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Titel	Aktnr.	Brevdato	Dok.type	Dok.nr.	Sagsbeh.
fejl	24	05-07-2012	DOKUMENT, Dokum...	708782	W17595
Mødeindkaldelse	23	04-07-2012	U, Udgående	708792	W17595
bmrk PUP + LBN	21	03-07-2012	I, Indgående	708364	W17595
provenu	20	29-06-2012	I, Indgående	705428	W17595
Lovforslag udkast (4)	22	26-06-2012	DOKUMENT, Dokum...	699717	W17595
Bemærkninger PU	18	20-06-2012	I, Indgående	696249	W17595
VS: Iværksætteraktier [1 vedhæftet fil]	1	20-06-2012	I, Indgående	696202	W17595
gul retur - ophævelse af iværksætterskatten	2	07-06-2012	DOKUMENT, Dokum...	689371	W17826
EL spg - iværksætterskatten	3	31-05-2012	DOKUMENT, Dokum...	686897	W17826
Notat til ministrene om ophævelse af iværksætterskat...	4	25-05-2012	I, Indgående	683981	W17683

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Notat til ministrene om ophævelse af iværksætterskat...	5	24-05-2012	DOKUMENT, Dokum...	683367	W17826
Notat til ministrene om ophævelse af iværksætterskat...	6	24-05-2012	DOKUMENT, Dokum...	683894	W17683
Notat til ministrene om ophævelse af iværksætterskat...	7	23-05-2012	DOKUMENT, Dokum...	683176	W17683
Ophævelse af iværksætterskatten i forhold til udenlan...	8	23-05-2012	DOKUMENT, Dokum...	682621	W17826
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Q/A Iværksætterskatten - skattereform	11	14-05-2012	DOKUMENT, Dokum...	679395	W17826
Lovforslag udkast (2)	12	10-05-2012	DOKUMENT, Dokum...	677746	W17826
Notat om erhvervsobligationer	13	27-10-2011	DOKUMENT, Dokum...	571476	W17683

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Fra: Lise Bo Nielsen
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-----Oprindelig meddelelse-----
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Emne: Iværksætteraktier

Hej Lise og Stine

Jeg læste denne artikel og tænkte på jer. Bemærk konklusionen:

"Based on a thorough analysis of existing ECJ case law and notification
decisions
published by the Commission, it seems fair to conclude that risk capital tax
incentives, such as that contemplated by Sweden, fall within the scope of the
State
aid prohibition (article
107(1) TFEU). The State aid would be selective to the extent that investments in

quoted companies would not qualify for the tax credit.
In other words, as long as the incentive targets a specific market (risk
capital)
and a category of taxpayers (unquoted companies or SMEs), the rules on State aid

requiring notification to the Commission would apply."

Håber alt er vel i København.

Mvh
Jesper

Cécile Brokelind*

Risk Capital Incentives, a Risky Business?

In this article, the author discusses the impact of the State aid rules on tax incentives for individual taxpayers to invest in companies that governments, in particular Sweden, have proposed to implement in order to boost the economy as a result of the economic crisis.

1. Background

As the financial crisis in the European Union continues, Member States face the challenge of finding alternative solutions to boosting their economies, creating job opportunities and helping start-ups, in order to widen the tax base and restore fiscal stability. Governments tend to use direct subsidies and indirect supports, such as tax exemptions, for some sectors of the economy, or even tax incentives for individual taxpayers to invest in those sectors. How these measures reconcile with the EU prohibition on State aid (article 107 of the Treaty on the Functioning of the European Union (TFEU) (2007)),[1] as well as the framework of the World Trade Organization and its numerous agreements prohibiting export subsidies is, however, rarely seriously considered before introducing tax reliefs or tax schemes, as proven by the numerous cases of the Court of Justice of the European Union (ECJ) in this area. Nevertheless, it is questionable whether or not and, if so, to what extent tax incentives, especially in regard to risk capital[2] are compatible with EU law on State aid. This topic is highly controversial and requires an in-depth study before reaching a conclusion.

Against this background, and what provides the impetus for this article, is a contemplated tax incentive for risk capital heavily debated in Sweden during the fall of 2011. In a nutshell, the Swedish tax system is based on neutrality, uniformity and the optimal tax theory,[3] which limits the use of tax incentives to a large extent. Tax incentives are, therefore, not as common in Sweden as in other Member States of the European Union. A new Company Tax Survey, launched in early 2011, however, reinitiated the discussion in Sweden, as the Committee in charge of this survey is considering adopting risk capital and research and development (R&D) incentives, amongst others.[4]

In 1996, the government had introduced a temporary tax credit of 30% for the acquisition costs of newly issued shares in unquoted companies of a value of between EUR 1,000 and EUR 10,000 (maximum), provided that the shares were held for five years.[5] This temporary tax incentive was held to be non-selective (and, therefore, passed the test of the State aid rules) as it reached all unquoted companies issuing shares without supporting a specific sector of the economy and, as such, could benefit all EU companies investing in Sweden. In particular, the incentive was available for all unquoted companies established within the EEA irrespective of their tax residence, provided that the benefitting company carried out its business from a permanent establishment in Sweden.

Then, in 2009, preparatory work (the "Gäverth risk capital investigation") suggested introducing a tax credit for individual taxpayers investing in shares of newly formed companies.[6] According to this legislative proposal, individual taxpayers could benefit from a tax credit of 20% of the acquisition cost of shares in unquoted companies resident in an EEA State and with a permanent establishment in Sweden. The tax credit was caped at a maximum of EUR 50,000 over a five-year period (i.e. the individual taxpayer could enjoy a tax credit of EUR 10,000 per year). This proposal was intended to extend the support to shares of companies in all EEA states with which Sweden has signed tax treaties containing an exchange of information clause.

From a legal viewpoint, the introduction of a tax incentive boosting SMEs raises a number of questions, including whether or not such an incentive derogates from the domestic norm of a uniform and neutral tax system.[7] Such a tax incentive may also conflict with EU competition laws regarding State aid,[8] as well as those on the freedom

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1. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.
2. As defined in the Community Guidelines on State Aid to promote risk capital investments in SMEs, para. 2.2(k), OJ 194 (2006) (18 Aug. 2006) (the Guidelines), risk capital means, "equity and quasi-equity financing companies during their early-growth stages (seed, start-up, and expansion phases) including informal investment by business angels, venture capital and alternative stock markets specialized in SMEs including high-growth companies (referred to as investment vehicles)".
3. See, for instance, SE: Swedish National Audit Office, Report RIR 2010:11 (auditing all state activities) criticizing derogations from the principle of uniformity and neutrality on the basis of which the Swedish tax system was constructed.
4. SE: Direktiven (dir 2011:1); see J. Fall & R. Hellenius, *Företagsskatterna utreds*, *Skattenytt* 5, pp. 248-253 (2011).
5. SE: Proposition 1995/96:109 (6 Nov. 1995); see, in particular, the analysis under para. 4(5) on the compatibility of the State aid rules.
6. SE: Skatterabatt på aktieförvärv och vinstutdelningar, SOU 2009:33 (7 Apr. 2009).
7. See, for instance, M. Tjernberg, *Beskattning av småföretag*, in *General Report* (Nordic Tax Research Council 2003).
8. Art. 107 TFEU (2007) provides that, "[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods

of establishment, to the extent that the tax incentives are reserved for domestic taxpayers or domestic investment.[9] Both issues were briefly assessed in the 2009 investigation, which concluded that the incentive would not breach State aid rules, as the tax credit was not granted to "undertakings" or reserved to domestic shares. Consequently, the rules would not affect trade between Member States[10] or infringe the prohibition of discrimination.

