CFE tax advisers europe

OPINION STATEMENT

Opinion Statement FC 1/2024 on the EU Commission BEFIT Proposal

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CFE Tax Advisers Europe is the European umbrella association of tax advisers. Founded in 1959, CFE brings together 33 national tax institutes, associations and tax advisers' chambers from 24 European countries. CFE was the initiator of the Global Tax Advisers Platform through which it is associated with more than 600,000 tax advisers worldwide. CFE is part of the EU Transparency Register no. 3543183647-05.

We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Bruno Gouthière, Chair of CFE Fiscal Committee, Jos Goubert, Chair of the Direct Taxes Subcommittee, or Aleksandar Ivanovski, Director of Tax Policy at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page http://www.taxadviserseurope.org/

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1. Executive Summary

On 12 September 2023, the European Commission (EC) proposed the Council Directive: “Business in Europe: Framework for Income Taxation (BEFIT)”. The purported purpose of the directive(s) is to reduce the administrative burden for taxpayers and authorities with the proposed harmonised corporate tax base and simplified TP administration.

CFE welcomes the opportunity to contribute its input concerning any measure that makes Europe more attractive as a location for doing business. The question that arises is whether there a need for BEFIT and is it in line with the stated legal bases of article 115 of the Treaty on Functioning of the European Union, its subsidiarity and its proportionality.

The BEFIT proposal needs to be considered from the point of view of the EU requiring increased revenues. This initiative is not being requested by companies themselves, including MNE groups. According to the opinion of the European Commission, several advantages would be provided by this initiative for companies, such as: establishing a level playing field, enhancing legal certainty, reducing compliance costs, encouraging businesses to operate cross-border and, as a result, stimulating investment and growth in the Union. CFE remarks that insufficient attention has been paid to the unpredictable impact of BEFIT on public finances of the Member States and, whilst the objective of BEFIT is to decrease complexity, compliance costs and legal uncertainty, the opposite seems to be the case.

CFE in this Statement sets out detailed remarks concerning the proposal, and reiterates comments made in our Opinion Statement of 26 January 2023. CFE would like to emphasise the most fundamental remarks which we believe need to be taken into account before this directive could be subject to a vote for adoption. Of course, these remarks are not exhaustive, but we believe are of fundamental importance to the successful implementation and acceptance of BFEIT in the long term:

- The legal basis of the BEFIT Directive is not in line with EU law and is disproportionate in certain aspects of the directive. The given explanations and formulations by the European Commission are not sufficient to satisfy the legal basis to demonstrate that the aims of the initiative cannot be sufficiently addressed by the Member States themselves.
- The timing for the BEFIT proposal is not appropriate bearing in mind the implementation process of Pillar Two. The proposal needs further development to be in line with Pillar Two. The interaction of BEFIT and the minimum tax rules would increase complexity to an unprecedented level, which would result in significant compliance costs and potentially make the EU a less attractive place to do business.
- Also, the timeframe for implementation is very short considering the impact on Member States and the enterprises involved. The directive outlines many legislative adjustments and needs to be more coherent in the broader perspective.
- CFE is concerned the tax administrations of Member States are not able and capable (yet) to deliver all launched initiatives on time, choosing instead to opt for a standard implementation

with reference to the guidelines, which ultimately creates legal uncertainty for the taxpayers and enterprises involved.
- The administrative costs for affected enterprises should not be underestimated, bearing in mind the different tax filings in a year that would need to occur: Pillar Two, BEFIT and national filings. Also, knowing that this directive currently foresees a timeline of seven years after implementation, CFE urges the Commission to clarify up-front what the sustainable solutions will be, particularly given there is a risk that the temporary solution could become the permanent one, if BEFIT is adopted.
- The BEFIT rules also contain a set of tax adjustments to the financial accounting statements with certain tax depreciation rules and raises timing and quantification issues. To prevent mismatches, and to contribute to the reduction of administrative burdens, the adjustments should align as much as possible with the adjustments under the Pillar Two rules. One possible method of simplification would be to specify the use of IFRS as a starting point for everyone within BEFIT.

