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Response to European Commission proposal for a BEFIT directive

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General consideration and fundamental concerns

Insurance Europe supports the initiative to introduce comprehensive and uniform tax rules in the European Union. Harmonising corporate taxation at EU level could potentially lead to reductions in administrative burdens and costs associated with complying with the varying tax systems of Member States.

However, the insurance industry maintains that the proposed BEFIT directive should be only adopted if it would achieve an effective simplification and standardisation of the European corporate tax framework.

Insurance Europe expresses concern that the proposed directive may not achieve this goal, particularly in the context of the insurance industry and therefore opposes the initiative as it stands now. The unique characteristics of the insurance business, such as technical reserves, are currently reflected in the special and distinct commercial and tax regulations implemented in various Member States. Additionally, certain Member States apply additional taxes, apart from income tax, on pensions and life insurance products. Insurance Europe believes that these distinctive features have not been adequately addressed in the current BEFIT directive.

Moreover, the insurance industry highlights the potential challenges that could arise from delaying the implementation of provisions intended to include the newly adopted International Financial Reporting Standard (IFRS) 17 within the BEFIT proposal.

Reasons behind Insurance Europe’s general concerns

To effectively streamline a complex regulatory framework, the legislator needs a thorough grasp of the individual regulatory areas and their potential consequences. However, it is unclear whether the relevant authorities and the insurance industry currently possess the necessary level of understanding to adequately evaluate the proposed simplification. This uncertainty stems from numerous unanswered questions regarding eg, the interaction between the Minimum Corporate Taxation Directive and BEFIT, the integration of the already implemented IFRS 17 standards (effective since 1 January 2023) and IFRS 9 for asset evaluation, and the future structure of the allocation method, making it impossible for a comprehensive assessment at this time.

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The European Commission (EC) should also consider additional insurance-specific aspects. Notably, the proposal should explicitly state that Article 14 (allowing deductions for technical provisions without further adjustments) takes precedence over Article 30 (generally prohibiting deductions for provisions).

BEFIT is presented as a common corporate income tax framework, suggesting that companies within its scope will no longer be subject to national corporate income tax. However, the directive fails to address how BEFIT will affect companies within scope that are subject to alternative taxation models, such as yield taxation. If BEFIT was to apply to companies subject to yield taxation, it could disrupt the foundation upon which certain businesses operate, particularly pension funds within the BEFIT scope. This could have significant implications for individuals relying on these pension funds. Insurance Europe is therefore strongly recommending a comprehensive impact assessment to thoroughly examine this issue.

Moreover, the EC should acknowledge that the GloBE rules are still being refined and developed at the OECD level. Given this context, it would be beneficial to postpone the negotiations on the proposal until the GloBE rules have been fully implemented and absorbed by businesses and tax authorities. A careful analysis of the Pillar Two's experience would help to identify any shortcomings or defects in the approach. By then, the primary impact of IFRS 17 on insurance contracts on financial statements will be clarified, and the EC will have sufficient time to incorporate the findings into the design of BEFIT. Delegated acts under Article 74 of the draft directive remain an option.

Despite potential benefits like cross-border loss relief or reduced transfer pricing issues, the proposed BEFIT directive's compliance costs outweigh its advantages.

The structure of the proposal suggests that affected groups would need to file multiple tax returns (BEFIT, and national BEFIT returns in all EU countries where they operate) potentially increasing administrative burdens rather than reducing them.

Insurance Europe highly doubts that the 65% reduction in tax compliance costs suggested in the impact assessment is achievable due to the increased administrative burden imposed by the current draft.

Given the lack of alignment between BEFIT and the Minimum Corporate Taxation Directive, and the Country-by-Country Reporting (CbCR) Directive, this version of the proposal would introduce additional reporting requirements, failing to uphold EC President Ursula von der Leyen's commitment to a 25% reduction in reporting requirements as part of the EC's strategy to enhance the EU's long-term competitiveness.

These concerns need to be addressed before finalising the proposal, as the unanimity principle makes subsequent amendments particularly challenging.

General comments on the draft directive in relation to the Minimum Corporate Taxation Directive

In pursuit of a single market free from tax obstacles, the insurance industry proposes a streamlined approach to achieve real simplification.

- **Aligning BEFIT with the Minimum Corporate Taxation Directive**

If the EC truly values simplification, BEFIT should closely align with GloBE rules. By harmonising the two reforms, policymakers can fulfil their stated goal of streamlining and standardising tax procedures, alleviating the burden on businesses and tax administrators.