In contrast to what the Swedish government claims, it is submitted here that such a tax incentive may fall within the scope of the State aid prohibition for two reasons: (1) State aid rules do apply to tax credits for individual taxpayers; and (2) State aid rules cover risk capital (or R&D) incentives for SMEs even if they apply irrespective of whether the company in which the capital is invested is resident in Sweden or in the EEA (i.e. non-discriminatory measure).

At first glance, the available sources of law do not clearly support the author's conclusion. A considerable amount of ECJ case law in the field of State aid, a Commission notice from 1998[11] (which has not been updated to reflect recent case law) and the debate in the literature over the interpretation of article 107 of the TFEU tend to demonstrate, however, that the position of the Swedish government is not unquestionable.

Therefore, the goal of this article is to use this material to demonstrate how risky a risk capital incentive may be. For this purpose, the article focuses on other Member States' experiences, before addressing the question of how a tax rule compatible with article 107 of the TFEU should be drafted. The most important issue to start with, however, is the risks of introducing a tax incentive that is incompatible with EU law, which is discussed in section 2. Subsequently, the article provides a substantive analysis of the personal scope of article 107 of the TFEU (section 3.) and the material scope of the prohibition (section 4.), leading to various conclusions in section 6.

2. Risks of Introducing a Risk Capital Tax Credit

The introduction of a tax scheme that may be challenged by the Commission under article 107 of the TFEU may be risky. This risk is complicated by the fact that once it has been found that a measure constitutes State aid, the state must restore the situation as if the State aid had not been granted.

Article 14(3) of the State Aid Procedure Regulation (1999)[12] provides that Member States should effectively recover unlawful or incompatible aid from the beneficiaries without delay.[13]

The recovery rule is based on the ECJ decision in *Commission v. Germany* (Case 70/72),[14] which declared, for the first time, that the Commission had the power to order the recovery of unlawful and incompatible State aid by the Member State in breach of EU law. This implies, for the said Member State, that it must require reimbursement of the aid by the beneficiaries, as a restoration of the situation entails financial effects as well as legal effects. The ECJ has held, on several occasions, that the purpose of recovery is to re-establish the situation that existed on the market prior to the aid being granted. According to the ECJ the:[15]

> [...] re-establishment of the previously existing situation is obtained once the unlawful and incompatible aid is repaid by the recipient who thereby forfeits the advantage which he enjoyed over his competitors in the market, and the situation as it existed prior to the granting of the aid is restored.

The only situation in which Member States are not required to recover the aid is where it would be contrary to a general principle of law or exceptional circumstances exist that would make it absolutely impossible for the Member State to properly execute the decision to recover the aid. The general principles of law most often invoked in this context are the protection of legitimate expectations and legal certainty; however, these are never upheld as an excuse for not repaying the aid. The Court pointed out that the absence of any recoverable assets is the only ground on which a Member State can rely to demonstrate the absolute impossibility of recovering the aid under very strict conditions.[16]

Secondly, it is the Commission who is empowered by the State Aid Procedure Regulation (1999) to recover unlawful State aid. Article 15, amongst others, provides that this recovery action shall be subject to a limitation period of 10 years. In other words, should the tax incentive be introduced as from the 2012 tax year in Sweden, the Commission has until 2022 to require its repayment, unless the limitation period is interrupted by action taken by the Commission regarding the unlawful aid, in which case the 10-year period starts running again. Even a request for information sent by the Commission to a Member state, which is not notified to the beneficiary, will restart the 10-year limitation period for recovery.[17]

shall, in so far as it affects trade between Member States, be incompatible with the internal market".

9. Art. 48 TFEU et seq.
10. *Supra* n. 6, at p. 184.
11. EU: Euro. Commn., Notice on the application of the State aid rules to measures relating to direct business taxation, pp. 3-9 OJ C 384 (10 Dec. 1998).
12. EU: Council Regulation No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, p. 1, OJ L 83 (27 Mar. 1999). This is the "Procedure Regulation".
13. EU: Euro. Commn., Commission Notice, "Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid", explaining all cases involving Member States failing to recover aid, OJ C 272 (15 Nov. 2007).
14. DE: ECJ, 12 July 1973, Case 70/72, *Commission v. Germany*, para. 13.
15. IT: ECJ, 4 Apr. 1995, Case C-348/93, *Commission v. Italy*, para. 27.
16. ES: ECJ, 2 July 2002, Case C-499/99, *Commission v. Spain*. For a review of this case law see the homepage of the European Commission, available at: http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html.
17. See, for instance, FR: ECJ, 6 Oct. 2005, Case C-276/03, *Commission v. French Republic*, where the beneficiaries of unlawful aid unsuccessfully claimed that they had legitimate expectations that the aid was properly granted. Therefore, they should not be required to repay the aid because of a state's behaviour.

An example involving a French tax rule (article 44 *septies* of the French General Tax Code (introduced in 1988))[18] illustrates the risks at stake here. The rule provided for an exemption from corporate tax for a period of two years for companies created to take over the activities of industrial firms in difficulty. The measures at issue were introduced in 1989 without receiving EU clearance. The French authorities had estimated that, for the years 1997 to 1999, the exemption from corporate tax alone resulted in a cost of almost EUR 200 million.