2. Background

On 12 September 2023, the European Commission (EC) proposed the Council Directive: "Business in Europe: Framework for Income Taxation (BEFIT)". A new framework for EU corporate taxation, which would: "*introduce a common set of rules for EU companies to calculate their taxable base while ensuring a more effective allocation of profits between EU countries, based on a formula.*" BEFIT strongly resembles the previous common consolidated corporate tax base proposal. BEFIT aims to replace and thus repeal the 2011 and 2016 Commission proposals for a common consolidated corporate tax base (CCCTB). Following the OECD base erosion and profit-shifting initiatives, the European Commission adopted several directives that have the purpose of tackling perceived tax evasion and avoidance. The question that arises is whether there a need for BEFIT and is it in line with the stated legal bases of article 115 of the Treaty on Functioning of the European Union, its subsidiarity and its proportionality.

BEFIT would establish a common set of rules to determine the tax base of companies subject to corporate income tax in an EU Member State as part of a group that prepares consolidated financial statements and replace the current 27 national corporate tax systems for MNE groups with combined revenue exceeding €750 million. The approval of the proposal requires unanimity, given the shared competence in corporate taxation between the Union and its Member States. If adopted, the BEFIT Directive would come into force on 1 July 2028.

CFE welcomes the opportunity to contribute through ongoing engagement with the European Commission and European Parliament, in discussions in our role as a Member of the EU expert group Platform for Tax Good Governance and Aggressive Tax Planning and via the public consultation process.

Given the degree of difficulty in finding a common ground concerning the reform of EU corporate taxation, our response does not necessarily represent the view of each and every Member

Organisation of CFE, although reasonable efforts have been made to provide a coherent and representative view of European tax institutes and associations of tax advisers.

In this respect, we also refer to our earlier contributions during the public consultation, as formulated in our 'Opinion Statement FC 1/2023 on the European Commission Public Consultation on the Introduction of a New Corporate Taxation System in Europe (BEFIT)', submitted to the EU Institutions on 26 January 2023, which contributions we considered to be copied in.

The legal basis of BEFIT is article 115 of the Treaty on Functioning of the European Union, which stipulates that legal measures are vested in the legal form of a directive. However, the EU's competences are governed and limited at the same time by the principles of subsidiarity and proportionality. The legal justification of the directive as given and its impact on the Member States are too limited and appear pro forma.

As mentioned, the BEFIT proposal would provide the key features of a common tax base together with an allocation of profits to Member States based on a formula. According to the European Commission the formula should ensure a balanced distribution of corporate tax revenues across Member States that better takes into account the realities of today's economic and global developments when allocating the tax base to Member States. Considering this aim, cross-border commercial activities facing tax-related complexities, legislative fragmentation of national corporate tax systems, and reduced competitiveness of the EU single market, the European Commission prefers the solution in the form of a directive, instead of a soft law approach.

This approach is (partly) in line with the Pillar Two rules and the EU Minimum Tax Directive which is currently being implemented by Member States. Both directives take the annual accounting standard as a starting point for determining the tax base and contain an adjustment to the way in which tax authorities make risk assessments of the transfer pricing remuneration of certain group activities. The purported purpose of the directive(s) is to reduce the administrative burden for taxpayers and authorities with the proposed harmonized corporate tax base and simplified TP administration.

The BEFIT proposal needs to be considered from the point of view of the EU requiring increased revenues. This initiative is not being requested by companies themselves, including MNE groups. Although, according to the opinion of the European Commission, several advantages would be provided by this initiative for companies, such as: establishing a level playing field, enhancing legal certainty, reducing compliance costs, encouraging businesses to operate cross-border and, as a result, stimulating investment and growth in the Union. At this point CFE remarks that insufficient attention has been paid to the unpredictable impact of BEFIT on public finances of the Member States and, whilst the objective of BEFIT is to decrease complexity, compliance costs and legal uncertainty, the opposite seems to be the case.

