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.

ICC supports an efficient, well-functioning Single Market that ensures the European Union is an attractive place to invest and undertake business. A key part of that is ensuring the tax system is stable and simple to administer, while providing certainty.

In pursuit of a European tax consolidation, businesses prioritize simplicity and financial stability. This entails achieving authentic harmonization of the consolidated taxable base on a voluntary basis, eliminating transfer pricing complexities, and establishing a steadfast and conclusive allocation, key for those groups thsat have elected to be covered by the regime.

The guiding principles presented in the proposal for a Directive on "Business in Europe: Framework for Income Taxation" ("BEFIT Proposal"), emphasizing (i) direct tax simplification and (ii) reduction of compliance costs, are positively recognized for their potential benefits.

However, ICC members have reservations about certain aspects of the BEFIT proposal which diverge from these objectives. The current proposal appears ultimately to result in an increase in the compliance, complexity and administrative burden and does not provide the certainty expected, especially in the following aspects:

- In the transitional phase, the departure from the well-established Arms-Length Principle (ALP), which risks conflicts with existing bilateral tax treaties and creation of tax disputes with third countries. Moreover, the presence of an arbitrary allocation key to attribute profit (i.e., average of the taxable results in the three previous fiscal years) in the transitional phase rather than an economically justifiable **formulary apportionment** of profits to be applied, is concerning in terms of compliance burden, complexity and certainty.

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- Inconsistency with Pillar Two which is calculated jurisdictionally and under a different tax base. There are several **deviations from the Global Minimum Tax** rules, considering, for example, the definition of the **entities in scope** (consolidated entities for Pillar Two vs entities in which the UPE exercises a 75% "qualified control" for BEFIT Proposal), some **adjustments to the Financial Net Income or Loss** stand-alone (100% exclusion of dividends for Pillar Two vs 95% exclusion of dividends for BEFIT, absence of a specific set of rules to address prior period errors and changes in accounting principles for BEFIT purposes). Moreover, GloBE rules are based on an aggregation of tax bases by country, whereas BEFIT is based on an aggregation at EU level. In addition, BEFIT would impose a significantly increased compliance burden on taxpayers.
- The multiplication of tax returns (Pillar Two, BEFIT and separate national tax return) would absolutely not be in line with the compliance savings of about 65%, predicted by the accompanying documents of the Directive.
- The lack of clear coordination between the BEFIT proposal and the pre-existing EU secondary law framework (e.g., DEBRA).
- Moreover, concerns also arise in relation to the possibility for Member States **to make domestic adjustments** by generating significant changes to the allocated tax base.

The international tax system is in a state of flux. Pillar Two is in the process of being implemented and negotiations are on-going to complete Pillar One. As a result, ICC members would suggest that these initiatives are allowed time to bed down and the results fully evaluated before further consideration is given to BEFIT which would introduce an additional layer of complexity to the tax system as other negotiations are still ongoing and proposals implemented.

Businesses anticipate streamlined processes and financial assurance from an elective European tax consolidation, emphasizing the need for genuine harmonization, transfer pricing elimination, and a reliable allocation key. Therefore, the BEFIT project needs significant adjustments to garner support and it is hoped that the concerns voiced by businesses will be duly addressed, ensuring that the BEFIT Directive does not introduce an additional layer of complexity to the tax landscape.

We thus value the opportunity to provide comments on the BEFIT proposal that we hope will be useful and informative.

We also remain fully available for any clarification of the points raised below and to provide any further information that the European Commission may need.

General Comments

The main general concerns, according to ICC members, in relation to the BEFIT proposal relate to:

1. **Deviation from the Arms-Length Principle (ALP):** Opting for the allocation of taxable profit among member states based on historical tax payments during the transitional period, followed by arbitrary allocation factors, represents a departure from the established arms-length principle (ALP). This unilateral shift not only introduces a potential destabilization of the international tax system but also raises concerns about disputes and the risk of double taxation. Reconsidering this departure from the ALP is essential to maintain stability and prevent unintended consequences.

