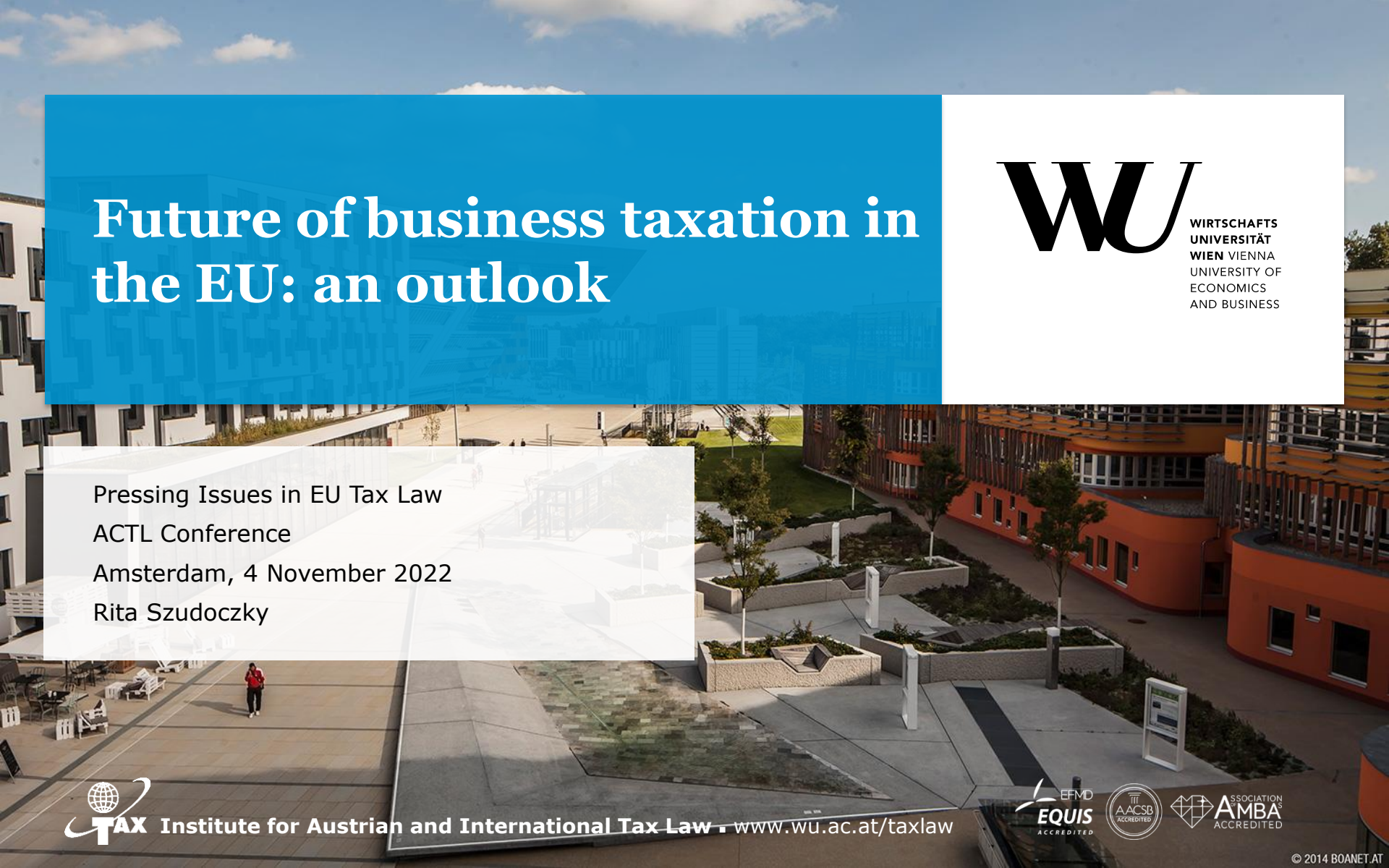
Future of business taxation in the EU: an outlook

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Pressing Issues in EU Tax Law
ACTL Conference
Amsterdam, 4 November 2022
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Negative integration

- Fundamental freedoms and national tax measures
  - ➢ Gradual unnoticed overruling of previous case law including some fundamental doctrines
- State aid and national tax measures
  - ➢ Halt of the expansion of the State aid rules and more weight of fiscal sovereignty of the MSs

Overruling of established doctrines

- Marks & Spencer final loss doctrine

  - Final losses of a foreign PE – *W AG*

***Since, under a double taxation convention**, the Federal Republic of **Germany has waived its power to tax the profits made and losses incurred by such a permanent establishment** situated in another Member State, a resident company which has such an establishment **is not in a situation comparable** to that of a resident company which has a permanent establishment situated in Germany in the light of the objective of preventing or mitigating the double taxation of profits and, symmetrically, the double taking into account of losses.* (CJEU, 22 September 2022, Case C-538/20 W AG, para. 27.)

