Connect. Engage. Impact.

1200 G Street, N.W., Suite 300
Washington, D.C. 20005-3814
202.638.5601
tei.org

22 January 2024

Directorate-General for Taxation and Customs Union
SPA3 08/015
B-1049 Brussels
Belgium

Via online submission

RE: Proposed "BEFIT" Directive

Dear Sir or Madam:

On 19 September 2023 the European Commission ("Commission") issued three proposals to simplify tax rules and provide certainty to small and large EU businesses:

- the Transfer Pricing Directive to ensure a common approach to transfer pricing within the EU;
- the Head Office system to enable small businesses to interact with only one tax administration when operating cross-border in the EU; and
- the Business in Europe: Framework for Income Taxation ("BEFIT") initiative (the "Proposed BEFIT Directive") to introduce a common system to compute the tax base of company groups across the EU.

The Commission requested stakeholder input on the Proposed BEFIT Directive no later than 24 January 2024. On behalf of Tax Executives Institute, Inc. ("TEI"), I am pleased to respond to the Commission's request for input.

About TEI

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 56 chapters in Europe the Middle East & Africa ("EMEA"), North and South America, and Asia. TEI, as the preeminent association of in-house tax professionals worldwide, has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our over 6,200 individual members represent over 2,800 of the leading companies around the world.

TEI Comments

General Comments

TEI's feedback on tax policy initiatives is driven by four principles that we believe underly all tax policy around the world: clarity, consistency, predictability, and dispute resolution/avoidance. While in theory a common tax base for multinational enterprises ("MNE") should advance all four of these principles, we have doubts about the utility of the Proposed BEFIT Directive in the current international tax policy environment both within the EU as well as more broadly, in particular the OECD Pillars One and Two project.

Given the high-level description of the rules in the Proposed BEFIT Directive, it is not yet possible to provide in-depth comments regarding the concrete consequences of this proposal. Therefore, we focus our comments on policy. Further, TEI believes that the Proposed BEFIT Directive, in combination with OECD Pillar Two rules, will lead to additional short-term complexity and increase uncertainty and the risk of double taxation for MNE groups. As a result, TEI recommends deferring the BEFIT Directive for at least five years, so different stakeholders (EU TAXUD, local tax administrations, as well as taxpayers) can gain experience with the Pillar Two Directive and subsequently discuss a better tailored BEFIT Directive. When considering a better tailored BEFIT Directive, the Commission should include a thorough assessment of whether several current rules and initiatives are necessary in a post-Pillar Two/BEFIT environment. Such rules and initiatives would include elements of ATAD 1 and 2, "Unshell," DEBRA, the EU Code of Conduct, among others.

BEFIT's Compatibility with Non-EU Tax Treaty Partners

The Proposed BEFIT Directive could have significant negative effects on Member State's tax treaty networks with non-EU jurisdictions. Tax treaties are almost uniformly bilateral between Members States and other jurisdictions. That is, each Member State has separate tax treaties with other jurisdictions. These treaties generally reflect the historic approach of relieving double taxation via the permanent establishment definition, tax credits, transfer pricing rules, and the mutual agreement procedure on a country-by-country basis. The Proposed BEFIT Directive might upset this historic approach by allocating revenue and taxes in a manner inconsistent with these treaties, leading to double taxation of MNE groups by Member and non-Member States.

For example, the allocation of income and taxes under the Proposed BEFIT Directive across Member States may result in the non-recognition of a taxpayer as tax resident under a Tax Treaty (such as in the case of a "subject-to-tax" rule) or as a beneficial owner, by non-EU jurisdictions. Another example would be the interaction of the non-recognition of Corresponding Adjustments (the adjustment in non-EU jurisdiction results in Corresponding Adjustment in EU Member State), that, subsequently under BEFIT is taxed in another Member State. TEI recommends the possibility of unrelieved double taxation be considered and addressed in any final BEFIT directive.

