

## **Reviewing the OECD's and the EU's Assessment of Singapore's Development and Expansion Incentive**

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## Chapter 1<sup>1</sup> - Introduction

In a world where capital, intangibles and high-skill labor are increasingly mobile, countries will use tax and non-tax measures to attract such resources. To encourage companies to grow their capabilities and to conduct new or expanded economic activities, Singapore offers various tax incentives, such as the Development and Expansion Incentive (“DEI”).<sup>2</sup> A company that is awarded a DEI certificate will benefit from a concessionary tax rate of either 5% or 10%; considerably lower than Singapore’s statutory tax rate of 17%. Singapore is not unique in offering these types of incentives: in the ASEAN region, countries like Malaysia<sup>3</sup> and Thailand<sup>4</sup> also offer tax incentives for similar activities as those covered by the DEI. As many of the qualifying activities are relatively mobile, these countries will therefore have to compete through their tax incentive offering in order to attract the desired economic activities to their territories and maintain them there.

In itself, such tax competition may help to foster investment, but in order to prevent it from being or becoming harmful (the tax foregone under the tax incentive will not be compensated through sufficient economic benefits for the country), the OECD/G20<sup>5</sup> has formulated certain measures in its work on preventing base erosion and profit shifting (BEPS), which has culminated in the BEPS Action Plan.<sup>6</sup> One of the BEPS Actions is BEPS Action 5, which is aimed at countering harmful tax competition by emphasizing the importance of transparency and substance. The governments of the OECD countries and the other countries that have committed to implementing the BEPS recommendations (by joining the Inclusive Framework on BEPS; Singapore is one of them<sup>7</sup>) have agreed to follow the recommendations in BEPS Action 5.

Within the EU, the work in the area of harmful tax competition (for instance, the EU’s Code of Conduct work<sup>8</sup>) has traditionally been focused on preventing a race to the bottom *within* the EU by applying political peer pressure on EU Member States to abolish regimes that are deemed harmful. Increasingly, though, the EU has begun expressing a desire to export the notion of what it considers “tax good governance” to third countries as well, i.e. countries outside the EU / EEA, such as Singapore. This may be effected *directly*, for instance, by inserting tax good governance clauses in a free trade agreement between the EU and the third country and in taking these

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<sup>2</sup> For an overview of tax incentives administered by Singapore’s Economic Development Board, see <https://www.edb.gov.sg/en/how-we-help/incentives-and-schemes.html>.

<sup>3</sup> Malaysia introduced the “Principle Hub Incentive Scheme” in 2015, it is administered by the Malaysian Investment Development Authority.

<sup>4</sup> Thailand introduced an International Headquarters Regime (IHQ) and International Trading Center Regime (ITC) in 2015, which are administered by Thailand’s Board of Investment.

<sup>5</sup> Hereafter briefly referred to as “OECD”.

<sup>6</sup> See the 2015 Final Reports pertaining to all 15 BEPS Actions: <http://www.oecd.org/ctp/beps-2015-final-reports.htm>.

<sup>7</sup> Singapore is one of the 110 countries to have joined the Inclusive Framework on BEPS (at December 2017). See <http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>.

<sup>8</sup> [https://ec.europa.eu/taxation\\_customs/business/company-tax/harmful-tax-competition\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/harmful-tax-competition_en).

elements into account in their aid policies, or *indirectly*, by economically imposing tax good governance principles on the third country through the threat of it being placed on an EU-blacklist and subsequently, being faced with EU-wide countermeasures.

Although Singapore, as a sovereign State, is in itself at liberty as to how it designs and administers the DEI, there are thus various international tax norms – that can be derived from the OECD’s and the EU’s work in the area of harmful tax competition – that influence the DEI’s design and administration by Singapore.

On 16 October 2017, the OECD/G20 published a review by the Forum on Harmful Tax Practices (“FHTP”) of 164 preferential regimes that were reviewed since October 2015 (“2017 Progress Report”).<sup>9</sup> Singapore’s DEI<sup>10</sup>, as a “Headquarters regime”, was treated as “Not harmful”. This means that, according to the FHTP, the DEI regime does not have harmful features. The FHTP was created when the OECD’s Harmful Tax Competition report was released in 1998 (see section 3.2.2) and has been mandated to monitor and review tax regimes of jurisdictions globally, focusing on the features of preferential regimes. The FHTP comprises of the G20 and OECD countries and the European Commission participates in all the meetings of the FHTP.

Soon after, on 5 December 2017, the Council of the European Union adopted the EU list of non-cooperative jurisdictions for tax purposes.<sup>11</sup> Singapore, although subjected to an initial screening (see chapter 3) is not on that list. As will be shown in chapter 4, implicitly this means that the Council of the European Union considers the DEI acceptable too.

No explanation of *why* Singapore’s DEI was treated as “not harmful” was provided in the 2017 Progress Report. It only offers a general outline of approach, process, and criteria used. Similarly, while stating the motivations for listing the (initially)<sup>12</sup> 17 non-cooperative jurisdictions (for example, in Korea’s case, having harmful preferential tax regimes and not committing to amending or abolishing them by 31 December 2018), it is not mentioned why Singapore is *not* listed. The Council Conclusions contains a “State of play of the cooperation with the EU with respect to commitments taken to implement tax good governance principles”, which “records the

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<sup>9</sup> OECD, *Harmful Tax Practices - 2017 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5*, 2017.

<sup>10</sup> As will be discussed in chapter 2, the DEI used to cover IP income as well, but that coverage has now been abolished / grandfathered. In certain cases, IP income is now covered by a new tax incentive, the IP Development Incentive (“IDI”). On the IDI, see F. Loh, H.S. Leng, F. Boulogne, “Singapore introduces IP Development Incentive to encourage innovation”, published on <http://www.businesstimes.com.sg/opinion/singapore-budget-2017/singapore-introduces-ip-development-incentive-to-encourage-innovation>. As an IP regime, the DEI was therefore treated as “abolished” in the 2017 Progress Report. The 2017 Progress Report distinguishes between “Development and expansion incentive – services” and “DEI – Legal services”, the latter being treated as “abolished” under “Miscellaneous regimes” as it will expire on 31 March 2020. The DEI – Legal services will not be further addressed in this paper as it is not aimed at the activities in scope of this paper.

<sup>11</sup> Council of the European Union, Council Conclusions, The EU list of non-cooperative jurisdictions for tax purposes, Brussels, 5 December 2017, 15429/17.

<sup>12</sup> On 23 January 2018, eight jurisdictions were removed from the list, following commitments at high political level by those jurisdictions that eased the EU concerns. Three more jurisdictions were removed on 13 March 2018. See <http://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/>.

commitments taken by the screened jurisdiction to address issues identified with respect to the criteria agreed by the November 2016 Ecofin Council, grouped under the headings of transparency, fair taxation and anti-BEPS measures”. This State of play does not contain any recordings of commitments by Singapore, even though Singapore ranked high in all “selection indicators” and was flagged in two out of three “risk indicators” in a Scoreboard of all third countries and jurisdictions for tax purposes drawn up by the European Commission on 14 September 2016 (see chapter 3).

In this article it will be analysed and described what the OECD’s and EU’s norms exactly are that influence Singapore’s design and administration of its DEI. This analysis will be relied upon in reviewing the FHTP’s conclusion that the DEI is “not harmful” and the decision not to place Singapore on the EU’s list of non-cooperative jurisdictions; a decision that suggests that the Council of the European Union considers Singapore to have adequately implemented the minimum anti-BEPS standards, of which BEPS Action 5 is one.

In chapter 2, relevant aspects of the DEI will be described and specific emphasis will be placed on the transparency around elements such as the eligibility criteria, the applicable tax rate and the qualifying activities (the “substance”) that are required in Singapore to benefit from the DEI.

Chapter 3 will illustrate the development of the OECD’s and the EU’s norms in the area of harmful tax competition; not only in order to identify the norms that currently apply, but also to show where those norms have emanated from.

In chapter 4, the DEI’s design and Singapore’s administration thereof will be assessed against the norms that were identified and described in chapter 3. It will then be analysed whether the FHTP’s and Council of the European Union’s findings can be reconciled with an own assessment against those norms. Where gaps are found, an effort will be made find explanations.

This paper finishes with final considerations in chapter 5.

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## Chapter 2 - Singapore's Development and Expansion Incentive

### 2.1. Legal basis and delegation

Part IIIB (Development and Expansion Incentive) of the Economic Expansion Incentives (Relief from Income Tax) Act (Chapter 86) (hereafter: "Part IIIB") is the legal basis for the DEI. This is a different Act than the 'standard' Singapore Income Tax Act. Part IIIB is added to this paper as Annex I.

The eight different Sections of Part IIIB govern the various aspects of the DEI:

- Interpretation of this Part (section 19I);
- Application for and issue of certificate to development and expansion company (section 19J);
- Tax relief period of development and expansion company (section 19K);
- International legal services (section 19KA);
- Recovery of tax subject to concessionary rate (section 19L);
- Ascertainment of income from qualifying activities (section 19M);
- Ascertainment of income from other trade or business (section 19N);
- Deduction of losses (section 19O);
- Power to give directions (section 19P).

Singapore's Minister of Trade and Industry has the right to approve a company's application as a "development and expansion company" for a certain "qualifying activity" through the issuance of a certificate. See, for instance, section 19J(2): "[t]he Minister may, if he considers it expedient in the public interest to do so, approve the company as a development and expansion company for the qualifying activity and issue to that company a certificate subject to such conditions as the Minister may impose."

That power, and the other powers in Part IIIB, have been deputed by the Minister of Trade and Industry to the Chairman of the Economic Development Board under the Delegation of Powers (Ministry of Trade and Industry) (Economic Expansion Incentives) Notification 2006, which has come into force on 21 July 2006. According to this Notification, the delegation of powers is "subject to the terms and conditions specified in the letter dated 14<sup>th</sup> July 2006 and any subsequent letter addressed to the Chairman." The present author has not been able to retrieve this letter, nor is he aware of any subsequent letters.

### 2.2. Tax rates

According to section 19J(4)(c) "[e]very certificate issued to a development and expansion company must be in respect of a qualifying activity and must specify (...) the concessionary rate of tax to be levied for that qualifying activity for the purposes of this Part."

Sections 19J(5C) – (5E) describe that for new DEI awards, the concessionary rate will be either a nominal rate of 5% or 10%. Such rates are considerably lower than Singapore’s statutory 17% income tax rate (see section 43 of the Income Tax Act, Rate of tax upon companies).

### **2.3. Qualifying activity**

Any company engaged in a “qualifying activity” may apply for approval as a “development and expansion company” (meaning: a company which has been issued with a certificate under section 19J(2)).<sup>13</sup> “Qualifying activity” is defined in section 19I as any of the following:

- (a) the manufacturing or increased manufacturing of any product from any industry that would be of economic benefit to Singapore;
- (b) any qualifying activity as defined in section 16; and
- (c) such other services or activities as may be prescribed.

The qualifying activities as defined in section 16 are:

- a) any engineering or technical services including laboratory, consultancy and research and development activities;
- b) computer-based information and other computer related services;
- c) the development or production of any industrial design; and
- d) such other services or activities as may be prescribed.

The Economic Expansion Incentives (Relief from Income Tax) (Qualifying Activity) Regulations prescribe the “other services or activities as may be prescribed” in paragraph (c) of section 19I (Part I) and paragraph (d) of section 16 (Part II):

#### **Part I**

- (1) Services and activities which relate to the provision of entertainment, leisure and recreation.
- (2) Publishing services.
- (3) Services which relate to the provision of education.
- (4) Medical services.
- (5) Services and activities which relate to agricultural technology.
- (6) Services and activities which relate to the provision of automated warehousing facilities.
- (7) Financial services.
- (8) Business consultancy, management and professional services.
- (9) Services and activities which relate to international trade.
- (10) Services provided by an auction house.

#### **Part II**

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<sup>13</sup> Section 19J(1A) makes clear that the application may be for more than one qualifying activity.

- (1) Services and activities engaged in by a company which relate to logistics and freight forwarding and which are not approved as shipping-related support services provided by the company under section 43ZF of the Income Tax Act (Cap. 134).

## **2.4. Qualifying income**

If the plain vanilla scenario of *one* qualifying activity is considered, section 19J(5C)(a) stipulates that the concessionary DEI rate is levied “upon the expansion income *derived by* a development and expansion company *from* the qualifying activity” [emphasis added]. It is not further clarified under which circumstances income can be considered to be derived “*from*” a qualifying activity.

Section 19J(6) states that the income from a qualifying activity is (logically) referred to as “qualifying income.” Expansion income is then defined in the same subsection as the qualifying income “to which the certificate issued under this section relates that exceeds the average corresponding income.”

Subsections (7) – (9) contain formulae for determining the “average corresponding income”. But subsection (10) gives the Minister the discretion to deviate from that amount: “[n]otwithstanding subsections (7), (8) and (9), the Minister may, if he thinks fit, specify any amount to be the average corresponding income in substitution of the amount determined under those subsections.” As an aside, as regards the signification discretion on the Minister’s side to set the “average corresponding income”, it is submitted that this would very likely not have been acceptable within the EU in view of the application of the EU State aid rules of Articles 107 and 108 of the Treaty on the Functioning of the European Union. Such discretion would make it difficult to exclude that certain undertakings are not favoured over others and, as a result, receive a ‘selective advantage’.<sup>14</sup> That would not be allowed under the EU State aid rules. Within the EU, it would therefore have to be much more specific to on the basis of which criteria the Minister would set the amount.

Section 19M addresses the ascertainment of income from qualifying activities and provides that qualifying income, subject to subsections (2) and (3) is “ascertained in accordance with the provisions of the Income Tax Act, after making such adjustments as may be necessary to give effect to any direction given under section 19P.” Subsections (2) and (3) deal with topics such as the deduction of allowances and donations.

## **2.5. Tax relief period**

The initial tax relief period is a period of no more than 10 years and that period may be extended for up to five years at a time (section 19k(1) and (2)). As a main rule, the total tax relief period of a development and expansion company for a qualifying activity shall not in the aggregate exceed 20 years (section 19k(3)).

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<sup>14</sup> See, on this point, para

The DEI itself has been given a finite lifetime: section 19J(3) stipulates that “no company may be approved as a development and expansion company on or after 1 January 2024.”

## **2.6. Administrative aspects**

Pursuant to section 19J(1) a company may apply “in the prescribed form to the Minister for approval as a development and expansion company for that qualifying activity.”

Section 19J(2) states that: “the Minister may, if he considers it in the public interest to do so, approve the company as a development and expansion company for the qualifying activity and issue to that company a certificate subject to such conditions as the Minister may impose.”

There does not seem to be any guidance as to when the approval of a company as a development and expansion company can be considered to be “in the public interest”.

Furthermore, it is not clear what the “conditions as the Minister may impose” are. None of the sections in Part IIIB give specific examples of such conditions, which suggests that section 19J(2) generally authorises the Minister to impose conditions. But it is not clear what those conditions should actually address and what the purpose would be of those conditions. Also other subsections in Part IIIB refer generally to, for instance, “terms and conditions as he may impose” (section 19K(1)(b)) and “conditions as the Minister may impose” (section 19K(2)), but they do not clarify either what those conditions should address.

Part IIIB does not specifically indicate how long the Minister may take to decide whether he approves a company as a development and expansion company. Neither does Part IIIB specify whether a company has the right to appeal or object if the Minister *explicitly* (e.g. he sends a refusal letter) or *implicitly* (e.g. he does not take a decision) does not approve a company as a development and expansion company.

The DEI certificates under section 19J(2) are not published.



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## Chapter 3 - International Tax Norms Influencing the Design and Administration of the DEI

### 3.1.Introduction

Historically, countries had total sovereignty in the design of their tax systems. The potential risk of double taxation that would arise as a result of the different tax policy choices made would be resolved through unilateral measures for the avoidance of double taxation or through bilateral tax treaties. While most countries generally have still kept the *legal* sovereignty to design their tax systems and to express their tax policy choices, that sovereignty has to an extent been constrained *politically* and *economically*.

*Politically*, the 110 plus countries that are part of the inclusive forum have committed to implementing the minimum standards of the OECD's BEPS project. This means a political commitment to bring that country's tax system in line with the BEPS recommendations, which will be peer reviewed. Elements that are deemed 'harmful' under the BEPS criteria would need to be abolished.

*Economically*, a country may be compelled to bring its tax system in line with the standards of others, even when those standards are not legally binding upon that state. Not doing so could result in the trading with other states and the investment by investors from other states being discouraged through sanctions that may be imposed by those other states, such as the application of anti-abuse rules, CFC-rules, mandatory withholding taxes or non-tax measures.

In this chapter it will be assessed what the international tax norms are that influence the design and administration of the DEI by Singapore and it will be explored what those international tax norms, and their sub-norms, exactly entail.