Overruling of established doctrines

- Marks & Spencer final loss doctrine

  - Final losses of a foreign PE – *Lidl Belgium*

In those circumstances, the tax situation of a company which has its registered office in Germany and has a permanent establishment in another Member State is ***less favourable*** *than it would be if the latter were to be established in Germany. By reason of that difference in tax treatment, a* ***German company could be discouraged from carrying on its business through a permanent establishment situated in another Member State.***

It must be held that ***the tax regime*** *at issue in the main proceedings* ***involves a restriction on the freedom of establishment.***

Overruling of established doctrines

the Court held in ***paragraph 55 of the judgment in Marks & Spencer*** *that a measure which restricts the freedom of establishment* ***goes beyond what is necessary to attain the objectives pursued where a non-resident subsidiary has exhausted the possibilities*** *for having the losses incurred in the Member State where it is situated taken into account ...*

Lidl Belgium has not shown *that the conditions laid down in paragraph 55 of the judgment in Marks & Spencer, for establishing the situation in which a measure constituting a restriction on the freedom of establishment for the purposes of Article 43 EC goes beyond what is necessary to attain legitimate objectives recognised by Community law, were satisfied.* (CJEU, 15 May 2008, Case C-414/06 Lidl Belgium, paras. 25-26, 47, 51)

Overruling of established doctrines

- After *Lidl Belgium*
  - *Nordea Bank* (CJEU, 17 July 2014, Case C-48/13)
  - *Timac Agro* (CJEU, 17 December 2015, C-388/14)

  } **Situations not comparable**

  - *Bevola, Jens W. Trock* (CJEU, 12 June 2018, C-650/16): situations are generally not comparable BUT **when the losses of the foreign PE are final, situations are comparable** (the risk of double deduction does not exists + ability to pay)
  - *W AG:* where the MS of residence **waived its power to tax in a double taxation convention**, **the situations are not comparable**, even when the losses of the foreign PE are final ➡ different from *Bevola* where the MS decided unilaterally not to tax the profits/losses of a foreign PE

Overruling of established doctrines

- Comparability criterion chosen at will by the Court depending on what outcome it wants to reach with regard to the comparability of the situations
  - *Lidl Belgium:* none (no examination of comparability)
  - *Nordea Bank*, *Timac Agro:* the tax treatment of the domestic and cross-border situations by the MS (subject to tax/not subject to tax)
  - *Bevola, Jens W. Trock:* factual circumstance (finality of loss)
  - *W AG:* the tax treatment of the domestic and cross-border situations by the MS (subject to tax/not subject to tax)

Overruling of established doctrines

From “always somewhere”
back to “subject to tax”

Drawing the boundaries of fiscal State aid

- The Court settled on a very broad concept of *de jure* selectivity: Joined Cases C-20/15 P and C-21/15 P *World Duty Free Group*; Case C-50/19 P *Sigma Alimentos Exterior*

  - it is enough to show that the measure benefits certain operators and not others, although all of them are in an objectively comparable situation in the light of the objective pursued by the ordinary tax system, no need to identify specific features that are characteristic of and common to the undertakings that are the recipients of the tax advantage
  - selectivity also when distinction is made between undertakings which choose to carry out certain transactions and other undertakings which choose not to do so

- What about the concept of *de facto* selectivity? (Joined Cases C-106/09 P and C-107/09 P *Gibraltar)*

Drawing the boundaries of fiscal State aid

- Cases on turnover-based progressive taxes – Court is unwilling to stretch further the scope of fiscal State aid
  - Hybrid taxes: can the State aid rules be used to scrutinize the consistency of taxes, i.e. whether the modalities of the tax (tax base, tax rate) are consitent with the declared objective of the tax?
  - What degree of discretion do the MSs enjoy in designing their taxes?

…amount of turnover constitutes, in general, a criterion of differentiation that is neutral and a relevant indicator of the taxable person's ability to pay (Case C-75/18, Vodafone Magyarország, para. 50)

…it does not follow from any rule or principle of EU law, including in the field of State aid, that progressive rates may apply only to taxes on profits.(Case C-596/19 P, Commission v Hungary, para. 47)

Positive integration

- Implementing the results of global coordination at EU level
- Further measures to counter BEPS and aggressive tax planning (Unshell Directive)
- However, the key question: what should be the role of the EU in shaping direct taxation at times when the most important coordination work in this domain is carried out at the global level (Inclusive Framework, OECD)? Is it sufficient to be the executor of global deals? Or should the EU strive for an autonomous EU direct tax policy?

Thank you