While the BEFIT proposal relies on financial accounting principles, other critical aspects diverge from the Minimum Corporate Taxation Directive. The rules introduced by the Minimum Corporate Taxation Directive are based on a jurisdictional approach and, unlike BEFIT, do not permit the blending of results across jurisdictions. Simultaneous application of both regimes could lead to inconsistencies and potential double taxation, as the utilisation of the BEFIT allocation key might lower the effective tax rates of certain entities in specific Member States, triggering a top-up tax under the Minimum Corporate Taxation Directive. Therefore, it is crucial to clarify how the two regimes will coexist, and which regime takes precedence.

Furthermore, the Minimum Corporate Taxation Directive is not fully adopted, and the effects of the new global tax rules have not been thoroughly tested or evaluated. This lack of data prevents us from predicting how the two reforms will interact and the potential consequences they may entail. This uncertainty further hinders the ability of European businesses to plan and operate effectively. The BEFIT proposal should therefore be delayed, so it could be fine-tuned in light of the lessons learned from the implementation of GloBE rules across the EU.

Furthermore, BEFIT calculations would also accumulate, in addition to those mandated by compliance with the Minimum Corporate Taxation Directive, and those stipulated by adherence to the CbCR rules.

To achieve true simplification, the proposal should be amended in the following areas:

- Scope
- Adjustments to the financial accounting net income or loss
- BEFIT tax base
- One-stop-shop principle

These amendments, if implemented, would significantly enhance the overall simplicity and effectiveness of BEFIT, aligning it more closely with the goal of a streamlined and harmonised corporate tax framework.

- **Scope**

The scope of the BEFIT directive and the Minimum Corporate Taxation Directive (the latter resembling that of the CbCR directive) should converge to maintain consistency and minimise potential conflicts. For instance, the BEFIT directive's restriction to 75% holdings (Article 5) sets it apart from the (multinational enterprise) MNE group as defined under GloBE, which only necessitates controlling interest for entity inclusion. Therefore, the BEFIT group configuration needs careful monitoring. Another example is that while the Minimum Corporate Taxation Directive provides a list of excluded entities, the BEFIT proposal does not. This lack of coherence hinders the goal of simplifying corporate taxation.

Tax-exempt entities like pension funds should be excluded from the scope of BEFIT, as calculating their tax is redundant. Eliminating these entities would enhance the process' simplicity and reduce administrative burdens.

BEFIT's application should be optional rather than mandatory, particular for purely national groups or those with modest international operations. This would allow smaller businesses to opt out of the directive, alleviating their regulatory burden.

These adjustments would bring BEFIT more in line with the overarching aim of a simplified and harmonised corporate tax framework, while also streamlining administrative processes and ensuring it's tailored to the intended entities.

- **Adjustments to the financial accounting net income or loss**

To achieve genuine simplification, the adjustments to the financial accounting net income or loss should be aligned as closely as possible with the adjustments introduced by the Minimum Corporate Taxation Directive.
The industry understands that, based on the draft proposal's text, the "adjustments to the financial accounting net income or loss" (Articles 8 to 21) and the provisions included in Articles 22 to 33, are to be applied

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uniformly to financial accounts prepared under both IFRS and the generally accepted accounting principles (GAAPs) in use in each Member State (Article 7 (1)).

- **BEFIT tax base**

According to Article 48 (2) and recital 14, Member States will have the option to apply additional post-allocation adjustments in areas not addressed by the common framework. Additionally, Member States would also be "free to further adjust their allocated share without a ceiling to ensure that Member States can make their national policy choices in this area."

If BEFIT is to truly simplify corporate taxation, national adjustment rights should be minimised.

The BEFIT tax base will be distributed among BEFIT group members based on the baseline allocation percentage. Has this allocated amount already been subdivided based on the group companies in this country or is it presented as a single total?

- **One-stop-shop**

The proposed regulatory concept presents a notable drawback compared to the previous proposals for uniform corporate taxation. Earlier concepts were founded on the concept of a one-stop shop, where the lead taxpayer of the group would have handled all administrative matters for the entire group with its respective national tax authority. This responsibility would have commenced with the filing of the tax return and extended to managing the assessment and oversight of potential tax audits.

