European Economic and Social Committee

OPINION

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Business in Europe: Framework for Income Taxation (BEFIT)

Proposal for a Council directive on Business in Europe: Framework for Income Taxation (BEFIT)
(COM(2023) 532 final – 2023/0321 (CNS))

Proposal for a Council directive on transfer pricing
(COM(2023) 529 final – 2023/0322 (CNS))

ECO/629

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Referrals	Council of the European Union, 14/11/2023 and 30/11/2023
Legal basis	Article 115 of the Treaty on the Functioning of the European Union
Section responsible	Economic and Monetary Union and Economic and Social Cohesion
Adopted in section	10/4/2024
Adopted at plenary session	24/4/2024
Plenary session No	587
Outcome of vote (for/against/abstentions)	179/0/4

1. Conclusions and recommendations

1.1 The EESC praises the Commission's continuous efforts to develop a common corporate tax framework to support the consolidation of the internal market.

1.2 The EESC notes that the Commission's CCCTB (2011) and CCTB (2016) proposals, both aimed at developing a common tax base across the EU, did not reach a political consensus within the Council. This has been taken into consideration in order to put forward the BEFIT legislative proposal both from a political and technical perspective.

1.3 The EESC supports the Commission's decision to propose BEFIT through an EU directive, as the current variety of different national rules results in fragmentation and discrepancies, hindering cross-border activities on the internal market due to the high costs that companies incur to comply with multiple legal frameworks.

1.4 The EESC notes that, pursuant to Article 48(2) of the BEFIT proposal, Member States will be entitled to add tax base increases, tax deductions or tax incentives to their allocated parts. While the EESC acknowledges the value of allowing Member States room for manoeuvre, such flexibility could come at odds with the Commission objective of reducing the compliance costs weighing on companies.

1.5 The EESC concurs with the Commission that the agreement on Pillar Two could contribute towards achieving a shared EU legal framework on corporate taxation. The EESC believes that, in order to actually simplify and reduce costs, BEFIT should be aligned with the OECD's Pillar Two rules.

1.6 The EESC observes that although BEFIT adjustments to financial accounts are more limited than Pillar Two adjustments, there are no special rules or incentives for innovation activities or specific industries. For example, it remains unclear if innovation schemes and patent boxes offered by some Member States will be kept.

1.7 The EESC believes that the possibility to offset cross-border losses in a BEFIT group will require clarifications on both time restrictions for carryforwards/carrybacks and co-existence with Pillar Two. Through aggregation, BEFIT will allow cross-border losses in one Member State to be offset against profits in another Member State, but this could come at odds with a top-up tax under Pillar Two to ensure an effective 15% minimum tax rate.

1.8 The EESC recommends that any data processing related to the BEFIT framework be carried out in accordance with the GDPR[1] principle of "data minimisation", limiting the collection of personal information to what is directly relevant and necessary to accomplish the specific purposes of the BEFIT proposal, and only retaining the data for the minimum period necessary to fulfil such purposes.

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

1.9 The EESC agrees with the Commission about the need to clarify several concepts and issues related to transfer pricing legislation, as an attempt to make the legal framework more certain and predictable. This could reduce compliance costs for SMEs in their everyday activities and potentially decrease procedural and litigation costs too.

1.10 It is worth noting that some of the objectives of the Commission proposal could have perhaps also been pursued by improving the Directive on tax dispute resolution mechanisms, and that it remains to be seen how other major third countries will respond to the new EU approach to transfer pricing. The EESC also believes that it would be helpful to re-establish the Joint Transfer Pricing Forum in order to discuss how to better handle transfer pricing disputes within the EU.

1.11 The EESC underlines the importance of carefully assessing compliance costs and administrative burdens on companies interested in the BEFIT proposal, so that they understand the actual benefits of the new framework for businesses across Europe. The Commission's planned activities to monitor the effectiveness and efficiency of BEFIT appears to be well-targeted in this respect (implementation and initial BEFIT running costs, number of groups of companies in the mandatory scope of the proposal, number of companies that voluntarily opt in, evolution of compliance costs and number of double taxation disputes).