### 3.2.The OECD's Norms

#### 3.2.1. Introduction

The OECD is an intergovernmental economic organisation that consists of 35 countries. Singapore is not an OECD member, but "welcomed" the OECD's recommendations to counter base erosion and profit shifting ("BEPS")<sup>15</sup> and in 2015, it joined the Inclusive Framework on BEPS in 2017 and thereby committed to implementing the four internationally-agreed standards under the OECD's BEPS Project (countering harmful tax practices, preventing treaty abuse, country-by-country reporting and enhancing dispute resolution) that will be addressed further on in this chapter.<sup>16</sup>

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<sup>15</sup> <http://www.mof.gov.sg/news-reader/articleid/1536/parentId/59/year/2015>.

<sup>16</sup> Singapore is one of the 110 countries to have joined the Inclusive Framework on BEPS (at December 2017). See <http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>.

The OECD has *de facto* become “a central global institution for technical tax policy design”.<sup>17</sup> A key contribution by the OECD has been the production of its OECD Model Tax Convention in 1963, which was followed by several updated versions, and its explanatory Commentaries to that Model Tax Convention. The OECD Model Tax Convention has served as the basis for many bilateral tax treaties worldwide and the interpretative value of the Commentary has been widely acknowledged. According to certain authors it is even legally binding when OECD Model Tax Convention-patterned treaties should be interpreted.<sup>18</sup>

Tax treaties, amongst others, allocate taxing rights in order to prevent double taxation. They contain distributive rules and rules on the methods of avoiding double taxation by the Contracting States. Essentially, those rules express whether or not a State is allowed to tax an item of income and – typically only in cases of passive income, such as dividends, interest and royalties – those rules set a maximum rate of taxation for the Contracting State that only has a secondary right of taxation. Tax treaties typically do not impose a maximum rate of tax of the Contracting State with a primary right of taxation, such as the State of residence under the ‘business profits’, Article 7, nor would they impose a minimum rate of taxation.<sup>19</sup> The present author is not aware of a tax treaty with a ‘maximum’ or ‘minimum’ tax rate requirement in the ‘business profits’ article.

In various areas has the OECD’s work set the standard, such as its Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, of which the latest version was released in 2017.<sup>20</sup> Those guidelines provide guidance on the application of the “arm’s length principle” and are universally embraced by national courts, or also, for example, by Advocate General Bobek in his Opinion in the *Hornbach-Baumarkt* case (before the European Court of Justice (“ECJ”)), who explicitly referred to those Guidelines.<sup>21</sup> The OECD also paved the way for the current Global Forum on Transparency and Exchange of Information for Tax Purposes, which is an international body ensuring the implementation of the internationally agreed standards of transparency and exchange of information in the tax area. Initially it consisted of mostly OECD countries and was created to address the risks to tax compliance posed by non-cooperative jurisdictions but has now been expanded to no less than 150 members, with a broader focus.<sup>22</sup>

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<sup>17</sup> A. J. Cockfield, The Rise of the OECD as Informal ‘World Tax Organization’ Through National Responses to E-Commerce Tax Challenges, *Yale Journal of Law and Technology*, Vol. 8, Issue 1 2006, at pp. 136 and 139.

<sup>18</sup> See e.g. F.A. Engelen, “How ‘Acquiescence’ and ‘Estoppel’ Can Operate to the Effect that the States Parties to a Tax Treaty Are Legally Bound to Interpret the Treaty in Accordance with the Commentaries on the OECD Model Tax Convention” in: S.C.W. Douma and F.A. Engelen, *The Legal Status of the OECD Commentaries, Vol. 1 – Conflict of Norms in International Tax Law Series*, IBFD, Amsterdam 2008, pp. 51-72.

<sup>19</sup> What is required, though, is that the company is “liable to tax”, see Article 4(1) of the OECD Model Tax Convention.

<sup>20</sup> Available online at: <http://www.oecd.org/publications/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>.

<sup>21</sup> Advocate-General Bobek’s Opinion in Case C-382/16, *Hornbach-Baumarkt A-G v Finanzamt Lindau* [14 December 2017] ECLI:EU:C:2017:974 (paragraphs 100-101).

<sup>22</sup> <http://www.oecd.org/tax/transparency/>.

While neither the OECD Model Tax Convention nor its Commentaries regulate the design and administration of a corporate income tax incentive, such as the DEI, this is different for the OECD's work in the area of harmful tax competition. That work has culminated in several milestones, such as the Report on "Harmful Tax Competition" in 1998 and the adoption of the OECD BEPS Action Plan in 2015, of which BEPS Action 5 is of particular relevance.

### 3.2.2. Harmful Tax Competition Report

In 1998 the OECD released its report "Harmful Tax Competition – An Emerging Global Issue" ("Harmful Tax Competition Report").<sup>23</sup> The Harmful Tax Competition Report was intended "to develop a better understanding of how tax havens and harmful preferential tax regimes, collectively referred to as harmful tax practices, affect the location of financial and other service activities, erode the tax bases of other states, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally" (para 4). The Harmful Tax Competition Report "recognises the distinction between acceptable and harmful preferential tax regimes" (para 4). The Harmful Tax Competition Report focuses on (para 6):

"(...) geographically mobile activities, such as financial and other service activities, including the provision of intangibles. Tax incentives designed to attract investment in plant, building and equipment have been excluded at this stage, although it is recognised that the distinction between regimes directed at financial and other services on the one hand and at manufacturing and similar activities on the other hand is not always easy to apply. The Committee intends to explore this issue in the future. The Committee also recognises that there are many economic, social and institutional factors that affect the competitive position of a country and the location of economic activities. These factors, however, are not the focus of this study."

The Harmful Tax Competition Report draws a distinction between *tax havens* and *non-haven jurisdictions offering harmful preferential tax regimes* and it does so for the following reasons (para 43):

"[a tax haven] has no interest in trying to curb the "race to the bottom" with respect to income tax and is actively contributing to the erosion of income tax revenues in other countries. For that reason, these countries are unlikely to co-operate in curbing harmful tax competition. By contrast, in the second case, a country may have a significant amount of revenues which are at risk from the spread of harmful tax competition and it is therefore more likely to agree on concerted action."

In the OECD's view, the willingness to co-operate in curbing harmful tax competition and agreeing on concerted actions will thus differ between tax havens and non-haven jurisdictions and this translates to differences in application of the Recommendations and the Guidelines between the two types of jurisdictions (paras 43 and 44).

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<sup>23</sup> OECD, *Harmful Tax Competition. An Emerging Global Issue*, Paris, 1998.

The Harmful Tax Competition Report mentions that the concept of “tax havens” does not have a precise technical meaning, but it makes an attempt at a broad categorisation by referring to “countries that are able to finance their public services with no or nominal income taxes and that offer themselves as places to be used by non-residents to escape tax in their country of residence” as opposed to “countries which raise significant revenues from their income tax but whose tax system has features constituting harmful tax competition” (para 42).

This distinction is interesting, as the ability to raise significant revenues from income tax does not automatically imply that the tax rates in that jurisdiction cannot be ‘nominal’ (attracting a broad mobile tax base can still generate significant revenue, even when taxed at a low rate). Furthermore, a higher nominal tax rate (but with room for significant deductions, allowances etc) may not necessarily lead to significant revenues from income tax, certainly not in an economic downturn when income levels are lower. Finally, countries make different policy choices, both as to the level of public services they (can) offer, and with which types of income they finance those services. It is debatable whether such choices should affect a country’s characterisation as tax haven, plus countries should also remain free to choose non-income taxes to finance their expenditure.

The Harmful Tax Competition Report identifies four key factors in identifying tax havens for the purposes of that Report (p. 23):

- (a) No or only nominal taxes;
- (b) Lack of effective exchange of information;
- (c) Lack of transparency;
- (d) No substantial activities.

What may be added to these criteria is the “reputation test” that came from a 1987 Report by the OECD:<sup>24</sup> “does the country or territory offer itself or is it generally recognised as a tax haven?”

If a country is not considered a “tax haven”, it should subsequently be examined whether the tax regimes offered by that jurisdiction should be regarded as “harmful preferential tax regimes”. The Harmful Tax Competition Report lists four key factors to identify and assess harmful preferential tax regimes (paras 60 *et seq*):

- (a) No or low effective tax rates;
- (b) “Ring fencing” of regimes;
- (c) Lack of transparency;
- (d) Lack of effective exchange of information.

The terminology of factor (a) differs from the one used under the “tax haven analysis”, which refers to “no or only nominal taxes”. The Harmful Tax Competition Report clarifies factor (a) as

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<sup>24</sup> OECD, *International Tax Avoidance and Evasion, Four Related Studies*, No.1, 1987, at p. 22.

follows (for harmful preferential tax regimes): “[a] zero or low effective tax rate may arise because the schedule rate itself is very low or because of the way in which a country defines the tax base to which the rate is applied” (para 61).

Factor (b), “ring fencing”, is described in the Harmful Tax Competition Report as a “partly or full (...) [insulation] from the domestic economy (para 62).” The Harmful Tax Competition Report mentions two forms of such “ring fencing”: (i) the regime restricts benefits to non-residents or (ii) investors who benefit from the tax regime are explicitly or implicitly denied access to domestic markets (para 62).

It is interesting to see why a lack of transparency, factor (c), is considered problematic. The Report gives as key reason that non-transparent regimes “are likely to increase harmful tax competition since non-transparent regimes give their beneficiaries latitude for negotiating with the tax authorities and may result in inequality of treatment of taxpayers in similar circumstances.” As a result “it [will be] harder for the home country to take defensive measures.” (para 63). The Report lists two conditions that a tax regime’s administration should normally satisfy to be deemed transparent in terms of administrative practices (para 63):

“[f]irst, it must set forth clearly the conditions of applicability to taxpayers in such a manner that those conditions may be invoked against the authorities; second, details of the regime, including any applications thereof in the case of a particular taxpayer, must be available to the tax authorities of other countries concerned.”

The Harmful Tax Competition Report also contains eight “other factors” that “generally help to spell out, in more detail, some of the key principles and assumptions that should be considered in applying the key factors themselves” to determine whether or not a preferential tax regime is harmful (para 68 *et seq*):

- (a) an artificial definition of the tax base;
- (b) failure to adhere to international transfer pricing principles;
- (c) foreign source income exempt from residence country taxation;
- (d) negotiable tax rate or tax base;
- (e) existence of secrecy provisions;
- (f) access to a wide network of tax treaties;
- (g) the regime is promoted as a tax minimisation vehicle;
- (h) the regime encourages operations or arrangements that are purely tax-driven and involve no substantial activities.

The Harmful Tax Competition Report finally contains a set of 15 Guidelines for dealing with preferential regimes in OECD Member Countries. The adoption of those Guidelines, according to the Harmful Tax Competition Report, would “provide a clear political message that the OECD Member countries are prepared to intensify their co-operation to counter harmful tax practices”

(para 90). How the OECD Member countries should achieve that result is indicated through a series of 15 Recommendations. It is instructive to list Recommendation 5 here:

“Recommendation concerning rulings: that countries, where administrative decisions concerning the particular position of a taxpayer may be obtained in advance of planned transactions, make public the conditions for granting, denying or revoking such decisions.”  
(p. 44 of the Report)

Recommendation 5 reflects the factor of transparency (factor (c)) as part of the assessment whether a preferential tax regime should be considered harmful.

The Harmful Tax Competition Report makes clear that the Recommendations were not only intended for OECD Member countries, but also for non-Member countries, like Singapore, and it strikes a tone of “encouragement” (para 156):

“[to] retain the spread of harmful tax practices, non-member countries should be associated with the Recommendations set out in this Chapter. Whilst the Recommendations in relation to tax havens should reduce the amount of displacement to non-member countries, it will not eliminate it since it would still be possible to relocate to a non-member country with a harmful preferential tax regime. In order to minimise the scope for such displacement, non-member countries should be encouraged to dismantle harmful preferential tax regimes by promoting a broader acceptance of the principles set out in this Report and by engaging in a dialogue with the Member countries on how they could apply the Guidelines.”

Based on the four “key factors” and the eight “other factors” discussed above, it has to be determined whether a preferential regime should be regarded as potentially harmful. Yet, it may not be *actually* harmful if it does not appear to have created harmful economic effects. According to the Report, the following questions can help in making this economic assessment (para 80 *et seq*):

- 1) Does the tax regime shift activity from one country to the country providing the preferential tax regime, rather than generate significant new activity?
- 2) Is the presence and level of activities in the host country commensurate with the amount of investment or income?
- 3) Is the preferential regime the primary motivation for the location of an activity?

We note that the assessment of the DEI against the international tax norms identified and described in this chapter will be confined to a *legal* analysis and will not contain an *economic* assessment as well.<sup>25</sup>

### 3.2.3. OECD BEPS Action 5

17 years after the publication of the “Harmful Tax Competition Report”, the OECD released – as part of its BEPS package for reform of the international tax system to tackle tax avoidance – its Final BEPS Reports in 2015, of which the one relating to Action 5 (“Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance”, “Action 5 Report”) is of particular relevance.<sup>26</sup> It is relevant to see whether, 17 year later, the factors for a regime being considered harmful that could be derived from the Harmful Tax Competition Report are still valid, or whether certain factors have been added, removed, or changed.

The Action 5 Report starts with the reinsurance that the Harmful Tax Competition Report has not lost its value (p. 9):

“the underlying policy concerns then [in the Report] are as relevant today as they were then. Current concerns are primarily about preferential regimes that risk being used for artificial profit shifting and about a lack of transparency in connection with certain rulings. The continued importance of the work on harmful tax practices was highlighted by the inclusion of this work in the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013), whose Action 5 committed the Forum on Harmful Tax Practices (FHTP) to:

Revamp the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for any preferential regime. It will take a holistic approach to evaluate preferential tax regimes in the BEPS context. It will engage with non-OECD members on the basis of the existing framework and consider revisions or additions to the existing framework.”

The Action 5 Report recognises that only the focus may have shifted in the last 17 years (p. 12):

“[m]ore than 15 years have passed since the publication of the 1998 Report but the underlying policy concerns expressed in the 1998 Report have not lost their relevance. In certain areas, current concerns may be less about traditional ring-fencing but instead

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<sup>25</sup> Although, admittedly, reference is made in this chapter to the Council of the European Council’s (Scoreboard of its pre-assessment of all third countries and jurisdictions) “selection indicators”, which serve to indicate economic relevance of ties between the third country and the EU.

<sup>26</sup> OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance: Action 5 - 2015 Final Report*, 2015.

relate to across the board corporate tax rate reductions on particular types of income (such as income from financial activities or from the provision of intangibles.”

This description of current concerns seems right: truly fenced-regimes have become an oddity. Tax incentives will typically offer a reduction of corporate income tax (and perhaps other taxes too, such as personal income taxes or dividend withholding taxes), in exchange for something more lucrative for the host country: jobs and economic growth and with that, the ability to raise, for instance, individual income tax from the persons employed by the incentivised company or consumption taxes on their spending. Rather than keeping the recipients of the incentives offshore, it is actually desired that they move onshore.

The choice of words used – “revamp”, “priority” and “renewed focus” – suggests that the OECD member countries see the Action 5 Report as essentially reinforcing Harmful Tax Competition Report, but adding a new emphasis on IP regimes (p.23):

“[t]o counter harmful regimes more effectively, Action 5 of the BEPS Action Plan (OECD, 2013) requires the FHTP to revamp the work on harmful tax practices, with a priority and renewed focus on requiring substantial activity for any preferential regime and on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes.”

“Substantial activity”, which was the above-mentioned eighth “other factor” from the Harmful Tax Competition Report in assessing whether a regime is harmful, namely that it is designed in such a way that taxpayers may derive benefits from the regime while engaging in operations that are purely tax-driven and involve no substantial activities, is effectively now given the same status as the four main criteria in the 1998 report. In the OECD’s view, if an operation is purely tax-driven, that seems to exclude substantial activities taking place. But when the amounts of tax at stake (and the possibilities to engage in tax rate arbitrage) are sufficiently great, taxpayers in a certain jurisdiction may be able to move substantial activity to another jurisdiction as a mere ‘cost’ to obtaining a larger tax benefit. It remains to be seen whether granting tax treaty benefits to arrangements that are purely tax-driven, but nonetheless substantive, can be challenged under the proposed “principal purpose test” (as part of BEPS Action 6) that will be implemented by many countries (for instance, those signing the Multilateral Instrument) or whether in such a case granting treaty benefits is “accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.”<sup>27</sup>

The Action 5 Report subsequently addresses the substantial activity requirement, both in the context of IP Regimes and in the context of non-IP regimes. As mentioned in chapter 1, the focus in this paper is on the DEI, which, after the introduction of the IDI in Singapore (covering IP

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<sup>27</sup> See Article 7(1) of the OECD’s Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting.



income), should now be regarded as a non-IP regime.<sup>28</sup> The introductory paragraphs of the Action 5 Report mention the differences in applying substantial activity requirement to non-IP regimes as compared to IP regimes (para 72):

“[w]hen applied to IP regimes, the substantial activity requirement establishes a link between expenditures, IP assets, and IP income. Expenditures are a proxy for activities, and IP assets are used to ensure that the income that receives benefits does in fact arise from the expenditures incurred by the qualifying taxpayer. The effect of this approach is therefore to link income and activities. When applied to other regimes, the substantial activity requirement should also establish a link between the income qualifying for benefits and the core activities necessary to earn the income. As set forth in the 1998 Report, the core activities at issue in non-IP regimes are geographically mobile activities such as financial and other service activities. These activities may not require anything to link them to income because service activities could be seen as contributing directly to the income that receives benefits.”