BEFIT and the MNE Tax Compliance Cycle

As noted above, while in theory an EU-wide common tax base for MNE groups may provide clarity and consistency, we are dismayed that the Proposed BEFIT Directive may, in combination with all the other EU and OECD initiatives, result in a greater tax compliance burden. For example, an MNE group with a 2026 fiscal year end may face the following compliance schedule (for tax and related purposes):

1. Financial statements: March 2026 (3-6 months after year-end).
2. BEFIT (under the proposal): 4 months after year-end with approval coming 8 months after year-end.
3. BEFIT Group Member tax return: 11 months after year-end.
4. BEFIT Payment due date – unclear, would it depend on the Member State?
5. Pillar Two GloBE Information Return ("GIR"): March 2028 (15 months after year-end).
6. Qualified Domestic Top-up Tax ("QDMTT") return: March 2027 (this is a local requirement, but presumably will be due around the same time as the regular corporate income tax return, e.g., nine months).
7. Payment of Top-up Tax:
    a. Following the QDMTT timing: March 2027
    b. Following the GIR timing: May 2028

The above compliance schedule would apply in most, if not all, Member States. There may be additional compliance requirements, depending on the local rules, such as (i) voluntary, preliminary, or estimated payments on a per-Member State basis, and (ii) non-corporate law taxes, such as municipal and similar taxes, that use, as a basis for taxation, the rules of the national corporate tax law system.

Not mentioned above are the country-by-country reporting ("CbCR") requirements and the potential public disclosure of such in the EU. As stated by the EU, public CbCR is:

> an efficient and appropriate tool for increasing transparency in relation to the activities of multinational undertakings and for enabling the public to assess the impact of those activities on the real economy. It also improves shareholders' ability to evaluate properly the risks taken by undertakings, leads to investment strategies being based on accurate information and enhances the ability of decision-makers to assess the efficiency and the impact of national legislation.[1]

TEI appreciates that the Proposed BEFIT Directive is an EC *tax* directive whereas Public CbCR is not. Nonetheless, the interplay between Pillar Two and BEFIT on the reporting under Public CbCR does not seem to have been considered when drafting the EU rules applying to the three initiatives. TEI

---

[1] *See* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021L2101.

fears that, without such consideration, the Public CbCR goals will not be achieved and, on the contrary, it will add to the confusion of public and investors and have adverse consequences.

BEFIT and Loss Settlement

One of TEI's primary concerns regarding any EU-wide consolidated corporate tax system such as that of the Proposed BEFIT Directive is what happens to local tax consolidations and, subsequently any losses that result therefrom? It seems that these consolidations will apply after allocation of BEFIT revenue and income. Take, for example, a group that did not pay taxes in Germany because it had one major entity with a loss. Under BEFIT, however, the entity with the loss will be allocated zero as taxable basis, but all the other entities in Germany will have to start paying taxes.

Further, cross border loss-settlement may be taxed away under Pillar Two or, vice versa, loss potential under Pillar Two may be taxed away under BEFIT. Consider, for example, an MNE Group with different Member State entities with one entity having a loss exceeding the profits of the other entities. Under BEFIT, the entity with the loss will be allocated zero as taxable basis, but all the other entities in the MNE Group will pay taxes. These taxes are "lost" with respect to the Pillar Two "covered taxes" calculation. TEI submits these issues should be taken into consideration and resolved so that any double-taxation and/or inability to settle losses are eliminated in any future BEFIT directive.

• • •

TEI appreciates the opportunity to comment on the Proposed BEFIT Directive. TEI's comments were prepared under the aegis of its EMEA Direct Tax Committee and were led by Ralf Thelosen of Citco. Should you have any questions regarding our comments, please do not hesitate to contact Mr. Thelosen at rthelosen@citco.com or Benjamin R. Shreck of TEI's Legal Staff at bshreck@tei.org or +1 202 464 8353.

Respectfully submitted,

Sandhya Edupuganty

Sandhya Edupuganty
International President
TAX EXECUTIVES INSTITUTE