ETAF feedback on the BEFIT proposal

The European Tax Adviser Federation (ETAF), which represents 215 000 regulated tax professionals, would like to thank the European Commission for the opportunity to comment on its proposal Business in Europe: Framework for Income Taxation (BEFIT), published on 12 September 2023.

BEFIT aims at introducing a common framework for corporate income taxation in the EU and comes in replacement of the 2011 and 2016 proposals for a common consolidated corporate tax base (CCCTB), which failed to be adopted.

As a preliminary remark, ETAF would like to reiterate its support of measures aiming at reducing tax compliance costs for businesses. While we agree, in principle, that a common framework for corporate income taxation has the potential to significantly reduce tax compliance costs, we have serious doubts that the BEFIT proposal, in its current form, will really do so. In our view, the lack of sufficient alignment of the proposal with the Pillar Two Directive will bring additional complexities which would outweigh possible compliance cost reductions.

The current structure of the BEFIT initiative represents a completely new introduction of further set of rules, at a time where all companies are already struggling with the implementation of the complex tax calculations under the Pillar Two Directive.

As we already argued during the first consultation phase in January 2023, we should wait to first learn the lessons from the implementation of Pillar Two before deciding on any further step to implement a common corporate tax framework in the EU.

I. Comments on the hybrid scope

In principle, we welcome the fact that the scope of application is not mandatory for all companies but only for large businesses with an annual combined revenue of at least €750 million meeting certain criteria. Smaller groups would otherwise have considerable difficulties in complying with all the provisions of the proposed directive. In addition, domestic groups would gain no or little benefit from the proposed directive.

The mandatory application of the BEFIT rules is limited to a subset of companies in the EU where the ultimate parent entity (UPE) directly or indirectly holds at least 75% of the ownership rights or the rights entitling to profits. At the same time, a materiality threshold is proposed for companies or permanent establishments of a UPE outside the EU, according to which the BEFIT rules should not be mandatory if the consolidated turnover of the group in the EU either

does not exceed 5% of the total turnover of the group on the basis of its consolidated accounts or does not exceed EUR 50 million in at least two of the last four fiscal years.

In our view, such a different treatment of European taxpayers depending on the ownership structure is contrary to the idea of simplification as it will lead to the coexistence of different corporate tax systems in the EU and will consequently place an additional burden on tax administrations. Moreover, this provision will probably also violate the principle of equality in taxation, as comparable situations are subject to different tax rules at the level of the taxpayer depending on its shareholder structure.

II. Comments on the definitions

The co-existence of BEFIT and Pillar Two reinforces the necessity to standardize the definitions in various EU tax directives in order to avoid future interpretation difficulties and legal uncertainties.

Likewise, some missing essential definitions should be added to the BEFIT proposal. This is notably the case of “direct business interest” (article 4), “fixed asset”, “tangible fixed asset”, and “intangible fixed assets” (section 3).

III. Comments on the calculation of the preliminary tax result

As with Pillar Two, the starting point for the calculations is the Financial Accounting Net Income or Loss (FANIL) before any consolidation adjustments of an entity, which must be determined in accordance with a single accounting standard for the BEFIT group.

However, in cases where a filing entity is not an EU-UPE, a local entity will be obliged to keep three sets of accounts, as it is obliged to prepare individual financial statements according to the local accounting principles, individual financial statements according to the accounting principles of the filing entity for corporation tax purposes and individual financial statements according to the accounting principles of the UPE for Pillar Two. This will inevitably lead to an increase in the compliance burden, which contradicts the intended objective of the Directive.

Accompanying measures, such as an exemption from local company law accounting principles if a BEFIT company is obliged to prepare separate financial statements in accordance with the accounting principles of a filing entity, are desirable.

For further simplification, it would also be desirable to adopt the same adjustments calculations introduced for Pillar Two. The statement from the European Commission according to which it decided to include fewer tax adjustments in BEFIT than in Pillar Two because the latter has a different purpose is quite incomprehensible to us.

