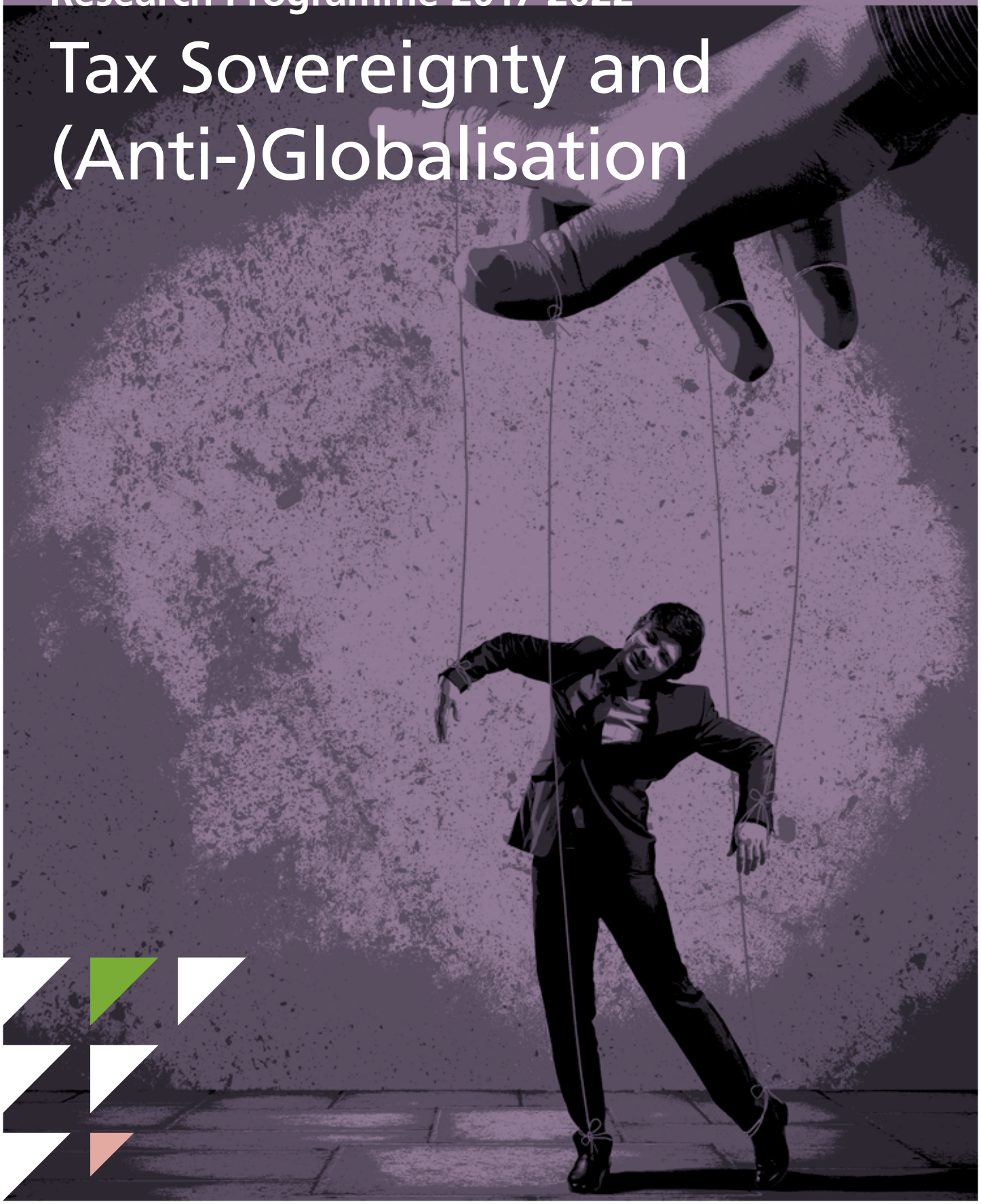
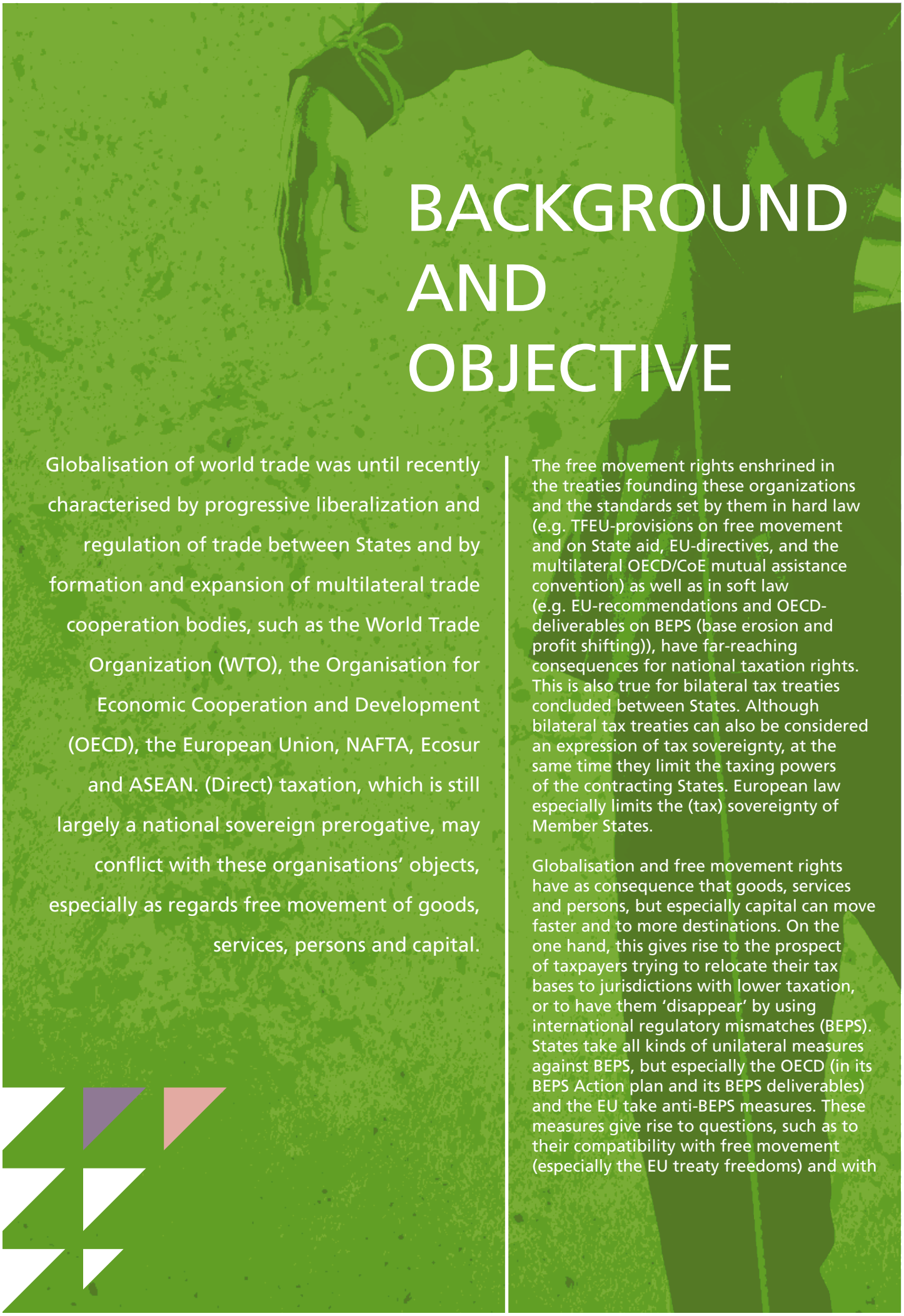
University of Amsterdam
Amsterdam Centre for Tax Law

