1 INTRODUCTION

Revolution cannot be planned. Suddenly there is momentum and then matters start moving. This observation also seems to have a bearing on the development of a harmonized corporate income tax system in the European Union (‘EU’). The so-called BEFIT proposal (Business in Europe: Framework for Income Taxation), as announced in the Communication on Business Taxation for the twenty-first century of May 2021,[1] appears to have a brighter future than the earlier initiatives of the European Commission (‘EC’) to bring about a comparable outcome.[2] It might therefore really cause a revolution for corporate income taxation in the EU and beyond. After all, the envisaged system of taxing multinational companies will clearly set the EU apart from (most of) the rest of the world.

One of the decisive factors for the auspicious start of the BEFIT initiative is probably that it was born under the lucky star of the work of the OECD. Even though the future of Pillar One does not look very promising by now, the mere agreement does clearly illustrate that formulary apportionment (FA) should be considered as a serious policy option to tax multinational companies. Moreover, the global minimum tax of Pillar Two puts in place an efficacious form of tax rate harmonization which will make it less costly for the Member States to agree on BEFIT in comparison to earlier initiatives in the past.[3] Consequently, it is fair to claim that the OECD’s work on Pillar One and Pillar Two served as a ‘stepping stone’ for the EC to build on the international developments in order to take a more ambitious step within the EU.[4] The BEFIT proposal is progressive indeed, since it comprises ‘a single corporate tax rulebook for the EU, based on the key features of a common tax base and the allocation of profits between Member States based on a formula (formulary apportionment)’.[5] Consequently, the EC is serious about the need of ‘(g)oing beyond the OECD agreement’.[6] It makes clear that the highly integrated EU, with its internal market, should not settle for a solution that is applicable to a limited number of companies only.[7]

It is the objective of this contribution to examine in some more detail how changing policy preferences of Member States are driving the BEFIT proposal. More in particular, the contribution focusses on the increasing relevance of regulatory authority (i.e., the mere power to regulate) as a crucial factor behind the prospective revolution. After all, the boldness of the BEFIT proposal is that it says goodbye to the arm’s length standard and...
takes the taxation of multinational companies beyond the current international status quo. This change indicates that the EC is proposing to settle on a completely different regulation strategy to tax such companies. The BEFIT initiative may be qualified as an example of command and control regulation which marks a decisive change in comparison to the reliance on the arm’s length standard which may be described as a reflexive regulation strategy.\textsuperscript{[8]} The future approval of this proposal would imply that the Member States no longer want to count on the relative freedom of taxpayers to allocate profits, but attempt to take full responsibility for that allocation instead.

The central research question of this contribution is therefore whether and to what extent the increasing relevance of regulatory authority may be regarded as one of the driving factors of the BEFIT proposal. This research builds on an inter-disciplinary research methodology that is consonant with an ongoing line of research that studies the challenges of international tax governance. The key insight of this piece is that a regulation perspective sheds a valuable light on the taxation of multinational companies and the BEFIT proposal in particular.\textsuperscript{[9]} In particular, an analysis on the basis of the outlined transformation of the regulation strategy makes it possible to consider how the Member States’ wish to obtain more regulatory authority over the taxation of multinational companies is driving the BEFIT initiative.

The outline of this contribution is as follows. Section 2 gives a brief introduction to the BEFIT initiative and addresses in particular the objectives that are explicitly addressed by the EC. Section 3 makes clear how the initiative marks a transformation from a reflexive regulation strategy towards a command and control regulation strategy. For this matter, it links these concepts to the relevant academic literature on the arm’s length standard and FA. This overview will subsequently make it possible in section 4 to analyse the relevance of regulatory authority as one of the factors driving the BEFIT initiative. Section 5 completes the analysis with the conclusions and some recommendations.