1.12 The EESC notes that the Commission considers BEFIT "also relevant from an own resource perspective, as set out in the 2021 Communication on the next generation of own resources for the Union budget". However, the long and uncertain legislative process that BEFIT faces makes it difficult to estimate both the amount of resources available for the own resource chapters, and when such additional resources will be available.

1.13 To ensure appropriate coordination between BEFIT and the specific national tax rules applicable in some Member States to social economy entities, such as cooperatives and social enterprises, the EESC calls for BEFIT to acknowledge the existence of such dedicated fiscal rules.

2. Commission proposal and context

2.1 The Commission's proposal *Business in Europe: Framework for Income Taxation (BEFIT)* deals with a new single set of rules to determine the tax base of groups of companies, and is aimed at reducing tax compliance costs for large businesses operating across borders, thereby making it easier for national authorities to determine which taxes are due.

2.2 The Commission's proposal replaces the two previous proposals, the common corporate tax base (CCTB) and the common consolidated corporate tax base (CCCTB) of 2011 and 2016 respectively, which have been withdrawn due to the lack of political consensus. The new framework builds on the previous experiences from the CCCTB, the OECD/G20 international tax agreement concerning the global minimum level of taxation, and on the Pillar Two Directive adopted at the end of 2022.

2.3 As for the scope of application, the new rules will be mandatory for groups operating in the EU with an annual combined revenue of at least EUR 750 million, where the ultimate parent entity holds at least 75% of the ownership rights or of the rights giving entitlement to profit. A BEFIT group member shall meet these thresholds without interruption, throughout the fiscal year. Other smaller groups – for example groups of SMEs operating across borders – may opt in, provided they prepare consolidated financial statements.

2.4 More specifically, the Commission's proposal will include common rules to compute the tax base at entity level. All the companies that are members of the same group will determine their tax bases according to a common set of tax adjustments to their financial accounting statements.

2.5 Aggregation of the tax base at EU group level is crucial for the functioning of the new framework. All group members' tax bases will be aggregated within one single tax base. This allows for cross-border loss relief, since losses will automatically be set off against profits across borders. Such a relief is only rarely possible at the moment, and could result in the over-taxation of the group profits, discouraging businesses from operating across borders in the internal market.

2.6 The aggregated tax base will then be allocated based on a transitional allocation rule, which uses each BEFIT group member's percentage of the aggregated tax base calculated as the average of the taxable results in the previous three fiscal years. The transitional allocation rule will facilitate the establishment of a permanent allocation method that can be based on a formulary apportionment using substantive factors.

2.7 More in detail, Chapter II includes the rules for the determination of the preliminary tax result of each BEFIT group member, by applying the rules set forth by Section 2 concerning "Adjustments to the financial accounting net income or loss", Section 3 regarding the "depreciation rules", and Section 4 pertaining to "timing and quantification".

2.8 From an organisational standpoint, pursuant to the provisions laid down in Chapter V, a hybrid one-stop shop will allow one group member to fill out the group's information returns with the tax administration of one Member State. In other words, the "filing entity", which is in principle the ultimate parent entity, will file one information return for the whole BEFIT group (the "BEFIT Information Return") with its own tax administration (the "filing authority"). The filing authority will then share all the relevant information with the other Member States where the group operates.

2.9 Tax audits and dispute settlements will remain at the national level. In some cases, audits may need to be carried out jointly under the existing legislative framework. For each BEFIT group there will also be a "BEFIT team", which will bring together representatives of each relevant tax administration from the Member States where the group operates to share information and coordinate action.

2.10 According to the Commission proposal: "To ensure that the rules of the common framework are implemented and enforced correctly, Member States should lay down rules on penalties

applicable to infringements of national provisions adopted pursuant to this Directive. Such penalties should be effective, proportionate and dissuasive."

2.11 The Commission's proposal also features targeted rules aimed at harmonising transfer pricing rules within the EU, ensuring a common approach to address the most recurrent critical issues regarding transfer pricing.