If this proposal should be adopted, CFE emphasise that the BEFIT proposal needs further development to be in line with other directives, e.g. Pillar Two. The interaction of BEFIT and the minimum tax rules would increase complexity to an unprecedented level, which would result in

significant compliance costs and potentially make the EU a less attractive place to do business. CFE below lists certain general and specific remarks to be considered in further development of the proposal.

3. Comments

In addition to CFE's earlier Opinion Statement of 26 January 2023, CFE Tax Advisers Europe recommends that the following factors are taken into consideration by the European Commission:

3.1 Basis & Timing of the Directive

- BEFIT would represent a fundamental shift in the corporate tax landscape, and CFE would encourage the European Commission to defer further consideration of BEFIT until the rules for the implementation of Pillar Two have had sufficient time to be operational in practice. The European Commission should also evaluate the process of implementation in practice Pillar Two by a number of large jurisdictions. Only then should the European Union proceed with a process to analyse whether BEFIT would provide a benefit to tax authorities and Multinational Enterprises. In relation to the scepticism in Pillar Two implementation by other large jurisdictions, the timing of the BEFIT proposal is questionable. The BEFIT proposal needs further development to be in line with Pillar Two. For example, the starting point of the BEFIT proposal is the accounting result, which must be determined under a single accounting standard for the whole BEFIT group.

3.2 Compatibility with EU Principles of Subsidiarity & Unanimity

- The Commission should take into account the subsidiarity principle of EU law and conduct a thorough quantitative and qualitative assessment of the impact of investment and revenue for all Member States, including sustainable revenue for the EU budget. Since the time of the CCCTB proposal being made, the EU has incorporated into EU law the OECD base erosion and profit-shifting initiatives and adopted several directives that aim to tackle perceived tax evasion and avoidance. These include the ATADs, DACs and anti-abuse provisions, such as the principle purpose test in tax treaties, meaning that tax laws of EU Member States have already been amended and tax authorities have a comprehensive arsenal of anti-abuse rules.

- The EU is justified in exercising its powers only when Member States are unable to achieve the objectives of a proposed action satisfactorily and the EU can provide added value. Furthermore, the measure must also comply with the principle of proportionality, so that the proposal must not go beyond what is required to ensure the minimum necessary level of protection for the EU objective: the internal market. Not only would BEFIT result in extreme complexity and legal uncertainty if adopted at this point, there would also be sovereignty issues. The differences in Member State tax systems are consistent with the Member States' sovereignty in tax matters and these would be compromised by the introduction of BEFIT. Although, the explanatory memorandum of the directive refers to article 115 of the Treaty on Functioning of the European Union, CFE considers BEFIT's objectives to be inconsistent with the principles of subsidiarity and proportionality at this stage of harmonisation of corporate tax law as allowed by the Treaties.

3.3 General Framework & Compatibility Issues with EU Law

- Compatibility of BEFIT rules with Pillar 2 ones may be questioned, while the proposal states that BEFIT should comply with Pillar 2. The aggregated tax results (the BEFIT Tax Base) would, among other things, effectively allow cross-border loss relief within the BEFIT Group, as the losses incurred by one BEFIT Group Member operating in one Member State will automatically be set off against the profits from another BEFIT Group Member operating in another Member State. This might result in unwanted consequences from national Pillar Two legislation that has been enacted. Based on the Pillar Two rules, additional tax may be charged based on the commercial results in that year. Because the profit to be allocated under BEFIT is based on results from the three previous years, it is conceivable that an undesirable difference will arise. This might be prevented by calculating and using a minimum EU effective tax rate approach.

- CFE is supportive of limited financial adjustments, a similar approach already taken in the EU Directive on Minimum Tax which implements Pillar Two in the EU. Appropriate simplification would be to simply mirror Pillar 2 rules for the determination of the taxation base. As such, the limited financial adjustments in the tax base calculation in the BEFIT group would use the EU's accepted financial accounting standards as a starting point. This would be the financial accounting net income and loss of each BEFIT group member, derived from the consolidated financial statements. Where the Ultimate Parent Entity is outside the EU, the group would choose one common, EU acceptable accounting standard as a starting point. A defined list of acceptable adjustments would then be applied to the financial accounting result of each BEFIT group member to arrive at the BEFIT tax base.