Research Programme 2017-2022

Tax Sovereignty and (Anti-)Globalisation





BACKGROUND AND OBJECTIVE

Globalisation of world trade was until recently characterised by progressive liberalization and regulation of trade between States and by formation and expansion of multilateral trade cooperation bodies, such as the World Trade Organization (WTO), the Organisation for Economic Cooperation and Development (OECD), the European Union, NAFTA, Ecosur and ASEAN. (Direct) taxation, which is still largely a national sovereign prerogative, may conflict with these organisations' objects, especially as regards free movement of goods, services, persons and capital.

The free movement rights enshrined in the treaties founding these organizations and the standards set by them in hard law (e.g. TFEU-provisions on free movement and on State aid, EU-directives, and the multilateral OECD/CoE mutual assistance convention) as well as in soft law (e.g. EU-recommendations and OECD-deliverables on BEPS (base erosion and profit shifting)), have far-reaching consequences for national taxation rights. This is also true for bilateral tax treaties concluded between States. Although bilateral tax treaties can also be considered an expression of tax sovereignty, at the same time they limit the taxing powers of the contracting States. European law especially limits the (tax) sovereignty of Member States.

Globalisation and free movement rights have as consequence that goods, services and persons, but especially capital can move faster and to more destinations. On the one hand, this gives rise to the prospect of taxpayers trying to relocate their tax bases to jurisdictions with lower taxation, or to have them 'disappear' by using international regulatory mismatches (BEPS). States take all kinds of unilateral measures against BEPS, but especially the OECD (in its BEPS Action plan and its BEPS deliverables) and the EU take anti-BEPS measures. These measures give rise to questions, such as to their compatibility with free movement (especially the EU treaty freedoms) and with

secondary EU law on tax harmonisation. There is also the question of whether the rights of taxpayers (rights to privacy, etc.) are sufficiently protected against the pursuit of States to safeguard taxation rights.