Legal issues outstanding pertaining to the insurance industry

- **Interaction between Article 14 and Article 30:**

The EC should clarify that Article 14 (specially paragraph 2) takes precedence over Article 30.

Article 14 (2) asserts that "The *amount of technical provisions of insurance undertakings established in compliance with Council Directive 91/674/EEC33 that were deducted in the financial accounting net income or loss of a BEFIT group member shall be reviewed and adjusted at the end of every fiscal year.* […]". The final portion of the sentence, stating *"shall be reviewed and adjusted at the end of every fiscal year",* lacks clarity and should be removed.

The industry interprets Article 14 (2) as implying that technical provisions are tax-deductible without further adjustments.

Article 30, through paragraph 1 and paragraph 2, offers a framework that is open to interpretation: paragraph 1 states that the amount of any provisions should be disallowed in principle. However, the creation of provisions should be simultaneously recognised as a principle.

Article 30 (3) stipulates that, in those cases where the obligation relates to an activity or transaction that extends over multiple fiscal years, the amount of the provision shall be spread proportionately over the estimated duration of the activity or transaction. In the insurance business, obligations typically extend over future fiscal years. Future liability must be fully recognised in the financial accounts in the first year.

- **Article 14 (3) - insurance undertakings and legal certainty:**

Insurance Europe welcomes the recognition by the proposed directive highlights that the insurance industry operates under distinct regulatory frameworks.

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Currently Article 14 (3) contemplates the possibility of delegated acts issued by the EC to supplement the directive with more detailed provisions governing the adjustment of the preliminary tax result for insurance undertakings, particularly in light of the impact of the new IFRS 17 on insurance contracts.

However, the precise implications of IFRS 17 on the taxation of insurance groups remain unclear, creating legal uncertainty for these entities and impeding the preparation of reliable tax plans. This poses challenges as tax plans are crucial for guiding the group regarding anticipated tax expenses in the future and are also essential for recording deferred tax assets under IAS 12.

IFRS 17 mandates that insurance contracts be measured using updated estimates and assumptions that reflect the cash flow timing and any uncertainties associated with these contracts. The expected cash flows for participating contracts are basically derived from market value fluctuations in underlying assets.

To achieve a consistent asset-liability matching between underlying assets and insurance reserves, IFRS 9 (financial instruments) was implemented alongside IFRS 17. However, underlying assets can extend beyond financial instruments to include real estate. To ensure an asset/liability matching for underlying real estate, insurance companies may opt for the fair value option when valuing these assets under IAS 40. This asset/liability match could be jeopardised if the directive mandates specific valuation criteria for underlying assets, such as straight-line based depreciation of real estate (Article 22 (2a)).

Additionally, the terminology employed for certain expressions, such as "financial assets held for trading", is ambiguous and necessitates clarification.

In conclusion, it is imprudent to finalise such a significant transformation in the taxation of insurance companies without a clear understanding of how the most substantial balance sheet items within this industry should be treated.

Further comments

- **Depreciation**

Insurance Europe recognises that Articles 22 to 28, which address depreciation, are uniformly applied to the relevant annual financial accounts and therefore no simplifying adjustments are anticipated. This could potentially enhance the complexity of BEFIT, particularly when combined with the fixed asset register requirement according to Article 25. To achieve maximum simplification, the depreciation rules should closely align with the relevant accounting standards employed by the BEFIT group.

- **Allocation method**

The allocation method proposed in the draft directive to apportion the tax base among Member States necessitates further refinements as the current approach could lead to contradictions with GloBE rules and therefore cause jeopardy. A formulary distribution method based on the outcome of previous fiscal years may not always result in an accurate allocation among Member States. Moreover, disparities between the tax rates, tax bases, and tax systems in different Member States could lead to unfavourable outcomes and even distort competition.

The current solution, which limits the allocation method to the first seven years while leaving open the possibility of adopting a permanent allocation formula in the future, creates uncertainty. Additionally, the proposed directive's reference to information obtained from the country-by-country reporting (CbCr) suggests that there is no intention to alleviate the reporting burden on large groups, such as by repealing the country-by-country reporting (CbCr) after the adoption of the Minimum Corporate Taxation Directive.

- **Interaction with other corporate tax laws and pre-existing legal solutions in substantive and procedural law**

The proposed BEFIT directive, like the Minimum Corporate Taxation Directive, is likely to generate numerous legal questions. The legal solutions found in national legal systems for similar issues cannot be seamlessly applied to the international legal framework. As a consequence, BEFIT could lead to an increase in the number and duration of national and international tax disputes. This raises concerns regarding the adequacy of legal recourse and the establishment of a well-ordered tax jurisdiction.