The Commission requested information for the first time in September 2001, thereby interrupting the 10-year limitation period that started running in 1992, although the disputed tax incentive had been introduced in 1989. Indeed, the Commission found that there might have been indications that the tax incentives for 1989, 1990, and 1991 were under the applicable threshold for the *de minimis* rules and only ordered recovery for the tax breaks applying after these years. Accordingly, on 16 December 2003, the Commission issued a decision ordering the recovery of all aid granted after 1991.[19]

Obviously, France has, since then, encountered difficulties in identifying all the beneficiaries of this tax scheme and the matter was, therefore, brought before the ECJ, which decided, on 13 November 2008, that France had failed to fulfill the recovery obligations stemming from the 2003 decision.[20] France had established a list containing 500 of the firms that had benefitted from the scheme but claimed that it was absolutely impossible for the French tax authorities to identify all of the beneficiaries of the corporate income tax exemption that was found to constitute prohibited State aid. The Court dismissed these claims. Following the decision, however, recovery was made only against 27 of the beneficiaries. As a result of this failure to recover State aid and comply with the ECJ decision, pursuant to article 260 of the TFEU, the Commission issued a letter of formal notice against France on 5 May 2010[21] formally requesting that the 2008 ruling be implemented. In the worst case scenario, France may now be forced to pay fines in the form of periodic penalty payments, a lump-sum payment or both.

In this case, it was quite clear that the corporate tax exemption directly benefitted several undertakings listed by the tax authorities. These undertakings, therefore, needed to refund the corporate income tax exemption they had benefitted from, even though it was the French government that wrongly introduced the scheme. In some cases, the recovery also impacts indirect beneficiaries of prohibited aid. The process for undertakings to subsequently claim damages against the state on the basis that the state is liable for the error due to its incorrect implementation of EU law is, however, not straightforward and depends on each Member State's procedural system.

3. Does a Tax Credit for Individual Taxpayers Fall within the Risk Zone?

As stated above in section 2, the State aid prohibition may encompass tax incentives that mitigate corporate income tax. In other words, Member States may not provide aid to the economic actors involved on a specific market, where competition is disturbed. The question is whether or not this conclusion is different in regard to, for example, a tax credit granted to *individual* taxpayers investing in shares as an incentive to boost risk capital or R&D-intensive enterprises (i.e. the enterprise is only indirectly benefiting from the incentive).

Generally speaking, and in regard to tax measures in particular, there is no doubt that most of the conditions are usually met, as a tax cut involves the use of public funds to benefit a class of taxpayers, it affects trade and distorts competition (as other Member States are harmed by the additional competition from lower taxes). What is more difficult to determine is whether or not the tax cut is selective or general and who benefits from it. The assessment is to be carried out in light of five main conditions (article 107 of the TFEU):

- the measure arises from public funds and is granted to an *undertaking* (economic actor);
- the aid confers an advantage on its *recipient* (such as a reduction of costs of operation otherwise borne in the regular course of business);
- the aid is *selective* (it does not apply to other undertakings in similar economic situations);
- the measure may affect trade between Member States; and
- the aid distorts competition.

The last two conditions are not really controversial. As soon as a Member State supports a sector or a domestic economy, it influences competition within the internal market negatively and, therefore, automatically fulfills these two prerequisites, unless the distortion is under a certain threshold (set by the *de minimis* rule). How a tax break for individual taxpayers falls into the category of aid to an undertaking is, however, less clear-cut. The same is true in regard to aid that is not discriminatory (i.e. where the market is not only domestic but reaches economic actors from other Member States).[22] The rule can, of course, be discriminatory and also be condemned under the last two headings.[23]

At first glance, the prohibition on State aid should not apply to the contemplated Swedish measure on the grounds that individual taxpayers are not *economic actors in the risk capital market* and do not compete with them.[24] This reasoning is not new, as, back in 2008, the Swedish

18. FR: General Tax Code (*Code Général des Impôts*), National Legislation IBFD.
19. EU: Eur. Commn., 2004/343/EC, OJ L 108 (16 Apr. 2004), p. 38 et seq.
20. FR: ECJ, 13 Nov. 2008, Case C-214/07.
21. EU: Eur. Commn. Press Release IP/10/529 (5 May 2010), available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/529&format=HTML&aged=0&language=EN&guiLanguage=en.
22. Art. 107(2)(a) TFEU provides that aid granted to individual consumers of a social character may be declared compatible with the Common Market provided that such aid is granted without discrimination in regard to the products involved. As Schön notes, this exemption would be superfluous if non-discriminatory State aid were not covered by the prohibition. See W. Schön, *Taxation and State Aid in the European Union*, C.M.L.R. 36, p. 918 (1999).
23. See, for instance, IT: ECJ, 17 Nov. 2009, Case C-169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, ECJ Case Law IBFD.
24. *Supra* n. 6, at p. 53.

legislator had already sustained that a tax credit for individuals for repairs to domestic households carried out by construction firms should escape the State aid prohibition of article 107 TFEU. In the preparatory works for this tax credit, which are contained in Chapter 67 of the Income Tax Act (1999),[25] the reporters concluded that the rule was compatible with EU law, as the tax credit was paid to individual taxpayers and not to the enterprises performing the work and charging the clients. A closer look at the rules demonstrates that this reasoning does not hold water. On the one hand, one could argue that the *direct* beneficiary of the tax cut was the individual taxpayer and that, in any event, it is absolutely impossible to assess how much the incentive benefitted construction businesses. On the other hand, the amount of tax unpaid by individual taxpayers (the recipients of the aid) is easily identifiable and correlates to an equivalent amount of working hours carried out by the enterprises. So, overall, it is easy to conclude that these economic actors are *indirectly* supported due to the tax credit granted to individual taxpayers.

The tax literature also firmly supports the distinction between recipients and beneficiaries, arguing, for instance, that tax allowances on mortgage interest payments can provide an incentive for private persons to invest in housing and can positively affect building and banking sectors.[26] The same holds true for a preferential depreciation rule for industrial buildings, which is not selective in regard to taxpayers, but may be selective towards the building company. In *Germany v. Commission* (Case C-156/98)[27] a German tax break for natural and legal persons in regard to the acquisition of shares in SMEs in Berlin and Neue Länder was found to be selective for the target companies, who were identified as the beneficiaries, although the recipients of the aid were the investors. Previously, in the *Gezamenlijke Steenkolenmijnen* (Case 30/59) case, coal miners' tax-free grants (bonuses that were not subject to income tax or social security contributions) in Germany had been found to constitute a subsidy in favour of the German coal industry to the detriment of the Dutch industry, as both were the main providers of coal in the region.[28]

In *France v. Commission* (Case 102/87),[29] the ECJ also condemned a French tax cut in respect of individual income tax on interest arising from a specific bank savings scheme (known as "Codevi") as illegal State aid on the grounds that part of the funds raised was allocated to a French financial institution, namely the "caisse de dépôts et consignations" to be used by another financial institution "Fond Industriel de Modernisation (FIM)" for the purpose of granting loans to provide financial support to industrial undertakings that made investments, of whatever kind, to modernize manufacturing processes or develop new products and processes.