IV. Comments on the transitional allocation rule

In the first seven fiscal years of implementation (transition phase), the BEFIT tax base will be allocated to the BEFIT group members using a baseline allocation percentage (instead of formulary apportionment as foreseen in the 2022 public consultation) calculated using their percentage of the average taxable results in the prior three fiscal years. This is a temporary allocation method that will be replaced by 2035 at the latest.

According to the Explanatory Memorandum, a permanent allocation method may be introduced following this initial phase and could be based on formulary apportionment by taking into account more recent County-by-Country Reporting (CbCR) data and the information gathered from the first years of the application of BEFIT.

The present proposal for a directive therefore leaves it completely open how a final formulary apportionment would look like, which is not acceptable from a legal certainty point of view.

Moreover, it appears to us disproportionate - in view of the high compliance costs and complex regulations that EU companies are already subject to today - to burden EU companies with a "field test" just to ensure that EU legislators can gather information to develop a final allocation mechanism. This also clearly contradicts the objective of simplification in the internal market.

V. Comments on the general administration of the system

The proposal provides for a one-stop-shop that will allow businesses to deal with one single authority in the Union for filing obligations. In principle, we recognise that such a measure could bring additional simplification and could gradually free up resources for administrations and companies.

However, as no harmonization of the 27 procedural laws of the Member States is planned, we hardly see how this could work in practice. The tax authorities' resources in EU Member States are quite different and the procedural regulations for tax audits, for example, also diverge. This is further complicated by the language barrier and, in some cases, a lack of willingness to use English.

Moreover, the 4-month deadline for filing the BEFIT Information Return after the end of the fiscal year is way too short and, in the context of all other compliance obligations of companies, it will rather increase compliance costs but not reduce them. It should be, at least, extended to 6 months.

We also further doubt that the proposed BEFIT teams - representatives of each relevant tax administration from the Member States where the group operates working together through an online collaborative tool - will work in practice, considering the differences in languages, approaches and education of the various tax authorities in the different Member States.

Similarly, external audits will continue to be carried out at Member State level and it will be possible for Member States to request joint audits, with the other side being obliged to accept

these joint audits. Although it is very welcome that the request to carry out a joint audit shall be mandatory, it is doubtful that this will lead to cost savings or speed up procedures in view of the shortage of human resources in the tax authorities.

VI. Comments on the date of entry into force

As one of the biggest game-changer in international tax law (Pillar Two) has just started to apply, the proposed date of entry into force (1 July 2028) for BEFIT is questionable. Both companies and tax authorities, now need time to implement the minimum tax procedures in their systems correctly.

If BEFIT is not postponed, at the minimum, we believe that the voluntary application of BEFIT should also be provided for groups of companies with a consolidated annual turnover of EUR 750 million or more in the transitional period between 1 July 2028 to 30 June 2035. This would give the companies concerned sufficient time to first deal with the implementation and application of the Pillar Two Directive and then implement the BEFIT rules.

Taking into account the foreseen penalties, both under the Pillar Two Directive and the BEFIT Directive, it is necessary and fair to grant companies a longer transitional period for the introduction of the necessary group-internal reporting processes.

Notes
For enquiries, please contact: Marion Fontana, EU Policy Officer, marion.fontana@etaf.tax, Phone: +32 2 2350 105 | Mobile: +32 471 78 90 64

About ETAF
The European Tax Adviser Federation (ETAF) is a European umbrella organisation for tax professionals whose activities are regulated by law. It is set as an international not-for-profit organisation (AISBL) governed by Belgian law, based in Brussels and was launched on 15th December 2015. It represents more than 215 000 tax professionals from France, Germany, Belgium, Romania, Hungary, Austria and Croatia. ETAF is a registered organisation in the EU Transparency Register, with the register identification number 760084520382-92.