

# EBIT

[www.ebit-businessstax.com](http://www.ebit-businessstax.com)

To: [TAXUD-UNIT-D1@ec.europa.eu](mailto:TAXUD-UNIT-D1@ec.europa.eu)

Additional comments to the EBIT response to the European Commission's Questionnaire as part of its public consultation on its initiative for a Directive on Business in Europe: Framework for Income Taxation (BEFIT): 13 October 2022 – 26 January 2023.

Brussels, 26 January 2023

Dear Mr Zuijendorp,

EBIT's Members<sup>1</sup> thank the European Commission for the opportunity to provide additional comments to the European Commission's Questionnaire as part of its public consultation on the Initiative for a Directive on BEFIT (hereafter proposed Directive) running from 13 October 2022 to 26 January 2023.

Below are EBIT comments that are intended to add to the Questionnaire and also where relevant help put EBIT's responses to it into perspective.

## Key Points

1. We strongly believe that this is not the right time for proposing fundamental changes to the tax base or novel approaches to the allocation of taxing rights specific to the European Union, when taxpayers and tax authorities will already need to invest very substantial resources to address the fundamental changes arising from the OECD's and other EU and domestic initiatives (e.g. Foreign Subsidies Regulation, Unshell/ATAD3,, Public CbCR, the Pillars, but also side effects of CBAM, ESG, due diligence requirements, CSR, ...).
2. Simplification and alignment of tax compliance obligations across the EU are important and laudable objectives, with potential benefits for tax authorities and taxpayers alike. We recommend therefore that the European Commission's work focus instead on reducing the burden of tax administration and beefing up dispute resolution across the EU. This would be of more benefit to both tax authorities and taxpayers, as well as deliver benefits in terms of economic efficiency and the competitiveness of Europe's Single Market. In particular, the European Commission could explore promising and helpful ideas such as the extension of the "One Stop Shop" approach from indirect to direct taxes.
3. Should the European Commission nevertheless choose to continue with this initiative at this time, EBIT recommends to take duly into account the experience with the CCCTB project and design a framework that is optional rather than compulsory. If the framework is sufficiently well designed and delivers the intended benefits, then taxpayers will no doubt flock to adopt it voluntarily – and this would in our view be a good test of whether the proposed is truly fit for purpose.

---

<sup>1</sup> EBIT's Members include Airbus Group, BP, Carlyle Carrier, Caterpillar, Diageo, GSK, Huawei, International Paper, Johnson and Johnson, JTI, PepsiCo, Pfizer, P&G, Raytheon Technologies, RELX, Schroders, SHV Group and Vattenfall. For more information on EBIT see: [www.ebit-businessstax.com](http://www.ebit-businessstax.com)

## **General comment**

EBIT's Members recognise that a practical and appropriate tax system which allows cross-border businesses to operate seamlessly within the EU in the field of corporate income taxation will enhance Europe's competitiveness vis-à-vis the rest of the world and benefit the EU as a whole and also smaller MNEs. We believe this to also be fully in line with European Commission President von der Leyen's 2022 State of the Union Address in which she vowed to "improve access to the dynamism of our continental market". We note that this is one of many issues that will need to be addressed among others such as R&D incentives, remote and hybrid working, ....). Next to differences in tax systems within the EU, differences in tax rates will also affect taxpayers. At this stage, however, many complex technical hurdles will have to be addressed, as well as political ones. EBIT's Members therefore wish to point to addressing the complexity and high costs that businesses, notably those with cross-border activities, are still facing as a result of having to comply with 27 different corporate tax systems when doing business across the EU

## **Other concerns**

### **Complexity**

The BEFIT initiative is added to a number of workstreams that currently are changing the design of the international tax landscape. EBIT's Members, as well as tax authorities, are currently looking at how to adapt to the GloBE Minimum Tax and GloBE Directive<sup>2</sup> as well as anticipating the potential introduction of Pillar One. We believe that introducing BEFIT on top of this is unwelcome now and stretches limited resources of the MNEs concerned too much (e.g. people and capital investment for the adaptation of accounting systems in order to provide the necessary data which largely is not yet available today). It also increases the tax uncertainty substantially, as this would mean another major (regional) tax reform presented within an unprecedented short timeframe that seems near impossible to meet. Therefore, we consider the BEFIT initiative certainly at this stage to be needlessly further complicating and redundant. We note that MNEs with revenue in excess of Euro 750 million annually in light of the former and on-going tax reforms will already need to adhere to a common tax base for the GloBE calculations, and a formulary apportionment for Amount A of Pillar 1.