The Commission's decision stated, in particular, that the interest rate on FIM loans was always fixed at a level below that of loans obtained at the market rate by virtue of the fact that Codevi savings financed FIM loans, the funds thus obtained being used to finance long-term loans to industry. The possibility of attracting funds at such a low interest rate and in such great quantities was due to the tax exemption granted to Codevi by the state, which was thereby forgoing considerable tax revenue. In these circumstances, the combination of the tax exemption for Codevi and the use of the money deposited on such accounts to finance FIM loans, amounted to granting an interest subsidy to the borrowing undertakings to the detriment of the state's tax revenue.

Conclusively, the reported case law above shows that an individual income tax break may well constitute illegal State aid under article 107(1) TFEU on the grounds that the notion of "undertaking"[30] covers the "beneficiary" of the State aid and not the "recipient". The next issue is to analyse the material extent of the tax incentive and how it qualifies as prohibited State aid.

4. What Tax Incentives Qualify as State Aid?

The question to be dealt with here is how to determine whether or not tax cuts fulfil all of the conditions necessary to be qualified as State aid. As mentioned in Section 3., article 107 TFEU applies only to the extent that the aid is selective and favours certain undertakings. On several occasions, Member States have introduced tax cuts for "all taxpayers" in order to avoid the selectivity criterion applicable to illegal State aid. The question is how to determine if this is sufficient to pass the compatibility test. Although the selectivity question has been addressed adequately elsewhere[31] and deserves more than a few paragraphs, some developments regarding the central elements of selectivity are briefly outlined in this section.

As Member States are free to shape their tax systems by determining tax objects, tax subjects, taxable events and tax rates, they may reduce or abolish a tax without infringing State aid provisions: the measure is general and applies to all economic actors. Support granted to a sector of the economy through tax mitigation lies, however, in the grey zone, as it is selective in nature.

For instance, a Member State may reduce a beer tax rate in order to support brewers in comparison to wine producers (not liable to beer tax).[32] However, if both sectors of the economy had been subject to alcohol tax and only beer

25. SE: Income Tax Act, 1999, National Legislation IBFD. See, for instance, SE: Proposition 2008/09:77 (27 Nov. 2008), p. 67.
26. See Schön, *supra* n. 22, at p. 931.
27. DE: ECJ, 19 Sept. 2000, Case C-156/98, *Germany v. Commission*, ECJ Case Law IBFD.
28. DE: ECJ, 23 Feb. 1961, Case 30/59, *Gezamenlijke Steenkolenmijnen*.
29. FR: ECJ, 13 July 1988, Case 102/87, *France v. Commission*.
30. See *supra* n. 8 for the text of the law.
31. See, for instance, Schön, *supra* n. 22, pp. 911-939; M. Aldestam, *EC State Aid Rules Applied to Taxes: An Analysis of the Selectivity Criterion*, doctoral thesis (Iustus förlag 2005); P. Nicolaides, *Fiscal State Aid in the EU: The Limits of Tax Autonomy*, 27 World Competition 3, pp. 365-396 (2004); J.J. Piernas López, *Annotation on Cases T-424-/05 and T-446/05, Indirect Advantage and Selectivity Revisited*, Eur. State Aid L. Rev. 1, pp. 219-228 (2010); and R. Luja, *Revisiting the Balance between Aid, Selectivity, Selective Aid in Respect of Taxes and Special Levies*, Eur. State Aid L. Rev. 1, pp. 161-168 (2010).
32. See Schön, *supra* n. 22, at p. 924.

producers were exempt from tax, then the tax exemption would qualify as prohibited State aid, as it only supports beer producers. Therefore, the requirement of "generality" may encompass, depending on the circumstances, a category of economic actors within a determined sector of economy. SMEs, therefore, are not considered to be a general category of taxpayers, as they are liable for corporate income tax on their profits just as large corporations are. Consequently, any support designed to benefit SMEs is, by nature, selective.[33]

Adding to the general confusion, the 1998 Commission notice[34] on the application of State aid rules to measures relative to direct business taxation provides that, "tax measures open to all economic agents operating within a Member State are in principle general measures," and that measures of a purely technical nature (lower tax rates, depreciation rules, loss carry-forward rules) or pursuing general economic policy objectives (R&D) do not constitute State aid. A general reduction in the corporate income tax rate for lower income tax brackets [35] would, in fact, be considered as a general measure, as the measure would not only target SMEs but all corporate income tax payers.

General tax measures approved by the Commission concern, for instance, tax breaks for R&D open to all sectors of the economy, or a reduction in tax and social security rates to encourage regularization of underground employees throughout an entire Member State and all sectors of the economy.[36]

The ECJ has recently provided guidance on the selectivity criterion. In *Paint Graphos* (Joined Cases C-78/08 and C-80/08)[37] the ECJ left it open to the referring court to decide whether or not the Italian tax regime applicable to labour-intensive cooperatives under Italian law (in regard to agriculture and small-scale fisheries, producers and workers' cooperatives and other kinds of cooperatives) qualifies as unlawful State aid. According to these Italian tax rules, these legal persons enjoy a favourable tax regime (corporate income tax exemption, local income tax exemption or reduction by half) even though they earn "profits" acting in the ordinary course of business and calculate their tax base on the same basis as any profit-making company. The goal of this corporate income tax exemption is to, "promote social function of cooperation for mutual benefit free of private speculation".

The Court assessed that this kind of tax rule may amount to illegal State aid, as it is selective (especially as cooperatives act in the ordinary course of profit-based activities). However, since the profit margin of these cooperatives is considerably lower than that of capital companies, and as they do not compete on the same level (companies are better adapted to market requirements), the ECJ seemed to conclude that the two legal forms cannot be compared, unless members of cooperatives are entitled to distribution of the results of the economic performance, as it is the case in regard to an ordinary company.[38] Consequently, a favourable tax regime for cooperatives does not seem to be selective.

Another example directly relevant for the current investigation is the Italian aid scheme implemented for certain undertakings for collective investment in transferable securities specialized in shares of small and medium-sized capitalization companies listed on regulated markets ("Fondo chiuso").[39]

In 2009, in *Associazione italiana del risparmio gestito et Fineco Asset Management SpA v. Commission* (Case T-445/05)[40] the Court of First Instance (then) confirmed the Commission's decision of 6 September 2005[41] on collective investment in transferable securities (UCITS/SICAV).

The Italian tax law in question essentially provided that the tax rate that replaced the corporate income tax normally levied on net profits of the various types of investment funds and open-ended investment companies was reduced from 12.5% to 5% where the funds or companies invested, during the calendar year, at least two-thirds of the value of their assets, for more than one-sixth of the fund's business days, in small or medium-sized quoted capitalization funds. All types of investment vehicles (Italian or otherwise) could benefit from this lower tax rate, provided they were registered as specialized investment vehicles or had invested in registered specialized investment vehicles.