The Action 5 Report then goes on to list eight types of ‘regimes’ and sets out a brief description of the type of substantial activities that might be required for the each of those regimes:

- A – Headquarters regime;
- B – Distribution and service centre regimes;
- C – Financing or leasing regimes;
- D – Fund management regimes;
- E – Banking and insurance regimes;
- F – Shipping regimes;
- G – Holding company regimes.

In light of these descriptions, the DEI can be considered to cover (elements of) regimes A,<sup>29</sup> B,<sup>30</sup> and G,<sup>31</sup> but its scope is broader than that. The guidance under these descriptions as to what constitute the relevant substantial activities is therefore of limited guidance.

Having covered the element ‘substance’, the Action 5 Report moves on to ‘transparency’ and with this element, the focus is on rulings. Chapter 5 of the Action 5 Report sets out six categories

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<sup>28</sup> Income from qualifying IP will not be covered by the IP development incentive; it is at yet unclear whether income from non-qualifying IP will remain covered by the DEI.

<sup>29</sup> Headquarter regimes grant preferential tax treatment to taxpayers that provide certain services such as managing, co-ordinating or controlling business activities for a group as a whole or for group members in a specific geographical area (para 74).

<sup>30</sup> Distribution centre regimes provide preferential tax treatment to entities whose main or only activity is to purchase raw materials and finished products from other group members and re-sell them for a small percentage of profits. Service centre regimes provide preferential tax treatment to entities whose main or only activity is to provide services to other entities of the same group (para 76).

<sup>31</sup> Holding company regimes can be broadly divided into two categories: (i) those that provide benefits to companies that hold a variety of assets and earn different types of income (e.g. interest, rents, and royalties) and (ii) those that apply only to companies that hold equity participations and earn only dividends and capital gains (para 86).

of taxpayer-specific rulings which – in the absence of compulsory spontaneous exchange of information – could give rise to BEPS concerns. These six categories are (para 91):

- (i) rulings relating to preferential regimes;
- (ii) unilateral APAs or other cross-border unilateral rulings in respect of transfer pricing;
- (iii) cross-border rulings providing for a downward adjustment of taxable profits;
- (iv) permanent establishment (PE) rulings;
- (v) related party conduit rulings;
- (vi) any other type of ruling agreed by the FHTP that in the absence of spontaneous information exchange gives rise to BEPS concerns.

The Report makes clear that the harmful part – from a transparency perspective – is not *per se* that those rulings represent preferential regimes (p. 46):

“[t]his does not mean that such rulings or the legal or administrative procedures under which they are given represent preferential regimes. Instead it reflects countries’ concerns that a lack of transparency can lead to BEPS, if countries have no knowledge or information on the tax treatment of a taxpayer in a specific country and that tax treatment affects the transactions or arrangements undertaken with a related taxpayer resident in their country.”

To enhance transparency, the FHTP has agreed to a framework, described in the FHTP’s 2014 Progress Report, to spontaneously exchange information pertaining to rulings given in respect of preferential regimes, being regimes that (i) are within the scope of the work of the FHTP; (ii) are preferential; and (iii) meet the low or no effective tax rate factor. It is relevant to note that, for purposes of spontaneously exchanging information, it is not relevant whether a regime has been reviewed by the FHTP or has actually been found harmful (p. 49):

“104. The obligation to spontaneously exchange information arises for rulings related to any such preferential regime. That is, a regime does not need to have been reviewed or found to be potentially or actually harmful within the meaning of the 1998 Report for the obligation to arise. Therefore, the obligation will also apply to any ruling (as defined) in connection with preferential regimes that have not yet been reviewed or that have been reviewed but that have not been found to be potentially or actually harmful and that have therefore been cleared.

105. Countries that have preferential regimes that have not yet been reviewed by the FHTP will need to self-assess and take a view on whether the filters are satisfied. Where this is the case, the obligation to spontaneously exchange information arises immediately, without the FHTP first needing to formally review the relevant regime. In case of doubt as to the applicability of the filters, it is recommended that the relevant country spontaneously exchange information. The expectation is that a country that has a

preferential regime which has not yet been reviewed by the FHTP will in the meantime self-refer this regime for review by the FHTP.”

Separate from Action 5, the OECD’s Task Force on Tax and Development has pressed for a more effective global transparency framework for tax incentives for investment to promote transparency in decision-making processes, increase the information available on costs and benefits, limit discretion and increase accountability.<sup>32</sup> A set of principles to promote the management and administration of tax incentives for investment in a transparent and consistent manner has been developed and a summary of these principles is the following:<sup>33</sup>

1. *Make public a statement of all tax incentives for investments and their objectives within the governing framework.*
2. *Provide tax incentives for investment through tax laws only.*
3. *Consolidate all tax incentives for investment under the authority of one government body, where possible.*
4. *Ensure tax incentives for investment are ratified through the law making body or parliament.*
5. *Administer tax incentives for investment in a transparent manner.*
6. *Calculate the amount of revenue forgone attributable to tax incentives for investment and publicly release a statement of tax expenditures.*
7. *Carry out periodic review of the continuance of existing tax incentives by assessing the extent to which they meet the stated objectives.*
8. *Highlight the largest beneficiaries of tax incentives for investment by specific tax provision in a regular statement of tax expenditures, where possible.*
9. *Collect data systematically to underpin the statement of tax expenditures for investment and to monitor the overall effects and effectiveness of individual tax incentives.*
10. *Enhance regional cooperation to avoid harmful tax competition.*

### **3.3. The EU’s Norms**

The EU – until a/the Brexit – consists of 28 European Member States. Singapore is a ‘third country’. At first sight, one could wonder why the EU’s norms should be considered when it comes to the design and administration of the DEI by Singapore. A cautious answer to that question is: because the EU increasingly seeks to push through a tax policy that would also seek to subject third countries to the EU’s standards of tax good governance in order to prevent that the levelling of the tax playing field within the EU, both through *positive* harmonisation (e.g. through the Anti-Tax Avoidance Directive and possibly a C(C)TB in the future) as well as *negative* harmonisation (for instance, the European Commission relying on the State Aid instrument to prevent harmful tax competition within the EU) would place EU companies at a

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<sup>32</sup> IMF, OECD, UN and World Bank, *Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment*, 2015.

<sup>33</sup> IMF, OECD, UN and World Bank, *Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment*, 2015, at p. 32.

global competitive disadvantage compared to their non-EU counterparts. Although there is no instrument that the EU could rely upon to *legally* bind Singapore unilaterally, investments and trade flows between the EU Member States and Singapore are significant (see the table below) and unilateral action by the EU Member States could still affect Singapore *economically*, which forms an important reason for Singapore to take account of the EU’s views on tax good governance. The next sections will address: (i) how the EU, over the last years, has begun to focus on third countries’ tax good governance, (ii) which tax good governance norms the EU wants third countries to adhere to, and (iii) how the EU envisages imposing those tax good governance norms on the third countries, both *legally* (e.g. through bilateral trade agreements) and *economically* (through unilateral measures). The latter, as Kalloe rightly observes, seems to become much more important.<sup>34</sup>

“[w]hereas in the past, the European Union aimed for inclusion of tax good governance provisions in various agreements with third countries, it has now achieved a standalone political approach that no longer requires the consent of the third country. The listing [of third countries, see below] can be imposed on a one-sided basis by way of an EU political decision without a clear legal basis [although it has a legal basis *within* the EU, GFB].”

	Stocks		Flows	
	Held by Singapore in the EU	Held by the EU in Singapore	From Singapore to the EU	From the EU to Singapore
<b>Singapore</b>	43,763	102,914	-5,489	8,477

*Table. EU Singapore Trade & Investment 2016 Edition (Millions in €)*

Considering the ECJ’s interpretation of the freedom of capital movement, the actual tax regime in a third country has never seem to be of much relevance. In its case-law it always seemed ‘sufficient’ for the relevant analysis that the third country concerned was, simply, a third country, and not an EU Member State. But increasingly, it seems possible to distinguish between ‘good’ and ‘bad’ third countries under EU tax law.

Article 63 of the Treaty on the Functioning of the European Union (“TFEU”) is the main Treaty article on the freedom of capital movements. Of particular relevance is the first paragraph, which reads:

“1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”

This freedom of capital movement is the only of the four EU fundamental freedoms (the others are: free movement of goods, services and workers) that can be characterised as a true ‘global

<sup>34</sup> V. Kalloe, “EU Tax Haven Blacklist – Is the European Union Policing the Whole World”, *European Taxation*, No. 2/3 2018, published online.

freedom’ as it also extends outside the EU’s territory to third countries. The ECJ has interpreted Article 63(1) TFEU in various cases where an EU Member State had a tax provision in place that made movements of capital between that Member State and a third country less attractive than capital movements within that Member State. In other words, in cases where that tax provision discriminated. Seyad explains that the aim of developing the euro as an international and competitive currency was behind the extension of the scope of the free movement of capital to third countries as well.<sup>35</sup>

“[t]he judgment [the *Sanz de Lera* judgment,<sup>36</sup> in which the ECJ held that [the current] Article 63 TFEU had direct effect in a case involving capital movement towards third countries] should also be viewed in light of the launching of the euro as the single currency of some of the member states of the Union in 1999. Even though the Lisbon Treaty does not expressly declare that the euro shall be developed as an international and competitive currency, the European Union plays a major role in international politics and trade and, to that extent, it would like to use its currency as a bargaining tool in such areas. The euro cannot develop into an international currency if the free movement of capital is to be limited to the geographical limits of the European Union.”

The ECJ has never considered the lack of reciprocity – the third country would not be required to remove a similar restriction in its domestic laws – a legitimate justification ground for allowing the Member State to restrict the capital movement vis-à-vis the third country. Hindelang and Maydell write:<sup>37</sup>

“[o]n the basis of the *telos* and the systematics of the treaty, the unilateral liberalization of free movement of capital *erga omnes* is to be perceived as unconditional. Ultimately, missing reciprocity is not an argument for a restriction of third country capital movement, but the very consequence of this unilateral act. Thus the introduction of mandatory requirements pursuing budgetary purposes also based on “lacking reciprocity” in a third country context must also be rejected. Closely related to the “lacking reciprocity” argument is that of ‘lacking harmonization’ in a third-country context, which also cannot form a valid plea to restrict third-country capital movement.”

Kiekebeld and Smit had also discussed whether a lack of reciprocity could be invoked by a Member State to justify a restriction imposed by a Member State on the free movement of capital in relation to third countries and they wrote that:<sup>38</sup>

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<sup>35</sup> S.M. Seyad, “Free Movement of Capital”, in: D. Patterson and A. Södersten (eds.), *A Companion to European Union Law and International Law*, John Wiley & Sons: London 2016, p. 231 et seq.

<sup>36</sup> Joined cases C-163/94, 165/94 and C-250/94, *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu* [14 December 1995] ECR I-04821.

<sup>37</sup> S. Hindelang and N. Maydell, “The EU’s Common Investment Policy – Connecting the Dots” in: M. Bungenberg, J. Griebel and S. Hindelang (eds.), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law*, Springer-Verlag: Berlin Heidelberg 2011, at pp. 10-11.

<sup>38</sup> D.S. Smit and B.J. Kiekebeld, “EU Free Movement of Capital and Corporate Income Taxation” in: S.J.J.M. Janssen, *Fiscal Sovereignty of the Member States in an Internal Market. Past and Future, EUCOTAX Series on European Taxation*, Kluwer Law International: Alphen aan den Rijn 2011, at p. 147.

“(…) it follows that accepting the lack of reciprocity in a third country context as a justification ground as such would eventually deprive Article 56/63 TFEU of its meaning. Given the clear and unconditional wording of the said provisions, this cannot be accepted. The lack of reciprocity in a third country context should therefore not, as such, be accepted as a justification ground. However, as also indicated by the Netherlands *Hoge Raad*,<sup>39</sup> it may be a factor to take into account when assessing the validity of the other justification grounds above.”

Repairing a domestic provision that breaches EU law could result in a loss of that Member State’s tax revenue. An ECJ decision such as *Emerging Markets* clarifies that this also has to be accepted in a third country context:<sup>40</sup>

“102 In that respect, suffice it to recall that, in accordance with the Court’s settled case-law, diminution of tax revenue cannot be regarded as an overriding reason in the public interest which may be relied upon in order to justify a measure which is, in principle, contrary to a fundamental freedom (*Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 126).

103 That case-law applies both where the Member State concerned surrenders tax revenue in favour of another Member State and where that surrender is in favour of a non-Member State. In any event, as observed by the Advocate General in point 127 of his Opinion, the Polish companies continue to be liable to taxation on their profits and European Union law does not prevent the Member State concerned, in the longer term, from abandoning the prevention of double taxation, by obliging it to adopt or maintain measures designed to eliminate situations where such double taxation arises.”

If it is not necessary to examine whether the third country would act reciprocally (a lack of reciprocity forms no justification ground, after all), is it relevant from an EU tax law perspective what the actual tax regime is in the third country? In the realm of the freedom of capital movement, the ECJ has indeed accepted certain justification grounds in a third-country context (*i.e.*, Member State vis-à-vis third country) that it dismissed in the relationship between Member States. A ground that has been submitted by Member States to justify a discriminatory treatment in their domestic laws, is that in a cross-border situation, they would lack access to relevant information from the other country in order to levy their taxes. In intra-EU situations, that argument has been rejected by the ECJ by pointing at the available machinery<sup>41</sup> under EU law to

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<sup>39</sup> Dutch Supreme Court.

<sup>40</sup> Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company v Dyrektor Izby Skarbowej w Bydgoszczy* [10 April 2014] EU:C:2014:249 (paragraphs 102-103).

<sup>41</sup> See e.g. Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, *Official Journal of the European Union* L 359/1, 16 December 2014.

obtain that information.<sup>42</sup> In third country situations, however, this argument was accepted by the ECJ when there was no tax treaty in place guaranteeing similar availability of information.<sup>43</sup> Still, such an argument relates more to a general aspect of the third country, namely that it is not covered by the EU machinery on exchange of information and mutual assistance for the recovery of tax claims, rather than a specific aspect of the third country's tax regime.

Against the backdrop of the developments discussed in the next paragraphs, such as the adoption of a common EU list of non-cooperative (third country) jurisdictions for tax purposes, it will be interesting to see whether the ECJ will give Member States more leeway to treat transactions with certain third countries ('bad third countries') less favourably than transactions with 'good third countries'. For instance, would a third country's presence on the common EU list in itself justify a difference in treatment? For transactions *between Member States*, the ECJ has firmly held that "any tax advantage for service providers resulting from the low taxation to which they are subject in the Member State in which they are established cannot, by itself, be used by another Member State as justification for according less favourable treatment in tax matters to recipients of services established in the latter State".<sup>44</sup> It not clear yet if the low taxation *in a third country* could nonetheless be used as justification.

Switching from the ECJ's case law to the work of the Council of the European Union and the European Commission in the area of direct taxation, it does not seem to be until 2007 that a policy towards tax good governance by third countries began to develop.<sup>45</sup> In that year, the European Commission made a start in its Communication<sup>46</sup> (a non-binding instrument) on "The application of anti-abuse measures in the area of direct taxation", within the EU and in relation to third countries. In that Communication a specific chapter (4) is dedicated to the application of anti-abuse rules in respect of third countries in light of the only limited application of the four EU fundamental freedoms in a third country context (as mentioned above, only the free movement of capital applies, whereas in intra-EU situations all four fundamental freedoms may apply). While the first four paragraphs of the short chapter (4) contain technical comments on the application of anti-abuse rules in the light of primary and secondary EU law, the last paragraph hints at increased co-operation between Member States and their non-EU partners in this area:

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<sup>42</sup> See, for instance, Case C-55/98, *Skatteministeriet v Bent Vestergaard* [28 October 1999] ECR I-07641 (paragraph 26) and Case C-1/93, *Halliburton Services BV v Staatssecretaris van Financiën* [12 April 1994] ECR I-01137 (paragraph 22).

<sup>43</sup> On this topic, see K. Spies, "Influence of International Mutual Assistance on EU Tax Law", *INTERTAX*, October 2010, pp. 518-530.

<sup>44</sup> See, for instance, Case C-318/10, *Société d'investissement pour l'agriculture tropicale SA (SIAT) v État belge* [5 July 2012] EU:C:2012:415 (paragraph 39).

<sup>45</sup> See paragraph M of Council of the European Union, Conclusions of the ECOFIN Council Meeting on 1 December 1997 concerning taxation policy, *Official Journal of the European Communities*, C 2/1, 6 January 1998: "The Council considers it advisable that principles aimed at abolishing harmful tax measures should be adopted on as broad a geographical basis as possible. To this end, Member States commit themselves to promoting their adoption in third countries; they also commit themselves to promoting their adoption in territories to which the Treaty does not apply.

