscay (see, by analogy, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 63).

77 It should be added, as regards prevention of the risk of losses being used twice, 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 in order for those companies to benefit from a deferral of taxation have been met.

78 Accordingly, the rules at issue in the main proceedings cannot be justified by the need to preserve the balanced allocation of the power of taxation between Member States and to prevent the risk of losses being used twice.

*Justification based on maintaining the cohesion of the tax system*

79 The Provincial Council of Biscay and the Spanish and German Governments submit that rules such as those at issue in the main proceedings 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.

80 In order for an argument based on the need to maintain the cohesion of the national tax system to succeed, according to settled case-law a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (judgment of 21 December 2023, *Cofidis*, C-340/22, EU:C:2023:1019, paragraph 55 and the case-law cited).

81 In that regard, it should nevertheless be noted that, in the present case, 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 in order to offset that reimbursement. Even if resident companies were required to include 50% of those dividends in their corporation tax base, the fact would remain that, if they were loss-making, those companies would enjoy at the very least a cash-flow advantage, or even an exemption if they ceased trading before once again recording a profit.

82 Therefore, a justification of the rules at issue in the main proceedings on the basis of the need to maintain the cohesion of the tax system cannot be accepted.

83 Having regard to all the foregoing, the answer to the question referred is that Article 63 TFEU must be interpreted as precluding rules applicable in a Member State under which dividends distributed by a company established in a fiscally autonomous territory of that Member State are subject to a withholding tax that, where those dividends are received by a resident company, which is subject to corporation tax in that fiscally autonomous territory, serves as a payment on account of that tax and is reimbursed in full if that company is loss-making at the end of the tax year concerned, whereas no reimbursement is provided for where those dividends are received by a non-resident company in the same situation.

## Costs

84 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

**Article 63 TFEU must be interpreted as precluding rules applicable in a Member State under which dividends distributed by a company established in a fiscally autonomous territory of that Member State are subject to a withholding tax that, where those dividends are received by a resident company, which is subject to corporation tax in that fiscally autonomous territory, serves as a payment on account of that tax and is reimbursed in full if that company is loss-making at the end of the tax year concerned, whereas no reimbursement is provided for where those dividends are received by a non-resident company in the same situation.**

[Signatures]