2 BEFIT: A BRIEF INTRODUCTION

The BEFIT proposal of the EC, on the face of it, would seem to be a typical case of relabeling old wine in new bottles. Ever since the famous Neumark report (back in 1962!), there has been a discussion about the need to agree on a common tax base and to introduce a form of FA in the EU.\textsuperscript{[10]} The EC proposed the ambitious Directive on a Common Consolidated Corporate Tax Base (‘CCCTB’) back in 2011.\textsuperscript{[11]} That initiative was clearly out of touch with political reality at that time so that the EC decided to change its strategy. It introduced the Directive on a Common Corporate Tax Base (‘CCTB’) back in 2016.\textsuperscript{[12]} The idea was to focus on a common tax base in the EU and to stall the discussion about a pan-European consolidation of that tax base in a separate proposal.\textsuperscript{[13]} That cautious approach is now abandoned again, since the BEFIT proposal builds on the more ambitious alternative of a common consolidated corporate tax base.

The Communication of 18 May 2021 explains how ‘BEFIT will consolidate the profits of the EU members of a multinational group into a single tax base, which will then be allocated to Member States using a formula, to be taxed at national corporate income tax rates’.\textsuperscript{[14]} Consequently, it is clear that the BEFIT proposal will build on the earlier work regarding the CCCTB. The EC is however making clear that it will take into consideration the relevant developments ever since. In particular, the Communication explicates how the proposal should expand on the OECD’s work on Pillar One with regard to the definition of the tax base and the design of the formula.\textsuperscript{[15]}

The EC lists a range of benefits of the BEFIT proposal, such as the reduction of barriers to cross-border investment, the mitigation of compliance costs, the effective countering of tax avoidance, the creation of jobs, growth and investment and the promise of a simpler and fairer approach towards the allocation of taxing rights between the Member States.\textsuperscript{[16]} This overview makes pretty clear that the proposed move towards unitary taxation in combination with FA should be seen against the
background of a strong sense of discontent about the separate entity approach in combination with the arm’s length standard. The Communication explicitly claims that this standard is, regardless of the changes laid down in the updated OECD Transfer Pricing Guidelines, ‘difficult to apply and enforce in a modern economy relying on intangible and non-marketed assets’. In this regard, it stresses how it will no more be necessary to apply ‘complex transfer pricing rules within the EU’ when the choice is made to allocate profits on the basis of a formula.

It is striking that the list of potential benefits of the BEFIT proposal does not include the ascertainment that it will bring about more (joint) regulatory authority for the Member States over the taxation of multinational companies. It is however submitted that this aspect will play an important role in their considerations as to approve the proposal at the expense of (again) some national sovereignty. The next sections elaborate on this hypothesis in order to understand whether and to what extent the increasing relevance of regulatory authority may be regarded as one of the driving factors of the BEFIT proposal. For this matter, section 3 outlines how BEFIT represents a choice for (state-driven) command and control regulation, whereas the traditional arm’s length standard may be described as reflexive regulation strategy with a strong emphasis on the responsibility of the taxpayer. This overview of a different regulation strategy will subsequently make it possible to analyse the relevance of regulatory authority in the trade-off of Member States about a potential change towards BEFIT.

### 3 From a Reflexive Regulation Strategy towards Command and Control Regulation

#### 3.1 Arm’s Length Standard as a Reflexive Regulation Strategy

The typical attribute of the arm’s length standard – in combination with the separate entity approach – is that it leaves the taxpayer with a considerable amount of responsibility for the allocation of profits between group companies. Navarro writes in this regard that ‘the taxpayer is the one preparing the relevant documentation, choosing the information to be disclosed, and enjoying ample freedom to contractually allocate functions, assets, and risks’. The thesis is that the reliance on the arm’s length standard implies a choice of states for a reflexive regulation strategy.

A reflexive regulation strategy starts from the assumption that ‘the state by itself cannot do all the heavy lifting required to meet most pressing societal challenges and that it therefore needs to engage other actors to leverage its capacities’. It may be described as a curbed form of self-regulation (‘geleide zelfregulering’), since it is, in the words of Teubner, aiming at ‘regulated autonomy’. The characteristic feature of a reflexive regulation strategy is that the legislator relies on ‘procedural norms that regulate processes, organization, and the distribution of rights and competencies’.

These procedures basically consist of a step-plan that should stimulate the taxpayer to apply the arm’s length in a consistent manner. Consequently, the arm’s length standard has a ‘self-referential’ character in the sense that the legislator is attempting to ‘design self-regulating social systems’ that force taxpayers to interpret these procedures in a responsible manner.