Furthermore, the interaction of BEFIT, particularly cross border loss offsetting, with Minimum Corporate Taxation has not yet been clearly explained or presented.

Achieving the goal of simplification would be challenging if national profit-based taxes, such as the German trade tax, remain in place.

BEFIT calculations would also accumulate, in addition to those mandated by compliance with the Minimum Corporate Taxation Directive, and those stipulated by adherence to the CbCR rules.

- **Timeline for implementation and subsequent review (in the absence of a freezing of the proposal)**

The implementation of BEFIT should be significantly delayed from its current proposed timeline of early 2028 to the second half of the 2030s, allowing involved parties ample time to adapt their operations to the Minimum Corporate Tax Directive and gain experience from its implementation. Insurance Europe believes that it is unlikely that the issues and administrative burdens associated with the application of the Minimum Corporate Tax Directive will have been resolved by July 1, 2028, when the BEFIT framework is scheduled to take effect. It should also be taken into account that the implementation of the Minimum Corporate Tax Directive is already putting significant strain on the resources of large corporations, ministries of finance, and tax administrations.

Regarding the planned review of BEFIT that is supposed to take place in 2033 according to Article 7 (77), this deadline should also be postponed to allow for a more comprehensive assessment of the directive's impact and the need for potential adjustments.

- **Reduction of abuse provisions**

If rules for uniform corporate taxation are adapted, existing EU tax law such as the Anti-Tax Avoidance Directive (ATAD) and the Directive on Administrative Cooperation in the Field of Taxation (DAC6) should be embedded within the new framework.

Administration

- **Filing of the BEFIT information return and individual tax returns:**

Insurance Europe believes that the proposed filing deadlines included in Article 57 (2) and Article 62 (1), are too short for submitting the BEFIT information return and individual tax returns. This is because the new BEFIT proposal would require a significant number of adjustments to IFRS or national GAAP results to determine the preliminary tax result, which could make it difficult for businesses to prepare and submit these returns on time.

Filing deadlines should be set only after a comprehensive understanding of the BEFIT proposal, its interaction with GloBE rules and IFRS 17, has been achieved by the industry, tax authorities, and policymakers.

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Technical issues

There are still various inconsistencies or ambiguities in the directive. Among other things, Insurance Europe would like to refer to the following issues.

Article 3 - definitions

According to Article 3 (1a), a "group" to include companies that have been excluded from the ultimate parent company's consolidated financial statements solely due to their small size, materiality, or being held for sale. However, Article 2 (1)(b)(iii) excludes these companies from the directive's scope. This creates an inconsistency that could lead to confusion and difficulties in interpreting and applying the directive.

Article 4 - general principles

Article 4 (2) states that the "expenses that are included in the financial accounting net income or loss of a BEFIT group member shall be deductible from its preliminary tax result only to the extent that they are incurred in its direct business interest." Insurance Europe believes that this rule is redundant and should be removed. Article 4 (1) already mandates that the preliminary tax result of each BEFIT group member be determined based on its financial accounting net income or loss, which is then adjusted in accordance with Article 8 to 41 of the directive. Therefore, Article 4 (2) serves no purpose and should be eliminated.

Article 6 - holding period requirements

Article 6 (1) mandates that "*A BEFIT group member shall meet the thresholds referred to in Article 5(1) without interruption, throughout the fiscal year.*" Insurance Europe retains that this requirement for permanent affiliation appears to contradict the wording in paragraphs 2 and 3, which suggests a more flexible approach to group membership.

Article 37 - provisions, revenues, and deductions when entering a BEFIT group

Article 37 (1) states that "Provisions and bad-debt deductions as referred to in Articles 30 and 31 shall be deductible only to the extent that they arise from activities or transactions that were carried out after this directive became applicable to the BEFIT group member." For Insurance Europe this restriction of the tax deductibility is inadmissible and should be amended.

Insurance Europe is the European insurance and reinsurance federation. Through its 37 member bodies — the national insurance associations — it represents all types and sizes of insurance and reinsurance undertakings. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe's economic growth and development. European insurers pay out over €1 000bn annually — or €2.8bn a day — in claims, directly employ more than 920 000 people and invest over €10.6trn in the economy.