<sup>46</sup> Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries, COM(2007) 785 final, 10 December 2007.

“[t]he Commission considers that, in particular in respect of application of their anti-avoidance rules to international tax avoidance schemes, the MSs should, in order to protect their tax bases, seek to improve the coordination of anti-abuse measures in relation to third countries. Such co-ordination can usefully consist of administrative co-operation, (e.g. exchange of information and sharing of best practices). The Commission would also encourage MSs, where appropriate, to enhance administrative co-operation with their non-EU partners.”

The first of several Communications by the European Commission on promoting “Good Governance in Tax Matters” came out in 2009 (“2009 Communication”).<sup>47</sup> The 2009 Communication refers to the European Council (ECOFIN) meeting on 14 May 2008 in which good governance in the tax area was defined as meaning the application by countries of “the principles of transparency, exchange of information and fair tax competition.” In the first place the topic of good governance in the tax area (in later Communications it is briefly referred to as “tax good governance”) seems to be aimed at stopping EU tax revenues from moving to “tax havens and insufficiently regulated financial centres that refuse to accept the principles of transparency and information exchange”. Such an outflow would “affect[...] the tax sovereignty of other [read: EU] countries and undermine their revenues”. But, further on in the 2009 Communication, it becomes clear that the promotion of tax good governance is based on more pillars, including the creation of a global level playing field:<sup>48</sup>

“[f]air and efficient tax systems not only play an essential role in ensuring a level playing field for economic relations, trade and investment but also provide the financial basis for all public spending. This translates as good governance in the tax area, which is not only an essential means of combating cross-border tax fraud and evasion but can also strengthen the fight against money laundering, corruption and the financing of terrorism.”

It is explored below how the element of ‘fair tax competition’ is filled in in the 2009 Communication and in the subsequent Communications. In its description of several of the measures that are designed to promote better governance in the tax field *within* the EU, the 2009 Communication lists, amongst others:

“[h]armful tax competition – The legal instruments on administrative cooperation are complemented by a political agreement between Member States to tackle harmful tax competition in the area of business taxation under a peer review process. The "Code of Conduct for business taxation" defines harmful tax measures as measures (including administrative practices) which affect or may affect in a significant way the location of

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<sup>47</sup> Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Promoting Good Governance in Tax Matters, COM(2009) 201 final, 28 April 2009.

<sup>48</sup> Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Promoting Good Governance in Tax Matters, COM(2009) 201 final, 28 April 2009, at p. 4.



business activity in the Community, and which provide for a significantly lower level of taxation than those that generally apply in the Member State concerned. Under the Code, which applies both to Member States and to their dependent and associated territories, over 400 business taxation measures have been assessed and over 100 of these, being considered harmful, have been removed or amended.

State aids – In addition, EU State aid policy as applied to fiscal State aids has contributed to removing distortions of competition resulting from specific business tax regimes introduced by individual Member States.”

The 2009 Communication recognises that the work in the EU on improving tax cooperation “reflects many of the underlying principles that have driven OECD activity against harmful tax competition over several years.” The criteria in the “Harmful Tax Competition Report” are considered “close (although with a narrower scope) to those in the EU’s Code of Conduct for business taxation.”<sup>49</sup> In the OECD’s 1998 Harmful Tax Competition Report, the OECD’s work on harmful tax competition (the Guidelines and the Recommendations ensuing from that Report) had already been compared to the EU’s Code of Conduct of Business taxation and, back then, it was noted that (para 18):

“[w]hilst the EU Code and the OECD Guidelines are broadly compatible, particularly as regards the criteria used to identify harmful preferential tax regimes, and mutually reinforcing, the scope and operation of the two differ. The OECD Guidelines are clearly limited to financial and other service activities, whereas the Code looks at business activities in general, although with an emphasis on mobile activities.”

Turning back to the 2009 Communication, it lists a number of measures in different areas to ensure that third countries adhere to good tax governance principles, and those measures include exporting the EU’s Code of Conduct criteria to those third countries:<sup>50</sup>

“Code of Conduct – When adopting the EU Code of Conduct for business taxation, EU Member States committed themselves both to ensuring that the principles of abolishing harmful tax competition are applied also in Member States’ dependent or associated territories and to promoting these principles among third countries. The latter issue is part of the 2009 to 2010 work programme of the EU Code of Conduct group.

The 2009 Communication also refers to the Action Plans concluded with countries covered by the European Neighbourhood Policy as a source for spreading the EU’s tax good governance gospel to third countries:

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<sup>49</sup> Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Promoting Good Governance in Tax Matters, COM(2009) 201 final, 28 April 2009, at p. 6.

<sup>50</sup> Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Promoting Good Governance in Tax Matters, COM(2009) 201 final, 28 April 2009, at p. 8.

“European Neighbourhood Policy – A number of Action Plans concluded with countries covered by this Policy include general references to cooperation in tax matters. Many also make specific reference to the principles of transparency, exchange of information and to the Code of Conduct for business taxation.”

Also State aid rules in agreements signed by the EU (or agreements rendering the body of EU law relating to the internal market directly applicable, such as the EEA agreement) may serve to keep the playing field between the EU and third countries level:<sup>51</sup>

“(…) rules equivalent to EU State aid rules are contained in the EEA agreement and enforced by the EFTA Surveillance Authority. Similar rules apply to Switzerland under the 1972 EU-Switzerland Free Trade Agreement. This limits the scope for distortive tax regimes in those countries and, in fact, the Commission has recently challenged some Swiss business tax regimes granting benefits that it regards as State aids.

Singapore does not have a trade agreement in place with the EU. Although the EU and Singapore completed negotiations for a comprehensive free trade agreement in October 2014, the ECJ decided in May 2017 that the trade agreement in its current form could not be concluded by the EU alone, but would also require ratification by the EU’s 38 national and regional authorities, for it also covered areas where the EU did not have exclusive competence.<sup>52</sup>

The 2009 Communication also refers to including tax good governance clauses in agreements with third countries and it states that:

“[t]he content of such agreements should, where appropriate, also include provisions similar to those applicable within the EU under State aid rules. This would improve fair competition between Member States and third countries in the area of business taxation. It should, for example, make it possible to tackle distortive practices unduly detrimental to EU Member States’ budgets and businesses, and not necessarily addressed by WTO rules.”

In 2010, the European Commission released a Communication “Tax and Development – Cooperating with Developing Countries on Promoting Good Governance in Tax Matters”<sup>53</sup> (“2010 Communication”) to:<sup>54</sup>

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<sup>51</sup> Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Promoting Good Governance in Tax Matters, COM(2009) 201 final, 28 April 2009, at p. 8.

<sup>52</sup> Case C-2/15, *Opinion pursuant to Article 218(11) TFEU* [16 May 2017]. For a comment on the impact of this Opinion by the ECJ, see <http://www.straitstimes.com/business/singapore-responds-to-european-court-decision-on-eu-singapore-free-trade-agreement>.

<sup>53</sup> European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Tax and Development. Cooperating with Developing Countries on Promoting Good Governance in Tax Matters, COM(2010) 163 final, 21 April 2010.

“improve synergies between tax and development policies by suggesting ways in which the EU could assist developing countries in building efficient, fair and sustainable tax systems and administrations with a view to enhancing domestic resource mobilisation in a changing international environment.”

It lists two international factors that are considered to affect the effectiveness of national tax systems in developing countries:<sup>55</sup>

“[c]ountries might be tempted to encourage foreign direct investments through too costly tax incentives and derogations that often fail to attract real and sustainable investment;

The existence of non-cooperative jurisdictions and harmful tax practices, both in developed and developing countries, is detrimental also to developing countries by not only having a negative impact on their revenues but also by undermining good governance and institutional development.”

Two years after the 2010 Communication – which was only focused on the cooperation between EU Member States and developing countries – a Communication came out in 2012 “on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries” (“2012 Communication”).<sup>56</sup> The 2012 Communication:<sup>57</sup>

“outlines how tax compliance can be improved and fraud and evasion reduced, through a better use of existing instruments and the adoption of pending Commission proposals. It also identifies areas where further legislative action or coordination would benefit the EU and Member States.”

The 2012 Communication comments on the OECD’s work on tax havens and it identifies two gaps in the OECD’s work:<sup>58</sup>

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<sup>54</sup> European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Tax and Development. Cooperating with Developing Countries on Promoting Good Governance in Tax Matters, COM(2010) 163 final, 21 April 2010, at p. 2.

<sup>55</sup> European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Tax and Development. Cooperating with Developing Countries on Promoting Good Governance in Tax Matters, COM(2010) 163 final, 21 April 2010, at p. 4.

<sup>56</sup> European Commission, Communication from the Commission to the European Parliament and the Council on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries, COM(2012) 351 final, 27 June 2012.

<sup>57</sup> European Commission, Communication from the Commission to the European Parliament and the Council on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries, COM(2012) 351 final, 27 June 2012, at p. 3.

<sup>58</sup> European Commission, Communication from the Commission to the European Parliament and the Council on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries, COM(2012) 351 final, 27 June 2012, at p. 12.

“Important progress has been made through the almost universal adoption of strong rules on information exchange on request and transparency following the successful re-launching of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes. However, although many former ‘tax havens’ have committed to these principles whether these commitments have been put into practice is only just being reviewed. Furthermore the Forum does not consider the question of ‘fair tax competition’, a principle which the EU upholds internally via the Code of Conduct for business taxation. Promoting such a concept to third countries is relevant both for the OECD and the EU.”

2012 also marked the year of another Communication, which contains an “Action Plan to strengthen the fight against tax fraud and tax evasion” (“2012 Action Plan”).<sup>59</sup> The 2012 Action Plan sets out:<sup>60</sup>

“concrete steps to enhance administrative cooperation and to support the development of the existing good governance policy, the wider issues of interaction with tax havens and of tackling aggressive tax planning and other aspects, including tax-related crimes.”

The 2012 Action Plan contains two Recommendations, which form part of a series of initiatives presented by the Commission to “ensure a coherent tax policy vis-à-vis third countries, to enhance exchange of information and to tackle certain fraud trends.”<sup>61</sup> In the first Recommendation the Commission mentions that Member States have responded differently to (third country) jurisdictions not complying with minimum standards of good governance in tax matters and observes that this has the potential of distorting the operation of the internal market:<sup>62</sup>

“[t]aking into account the freedoms awarded to them when operating in the internal market, business may structure arrangements with such jurisdictions via the Member State with the weakest response. As a result, the overall protection of Member States’ tax revenues tends to be only as effective as the weakest response of any one Member State. This does not only erode Member States’ tax bases but also endangers fair competitive conditions for business and, ultimately, distorts the operation of the internal market.”

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<sup>59</sup> European Commission, Communication from the Commission to the European Parliament and the Council, An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final, 6 December 2012.

<sup>60</sup> European Commission, Communication from the Commission to the European Parliament and the Council, An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final, 6 December 2012, at p. 2.

<sup>61</sup> European Commission, Communication from the Commission to the European Parliament and the Council, An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final, 6 December 2012, at p. 5.

<sup>62</sup> European Commission, Communication from the Commission to the European Parliament and the Council, An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final, 6 December 2012, at p. 5. The website of the European Commission contains a map that presents a full consolidated overview of third countries and territories listed by Member States for tax purposes (on 31 December 2016).

[http://ec.europa.eu/taxation\\_customs/business/company-tax/tax-good-governance/tax-good-governance-world-seen-eu-countries\\_en](http://ec.europa.eu/taxation_customs/business/company-tax/tax-good-governance/tax-good-governance-world-seen-eu-countries_en). It shows that Singapore is listed by Finland.

To avoid such distortions arising through unharmonised, unilateral approaches by Member States, the Commission recommends more harmonisation, both as regards the criteria to identify the non-compliant third countries and through a common ‘toolbox’ of counter-measures against those countries.<sup>63</sup>

“[w]ith a view to tackling this problem the Commission recommends the adoption by Member States of a set of criteria to identify third countries not meeting minimum standards of good governance in tax matters and a ‘toolbox’ of measures in regard to third countries according to whether or not they comply with those standards, or are committed to comply with them. Those measures comprise the possible blacklisting of non-compliant jurisdictions and the renegotiation, suspension or conclusion of Double Tax Conventions (DTCs). To avoid promoting business with blacklisted third countries, the Commission invites Member States to take additional complementary actions but in full respect of EU law.”

The other of the two Recommendations in the 2012 Action Plan concerned combatting aggressive tax planning within the EU and in order “to provide assistance in preparing its report on the application of the two Recommendations, and in its on-going work on aggressive tax planning and good governance in tax matters” the Commission announced its plans to establish a Platform for Tax Good Governance composed of experts from Member States and stakeholders representatives.<sup>64</sup>

When it comes to the work discussed in the Code of Conduct for business taxation, the Commission’s words echo some frustration with the progress made. The Commission calls for an “urgent need for a new impetus to be given” and it offers its (continued) assistance to Member States “in ensuring the effective promotion of the Code of conduct for business taxation in selected third countries and to promote fair tax competition globally by negotiating good governance provisions in relevant agreements with third countries and by assisting developing countries in line with the Commission’s standing policy on tax and development.”<sup>65</sup>

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<sup>63</sup> European Commission, Communication from the Commission to the European Parliament and the Council, An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final, 6 December 2012, at p. 6.

<sup>64</sup> The Platform for Tax Good Governance, Aggressive Tax Planning and Double Taxation was formally set-up as a “Commission Expert Group” through European Commission, Commission Decision of 23.4.2013 on setting up a Commission Expert Group to be known as the Platform for Tax Good Governance, Aggressive Tax Planning and Double Taxation, C(2013) 2236 final, 23 April 2013.

<sup>65</sup> European Commission, Communication from the Commission to the European Parliament and the Council, An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final, 6 December 2012, at pp. 7-8.

With the release of the 2012 Action Plan, also a Study was released – conducted by PwC<sup>66</sup> – on existing and proposed tax measures of a selected group of EU Member States in relation to non-cooperative jurisdictions and aggressive tax planning. The data collected showed that:<sup>67</sup>

“few Member States have a clear definition of the terms "Non-Cooperative Jurisdictions" and "Aggressive Tax Planning", although many of them did report having various concepts that are akin to these key concepts. In this respect, it is interesting to note that anti-abuse measures in some participating countries apply to countries where the level of taxation is inappropriate (e.g. no taxation at all or a very low nominal/effective tax rate), whereas, in other Member States, the decisive criterion is the level to which countries cooperate in terms of exchange of information (which is more like the OECD approach). However, these countries, sometimes featuring on black, grey or white ‘lists’, are not always Third Countries.”

With the Action Plan and the PwC Study, a Recommendation was issued regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters (“2012 Recommendation”).<sup>68</sup> The 2012 Recommendation reiterates the wording from the 2012 Action Plan that the distortions arising because of Member States’ different responses to non-compliant third countries (i.e. taxpayers routing their business or their transactions with third countries through Member States with the lowest level of ‘protection’) should be remedied “through an approach shared by all Member States”. It therefore sets out the criteria to identify third countries which do not meet minimum standards of good governance in tax matters and lists the actions that Member States may take towards countries that do *not* meet those standards. Applying a carrot-and-stick approach, it also lists actions *in favour* of third countries that comply with them.

The 2012 Recommendation considers good governance in tax matters to be built on three pillars: transparency, exchange of information and harmful tax measures. To fill in the minimum standards in regards of those three pillars, the Recommendation has recourse to existing standards:

“[i]n regard to transparency and exchange of information, an internationally recognised standard has been set out in the Terms of Reference agreed by the Global Forum in 2009. Those terms should therefore form the basis of this Recommendation. As far as harmful tax measures are concerned, the Code of conduct has proven to be a pertinent reference

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<sup>66</sup> PwC, *Study including a data collection and comparative analysis of information available in the public domain on existing and proposed tax measures of the 14 EU Member States in relation to non-cooperative jurisdictions and aggressive tax planning*, 2014. Available online at: [http://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/taxation/tax\\_fraud\\_evasion/pwc\\_study.pdf](http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/tax_fraud_evasion/pwc_study.pdf).

<sup>67</sup> PwC, *Study including a data collection and comparative analysis of information available in the public domain on existing and proposed tax measures of the 14 EU Member States in relation to non-cooperative jurisdictions and aggressive tax planning*, 2014, at p. 6.

<sup>68</sup> European Commission, Commission Recommendation of 6.12.2012 regarding measures intended to encourage third countries to apply minimum standards of governance in tax matters, COM(2012) 8805 final, 6 December 2012.

within the Union. Member States have committed themselves to promoting principles of that Code in third countries. It is therefore appropriate to refer to the criteria of that Code for the purposes of this Recommendation.”

Section 3 of the Recommendation (Minimum standards of good governance in tax matters) lists the Terms of Reference agreed by the Global Forum in 2009 (through a referral to the standards of transparency and exchange of information set out in the Annex) and also lists the Code of Conduct criteria for assessing whether tax measures that provide for a significantly lower effective level of taxation (including zero taxation), than those levels which general apply in the third country in question are to be regarded as harmful.