The supporting idea behind the arm’s length standard is that the market reflects economic reality. Advocates of the arm’s length standard therefore claim that the standard has both an objective and a determinate character. Such scholars are certainly aware of the difficulties to approximate this economic reality in certain situations (see below!), but they are willing to accept...
the imperfect nature of this regulation strategy. Schoueri, for example, refers to John Maynard Keynes who (allegedly) said that ‘(i)t is better to be roughly right than precisely wrong’.\[31\]

This preference for a regulation strategy that aligns with market outcomes is actually very suitable to establish two closely-related traditional ‘principles’ of international taxation. One argument in this regard is the view that the arm’s length standard generates outcomes that are in accordance with the ‘principle’ of neutrality.\[32\] The other argument concerns the ‘principle’ that income should be allocated to the state where the ‘real’ geographic source, or origin, of the income is to be found (i.e., economic allegiance).\[33\] The arm’s length standard, especially with its contemporary emphasis on value creation, functions, assets, and risks, establishes exactly that result.\[34\]

The fundamental theoretical weakness of this regulation strategy to tax multinational companies is that it does not provide a solution for above-market returns.\[35\] This shortcoming causes a debatable friction with economic reality, since the very existence of a multinational company is based on the premise that it is able to generate such residual profits as a result of the economies of scale and integration of its economic activities.\[36\] Consequently, it is not straightforward to argue that the arm’s length standard serves as an objective and determinate standard to deal with residual profit allocation.\[37\] The standard struggles to do justice to profits resulting from, as Kane calls it, ‘common control value’ (such as group synergies) and ‘unique firm specific value’ (such as risks, intangibles and capital) for which categories it is either theoretically or practically impossible to find appropriate comparables.\[38\] Notwithstanding this serious shortcoming, the arm’s length standard continues to have a special force of attraction. It provides, in the words of Ylönen and Teivainen, ‘a basis for assuming that markets exist in places where their presence is difficult to verify in practice but ideologically important to simulate in theory’.\[39\] After all, proponents acknowledge the outlined concerns, but emphasize (with a reference to Hayek) its quality as a ‘general rule’ and the fear that an alternative regulation strategy (i.e., FA) would be ‘exposed to and shaped by the fiscal and economic interests of negotiating states’.\[40\]

Supporters of the arm’s length standard therefore emphasize the flexibility of the standard and suggest improvements to brush away its deficiencies.\[41\] This very point clearly illustrates the great advantage of the arm’s length standard: a reflexive regulation strategy thrives on its adaptability. As a matter of fact, the very development of the standard is illustrating how it is a worthy child of ‘reflexive modernization’ in the sense that ‘social practices are constantly examined and reformed in the light of incoming information about those very practices, thus constitutively altering their character’.\[42\] For this very reason, it is also understandable why Owens claims that the arm’s length standard will survive because of its great flexibility.\[43\] It is this very characteristic that even leads some scholars to claim that the standard may be adapted to a mechanism that (also) allocates part of the profits of a multinational company to the market jurisdiction.\[44\]

### 3.2 BEFIT as a Command and Control Regulation Strategy

Notwithstanding this flexibility, the adaptability of the arm’s length standard is reaching its limits. Contemporary developments are clearly illustrating that it is necessary to go beyond the arm’s length standard in order to live up to societal expectations. It is, for example, becoming more and more acceptable for the OECD to rely on formulas in the profit split method to try to repair the described flaw concerning residual profit allocation.\[45\] This ongoing development towards some combination of the arm’s length standard and elements of FA was already visible in the Base Erosion and Profit Shifting (BEPS) 1.0. project\[46\] but Pillar One of the BEPS 2.0. project is clearly making this hybrid form of income allocation an integral part of the international tax system.\[47\]
Seen from this point of view, it is actually very noteworthy that the BEFIT proposal is completely breaking with the reliance on the arm’s length standard (within the EU) and therefore also with the well-established regulation strategy to tax multinational companies. The suggested regulation strategy is to rely on more traditional command and control regulation. Command and control regulation implies ‘the exercise of influence by imposing standards backed by criminal sanctions’. A crucial difference with a reflexive regulation strategy is that the legislator does not count on mere procedures to establish its objectives, but that it is ‘taking full responsibility for substantive outcomes’ instead. It is this emphasis on the all-knowing legislator that has given command and control legislation a bad reputation over the last thirty years. The decisive aspect of this regulation strategy is however that the state is supposed to have the capacity to exercise this command and control including the effective power to enforce the rules. It is exactly this aspect of ‘regulatory compulsion’ that plays a crucial role in the considerations of Member States to opt for C(C)CTB or BEFIT. These initiatives should give the Member States decisively more control on the allocation of taxing rights between them.

