



ICC comments on Transfer Pricing Simplification Rules in the context of the BEFIT proposal

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, appreciates the opportunity to provide input on the European Commission Transfer Pricing Simplification Rules in the context of the BEFIT proposal public consultation.

ICC welcomes the efforts undertaken by the European Commission aimed at simplifying compliance and reducing uncertainty. ICC members encourage the Commission and the Member States to continue working in this direction. An efficient well-functioning Single Market, including administrative simplification, greater incentives for innovative activity, and better dispute resolution is essential to attract investment and drive economic recovery. Similarly, it is fundamental to have all members agree on the proposal avoiding substantial differences in interpretations or the implementation only from a limited number of countries, which would entail the risk of exacerbating administrative burdens and compliance costs.

It is indeed vital that the European Commission engages with the business community from the start to understand how these transfer pricing rules work in practice and what are the actual challenges that might be encountered in the context of tax audits. Given the high-level description of the proposed rules, for the business community it is not yet possible to assess in depth the concrete potential implications of this proposal. Nevertheless, we very much welcome the opportunity to provide a first general feedback and we warmly encourage future public consultations as the rules are further developed. This will enable the business community to provide more detailed and targeted comments aiming at the shared and common goal of an improved and better functioning European Single Market.

To this end, ICC provides the following comments:

- ICC believes the longstanding principles that tax is levied where value is created and transactions are recorded on an “arms-length” basis should be maintained. Adoption of a system in which taxable profits are allocated to member states formulaically would depart from these important principles.
- ICC members would like to express their concerns in general about the BEFIT concept and its aim to apportion the profit of the EU members of MNE groups using a formulary approach. This appears to be moving away from the arm’s length principle which requires the application of transfer pricing principles to individual legal entities and their related party transactions based on functions, assets and risks. ICC members do not consider it

appropriate to consider the EU members of a MNE as one entity on which transfer pricing principles should be applied to other non-EU members of the group.

- The main objective of BEFIT is simplification for businesses active in the EU. But many multinational groups that also operate outside the EU would in fact be burdened with additional compliance and administrative costs if an EU consolidation requirement were introduced, e.g. investments in new consolidation systems and other adaptations, including filing of the BEFIT Information Return. Furthermore, there is a risk that a formula-based allocation of profits, that deviates from the arm's length principle, disfavors investment in R&D and risk-taking, which could be counterproductive to the EU's overall objective of promoting innovation and growth. Therefore, it is important that the BEFIT rules, if introduced, are optional for all EU members of a group
- According to ICC members, the proposed traffic light system may theoretically work. However, the practical consequences of the "traffic light" system should be further clarified. From a practical application viewpoint, the approach put forward in its current form is too simplistic and there are many questions that can arise and should be taken into consideration.
- Possible issues can arise from the qualification of a manufacturer or distributor as contract manufacturer or limited risk distributor respectively. The use of qualitative criteria as it emerges from the current version of the proposed rules (e.g. strategic sales and marketing activities) can lead to further tax uncertainty and discretionary interpretation of those criteria by different tax authorities. Concerning the Transfer Pricing method and profit level indicator, the business community appreciates that these would be in line with the OECD TP Guidelines. However, based on the experience of some members, differently from the suggested five-year weighted average of EBIT, a three-year average would be more common and usually closer in time to the year under analysis. Thus, a three-year average would be recommendable.
- Moreover, ICC members believe, the scope of the simplification rules is currently too narrow. It should also include management fees and intragroup interest on cash pooling and loans/deposits.
- In the opinion of ICC members, practical difficulties might also arise from the attempt to fit specific activities under the standard benchmarking exercise.
- Having benchmarking for transactions for distribution and contract manufacturing that is accepted by tax authorities and reduces disputes is welcome. However, the European Commission's document makes reference to the OECD's Amount B if relevant. ICC members consider Amount B to be highly relevant as it is intended that the OECD's work on Amount B provides a safe harbour and clarity for expected returns for marketing and distribution. It would be helpful just to have one set of benchmarking that multinationals could apply with confidence that the tax authorities would accept rather than having one set of benchmarking prepared by the OECD and one by the European Commission. Thus, ICC members would recommend waiting until the imminent publication of the Amount B documentation before proceeding with a separate set of benchmarking.

- As outlined in the proposal, the European Commission will elaborate two separate benchmark studies, namely one for distributors and a second one for manufacturers. ICC members would welcome further clarification on whether they will also differentiate based on the underlying activity (i.e., considering whether the manufacturers or distributors operate in the food and drinks sector, or garment sector etc.).
- ICC members would also welcome the regular update of such benchmarks (ideally on an annual basis) by the Commission services and/or the agreement with the Member States on the period of time under which such benchmarks will be considered as valid reference for testing the related party transaction profitability.
- In the opinion of ICC members, from the current version of the proposed rules it is also unclear what would be the purpose of the risk assessment approach, considered that the documents for consultation specifies that it is not intended to function as a safe harbour and compliance with ALP and the preparation of the TP documentation would be similarly required. Accordingly, it is unclear which would be the benefits from a taxpayer perspective. Assuming that taxpayers will not be required to prepare their own benchmark, the compliance burden would only be slightly lowered. Additionally, from the current version of the proposed rules, controversies do not appear to be prevented and controversy levels would unlikely be reduced.
- Moreover, it appears that falling under the medium or high-risk zone will raise tax authorities' suspicions. Consequently, this will require additional explanations which according to the existing system might not be requested as long as the economic analysis is aligned with the actual and accurate delineation of the transaction. Even in this case, the compliance burden does not seem to be reduced.
- Finally, the document under consultation needs to clarify how the new rules will interact with existing APAs. ICC members warmly recommend the adoption of a fast-track system for dispute resolution, ensuring that possible controversies arising under this framework will not prolong their solution.
- To prevent tax disputes, ICC members recommend that when a company applies a management fees methodology in the same way for all subsidiaries in the European Union (included in its own country), then the method should be accepted by all tax authorities.
- Moreover, ICC members believe, on the MAP side, the resolution of the consequences of double taxation should be accelerated by allowing companies to deduct the doubly taxed amount where a MAP was launched and not solved after 3 years.

ICC members would like to reiterate our appreciation for engaging with the business community at such an early stage and we hope in a continuous constructive exchange as the rules of this proposal will be further developed.