- The allocation of the BEFIT Tax Base (under the formulary apportionment) is currently only given for a transactional period of seven years. It is not clear what will happen after this period. Further attention should be paid to how pre-BEFIT losses are dealt with locally. Regarding the profit allocation mechanism and in its current form, the proposed method of attributing profits to EU Member States can be considered to be disproportionate. In this respect, it should be clear that the BEFIT filing should replace the local CIT filings.

- It follows from the proposed directive that a tax assessment must be able to be adjusted without a time limit if a tax authority or court in another Member State makes a ruling that (indirectly) also affects the tax base of another Member State. This can happen when the provisional basis calculation is changed in such a way that it significantly affects the profit allocation. As a result, the profit allocation to the other Member State can be changed in such a way that the tax assessment must be adjusted in a different Member State. Therefore, it is important to note that in practice this provision should not result in a tax assessment of a member of a BEFIT group being irrevocably determined.

- Furthermore, the proposal also distributes withholding taxes levied by third countries on payments to BEFIT group entities. The amount of these withholding taxes is often determined by the applicable tax treaty between two countries, the third country and the Member State in which the BEFIT group entity is established. Further investigation is needed as to whether the distribution mechanism is in line with good treaty policy now that withholding taxes are distributed among Member States that are not part of the treaty.

- There would be two tax systems applying in parallel (three if Pillar 2 is taken into consideration), irrespective of how broad the scope of application of BEFIT would be.

3.4 Formulary Apportionment

- It must be stated from the outset that there is no unanimous position within CFE member institutes on the introduction of formulary apportionment within the Single Market. Several members are opposed to such a solution and would not wish to see traditional rules of international tax law being abandoned, including the Arm's Length Principle. If BEFIT is implemented, the allocation would be based on the average of the taxable results of the previous three fiscal years (transition period), and subsequently a new allocation key would need to be developed.

- Even though it may be argued that countries have now accepted the principle of formulary apportionment by signing up to Pillar One, accepting "CCCTB" by another name is another matter entirely. Issues identified with the earlier CCCTB proposals remain pertinent to the BEFIT policy initiative, which appears to be substantially similar. The basic principle that CFE might endorse is a model which incorporates intangible assets, in addition to sales, labour and tangible assets. We would welcome further details on how intangibles would potentially be incorporated and valued to give our conclusive comments on this matter.

- The formulary apportionment system requires a careful balance on the elements of the formula and their allocation among Member States. In designing the formula, the allocation key that would be chosen by the European Commission as part of the proposed formulary apportionment method must strike a balance between traditional economies and the knowledge or service orientated industries and the digital economy. We agree in principle that the intangible assets should be apportioned according to the location where significant Research and Development expenses are incurred, i.e., with reference to the location where intangible assets are booked in financial accounts). As such, Research and Development costs and the related marketing and advertising costs and resources required for their maintenance and protection could potentially serve as a proxy value for apportionment and would make this formula factor more resilient against manipulation and less mobile solely for tax reasons.

- CFE does not support location of critical staff involved in Research and Development being a formulary apportionment factor, given that this is largely outdated in today's post-COVID world of modern economy and mobile workers working from home. CFE recognises that a degree of employee presence is required by the OECD Transfer-pricing Guidelines to comply with DEMPE (development, enhancement, maintenance, protection and exploitation of intangibles) requirements. By including intangibles in the formula to be used, it must be said that the use of a proxy based on Research and Development expenses and costs for marketing and advertising would not fully reflect the investment made by businesses in both developing and acquiring intangibles.

- In outlining the issue, the Commission's Call for Evidence for an Impact Assessment states 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. These changes should also be reflected in how they are taxed."