Furthermore, the increased possibilities for relocation of the taxpayer or of his economic activities leads to 'tax competition' between States. States make their tax system as attractive as possible for (foreign) investment (special regimes, low rates, advance tax rulings, etc.). Such measures may lead to a 'race to the bottom', to retaliation such as blacklists, CFC*-rules, and interest deduction limitations (and with that to possible violation of free movement rights) and to State aid investigations by the EU Commission, as, e.g., in the *Apple* and *Starbucks* cases. Tax competition also leads to the very interesting phenomenon of a Code of Conduct (a legally nonbinding gentlemen's agreement between the EU member States); a specimen of the so-called 'open method of coordination', which is, however, rather hidden from parliamentary and public scrutiny.

The aim of the ACTL research is twofold: (1) to establish the limits on national tax sovereignty and national taxing jurisdiction set by international and supranational law, and (2) to assess whether these limits should be narrowed or broadened on the basis of criteria such as level playing field, interjurisdictional equity, free movement of persons and capital, budgetary stability, tax base integrity, fair interstate policy competition and taxpayers rights. The emphasis in the research program lies on EU law given its major influence on national and bilateral tax law in the EU.

In the research programme a distinction is drawn between the influence of double tax treaties and other treaties on tax sovereignty (theme 1); the impact of the TFEU freedoms and the EU State aid rules (theme 2), the impact of the various harmonisation measures in the area of tax law within the EU (theme 3) and taxpayers rights (theme 4).

* Controlled foreign corporations

RESEARCH THEMES

The research program is dividend into four interrelated and partly overlapping research themes: Theme 1: double tax treaties and multilateral instruments (regular international public law); Theme 2: the EU treaty freedoms and EU State Aid rules (negative market integration); Theme 3: the EU directives in the area of direct and indirect tax law (positive market integration); and Theme 4: taxpayers rights, on the basis of national law, EU law (e.g. the EU Charter rights, the EU data protection directive, and general principles of EU law such as the rights of the defence) and human rights treaties such as most notably the European Convention on Human Rights. These four bodies of law all limit the tax sovereignty and/or the tax jurisdiction of the Member States.

* Base erosion and profit shifting

Research theme 1

Influence of double tax treaties and other treaties on tax sovereignty

Double taxation treaties may be considered as an expression of tax sovereignty. By concluding tax treaties, the States voluntarily limit their taxing jurisdiction and allocate taxing rights. In some States (e.g. the United States, Canada, Germany and Denmark), this limitation and allocation of the tax jurisdiction may be unilaterally overridden by subsequent national law (tax treaty override). Tax treaties are generally bilateral and provide for the avoidance of double taxation on income and capital, or on inheritance and gift taxes. Theme 1 focuses on the bilateral tax treaties for the avoidance of double taxation on income and capital and on the BEPS* project of the OECD which also includes multilateral instruments. These bilateral tax treaties are generally concluded on the basis of the OECD model tax convention on income and on capital. A bilateral tax treaty generally requires the state of residence of a taxpayer to prevent double taxation by providing either an exemption for foreign-sourced income or foreign-located capital which may be taxed in the state of source or locus, or a credit for the tax levied by the state of source.

Research Theme 1 explores the extent to which tax jurisdiction is limited by those treaties, especially as regards the

(remaining) powers to curb international tax avoidance and abuse of rights. Issues that will be researched include:

1 The status in public international law of the official OECD Commentary to the Model Convention and the relevance thereof as a means of interpretation of treaties following the Model Convention;
2 The relevance of national law of both States party to a bilateral treaty, both anterior and posterior law (i.e. prior to or after concluding the treaty, respectively) for the interpretation of these bilateral tax treaties, given that these tax treaties usually refer to national (tax) law for any terms not defined in the treaty;
3 The relevance of the Vienna Convention on the Law of Treaties for the application of tax treaties;
4 The relevance of justified expectations of both the contracting States and of their residents for the interpretation of these bilateral tax treaties;
5 The possibility to fight treaty abuse by taxpayers (the doctrine of *fraus conventionis* or *fraus tractatus*);
6 The phenomenon of tax treaty overrides;
7 The differenced and similarities between the OECD Tax Model treaties/guidelines and the United Nation Tax Model treaties/guidelines, especially as regards tax treaties between developed and developing countries;
8 The phenomenon of TIEAs (tax information exchange agreements) with 'tax havens' which are coerced, by the OECD, the G20 and the EU, into accepting the CRS (common reporting standard) of tax transparency.