2. **Misalignment with Pillar Two:** The BEFIT proposal introduces unnecessary complexity, diverging from the principles outlined in Pillar Two. The requirement for taxpayers to convert their financial records to an alternative accounting base acceptable for BEFIT purposes adds an avoidable layer of intricacy.

3. **Administrative burden:** Furthermore, the BEFIT methodology seems to impose a significantly increased administrative burden on taxpayers compared to the current system. This misalignment with Pillar Two, coupled with the augmented administrative load, calls for a comprehensive reassessment to ensure practicality and coherence within existing frameworks. The calculation of the tax base for BEFIT and Pillar Two could generate, for the big EU multinationals in scope of BEFIT and Pillar Two, an increase in compliance and monitoring activities with potential negative impacts in terms of simplification and possible duplication of tax accounting and administrative processes both at consolidated and country level.

Notwithstanding the above, should the proposal be pursued, we submit for consideration the following recommendations in relation to the BEFIT proposal, taking a higher-level policy perspective at first:

1. **Making BEFIT optional at the taxpayers' instance:** Consideration should be given to making BEFIT optional at the instance of the taxpayer rather than imposing a "one-size-fits-all" mandatory approach.

2. **Limited Pilot Project**: Explore the possibility of initiating BEFIT as a limited pilot project, similar to the EU's ETACA (European Trust and Cooperation Approach). This preliminary phase would allow willing and interested groups to experiment with the potential BEFIT Directive.

   Moreover, a mandatory inclusion would impose an inappropriate “one-size-fits-all” regime. We would also recommend that the pilot should only commence after the Pillar Two rules and their domestic implementation have achieved stability and tax administrations and taxpayers have been given sufficient time to integrate the rules into their systems (along the lines of the next point about postponing BEFIT implementation).

3. **Temporarily Postpone BEFIT Implementation:** Consider a temporary suspension of the proposed BEFIT Directive until the comprehensive integration of changes mandated by OECD Pillar Two and the EU Pillar Two Directive is achieved across group systems, businesses and tax administrations. This step is crucial to assess carefully the potential complexities and administrative burdens associated with the BEFIT proposal and avoid unintended consequences, such as incongruities with the Pillar Two Directive leading to the risk of double taxation.

4. **Contextual Consideration for Green Transition:** Place the BEFIT proposal in the context of the ongoing green transition, recognizing the need for utilizing all available levers, including fiscal measures, to facilitate this urgent and essential change. To achieve this, bold measures are required within the framework of the rule, encompassing aspects like the taxable base and eligible tax incentives on the tax quota. It is crucial to clarify Member States' attributions, as outlined in Article 48.2 of the draft Directive, to avoid compromising the EU's competitiveness. Fiscal incentives, such as the Rollover relief for replacement assets (Article 18 of the Draft Directive), should be revisited to transform them from mere temporal deferrals into effective tax incentives, promoting a competitive green transition at the EU level.

5. **Addressing Uncertainties in Rule Configuration:** The configuration of the rules in the BEFIT proposal introduces a notable level of uncertainty, particularly concerning crucial points like the interaction of BEFIT rules with National Corporate Income Tax Fiscal Unity regulations and cross-border loss relief (please see final losses comments below). A comprehensive assessment of all relevant key elements of a proposal to

replace national corporate income tax systems is essential to mitigate uncertainties and ensure a smooth transition.

Specific Comments

There are some specific aspects of the proposed BEFIT Directive that, according to ICC members, would need to be re-examined and supported by a revised impact assessment:

1. Definition of BEFIT Group (Art. 2, 3, 5 and 6)

While the BEFIT scope appears to align with that of the Pillar Two Directive, both applicable to groups with annual combined revenues of at least Euro 750 million, BEFIT introduces a distinct criterion. Specifically, it requires "qualified control," defined as the direct or indirect holding of either 75% of ownership rights or 75% of rights entitling profit. This additional stipulation, establishing a 75% ownership threshold, poses challenges in achieving coherence and harmonization with the Pillar Two Directive.

Furthermore, we recommend allowing Member States flexibility in setting a different threshold for listed groups, such as 70%. Some Member States already adopt such variances for establishing Tax Unities in the context of national corporate income tax regulations.

