ICC comments in response to EU Commission public consultation: Business in Europe: Framework for Income Taxation (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 in the context of the European Commission BEFIT proposal public consultation.

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 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. It is indeed vital that the European Commission engages with the business community from the start to understand how this framework will work in practice and what are the actual challenges that might be encountered in the context of tax audits. ICC hopes the European Commission continues engaging broadly and transparently on this important topic, in line with a clear but realistic timeline.

To this end, ICC provides the following comments:

- An efficient, well-functioning Single Market, including administrative simplification, greater incentives for innovative activity, and better dispute resolution is important to attract investment and drive economic recovery.

- 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. The adoption of a system in which taxable profits are allocated to member states formulaically would depart from these important principles. Moreover, ICC members would like to point out that the OECD does not consider formulaic profit splitting as an adequate alternative to the arm's length principle and that it does not consider such a method appropriate (OECD Transfer Pricing Guidelines, No. 1.21).

- 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. Departure from the use of the ALP increases the risk of mismatches between EU and non-EU jurisdictions and leads to double taxation. ICC members do not consider it appropriate to consider the EU members of an MNE as one entity on which [different] transfer pricing principles should be applied to other non-EU members of the group.

- Due to Member States having concluded different tax treaties with third (i.e., non-EU) countries, despite BEFIT, companies are likely to have to apply the ALP within the EU to ensure appropriate profit is recorded in each jurisdiction, eroding the possible simplicity benefits of BEFIT.

- Moreover, any new system determining tax base should avoid mismatches in tax law interpretation that presents risks of double taxation. Accordingly, it would be essential that there is both clarity and commitment to relief from double taxation.

- ICC members recommend not introducing BEFIT as mandatory, but optional at the company level. Mandatory inclusion would otherwise impose an improper "one-size-fits-all" regime.

- The main objective of BEFIT is simplification for businesses active in the EU. However, many multinational groups also operating 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, disfavours investment in R&D and risk-taking, which could be counterproductive to the EU's overall objective of promoting innovation and growth. Therefore, ICC members believe that it is vital that, if introduced, the BEFIT proposal to consolidate and allocate profits between EU members is optional for all EU members of a group.

- Moreover, ICC members would welcome further clarity on how transfer pricing would function between the individual EU entities and non-EU entities for these groups. Indeed, if TP is to continue to operate under the ALP at the separate entity level, then the profit allocation under BEFIT would not be a suitable starting point.

- ICC members would like also to underscore that any allocation formula must include consideration of intangible assets, which are increasingly key value drivers in many global businesses.

- ICC would like to emphasize that it is vital that the allocation of factors reflect the economic reality of a company's business model.

- The BEFIT rules should be designed aiming at preserving the value of incentives (e.g. for R&D, green transition and the development of IP) so as to maintain the competitiveness and attractiveness of the single market.

- BEFIT rules should carefully consider and cater for interaction with international tax developments, existing EU directives, double tax treaties and local corporate income tax rules, including specialty regimes such as e.g., tonnage tax for shipping and upstream tax rules for extractive activities.

- ICC would welcome further clarity on how BEFIT rules will co-exist with the OECD Pillar One rules, which reallocate taxable profits between member states on a formulary apportionment basis. While the idea of harmonizing the tax computation in the EU could represent a possible move towards simplification of the European tax system, trying to reallocate profit in the same step appears to be too ambitious and needs to be coordinated with OECD Pillar One rules.
  Moreover, it should be noted that under the BEFIT concept, an overall distribution of the consolidated group profit is probably planned according to certain key figures, whereas Amount A under Pillar 1 contains the distribution of a certain residual profit. The key figures used also seem to be outdated and not in line with the economy of tomorrow.

- Clarification would also be appreciated in relation to the co-existence of BEFIT and Pillar Two rules, on content as well as compliance.

- In terms of administrability, ICC members encourage the European Commission to design the BEFIT rules aiming to avoid increasing unnecessary compliance burdens. Pillar One and Pillar Two rules will already place heavy compliance burdens on large businesses falling under their scope. Under Pillar One, companies in scope will have to be required to prepare national tax returns, returns and tax filings for Pillar One, and Pillar Two also introduced new compliance obligations. Furthermore, it should not be forgotten that the transfer pricing rules continue to apply at least for business relationships with related parties in non-EU countries, so that the extensive transfer pricing documentation rules (e.g. master file, local file, documentation for exceptional business transaction) are still to be followed. If further returns were to be required under BEFIT, this would create an additional layer of administrative burden for both tax administrations and taxpayers.

- Similarly, BEFIT must be structured in a way to prevent adding new reporting requirements, such as requirements that go beyond the ones already foreseen under country-by-country reporting (CbCR). Taxpayers should not be required to prepare an additional set of financial statements drawn up in line with an accounting standard under which they ordinarily do not report. In addition, financial statements do not make the difference between costs, revenues and transactions within the EU and outside the EU.

- Additionally, it is currently not clear to ICC members which tax adjustments are to be made in order to derive the tax base starting from the financial statements. Before proposing the reallocation of profits, ICC members would recommend undertaking the needed efforts to first harmonize the presentation of the tax results at EU level.

- To achieve real efficiencies and savings for both Member States and taxpayers, ICC members consider that the administration of the BEFIT must be centralized and simplified, through a “one-stop-shop” approach (i.e. dealing primarily with one Member State’s tax administration) that streamlines administration in the EU as much as possible. Considering the need of a deep consensus needed to progress proposals to harmonise tax base in the

EU, a focus on the one-stop-shop could allow some of the stated objectives of the BEFIT project to be achieved faster.

- ICC members strongly encourage the European Commission to continue abstaining from tax rate harmonisation, which is key for preserving and developing investment and EU competitiveness. Harmonization of tax rates is also not recommended because in some Member States other taxes on profits (e.g., trade taxes) are levied in addition to corporate income tax, which could require imputation mechanisms. In addition, harmonization of corporate tax rates would involve a considerable encroachment on national tax sovereignty.

- Furthermore, given the existing EU Anti-Tax avoidance directives, BEPS actions and the two pillars proposals, ICC members doubt that an underlying anti-avoidance justification for the adoption of BEFIT would be a convincing argument in support for the need of BEFIT.

- Finally, if the proposal moves forward, it will be 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.