archive ouverte UNIGE
http://archive-ouverte.unige.ch

Article

Encouraging Sustainable Investment through Direct Tax Relief: Swiss and EU State Aid Legal Framework

LIDEIKYTE-HUBER, Giedre, PETER, Henry

Abstract

Direct tax incentives for individual investors are one of the policy measures that governments use to generate funds to develop the sustainable business sector. There are a number of arguments in favor of these measures. Existing research in behavioral science shows that the majority of investors perceive sustainable businesses as less profitable. It is also known, at least so far, that companies which follow sustainable commercial practices find it harder to attract investors. Several governments have identified this issue and enacted tax incentives specifically designed to encourage investors to turn to sustainable businesses. This type of economic policy approach is, however, still very rare, and the literature on the topic is sparse. This article seeks to provide input from a legal standpoint, highlighting the rationale and feasibility in the light of the fundamental principles of taxation, as well as of EU state aid rules, because this is an issue that inevitably arises. In particular, it analyzes whether encouraging sustainable investments via direct tax relief for investors is compatible with the legal framework [...]

Reference

LIDEIKYTE-HUBER, Giedre, PETER, Henry. Encouraging Sustainable Investment through Direct Tax Relief: Swiss and EU State Aid Legal Framework. *IFF Forum für Steuerrecht*, 2020, vol. 3, p. 207-221

Available at:
http://archive-ouverte.unige.ch/unige:140817

Disclaimer: layout of this document may differ from the published version.

UNIVERSITÉ
DE GENÈVE

Encouraging Sustainable Investment through Direct Tax Relief: Swiss and EU State Aid Legal Framework

Dr. Giedre Lideikyte Huber/Prof. Henry Peter

Dr. Giedre Lideikyte Huber,
Senior Lecturer at the University of Geneva, Geneva

Henry Peter, Prof.,
Head of the Geneva Centre for Philanthropy of the University of Geneva

Direct tax incentives for individual investors are one of the policy measures that governments use to generate funds to develop the sustainable business sector. There are a number of arguments in favor of these measures. Existing research in behavioral science shows that the majority of investors perceive sustainable businesses as less profitable. It is also known, at least so far, that companies which follow sustainable commercial practices find it harder to attract investors. Several governments have identified this issue and enacted tax incentives specifically designed to encourage investors to turn to sustainable businesses. This type of economic policy approach is, however, still very rare, and the literature on the topic is sparse. This article seeks to provide input from a legal standpoint, highlighting the rationale and feasibility in the light of the fundamental principles of taxation, as well as of EU state aid rules, because this is an issue that inevitably arises. In particular, it analyzes whether encouraging sustainable investments via direct tax relief for investors is compatible with the legal framework for EU state aid and Swiss legislation. Depending on how such tax incentives are structured, we argue that they can be compatible with both.

Direkte Steueranreize für Einzelinvestoren sind eine der politischen Massnahmen, welche Regierungen einsetzen, damit Kapital für die Entwicklung des nachhaltigen Unternehmenssektors zur Verfügung gestellt wird. Es gibt eine Reihe von Argumenten, die für diese Massnahmen sprechen. Bestehende Forschungen in der Verhaltenswissenschaft zeigen, dass die Mehrheit der Investoren nachhaltige Unternehmen als weniger profitabel empfindet. Es ist auch bekannt, dass es, zumindest bisher, für Unternehmen, die nachhaltige Geschäftspraktiken verfolgen, schwieriger ist, Investoren anzuziehen. Mehrere Regierungen haben dieses Problem erkannt und Steueranreize erlassen, die speziell darauf ausgerichtet sind, Investoren zu ermutigen, sich an nachhaltige Unternehmen zu wenden. Diese Art von wirtschaftspolitischem Ansatz ist jedoch noch sehr selten und die Literatur zu diesem Thema ist spärlich. Dieser Artikel versucht, einen Beitrag aus rechtlicher Sicht zu leisten, indem er das Grundprinzip und die Durchführbarkeit im Lichte der Grundprinzipien der Besteuerung sowie der Vorschriften der Europäischen Union (EU) über staatliche Beihilfen hervorhebt, da es sich hierbei um ein Problem handelt, das sich unweigerlich stellt. Insbesondere wird analysiert, ob die Förderung nachhaltiger Investitionen durch direkte Steuererleichterungen für Investoren mit dem rechtlichen Rahmen für staatliche Beihilfen der EU und der Schweizer Gesetzgebung vereinbar ist. Je nachdem, wie solche Steueranreize strukturiert sind, argumentieren wir, dass sie mit beiden kompatibel sein können.

© IFF-HSG

Inhalt

1 Introduction . . . 208

2 Background: Sustainable investment policy and fiscal incentives . . . 209

3 Case studies: the UK and the Netherlands . . . 210

3.1 Sustainable Investment Tax Relief (UK) . . . 210

3.2 Green Funds Scheme (NL) . . . 211

3.3 The EU state aid regime . . . 213

4 Analysis of the Swiss legal framework for tax subsidies . . . 214

4.1 Notions and analysis framework . . . 214

4.2 Art. 94 Cst . . . 215

4.3 Art. 27 and 36 Cst . . . 216

4.4 Inexistence of the Swiss state aid rules . . . 217

4.5 Switzerland and the EU state aid rules . . . 217

5 Conclusions . . . 218

Bibliography . . . 219

Official Documents . . . 220

1 Introduction

This article discusses direct tax incentives aimed at individual investors as a means of promoting investment in sustainable businesses. Tax incentives for sustainable development take different forms and target different levels: for instance, investment tax credits may be offered to investors, whereas other types of incentives, such as accelerated depreciation provisions for equipment (e. g., pollution control or waste treatment facilities) are applied to business entities.[1] We will focus on investment incentives for individuals who invest in sustainable domestic business activities, and examine the compatibility of these incentives with EU state aid and Swiss legislation. We will not analyze tax incentives, such as accelerated depreciation provisions, granted to business entities to develop sustainable commercial practices.

For the purposes of this article, we will not provide a definition of the sustainable business practices that would qualify for investment tax relief. In fact, sustainable business models and their archetypes have already been widely covered in economic literature.[2] Researchers have analyzed various possible approaches and a wide range of stakeholder interests, including environment and society, and have identified these as important in driving and implementing corporate innovation for sustainability, as well as in serving as a driver of competitive advantage.[3] We therefore refer to this body of literature for an extensive analysis of the characteristics of sustainable business. However, we highlight that this definition is important for policy makers in the area of tax incentives. In particular, this definition is necessary for determining whether a specific tax incentive is compatible with EU state aid legislation and whether, in Switzerland, a limitation to the Swiss constitutional principle of economic freedom of art. 94 Cst is possible.

This article thus seeks to contribute to the existing literature in the two following points: firstly, we seek to present the tax incentives for individual investors that exist in EU countries and, secondly, we describe their design with regard to state aid legislation, analyzing Swiss legislation in this respect. Our article is structured as follows: (i) we will introduce the political and legal background of direct tax incentives to encourage sustainable investment; (ii) we will describe two jurisdictions – the UK and the Netherlands – that introduced investor tax incentives for investments in sustainable development, highlighting how EU state aid rules influenced the design of these incentives and (iii) we will analyze the Swiss state aid legal framework, determining whether similar tax subsidies would be compatible with its normative system, as well as with the EU legal framework.

1 Panayotou, Instruments of Change, 33; Easson/Zolt, Tax Incentives, 18.

2 Bocken/Short/Rana/Evans, A Literature and Practice Review to Develop Sustainable Business Model Archetypes, 42 et seqq.; Joyce/Paquin, The Triple Layered Business Model Canvas: A Tool to Design More Sustainable Business Models, 1474 et seqq.; Defourny/Nyssens, Conceptions of Social Enterprise and Social Entrepreneurship in Europe and the United States: Convergences and Divergences, 32 et seqq.

