

## Consultation response

# Business in Europe: Framework for Income Taxation Proposal (BEFIT Proposal)



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

## Executive Summary

The BEFIT Directive Proposal represents an ambitious step towards harmonising corporate tax systems in the EU. However, we are concerned the current proposal would not reduce compliance burdens for affected companies. Lawmakers should wait for the full implementation of Pillar 2 before progressing with the draft. Instead, the EU Commission can play a role in reviewing existing anti-avoidance and reporting rules for opportunities to streamline tax burdens, using member state seminars to ensure EU tax rules are implemented consistently, and providing further clarity on how Pillars 1 and 2 will apply in the EU.

## Introduction

The American Chamber of Commerce to the EU (AmCham EU) has consistently supported measures to strengthen the Single Market and have provided contributions to the Business in Europe: Framework for Income Taxation (BEFIT) consultation, encouraging a system that ensures administrative simplification, provides clear rules, aligns with international tax systems, greater incentives for innovative activity and includes the elimination of opportunities for aggressive tax planning.

The BEFIT Directive Proposal, released on 19 September 2023 as part of the larger BEFIT Package, represents an ambitious step towards harmonising corporate tax systems in the EU.

Our analysis of the current proposal suggests it would not reduce compliance burdens for affected companies. Instead, it could introduce added complexities and burdens for taxpayers, fails to fully align with Pillar 2, and poses challenges to the international tax framework by moving away from the arm's length principle (ALP). This shift might lead to disputes and risks of double taxation. As stated in the proposal, 'simplification is crucial to growth and competitiveness in the EU', but the proposal effectively adds complexity while still requiring tax returns in 27 member states, compliant with local rules. It is challenging to envision how this proposal might effectively foster business growth in Europe and bolster the EU's competitive edge.

We have raised concerns in the past on the Common Consolidated Corporate Tax Base (CCCTB) (and Common Corporate Tax Base (CCTB)) and will repeat some of those which are equally applicable to the draft BEFIT Directive. Our contribution highlights concerns with the current BEFIT Proposal and offers some suggestions for further consideration.

## General recommendations

As a general principle, BEFIT should be optional at the company level to avoid an awkward 'one-size-fits-all' regime.

### Double taxation and treaty implications

It is imperative that there is more clarity and commitment to relief from double taxation.

Companies will likely have to apply the ALP within the EU to ensure that appropriate profit is recorded in each jurisdiction. This would be a result of corporate law imposing fiduciary duties on directors and

member states having different tax treaties with third countries despite BEFIT. These incongruencies with BEFIT would limit the extent to which the Proposal could potentially simplify tax filings.

## Tax rates and incentives

BEFIT, should it proceed, should preserve – and, where possible, enhance – the value of investment incentives to maintain the competitiveness and attractiveness of the EU.

Additionally, given the implementation of the Pillar 2 minimum tax rate, member states should retain the ability to set tax rates at their discretion. This is vital to maintaining investment and employment in eligible Member States and for the overall competitiveness of the EU.

## Allocation methodology

The proposed adoption of formulary apportionment may be distortive in many cases and not reflect the economic reality of a company's business model.

The transitional apportionment system creates significant uncertainty for businesses and introduces an undefined and unwelcome formulary apportionment system. Both non-EU headquartered multinationals, as well as EU-based multinational enterprises, may hesitate to increase their investments in the European Union due to uncertainty regarding the future mechanism for allocating taxes under BEFIT. In order to encourage new investments, lawmakers should clarify how taxable profits and tax obligations will be distributed across EU Member States in the BEFIT system. The methodology and allocation factors for apportioning profit between member states after the transitional period has ended should be specified now and subject to review and consultation. Any allocation formula (transitional and final) must fully reflect the importance of intangible assets.

## Clarify and adjust alignment with Pillars 1 and 2

The international tax system remains unstable and uncertain. Pillar 2 has not been universally implemented outside of the EU and the Pillar 1 Amount A Multilateral Convention is not now expected to be available for signature until mid-2024. The Pillar 2 rules are still being clarified, with further tranches of administrative guidance expected in 2024. Likewise, recent developments at the United Nations creates further uncertainty around the international taxation system. With this uncertain backdrop, agreeing on a BEFIT directive now, then using implementing regulations to adapt it to align with other international tax reforms, would appear premature.

The European Commission should consider waiting until Pillar 2 is fully implemented and bedded down and Pillar 1 negotiations concluded before negotiating the BEFIT Proposal with member states.

The BEFIT proposal appears inconsistent with Pillar 2. For example, Pillar 2 is calculated on a jurisdictional basis and uses a different accounting base. Through aggregation, BEFIT would allow losses in one jurisdiction to be offset against profits in another. However, this would appear to be 'undone' by Pillar 2, which would be calculated on a jurisdictional basis.

Any BEFIT proposal should fully consider and be consistent with both Pillars including Amount B of Pillar 1. For example, further clarity is needed about how the traffic light system for low-risk activities

of distributors and contract manufacturers will align with Amount B of Pillar 1. Instability and dispute may arise if the benchmarks are different between activities in scope.