The Commission's decision found that the scheme did qualify as State aid, benefitting the companies managing the funds and the SMEs whose shares were held by these investment vehicles, as they would benefit from increased liquidity due to a lower tax rate at the investor level. As a result, the Commission's decision requested the recovery of the corporate income tax unpaid by the investors which indirectly benefited to the SMEs (i.e. the effective beneficiaries of the State aid).

Both the Italian government and an Italian association of funds (*Assogestioni*), together with a large asset management company (Fineco) appealed to the General Court (then Court of First Instance, CFI) against the Commission's decision on the grounds, firstly, that they were not recipients of the aid (they paid no corporate income tax themselves) and had only obtained more funds to manage. There was no financial advantage except for the

33. See Schön, *supra* n. 22, at p. 929.
34. See *supra* n. 11.
35. Presumably, the taxable profits of SMEs are not necessarily less than the taxable profits of large MNEs. Consequently, a progressive tax system based on ability to pay, which leads to start-up companies and SMEs not paying tax, would pass the test as a general tax measure.
36. Examples from Nicolaides, *supra* n. 31, at p. 372.
37. IT: ECJ, 8 Sept. 2011, Joined Cases C-78/08 and C-80/08, *Paint Graphos et al.*, ECJ Case Law IBFD.
38. Id., paras. 60-61.
39. SE: Decree Law No. 269/2003, converted into Law No. 326/2003, art. 12.
40. IT: ECJ, 4 Mar. 2009, Case T-445/05, *Associazione italiana del risparmio gestito and Fineco Asset Management SpA v. Commission.*
41. EU: Euro. Commn., Commission Decision of 6 September 2005 on the aid scheme implemented by Italy for certain undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies listed on regulated markets *(notified under document number C(2005) 3302)*, OJ L 268 (27 Sept. 2006), pp. 1-11.

management fees charged (indirect advantage). Further, the measure was not selective, as it applied to all investment vehicles regardless of their size, nationality or legal form (indirect selectivity).

The CFI's ruling dismissed both claims on the grounds, first, that the increase in demand for shares in specialized investment vehicles favours those undertakings and constitutes State aid,[42] and second, that the selectivity criterion is not assessed in regard to the general scope of a scheme (i.e. open to all economic actors), but on the grounds that it constitutes an exception to a general tax scheme.[43]

The reported case law above demonstrates that an incentive for risk capital in the form of a tax break may well constitute illegal State aid under article 107(1) TFEU on the grounds that it provides a clear advantage to targeted undertakings.[44] Considering that SMEs compete with larger enterprises on the same market, they would enjoy an advantage in the form of a larger capital flow and, therefore, the condition of selectivity is fulfilled. However, and according to ECJ case law[45] on State aid applicable to fiscal measures, a measure that constitutes an exception to the application of the general tax system may be justified if the Member State concerned can show that this measure results directly from the basic or guiding principles of its tax system, depending on the effects it produces.

The difficulty in assessing whether or not a tax exemption is inherent to a tax system has been discussed extensively in the literature.[46] There is no consensus, however, on how the ability-to-pay principle may justify some taxpayers paying lower taxes than others. Conversely, a general tax scheme passing the State aid test may have effects that impact a selected number of taxpayers, but the Commission still may not initiate proceedings.

In practice, and in brief, protection of employment,[47] environmental protection (reduction in energy consumption,[48] reduction in the washing out of nitrates,[49] efficient use of natural resources[50] and a reduction in the emission of CO_2),[51] encouraging companies to go public on a regulated European stock exchange,[52] R&D and innovation promotion (attracting foreign experts,[53] tax reduction on revenue from certain intangible assets)[54] and regional development[55] constitute non-fiscal objectives that may be invoked as justifying State aid.

To summarize this section, the main issue is that only a non-selective tax incentive may pass the test of article 107 TFEU and under very strict conditions. If the measure remains within a safe harbour, however, Member States will stay out of reach of the Commission's investigative powers, as further addressed in section 5.

5. Safe Harbour?

5.1. The legal background

State aid may sometimes be desirable, because it is used by a Member State to pursue an economic policy. Therefore, paragraphs 2 and 3 of article 107 TFEU sets certain exemptions to the general prohibition under article 107(2)-(3) TFEU.[56] This does not exempt Member States from their duty to notify the Commission of the imple-

42. *Associazione italiana del risparmio gestito* (T-445/05), para. 143.
43. *Associazione italiana del risparmio gestito* (T-445/05), para. 155. This case is different from the tax incentive schemes contemplated by Sweden, as the State aid supported investment in funds and specific undertakings that were selected for their risk capital function. Selectivity of the measure here was indisputable.
44. EU: Eurn. Commn., Commission Notice on the application of the State aid rules to measures relating to direct business taxation, 98/C 384/03, p. 3 et seq., OJ C 384 (10 Dec. 1998), notes, at para. 27, that, "the logic underlying certain specific provisions on the taxation of SMEs is comparable to that underlying the progressiveness of a tax scale". This statement, however, concerns mainly the exemption of corporate income tax for start-ups or lower thresholds of income, but cannot be extended, in the author's opinion, to a capital advantage as contemplated by Sweden.
45. See, for instance, AT: ECJ, 8 Nov. 2001, Case C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggaure Zementwerke*, para. 42, ECJ Case Law IBFD; and UK: ECJ, 22 Dec. 2008, Pending Case C-487/06 P, *British Aggregates v. Commission*, para. 84, ECJ Case Law IBFD.
46. See M.-A. Mamut, *The State Aid Provisions of the TFEU in Tax Matters*, in *Introduction to European Tax Law on Direct Taxation*, 2nd ed., p. 81 (Linde 2009), which includes a list of references to literature.
47. BE: ECJ, 17 June 1999, Case C-75/97, *Belgium v. Commission*, ECJ Case Law IBFD, wherein the ECJ ruled that the tax measure concerned was selective.
48. See *Adria-Wien Pipeline* (C-143/99), wherein the court ruled that the tax measure concerned was selective.
49. NL: ECJ, 29 Apr. 2004, Case C-159/01, *Netherlands v. Commission*, ECJ case Law IBFD, wherein the ECJ ruled that the tax measure concerned was selective.
50. *British Aggregates Association* (C-487/06), ECJ Case Law IBFD.
51. DK: Eur. Commn., 29 Oct. 2009, Case N 327/2008, *Denmark*. The Commission ruled that the tax measure concerned was non-selective.
52. IT: ECJ, 4 Sept. 2009, Case T-211/05, *Italy v. Commission*, wherein the ECJ ruled that the tax measure concerned was selective.
53. DK: Eur. Commn., 3 May 2000, Case N 41/1999, *Denmark*. The Commission ruled that the tax measure concerned was non-selective.
54. ES: Eur. Commn., 13 Feb. 2008, Case N 480/2007, *Spain*. The Commission ruled that the tax measure concerned was non-selective.
55. PT: ECJ, 6 Sept. 2006, Case C-88/03, *Portugal v. Commission*.
56. 2. The following shall be compatible with the internal market:
    (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
    (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
    (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.
    3. The following may be considered to be compatible with the internal market:
    (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
    (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
    (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
    (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
    (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

mentation of the aid measure prior to giving it effect. In addition, on 7 May 1998, Council adopted Regulation No. 994/98,[57] which enables the Commission to adopt so-called Block Exemption Regulations for State aid. Measures that fall under a block exemption benefit, therefore, from a "safe harbour". Accordingly, the Commission is empowered to declare specific categories of State aid compatible with the Treaty if they fulfil certain conditions, thus exempting them from the requirement of prior notification and Commission approval. As a result, Member States are able to grant aid that meets the conditions laid down in these regulations without the formal notification procedure. In these circumstances, they only have to fulfil the monitoring requirements on the implemented aid.[58]