In 2015 the European Commission listed 5 “Key Areas for Action” in its Communication on a fair and efficient corporate tax system in the European Union,<sup>69</sup> which “sets out a (more comprehensive European approach to corporate taxation (“2015 Action Plan”).” The 2015 Action Plan sets out a series of measures that would “allow for a more cohesive EU approach in relation to third countries.” One measure in point is measure 2.3 on “linking preferential regimes to where value is generated”. Here the Commission indicates that it will provide guidance to Member States on how to bring patent box regimes in line with the “modified nexus approach”. Measure 4.1 is about “ensuring a more common approach to third country non-cooperative tax jurisdictions” and reference is made to the above-mentioned steps of drawing up a list of third countries which do not meet minimum standards of good governance in tax manners through uniform criteria and adopting a common set of possible counter-measures against non-compliant third countries.

In January 2016 the European Commission launched its Anti-Tax Avoidance Package, of which a Communication on an External Strategy for Effective Taxation<sup>70</sup> forms part (“2016 Communication”). It addresses the development of a common EU process for assessing and listing third countries in regard of their commitment to tax good governance. Interesting is the comment that a common EU approach “will also ensure that the specific situation of third countries, particularly developing ones, is consistently taken into account.” It is not clear which definition of ‘developing countries’ is used here, although Singapore would not be among them.<sup>71</sup> It is likely that this term would have a narrow meaning and cover solely the world’s “least developed countries”. Neither is it clear what should be understood by “specific situation”. Would this give a country like Singapore, for instance, more leeway in the design of its tax system given its “specific situation” (e.g. small, devoid of natural resources)? The

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<sup>69</sup> European Commission, Communication from the Commission to the Parliament and the Council, A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final, 17 June 2015.

<sup>70</sup> European Commission, Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, COM(2016) 24 final, 28 January 2016.

<sup>71</sup> The Scoreboard that was presented by the European Commission on 14 September 2016 lists the 48 least developed countries identified by the United Nations as a separate category. Singapore is not on that list. The Scoreboard is available online at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/2016-09-15\\_scoreboard-indicators.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09-15_scoreboard-indicators.pdf).

Communication is cognizant that a common approach to third countries cannot be taken in isolation (“it must be fair objective and internationally justifiable. It must also be compatible with EU commitments under multilateral or bilateral international agreements”).

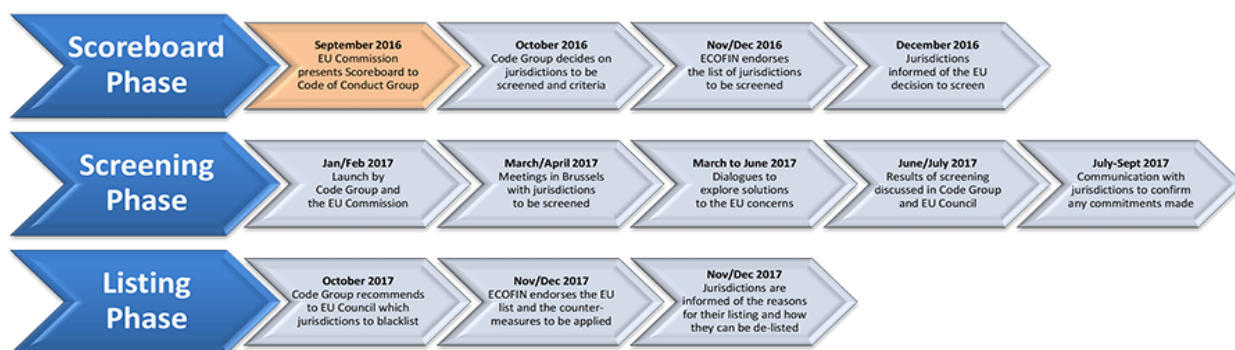
A three-step process was proposed as common approach. The first step was the internal identification by the Commission of the third countries that should be prioritised for screening on the basis of a scoreboard of indicators, which not only reflect the three pillars of tax good governance, but also the potential impact of jurisdictions on Member States’ tax bases.

The second step of the listing process was the decision by the Member States which jurisdictions should be assessed against the EU’s updated good governance criteria. Part of this assessment phase was a dialogue with the third countries in question.

The third step of the listing process was the decision which jurisdictions to add to the list of problematic tax jurisdictions. The Communication stated that this decision would be “mainly based” on a recommendation from the Commission, but also other factors would need to be taken into account:<sup>72</sup>

“[f]or example, some developing countries may show a strong willingness to comply with EU good governance standards, but lack the capacity to do so. In such cases, listing may not be the most effective tool and alternative instruments may be more effective in addressing EU concerns with their tax systems. Similarly, if a third country is already formally engaged with the EU to address tax good governance issues, continuing in this process may lead to more effective results.”

On the European Commission’s website, the timeline of the three-step process is depicted as follows:



<sup>72</sup> European Commission, Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, COM(2016) 24 final, 28 January 2016, at p. 11.



Neither of the two ‘escapes’ for being placed on the EU list ((i) being a developing country or (ii) lacking the capacity to comply with EU good governance standards or formally engaging with the EU to address tax good governance issues) applied to Singapore.

The Communication gives examples of common counter-measures against listed problematic jurisdictions – which “should serve both to protect Member States’ tax bases and to incentivise the jurisdiction in question to make the necessary improvements to its tax system” – and it states that:<sup>73</sup>

“[c]urrently, Member States apply different sanctions or defensive measures to jurisdictions on their national lists. These are largely tax-based provisions, such [as] Controlled Foreign Company (CFC) rules or the refusal of normal tax exemptions or deductions for payments made to companies in the listed countries.

In some cases, these national provisions will be overtaken by the minimum standards in the Anti-Tax Avoidance Directive (e.g. CFC rules). However, the Directive will not cover all of the defensive measures that Member States currently apply. The defensive measures linked to the common EU list should therefore be a complementary top up to the defensive measures in the Directive. Options could include withholding taxes and non-deductibility of costs for transactions done through listed jurisdictions. This would make it much less attractive for companies to invest or do business in these jurisdictions as the administrative burden and risk of double taxation would be higher.”

Unlike in the 2012 Recommendation, it is hard to identify any incentivising actions *in favour* of third countries that comply with the EU’s tax good governance standards (the rabbit seems to have eaten the carrot).<sup>74</sup>

The 2016 Communication also contained two Annexes with “Good Governance Standards in Tax Matters” (Annex 1) and an “Update of the Standard Provision on Tax Good Governance for Agreements with Third Countries” (Annex 2) respectively.<sup>75</sup> Concerning the three pillars of tax good governance, they contain an updated overview of the standards that would be considered as part of the listing process:

- Transparency and exchange of information on request: the compliance ratings published by the OECD’s Global Forum on Transparency and Exchange of Information for Tax Purposes, as a result of the peer reviews it conducts.
- Automatic Exchange of Information (AEOI) of financial account information: The Standard for Automatic Exchange of Financial Account Information in Tax Matters that

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<sup>73</sup> European Commission, Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, COM(2016) 24 final, 28 January 2016, p. 12.

<sup>74</sup> It is noted that in their trade agreements with the EU, the “least developed countries” will still obtain favourable treatment. See [http://trade.ec.europa.eu/doclib/docs/2016/september/tradoc\\_154961.pdf](http://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154961.pdf).

<sup>75</sup> European Commission, Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, COM(2016) 24 final, 28 January 2016.

was approved by the OECD Council on 15 July 2014 (Global Standard) and the compliance ratings (of third countries with the Global Standard) that are published by the Global Forum as a result of its peer reviews.

- Fair tax competition: the criteria as provided for in the Code of Conduct on Business Taxation endorsed by the Council, as well as practice and guidance agreed by the Code of Council [sic] working group.
- Fair tax competition: The BEPS standards under (particularly) BEPS Actions 2, 4, 5, 6, 7, 9-10, 13, 14.
- Transparency: Financial Action Task Force (FATF) international standards on Combating Money Laundering and the Financing of Terrorism and Proliferation.

On 14 September 2016, the European Commission presented the Scoreboard of its pre-assessment of all third countries and jurisdictions.<sup>76</sup> It was reiterated that:

“[t]his Scoreboard does not represent any judgment of third countries, nor is it a preliminary EU list. It is an objective and robust data source, produced by the Commission, to help Member States in the next steps of the common EU listing process.”

The Scoreboard contains both “selection indicators” and “risk indicators”. The selection indicators serve to indicate economic relevance of ties between the third country and the EU and they are grouped into three dimensions:

- Strength of economic ties with the EU;
- Financial activity;
- Stability factors.

Countries that rank above a certain threshold in all three dimensions are featured in Table I of the Scoreboard.

The risk indicators serve to assess the potential risk level of the jurisdictions facilitating tax avoidance. The risk indicators used were:

- Transparency and exchange of information;
- The existence of preferential tax regimes;
- No corporate income tax or a zero corporate tax rate.

Singapore was considered to be one of the “Third Country Jurisdictions” that rank high in all selection indicators and it scored as follows:

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<sup>76</sup> The Scoreboard is available online at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/2016-09-15\\_scoreboard-indicators.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09-15_scoreboard-indicators.pdf).

I. Third Country Jurisdictions that rank high in all selection indicators	Selection indicators (*)			Risk indicators (**)		
	STRENGTH of ECONOMIC TIES with the EU	MAGNITUDE of FINANCIAL ACTIVITY in the jurisdiction	STABILITY FACTORS	TRANSPARENCY	Preferential CIT regimes	No CIT/zero rate
Singapore	14.8	2.0	2.9	X	X	

On 8 November 2016, after the publication of the Scoreboard, the Council of the European Union adopted the Council conclusions on criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes.<sup>77</sup> The Annex to the Council conclusions not only listed the relevant international standards for the three tax good governance elements (tax transparency,<sup>78</sup> fair taxation and the implementation of BEPS measures) but also set out how a jurisdiction should score on each of those elements:

Considering the “Selection indicators” and “Risk indicators” used, it is clear that Scoreboard led to a far greater list of possibly non-compliant third countries than the actual lists as it now stands after the two rounds of removal (with only 9 countries left on it). Each of those nine countries was also on the list of “Third Country Jurisdictions” that rank high in all selection indicators. Conceptually, if one would have an EU multinational enterprise in mind with a subsidiary in a third country (for instance, to hold the group’s IP or to finance the group companies) one would have thought that the assessment of that third country would have zoomed in to a greater extent on aspects such as: (i) the tax treaty network between the EU Member States and that country, (ii) withholding taxes on outbound payments, (iii) foreign exchange controls. The factors of “magnitude of financial activity” and “stability” may be relevant to identify whether that country is suitable as a place for situating group’s cash or intra-group receivables, but less suitable for identifying whether that country would be positioned to receive the group’s IP income.

### 1. Tax transparency criteria

<sup>77</sup> Council of the European Union, Outcome of the Council Meeting, 3495<sup>th</sup> Council meeting, Brussels, 8 November 2016, 14094/16.

<sup>78</sup> A term that now includes exchange of information, which was previously a separate term.

Criteria that a jurisdiction should fulfil in order to be considered compliant on tax transparency:

1.1 Initial criterion with respect to the OECD Automatic Exchange of Information (AEOI) standard (the Common Reporting Standard – CRS): the jurisdiction, should have committed to and started the legislative process to implement effectively the CRS, with first exchanges in 2018 (with respect to the year 2017) at the latest and have arrangements in place to be able to exchange information with all Member States, by the end of 2017, either by signing the Multilateral Competent Authority Agreement (MCAA) or through bilateral agreements;

Future criterion with respect to the CRS as from 2018: the jurisdiction, should possess at least a “Largely Compliant” rating by the Global Forum with respect to the AEOI CRS, and

1.2 the jurisdiction should possess at least a “Largely Compliant” rating by the Global Forum with respect to the OECD Exchange of Information on Request (EOIR) standard, with due regard to the fast track procedure, and

1.3 (for sovereign states) the jurisdiction should have either:

- i) ratified, agreed to ratify, be in the process of ratifying, or committed to the entry into force, within a reasonable time frame, of the OECD Multilateral Convention on Mutual Administrative Assistance (MCMAA) in Tax Matters, as amended, or
- ii) a network of exchange arrangements in force by 31 December 2018 which is sufficiently broad to cover all Member States, effectively allowing both EOIR and AEOI;

(for non-sovereign jurisdictions) the jurisdiction should either:

- i) participate in the MCMAA, as amended, which is either already in force or expected to enter into force for them within a reasonable timeframe, or
- ii) have a network of exchange arrangements in force, or have taken the necessary steps to bring such exchange agreements into force within a reasonable timeframe, which is sufficiently broad to cover all Member States, allowing both EOIR and AEOI.

1.4 Future criterion: in view of the initiative for future global exchange of beneficial ownership information, the aspect of beneficial ownership will be incorporated at a later stage as a fourth transparency criterion for screening.

Until 30 June 2019, the following exception should apply:

- A jurisdiction could be regarded as compliant on tax transparency, if it fulfils at least two of the criteria 1.1, 1.2 or 1.3.

This exception does not apply to the jurisdictions which are rated "Non Compliant" on criterion 1.2 or which have not obtained at least "Largely Compliant" rating on that criterion by 30 June 2018.

Countries and jurisdictions which will feature in the list of non-cooperative jurisdictions currently being prepared by the OECD and G20 members will be considered for inclusion in the EU list, regardless of whether they have been selected for the screening exercise.

## **2. Fair taxation**

Criteria that a jurisdiction should fulfil in order to be considered compliant on fair taxation:

2.1 the jurisdiction should have no preferential tax measures that could be regarded as harmful according to the criteria set out in the Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 on a code of conduct for business taxation, and

2.2 The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.

## **3. Implementation of anti-BEPS measures**

3.1. Initial criterion that a jurisdiction should fulfil in order to be considered compliant as regards the implementation of anti-BEPS measures:

- the jurisdiction, should commit, by the end of 2017, to the agreed OECD anti-BEPS minimum standards and their consistent implementation.

3.2. Future criterion that a jurisdiction should fulfil in order to be considered compliant as regards the implementation of anti-BEPS measures (to be applied once the reviews by the Inclusive Framework of the agreed minimum standards are completed):

- the jurisdiction should receive a positive assessment for the effective implementation of the agreed OECD anti-BEPS minimum standards.

It is noteworthy that criterion 2.2 (on Fair taxation) is new: “[t]he jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.”

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## Chapter 4

### Assessing the DEI Against the International Tax Norms

#### 4.1. Introduction

In chapter 3, the international tax norms were identified and described that apply to the design of Singapore's DEI and its administration by the EDB. In this chapter, the DEI is assessed against those norms. As the FHTP found in 2017 that the DEI should be regarded as “not harmful” and the EU decided only soon thereafter that Singapore should *not* be regarded as a “non-cooperative jurisdiction in taxation matters” (which implicitly means that the DEI is acceptable too), this assessment will start on the basis of the two relevant documents by the OECD (the 2017 Progress Report) and EU (the December 2017 “EU List of non-cooperative jurisdictions for tax purposes”) and it will then be analysed whether the FHTP's and the Council of the European Union's findings can be reconciled with an own assessment against those norms. Where gaps are found, an effort will be made find explanations.

#### 4.2. The 2017 Progress Report

The 2017 Progress Report contains the results of the FHTP's review of jurisdictions' compliance with the BEPS Action 5 minimum standard. As mentioned in the introduction to the 2017 Progress Report (para 4):

“[t]here are two aspects to this [review]: whether preferential tax regimes have harmful features; and the compulsory spontaneous exchange of information on tax rulings (the “transparency framework”). The FHTP has commenced the review of the implementation of the transparency framework, the results of which are currently scheduled to be published separately by early 2018.”

As mentioned in chapter 1, as the DEI in its current form can be considered to be a non-IP regime, it is relevant that the 2017 Progress Report contains further detail on the FHTP's approach to the application of the substantial activities criterion to non-IP regimes in Annex D, which will be covered below.

The last two paragraphs of the first Chapter of the 2017 Progress Report give some clarification as to how the review was conducted:

“11. The regimes have generally been reviewed using a thematic approach, whereby regimes of a similar nature are reviewed together. The categories of regimes used are those that the FHTP has observed in the course of its work. They are presented thematically below: IP regimes, headquarters regimes, financing and leasing regimes, banking and insurance regimes, distribution and service centre regimes, shipping regimes, holding company regimes, fund management regimes and miscellaneous regimes. (...)

12. The review involves each jurisdiction which offers a relevant regime completing a standardised self-review questionnaire and submitting the relevant legislation to the FHTP. Each regime is then discussed at the period meeting of delegates of the FHTP, which includes a dialogue with the jurisdiction in order to provide any clarifying information. Decisions are reached on a consensus basis, although it is possible where necessary to use a “consensus minus one” basis of decision making in relation to the peer review process.”