Building upon the overarching concern expressed earlier, it is imperative to align the BEFIT structure with existing national systems that permit the consolidation of results. Emphasizing the concept of a sole taxpayer, the Tax/Fiscal Unity should represent the exclusive BEFIT taxpayer, encompassing entities within the consolidated Unity.

As highlighted in the "General Comments" section, ICC members believe it is vital that the BEFIT Directive is framed as an elective regime for every group rather than imposing a mandatory requirement for those meeting the specified threshold. The provision allowing Member States to offer an opt-in option exclusively for out-of-scope groups should be approached cautiously, as it may lead to fragmentation within the regulatory framework.

2. Dividends and other distributions (Art. 8 and 9)

Articles 8 and 9 suggest a 95% exclusion for dividend distribution or capital gains if the ownership interest meets a 10% threshold of profits, capital, reserves, or voting rights held for at least one year.

There are notable discrepancies between the referred 95% adjustment in dividends and capital gains and a 100% adjustment for fair value gains (Art.10), subject to similar conditions.

Moreover, such a system is not aligned with the applicable treatment of dividends and capital gains under Pillar Two, where the definition of Excluded Dividends and Capital Gains allows in the vast majority of cases, a 100 % relief.

Moreover, in case a jurisdiction of a BEFIT Entity provides for a different treatment, such as, a full participation exemption rule in Country X (subject to conditions), the tax burden of the BEFIT Entity will be higher than under the tax treatment of the local jurisdiction. In case a jurisdiction wants to keep the existing different treatment at local level and/or wants to introduce exceptions from the BEFIT rules, the Directive's proposal states that this can be done, but this could imply a lack of harmonization and a disparity among EU States whilst one of the main manifested objectives of the BEFIT proposal is to reach a harmonized tax treatment across the EU Member States.

In the case illustrated above, there could be also the implication of additional administrative and compliance activity of the taxpayer when calculating its tax burden amount at the level of the domestic tax declaration.

It is imperative to maintain competitiveness in the economic landscape. The mandatory enforcement of a 5% double taxation could disincentivize investments, as imposing such a measure could impact economic growth within the EU. A 100% exemption should be mandatory.

3. Permanent establishment results (Art. 12)

In accordance with Article 12, any profit or loss attributable to a permanent establishment of a BEFIT group member is to be excluded. Certain Member States offer taxpayers a choice between an exemption regime or adopting a tax imputation method, complemented by tax relief for foreign tax payments. ICC members would like to underscore the importance of respecting such flexibility. Conversely, the exclusion of the imputation method might conflict with numerous tax treaties established between countries, potentially undermining established international agreements.

4. Qualification of fixed assets when entering a BEFIT group (Art. 35 (b))

ICC members consider it highly advisable to introduce grandfathering rules and provide additional guidance concerning deferred tax assets associated with fixed assets, seeking clarification on the applicability of Article 35(b) in this specific context. Additionally, with regard to portfolio impairments, they believe that it would be necessary to include explicit provisions addressing the deductibility of the difference between the net value and tax value of financial assets upon their entry into the BEFIT group.

5. Provisions for bad debts

ICC members believe that it is necessary to include exceptions for bad debts between associated entities (within or outside the BEFIT group) by providing for their fiscal deductibility when there are extraordinary circumstances of insolvency objectively verifiable.

6. Unrelieved pre-BEFIT losses (Art.38 and Art. 48(1)(a))

We strongly encourage the European Commission to reconsider the proposed rules for unrelieved pre-BEFIT losses. Multinationals (MNEs) in their initial or early stages of growth may have incurred significant pre-BEFIT losses in a Member State due to substantial investments in earlier years. Those investments will serve as a pivotal catalyst for revenue growth and the expansion into new markets during later years.