There are two regulations that are particularly interesting in regard to State aid in the form of a tax incentive for risk capital, namely the *de minimis* Regulation 1998/2006 of 15 December 2006 and the General Block Exemption Regulation (GBER) 800/2008 on horizontal aid of 6 August 2008.[59] Additionally, some guidelines and a handbook published by the Commission, provide details on the conditions of application of these Block Exemption Regulations.[60]

The first mentioned text, the *de minimis* Regulation, applies to all kinds of sectors and includes SMEs and risk capital. Under this regulation, Member States may grant qualifying State aid without notifying the scheme for authorization. However, they are liable to considerable reporting formalities (article 9) and strict conditions of application. The *de minimis* block exemption covers aid measures of up to EUR 200,000 per company over a period of three fiscal years, provided that they are transparent (i.e. it must be possible to assess the gross grant in advance) and irrespective of whether the aid is reserved for SMEs or not.[61] However, "aids comprised in risk capital measures" shall not be considered as transparent *de minimis* aid, unless the risk capital scheme concerned provides capital up to the ceiling for each target enterprise. Therefore, specific rules for risk capital apply.

The second mentioned Block Exemption Regulation of 6 August 2008 covers State aid intended to support SMEs and especially targets risk capital. This concerns micro enterprises (fewer than 10 employees and an annual turnover and/or balance sheet total below EUR 2 million), small enterprises (fewer than 50 employees and annual turnover and/or balance sheet total below EUR 10 million) and medium-sized enterprises (fewer than 250 employees and annual turnover under EUR 50 million and/or balance sheet total below EUR 43 million).[62] Under this second Block Exemption Regulation, the fiscal incentives for investment funds or investors to undertake risk capital investment must fall under a safe harbour of EUR 2.5 million per target SME over any period of 12 months (article 29.3).[63] The aid shall be restricted to providing seed capital and start-up capital to the exclusion of expansion capital. The risk capital measure shall take the form of participation in a profit-driven private equity fund, managed on a commercial basis (article 29.1). The investment fund through which risk capital is injected (if any) shall provide at least 70% of its total budget invested into target SMEs in the form of equity, and 50% of the funding of the investment fund shall be provided by private investors (article 29.5). According to article 29.7, some additional formal conditions have to be met, such as providing for a business plan and exit strategy for each investment. In any event, such risk capital State aid needs to be structured through an investment fund in order to qualify for the safe harbour.

To summarize, as regards support measures for SMEs, three types of situations may arise. First, the measure is not considered State aid if it remains below the above-mentioned threshold of EUR 200,000 in accordance with the *de minimis* rule provided for in Regulation 1998/2006. In this instance, there is no need for the state to notify. Second, the measure constitutes State aid because it applies to risk capital and is not considered sufficiently transparent,[64] in which case the tax incentive must be notified and cleared by the Commission before being launched. However, if the measure is not transparent, but meets the criteria of GBER 800/2008 as risk capital incentives for SMEs, then it may be subject to the safe harbour of EUR 2.5 million per year for start-ups and seed capital constituted through investment funds.

Third, the incentive does not fall within the scope of the Block Exemption Regulation or the *de minimis* regulation and has to be notified under the heading of article 107(3), which involves the standard notification procedure for measures outside the scope of any general block exemption.[65]

In brief, it seems that all the rules mentioned above apply simultaneously, and that introducing a tax credit for individuals that invest in SMEs is not safe in respect of any of

57. EU: Council Regulation (EC) No. 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, pp. 1-4, OJ L 142 (14 May 1998).
58. EU: Eur. Commn. Regulation No. 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, p. 3, OJ L 214 (28 Aug. 2008); arts. 9 to 11 on transparency, monitoring and reporting require some formalities to be fulfilled such as filing a form provided for in Annex III of this Regulation.
59. Id. at p. 3. See also EU: Eur. Comm. Regulation No. 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, pp. 5-10, OJ L379, 28 Dec. 2006.
60. Guidelines, modified by EU: Communication from the Commission amending the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises, No. 2010/ C-329/05, pp. 4-5, OJ C 329, 7 Dec. 2010. The Handbook on community state aid rules for SMEs including temporary state aid measures to support access to finance in the current financial and economic crisis of 25 Feb. 2009 is available at ec.europa.eu/competition/state_aid/studies.../sme_handbook.pdf (accessed on 9 Dec. 2011).
61. Regulation No. 800/2008, at p. 3. The relevant provision for "fiscal incentive" is article 51 (d), which provides that fiscal aid shall be deemed transparent, "where the measure provides for a cap ensuring that the applicable threshold is not exceeded".
62. The definitions arise from Regulation No. 1998/2006, at p. 5.
63. Thresholds amended by the Communication from the Commission amending Community guidelines on State aid to promote risk capital investments in SMEs (2010).
64. Guidelines (as amended on 7 Dec. 2010), at p. 4, referring to Commission Regulation No. 800/2008.
65. Council Regulation 659/1999 (1999).

them, unless the amount of capital injected in the target companies is capped, and easily identifiable.

As reported hereafter, some Member States of the EU have successfully introduced incentives for risk capital on the basis of the second kind of measures (risk capital for SMEs), and with support of a detailed assessment provided to the Commission, obtained clearance.

5.2. Commission's decisions involving risk capital

In 2009, the United Kingdom was authorized[66] to adopt a measure designed to encourage private individuals subject to UK income tax and companies to invest in smaller, unquoted, high growth potential companies in order to grow their businesses into sustainable, profitable enterprises. There were no residency requirements for the target company either, but they had to have at least a permanent establishment in the UK as the measures were intended to encourage investors to invest in the UK.