Therefore, any effective exclusion of purchased intangibles from the formula would distort the allocation of profits and is inconsistent with the articulated and stated principles.

3.5 Transfer – Pricing & the Arm's Length Principle

- The system will not eliminate the Arm's Length Principle and transfer pricing as we know it; as BEFIT will only apply within the EU for the companies coming within the ambit of the legislation. Multinational Enterprises will still be subject to traditional transfer pricing rules outside of the EU. This will create a two-tier system, which will lead to increased complexity and compliance costs for companies and tax authorities.

- The proposed 'risk-based' approach to transfer pricing does not address these concerns, and instead, it focuses on one, non-traditional transfer pricing method, which might be controversial from the perspective of policy and practice.

- If there is an objective to prevent certain companies from abusing the Arm's Length Principle and the transfer pricing provisions, certain provisions must be included to deter Multinational Enterprises from engaging in formula-factor manipulation.

- The European Commission has indicated in consultation with relevant stakeholders that traditional rules of international tax law, i.e., Article 9 of the OECD Model on which the Arm's Length Principle is largely based, would need to be adapted to simplify the rules applicable to transactions between an EU-member of a BEFIT group and the BEFIT member (entities outside EU consolidation), and between members of a BEFIT group and outside EU entities. CFE is opposed to the introduction of specific, EU-imposed transfer pricing rules. As accepted by the Court of Justice in the fiscal State aid cases, the choice of the transfer pricing methodology is for the taxpayers, in accordance with EU law, national tax law (and OECD Transfer-Pricing Guidelines, if implemented), provided they reflect market transactions and commercial reality.

- Taxpayers have invested heavily over the last number of years to ensure that they comply with OECD Transfer Pricing requirements. The European Commission has not provided a rationale for moving away from that approach.

- Restricting existing options for profit allocation and transfer pricing methodology as set out by the OECD Transfer-Pricing Guidelines would represent a new interpretation of the Arm's Length Principle which could lead to uncertainty, higher compliance costs and disputes.

- CFE has submitted further detailed comments in relation to the EU Commission proposal for a Council Directive on Transfer Pricing, launched at the same time as the proposal for a Council Directive "Business in Europe: Framework for Income Taxation (BEFIT)". We reiterate the comments set out in that Statement.

3.6. Compliance Issues (BEFIT Information Return, Accounting Standards & Administrative Simplification)

- In CFE's view, the deadline to file the BEFIT information return is not realistic as there is a need to reconcile accounts into one GAAP, do the adjustments and then determine the BEFIT taxable basis. The set deadline is shorter than the deadline for filing the financial account in certain Member States, for example, 6 months after closing. Additionally, there are timing issues with Pillar 2 as BEFIT information returns should still comply with Pillar 2

rules, for example the Pillar 2 return is to be filed within a longer deadline. The complexity of the interactions of these two systems is not addressed by the BEFIT proposal. Legal certainty would also be impacted as there is no common statute of limitation, which should be harmonised in the EU to ensure coherence. The accounting standard must be accepted under EU law, so it must either be the national generally accepted accounting principles (GAAP) of one of the Member States or the international financing reporting standards (IFRS). This may create additional complexity and compliance burden in the EU as BEFIT would deviate from Pillar 2. Although, adjustments are applied, there are generally fewer adjustments under BEFIT than those allowed under the Pillar Two rules. Pillar Two also has a different purpose, to calculate the appropriate qualifying income when determining the minimum level of tax due.

- The BEFIT proposal envisages that tax authorities would operate multiple different tax systems in parallel (three, if Pillar 2 is taken into consideration), which would not meet the stated objective of administrative simplification and instead increase complexity.

- In addition to increased complexity for tax authorities, a two-tier system could increase the administrative burden for companies balancing on the 'application edge' of the BEFIT rules - i.e. if local non-BEFIT rules and BEFIT rules deviate to a large extent, it would make moving from one system to another difficult for taxpayers (such as Small and Medium Enterprises).