3 Bocken/Short/Rana/Evans, A Literature and Practice Review to Develop Sustainable Business Model Archetypes, 42 et seqq.

 © IFF-HSG

2 Background: Sustainable investment policy and fiscal incentives

In recent years, governments have been adopting a more active role in steering and regulating their economies.[4] Industrial development strategies are proliferating in a number of countries, with governments providing more guidelines for investment policies, and often enacting targeted investment promotion or restriction measures.[5] Peoples' expectations of governments' investment promotion activities also seem to be changing gradually, with a greater focus on quality rather than quantity of investment (for instance, encouraging low-carbon or job-creating investments).[6] This increased role of governments in steering investment activities, as well as the shifting perception of the aim of investment policies, reflects a new, more realistic approach to the economic and social costs of unregulated market forces.[7]

In this context, government investment policies are increasingly taking into account sustainable development considerations. The idea of mobilizing funds and channeling investments to areas considered as important for sustainable development but under-served by private investors is recurrent in international investment policy discussions.[8] UNCTAD describes the rise of a «new generation» of investment policies, which place sustainable development at the center of efforts to attract and benefit from investment, shifting from classic «location-based» incentives.[9] The researchers acknowledge that:

> «the public sector can play a catalytic role in the social investment market in terms of creating a conducive regulatory environment, encouraging greater transparency and taking concrete steps to help develop the market.»[10]

One of the policy options in mobilizing funds for sustainable-development-oriented investments is fiscal incentives.[11] Also referred to as tax incentives,fiscal incentives are a category of state fiscal instrument, i. e. are economic instruments of a fiscal nature that governments use to provide incentives to shift the behavior of a targeted group towards a certain public policy objective.[12] There are two categories of fiscal instrument, with opposite approaches: taxes and subsidies. Taxes are often called «pricing instruments», as they increase the price of certain aspects of production or consumption (e. g. «carbon tax»), whereas subsidies provide incentives by decreasing the price or purchasing costs of a product.[13] Governments can provide subsidies either directly, through funding, or through their tax system;[14] subsidies provided through taxes are called tax expenditures.[15] Thus, a fiscal instrument deployed through taxes can be either a tax measure or a tax subsidy, depending on its goal and the way it is enacted. Subsidies fall into three categories: (i) direct subsidies; (ii) subsidies made via direct tax systems and (iii) subsidies made via indirect tax systems.[16] In conclusion, one can define fiscal or tax incentives as subsidies or tax expenditures that seek to induce certain activities or behavior as a result of the monetary benefit available.[17]

The widespread use of fiscal instruments (both taxes and subsidies) to promote sustainable development started in the 1990s. Nowadays, governments employ various types of these instruments in order to achieve their Sustainable Development Goals («SDG») agendas. They do this through environmental taxes, emission and effluent taxes, subsidies, differential tax structures, industrial relocation incentives, fiscal policy reform, etc.[18] Sustainable investment tax incentives *targeted at investors* are among these fiscal instruments and include tax allowances, tax credits, removal of withholding tax for foreign investors, and creating flow-through shares that allow investors to deduct a company's expenses.[19] However, these instruments remain relatively rare – even though tax incentives for regular investments are recurrent in almost all countries in the world, especially when governments are trying to attract direct foreign investment.[20]

There are several arguments that support more frequent use of sustainable investment incentives for investors.

Firstly, it appears that investors perceive sustainable business as less profitable (this perception is, however, not

4 UNCTAD, Investment Policy Framework for Sustainable Development 2015, 14.
5 UNCTAD, Investment Policy Framework for Sustainable Development 2015, 14.
6 UNCTAD, Investment Policy Framework for Sustainable Development 2015, 14.
7 UNCTAD, Investment Policy Framework for Sustainable Development 2015, 14.
8 UNCTAD, Investment Policy Framework for Sustainable Development 2015, 14.
9 UNCTAD, Investment Policy Framework for Sustainable Development 2015, 14.
10 Wilson, Social Investment: New Investment Approaches for Addressing Social and Economic Challenges, 5.
11 UNCTAD, Investment Policy Framework for Sustainable Development 2015, 48 and 63–64.
12 Panayotou, Instruments of Change, 1–2.
13 Panayotou, Instruments of Change, 1–2.
14 Panayotou, Instruments of Change, 1–2.
15 Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 705 et seqq.
16 Panayotou, Instruments of Change, 2.
17 Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 711.
18 Panayotou, Instruments of Change, 28 et seqq.
19 Scott/Elgie, Tax Incentives to Boost Clean Growth: Investor Tax Credits and Flow-Through Shares, 1 ff.
20 Easson/Zolt, Tax incentives, 2.

substantiated by economic research). Even though, regrettably, there is still very little behavioral science research on this question, existing studies do offer some clues. For instance, a study carried out by RIEDL/SMEETS found that socially responsible investors already holding shares in Socially Responsible Investment funds (following «SRI») expect to earn lower returns than on conventional investments. Thus, the perception of lower returns is at least in certain cases present even among sustainability-oriented investors.[21] In another study, JANSSON/BIEL suggest that this perception differs depending on investor characteristics, with investment institutions having a tendency, for their beneficiaries, to overrate the importance of financial returns and to underestimate the importance of ethical, environmental and social aspects.[22] It is therefore possible that certain investors looking for immediate financial returns could be more sensitive to financial incentives for SRI, including tax incentives.

Secondly, there is evidence that sustainable businesses often face difficulties in attracting investors. For instance, a study conducted in Canada found that a lack of financing remains a major barrier to scaling-up and commercializing cleantech firms poised for growth, which highlights a need for government-specific investor-oriented tax incentives.[23] In the UK, the government introduced tax incentives to invest in social enterprises because these companies had difficulty raising capital from investors and commercial lenders.[24] The Green Funds Scheme was introduced in the Netherlands because investments in environmental projects needed to be boosted further.[25]

One of the reasons for which tax incentives are rarely used to encourage investments in sustainable ventures might be that in Europe such incentives must be very carefully conceived in view of the complex EU state aid rules. We have identified and will focus on the two aforesaid jurisdictions in Europe that grant direct tax relief to individuals investing in sustainable businesses, i. e. the Netherlands and the UK. We will discuss these cases further below, with a particular emphasis on aspects relating to EU state aid law.

21 RIEDL/SMEETS, Why Do Investors Hold Socially Responsible Mutual Funds?, 2505 ff.
22 JANSSON/BIEL, Motives to Engage in Sustainable Investment: A Comparison Between Institutional and Private Investors, 135 f.
23 SCOTT/ELGIE, Tax Incentives to Boost Clean Growth: Investor Tax Credits and Flow-Through Shares, 9.
24 HM Revenue & Customs, Social Investment Tax Relief 2013, 1 ff.
25 SCHOLTENS, The Sustainability of Green Funds, 223 ff.

3 Case studies: the UK and the Netherlands

3.1 Sustainable Investment Tax Relief (UK)

In 2014, the UK incorporated a fiscal policy measure called Social Investment Tax Relief (following «SITR») into its legislation. SITR provisions were added to the amended «ITA-UK 2007» and the scope of these provisions was extended in 2017. According to the UK government, SITR was the world's first fiscal policy measure to offer financial incentives to individual investors for the purpose of providing social investment capital.[26] The European Commission described the SITR as «the only tax incentive to specifically target social enterprises».[27]

The SITR offers individual (not corporate) investors several types of income tax relief[28] in the form of an income tax credit. More specifically, they can deduct 30 % of the amount invested – in equity or debt – from what would otherwise be their income tax liability for the year, or the previous tax year in which the investment was made.[29] In addition, investors can defer their taxable capital gains if they re-invest them in a qualifying social investment, until the social investment is sold or redeemed.[30] The capital gains tax is also not due on any gain on the investment itself (i. e. sale of shares); however, investors are liable to regular income tax on any dividend and interest or redemption premium on debt.[31] If a social investment in shares has been held for at least two years prior to the person's death, it may qualify for inheritance tax relief. Finally, investments in shares may qualify for loss relief against income or capital gains tax, and debt may in certain cases qualify for relief against capital gains tax.[32] In order to be eligible for the relief, investors must hold the investment for at least three years. Under SITR, investors can invest either directly in qualifying social enterprises, or indirectly via SITR funds.