This ‘regulatory compulsion’ of command and control regulation is reflected in the BEFIT proposal in two closely related ways: the choice for unitary taxation and the comprehensive reliance on FA.

The choice for unitary taxation serves as a solid remedy for the described problems of the arm’s length standard with residual profit allocation. It does theoretical justice to the global and integrated nature of contemporary multinational companies, as it does away with the outdated fiction that every group company should be taxed on its own merits. Moreover, unitary taxation is literary a way to obtain ‘command’ over taxpayers and the allocation of taxing rights in particular. It makes it possible to ‘reconcile the scope of economic activity with the scope of governance’. It definitely gives Member States, in comparison to the current reflexive regulation strategy, more economic control over multinational companies, since it eliminates the practical difficulties of monitoring intra-firm trade. Moreover, unitary taxation also serves as a serious counterweight to the structural power of the really large multinational companies in relation to state-based governance.

The aspect of command and control regulation is also reflected in the fact that the BEFIT proposal is entirely based on FA. It is this reliance on a formula that reflects the willingness and capability of the Member States to be in charge of the allocation of profits between themselves. A formula merely aims at the effectuation of ‘an equitable allocation of income’. It is therefore nothing more and nothing less than a ‘distributive code’ that is used to ‘share the pie’. Consequently, the BEFIT proposal also concurs with the growing awareness that it is not desirable or even possible to count on ‘value creation’ or the ‘real’ geographic source (or origin), of income as a yardstick for the allocation of income. As such, this regulation strategy starts from the view that ‘(t)he business and the structure of the global firm (…) makes it difficult, if not impossible, to identify the country where the value is created’.

4 BEFIT AND THE DECISIVE MOVE TOWARDS REGULATORY AUTHORITY

The preceding analysis of the changing regulation strategy makes it possible to acquire a better understanding of the changing policy preferences about the taxation of multinational companies. The proposed move from the arm’s length standard towards unitary taxation in combination with FA indicates a decisive reordering of such preferences in the EU. This section attempts to acquire a better understanding of these changes on the basis of two ‘regulatory variables’ to tax multinational companies. After all, the sketched evolution indicates that ‘regulatory compulsion’ is becoming more important than ‘regulatory flexibility’ within the EU. The thesis is that this reordering of variables fits in the Member States’ wish to have more regulatory authority over the taxation of multinational companies. As such, this aspiration serves as one of the main objectives of the BEFIT proposal.
Clearly, a number of factors explain the proposed move towards a regulation strategy that is based on command and control. One aspect is that the BEFIT proposal is pretty much congruous with the attempts of the EU to acquire more ‘strategic autonomy’ in the policy fields of trade policy and industrial policy.\[64\] Time will tell how far the EC, and of course the Member States, are willing to rely on corporate income tax policy in order to provide a competitive European response to the US Inflation Reduction Act of 2022.\[65\] On top of this, it is also pretty obvious that BEFIT’s evolution towards more ‘command and control’ goes hand in hand with the gradual expansion of the EU’s current ambitions concerning its ‘new own resources’. The BEFIT proposal is explicitly mentioned as a constitutive element of the second basket of such resources.\[66\] This development therefore clearly indicates that tax harmonization and budgetary reforms are, as Cordewener describes it, becoming brothers in arms.\[67\]