As one of the 17 Headquarters regimes that were reviewed, the DEI was considered to be “Not harmful”. The 2017 Progress Report does not further substantiate that finding. As mentioned above, Annex D contains further guidance on applying the substantial activities criterion to non-IP regimes, which will often be “a more straightforward and simpler exercise” for those regimes than for IP-regimes “as the value creation is primarily driven by the services provided rather than a separate IP asset that can be shifted” (para 1).

Non-IP regimes can therefore be found to meet the substantial activity requirement “if they (...) granted benefits only to qualifying taxpayers to the extent that those taxpayers undertook the core income generating activities required to produce the type of business income covered by the preferential regime” (para 2). For a regime outside the EU (as within the EU, the non-discrimination principle enshrined in the freedom of establishment applies), such as the DEI in Singapore, the Annex notes that it is *not* sufficient that the income generating activities are undertaken “by the qualifying taxpayer”, but they must also be undertaken “in the jurisdiction providing benefits” (para 7).

According to the Annex: “[c]ore income generating activities presuppose having an adequate number of full-time employees with necessary qualifications and incurring an adequate amount of operating expenditures to undertake such activities. (...) Such activities could include the following:

“**Headquarters regimes** – The core income generating activities in a headquarters company could include taking relevant management decisions; incurring expenditures on behalf of group entities; and coordinating group activities (para 8).”

The Annex continues that (para 9):

“[a]long with articulating the core income generating activities that are required for a taxpayer to benefit from a regime, jurisdictions providing benefits must (...) also have a transparent mechanism to review taxpayer compliance and to deny benefits if these core income generating activities are not undertaken by the taxpayer or do not occur within the jurisdiction. Jurisdictions must ensure that this mechanism ensures that taxpayers comply.”

The Annex also mentions that (para 10):



“(…) jurisdictions would be expected to gather and maintain information on the identity (and hence the number) of taxpayers benefitting from the regime. Furthermore, they should gather information on the type and level of activity performed. Such information includes information on whether the taxpayer performs the core activities for which the regime is designed, the level of core activities undertaken, and the number of qualified full-time employees and amount of operating expenditures associated with the core activities. Finally, the jurisdiction should gather information on the amount of net income for which each taxpayer receives benefits under the regime because, for instance, a disproportionately large net income relative to benefitting core activities may indicate that other non-benefitting activities/value drivers may be responsible for the reported net income.”

The Annex also gives a very relevant example of the application of the substantial activities factor to non-IP regimes (para 13):

**“Example 2: Headquarters regime.** A regime requires taxpayers to carry on headquarters activities in the jurisdiction, such as strategic business planning and development, supply chain management and co-ordination, and general management and administrative activities, including the control and provision of services to related group companies. The regime further requires taxpayers to incur at least EUR 3 million in annual business spending and employ an adequate number of qualified full-time employees, including managers and professionals, to undertake the core activities (and at least ten such employees) in the jurisdiction. The jurisdiction requires the taxpayers to report information annually on the income benefitting from the regime, as well as the type and level of activity performed to generate the income. Taxpayers which do not meet the requirements are denied the regime’s benefits. This regime demonstrates that the core income generating activities occur in the jurisdiction and has a robust follow-up mechanism to ensure compliance. It therefore satisfies the requirement for having substantial activities in the jurisdiction.

The Annex also describes how the monitoring process should take place :

#### **“FHTP monitoring**

14. For non-IP regimes that have been subject to a substantial activities assessment, jurisdictions would need to establish monitoring procedures and notify the FHTP of how they define core income generating activities and how they review taxpayer compliance with the substantial activities requirement. The purpose of such monitoring is not to conduct a transfer pricing analysis but instead to confirm that the regime continues to operate consistently with the type and level of activities upon which the previous findings of the FHTP were based. Jurisdictions would also need to report on an annual basis on:

- the number of taxpayers applying for the regime;
- the number of taxpayers benefitting from the regime;
- the type of core activities undertaken by taxpayers benefitting from the regime;

- the quantity of core activities undertaken by taxpayers benefitting from the regime (as measured by the number of full-time employees and the amount of operating expenditures associated with these activities);
- the aggregate amount of net income benefitting from the regime (...); and
- the number of taxpayers, if any, that no longer qualify for benefits in whole or in part under the regime.

15. To balance the importance of monitoring substantial activities in preferential regimes against the administrative burden of collecting the required information, monitoring would be required only with respect to taxpayers that are members of multinational enterprise groups with annual revenues in the preceding year of EUR 750 million or more – that is, taxpayers which are constituent entities of MNE groups required to file CbC reports, as set out in the Action 13 Report (OECD, 2015b) and subsequent guidance on CbC reporting. Monitoring would also not be required if the small number of taxpayers benefitting from a regime means that provision of the above information would have the effect of disclosing the identity of the taxpayer, and jurisdictions could establish de minimis exceptions to the monitoring requirement to prevent such disclosure.

#### **4.3.Reconciling the 2017 Progress Report’s findings with an own assessment**

In this section it will be attempted to reconcile the 2017 Progress Report’s findings, which are rather unsubstantiated, with an own assessment of the DEI. First, the Harmful Tax Competition Report is resorted to, which – as the BEPS Action 5 Final Report clarified – has kept its relevance.

The question is whether the DEI would have been in focus of that report. Most of the qualifying activities under the DEI can be classified as “geographically mobile”,<sup>79</sup> but they typically do not cover “financial activities”, a term that would be considered to encompass activities such as group financing or carrying on of offshore insurance business. Singapore offers other different tax incentives for those type of financial activities.<sup>80</sup> But the Harmful Tax Competition Report recognises that “the distinction between regimes directed at financial and other services on the one hand and at manufacturing and similar activities on the other hand is not always easy to apply” (para 6). So even though the DEI does not cover financial activities, this incentive would likely have been in scope of the Harmful Tax Competition Report for encouraging “geographically mobile” activities.

As Singapore is not a ‘tax haven’, it has to be analysed whether the DEI qualifies as a ‘harmful preferential tax regime’ and to reiterate, the relevant criteria were:

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<sup>79</sup> Although some services and activities would be immobile, such as “services and activities which relate to the provision of automated warehousing facilities” (see paragraph (c) of section 19I (Part I)): they require automated warehousing facilities.

<sup>80</sup> Such as the Finance and Treasury Centre Incentive or the Insurance Business Development scheme (scheduled to lapse on 31 March 2020).

- (a) No or low effective tax rates;
- (b) “Ring fencing” of regimes;
- (c) Lack of transparency;
- (d) Lack of effective exchange of information.

As concessionary rates of either 5% or 10% are awarded, the *statutory* tax rates can be considered to be “low”: a 2017 study by the Tax Foundation, shows that the worldwide average *statutory* corporate income tax rate, measured across 202 tax jurisdictions, is 22.96%.<sup>81</sup> In other words: significantly higher. Whether the “*effective*” tax rate under the DEI would also be low, though, is less straightforward to say (there is no full consensus as to how one calculates the *effective* tax rate, although, amongst others, the World Bank<sup>82</sup> and the OECD<sup>83</sup> have given definitions); but it is nonetheless assumed that that would typically also be the case, so that criterion (a) would be met.

With the DEI aimed at generating onshore economic activity in Singapore, this incentive should *not* be classified as being ‘ring fenced’ from the normal regime (criterion (b)): non-residents carrying on business in Singapore through a branch are also eligible to the DEI and recipients of a DEI award are not barred access to Singapore’s domestic market (for completeness’ sake, resident companies can access the regime too).

The crucial criterion when analysing whether or not the DEI is to be regarded a “harmful preferential tax regime” is whether it lacks transparency (criterion (c)). If the key motivation for the OECD for requiring transparency is to avoid inequality of treatment of taxpayers in similar circumstances, it may be difficult to describe the administration of the DEI as being fully transparent for the reasons set out below.

As mentioned in chapter 2, the issuance of a DEI certificate is discretionary (“the Minister *may*”) and is also subject to a degree of judgment (“if he *considers* it in the public interest to do so”). Furthermore, the issuance of a DEI certificate is possibly subject to such conditions “as the Minister may [again, “*may*”] impose.” But those conditions are not published. As individual DEI certificates are not published either, a taxpayer that considers itself in similar circumstances to a competitor cannot avail itself of the relevant elements of its competitor’s DEI certificate, such as the concessionary rate granted and the conditions imposed by the Minister. But even if the taxpayer would manage to obtain its competitor’s DEI certificate, the discretion and degree of judgment assigned to the Minister would not necessarily guarantee that that taxpayer would also be treated similarly to its competitor. While one may differ in view as to whether the conditions of applicability for the DEI are “set forth clearly” [the wording used in the Harmful Tax

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<sup>81</sup> See <https://taxfoundation.org/corporate-income-tax-rates-around-the-world-2017/>.

<sup>82</sup> The latest Doing Business study by the World Bank (2018) now uses a “total tax and contribution rate” (<http://www.doingbusiness.org/methodology/paying-taxes>).

<sup>83</sup> See e.g. this Explanatory Annex, with computations how effective tax rate is derived from statutory tax rate: <http://www.oecd.org/ctp/tax-policy/corporate-and-capital-income-tax-explanatory-annex.pdf>.

Competition Report] since Part IIIB gives plenty of guidance about qualifying for the DEI (but perhaps does not give all the guidance required), it is at least not clearly specified whether a company has the right to appeal or to object if the Minister either explicitly or implicitly does not approve a taxpayer as a development and expansion company, even if that taxpayer, for instance, would meet all the conditions that were imposed on a competitor in the same circumstances, that leaves open the theoretical possibility that some taxpayers are treated more equally than others.

Given Singapore's commitment to spontaneously exchange rulings under the framework for compulsory spontaneous exchange of information under BEPS Action 5,<sup>84</sup> Singapore scores a passing grade on the "exchange of information" criterion. It is unclear, though, whether Singapore also scores points on the second limb of the Harmful Tax Competition Report's recommendation on transparency, namely that details of the DEI regime, including applications thereof in the case of a particular taxpayer, must be available to the tax authorities of other countries concerned. In the present author's experience, Singapore has been reluctant in sharing this information.

Of the eight "other factors" that are to be taken into account in assessing the potential harmfulness of the DEI, "other factor" (h) seems to be the most relevant one. Para 79 of the Harmful Tax Competition Report contains a brief description of this factor:

"[m]any harmful preferential tax regimes are designed in a way that allows taxpayers to derive benefits from the regime while engaging in operations that are purely tax-driven and involve no substantial activities."

Read conversely, this factor clarifies that a regime has a smaller chance of being considered harmful if it is designed in such a way that the benefits are only open to taxpayers who engage in operations that are not purely tax-driven and that also involve substantial activities. Although it is not fully clear what is meant by 'substantial activities' (as mentioned, the BEPS Action 5 Report gives some guidance), the decision to set up the types of activities in Singapore that qualify under the DEI would typically be driven by non-tax factors as well (even if the tax factor is a predominant one) and it is our experience that the requirements imposed by the EDB on taxpayers to qualify for the DEI certainly pertain to the 'substance' of the taxpayers in Singapore. Those 'substance' criteria, however, are not made public. But as will be discussed below, the question is not only whether 'substance' is required in Singapore, but also whether *the right* 'substance' is required, that is: the core activities that actually produce the qualifying income.

As set forth in the Harmful Tax Competition Report, the core activities at issue in non-IP regimes, such as the DEI, are geographically mobile activities, such as financial and other service activities. These activities may not require anything to link them to income because service activities could be seen as contributing directly to the income that receives benefits. Turning to the BEPS Action 5 Report – which, as mentioned, incorporates the principles of the Harmful Tax Competition Report – the question is whether the DEI sufficiently establishes a link

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<sup>84</sup> See <https://www.iras.gov.sg/irashome/Quick-Links/International-Tax/>.

between the income qualifying for benefits and the core activities necessary to earn the income. Or do the qualifying (service) activities contribute directly to the income that receives DEI benefits? As mentioned, Section 19M provides that qualifying income “derived from” a qualifying activity “is ascertained in accordance with the provisions of the Income Tax Act.”. And Section 19N clarifies that if the development and expansion company not only carries out a qualifying activity, but also another trade or business, that in such a case separate accounts must be maintained for that other trade or business. Turning to the list of qualifying activities defined in Sections 19I and 16 (through the cross-reference in Section 19I) it becomes clear that those qualifying activities are myriad and as myriad are the links between those activities and the activities necessary to earn the income from them. In some cases, the link will be direct: for instance, for technical services (covered through Section 16). But for a manufacturing activity (Section 19I): what exactly is the qualifying income “from” it? That remains unclear under the current guidance.

If the entire income of the qualifying company is from a qualifying activity (ignoring any ‘separation’ issues when the qualifying company also carries out another trade or business), Section 19M states that the qualifying income is ascertained “in accordance with the provisions of the Income Tax Act”. As Singapore embraces the arm’s length principle,<sup>85</sup> this means that – in principle – the qualifying income should correspond with the activities performed (also taking into account risks incurred, capital employed etc.). But a key question is, in spite of its embracing of the arm’s length principle, to what extent Singapore would be inclined to put downward pressure on the income level attributed to Singapore by the taxpayer. If the DEI results in a more favourable tax rate than can be realised by the taxpayer elsewhere, that taxpayer would generally be inclined to overstate the income attributable to the DEI company, while it would be expected that the Singapore tax authorities would generally be more inclined to act (read: adjust) in case of an *understatement*, than an *overstatement* of taxable income. That is particularly true when that income would not otherwise have been taxable in Singapore (against the statutory income tax rate of 17%).

Turning to the more detailed guidance on the application of the ‘substantial activity requirement’ in Annex D of the BEPS Action 5 Report, various questions arise as to the DEI’s compliance with this guidance. As mentioned above, it is stated in Annex D that in a non-EU country, such as Singapore, the qualifying activities must be undertaken “in the jurisdiction providing benefits” (para 7). But in Part IIIB it is not mentioned *where* the qualifying activities must take place. For instance, “computer-based information and other computer related services”, covered by Section 16, could be performed from virtually anywhere and still produce income that is taxable in Singapore.

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<sup>85</sup> See also para 3.2 of the PC and DEI brochure on the EDB’s website (available at: <https://www.edb.gov.sg/content/dam/edb/en/why%20singapore/Incentive-PCandDEI.pdf>): “[a]ll business entities incorporated, registered or carrying on a business in Singapore must carry out any transaction with any related parties at arm’s length and are subject to transfer pricing guidelines.”.

Resorting to the above-discussed guidance in the Annex that “[c]ore income generating activities presuppose having an adequate number of full-time employees with necessary qualifications and incurring an adequate amount of operating expenditures to undertake such activities” and that such core income generating activities could include “taking relevant management decisions; incurring expenditures on behalf of group entities; and coordinating group activities (para 8)” it cannot be ascertained on the basis of the conditions in Part IIIB that a DEI company would be required by the EDB to have such qualified full-time employees or incur such operating expenditures. In practice, though, that would be the case.

The present author, therefore, believes that there is rather a lack of full transparency about it, than that Singapore does not comply with the ‘substantial activity requirement’. In his experience, the EDB always requires substantial activities from DEI companies and this is also mentioned in the Pioneer/DEI brochure on the EDB’s website,<sup>86</sup> for instance, in para 2.2:

“[t]o qualify, companies must meet quantitative and qualitative criteria. These include the employment created (including skills, expertise and seniority), total business expenditure which generates spin-off to the economy, as well as commitment to growing the capabilities (e.g. technology, skillsets, knowhow) in Singapore. [...]”

It is even noted that the EDB’s evaluation of the ‘substantial activity requirement’ seems to bear a lot of similarities with the description of Example 2: Headquarters regime in Annex D, which is discussed above.

And in spite of the lack of full transparency around the review mechanism (Annex D calls for a “transparent mechanism to review taxpayer compliance” (para 9)), it is our experience that the EDB critically evaluates a taxpayer’s compliance with the conditions in the DEI certificate. This is also mentioned in the abovementioned brochure on the EDB’s website (para 3.1):

“[...] A DEI company must submit regular progress reports to the EDB for the evaluation of performance. In the event of any breach of term or condition of the PC or DEI, the company is subject to the potential revocation of the incentive and recovery of any associated benefits.”

In his experience, the EDB’s evaluation covers the aspects mentioned in Annex D (para 10), such as the type and level of activity performed. But again, it is not sufficiently transparent how the EDB exactly gathers and maintains this information.

Summarising, in light of the criteria in the Harmful Tax Competition Report, which also remain applicable under BEPS Action 5, the DEI should be characterised as a regime that offers a low effective tax rate, that is not ring fenced, that is characterised by a degree of transparency (but is not as fully see-through as is required) and that is part of a system of exchange of information that is embedded within the framework for compulsory spontaneous exchange of information

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<sup>86</sup> <https://www.edb.gov.sg/content/dam/edb/en/why%20singapore/Incentive-PCandDEI.pdf>.

under BEPS Action 5, although Singapore has in practice been reluctant in sharing details of the DEI regime pertaining to individual taxpayers. Although in our experience the DEI (and the EDB's administration thereof) requires substantial activities to be performed in Singapore, and in doing so, should comply with the guidance on the "substantial activity requirement", there is not enough transparency around the exact substantial activities required, where those activities are required and how a taxpayer's compliance with the requirement is reviewed.