In order to qualify for the SITR, both the benefiting enterprise and the investment must meet certain criteria. Art. 257J(2) ITA-UK 2007 sets out the definition of a qualifying «social enterprise». A social enterprise is an

26 HM Government, Social Investment: A Force for Social Change – UK Strategy 2016, 8.
27 European Commission, Effectiveness of Tax Incentives for Venture Capital and Business Angels to Foster the Investment of SMEs and Start-Ups, Final Report 2017, 197.
28 Art. 257K ITA-UK 2007.
29 Art. 257JA ITA-UK 2007; HM Revenue & Customs, Social Investment Tax Relief 2016, 1 et seqq.
30 Art. 257JA ITA-UK 2007; HM Revenue & Customs, Social Investment Tax Relief 2016, 1 et seqq.
31 Art. 257JA ITA-UK 2007; HM Revenue & Customs, Social Investment Tax Relief 2016, 1 et seqq.
32 Art. 257JA ITA-UK 2007; HM Revenue & Customs, Social Investment Tax Relief 2016, 1 et seqq.

 © IFF-HSG

organization such as a community interest company, a charity, or an accredited social impact contractor, or any other body prescribed – or of a description prescribed – by an order of the Treasury. Between 2014 and 2017, one requirement was that the organization must employ fewer than 500 full-time equivalent employees;[33] another was that the organization's total assets had to amount to less than GBP 15 million[34].[35] Later on, several other restrictions were introduced in order to meet the requirements for inclusion in the category of investment aid that is permitted for small and medium-sized enterprises (following «SMEs») under the GBER. The cap on employee numbers (not including volunteers) was reduced to 250. Activities such as asset leasing, lending, energy generation, and operating nursing and residential care homes were excluded from the scheme[36], and enterprises in commercial difficulty were not eligible for the aid. Organizations are not able to use SITR funding to repay existing loans.[37] Investments qualifying for the relief can be made in equity as well as in loans.

According to the UK government, the initial results of this tax incentive scheme were unsatisfactory.[38] The reasons for this are not totally clear, since almost no academic research exists with regard to the scheme; nevertheless, it ranked fourth in the European Commission's benchmarking on the Effectiveness of Tax Incentives for Venture Capital and Business Angels to Foster the Investment of SMEs and Start-Ups.[39] To date, however, the SITR has raised only a fraction of the projected funds. Initial estimates put the amount of new investments to be generated by the SITR at GBP 480 million, while recent estimates show that only around GBP 3.4 million was invested in 30 organizations in the first two years of the scheme, i. e. between 2014 and 2016.[40] The average amount of social investment raised by an organization was around GBP 100 000. The average turnover of these organizations was GBP 615 000, and they had assets of around GBP 1 million and fewer than 10 employees. The SITR legislation received criticism from organizations and individuals for being too restrictive and excluding a number of social enterprises and charities from its scope, especially because SITR cannot be used to pay off debt, and because nursing and residential care homes are excluded from the scheme.[41] Some financial service providers, however, indicated that their use of SITR to offset a portion of an individual's investment against income tax raised the value of the potential rate of return in two social impact bonds from 7 % per annum to 19 %.[42]

3.2 Green Funds Scheme (NL)

A very different example of direct tax incentive for investors in sustainable business is the Dutch Green Funds Scheme, which came into force in 1995 and is, with amendments, still in place. The broad objective of this incentive scheme was to stimulate investments that protect the environment. The Dutch government has continually adjusted the contents and scope of this policy measure, and it now encompasses an increased number of sustainable development aspects.[43] The government branded this scheme as being a unique way of funding environmental projects.[44]

The scheme is a tax incentive for private investors who invest in certified «green» projects or a «green» fund or bank.[45] In the Netherlands, income from savings and investments – including dividends (other than those on substantial shareholdings, which are regulated by a different tax regime), interest and royalties – is not subject to income tax as such. Instead, the government taxes the «notional return» on investments, based on the investor's net assets (assets minus debt) on 1 January. This notional return on assets is calculated on the basis of three ascending fixed percentages, applied as tax brackets, and is taxed at a flat rate of 30 %[46].[47] The government deter-

33 Art. 257MC(1) ITA-UK 2007.

34 Art. 257MC(1) ITA-UK 2007.

35 Art. 257JA ITA-UK 2007; HM Revenue & Customs, Social Investment Tax Relief 2016, 1 et seqq.

36 HM Treasury have in fact suggested that residential care homes will, in due course, be able to introduce a system for accrediting nursing homes and residential care homes in order to make them eligible for SITR investment (HM Treasury, Social Investment Tax Relief: Call for Evidence 2019, 1 et seqq.).

37 Cf. Website of Big Society Capital.

38 HM Treasury, Social Investment Tax Relief: Call for Evidence 2019.

39 European Commission, Effectiveness of Tax Incentives for Venture Capital and Business Angels to Foster the Investment of SMEs and Start-Ups, Final Report 2017, 197.

40 Rotheroe/Lomax, Social Investment Tax Relief: Two Years On, 1.

41 Hopkins, Understanding Social Investment Tax Relief and How to Make it Work.

42 Wiggan, Policy Boostering the Social Impact Investment Market in the UK, 728.

43 Scholtens, The Sustainability of Green Funds, 224.

44 NL Agency, Ministry of Housing, Spatial Planning and the Environment, The Green Funds Scheme, 1; Rubik u. a., Innovative Approaches in European Sustainable Consumption Policies, 1 et seqq.

45 NL Agency, Ministry of Housing, Spatial Planning and the Environment, The Green Funds Scheme, 2–3.

46 Art. 5.2 ITA-NL 2001.

47 PwC, Netherlands; it must be noted that the Dutch income taxation system uses two fictions. Firstly, one part of an individual's assets is deemed to be savings and another part is deemed to be investments (notwithstanding the real division between the two types of assets). The higher the amount of assets, the larger the part that is deemed to be an investment. The second fiction is the deemed return: for 2020 this is set at 0,06 % for the part of the assets that is deemed to be savings and 5,33 % for the part that is deemed to be investments. This deemed return is taxed at a rate of 30 % (Hemels, Personal and informal e-mail communication with Giedre Lid-

mines these percentages based on market information from previous years and investment results, and reassesses them periodically.[48] The system is controversial, as in many cases, especially in relation to savings accounts, it leads to taxing higher amounts than the actual interest received. With regard to 2020, the amount of tax an individual investor could pay ranges from no tax (a general exemption applies up to EUR 30 846) to 5,33 %, depending on the individual's total assets. However, investments in certified «green funds» are considered as qualified investments which, for 2020, have been excluded from the taxable base up to EUR 59 477.[49] This tax incentive seeks to partially compensate a hypothetically lower rate of interest or return on «green» investments.[50]

Four types of stakeholders are eligible for the Green Funds Scheme: (i) those who launch «green projects» eligible for funding under the scheme; (ii) «green» financial institutions that select, finance and monitor green projects; (iii) households (private investors) who seek to invest in «green projects» and (iv) the Dutch government.[51] Private investors cannot invest directly in green projects under the scheme; they have to pass through a certified «green» financial institution, which offers investors three options: (i) deposits; (ii) bonds with a fixed value, term and interest rate, and (iii) shares in a green investment fund.[52] To qualify as green funds, investment funds have to invest mainly (i. e. at least 70 %) in «green projects».