The MNE group may find itself taxed in excess of economic profits as a result of pre-BEFIT losses remaining in the residence Member State of the group member that has incurred those losses while the BEFIT tax base is shared between all Member States where the MNE group is present. The Member State in which the losses were incurred would not be allocated any BEFIT tax base if the relevant BEFIT group member's average taxable results in the previous three fiscal years are negative. Hence, there may not be any allocated BEFIT tax base to set these losses off against. Even if that Member State eventually receives a portion of the BEFIT tax base (whether under the transitional allocation rule or a formulary apportionment), the timeline for utilizing pre-BEFIT losses becomes significantly protracted. In the meantime, other Member States may be allocated and tax a share of the BEFIT tax base. This allocation would not be reduced by any pre-BEFIT losses, despite the fact that those losses - and the investments that gave rise to them - were instrumental in generating the tax base that these Member States are now able to tax.

The result of all of this is that the potential for fully or significantly offsetting pre-BEFIT losses is severely restricted and the likelihood of over-taxation is high. Such an outcome undermines the fundamental objective of BEFIT which is to foster growth and investment in the EU and enhance the EU's competitiveness. We strongly recommend that cross-border relief be made available for pre-BEFIT losses in the same way as losses incurred once within the rules.

7. Recognition of final losses realized by activity outside the European Union

The treatment of final losses realized by subsidiaries or PEs of the “BEFIT Group” located outside the EU is not explicitly regulated by the proposed BEFIT Directive leading to high uncertainty over their consideration. These final losses must be deductible in order to get a fair, coordinated and balanced taxation based on real economic results, taking into consideration also CJEU final losses and associated jurisprudence.

8. Allocation formulas

Any allocation formula (transitional or final) must include consideration of intangible assets, which are increasingly key value drivers in many global businesses. Failure to recognize intangible assets in the allocation formula will decrease the attractiveness of the EU when compared to non-EU locations as a destination for investment in research, development and manufacturing.

Moreover, allocation factors should not result in an allocation of profit within the EU that does not reflect the economic reality of a company’s business model. This is particularly important when it comes to investment in R&D and risk-taking. If such investments are not properly rewarded in accordance with the arm's length principle, the result could be counterproductive to the EU's overall objective of promoting innovation and growth.

Furthermore, it should be considered that due to corporate law imposing fiduciary duties on Directors, and 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.

ICC also recommends that 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. It is not clear that this is the case in the proposal.

BEFIT should also be designed in such a way as to preserve the value of incentives (e.g., for R&D, green transition, etc.) so as to maintain the competitiveness and attractiveness of the EU.

ICC members agree on the Commission's decision to abstain from tax rate harmonization. This is key for maintaining and developing investment and employment in the eligible Member States and thus for the competitiveness of the EU as compared to other jurisdictions.

9. Accounting base

BEFIT will impose a requirement on taxpayers to adopt a GAAP accepted under EU law. As a result, many taxpayers will be required to translate their books to an acceptable GAAP, imposing an additional administrative burden. It is not clear why this is required, as EU Member States have accepted non-EU GAAP (e.g, US GAAP) as the starting point for Pillar Two.

10. Coexistence with Pillar Two

Presently, there exists uncertainty regarding the coexistence of BEFIT with Pillar Two and the sequence of their application. The BEFIT Directive, stemming from the consensus established under the "BEPS 2.0" international tax reform encompassing Pillar One and Pillar Two, significantly diverges from this initiative. It introduces a complex and selective tax consolidation system, necessitating the duplication of accounting processing systems for entities subject to both Pillar Two and BEFIT.

Notably, the BEFIT Directive does not address the implications of the new consolidated tax base (BEFIT tax base) on the effective tax rate calculated under the Global Minimum Tax ("GloBE") Directive. Consequently, the tax advantages resulting from offsetting profits and losses may be partially nullified by the application of the minimum tax under Pillar Two (the proposed transposition deadline is set for January 1, 2028, with implementation scheduled to commence on July 1, 2028).

While specific elements of the BEFIT Directive, such as cross-border loss relief, hold individual appeal, ICC members firmly believe that the timing of BEFIT's introduction, amidst the ongoing implementation of Pillar Two, is highly unwelcome. The business community is currently fully engaged in deciphering the implications and requirements of Pillar Two, a complex and resource-intensive endeavor that is expected to command considerable attention for an extended period. With the impending arrival of Pillar One implementation, we argue that initiating something as extensive and impactful as BEFIT at this juncture is not prudent. Such a move is likely to introduce additional layers of complexity and uncertainty, particularly in its interaction with Pillar Two, exacerbating demands on already stretched resources. We recommend deferring consideration of

BEFIT until after the successful establishment of Pillar Two, and potentially even Pillar One, to ensure a smoother and more manageable transition.