- If BEFIT rules are introduced, it would not be just a one-off transition from current system(s) to the new BEFIT era. Going forward there would be a number of taxpayers balancing between the two systems each year.

- The BEFIT proposal offers companies with a turnover of less than €750 million the opportunity to opt for the BEFIT system, and the opportunity to choose every five years whether they want to continue using the BEFIT system. The choice to change systems means that companies can switch between a valuation based on commercial book values to tax book values, and vice versa. This leads to additional administrative burdens for both businesses and tax authorities. To limit this burden, it could be preferable to extend the period.

3.7 Cooperative Compliance

- In order to arrive at a more efficient system, CFE encourages the European Commission to focus on the value of cooperative compliance. CFE has highlighted areas for policymakers in which the current tax system could be improved whilst longer term reforms are developed. Member States should co-operate, with the help of the European Commission, to develop effective co-operative compliance programmes suitable for all sizes and types of businesses which facilitate cross-border trade and reduce the possibilities for double taxation. The development of tax governance requirements across the EU should be encouraged as part of the move toward cooperative compliance as this would ensure that tax risks are managed appropriately, and that tax compliance is fulfilled appropriately. This would also be coherent with the move towards increased tax transparency (EU public CBRC) and new ESG requirements such as CSRD. We call on the European Commission to encourage and enable the exchange of best practices on co-operative compliance in Europe, and to issue recommendations for co-operative compliance fit for Small Medium Enterprises. Cooperative compliance programmes should be transparent and respect taxpayers' rights, as set out in national and international / EU law.

3.8 Dispute Resolution

- Regarding the introduction of the BEFIT team, it is important that this team has sufficient instruments to resolve any disputes regarding the basis between tax authorities. A comparison could be made to the VAT Committee. Their decision should be made public (as with rulings), but of course anonymously. It should also be noted that the deadline imposed on the team of 4 months does not seem practicable.

3.9 R&D Credit

- CFE welcomes any measure that makes Europe more attractive as a location for Research and Development investment and as such would welcome the introduction of a Research and Development credit in the design of the proposal. This would be particularly beneficial for those countries that are trying to encourage innovation in Small Medium Enterprises. It is important that the EU remains an attractive location for Research and Development investment in comparison to competitor territories. In order to achieve this, we believe that Member States should have the flexibility to design tax policy for Research and Development as they see fit. A concern exists that knowledge and service-based economies will be adversely affected if the formula results in a lack of flexibility to develop and implement tax policy for Research and Development as Member States see fit within the framework.

4. Scope & Implementation

The European Commission intends to focus its proposal on five building elements: scope; tax base; formulary apportionment; transactions with parties outside the BEFIT group; and administration. Regarding the scope, at this stage of the policy discussion, CFE supports the optional introduction of BEFIT. As such, all EU tax resident companies and EU-located Permanent Establishments which are members of a group that file consolidated financial statements could opt-in to apply the BEFIT consolidation, regardless of annual revenue thresholds previously considered for mandatory introduction of consolidation.

The scope of the proposal includes entities and permanent establishments located in the EU that are part of a multinational group or a large domestic group with a consolidated turnover of at least €750 million, unless in certain cases only a limited part of the turnover is realized within the EU. Groups with a turnover lower than €750 million can choose to apply the BEFIT rules instead of the 'regular' corporate tax system. This choice applies for five years. These groups can then choose to return to the regular system. In principle, the BEFIT Directive covers all sectors. However, certain sector-specific characteristics are included, such as a carve-out from the BEFIT tax base for shipping income covered by a national tonnage tax regime.

Article 5(3) of the Treaty on European Union provides: *"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."*

To assist national parliaments in their evaluation of subsidiarity compliance, article 5 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality states: *"Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States (…)."* In the BEFIT Directive, Member States are free to maintain their individual tax rate policies and, in that respect, apply any deductions, tax incentives or base increases to their allocated parts, provided these adjustments are in line with the rules laid down in the Pillar Two Directive. Moreover, they remain in charge of the enforcement of tax law in their respective jurisdictions.