In 2011, certain authors described the Green Funds Scheme as a success and a useful policy to promote sustainable development.[53] They pointed out that, since the introduction of the scheme, Dutch financial institutions had recorded a sharp rise in demand for socially responsible investments, which prompted the financial sector to develop and offer sustainable products.[54] Scholtens noted that, from 1995 to 2011, the scheme attracted 250 000 private investors, which facilitated more than 6000 projects for a total amount of EUR 12 billion, resulting in some encouraging environmental indicators (even though the reporting on the environmental impact is very limited).[55] Although the functioning of the scheme has fundamentally remained the same since 1995, the project categories have been expanded considerably, and more social and indirect environmental issues have entered the scope of the scheme, bringing it more in line with the general notion of sustainable development.[56] The scheme also appears to have had a major impact on encouraging environmental innovation and has contributed to raising awareness about the complexity of environmental and sustainability issues.[57]

In 2011 the incentive was, however, significantly reduced as a result of the austerity measures adopted by the Dutch government. In a report published in 2014, the Netherlands' Court of Audit in fact observed that the resulting decrease in green investments was significant, and exceeded the government's estimates.[58] It noted that, in total, private individuals had withdrawn more than EUR 2.5 billion from green banks since 2010, when it became known that the scheme's tax advantages would be reduced. In 2011 and 2012, fewer assets were allocated to green projects via green banks. The assets invested in the scheme fell from EUR 5.5 billion in 2011 to EUR 4.6 billion in 2013.[59] In 2017, the capitalization of investments made through the Green Funds Scheme had, however, risen again to approximately EUR 5 billion.[60]

It therefore seems that the tax incentives were an important stimulus to invest in «green» investments in the Netherlands, as the cut to tax relief resulted in an immediate withdrawal of a substantial amount of funds. However, Dutch researchers note that it is difficult to apply this example to other jurisdictions because of the specificities of the Dutch income tax system. In particular, the fact that the government taxes notional (and not real) investment income creates a situation where individuals are actually being taxed on amounts that are higher than the interest earned on their savings accounts, especially given current low interest rates.[61] The Supreme Court of

eikyte Huber in 2020). If one combines all this, it leads to a tax of: 1,799 % on assets with a total value of EUR 30 846 to EUR 103 643; 4,223 % on assets with a total value of EUR 103 643 to EUR 1 036 418; 5,33 % on assets with a total value exceeding EUR 1 036 418 (2020). Even if a taxpayer only has savings income, he is partly taxed as if he had investment income. In many such cases, people pay more tax than they actually earn in investment income (effective tax rates of over 100 %). The Dutch Supreme Court has already deemed this system to be in breach of the right to property of art. 1 First Protocol to the ECHR. However, for budgetary reasons, the Dutch government has not yet acted on this decision, (Hemels, Personal and informal e-mail communication with Giedre Lideikyte Huber in 2020).

48 Hemels, Personal and informal e-mail communication with Giedre Lideikyte Huber in 2020.
49 The Netherlands Ministry of Finance, Tax Policy Information 2019, 1.
50 NL Agency, Ministry of Housing, Spatial Planning and the Environment, The Green Funds Scheme, 2.
51 Scholtens, The Sustainability of Green Funds, 224.
52 Scholtens, The Sustainability of Green Funds, 224.
53 Scholtens, The Sustainability of Green Funds, 224.
54 Scholtens, The Sustainability of Green Funds, 224.
55 Scholtens, The Sustainability of Green Funds, 224.
56 Scholtens, The Sustainability of Green Funds, 224.
57 Scholtens, The Sustainability of Green Funds, 224.
58 NL Court of Audit, Versobering heffingskorting groen beleggen, 1 et seqq.
59 NL Court of Audit, Versobering heffingskorting groen beleggen, 1 et seqq.
60 Trinomics, Private Climate Finance Report 2017, 22.
61 Hemels, Personal and informal e-mail communication with Giedre Lideikyte Huber in 2020.

 © IFF-HSG

the Netherlands deemed this to be a breach of the right to property, pursuant to art. 1 First Protocol to the ECHR. For this reason, the tax cuts on green investments might be attractive for Dutch taxpayers, but may not necessarily produce the same effect in jurisdictions with a different income tax system.

3.3 The EU state aid regime

Tax incentives for investments are indirect subsidies that may fall within the scope of *legal provisions related to competition*. Subsidizing investments in sustainable business through tax relief privileges economic entities operating in this sector compared to those operating in non-subsidized sectors, and can potentially distort market competition. The smooth functioning of competition and its limits are controlled by competition law.[62] Through different legal provisions, competition law aims to prevent behavior by both private and public players that distorts competition, including when legal norms and measures adopted by a government, such as state aid, might have that effect.[63] When creating tax incentives, the legislator must therefore make sure that it does not infringe domestic or international rules in that regard.

The EU's state aid principles are enshrined in art. 107 TFEU. Art. 107 para. 1 TFEU prohibits state aid that distorts, or threatens to distort competition. Art. 107 para. 2 TFEU foresees three exceptions to the rule of art. 107 para. 1 TFEU, including state aid that is compatible with the internal market. Art. 107 para. 1 lit. a TFEU is particularly important because it authorizes aid granted to individuals, provided that such aid has a social character, and is granted without discrimination related to the origin of the products concerned. However, the scope of the exceptions of the said art. 107 para. 2 TFEU is quite limited. The European Commission, when analyzing subsidies in the light of the EU State aid principles, relies more often on art. 107 para. 3 TFEU. That latter states that certain types of state aid «may be considered to be compatible» with the internal market. This third paragraph is one of the key instruments available to governments seeking to grant domestic subsidies. All three paragraphs are subject to an extensive and sophisticated body of EU legislation, case law and academic works.

In order to allow domestic subsidies for businesses, EU state aid law requires there to be sufficient evidence of market failure and of the necessity and proportionality of the intervention.[64] In that regard, the EU has developed multiple rules and regulations that fall outside the scope of the present analysis. We would, however, like to mention two aspects relating to the exceptions allowed under art. 107 TFEU: (i) *de minimis* Regulation rules and the GBER rules, and (ii) the exceptions allowed under art. 107 para. 3 TFEU.

The *de minimis* Regulation and the GBER rules allow EU Member States to implement a wide range of public subsidies without prior mandatory notification to the European Commission, in areas such as research and development, environmental protection and support to SMEs, as long as this aid complies with specific requirements.[65] The difference between the *de minimis* Regulation and the GBER rules is that state aid that falls within the scope of the *de minimis* Regulation is deemed to have no impact on competition and trade in the internal market because it involves negligible amounts.[66] In contrast, state aid falling within the scope of the GBER, which declares certain categories of aid compatible with the internal market in application of art. 107 and 108 TFEU, affects trade between member states in any case, but it is exempted from notification because it fulfils specific requirements laid down in the GBER. Finally, state aid that does not fall into the above category must follow the mandatory notification procedure and seek to obtain an exemption under art. 107 para. 3 TFEU.

The UK and Dutch tax incentives described above were carefully crafted, taking into account the EU state aid rules but using different approaches.