2.12 The new transfer pricing rules aim to introduce a common framework in the EU for applying the arm's-length principle. This objective is pursued by: i) incorporating the arm's length principle into Union law; ii) harmonising key transfer pricing rules; iii) clarifying the role and status of the OECD Transfer Pricing Guidelines; and iv) creating the possibility to establish – within the EU – common binding rules on specific transfer pricing subjects within the framework of the OECD Transfer Pricing Guidelines.

2.13 The transfer pricing directive proposal affirms key elements of the analysis under OECD Transfer Pricing Guidelines (delineation of actual transactions undertaken, comparability analysis, recognised OECD transfer pricing methods) and clarifies how the mechanisms to perform adjustments should be applied within the EU to prevent double taxation.

3. General and specific comments

3.1 The EESC praises the Commission's continuous efforts to develop a common corporate tax framework in support of the internal market, an idea that has been part of the EU's history since first appearing in policy documents of the European Economic Community as early as the 1960s. This ambitious objective is once again pursued with the BEFIT proposal.

3.2 The EESC notes that the Commission's latest attempts to develop a common tax base across the EU (in the 2011 and 2016 CCCTB and CCTB proposals) did not reach a political consensus within the Council. The previous experience has been taken into consideration to put forward the present legislative proposal both from a political and technical perspective. The resulting text also takes into account the most recent tax developments in terms of globalisation and digitalisation.

3.3 The EESC appreciates that the Commission carried out a public consultation before publishing the final BEFIT text. Overall, the consultations received 123 contributions from businesses associations, tax advisers and lawyers. Respondents also included citizens and both larger and smaller businesses, as well as academics and research institutions, non-governmental organisations and trade unions.

3.4 The EESC agrees with the Commission that the BEFIT proposal is consistent with other recent legislative initiatives carried out in the field of taxation, for example the DAC framework. The administration system of BEFIT pursued by the Commission might indeed substantially benefit from the existing and growing cooperation among national tax authorities.

3.5 The EESC supports the Commission's decision to propose an EU directive on BEFIT, as the current variety of different national rules results in fragmentation and discrepancies, hindering

cross-border activities due to the high costs that companies incur to comply with multiple different legal frameworks. The disparities between Member States can also bring about mismatches, possibly leading to either lack of taxation or multiple taxation of the same profit. An EU legislative initiative is therefore better suited and more efficient than a plurality of national interventions (subsidiarity principle).

3.6 The EESC concurs with the Commission that the agreement on Pillar Two of the OECD/G20 Inclusive Framework endorsed by Member States[2] could contribute towards achieving a shared legal framework on corporate taxation in the internal market. In order to actually simplify and reduce costs, BEFIT should be aligned with the OECD's Pillar Two rules. However, BEFIT requires taxpayers to draw up financial accounts under an accounting standard that is in line with EU law[3] (e.g. a national GAAP or IFRS).

3.7 The EESC notes that, with BEFIT, three sets of rules will be running in parallel: the domestic national revenue determination framework, the Pillar Two system and the BEFIT system. Such a disjointed framework could become burdensome for small Member States with very limited administrative capacity, especially when the headquarters of a large group is located in a small Member State.

3.8 The EESC observes that, although BEFIT adjustments to financial accounts are more limited than the Pillar Two adjustments, there are no special rules or incentives for innovation activities or specific industries. As an example, it remains unclear if innovation schemes and patent boxes offered by some Member States will be kept, potentially reducing the EU's competitive edge.

3.9 The EESC notes that, pursuant to Article 48(2) of the BEFIT proposal[4], Member States will be entitled to add tax base increases, tax deductions or tax incentives to their allocated parts, potentially leading to differentiated taxation of corporate profits within the various Member States. While the EESC acknowledges the value of allowing Member States a certain room for manoeuvre, such extended flexibility could undermine the simplification objectives pursued by the BEFIT proposal.