The notified measure involved three schemes, for both individual taxpayers and corporate taxpayers. The first one, the Enterprise Investment Scheme (EIS), allowed individual income tax relief of 20% of the amount invested in new full-risk ordinary shares in qualifying companies (up to GBP 500 per year), as well as capital gain tax exemptions for shares held more than three years. The second scheme was the Venture Capital Trust Scheme (VCTS) granting individual taxpayers a tax credit of 30% of the amount invested in investment funds investing in shares held for at least five years.

After an in-depth analysis of the advantages and inconveniences of such aid to the risk capital market, the Commission cleared the scheme. It came to the conclusion that since the schemes are cross-sectorial and allow private investors to freely choose the target of investment, fully bearing the risk of their investment, there did not appear to be a distortion to competition, such as keeping inefficient firms or sectors afloat. The risk of an artificial increase in inefficient companies in non-competitive sectors was limited.[67]

France also notified a scheme in 2007 that introduced a wealth tax reduction for individual taxpayers investing directly in SMEs directly or indirectly through funds or holding companies (seated in the EEA area). The tax cut amounts to (1) 75% of the direct investment (limited to EUR 50,000 per year), (2) 50% of the investment through funds (limited to EUR 20,000 per year), or (3) 75% of gifts to foundations supporting SMEs (limited to EUR 50,000). The whole scheme's purpose is to enhance risk capital and induce taxpayers to behave like "business angels". The total investment for each targeted SME may not exceed EUR 1.5 million over a 12-month period. The expected result of the tax cut is to increase risk capital (EUR 637 million for 2008) up to the EU average level of 0.2% of GDP, as France falls far below this level. Although the scheme stayed within the threshold for the *de minimis* exception, the scheme had to be notified and scrutinized by the Commission,[68] who came to the conclusion that most conditions had been fulfilled and allowed the scheme.

To put it in a nutshell, only small amounts of State aid that are transparent (i.e. determined in advance) do not need to be notified pursuant to the general *de minimis* exemption.[69] In respect of the other safe harbour of EUR 2,5 million by investment tranches for risk capital guidelines, the conditions for compatibility are so restrictive that such measures should nevertheless be notified and cleared. Among others, a detailed assessment will be necessary each time the tax incentive will target existing SMEs, which is the way the Swedish government chose for their contemplated tax scheme. Furthermore and as explained by the Commission and in regard to risk capital measures in particular, the application of the *de minimis* rule is complicated by difficulties in calculating the aid and also by the fact that measures may provide aid not only to the targeted enterprise but also to other investors.[70] The easiest way out is to directly allow a grant of a maximum of EUR 200,000 over a three-year period without reference to either risk capital or the sector of activity.

6. Conclusions

Based on a thorough analysis of existing ECJ case law and notification decisions published by the Commission, it seems fair to conclude that risk capital tax incentives, such as that contemplated by Sweden, fall within the scope of the State aid prohibition (article 107(1) TFEU). The State aid would be selective to the extent that investments in quoted companies would not qualify for the tax credit. In other words, as long as the incentive targets a specific market (risk capital) and a category of taxpayers (unquoted companies or SMEs), the rules on State aid requiring notification to the Commission would apply.

The only safe harbour available for such incentives would be the *de minimis* threshold, which is EUR 200,000 per enterprise over a three-year period, provided that each beneficiary of the aid would have to make sure not to exceed the ceiling. Due to the need for such monitoring, this may not be an optimal solution for SMEs.

66. EU: Eur. Commn., Commission decision NN 4aa/2007, C(2009)3045 final (29 April 2009).
67. Id., para. 77. Interestingly, the decision mentions (para. 64) that the UK authorities submitted an academic report providing powerful evidence of an equity gap of around GBP 2 million for venture capitalists and entrepreneurs alike: Harding Cowling & Murray, *Assessing the Scale of Equity Gap in the UK Economy*, Report to HM Treasury and Small Business Service (Nov. 2003).
68. The Guidelines, on the basis of which the Commission assesses the compatibility of notified aid with article 107(3) TFEU, provides at 4.3 that the incentive is to be limited to start-up and early stages of activity, a condition that the French regime did not take into consideration and, therefore, it had to notify the State aid for approval.
69. Regulation No. 800/2008, at p. 3.
70. Guidelines, at 3.3.

As the Commission puts it:

> [...] more general structural measures not constituting State Aid may also contribute to an increase in the provision of risk capital, such as promoting a culture of entrepreneurship, introducing a more neutral taxation of the different forms of SMEs financing (for example new equity, retained earnings and debt), fostering market integration and easing regulatory constraints, including limitation on investments by certain types of financial institutions (for example pension funds) and administrative procedures for setting up companies.[71]

What is meant by a "more neutral taxation of the different forms of SMEs financing such as new equity [...]" is, however, not clear and should definitively be thoroughly investigated. The 25 February 2009 guidelines in the handbook on Community State aid rules for SMEs, including temporary State aid measures to support access to finance in the current financial economic crisis, encourage general support measures, such as a general reduction in the taxation of labour and social costs, or even general assistance and training for the unemployed and labour law improvements. In any event, it is submitted here that introducing a tax credit for individual taxpayers acquiring shares in unquoted companies constitutes State aid that must be cleared by the Commission, unless the aid for each target stays below the *de minimis* threshold and is transparent. Any notification process that would have to be initiated for larger amounts is, however, burdensome and time-consuming and should be considered carefully before setting up the tax incentive.

Finally, it should be stated that this legal analysis has ignored the Commission's current recognition of the need for urgent action to remedy the effects of the financial crisis. The Commission has, in particular, put in place very flexible procedures to assess emergency measures necessary to safeguard the stability of the European financial system or bring liquidity to the real economy, which may lead to a different outcome than that previously outlined in this article.

Moreover, it should be noted that some Member States take the risk of introducing incentives for risk capital business without clearance, although they should, and thereby distort the internal market. Further research on the economic impact of the State aid regulations would, therefore, be welcome.

71. Guidelines, at 1.3.3.

BILAG FRA AKT NR. 2

FOLKETINGSTIDENDE A

FOLKETINGET

Beslutningsforslag nr. **B 23** Folketinget 2010-11

Fremsat den 17. november 2010 af Morten Østergaard (RV), Niels Helveg Petersen (RV) og Margrethe Vestager (RV)

Forslag til folketingsbeslutning

om afskaffelse af iværksætterskatten

Folketinget pålægger regeringen i indeværende folketingssamling at fremsætte de nødvendige lovforslag og foretage de fornødne administrative ændringer, der sikrer, at beskatningen af unoterede porteføljeaktier (også kaldet iværksætterskatten), jf. lov nr. 525 af 12. juni 2009, afskaffes med virkning fra indkomståret 2010.