At the beginning, the UK designed its SITR incentives according to the thresholds of the EU's *de minimis* legislation in order it not to have to go through the European Commission's notification and approval procedure.[67] Due to the need to comply with the *de minimis* Regulation thresholds, the maximum lifetime amount that a social organization could raise was limited to GBP 1 million per year between 2014 and 2017. In 2017, the UK changed its incentive scheme, adapting it to the requirements concerning the provisions for state aid to SMEs under art. 17 GBER. The SITR scope was thus extended, allowing companies to raise up to GBP 1,5 million. This new scheme was specifically designed to meet the EU's GBER rules. The UK government claimed that the con-

62 Tercier/Martenet, Introduction générale, 5.
63 Tercier/Martenet, Introduction générale, 5.
64 HM Treasury, Social Investment Tax Relief: Call for Evidence 2019, 1 et seqq.
65 European Commission Information, Targeted Review of the General Block Exemption Regulation (State Aid): Extension to National Funds Combined with Certain Union Programmes 2019.
66 European Commission Press Release, State Aid: Commission Adopts Revised Exemption for Small Aid Amounts (de minimis Regulation); de minimis aid should not exceed EUR 200 000 per company over any period of three fiscal years (EUR 100 000 in the road transport sector).
67 HM Treasury, Social Investment Tax Relief: Call for Evidence 2019, 1 et seqq.; HM Revenue & Customs, Income Tax: Enlarging Social Investment Tax Relief.

tinuous application of these rules would be ensured even if the UK left the EU, under the following conditions: if the UK leaves the EU without a deal, it will transpose the EU state aid rules into UK domestic legislation; if it leaves with a deal, the EU (Withdrawal) Act-UK 2018 will replicate the existing state aid framework.[68] In this latter case, the UK Competition and Markets Authority would monitor and approve new aid granted in the UK.[69]

The Dutch Green Funds Scheme was also drafted in order to comply with the EU state aid regime. From 1994 to 2011, it was designed, similarly to the SITR, applying the *de minimis* standards. When the scheme was renewed, the European Commission asked the Netherlands to follow the mandatory notification procedure, stating that the Green Funds Scheme involved aid pertaining to investment funds and projects eligible for aid and therefore constituted state aid within the meaning of art. 107 para. 1 TFEU. The Dutch scheme and its projects were then divided into eleven different subsidy categories, ranging from «organic agriculture» to «sustainable energy» and including very diverse projects, such as «development of additional urban green areas», «construction of biogas storage plant» and «investment in low-noise and low-emission mobile tools».[70] After multiple requests for information and a meeting with Dutch representatives, the European Commission finally authorized this exception under art. 107 para. 3 TFEU.[71] The European Commission took the view that the state aid for projects in the various categories indicated by the Dutch government fulfilled the conditions laid down in the guidelines pertaining to agriculture, fisheries and environmental aid, and could be found to be directly compatible on the basis of art. 87 para. 3 lit. c EC Treaty.[72] As we noted in the previous section, the new 2011 Green Funds Scheme, however, substantially reduced the tax relief for sustainable investments.

In conclusion, both examples of tax incentives for sustainable investments that could potentially have qualified as state aid were granted exceptions under EU law. It is therefore possible that a general direct tax incentive for individuals investing in sustainable projects would most probably be recognized as state aid within the meaning of art. 107 para. 1 TFEU and would not fit in the very limited list of exceptions provided in art. 107 para. 2 TFEU. However, if any such tax incentive fulfils the conditions of art. 107 para. 3 TFEU, it will be compatible with the Common Market requirements. The UK and Dutch examples confirm this, the former having specifically structured the SITR in order to remain within the *de minimis* Regulation rules and the latter having followed the mandatory notification procedure, receiving the European Commission's authorization under art. 107 para. 3 lit. c TFEU. Thus, other European jurisdictions willing to adopt a tax incentive scheme for sustainable development may consider the UK or Dutch examples.

4 Analysis of the Swiss legal framework for tax subsidies

In recent years, Switzerland has frequently expressed its wish to become a sustainable finance market player. Should the Swiss legislator consider implementing sustainable development investment schemes similar to those enacted by the UK and the Netherlands, it should take care to design them taking into account the requirements governing free market competition. We will therefore analyze whether tax subsidies in the form of tax expenditures for individual investors in sustainable businesses would be possible in light of the Swiss legal framework and EU law, for the reasons that we will discuss later in this section. We will not consider tax measures aimed at attracting direct foreign investment, but rather tax incentives focused on the domestic market, like in the UK and the Dutch schemes described above.

4.1 Notions and analysis framework

The Swiss legal system embraces the principle of free competition, despite deeply divergent opinions about its efficiency and implementation.[73] The basic assumption for promoting free competition is that it helps make the economy more efficient by providing a balance between the most efficient supply and demand.[74] Unrestricted market competition is, however, not a goal in itself, but rather a means to achieve specific objectives.[75] Sometimes the legislator has to intervene and restrict competition in favor of prevailing public (social or economic) interests, and the great challenge of any economic system is to find the right balance between free competition and legitimate

68 HM Treasury, Social Investment Tax Relief: Call for Evidence 2019, 1 et seqq.
69 HM Treasury, Social Investment Tax Relief: Call for Evidence 2019, 1 et seqq.
70 European Commission Press Release, State Aid: Commission Approves Dutch Green Funds Scheme for Environmentally-Friendly Investment Projects.
71 European Commission Press Release, State Aid: Commission Approves Dutch Green Funds Scheme for Environmentally-Friendly Investment Projects.
72 European Commission Press Release, State Aid: Commission Approves Dutch Green Funds Scheme for Environmentally-Friendly Investment Projects.

73 Tercier/Martenet, Introduction générale, 3.
74 Tercier/Martenet, Introduction générale, 3.
75 Tercier/Martenet, Introduction générale, 3.

 © IFF-HSG

public interests.[76] In that context, social public interests have a broad meaning that is by no means limited to the field of social policies.[77]

Under Swiss law, the highest legal norms setting out the principle of free competition are art. 27 and 94 Cst. The former establishes economic freedom as a fundamental right, including the freedom to pursue a private economic activity, whereas the latter describes the institutional dimension of this principle, stating that the federal government and the cantons shall abide by the principle of economic freedom, enshrining the State's neutrality in this respect[78].[79] The Cst thus offers «negative» protection, stipulating that the State must adopt a neutral position towards competition, although that neutrality must not be absolute.[80]

Prior to enacting any tax subsidy, the legislator has to make sure that the suggested measure is in line with such constitutional provisions. Several Swiss scholars, like Hoffman[81] and Bürgisser[82], suggest starting the analysis from art. 94 Cst by determining whether the tax incentive at stake is in compliance with the principle of economic freedom. If the answer is negative and the suggested subsidy is contrary to the principle of economic freedom, one must verify whether another implicit or explicit constitutional basis can justify an exception in accordance with art. 94 para. 4 Cst. If the answer to the first question is positive – i. e. even if the scheme complies with art. 94 para. 1 Cst – checks must still be made to determine whether the subsidy is in line with art. 27 and 36 Cst; if not, the scheme is unconstitutional.[83] Below, we follow the suggested analysis pattern to determine whether tax subsidies for investments in sustainable business are in line with Swiss constitutional requirements.

4.2 Art. 94 Cst

Art. 94 para. 1 Cst safeguards free competition by stipulating that the federal government and the cantons must abide by the constitutional principle of economic freedom. If the legislator enacts measures restricting this principle, it restricts one of the fundamental constitutional rights.[84] Exceptions to the principle of economic freedom are only possible if they are expressly foreseen in the Cst, are based on the so-called cantonal «regalian» rights, or are motivated by predominantly public interest.[85]

Swiss authors have highlighted that the distinction between tax subsidies that distort competition in breach of art. 94 para. 1 Cst, and those that do not, is often blurry.[86] In general, the State can boost certain economic sectors or encourage certain economic activities as long as this does not impose «specific constraints».[87] Legal scholars agree that general policy measures promoting economic development, including tax relief and subsidies, are compatible with the principle of free competition, even though they have a certain effect on the economy.[88]

The general economic policy measures compatible with art. 94 para. 1 Cst should comply with a number of criteria regarding their purpose and effects. The Swiss Federal Supreme Court considers that both the objective and the effects of such policy measures must not be inherently protectionist, i. e. giving financial advantages to specific economic groups.[89] There are, however, diverging opinions among legal scholars about this issue. Reich and Hertig, for instance, have a position similar to that of the Swiss Federal Supreme Court, emphasizing that general economic policy measures must not have protectionist objectives.[90] Other authors, however, express different views. Aubert considers that the State can interfere in the private economy as long as it does not infringe upon market players' freedom to choose and exercise their economic activities. In this respect, tax relief deriving from economic policy measures – such as R&D incentives – does not favor specific branches of the economy or prevent companies from growing.[91] Thurnheer notes that an economic policy measure must not impose specific behavior on economic players (e. g. fixed prices); in the case of tax relief, the State simply seeks to persuade market players to adopt certain behavior, but is not imposing that behavior and thus is not contrary to art. 94 Cst.[92] Along the same lines, Christen notes that in the

