November 22, 2023

European Commission
Taxation and Customs Union DG
B-1049 Brussels
Belgium

Re: Comment Letter on the Business in Europe: Framework for Income Taxation

The National Foreign Trade Council (the "NFTC") is pleased to provide written comments on the European Commission's (the "EC") impact assessment for the Business in Europe: Framework for Income Taxation ("BEFIT") published on September 12, 2023 (the "Consultation Document").

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members value the work of the European Commission to foster a fair and sustainable business environment and tax system as set out in its Communication on Business Taxation for the 21st Century. The NFTC welcomes the opportunity to provide written comments on the Consultation Document.

The stated goals of the EC to streamline tax compliance across the EU while reducing compliance costs is admirable. However, BEFIT fails to achieve these goals and furthermore is inconsistent with the "arm's-length principle" ("ALP"). The most recent iteration of the Consultation Document is still fundamentally flawed; the proposed unilateral departure from the ALP risks further destabilizing the international tax system, leading to disputes and double taxation. As stated in our prior consultation comments dated January 26, 2023, NFTC strongly urges the EC not to implement BEFIT.

As explained in more detail below, fundamental changes to the EU tax system of this magnitude should not be considered prior to assessing the broader context of global tax and economic development. The challenges and uncertainty surrounding the implementation of the Global Minimum Tax Directive, as well as the continued work for the adoption of Pillar One (with the possibility of trade countermeasures against EU members imposing digital services taxes), may hinder the success of the EU marketplace. Additionally, it is unclear in many respects how the BEFIT rules would interact with the Global Minimum Tax and the potential fallout of adding yet another layer of complexity to the EU's extensive anti-tax avoidance rules, which already mitigate anti-avoidance concerns.

General Comments

NFTC welcomes the opportunity to comment regarding the proposed BEFIT initiative. We reaffirm our support for efforts to create an efficient, well-functioning Single Market, including administrative simplification, greater incentives for innovative activity, and better dispute resolution, which are all essential to attracting investment and driving economic recovery.

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We request that, prior to moving forward, the proposal should include clarification on how BEFIT will interact with other enacted and proposed EU directives including the Global Minimum Tax Directive, the commitment therein to find an EU approach to implementing the OECD's Pillar One, the ATAD 3 Directive (2021/0434(CNS) commonly referred to as "Unshell"), the Debt-Equity Bias Reducing Allowance ("DEBRA"), and the proposed Transfer Pricing Directive, etc. As currently outlined in the Consultation Document, BEFIT is too complex and too onerous for both taxpayers and tax administrators and may discourage business investments and job creation. For instance, BEFIT would add unnecessary complexity by requiring taxpayers to translate their books to another accounting base deemed acceptable for BEFIT purposes. Furthermore, the BEFIT methodology appears to impose a significantly increased administrative burden on taxpayers operating in the EU. Finally, the BEFIT proposal leaves open the possibility of several potential methodologies for formulary apportionment, which introduces considerable complexity and uncertainty for taxpayers, particularly at a time when taxpayers are working to comply with and understand the interactivity of global taxing regimes.

Specific Comments

Accounting base

The Consultation Document imposes a requirement on taxpayers to adopt a GAAP accepted under EU law. U.S. taxpayers generally use U.S. GAAP to prepare their consolidated financial statements. As a result, many U.S. MNCs would be required to translate their books to an acceptable GAAP, imposing an additional administrative burden in jurisdictions where a local GAAP is not already required to prepare tax accounts or otherwise satisfy local requirements. While many companies subject to these rules will have statutory financial statements in each jurisdiction based on the statutory accounting rules in that particular EU jurisdiction, these companies will not have conformed all EU statutory financials to a single EU accounting standard, which will be onerous and unnecessarily complex. NFTC requests that taxpayers may elect to use the accounting standard that best positions the taxpayer and relevant tax administrations to achieve a reliable shared understanding of the data.

Allocation

In designing an allocation formula, it is imperative that the resulting allocation of profit within the EU is reflective of the economic reality of a company's business model. This includes consideration of intangible assets, which are increasingly the key value drivers in many global businesses. Local incentives (e.g., for R&D, green transition, etc.) must be considered in the design. Failure to include intangible assets and the value of incentives will decrease the competitiveness and attractiveness of the EU, especially as a destination for investment in research and development and manufacturing - the opposite outcome of the intended effect.

Permanent Apportionment

The Consultation Document sets forth "permanent apportionment factors." These factors will apply after the transitional period ends; however, to reduce the administrative burden, the EC needs to clearly set out these factors well in advance of the transitional period. This allows the factors to be considered by member states and commented on by stakeholders in the context of the proposal as a whole.

Administrative burden

The Consultation Document outlines a BEFIT methodology that appears to impose an increased administrative burden far in excess of the burden borne by taxpayers operating in the EU today. Under

BEFIT, a taxpayer will need to complete a six-step process to arrive at its taxable profit.[1] 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., on audit) in a prior period forming part of the transitional allocation key. The Consultation Document proposes that an MNE group files a BEFIT information return as well as tax returns in each member state. Requiring both an information return, and a tax return appears to create an additional layer of administrative burden.