AX012622

Bemærkninger til forslaget

»Forårspakke 2.0 - Vækst, klima, lavere skat« blev hastet igennem Folketinget af et smalt flertal bestående af regeringen og Dansk Folkeparti i foråret 2009. Efter Radikale Venstres opfattelse var flere af elementerne i reformen uigennemtænkte og direkte skadelige for Danmark.

Det gælder således også den såkaldte iværksætterskat.

Iværksætterskatten indebærer kort fortalt, at den iværksætter eller investor, der igennem et holdingselskab har en ejerandel på mindre end 10 pct. i et unoteret iværksætterselskab, fremover skal betale en 25 pct.s ekstraskat af gevinsten på en sådan investering i en iværksættervirksomhed. Det modsatte er tilfældet, hvis ejerandelen er større end 10 pct. Her er gevinsten skattefri.

Vækstiværksættere vil som oftest gå fra at have en ejerandel på mere end 10 pct. til at have en ejerandel på mindre end 10 pct. som følge af kapitaludvidelser, hvor vækstiværksætterens ejerandel – på grund af den kapital, der kræves, og iværksætterens begrænsede mulighed for selv at deltage i kapitaludvidelsen – bliver udvandet. Herved bliver iværksætterskatten aktuel for vækstiværksætteren.

For investorernes vedkommende bliver iværksætterskatten aktuel som følge af, at investorerne som oftest ved kapitaludvidelserne ikke opnår eller kan opretholde en ejerandel på mere end 10 pct. Dette skyldes, at vækstvirksomheder kræver ganske meget kapital.

Iværksætterskatten indebærer, at den effektive skatteprocent er på 67,4 pct. for den iværksætter, der ejer anparterne i et unoteret iværksætterselskab igennem et personligt holdingselskab, som er den helt normale praksis i dag. Det samme gør sig gældende for investorerne i iværksætterselskabet. Det er illustreret i nedenstående eksempel, hvor iværksætterskatten fremgår af søjlen med »porteføljeaktier«.

Beregningseksempel: Beskatning af porteføljeaktier

	Datterselskabsaktier	Porteføljeaktier
Driftsselskabet		
Overskud før skat	100.000	100.000
Selskabsskat	(25.000)	(25.000)
Resultat efter skat	75.000	75.000
Holdingselskab		
Udbytte modtaget	75.000	75.000
Selskabsskat	0	(18.750)
Resultat efter skat	75.000	56.250
Personlig hovedaktionær		
Udbytte modtaget	75.000	56.250
Aktieindkomstskat (42 pct.)	31.500	23.625
Resultat efter skat i alt	43.500 kr.	32.625 kr.
Effektiv beskatning:	56,5 pct.	67,4 pct.

I især vækstvirksomheder er det helt normalt, at der findes mange investorer med meget små ejerandele. Det skyldes som tidligere anført, at kapitalbehovet i disse virksomheders vækstfase er så enormt, at der ofte gennemføres mange investeringsrunder med flere investorer.

Iværksætterskatten har allerede haft katastrofale følger for dansk erhvervslivs vækstlag, vækstiværksætterne, som der er bred enighed om i Folketinget er de virksomheder, Danmark skal leve af i fremtiden.

Iværksætterskatten vil uundgåeligt føre til et dræn af privat, risikovillig kapital på det danske marked. Omfanget er vanskeligt at estimere præcist. Brancheforeningen for danske business angels, venture- og kapitalfonde, DVCA, estimerer dog på baggrund af en undersøgelse blandt deres medlemmer, at Danmark i løbet af de kommende 5-7 år vil miste risikovillig kapital for mellem 4,4 og 14,5 mia. kr. Uanset at et sådant estimat er forbundet med stor usikkerhed, viser undersøgelsen, at iværksætterskatten med foruroligende præcision markant hæmmer investeringslysten blandt private danske investorer.

Dette modsvares af et estimeret årligt skatteprovenu på iværksætterskatten på ca. 150-200 mio. kr. i dag og op imod 500 mio. kr., når skatten om en del år er fuldt indfaset, jf. skatteministerens svar af 31. maj 2010 på SAU alm. del – spørgsmål 507 (2009-10). I løbet af de første 5-7 år er skatteprovenuet således væsentligt mindre end den risikovillige kapital, der mistes som følge af skatten.

Dertil kan det tilføjes, at en meget stor del af den risikovillige kapital, der skydes ind i vækstvirksomhederne, bruges på lønninger, der indkomstbeskattes i Danmark.

Derudover er vækstvirksomheder overordentlig gode til at tiltrække udenlandsk kapital, hvilket også medfører, at beskæftigelsen og dermed indkomstskatten i Danmark vil stige.

Faktisk er det samfundsmæssige afkast på investeringer i risikovillig kapital rigtig godt. Deutche Bank har fastslået, at en krone investeret i risikovillig kapital har et vækstafkast på mellem 5 og 10 kr. for hele samfundet.

Det er således et stort spørgsmål, om der overhovedet vil være et skattemæssigt plus af iværksætterskatten, når alt tages i betragtning, mens det er hævet over enhver tvivl, at der vil være et samfundsmæssigt minus i form af mindre vækst.

Ud over de økonomiske omkostninger vil iværksætterskatten også ramme danske vækstiværksættere på andre måder. DVCA's undersøgelse viser således, at en af konsekvenserne af skatten har været, at iværksættere har været nødt til at tage meget store privatøkonomiske risici for at kunne bevare en ejerandel på mere end 10 pct., f.eks. ved at optage yderlige lån med sikkerhed i private aktiver.

Derfor foreslås iværksætterskatten afskaffet ved at ophæve beskatningen af selskabers unoterede aktier med undtagelse af aktier i selskaber udenfor EØS, uanset størrelsen af selskabets ejerandel.

En fuldstændig fritagelse af beskatning af unoterede aktier kendes i dag fra Sverige og Norge (også her med undtagelse af unoterede aktier i selskaber uden for EØS).

For at undgå skattetænkning med henblik på at opnå gavn af skattefriheden for unoterede aktier, eksempelvis af diverse investeringsprodukter fra banker, bør der indføres en række værnsregler efter en nærmere vurdering.

Samlet set er det Radikale Venstres opfattelse, at hensynet til vækst og adgangen til risikovillig kapital gør, at Danmark ikke kan fastholde en unik porteføljebeskatning, som gør det

mere attraktivt for kapitalstærke private investorer at investere i vækstiværksættere i vore nabolande end i Danmark.

Skriftlig fremsættelse

Morten Østergaard (RV):

Som ordfører for forslagsstillerne tillader jeg mig herved at fremsætte:

Forslag til folketingsbeslutning om afskaffelse af iværksætterskatten.

(Beslutningsforslag nr. B 23)

Jeg henviser i øvrigt til de bemærkninger, der ledsager forslaget, og anbefaler det til Tingets velvillige behandling.