#### **4.4.The December 2017 "EU List of non-cooperative jurisdictions for tax purposes"**

As mentioned, on 5 December 2017, the Council of the European Union adopted the EU list of non-cooperative jurisdictions for tax purposes. It had committed to do so in its Conclusions of 25 May 2016 and in its Conclusions of 8 November 2016 it had agreed on the criteria and process. The Council of the European Union is made up of Government Ministers from each Member State (in the case at hand: the Ministers of Finance). Given the topic, the voting was most likely done on the basis of unanimity.<sup>87</sup>

Singapore is not on the list nor are any of the 28 EU Member States on it. Implicitly, this means that also Singapore's DEI should be regarded as "not harmful", but an individual motivation for that conclusion is lacking. There is only the general outline of approach, process, and criteria used. Similarly, while stating the motivations for listing the (at that time) 17 non-cooperative jurisdictions (for example, in Korea's case, having harmful preferential tax regimes and not committing to amending or abolishing them by 31 December 2018), it is not mentioned why Singapore is *not* listed.

The Council Conclusions contain a "State of play of the cooperation with the EU with respect to commitments taken to implement tax good governance principles", which "records the commitments taken by the screened jurisdiction to address issues identified with respect to the criteria agreed by the November 2016 Ecofin Council, grouped under the headings of transparency, fair taxation and anti-BEPS measures". This State of play does not contain any recordings of commitments by Singapore. That can be seen as surprising, as Singapore ranked high in all "selection indicators" and was flagged in two out of three "risk indicators" in the Scoreboard of all third countries and jurisdictions for tax purposes drawn up by the European Commission on 14 September 2016 (see chapter 3).

#### **4.5.Reconciling the December 2017 "EU List of non-cooperative jurisdictions for tax purposes" findings with an own assessment**

To understand why Singapore is *not* on the EU list of non-cooperative jurisdictions, the criteria on tax transparency, fair taxation and implementation of anti-BEPS measures that were valid when the list of non-cooperative jurisdictions was adopted by the Council of the European Union will be applied below.

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<sup>87</sup> On the voting process within the Council of the European Union, see <https://mycountryeurope.com/domestic-politics/eu-domestic-policy/unanimity-qvm-council-vote/>.

## *Tax transparency*

- 1.1 A jurisdiction should have committed to and started the legislative process to implement effectively the OECD Automatic Exchange of Information (AEOI) standard (the Common Reporting Standard – CRS), with first exchanges in 2018 (with respect to the year 2017) at the latest and have arrangements in place to be able to exchange information with all Member States, by the end of 2017, either by signing the Multilateral Competent Authority Agreement (MCAA) or through bilateral agreements.
- 1.2 A jurisdiction should possess at least a “Largely Compliant” rating by the Global Forum with respect to the OECD Exchange of Information on Request (EOIR) standard, with due regard to the fast track procedure, and
- 1.3 A jurisdiction should have either:
  - i) ratified, agreed to ratify, be in the process of ratifying, or committed to the entry into force, within a reasonable time frame, of the OECD Multilateral Convention on Mutual Administrative Assistance (MCMAA) in Tax Matters, as amended, or
  - ii) a network of exchange arrangements in force by 31 December 2018 which is sufficiently broad to cover all Member States, effectively allowing both EOIR and AEOI;

Until 30 June 2019, the following exception should apply:

- A jurisdiction could be regarded as compliant on tax transparency, if it fulfils at least two of the criteria 1.1, 1.2 or 1.3.

Countries and jurisdictions which will feature in the list of non-cooperative jurisdictions currently being prepared by the OECD and G20 members will be considered for inclusion in the EU list, regardless of whether they have been selected for the screening exercise.

**Applied to Singapore:** Singapore has made international commitment to commence AEOI under the CRS in 2018<sup>88</sup> and on 21 June 2017 it signed the MCAA on CRS.<sup>89</sup> Furthermore, Singapore’s overall rating following peer reviews against the standard of EOIR (at November

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<sup>88</sup> <https://www.iras.gov.sg/irashome/News-and-Events/Newsroom/Media-Releases-and-Speeches/Media-Releases/2017/Common-Reporting-Standard--CRS--from-1-Jan-2017>.

<sup>89</sup> <https://www.iras.gov.sg/irashome/News-and-Events/Newsroom/Media-Releases-and-Speeches/Media-Releases/2017/Singapore-Signs-Multilateral-Competent-Authority-Agreements-to-Enhance-Tax-Co-operation-on-Exchange-of-Information>.



2017) was “largely compliant”.<sup>90</sup> In addition, on 20 January 2016, the MCMAA was ratified by Singapore.<sup>91</sup> Singapore therefore complies with criteria 1.1, 1.2 and 1.3.

### *Fair taxation*

2.1 The jurisdiction should have no preferential tax measures that could be regarded as harmful according to the criteria set out in the Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 on a code of conduct for business taxation, and

2.2 The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.

**Applied to Singapore:** Turning to criterion 2.2 first, if the analysis is confined to the question whether the mere ‘offering’ of the DEI itself should affect Singapore’s absence on the EU’s list of non-cooperative jurisdictions (hence disregarding the question whether Singapore “facilitates offshore structures etc.” through other tax incentives), it must be concluded that in the present author’s view the DEI requires “real economic activity” in Singapore. Again, it is stressed that it is not fully clear what, in the Council of the European Union’s view, constitutes “*real economic activity*” and whether the economic activity required in Singapore by the EDB (for purposes of the DEI) is also the *right* economic activity.

Annex VII to the Conclusions of the Council meeting of 5 December 2017, in which the EU list of non-cooperative jurisdictions was adopted, contains the “Terms of reference for the application of the Code test by analogy” and explains that it has to be ascertained:

- whether a jurisdiction does require a company or any other undertaking (e.g. for its incorporation and/or its operations) the carrying out of real economic activities and a substantial economic presence:
  - "Real economic activity" relates to the nature of the activity that benefits from the non-taxation at issue.
  - "Substantial economic presence" relates to the factual manifestations of the activity that benefits from the non-taxation at issue.
  - By way of example and under the assumption that, in general, elements considered in the past by the COCG are relevant also for this analysis, the current assessment should consider the following elements taking into account the features of the industry/sector in question: adequate level of employees, adequate level of annual expenditure to be incurred; physical offices and premises, investments or relevant types of activities to be undertaken.

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<sup>90</sup> <http://www.oecd.org/tax/transparency/exchange-of-information-on-request/ratings>.

<sup>91</sup> [http://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf).

- whether there is an adequate de jure and de facto link between real economic activity carried on in the jurisdiction and the profits which are not subject to taxation;
- whether governmental authorities, including tax authorities of a jurisdiction, are capable of (and are actually doing) investigations on the carrying out of real economic activities and a substantial economic presence on its territory, and exchanges of relevant information with other tax authorities;
- whether there are any sanctions for failing to meet substantial activities requirements.

The criteria set out in the Code of Conduct for business taxation (conclusions of the Council of Economics and Finance Ministers (ECOFIN) of 1 December 1997 are:<sup>92</sup>

“Tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code.

Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor.

When assessing whether such measures are harmful, account should be taken of, *inter alia*:

- 1 whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents; or
- 2 whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or
- 3 whether advantages are granted even without any real economic activity and substantial presence within the Member State offering such tax advantages, or
- 4 whether the rules for profit determination in respect of activities within a multinational group of companies depart from internationally accepted principles, notably the rules agreed upon within the OECD, or
- 5 whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.”

As the DEI provides for a “significantly lower effective level of taxation” (5% or 10%) than the level which generally applies in Singapore, it is to be regarded as “potentially harmful”. When assessing whether it is *actually* harmful by having recourse to the five above-mentioned criteria, only the fifth criterion seems potentially problematic (for the DEI). As mentioned above, the DEI does not *lack* transparency, but it is not entire clear either whether or not “legal provisions are relaxed at administrative level in a non-transparent way.”

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<sup>92</sup> [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/coc\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/coc_en.pdf).

## *Implementation of anti-BEPS measures*

3.1. Initial criterion that a jurisdiction should fulfil in order to be considered compliant as regards the implementation of anti-BEPS measures:

- the jurisdiction, should commit, by the end of 2017, to the agreed OECD anti-BEPS minimum standards and their consistent implementation.

**Applied to Singapore:** As Singapore has joined the Inclusive Framework for Implementing Measures against BEPS,<sup>93</sup> it satisfies this criterion.

Summarising the above own assessment under the three categories of criteria, Singapore fully complies with the “tax transparency” and “implementation of anti-BEPS measures” criteria, but the lack of full transparency around the process of application for a DEI award, the requirements imposed (is compliance with the ‘substantial activity requirement’ ensured?) and the subsequent monitoring of those requirements by the EDB may have as consequence that “legal provisions are relaxed at administrative level in a non-transparent way”. That would potentially make it difficult to comply with “fair taxation” criterion 2.1. The “Terms of reference for the application of the Code test by analogy” in Annex VII to the Conclusions of the Council meeting of 5 December 2017, in which the EU list of non-cooperative jurisdictions was adopted, suggest that the notion of “relaxation at administrative level in a non-transparent way” is broad (and would likely affect the EDB’s administration of the DEI):

“More specifically, it has to be assessed whether any elements of the legal system, including the granting of tax residence or the setting up of companies can be granted on a discretionary basis or whether it is bound by the law, verifying whether any legal provision, including non-tax provisions, can be deemed to be discretionary in matters related to the setting up of a company in that jurisdiction.”

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<sup>93</sup> <https://www.iras.gov.sg/irashome/News-and-Events/Newsroom/Media-Releases-and-Speeches/Media-Releases/2016/Singapore-Joins-Inclusive-Framework-for-Implementing-Measures-against-Base-Erosion-and-Profit-Shifting--BEPS-/>.

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## Chapter 5 – Final considerations and recommendations

This paper reviewed the OECD's and the EU's assessment of Singapore's DEI. Assessing regimes in numerous jurisdictions (in the OECD's case, specific regimes; in the EU's case, jurisdictions as such) is a laudable act in the fight of harmful tax competition, but also a tall order. The present author is fully appreciative of the efforts required with such a review in a relatively short timeframe under intense political pressure. That the EU chose its 'basket trap' 3-step-process to come to a list of non-cooperative jurisdictions and that the FHTP's review hinged upon self-assessment by the jurisdictions is, therefore, fully understandable. Other, more thorough options, such as full-blown external reviews, would likely have been too time-and resource-consuming.

In spite of the time pressure and the political scrutiny, though, the 2017 Progress Report and the EU's list of non-cooperative jurisdictions are now out there. From an academic perspective, it is fully legitimate to review these assessments now the dust has settled. This was done in this paper by performing an own assessment of Singapore's DEI – a regime that was chosen as a 'sample' because of the present author's familiarity with it – against the criteria used by the OECD and the EU and by reconciling those findings with the verdict that the DEI is not a harmful preferential tax regime and that Singapore is not a non-cooperative tax jurisdiction.

Those two outcomes, also after the own assessment in this paper, are in the present author's view still perfectly defensible: the DEI is not a harmful preferential tax regime. It is a regime legitimately chosen by a country in order to attract and maintain those types of economic activities that spur actual economic growth. If Singapore would not be allowed to offer companies a regime like the DEI, what should it do instead?

But although the verdict on the DEI in the 2017 Progress Report and the absence of Singapore in the EU's list of non-cooperative jurisdictions are understandable, those outcomes are hard to justify on the basis of the criteria that were supposedly applied by the FHTP and the Council of the European Union. Particularly on the standards of 'transparency' and the 'substantial activity requirement' it seems difficult to conclude on the basis of the relevant legal provisions in, for instance, the Economic Expansion Incentives (Relief from Income Tax) Act (Chapter 86) or Singapore's Income Tax Act, that the DEI is really sufficiently transparent and that *the right* substantial activities are required for the DEI. Those conclusions can only be drawn on the basis of actual experience with the EDB's thorough and professional administration of the DEI, but that is not the test here.

The present author, therefore, recommends the FHTP and the Council of the European Union to give much more insight as to why, and on which basis, the verdicts in the 2017 Progress Report were ultimately made and why the list of non-cooperative jurisdictions was in the end drawn up as it was. It would, for instance, be useful if the self-assessments of the regimes reviewed by the FHTP would be made public. And given the various criteria and sub-criteria used, what was the *grading* system that was applied in the end: could non-compliance with one criterion still be

compensated by full compliance with other criteria? Absent more guidance on those types of questions, only speculation remains.

Take the criterion of transparency, which has a twofold objective of promoting equality of treatment of taxpayers in similar circumstances and allowing home countries to take measures. As long as DEI certificates are not made public and as long as those certificates are not individually exchanged with authorities of other jurisdictions, it remains difficult to ensure that both parts of that twofold objective are fulfilled. While the different provisions in Singapore's laws that were addressed in chapter 2 give a good general understanding of the conditions of applicability, it is the present author's experience that the EDB will, understandably, seek to keep some individual room for maneuver. Given the discretion given to the Minister to actually award a DEI certificate, it does not seem possible for a taxpayer to actually "invoke" the conditions against the authorities (and simply 'demand' being given a DEI certificate for complying with the conditions) nor would the discretion assigned to the Minister always ensure that a taxpayer is treated fully identically to another taxpayer in similar circumstances. The processes for "granting, denying or revoking" DEI certificates are relatively opaque as well: it is, for instance, unclear when the Minister should decide on a DEI request, which types of additional conditions he is allowed to impose, or which appeal mechanism (if any) is open to a taxpayer whose request for a DEI certificate is denied. On those points, Singapore should offer more transparency. In addition, also towards Singapore's citizens, more transparency on the economic costs and benefits of the DEI (the tax revenue foregone versus the favourable overall effects for Singapore, such as investment benefits) is desirable, particularly against the backdrop of the principles on "management and administration of tax incentives" that were highlighted in chapter 2. Those statistics should be published annually. Increased transparency would address the above points and could serve to alter the public perception that tax burdens of individuals have gone up, while multinational companies have managed to keep their ETRs low by shifting profits around the globe. Transparency will help governments and companies in separating facts from fiction and open themselves up to more public accountability around the effectiveness and fairness of incentive regimes. Another reason for increasing transparency is that multinational companies are increasingly bound by (public) CbCR reporting requirements, self-initiated tax transparency paragraphs in their Annual Reports and audit standards that require full disclosure of special tax arrangements. In those circumstances, trying to preserve some degree of secrecy around tax incentive criteria seems an uphill battle. Finally, maintaining some discretion around the exact incentive criteria could arguably allow Singapore to offer tailor-made agreements to multinational companies without setting a standard for neighbouring, competing jurisdictions to go below. Yet it is the present author's experience that many multinational companies would prefer upfront clarity over post-negotiation certainty. And even when the eligibility criteria ultimately agreed upon would be relatively stringent, the shadow of secrecy may make other countries imagine them to be relatively light.

On the point of 'substance', the 2017 Progress Report refers to the 'substantial economic activity' requirement (which also applies for purposes of the EU's list of non-cooperative jurisdictions through the standard of 'implementation of anti-BEPS measures') which requires that the DEI's

benefits be granted only to taxpayers “to the extent that those taxpayers undertook the core income generating activities required to produce the type of business income covered by the preferential regime”. Those activities would also have to be undertaken in Singapore. Under the current guidance, it is not clear enough whether those criteria are fulfilled. Does the DEI sufficiently establish a link between the income qualifying for benefits and the core activities necessary to earn the income? When exactly can qualifying income be considered to be “derived from” a qualifying activity? How should the level of qualifying income be ascertained, and which standards ensure that the qualifying income does not go beyond with what one would expect given the activities performed? And for the more mobile activities, is it ensured that all the qualifying activities actually take place in Singapore (Part IIB seems to leave this open). And although it is the present author’s experience that the EDB requires full-time employees with necessary qualifications and the incurring of an adequate amount of operating expenditures to undertake the core income generating activities (this is also mentioned in the EDB’s Pioneer/EDB brochure) and critically monitors compliance with those ‘substance requirements’ on the DEI certificate, it is recommended that more transparency is offered around the actual requirements and their monitoring.

Annex I – Part IIB (Development and Expansion Incentive) of the Economic Expansion Incentives (Relief from Income Tax) Act (Chapter 86)

Interpretation of this Part

**19I.** In this Part, unless the context otherwise requires —

“commencement day”, in relation to a qualifying activity that is approved under section 19J(2) for a development and expansion company, means the date specified in the development and expansion company’s certificate under section 19J(4)(b) or (5A)(a) or (c) as the commencement day of that qualifying activity;

[[Act 11 of 2016 wef 19/04/2016](#)]

“development and expansion company” means a company which has been issued with a certificate under section 19J(2);

“qualifying activity” means any of the following:

(a)

the manufacturing or increased manufacturing of any product from any industry that would be of economic benefit to Singapore;

(b)

any qualifying activity as defined in section 16; and

(c)

such other services or activities as may be prescribed.