The timing for filing information returns needs to be extended. The proposed deadline for filing the BEFIT information return is four months after the period ends, which is not feasible. MNEs will not have prepared accounts and have had them audited within that deadline. NFTC suggests that a more realistic timeframe would be twelve months after the period ends.

Furthermore, the Consultation Document suggests a de minimis threshold of the lower of €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, which again increases the burden on taxpayers.

Tax Certainty

Tax certainty, dispute prevention, and dispute resolution are key for taxpayers. While we acknowledge that the Consultation Document provides certain safe harbors, these are insufficient. Transfer Pricing and tax simplifications, along with the transition period and traffic light approach for certain low-risk activities, do not provide the needed clarity and commitment to ensure effective relief from double taxation.

Tax assessments and tax audits

The BEFIT proposal introduces the concept of a "BEFIT Team" that would be composed of representatives of each relevant tax administration from the Member States where the BEFIT group has operations. This BEFIT team would examine and reach a consensus on the completeness and accuracy of the BEFIT Information Return. This concept is targeted at facilitating information exchange and coordination between local tax administrations, as well as providing early certainty and resolving disputes on specific topics. While this may streamline interactions for Tax Administrators, taxpayers do not appear to receive assurance, certainties or other streamlined interactions (such as audit timelines) under this new concept. The creation of a BEFIT Team not tasked with providing value to taxpayers would represent a waste of Member State resources and a further administrative burden rather than removing hurdles for businesses operating within the EU.

Rules for Mergers and Acquisitions

The process of merging or integrating a company into an existing structure takes several months at a minimum and, depending on the transaction, can take years. NFTC suggests that sufficient time is provided to allow acquisitive companies to align the fiscal years of companies acquired. Furthermore, aligning a fiscal year to comply with BEFIT obligations must not be viewed as an abusive transaction.

[1] The six steps are: (1) Ensure its books are prepared under an EU accepted GAAP; (2) Apply, on an entity basis, the prescribed adjustments in the BEFIT directive (e.g. tax depreciation); (3) Aggregate the results of all EU taxable entities; (4) Determine allocation keys;.(5) Apply the allocation keys to determine profit allocated to each Member State; and (6) Apply the specific tax adjustments prescribed by each Member State.

Integration with Existing Rules & the Inclusive Framework

BEFIT is wholly unnecessary, and it would add to an already significant and increasing tax compliance burden. If additional returns are required under BEFIT, this would create an additional layer of administrative burden for both tax administrations and taxpayers without reliably solving the need for additional EU resources or meaningfully funding the national budgets of any Member State.

The Consultation Document provides a traffic light system, but the context in which this system has been developed leaves uncertainty as to whether this proposal is compatible with, or incremental to, other proposals, such as the OECD's "Pillar One" proposal which the EU has committed to enacting at the EU level in the text of the Global Minimum Tax Directive. To the extent the same activities are in scope, instability and disputes will arise if the benchmarks differ.

Additional clarity is needed regarding how BEFIT would coexist with the Global Minimum Tax Directive. For instance, would the EU's Global Minimum Tax be applied before or after BEFIT? Would the OECD Inclusive Framework, Member State Authorities or the EU Commission be the arbiter of disputes between tax authorities arising from the interaction between national tax bases, the GloBE tax base, and the proposed BEFIT tax base? Furthermore, the Global Minimum Tax is calculated on a jurisdictional basis and may be computed based upon a different accounting base (i.e., local GAAP is sometimes but not always the tax base to be applied under the Global Minimum Tax Directive). Through aggregation, BEFIT will offset losses in one jurisdiction against profits in another. However, this would appear to be "undone" by the Global Minimum Tax, which would be calculated on a jurisdictional basis.

NFTC again stresses that if BEFIT were to be implemented, it should not be mandatory but optional at the company level. This is of particular concern for companies below the threshold for the Global Minimum Tax. Mandatory inclusion would impose an improper "one-size-fits-all" regime. BEFIT must be structured to avoid adding new reporting requirements that expand upon country-by-country reporting ("CbCR"). Additionally, taxpayers electing into BEFIT 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.

Finally, we encourage the Commission to refrain from pursuing further tax rate harmonization. Allowing EU members to determine their respective tax rate is key for maintaining and developing investment and employment in the eligible Member States. It also fosters the competitiveness of the EU as a center for foreign direct investment compared to other jurisdictions.

Conclusion

The NFTC appreciates the opportunity to comment on the BEFIT proposal. We strongly believe that the EC should not proceed with implementing the proposal in the Consultation Document. However, should the EC decide to implement BEFIT, the Consultation Document needs to be significantly altered to (i) focus on simplification, modernization, and alignment with international tax rules; (ii) remove any formulary apportionment, allow optionality for MNCs, and (iii) ensure that it is integrated with the OECD Inclusive Framework and other existing schemes in order to decrease complexity and minimize the compliance burdens it would impose on European business.