76 Tercier/Martenet, Introduction générale, 3.
77 Tercier/Martenet, Introduction générale, 3.
78 Art. 94 para. 1 Cst.
79 Tercier/Martenet, Introduction générale, 3.
80 Tercier/Martenet, Introduction générale, 3.
81 Hofmann, La liberté économique suisse face au droit européen, 1 et seqq.
82 Bürgisser, Les incitations fiscales en faveur de l'économie, 1 et seqq.
83 Bürgisser, Les incitations fiscales en faveur de l'économie, 1 et seqq.
84 Oesch/Burghartz, En Suisse, les aides d'État ne sont pas soumises à la discipline du marché.
85 Oesch/Burghartz, En Suisse, les aides d'État ne sont pas soumises à la discipline du marché.
86 Bürgisser, Les incitations fiscales en faveur de l'économie, 170 – 171.
87 Grisel, Liberté économique, 343.
88 Bürgisser, Les incitations fiscales en faveur de l'économie, 171 – 172; Hertig, Les aides des cantons aux particuliers, 29.
89 ATF 121 I 129; Bürgisser, Les incitations fiscales en faveur de l'économie, 174 – 175.
90 Bürgisser, Les incitations fiscales en faveur de l'économie, 174 and quoted references.
91 Aubert, Traité de droit constitutionnel suisse, 682 – 683; Bürgisser, Les incitations fiscales en faveur de l'économie, 177.
92 Bürgisser, Les incitations fiscales en faveur de l'économie, 175; Thurnheer, La mesure de politique économique au sens

© IFF-HSG

case of indirect subsidies, the State does not issue directives or prohibitions, but tries to influence economic development, endeavoring to favor projects that are owned by economic players and does not limit their private initiative, and are thus compatible with art. 94 Cst.[93]

Legal scholars also agree that placing certain conditions on tax incentives is not contrary to the principle of economic freedom under art. 94 Cst, as long as the State complies with the fundamental principles regulating government activity (e. g. equality, proportionality, good faith, etc.).[94] In fact, Switzerland has adopted several economic policy measures in the form of tax incentives that impose certain conditions on their beneficiaries, for instance in the areas of R&D or the promotion of tourism, as well as cantonal aid to local businesses. All of these subsidies are in principle considered compatible with art. 94 Cst.[95]

In light of the conditions described above, we consider that fiscal incentives to invest in sustainable business – depending, of course, on the exact structure of such incentives – could qualify as general economic policy measures that do not restrain competition under art. 94 Cst and the required State neutrality. In fact, there are reasons to consider that such incentives do not ban or restrain the choice of investors, and are not protectionist as long as their eligibility requirements are not too restrictive. Their main objective would be to encourage market players to change their behavior. They need to have an express legal basis, however, and have to define the sustainable development objective that they pursue convincingly.

4.3 Art. 27 and 36 Cst

The second step in the analysis is to verify whether tax subsidies, even those that are compatible with art. 94 Cst, have an impact with regard to art. 27 Cst, and, if so, whether such subsidies comply with the conditions of art. 36 Cst.

Art. 27 Cst guarantees economic freedom[96], specifying that it includes the freedom to choose an occupation as well as the freedom to pursue a private economic activity[97]. According to the Swiss Federal Supreme Court, this constitutional provision ensures the equal treatment of market players operating in the same economic field (i. e. direct competitors).[98] Two issues have to be mentioned in relation to possible exceptions to this provision. Firstly, the provision does not guarantee *absolute* equal treatment; the legislator can in fact introduce exceptions that create major disparities in the treatment of direct competitors, provided that such measures are justified by the goals of tax subsidies.[99] Such subsidies also have to fulfill the conditions of art. 36 Cst pertaining to the restriction on fundamental rights, i. e. they must have a legal basis (major restrictions must be anchored in a federal act), be justified by the public interest or by the protection of fundamental rights of third parties, and be proportionate). The Swiss Federal Supreme Court also notes that such restrictions must result from the system itself.[100]

In addition, the Swiss Federal Supreme Court considers that the principle of economic freedom, as set out in art. 27 Cst, does not concern general taxes (i. e. only special taxes) and thus does not in principle concern the issue of equality between direct competitors in the context of direct taxation.[101] Swiss legal scholars generally agree with this position; some of them, however, highlight that such direct taxes should not target a specific economic activity.[102] Yet other authors note that the tax relief introduced via direct taxes is a state aid measure, and that its compatibility with art. 27 and 36 Cst can therefore be examined, as described in the previous chapter.[103]

Another relevant aspect is whether tax relief creates a so-called «prohibitive» tax burden for direct competitors that are not eligible for the tax relief in question.[104] The problem here is not the fact that the profits of excluded competitors decrease because of the tax relief, but that they will not be able to compete efficiently because the privileged businesses will lower their prices (this point is, however, very difficult to prove in practice).[105] The bottom line is that the tax relief becomes problematic when it creates a situation where it becomes impossible – or

de l'article 31 bis II de la Constitution fédérale, 65 – 68.

93 Christen, Die Wirtschaftsverfassung des Interventionismus, 294 – 295; Bürgisser, Les incitations fiscales en faveur de l'économie, 177.

94 Bürgisser, Les incitations fiscales en faveur de l'économie, 185 – 186.

95 Bürgisser, Les incitations fiscales en faveur de l'économie, 185 – 186.

96 Art. 27 para. 1 Cst.

97 Art. 27 para. 2 Cst.

98 Art. 27 para. 2 Cst; ATF 125 I 431, published in: RDAF 2000 I, 675.

99 ATF 140 I 218.

100 ATF 140 I 218.

101 ATF 135 I 130.

102 Grisel, Liberté économique, 934 et seqq; Torrione, Egalité de traitement, neutralité concurrentielle et liberté économique dans l'imposition des entreprises, 628.

103 Bürgisser, Les incitations fiscales en faveur de l'économie, 195; Torrione, Egalité de traitement, neutralité concurrentielle et liberté économique dans l'imposition des entreprises, 628.

104 Bürgisser, Les incitations fiscales en faveur de l'économie, 203.

105 Bürgisser, Les incitations fiscales en faveur de l'économie, 203; Swiss Federal Supreme Court 28 April 2010, 2C_763/2009, consid. 6.2; Taxation of Charities, 25.

very difficult – for the competitors that are not eligible for the tax relief to carry out their professional or business activities.[106] Certain authors however submit that the reason why this judicial standard of proof is so high is because of a certain reluctance of the Swiss Federal Supreme Court to deal with tax reliefs and subsidies. A further hurdle is the distinction which has to be made between legal restrictions and factual restrictions. Tax relief would be a factual restriction of competition, and these type of restrictions are very rarely considered as contrary to economic freedom in the Swiss legal system.

We consider that tax relief for sustainable investments would be compatible with art. 27 Cst. First of all, this type of tax relief concerns direct taxes that are in principle outside the scope of this constitutional provision. Should they be considered as restricting competition between direct competitors, however, it would be possible to structure them in accordance with the requirements of art. 36 Cst, in view of the fact that the Swiss Federal Supreme Court has confirmed on a number of occasions that the principle of equal treatment of competitors is not absolute.