[36/96]

Application for and issue of certificate to development and expansion company

**19J.**

—(1) Any company engaged in any qualifying activity may apply in the prescribed form to the Minister for approval as a development and expansion company for that qualifying activity.

[36/96]

[[Act 11 of 2016 wef 19/04/2016](#)]

(1A) A company may make an application under subsection (1) to be approved as a development and expansion company for more than one qualifying activity which it is engaged in.

[[Act 11 of 2016 wef 19/04/2016](#)]

(2) The Minister may, if he considers it expedient in the public interest to do so, approve the company as a development and expansion company for the qualifying activity and issue to that company a certificate subject to such conditions as the Minister may impose.

[36/96]

[[Act 11 of 2016 wef 19/04/2016](#)]

(3) No company may be approved as a development and expansion company on or after 1 January 2024.

[[Act 11 of 2016 wef 19/04/2016](#)]

(4) Every certificate issued to a development and expansion company must be in respect of a qualifying activity and must specify —

(a)

the qualifying activity;

(b)

a date as the commencement day of the qualifying activity; and

(c)

the concessionary rate of tax to be levied for that qualifying activity for the purposes of this Part.

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(5) Where the Minister approves a company as a development and expansion company for 2 or more qualifying activities, the Minister may issue a single certificate in respect of those qualifying activities if —

(a)

the tax relief periods of the development and expansion company for all the qualifying activities, as determined by the Minister under section 19K, expire on the same day; and

(b)

the Minister is satisfied that the development and expansion company is engaged in all the qualifying activities as part of the same project.

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(5A) The Minister may, upon the application of any development and expansion company, amend a certificate issued to the company —

(a)

by substituting for the commencement day of a qualifying activity specified in the certificate under subsection (4)(b) such earlier or later date as the Minister thinks fit, and upon such substitution the provisions of this Act have effect as if the date so substituted were the company's commencement day of that qualifying activity;

(b)

by removing any qualifying activity from the certificate with effect from a date determined by the Minister; or

(c)

by adding to the certificate any qualifying activity and a date as its commencement day, if —

(i)

the tax relief period for the qualifying activity expires on the same day as the tax relief period or periods for the other qualifying activity or activities already specified in the certificate; and

(ii)

the Minister is satisfied that the development and expansion company is engaged in the qualifying activity and the other qualifying activity or activities already specified in the certificate as part of the same project.

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(5B) Without prejudice to section 99, the Minister may, on the Minister's own initiative, remove any qualifying activity from a certificate with effect from a date determined by the Minister, if the Minister is satisfied that the development and expansion company has contravened —

(a)

any provision of this Act; or

(b)

any condition of its approval as a development and expansion company.

[\[Act 11 of 2016 wef 19/04/2016\]](#)



(5C) Despite section 43 of the Income Tax Act, tax at the applicable concessional rate in subsection (5D) is levied and must be paid for each year of assessment —

(a)

upon the expansion income derived by a development and expansion company from the qualifying activity specified in its certificate during its tax relief period for that activity; or

(b)

if the certificate specifies 2 or more qualifying activities, upon the expansion income derived by it from all of those qualifying activities during its respective tax relief periods for those activities.

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(5D) In subsection (5C), the concessional rate is —

(a)

in the case of a development and expansion company approved as such before the date of commencement of section 17(d) of the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act 2016, a concessional rate of not less than 5%, as the Minister may specify in the certificate; or

(b)

in any other case, either 5% or 10% as the Minister may specify in the certificate.

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(5E) In the case of a development and expansion company that is approved as such on or after 29 February 2012, or that has been granted on or after that date an extension of its tax relief period or periods for any qualifying activity or activities, the concessional rate of tax applicable to the expansion income derived by it —

(a)

from the qualifying activity specified in the company's certificate during any part of the company's tax relief period for that activity mentioned in subsection (5F); or

(b)

if the certificate specifies 2 or more qualifying activities, from all of those activities during any part of the company's respective tax relief periods for those activities mentioned in subsection (5F),

at any time on or after the date of the approval or during the extension period (as the case may be), is the rate specified by the Minister to the company, which must not be less than —

$(0.5 + A)\%$ ,

where A

is the concessional rate of tax applicable to the company's expansion income derived by it from that activity or those activities (as the case may be) immediately before the commencement of that part of the tax relief period or those tax relief periods.

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(5F) In subsection (5E), the parts of a tax relief period for a qualifying activity are —

(a)

the beginning of the 11th year of the tax relief period to the end of the 15th year of, or the end of, the tax relief period, whichever is earlier;

(b)

the beginning of the 16th year of the tax relief period to the end of the 20th year of, or the end of, the tax relief period, whichever is earlier;

(c)

the beginning of the 21st year of the tax relief period to the end of the 30th year of, or the end of, the tax relief period, whichever is earlier; and

(d)

the beginning of the 31st year of the tax relief period to the end of the 40th year of, or the end of, the tax relief period, whichever is earlier.

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(6) The expansion income shall be the income from such qualifying activity or activities (referred to in this section and section 19M as qualifying income) to which the certificate issued under this section relates that exceeds the average corresponding income.

[36/96; 11/2004]

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(7) The average corresponding income referred to in subsection (6) shall be determined by taking one-third of the total of the corresponding qualifying income for the 3 years immediately preceding the commencement day specified in the certificate issued under this section from that qualifying activity or those qualifying activities.

[36/96; 11/2004]

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(8) Where a development and expansion company which has been approved as such at any time before the date the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act 2012 is published in the *Gazette*, and has been granted a tax relief period of at least 10 years, is granted at any time before that date an extension or a further extension of its tax relief period under section 19K(1)(b) or (2), the Minister shall compute the average corresponding income for each such extension or further extension in accordance with subsection (9).

[48/2004]

[\[Act 1 of 2012 wef 29/02/2012\]](#)

(9) The average corresponding income for each extension or further extension referred to in subsection (8) shall be determined by taking one-third of the total of the corresponding qualifying income for the 3 years immediately preceding the date of that extension or further extension of its tax relief period, as the case may be.

[48/2004]

(10) Notwithstanding subsections (7), (8) and (9), the Minister may, if he thinks fit, specify any amount to be the average corresponding income in substitution of the amount determined under those subsections.

[48/2004]

Tax relief period of development and expansion company

### **19K.**

—(1) Subject to subsection (3), the tax relief period of a development and expansion company for a qualifying activity commences on its commencement day of that qualifying activity and continues —

(a)

for such period not exceeding 10 years as the Minister may determine; and

(b)

for such further period or periods, not exceeding 5 years for each period, as the Minister may determine, where the Minister is satisfied that it is expedient in the public interest to do so and subject to such terms and conditions as he may impose.

[48/2004]

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(2) Subject to subsection (3), the Minister may, if the Minister is satisfied that it is expedient in the public interest to do so and subject to such conditions as the Minister may impose —

(a)

where the certificate issued to a development and expansion company only specifies one qualifying activity, extend the tax relief period of the company in subsection (1) for that activity for such further period or periods, not exceeding 5 years at any one time, as the Minister may determine; or

(b)

where the certificate issued to a development and expansion company specifies more than one qualifying activity, extend the tax relief period or periods of the company in subsection (1) for one or more of those activities for such further period or periods, not exceeding 5 years at any one time, as the Minister may determine.

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(3) The total tax relief period of a development and expansion company for a qualifying activity under subsections (1) and (2) shall not in the aggregate exceed 20 years.

[48/2004]

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(3A) Notwithstanding subsection (3) and subject to subsection (3B), the Minister may, if he is satisfied that it is expedient in the public interest to do so and subject to such terms and conditions as he may impose, extend the tax relief period of a relevant development and expansion company for a qualifying activity (beyond the maximum total period allowed under subsection (3)) for such further period or periods, not exceeding 10 years at any one time, as he may determine.

[Act 2 of 2013 wef 18/02/2008]

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(3B) The total tax relief period of a relevant development and expansion company for a qualifying activity under subsections (1), (2) and (3A) shall not in the aggregate exceed 40 years.

[Act 2 of 2013 wef 18/02/2008]

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(3C) An extension of the tax relief period of a relevant development and expansion company for a qualifying activity under subsection (3A) shall only be granted during the period between 18th February 2008 and 17th February 2018 (both dates inclusive).

[Act 2 of 2013 wef 18/02/2008]

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(3D) In subsections (3A), (3B) and (3C), “relevant development and expansion company” means a development and expansion company which engages in one or more qualifying activities, and oversees, manages or controls the conduct of any activity on a regional or global basis.

[Act 2 of 2013 wef 18/02/2008]

(4) Any tax relief period initially granted to a development and expansion company before the date of commencement of the Economic Expansion Incentives (Relief from Income Tax) (Amendment No. 2) Act 2004 which exceeds 10 years shall be deemed to have been granted under this section.

[48/2004]

(5) Where a development and expansion company has been granted tax relief under Part IIIA in force immediately before the date of commencement of the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act 2004 in respect of any qualifying activity specified in the certificate issued under section 19J(2), the Minister shall, in extending the tax relief period of the company for that qualifying activity under subsection (1), (2) or (3A), take into account the tax relief period of the company for that qualifying activity under that Part.

[36/96; 11/2004; 48/2004]

[Act 2 of 2013 wef 18/02/2008]

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(6) The Minister must, in extending the tax relief period of a development and expansion company for international legal services as defined in section 19KA(3), take into account any tax relief period which it enjoyed for such services under section 19KA.

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(7) Notwithstanding anything in this section, the tax relief period of a development and expansion company that is deemed to be an approved company for the purposes of section 43ZF of the Income Tax Act (Cap. 134) under regulations made under that section, shall expire on 1st June 2011 and shall not be extended.

[Act 2 of 2013 wef 01/06/2011]

International legal services

#### **19KA.**

—(1) If a company engaged in international legal services is approved under section 19J(1) as a development and expansion company for those services at any time between 1st April 2010 and 31st March 2020 (both dates inclusive), then —

(a)

despite section 19K(1), (2), (3), (3A) and (3B), the tax relief period of the company for international legal services is a non-extendable period of 5 years commencing on its commencement day; and

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(b)

despite section 19J(5C), tax at the rate of 10% is levied and must be paid for each year of assessment upon the expansion income derived from the provision of those services by the company during its tax relief period for those services.

[\[Act 11 of 2016 wef 19/04/2016\]](#)

[\[Act 11 of 2016 wef 01/04/2015\]](#)

(2) This section does not apply to a company approved under section 13V(1) of the Income Tax Act (Cap. 134).

(3) In this section —

“expansion income” has the meaning given to that expression in section 19J;

“international legal services” means any qualifying activity comprising legal services that qualify for zero-rating under section 21(3) of the Goods and Services Tax Act (Cap. 117A).

[Act 1 of 2012 wef 01/04/2010]

Recovery of tax subject to concessionary rate

**19L.** Despite any other provision of this Part, the Comptroller may, subject to section 74 of the Income Tax Act (Cap. 134), make an assessment or additional assessment upon a company to make good any loss of tax, if it appears to the Comptroller that any income of the company ought not to have been taxed at a concessionary rate under section 19J or 19KA.

[Act 11 of 2016 wef 19/04/2016]

Ascertainment of income from qualifying activities

**19M.**

—(1) Subject to subsections (2) and (3) —

(a)

the qualifying income of a development and expansion company derived from a qualifying activity; or

(b)

where the certificate issued to a development and expansion company under section 19J(2) specifies 2 or more qualifying activities, the total qualifying income of the development and expansion company derived from all of those qualifying activities, is ascertained in accordance with the provisions of the Income Tax Act, after making such adjustments as may be necessary to give effect to any direction given under section 19P.

[Act 11 of 2016 wef 19/04/2016]

(2) In determining the qualifying income of a development and expansion company mentioned in subsection (1)(a) or the total qualifying income of a development and expansion company mentioned in subsection (1)(b) for the basis period for any year of assessment —

(a)

the allowances provided for in sections 16 to 22 of the Income Tax Act for capital expenditure incurred for the purposes of the qualifying activity or all the qualifying activities shall be taken into account notwithstanding that no claim for such allowances has been made;

[Act 11 of 2016 wef 19/04/2016]

(b)

the allowances referred to in paragraph (a) for that year of assessment shall firstly be deducted against the qualifying income of the company from the qualifying activity or the total qualifying income of the company from all the qualifying activities, and any unabsorbed allowances shall be deducted against the other income of the company subject to tax at a different rate of tax under this Act or the Income Tax Act (Cap. 134) in accordance with subsection (3);

[Act 11 of 2016 wef 19/04/2016]

(c)

the balance, if any, of the allowances after the deduction in paragraph (b) shall be available for deduction for any subsequent year of assessment in accordance with sections 22A and 23 of the Income Tax Act and shall be made in the manner provided in that paragraph;

(d)

any loss incurred in carrying out the qualifying activity, or any net loss incurred in carrying out all the qualifying activities, for that basis period shall be deducted in accordance with subsection (3) against the other income of the company subject to tax at a different rate of tax under this Act or the Income Tax Act;

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(e)

the balance, if any, of the losses after the deduction in paragraph (d) shall be available for deduction for any subsequent year of assessment in accordance with section 37 of the Income Tax Act firstly against the qualifying income of the company from the qualifying activity or the total qualifying income of the company from all the qualifying activities, and any balance of the losses shall be deducted against the other income of the company subject to tax at a different rate of tax under this Act or the Income Tax Act in accordance with subsection (3);

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(f)

any unabsorbed donation for that year of assessment shall be deducted in accordance with subsection (3) against the other income of the company subject to tax at a different rate of tax under this Act or the Income Tax Act; and

(g)

the balance, if any, of the donations after the deduction in paragraph (f) shall be available for deduction for any subsequent year of assessment in accordance with section 37 of the Income Tax Act firstly against the qualifying income of the company from the qualifying activity or the total qualifying income of the company from all the qualifying activities, and any balance of the donations shall be deducted against the other income of the company subject to tax at a different rate of tax under this Act or the Income Tax Act in accordance with subsection (3).

[11/2004]

[\[Act 11 of 2016 wef 19/04/2016\]](#)

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(3) Section 37B of the Income Tax Act shall apply, with the necessary modifications, in relation to —

(a)

the deduction of the allowances provided for in sections 16 to 22 of that Act; and

(b)

the losses or donations under section 37 of that Act in respect of —

(i)

the qualifying income or the total qualifying income of the development and expansion company; and

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(ii)

such part of the development and expansion company's income as is subject to tax at a different rate of tax under this Act or the Income Tax Act (Cap. 134).

[11/2004]

(4) For the purpose of the application under subsection (3), any reference in section 37B of the Income Tax Act to income of a company subject to tax at a higher or lower rate of tax or income of the company subject to tax at a higher or lower rate of tax, as the case may be, shall be read as a reference to the qualifying income or the total qualifying income of the development and expansion company.

[11/2004]

[\[Act 11 of 2016 wef 19/04/2016\]](#)

Ascertainment of income from other trade or business

**19N.**

—(1) Where at any time —

(a)

during the tax relief period of a development and expansion company for a qualifying activity; or

(b)

where the certificate issued to the development and expansion company under section 19J(2) specifies 2 or more qualifying activities, during the longer or longest of the tax relief periods of the company for those qualifying activities,

the development and expansion company carries on any trade or business other than the qualifying activity or activities, separate accounts must be maintained for that other trade or business and in respect of the same accounting period; and the income from that other trade or business must be computed and assessed in accordance with the Income Tax Act (Cap. 134) with such adjustments as the Comptroller thinks reasonable and proper.

(2) Where, in the opinion of the Comptroller, the carrying on of such other trade or business is subordinate or incidental to the carrying on of the qualifying activity or activities, the income or loss arising from such other trade or business is considered to form part of the income or loss of the company from that qualifying activity or the total income or total loss of the company from those qualifying activities.

[\[Act 11 of 2016 wef 19/04/2016\]](#)

Deduction of losses

**19O.** The Minister may, in relation to development and expansion companies, by regulations provide for —

(a)

the manner in which expenses, capital allowances and donations allowable under the Income Tax Act are to be deducted; and

(b)

the deduction of capital allowances, losses and donations otherwise than in accordance with sections 23 and 37 of the Income Tax Act (Cap. 134).

[11/2004]

Power to give directions

**19P.** For the purposes of this Act and the Income Tax Act, the Comptroller may direct that —

(a)

any sum payable to a development and expansion company in its tax relief period for a qualifying activity which might reasonably and properly have been expected to be payable, in the normal course of business, after the end of that period shall be treated as not having been payable in that period but as having been payable on such date, after that period, as the Comptroller thinks fit; and

[\[Act 11 of 2016 wef 19/04/2016\]](#)

(b)

any expense incurred by a development and expansion company in respect of a qualifying activity within one year after the end of the tax relief period for that activity which might reasonably and properly have been expected to be incurred, in the normal course of business, during that tax relief period, is to be treated —

(i)

as not having been incurred within that year; but

(ii)

as having been incurred for the purposes of that qualifying activity and on such date during that tax relief period as the Comptroller thinks fit.

[\[Act 11 of 2016 wef 19/04/2016\]](#)