Member States are unlikely to be ready to implement a BEFIT Directive according to its current timeline. Five member states have deferred the transposition of the Pillar 2 Directive until 2030, after the BEFIT Directive is proposed to come into effect. In these circumstances, clarity is needed as to how BEFIT would contend with a system in which Pillar 2 is effect in some Member States but not legislated for in others.

## Minimise additional administrative burdens and complexities for businesses

### Timing of the BEFIT Information Return

The proposed BEFIT information return filing deadline of four months after the period end is too short. A longer timeframe would be more realistic, allowing companies sufficient time to prepare accounts and have had them audited.

Any final BEFIT regime must also provide sufficient time for acquisitive companies to align the fiscal years of companies acquired. Such aligning of fiscal years to comply with BEFIT obligations should not be viewed as abusive.

Likewise, prior to implementing BEFIT, member states should be provided sufficient time to simplify their national tax systems. It's likely, some Member States will seek to 'declutter' or simplify their tax systems after implementation of the complex Pillar 2 rules. Such simplification will be important to maintain competitiveness and attract foreign investment.

### Accounting standards

As is, BEFIT would require taxpayers to adopt a Generally Accepted Accounting Principles (GAAP), accepted under EU law. As proposed, a US GAAP would not be an acceptable accounting base. Therefore, many large taxpayers would have to translate their books to an EU GAAP, imposing an additional administrative burden—even though US GAAP is an acceptable Financial Accounting Standard under the Pillar 2 Model Rules.

### Administrative burden

The BEFIT methodology imposes a significantly increased administrative burden on taxpayers. Under BEFIT, a taxpayer will need to complete the following steps to arrive at its taxable profit:

1. Ensure its books are prepared under an EU-accepted GAAP (in addition to maintaining local GAAP and US GAAP books).
2. Apply, on an entity basis, the prescribed adjustments in the BEFIT directive (e.g., tax depreciation), not fully aligned with Pillar 2.
3. Aggregate the results of all EU taxable entities.

4. Determine allocation keys. This will require analysing historical tax results by entity and averaging during the transitional period.
5. Apply the allocation keys to determine profit allocated to each Member State.
6. Apply the specific tax adjustments prescribed by each Member State
7. File local tax returns in each of the member states.

In applying the transitional allocation methodology, taxpayers should not be required to recalculate BEFIT liabilities or refile the BEFIT return as a result of an adjustment (e.g., an audit) in a prior period forming part of the transitional allocation key. Requiring a group to file a BEFIT information return as well as tax returns in each member state creates an additional layer of administrative burden.

## Amendment of tax assessments

The *de minimis* threshold for amending tax assessments (e.g., as a result of a local audit activity) of the lower of Euro 10,000 or 1% of the BEFIT tax base is far too low and may result in the BEFIT return having to be filed multiple times due to multiple local audits.

## Tax Simplification

Rather than prioritising BEFIT, the European Commission should consider using this time as an opportunity to extend its ambition to reduce reporting burdens by 25%. Reducing reporting burdens is not only a priority for the European Commission<sup>1</sup>, but for the Belgian Presidency of the Council of the European Union<sup>2</sup>.

Member States are already using the momentum towards the Pillar 2 Directive implementation to reduce other tax burdens on businesses. Germany, for one, has announced steps to streamline the suite of anti-tax avoidance rules in view of Pillar 2 by adapting the definition of 'low-taxed' income in CFC rules to the Pillar 2 Directive. Key competitors are following in suit. The United Kingdom, for example, has recently announced that it will phase out its Offshore Receipts in respect of Intangible Property (ORIP) regime as it implements Pillar 2's Under Taxed Profits Rule (UTPR).

As a first step towards reducing administrative burdens, the EU Commission has a role to play in reviewing the existing Anti-Tax Avoidance Directive (ATAD) to identify opportunities to streamline the taxation burden on companies.

The European Commission should complement this by minimising administrative burdens for businesses by facilitating a dialogue on the consistent implementation of tax rules across member states. Specifically, similar to the approach adopted for Pillar 2 implementation, the Commission could hold regular seminars with member states to encourage a more consistent implementation of tax rules. Using member state seminars to promote streamlined reporting could have a great impact on businesses and Europe's competitiveness.

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<sup>1</sup> [https://commission.europa.eu/system/files/2023-10/Factsheet\\_CWP\\_Burdens\\_10.pdf](https://commission.europa.eu/system/files/2023-10/Factsheet_CWP_Burdens_10.pdf)

<sup>2</sup> [https://belgian-presidency.consilium.europa.eu/media/3kajw1io/programme\\_en.pdf](https://belgian-presidency.consilium.europa.eu/media/3kajw1io/programme_en.pdf)

A streamlined ATAD and wider corporate income tax decluttering should be prioritised ahead of any harmonisation of tax bases in member states.