EBIT's Members also fear that the European Commission's stated objective of simplicity and cost reduction may not be achieved. In our opinion, as BEFIT is contemplated in the EU at the same time as the redesign of the international tax framework, compliance costs and complexity will rather increase, both at an accounting and tax accounting level, and in terms of reporting burden. In particular, as BEFIT will be built upon the principles of Pillar Two, these principles have to be known and applied, and be effective (and preferably tested) first before building another layer of tax rules on that basis.

### **Interaction with on-going tax reforms**

It is unclear to EBIT's Members what the interaction is and will be between BEFIT and the OECD two-pillar project, also because the former entails hard law and the latter soft law. They could even have opposite results as the GloBE rules introduce a 15 pct minimum tax on the profit before tax of low taxed companies. The PBT is based on the economic substance of the enterprise generated in a certain jurisdiction. The BEFIT initiative departs to a very large extent from that economic substance and hence profit that is generated in a jurisdiction. Where the GloBE rules increase the taxes in the jurisdiction in which economic substance is generated, BEFIT

---

<sup>2</sup> COUNCIL DIRECTIVE (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union

reallocates that return based on a formulaic approach. EBIT's Members therefore currently do not see any correlation between the GloBE rules and the BEFIT proposal. We further consider whether the EU will present itself as a bloc for the purpose of BEFIT and for the purpose of the Pillars. We also question how Pillar One Amount A would apply to relieving EU jurisdictions that have joined the MLC as well as the status of that instrument within the EU. Conflicting situations may arise that need to be resolved before entering into the BEFIT adventure. If BEFIT is really intended to be about removing investment obstacles in the EU common market and aimed at simplicity of administration, we consider that at most BEFIT should be made optional.

### **(Non) Creation of a level playing field**

EBIT's Members also have concerns that instead of creating a level playing field between EU Member States, discrepancies may arise between the individual countries. In that respect, it is useful to refer to the recent article published in Tax Notes International<sup>3</sup> concluding that BEFIT may result in the reallocation of corporate profits from smaller innovation- and service-oriented EU Member States toward larger EU Member States. This article contradicts the claim made in the call for evidence for an impact assessment that BEFIT will not lead to significant redistribution of tax revenues between Member States. It also needs to be ensured for competitiveness reasons that the new BEFIT tax base is overall larger than the existing Member State tax bases, in order to avoid a higher tax burden for companies. We understand, however, that this is a very sensitive topic, but we believe due consideration and attention should be given to it in the interest of the in-scope MNEs which are an engine of the economic strength of the EU.

### **Design issues**

EBIT's Members want to draw attention to several design issues that may pop up. For example:

- Not all EU MS use the Euro as currency
- Developing – yet another – accounting system to develop the common tax base (on top of local GAAP, consolidated accounting, GloBE adjustments and possible Pillar One, Amount A adjustments)
- MNE must also consider other tax bases, for example US GILTI & CAMT, as well as (public) CBCR (proliferation of measures)
- Inclusions and exclusions from BEFIT (for example, financial services, extractives industries, alignment with GloBE rules, ...)
- Finding a common ground for important issues such as thresholds, in scope entities, mandatory or optional application to SMEs, creation of a level playing field between MNE and SME, ...

### **Certainty**

Further concerns that EBIT's Members have relate to certainty. Appropriate and efficient dispute prevention and resolution tools should be developed / adapted (for example in the framework of the EU Arbitration Directive), but also certainty for transactions involving third countries should be addressed. Although one would expect the number of disputes to go down under a common tax base approach, EBIT's Members are wary that the disputes might be transferred from a profit determination discussion to a discussion on the valuation of the components in the formula and the different views and interpretations thereof (for example, discussions on payroll, costs of developing IP, marketing costs, ...).