3.10 The EESC believes that the possibility to offset cross-border losses in a BEFIT group will require clarification on: i) time restrictions for carryforwards/carrybacks; ii) co-existence with Pillar Two. Through aggregation, BEFIT will allow cross-border losses in one Member State to be offset against profits in another Member State, but this could come at odds with a top-up tax under Pillar Two to ensure an effective 15% minimum tax rate.

3.11 The EESC notes that personal data, such as information about ownership interests in a BEFIT group, might be processed by tax administrations for the purpose of applying Chapter IV of the

2 The Member States unanimously adopted the *Pillar Two Directive on ensuring a global minimum level of taxation for multinational enterprise groups and domestic groups in the EU* in December 2021.

3 The Commission should pay particular attention to the effects of BEFIT on corporations consolidating their tax base using a GAAP applicable in a non-EU country.

4 Article 48(2) of the proposal states: 'In addition to the adjustments listed in paragraph 1, a Member State may allow for increasing or decreasing, through additional items, the allocated part of BEFIT group members that are resident for tax purposes or situated in the form of a permanent establishment in that Member State.'

proposal, and for the purpose of examining and reaching consensus on the content of the BEFIT information return and processing and assessing individual tax returns pursuant to Chapter V. The EESC recommends that any data processing related to the BEFIT framework be carried out in accordance with the principle of "data minimisation" set forth by the GDPR, limiting the collection of personal information to what is directly relevant and necessary to accomplish the specific purposes of the BEFIT proposal, and only retaining the data for the minimum period necessary to fulfil such purposes.

3.12 The EESC agrees with the Commission about the need to clarify several concepts and issues related to transfer pricing legislation, making the legal framework more certain and predictable. This could reduce compliance costs for SMEs in their everyday activities and potentially also decrease the procedural and litigation costs that a significant number of enterprises incur annually. In this respect, it is worth noting that some of the objectives of the Commission proposal could have perhaps also been pursued by improving the Directive on tax dispute resolution mechanisms, and that it remains to be seen how other major third-country jurisdictions will relate to the new EU approach to transfer pricing rules.

3.13 In any case, the EESC believes that it would be helpful to re-establish the Joint Transfer Pricing Forum in order to facilitate an open discussion on the need to better handle transfer pricing disputes in the EU.

3.14 The EESC shares the Commission's view that an evaluation of the directive's implementation five years from its entry into force could be useful and help give Member States the time and necessary assistance to properly implement the new framework and modify the legislative framework if needed. In this respect, it is crucial that the Member States cooperate and share information on the future functioning of the system.

3.15 The monitoring activity planned by the Commission regarding the effectiveness and efficiency of BEFIT also seems useful and will concern the implementation and initial BEFIT running costs, the number of groups of companies in the mandatory scope of the proposal, and the number of companies that voluntarily opt in, as well as the evolution of the compliance costs and the number of double taxation disputes.

3.16 The EESC underlines the importance of carefully assessing compliance costs and administrative burdens on all companies involved, in order to understand the actual benefits of the new framework for businesses across Europe.

3.17 The ESSC notes that the Commission considers BEFIT "also relevant from an own resource perspective, as set out in the 2021 Communication on the next generation of own resources for the Union budget". However, the long and uncertain legislative process the BEFIT proposal faces actually makes it difficult to estimate the amount of resources available to deploy to the own resource chapters, and when such additional resources will be available.

3.18 To ensure appropriate coordination between BEFIT and the specific national tax rules applicable to social economy entities, such as cooperatives and social enterprises, in some Member States, the EESC calls for BEFIT to acknowledge such dedicated fiscal rules. One

example in this respect is the deductibility of profits deposited by cooperatives and cooperative groups as reserves that cannot be distributed to members while the company is operating or even after it is dissolved. Another case in point is the deductibility of benefits or dividends distributed by cooperatives to their members in proportion to their mutuality relationship. Such an approach would be in line with the Commission Communication of 9 December 2021 (Social Economy Action Plan) and the Council Recommendation of 27 November 2023, no 1344 (Council Recommendation on Developing Social Economy Framework Conditions).

Brussels, 24 April 2024.

The President of the European Economic and Social Committee
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