A more fundamental factor driving a possible transition towards BEFIT is probably that policymakers are – in general – increasingly starting to attach more value to regulatory compulsion than to regulatory flexibility when it comes to the taxation of multinational companies. As such, it is this changing ordering of preferences that is actually guiding the current choices of policymakers on the well-known continuum\[68\] between the arm’s length standard and FA. Decisive value has been attached to the regulatory flexibility of the arm’s length standard for a long period of time. Contemporary developments like Pillar One, as described in section 3.2., are however illustrating that even the OECD is clearly starting to attach somewhat more value to regulatory compulsion. Consequently, also the OECD is steadily moving somewhat towards FA on the continuum.\[69\] The OECD is, however, not considering to do away with the arm’s length standard. Regulatory compulsion is therefore certainly not trumping regulatory flexibility in the OECD’s ordering of preferences. This is exactly the decisive difference with the policymakers in the EU. It is this changing trade-off of regulatory ‘variables’ that is effectively guiding their aspiration to stop the efforts to tweak the arm’s length standard and to take a more progressive route instead.\[70\]

It is fair to conclude that the BEFIT proposal thrives on the assessment that the Member States will value a distinctive step towards the further strengthening of their regulatory authority to tax multinational companies. Consequently, the BEFIT proposal should be seen as the culmination of a number of earlier initiatives (i.e., BEPS project and the global minimum tax) that resorted to the regulatory function of international tax law in order to ‘affect the behaviour of both corporate taxpayers in arranging their cross-border activities and the states in designing elements of their corporate income tax systems.’\[71\] The distinctive novelty of the BEFIT proposal is however that it adds a more fundamental layer to these initiatives by interfering with the institutional choice between state and market in the realm of the allocation of taxing rights between Member States. BEFIT’s choice for unitary taxation in combination with FA ensures that the (joint) Member States exercise indisputable regulatory authority over that allocation within the EU. As such this choice does away with the discussed discontent about the longstanding regulatory authority of the market – as reflected by the arm’s length standard – to divide the profits of a multinational companies between the Member States.\[72\] It will be that different institutional choice that should convince the Member States to approve the proposal at the expense of another ‘piece’ of their national sovereignty. It is after all that very choice that will ensure that they obtain more regulatory authority over the taxation of multinational companies.

As explained, the possible approval of BEFIT in the future would imply that Member States are attaching more value to ‘regulatory compulsion’ than to ‘regulatory flexibility’. It is therefore that very change of preferences that would effectively entail to the death blow for the arm’s length standard in the EU. No doubt that such a different evaluation comes at a price for the Member States. After all, a system of unitary taxation in combination with FA is certainly not perfect.\[73\] For example, the regulatory flexibility of the arm’s length standard will be missed in the future when new developments in society are posing new challenges to the renewed system of corporate income taxation in the EU. It might therefore be a good idea to agree on a clause that provides for a re-evaluation of the
agreed formula every 10–15 years. Also the fact that the introduction of BEFIT implies that the EU will be out of step with the rest of the world comes with a price. The EC is therefore well advised to resolve the interplay of BEFIT with third states in an effective way through double tax treaties.

5 CONCLUSION

The governance perspective of this contribution illustrates how the BEFIT proposal constitutes a major overhaul of the regulation strategy to tax multinational companies in the EU. This proposal provides for a transformation from a reflexive regulation strategy (i.e., the arm's length standard) towards a command and control regulation strategy (i.e., FA). It is plausible to conclude that this change is dictated by the Member States’ need for more regulatory authority over the taxation of multinational companies and – consequently – that this factor is driving the BEFIT initiative.

This analysis basically illustrates how the BEFIT proposal fits well in the ongoing awareness of states that ‘governance by taxation’ is crucially conditional on an adequate system of ‘governance of taxation’.\[74\] They are increasingly acknowledging that having ‘authority over revenue’ (i.e., ‘governance by taxation’) in a globalized world is not possible without a set of rules that ‘govern the interaction of different taxes or tax systems’ (i.e., governance of taxation).\[75\] In particular, the last decade clearly illustrated how states reinforced the system of governance of corporate income taxation in order to prolong the key function of governance by corporate income taxation. It is exactly this very consideration that will likely give the hesitant Member States a final nudge to surrender another ‘piece’ of their national sovereignty for the benefit of the approval of BEFIT. As such, the factor of regulatory authority constitutes a decisive addition to the more traditional arguments (in particular the need to remove economic distortions) for the introduction of harmonized system of corporate income taxation in the EU.