While the primary categories of adjustments under Pillar Two rules may appear similar, the adjustments for determining the BEFIT tax base, in reality, exhibit differences. Furthermore, the BEFIT Directive allows Member States the flexibility to increase or decrease their allocated portion of the BEFIT tax base before applying their domestic tax rate.

The BEFIT Directive introduces a "transitional" key for allocating the BEFIT tax base, relying on the proportion of the average taxable results of the last three years of the relevant in-scope entities. However, it lacks clarity on the final rule, which is expected to be submitted by the Commission to the Council before the end of the third year of application. This issue of the allocation key has previously contributed to the setbacks of European consolidated tax base projects.

Notably, the BEFIT Directive does not relieve intra-group transactions from transfer pricing obligations. Instead, it introduces (i) a risk assessment approach for intra-BEFIT transactions and (ii) a simplified transfer pricing approach for routine distribution activities with associated entities outside of BEFIT. This simplified transfer pricing approach, though somewhat similar, deviates from the Pillar One Amount B method, introducing an additional layer of methodologies to navigate.

Pillar Two is calculated on a jurisdictional basis and uses a different accounting base. Through aggregation BEFIT will allow losses in one jurisdiction to be offset against profits in another. However, this would appear to be “undone” by Pillar Two which would be calculated on a jurisdictional basis.

At the level of the detailed calculations, it must also be noted that different book-to-tax adjustments from the financial statements are to be made for BEFIT purposes compared with under the EU’s Pillar Two Directive. Thus, additional computations will need to be undertaken for BEFIT, over and above those performed for Pillar Two purposes, which will add extra complexity, uncertainty and resource requirement for the business.

Moreover, the EU Pillar Two Directive states (Article 16.4) that all transactions between constituent entities must be at arm’s length, whereas BEFIT aims at formulary apportionment in due course (Article 45.9). It will therefore need to be established how BEFIT interacts with the Pillar Two requirements and at what level (national or EU), e.g., how the BEFIT entity would have to be treated at the EU level for Pillar Two purposes.

The same consideration is also applicable to the interaction of BEFIT with the Transfer Pricing Directive. It appears that a group is defined differently in BEFIT from the TP Directive (where an associated enterprise has a 25% ownership threshold), which may add further complications of interpretation.

11. Permanent apportionment factors

It is imperative to clearly define in advance the proposed permanent apportionment factors that will be in effect after the conclusion of the transitional period. This preemptive clarification is essential for member states to thoroughly assess and for stakeholders to provide informed comments within the broader framework of the entire proposal.

12. Administrative burden

The BEFIT methodology appears to impose an increased administrative burden on taxpayers, far in excess of that of today. Under BEFIT, a taxpayer will need to complete the following steps to arrive at its taxable profit:

i. Ensure its books are prepared under an EU accepted GAAP
ii. Apply, on an entity basis, the prescribed adjustments in the BEFIT directive (e.g, tax depreciation)
iii. Aggregate the results of all EU taxable entities
iv. Determine allocation keys. During the Transitional period this will require analyzing historical tax results by entity and averaging.
v. Apply the allocation keys to determine profit allocated to each Member State
vi. Apply the specific tax adjustments prescribed by each member state.

In applying the transitional allocation methodology, ICC members recommend that taxpayers should not be required to recalculate BEFIT liabilities or refile the BEFIT return as a result of an adjustment (e.g, on audit) in a prior period forming part of the transitional allocation key.

In the current text of the proposal, it is proposed that a group files a BEFIT information return as well as tax returns in each member state. However, this appears to create an additional layer of administrative burden.

13. BEFIT Information return - timing

Doubts also arise regarding the four-month deadline for submitting the BEFIT information - return shall be submitted to the filing authority no later than four months after the end of the fiscal year. This proposed deadline is not feasible. A four-month period will significantly lower the average period for submitting the domestic tax return and companies will not have prepared accounts and have had them audited within that deadline. A more realistic timeframe would be twelve months after the period ends.