Should the European Commission decide to proceed with the BEFIT proposal, a statement would need to be provided per primary EU law, with sufficient quantitative and qualitative indicators to allow national parliaments to fully assess all the implications of a cross-border proposal of this nature. The statement should demonstrate that the aims of the initiative cannot be sufficiently addressed by the Member States themselves and that action at the EU level would have additional benefits.

The legal basis for BEFIT is article 115 of the Treaty on the Functioning of the EU, which requires unanimity in the Council before the directives can be adopted. As mentioned, some parts of the directive can be considered to be disproportionate and should therefore have been limited to a truly harmonised basis.

If adopted, the necessary steps to comply with the BEFIT Directive need to be implemented as soon as possible because it will enter into force by 1 July 2028. If the directive enters into force, it may have a major impact on large-scale groups operating in the EU, as it will create a new framework of EU tax rules. It might therefore be important for multinationals and large-scale groups operating in the EU to assess the potential impact of the BEFIT Directive.

5. Burden on Business

It is important to realise that by implementing the BEFIT proposal, domestic tax systems with a long history, including extensive guidance and established case law, will be forever changed. A continued chronic legal uncertainty will likely be a consequence of BEFIT, given that replacing these domestic tax systems with BEFIT will likely be interpreted differently in different EU Member States. It would take a long time before the practical application of these new rules would become settled and mean that taxpayers and tax authorities would need to dedicate more resources to ensuring compliance and settling the disputes resulting from this legal uncertainty.

The purpose of the directive is to reduce the administrative burden for taxpayers and tax authorities with the proposed harmonised corporate tax base and simplified TP administration. The BEFIT Directive provides a common administrative framework by introducing a one-stop-shop. In principle, the Ultimate Parent Entity will be required to file one BEFIT information return for the whole BEFIT Group with its own domestic tax administration. The tax administration will share the

BEFIT Information Return with the other Member States in which the BEFIT Group operates. After filing the BEFIT Information Return, a team of representatives from each relevant tax administration will be formed, known as the BEFIT team. The BEFIT team will examine and assess the completeness of the BEFIT Information Return.

In addition, each BEFIT Group Member will be obliged to file an individual tax return with its national competent tax administration, as the Member States may apply domestic adjustments on its allocated part of the BEFIT Tax Base. In principle, individual Member States will remain competent to perform (tax) audits. Appeals of an individual BEFIT Group Member against an individual tax return may be brought to its own tax administration. However, appeals against the BEFIT Information Return may be brought to the competent authority in the state of the filing entity. In general, this will be the Ultimate Parent Entity.

Considering the above, there will arguably be no simplification as there will be a BEFIT return, the individual returns and the Pillar Two returns, i.e. one further return than companies were obliged to file before, and also potentially one further set of financial accounts to keep for BEFIT purposes.

On the basis of the given background and these administrative aspects of BEFIT, it is questionable whether the objectives of reducing compliance and administration costs will be achieved. Considering that the European Commission already admits that *“some additional compliance and administrative costs could arise in certain circumstances”*, the administrative burden for the companies involved should not be ignored. The costs incurred to (again) change tax compliance procedures should not be underestimated. One of the objectives of BEFIT is to decrease complexity, compliance costs and legal uncertainty; in CFE’s view the introduction of BEFIT will instead lead to the opposite. Also, the decision for smaller groups to opt in and the consequences that would flow from this is difficult to determine and brings some uncertainty. Certainty is fundamental for every legal system.

The directive outlines a large number of adjustments and in CFE’s view needs to be more coherent with related directives, for example with Pillar Two. There are significant concerns that administrations of many Member States are not able and capable (yet) in following up all launched initiatives on time. From this perspective, it is often seen that the legislators of the Member States increasingly choose to opt for a standard implementation with reference to the guidelines, passing on uncertainty to the relevant taxpayers, which is undesirable for any legal system from any perspective. The combination of Pillar Two and BEFIT will result in increased complexity to an unprecedented level and makes it difficult, or impossible, to manage (on time) placing a significant burden on taxpayers and tax administrations. As a result, the EU would become a less attractive place to do business. Furthermore, BEFIT proposes a drastic change to the corporate tax system by changing tax revenues, and so, raises concerns about the public finances, making it difficult to predict the exact effect on the budgets of Member States. It would be simpler to use Pillar 2 rules for scoping and the taxable basis determination and then allocate the tax to each Member State based on a formula; this would at least simplify compliance as it would leverage on existing rules applied across the EU.