This very conclusion about relevance of regulatory authority also implies that the capturing of this authority probably serves as one of the main objectives of the BEFIT proposal. After all, the relevance of a changing trade-off between regulatory compulsion and regulatory flexibility goes beyond the mere technicalities of a different corporate income tax system. A choice for unitary taxation and the comprehensive reliance on FA could certainly establish the list of presumed benefits of the BEFIT proposal including the potential to create a corporate income tax system that it is simpler and even fairer than the current one that is built on the arm’s length standard. The EC should however be more straightforward about the fact that the Member States’ wish to obtain more regulatory authority is actually one of the ultimate goals of BEFIT. The BEFIT proposal eventually aims at the strengthening of the European system of ‘governance of corporate income taxation’ in order to make the system of ‘governance by corporate income taxation’ more sustainable in the longer run.

These considerations are also clearly illustrating that it is becoming more and more difficult for the skeptics of FA, and BEFIT in particular, to argue against the revolution in the making. The need to obtain regulatory authority as a building block for adequate governance of taxation simply serves as a powerful argument that cannot easily be dismissed. In this regard, it is relevant to repeat that a command and control regulation strategy is generally met with a great deal of criticism. It is therefore important to think of Albert Hirschman who taught us to be attentive to the so-called ‘rhetoric of reaction’.\[76\] Such rhetoric is often used by conservatives who are strongly opposed to a progressive piece of social engineering. It includes arguments, defined as the ‘jeopardy thesis’, which warn that ‘the cost of the proposed change or reform is too high as it endangers some previous, precious accomplishment’.\[77\] Think for example of those skeptics of FA that raise the alarm about ‘the vast fiscal and economic uncertainties of a revolutionary move towards FA or establishing two systems of international profit allocation that work in parallel’.\[78\] Those non-believers do however clearly underestimate the new political reality that attaches much value to regulatory authority.\[79\] It is exactly that reality that will set in motion the transformation towards BEFIT.
Naturally, there are still many obstacles towards the planned revolution. This includes most of all the design of the formula which should by all means be safeguarded from future claims that it results in an arbitrary allocation of profits between states. The selected factors for the formula should therefore guarantee that tax avoidance is minimized as much as possible.\[80\] A related matter is whether it will be decided to create an autonomous and comprehensive set of rules to calculate the tax base or to rely on International Financial Reporting Standards (IFRS) instead.\[81\] It is precisely these kind of matters that will affect both the legitimacy of the new system for corporate income taxation in the EU and its complexity.\[82\] Time will therefore tell whether the planned BEFIT revolution will be a success after all. That is however ever the destiny of any revolution.

Footnotes

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1 European Commission, *Communication from the Commission to the European Parliament and the Council. Business Taxation for the 21st Century*, COM(2021) 251 final, Brussels 18 May 2021. The Communication also addressed other initiatives, such as the Debt Equity Bia Reduction Allowance (‘DEBRA’), but these are not discussed in this contribution.

2 See s. 2.


5 Communication of 18 May 2021, at 11–12.


8 See s. 3 for a further elaboration of this position.


14 Communication of 18 May 2021, at 12.
Communication of 18 May 2021, at 13. At the moment of writing this contribution the EC is still working on the technical details of the proposals. The Consultation Document of 13 Oct. 2022 sketched some of the choices that will need to be made. This concerns crucial matters, such as the scope of application, the calculation of the tax base, the design of the formula for the allocation of taxable profits and the allocation of profits to associated parties outside the consolidated (European) group.

Communication of 18 May 2021, at 12.

Ibid., at 13.

Ibid., at 12.

Basically, this section constitutes an alternative and innovative angle to study the pros and cons of both the arm’s length standard and FA. There is obviously no shortage of academic studies on that topic.


Ibid., at 255.


See in particular Art. 3.4. OECD Transfer Pricing Guidelines.


In fact, this weakness illustrates the fact that the legislator acknowledges the limits of law as an instrument to regulate the taxation of multinational companies. This characteristic – and the consequential role of discretion in the process of applying the reflexive arm’s length standard – is further elaborated in my contribution about the intersection of EU State aid law and the arm’s length standard. See Peters, supra n. 21, at 32–34.