4.4 Inexistence of the Swiss state aid rules

A general analysis of Swiss law shows that tax relief aimed at encouraging sustainable investments could in principle be compatible with constitutional law requirements relating to market competition. It is, however, useful to highlight that, in general, the area of State subsidies is not very well regulated in Switzerland. Swiss law does not contain state aid provisions as understood under EU law[107]: although Switzerland has legal norms dealing with the concept of subsidies, this concept is both somewhat larger and, to a certain extent, narrower than that of EU state aid.[108] In contrast with EU law, Swiss domestic law does not provide guidance as to when state subsidies are compatible with the internal market.[109] Despite the fact that the principle of legality governs state actions, a subsidy in Switzerland may be granted without a formal legal basis (parliamentary law).[110] At the cantonal level, local legislators enjoy vast freedom in promoting their respective economies, and there is little publicly available information about the extent of cantonal subsidies.[111]

Swiss law contains very few provisions restricting competition-distorting state subsidies made through the tax system. Researchers highlight that the only material provisions restricting such subsidies are to be found in the Cst and the DTHA.[112] For instance, the DTHA establishes certain rules regarding tax incentives that cantons may grant to new businesses. However, information on cantonal incentives and their extent is almost never publicly available, and all attempts to create a supervisory authority in this respect have failed so far[113]. As a result, cantons are not under great pressure to meticulously analyze whether their subsidies comply with the principles of competition law. Certain competition-distorting subsidies at cantonal level might thus be and remain in force, and even unknown to the general public and the affected competitors. It cannot be ignored, however, that it is unwise for any Swiss scheme to take the risk of diverging drastically from EU requirements, because the EU is Switzerland's main trade partner. It is therefore unavoidable to proceed with an analysis of the EU legal framework in that context.

4.5 Switzerland and the EU state aid rules

In general, as Switzerland is not part of the EU, it has no obligation to comply with EU state aid rules. However, the situation is more delicate concerning subsidies that may affect trade between Switzerland and the EU covered by the FTA or one of the bilateral treaties. In fact, there is a fundamental disagreement between the European Commission and the Swiss government as to whether Swiss-EU bilateral agreements cover EU state aid legislation. Thus, when structuring tax relief in Switzerland that could potentially be relevant for the trade with the EU, it is advisable to carry out a preliminary assessment of the EU legal framework. In fact, despite this disagreement, the so-called «third company taxation reform», which abolished special corporate tax regimes in Switzerland in 2019, was enacted precisely because of EU pressure regarding the alleged incompatibility of

106 Swiss Federal Supreme Court 28 April 2010, 2C_763/2009, consid. 6.2.

107 Këllezi, Switzerland, 399.

108 The Swiss Federal Council has expressly refused to define legitimate state aid because this would be highly time-consuming, because the cantons would have to be involved and because any definition would be a source of legal loopholes. When the question has arisen, the Council has preferred to address the validity of governmental subsidies on a case-by-case basis (cf. Swiss Federal Council, Statement of the Federal Council of 19 August 2015 regarding the postulat No. 15.3387 of national council Peter Schilliger «For Free Competition. Against the Competition-Distorting State Aid» of 4 May 2015).

109 Cf. EC Treaty.

110 Këllezi, Switzerland, 403.

111 For instance, the DTHA allows cantons to grant tax incentives to new businesses for up to ten years. It is not clear how these measures affect competition and there is no supervision as to whether cantons comply with these measures (cf. Oesch/Burghartz, En Suisse, les aides d'État ne sont pas soumises à la discipline du marché, 28).

112 Oesch/Burghartz, En Suisse, les aides d'État ne sont pas soumises à la discipline du marché, 28.

113 Oesch/Burghartz, En Suisse, les aides d'État ne sont pas soumises à la discipline du marché, 28.

those regimes with EU state aid rules. Furthermore, Switzerland and the EU are currently in ongoing negotiations to reach an institutional agreement covering the existing bilateral agreements that would consolidate mutual market access. Even though the EU legal norms on state aid in such an institutional agreement are, to date, limited to general principles that are not directly applicable (except in the area of air transport), it nevertheless foresees the setting up of a monitoring system that would be equivalent to the one in place in the EU.[114] Certain Swiss authors suggest that even though the automatic application of EU state aid rules is not possible as certain EU directives are not adapted to Switzerland, it would, for a number of reasons, be desirable to bring those two systems closer, and «best practice» analysis is therefore useful.[115] Other scholars note that bringing the Swiss and EU systems closer would in any event be advisable because Swiss constitutional law, and especially the principle of state neutrality under art. 94 Cst, is not enough to impose (especially in cantonal legislation) sufficient discipline in the area of state aid.[116]

We consider that the insufficiency of the Swiss constitutional rules should not necessarily mean that Switzerland has to adopt the EU state aid system. Such a system is sophisticated and has developed a robust framework of analysis but is also known to be quite rigid. The examples described in this article suggest that the UK and the Netherlands structured their tax incentives in a way that allows avoidance of *ex ante* state aid notification procedures. However, even though the Swiss legislator should not adopt the EU system in its entirety, it could usefully draw from the EU regarding certain aspects of its well-developed state aid experience, for instance the framework of analysis assessing the negative effects of state aid.

5 Conclusions

There are currently very few direct tax incentives for individuals investing in sustainable businesses. In Europe, we have identified two jurisdictions which enacted policy measures of that kind: the UK and the Netherlands. Both have adopted schemes that are – of course – heavily influenced by the EU legal framework governing state aid. The Dutch and the UK approaches are, however, very different. The Dutch Green Funds Scheme, which has been in place for almost 25 years, has been described as a clear success and has been periodically renewed, progressively developing the notion of sustainable business activities. Observers note that the scheme has been instrumental in incentivizing the financial sector to develop and offer sustainable products, in raising general awareness about sustainability issues, and at the same time encouraging environmental innovation. The Dutch example may also give some clues about investors' responsiveness to tax incentives concerning sustainable development, as we saw a large decrease in green investments after the government announced that the tax relief would be cut. Nonetheless, further research needs to be done to clarify the different causes for such investor behavior, which might also be linked to the Netherlands' very particular income tax system, which taxes notional investment returns and encourages taxpayers to look for tax-saving solutions. In contrast to the seemingly successful Dutch example, UK's SITR, which was designed very differently, encountered difficulties in raising the expected investment funds. One of the reasons highlighted by stakeholders has been the difficulty in qualifying for the scheme and its relatively rigid framework. As a reminder, SITR's maximum amount has been deliberately kept low in order to comply with EU's *de minimis* Regulation state aid rules. Its conditions were extended in 2017 to fit into the GBER framework; existing data, however, does not yet confirm the success of this policy measure.

As we have shown, complying with state aid legislation was instrumental in designing such incentives, and legislators should be particularly cautious in this respect. However, there is no evidence that adherence to specific state aid rules *(de minimis* Regulation or the GBER) has an impact on the general success of such tax schemes: both examples described in this paper started under *de minimis* Regulation rules but showed different results. Further research is needed to understand why certain direct tax incentives are more successful in attracting sustainable investments than others.

In terms of Swiss law, the legislator could consider the option of encouraging sustainable investments with direct tax incentives for individual investors, which is an innovative (even though still quite experimental) approach to encouraging sustainable business. Our general analysis shows that such tax relief could be compatible with Swiss constitutional law pertaining to market competition. In this respect, the Swiss legislator should, however, not only consider state aid possibilities under Swiss federal and cantonal law, but also analyze their compatibility with EU state aid legislation. Regarding the type of tax incentive, a thorough analysis needs to be

114 Swiss DEA, Institutional agreement between Switzerland and the EU: Key Points in Brief, 1.

115 Bürgisser, Les incitations fiscales en faveur de l'économie, 227–228.

116 Oesch/Burghartz, En Suisse, les aides d'État ne sont pas soumises à la discipline du marché; Bürgisser, Les incitations fiscales en faveur de l'économie, 277.

 © IFF-HSG

conducted by the Swiss government in order to define the optimal balance in terms of intervention. The Dutch example might be an interesting model, being both effective and compatible with the complex EU state aid framework.