---

<sup>3</sup> How the BEFIT Proposal May Disadvantage Smaller Countries by Gilles Franssens and Hannes Polfliet - TAX NOTES INTERNATIONAL, VOLUME 109, JANUARY 9, 2023 – p 209

## **Intangible property**

With regard to IP, the call for evidence for an impact assessment indicates that the introduction of IP in the allocation formula is one of two options. EBIT's Members would welcome the inclusion of IP in the allocation formula as it is a major profit driver. On that matter, useful reference can also be made to the discussion on the relation between substance and the DEMPE concept in the OECD Transfer Pricing Guidelines as a result of BEPS. Discarding IP from the allocation formula would negate the (increasingly important) value that is brought by IP in generating the returns. Care should also be taken to avoid the EU becoming an island where it is no longer attractive to investors in R&D and the bloc would hence lose R&D capacity and knowledge and risk a real brain-drain.

We note that IP would be valued by using a proxy, based on costs for research and development plus marketing and advertising. The concerns that EBIT's Members have are that costs do not represent the real value of the IP and that not all IP is included in the financial statements or the balance sheet (knowhow for example) of a company.

## **Digitalization of the economy**

The call for evidence for an impact assessment indicates that the current corporate tax systems do not fully reflect the realities of today's economy and global developments as they are still mainly based on the principles of local brick-and-mortar production. These principles are believed to be outdated since globalisation, digitalisation and the intensified use of intangibles have substantially changed how companies do business. EBIT's Members consider the approach taken under BEFIT, however, to be a "brick and mortar" approach, which can be clearly identified in the suggested profit allocation formula. Where the arm's length principle (ALP) has evolved over time and new approaches have been or are being designed to meet up with the digitalised world, the suggested allocation formulas seem still to be hung up on the traditional factors in a brick-and-mortar economic world. Labour-intensive and fixed asset intensive economies would be favoured in the allocation formulas.

## **Application of the Arm's length principle**

Lastly, EBIT's Members are concerned about the removal of the application of the ALP in intra-EU transactions. Although EBIT's Members recognise that the ALP has its flaws, we do not consider a formulaic approach like BEFIT to be superior or better adapted to the current economic environment. It would seem to EBIT's Members that the ALP is embedded in the heart of the current tax reforms. Where the call for evidence for an impact assessment claims to be consistent with, and where possible build on, the principles that underlie the OECD's two-pillar approach, EBIT's Members cannot do otherwise than state that the ALP is present in both the OECD Model rules (§ 3.2.3) and the GloBE Directive (art 16, § 4). EBIT's Members are concerned that adapting the GloBE Directive to meet BEFIT may lead to the GloBE directive no longer being considered a qualified implementation of the GloBE rules.

To conclude and summarize, EBIT's Members consider that the proposed BEFIT approach is not the right way forward, at least not for the time being. Instead of focusing on introducing yet another system, more efforts could be devoted first to, for example, the creation of a one-stop shop, or the development of accelerated upfront tax certainty.

EBIT's Members trust this contribution is helpful to you. EBIT is always ready to dialogue and engage.

Yours sincerely,

**European Business Initiative on Taxation – January 2023**

**Additional comments to the EBIT response to the European Commission's Questionnaire as part of its public consultation on its initiative for a Directive on BEFIT**

For further information on EBIT, contact the EBIT Secretariat via Bob van der Made, Tel: +32 472 74 5631; E-mail: [bob@vandermadeconsulting.com](mailto:bob@vandermadeconsulting.com)).

**Disclaimer / Copyright:** This document contains the collective views of the EBIT business working group and is provided to you courtesy of EBIT. Van der Made Consulting acts as EBIT's Secretariat but it is not a Member of EBIT. Nothing in this document can be construed as an opinion or point of view of any individual member of EBIT, nor of van der Made Consulting, nor of PwC, which acts as associated knowledge partner of EBIT but is not a member of EBIT. Any reproduction, in part or in total, of this document, in any form whatsoever, is subject to prior written authorization of EBIT, which can be obtained from EBIT's Secretariat. EBIT's EU Transparency Register ID: 26231733692-35.