37 There is after all a continuum of 'correct' transfer prices available to allocate these residual profits between the relevant group companies. See e.g., Avi-Yonah, supra n. 36, at 148–149.


40 Schreiber, supra n. 32, at 415.

41 Ibid., at 411–419.

42 A. Giddens, The Consequences of Modernity 38 (Cambridge: Polity Press 1990). Anthony Giddens was one of the sociologists theorizing reflexive modernization in social theory. This is obviously not the proper occasion to sketch the history of the development of the arm’s length standard. Compare, e.g., Collier & Andrus, supra n. 38, Ch. 2.


49 Teubner, supra n. 24, at 254.


51 Ibid., at 106.


53 See s. 4.


56 Compare Ylönen & Teivainen, supra n. 39, at 442 and 451.


61 See Hellerstein, supra n. 58, at 111 and De Wilde, supra n. 54, at 362.


63 This terminology is used by Sinclair who writes about ‘a number of “regulatory variables” which policymakers can use to “fine-tune” regulatory options to suit the specific circumstances of particular environmental issues’. (See Sinclair, supra n. 52, at 529). These variables are, as explained in this article, regulatory compulsion, regulatory flexibility, industry design and a focus on win-win outcomes. It is put forward that the first two variables are relevant ones for policymakers working on the taxation of multinational companies. For the rest, this contribution does not aim at the listing of potentially relevant regulatory variables for taxation.


65 The Communication of 18 May 2021 explicitly mentions, at 2, how the tax agenda of the EU should be supporting broader EU policies like the European Green Deal and the New Industrial Strategy for Europe. One of the options for BEFIT would be the ‘super-deduction’ for R&D costs that was proposed in the CCTB Directive before.


69 Several scholars are actually defending a hybrid combination of both in order to repair the weaknesses of the arm’s length standard. See e.g., Avi-Yonah and Benshalom (R. Avi-Yonah & I. Benshalon, Formulary Apportionment – Myths and Prospects, 3(3) World Tax J. 380–397 (2011) and Collier & Andrus ( supra n. 38, paras 8.89–8.97)). It is fair to add though that the political infeasibility of an unequivocal choice for formulary apportionment plays a role in Avi-Yonah’s thinking about this topic. See R. Avi-Yonah, A Proposal for Unitary Taxation and Formulary Apportionment (UT+FA) to Tax Multinational Enterprises, in Global Tax Governance 289–306 (P. Dietsch & T. Rixen eds, Colchester: ECPR Press 2016).

70 Seen from this point of view it is therefore necessary to go beyond the current initiatives of the OECD. A different evaluation of the BEFIT proposal can be reduced to a different weighing of these factors. See e.g., Wingerter who is writing about the need of ‘preserving the elements of the arm’s length standard that are


72 See s. 3.1.

73 It is instructive to quote Clausing at this point: ‘Like democracy, and like capitalism, formulary apportionment could be the worst possible system, except for all the others’. See Clausing, *supra* n. 54, at 239.

74 See Rixen & Unger, *supra* n. 9.


78 See Greil et al., *supra* n. 44, at 274. Also the OECD is eager to emphasize the price of a change towards (global) formulary apportionment. Compare s. 1.24 OECD Transfer Pricing Guidelines.

79 This ascertainment can be linked to the six ‘myths’ concerning formulary apportionment that are identified by Avi-Yonah and Benshalom. See Avi-Yonah & Benshalom, *supra* n. 69.


81 This is a classical topic that was also discussed in the past. See e.g., P. Essers & R. Russo, *The Precious Relationship Between IAS/IFRS, National Tax Accounting Systems and the CCCTB*, in *The Influence of IAS/IFRS on the CCCTB, Tax Accounting, Disclosure and Corporate Law Accounting Concepts: ‘A Clash of Cultures’* 29–85 (P. Essers et al. eds, Alphen aan den Rijn: Wolters Kluwer. Kluwer Law International 2020). From the point of view of regulatory authority and possibly also legitimacy it is advisable to stick to the earlier approach of creating a comprehensive set of autonomous rules.

82 These topics would obviously require further research.