As BEFIT information result would comprise also the BEFIT tax base with relevant adjustments and further reviews in terms of financial statements, it could be supposed to see an increase, instead of simplification, of the administrative and procedural efforts.

14. Alignment of fiscal year

Sufficient time must be allowed to allow acquisitive companies to align the fiscal years of companies acquired. According to ICC members, aligning the fiscal year to comply with BEFIT obligations must not be viewed as abusive.

In the proposal text, it is stated that all BEFIT group members shall have the same fiscal year, which shall be a period of 12 months. In the year in which a BEFIT group member joins a BEFIT group, it shall bring its fiscal year in line with the fiscal year of the BEFIT group.

However, it is not clear what are the implications for the company/ies that are considered to be part of the BEFIT Group at the time of the implementation of the regulation, but that have a different fiscal year compared to the one of the majority of the other members. More specifically, in the said case, it is unclear whether there will be the imposition for such company/ies to modify the fiscal year accordingly.

15. Improving tax certainty

The BEFIT proposal introduces the concept of a "BEFIT Team," comprising representatives from relevant tax administrations in Member States with BEFIT group operations. This team is tasked with examining and striving to achieve consensus on the completeness and accuracy of the BEFIT Information Return. Although the BEFIT team concept aims to offer early certainty and effective dispute resolution through collaborative consultation and coordination among tax authorities, it does not propose any meaningful assurance or streamlined processes for early certainty, interactions with the taxpayer (as part of the review of the BEFIT Information Return or any subsequent audits) or resolving differences between tax authorities on the BEFIT tax base. We encourage the European Commission to give further thought to strengthening the role of the BEFIT tax team as an effective dispute prevention and resolution mechanism. Additionally, we suggest the implementation of additional centralized mechanisms to address situations where the

BEFIT team is unable to reach a decision or resolve disagreements, as well as to handle taxpayer appeals.

16. Adjustment of the BEFIT tax base

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

In Article 51, the proposal outlines a 3-level risk assessment framework, suggesting that transactions deemed high-risk may be appropriate for audit and transactions deemed medium-risk may be appropriate for further inquiry. The framework is copied below.

Risk zone	**Profit performance of the tested party relative to the EU profit markers**
low	above 60^{th} percentile of the results of the public benchmark
medium	below 60^{th} percentile but above the 40^{th} percentile of the results of the public benchmark
high	below the 40^{th} percentile of the results of the public benchmark

We note the following:

i. It is questionable whether the above risk assessment is completely aligned with the following parts of the OECD TP Guidelines:
   a) **A.7.2. 3.60.** If the relevant condition of the controlled transaction (e.g., price or margin) is within the arm's length range, no adjustment should be made.
   b) **3.62.** In determining this point, where the range comprises results of relatively equal and high reliability, it could be argued that any point in the range satisfies the arm's length principle.

ii. As the parameter of the risk assessment will be based on Union Public Benchmarks (thus to be considered with high reliability as per Par. 3.62), it could be arguable assigning a medium risk to profit performances above the median: in the table, ranges within the 50th and 60th percentile are considered having a medium risk, whilst it would be probably more coherent assigning a low risk (or “no risk” considering Par. 3.62 of OECD TP Guidelines mentioned above).

iii. ICC members would welcome a specific confirmation that since APAs or BAPAs confirm the arm's length nature of transactions covered therein, those transactions would be considered low risk and the BEFIT 3 risk zones should not be taken into consideration, regardless of whether the margin agreed falls within the entire Interquartile range (25th – 75th percentile) or within a different range not consistent with the BEFIT 3 risk zones. Differently, there would be a decrease in the level of certainty obtained with the combined effort, both of taxpayer and relevant tax Authority, in assessing the cross-border transaction and reaching an agreement about the arm’s length margin.

17. Traffic light system for low-risk activities of distributors and contract manufacturers

ICC members believe that further clarity is needed as to how the proposed traffic light system will align with Amount B of Pillar One. This is particularly needed to the extent that, if same activities are in scope, instability and disputes will arise if the benchmarks are different.

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