The above also highlights the importance of how the rights of the taxpayers will be preserved in this filing complexity and with the different legal authorities. At this point the taxpayers' positions are not yet guaranteed from a protective aspect against the numerous authorities at play.

Further uncertainty follows from the tax treaty override. The formulary apportionment under BEFIT would be inconsistent with the tax treaty obligations of EU Member States and represent tax treaty override. Tax treaties concluded by EU Member States are generally based on the OECD model, and the as domestic legislations of this model have been developed over time and agreed upon at the global level by the OECD countries (including all EU Member States), the overwriting of these fundamental tax principles by the BEFIT Directive cannot be considered as an improvement, nor be considered proportional.

6. Conclusions

From the point of view of taxpayers and Member States, it is important to maintain a 'balanced allocation of taxing rights' for Member States to guarantee their current tax revenues. If the imbalance in taxing rights would result in an increase in domestic tax rates in the longer term, CFE would view this as an unwanted consequence. This stems from the existing point of view that there is pressure to increase tax revenues given the multiplicity of crises and the public spending needs of the continent.

CFE welcomes and wants to contribute to any measure that makes Europe more attractive as a location for doing business, especially for Research and Development investments.

If there is a need for BEFIT and BEFIT is to be considered in line with the stated legal basis of article 115 of the Treaty on Functioning of the European Union, its subsidiarity and its proportionality, CFE recommends that before the directive is adopted, some adjustments need to be made. CFE refers to and reiterates the comments in this Statement, and our Opinion Statement of 26 January 2023, and CFE would like to reiterate the most fundamental remarks which need to be taken into account before this directive could be subject to a vote for adoption. Of course, these remarks are not exhaustive, but we believe are of fundamental importance to the successful implementation and acceptance of BFEIT in the long term:

- The legal basis of the BEFIT Directive is not in line with EU law and is disproportionate in certain aspects of the directive. The given explanations and formulations by the European Commission are not sufficient to satisfy the legal basis to demonstrate that the aims of the initiative cannot be sufficiently addressed by the Member States themselves.
- The timing for the BEFIT proposal is not appropriate bearing in mind the implementation process of Pillar Two. The proposal needs further development to be in line with Pillar Two. Also, the timeframe for implementation is very short considering the impact on Member States and the enterprises involved. The directive outlines many legislative adjustments and needs to be more coherent in the broader perspective.
- CFE is concerned the tax administrations of Member States are not able and capable (yet) to deliver all launched initiatives on time, choosing instead to opt for a standard implementation

with reference to the guidelines, which ultimately creates legal uncertainty for the taxpayers and enterprises involved.

- The administrative costs for affected enterprises should not be underestimated, bearing in mind the different tax filings in a year that would need to occur: Pillar Two, BEFIT and national filings. Also, knowing that this directive currently has foresees a timeline of seven years after implementation, CFE urges the Commission to clarify up-front what the sustainable solutions will be, particularly given there is a risk that the temporary solution could become the permanent one, if BEFIT is adopted.
- The BEFIT rules also contain a set of tax adjustments to the financial accounting statements with certain tax depreciation rules and raises timing and quantification issues. To prevent mismatches, and to contribute to the reduction of administrative burdens, the adjustments should align as much as possible with the adjustments under the Pillar Two rules. One possible method of simplification would be to specify the use of IFRS as a starting point for everyone within BEFIT.

CFE and its Member Organisations stand ready to assist the Commission in considering the issues raised above in our Statement in the course of the policy dialogue and public consultation.