Bibliography

AUBERT JEAN-FRANÇOIS, Traité de droit constitutionnel suisse, Paris/Neuchâtel 1993

BOCKEN NANCY M. P./SHORT SAMUEL WILLIAM/RANA PADMAKSHI/EVANS STEVE, A Literature and Practice Review to Develop Sustainable Business Model Archetypes, Journal of Cleaner Production 2014, 42

BÜRGISSER JÉRÔME MARCEL, Les incitations fiscales en faveur de l'économie. Analyse de conformité de mesures sectorielles à la Constitution fédérale, aux règles de l'Union européenne en matière d'aides d'Etat et aux règles de l'Organisation mondiale du commerce, Lausanne 2016

CHRISTEN HEINZ PETER, Die Wirtschaftsverfassung des Interventionismus, Zürich 1970

DEFOURNY JACQUES/NYSSENS MARTHE, Conceptions of Social Enterprise and Social Entrepreneurship in Europe and the United States: Convergences and Divergences, Journal of Social Entrepreneurship 2010, 32

EASSON ALEX/ZOLT ERIC, Tax Incentives, Washington DC 2002

GRISEL ETIENNE, Liberté économique. Libéralisme et droit économique en Suisse, Berne 2006

HEMELS SIGRID, Personal and informal e-mail communication with Giedre Lideikyte Huber in 2020

HERTIG GÉRARD, Les aides des cantons aux particuliers, RDAF 1985, 1

HOFMANN DAVID, La liberté économique suisse face au droit européen, Berne 2005

HOPKINS TOM, Understanding Social Investment Tax Relief and How to Make it Work, FT Adviser, 10 July 2018, published on: www.ftadviser.com

JANSSON MAGNUS/BIEL ANDERS, Motives to Engage in Sustainable Investment: A Comparison Between Institutional and Private Investors, Sustainable Development 2011, 135

JOYCE ALEXANDRE/PAQUIN RAYMOND L., The Triple Layered Business Model Canvas: A Tool to Design More Sustainable Business Models, Journal of Cleaner Production 2016, 1474

KËLLEZI PRANVERA, Switzerland, in: Paul F. Nemitz (ed.), The Effective Application of EU State Aid Procedures. The Role of National Law and Practice, Alphen aan den Rijn 2007, 399

OESCH MATTHIAS/BURGHARTZ NINA, En Suisse, les aides d'État ne sont pas soumises à la discipline du marché, La Vie économique, 24.4.2018, published on: https://dievolkswirtschaft.ch

PANAYOTOU THEODORE, Instruments of Change. Motivating and Financing Sustainable Development, London 1998

PwC, Netherlands. Individual – Income Determination, 6 July 2020, published on: https://taxsummaries.pwc.com

RIEDL ARNO/SMEETS PAUL, Why Do Investors Hold Socially Responsible Mutual Funds?, The Journal of Finance 2017, 2505

ROTHEROE ABIGAIL/LOMAX PLUM, Social Investment Tax Relief (SITR): Two Years On, New Philanthropy Capital, July 2016, published on: www.thinknpc.org

RUBIK FRIEDER u. a., Innovative Approaches in European Sustainable Consumption Policies. Assessing the Potential of Various Instruments for Sustainable Consumption Practices and Greening of the Market (ASCEE), Berlin 2009

SCHOLTENS BERT, The Sustainability of Green Funds, National Resources Forum 2011, 223

SCOTT WILLIAM/ELGIE STEWART, Tax Incentives to Boost Clean Growth: Investor Tax Credits and Flow-Through Shares, Smart Prosperity Institute 2019, 1

SURREY STANLEY S., Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, Harvard Law Review 1970, 705

TERCIER PIERRE/MARTENET VINCENT, Commentaire Romand, Droit de la concurrence, Loi sur les cartels, loi sur la surveillance des prix, loi sur le marché intérieur, loi sur les entraves techniques au commerce, 2e éd., Bâle 2012

TORRIONE HENRI, Egalité de traitement, neutralité concurrentielle et liberté économique dans l'imposition des entreprises. Réflexions sur le Rapport de la Commission ERU et l'Avant-projet de Message sur la réforme de l'imposition des entreprises II, Archives 73 (2004/2005), 593

Trinomics, Private Climate Finance Report 2017, Rotterdam 2018

Thurnheer Heinz, La mesure de politique économique au sens de l'article 31 bis II de la Constitution fédérale, Bienne 1957

Wiggan Jay, Policy Boostering the Social Impact Investment Market in the UK, Journal of Social Policy 2018, 721

Wilson Karen E., Social Investment: New Investment Approaches for Addressing Social and Economic Challenges, SSRN Electronic Journal, of 7 January 2014, published on: www.ssrn.com

Official Documents

Cst, Federal Constitution of the Swiss Confederation (of 18 April 1999), SR 101

de minimis Regulation, Commission Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (of 18 December 2013) OJ L 352, 1 of 24 December 2013

DTHA, Swiss Federal Act on the Harmonization of Direct Taxation at Cantonal and Communal Levels (of 14 December 1990), SR 642.14

EC Treaty, Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (of 10 November 1997), OJ C 340, 1

European Commission, Effectiveness of Tax Incentives for Venture Capital and Business Angels to Foster the Investment of SMEs and Start-Ups, Final Report 2017, Luxembourg 2017, published on: https://ec.europa.eu

European Commission Press Release, State Aid: Commission Adopts Revised Exemption for Small Aid Amounts (de minimis Regulation), 18 December 2013, published on: https://ec.europa.eu

European Commission Press Release, State Aid: Commission Approves Dutch Green Funds Scheme for Environmentally-Friendly Investment Projects, 14 October 2009, published on: https://ec.europa.eu

European Commission Information, Targeted Review of the General Block Exemption Regulation (State Aid): Extension to National Funds Combined with Certain Union Programmes 2019, published on: https://ec.europa.eu

EU (Withdrawal) Act-UK 2018, European Union (Withdrawal) Act 2018, published on: www.legislation.gov.uk

First Protocol to the ECHR, First Procotol to the Convention for the Protection of Human Rights and Fundamental Freedom (of 20 March 1952), published on: https://ec.europa.eu

FTA, Free Trade Agreement between the European Economic Community and the Swiss Confederation (of 31 December 1972), OJ L 300, 191

GBER, Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (of 17 June 2014), OJ L 187, 1 of 26 June 2014

HM Government, Social Investment: A Force for Social Change – UK Strategy 2016, published on: www.gov.uk

HM Revenue & Customs, Social Investment Tax Relief 2013, published on: www.gov.uk
- Social investment tax relief 2016, published on: www.gov.uk
- Income Tax: Enlarging Social Investment Tax Relief, 26 January 2017, published on: www.gov.uk

HM Treasury, Social Investment Tax Relief: Call for Evidence 2019, published on: www.gov.uk

ITA-NL 2011, Income Tax Act 2001 (of 11 May 2000), published on: https://wetten.overheid.nl

ITA-UK 2007, Income Tax Act 2007, published on: www.legislation.gov.uk

NL Agency, Ministry of Housing, Spatial Planning and the Environment, The Green Funds Scheme. A Success Story in the Making (of September 2010), published on: www.rvo.nl

NL Court of Audit, Versobering heffingskorting groen beleggen. Realisatie en effect (of 2 September 2014), Den Haag 2014

Swiss DEA, Institutional agreement between Switzerland and the EU: Key Points in Brief (of 7 December 2018), published on: www.fdfa.admin.ch

Swiss Federal Council, Statement of the Federal Council of 19 August 2015 regarding the postulat No. 15.3387 of national council Peter Schilliger «For Free Competition. Against the Competition-Distorting State Aid» of 4 May 2015

The Netherlands Ministry of Finance, Tax Policy Information 2019 (of 15 January 2019)

 © IFF-HSG

TFEU, The Treaty on the Functioning of the European Union (Consolidated Version of 7 June 2016), OJ C 202, 1

UNCTAD, Investment Policy Framework for Sustainable Development 2015, Geneva 2015, published on: www.unctad.org