Research theme 2

Influence of EU treaty freedoms and EU State aid rules on tax sovereignty

Tax sovereignty is limited by EU law, in case of direct taxes mainly by the EU treaty freedoms and the EU State Aid rules and to a much lesser extent by EU Directives, and in case of indirect taxes by a far-reaching harmonization or even uniformization of tax rules. Although the tax sovereignty of Member States in the field of direct taxation is in general recognised by the Court of Justice of the European Union (CJEU) in the absence of EU (positive) harmonization measures, the CJEU case law on negative integration (prohibitions set by free movement rights and State aid rules) has a huge impact on direct taxation. The State Aid Decisions of the European Commission in direct taxation cases and the case law of the CJEU also affects the allocation of taxing rights between EU Member States and between EU Member States and non-EU countries.

Research Theme 2 will explore the extent to which the tax sovereignty is limited by the EU treaty freedoms and the EU State aid rules and the influence of (EU soft law against) harmful tax competition.

Issues that will be researched include:

1 The questions whether and under which circumstances it is still permitted to distinguish between taxpayers of various other Member States ('horizontal discrimination'; does EU free movement law require 'most favoured nation tax treatment' within the EU?);
2 The contribution of the EU treaty freedoms to the reduction of international double taxation;
3 The influence of EU law on the tax treatment nonresidents (such as branches of companies resident in other Member States) as compared to a resident (company);
4 The correct balance between free movement within the EU and the right to levy tax on income generated within the national territory, especially as regards the following questions:
   - Does the Court of Justice overstep its competence in tax matters, given the attribution system of the EU Treaty?
   - Or does the Court of Justice show too much deference as regards the most effective impediment against free movement, double taxation of cross-border income, by recognizing 'parallel exercise of taxing power' as a market impediment which cannot be remedied under the free movement rights?
   - What balance does the CJEU strike between free movement and tax sovereignty, especially the right to protect taxing rights on tax base generated within a jurisdiction against tax avoidance relying on free movement rights?
   - Are the regular discrimination and restriction concepts used by the CJEU in free movement cases adequate to test national tax measures addressing cross-border profit shifting and tax avoidance situations which do not exist in purely internal situations, such as arm's length transfer pricing rules, controlled foreign corporations (CFC) rules and thin capitalization rules? Is there a fourth concept (dislocations) in between disparities on the one hand and discriminations and restrictions on the other?
   - Does the CJEU leave the Member States sufficient room for protecting tax base integrity?
   - What is the reach of the unwritten justifications for fiscal market impedements the CJEU allows, such as the need for effective fiscal supervision, 'the fiscal territoriality principle', protection of the coherence of the tax system, and the need for 'a balanced allocation of taxing powers between the member States'?
5 The correct balance between the EU State aid rules and the right not to levy tax, especially as regards the following questions:
   - To what extent may Member States issue advance tax rulings and advance pricing agreements to MNE's?
   - Is a derogation from the OECD transfer pricing rules or not having any transfer pricing rules in place or not curbing tax avoidance State aid?
   - Does the EU State Aid concept of (market) equality coincide with the OECD's arm's length principle or do these two concepts differ?
   - How should the selectivity criterion under the State Aid rules be applied to ostensibly horizontal taxation measures?
   - What 'justifications in the nature or the general scheme of a tax measure' may pardon it from being selective?

Research theme 3

Influence of EU directives on tax Sovereignty

Disparities between national tax laws are an impediment to the internal market. These impediments may be removed by positive integration. This has been done in the area of indirect taxation (e.g. VAT, customs duties, excises and energy taxation). There are, however, only few harmonisation measures in the field of direct taxation, as the Member States do not wish to relinquish their sovereignty in that area. Under the influence of the OECD/G20 BEPS project, however, also the EU takes large steps towards (minimum) harmonization of anti tax avoidance rules and automatic exchange of tax information. Research theme 3 will explore the scope and interpretation of the EU directives in the area of both direct and indirect tax law, including the interpretation of the VAT Directives, and the interpretation of the few directives in the area of direct taxation (the Merger Directive, Interest & Royalty Directive, Parent-Subsidiary Directive, Administrative Cooperation Directive, and Anti-Tax Avoidance Directive). Furthermore, this theme will assess the (un)desirability and (im)possibility of harmonizing corporate income taxation to a degree comparable to the base integration of turnover taxes (the EU VAT system), especially on the basis of the Commission's proposal for a common corporate tax base (CCTB) and cross-border loss relief, and its proposal for a Directive on arbitration in case of international double business taxation.

Lessons learned from the EU

A sub-theme of Research themes 2 and 3 is a project which investigates in which way the lessons learned within the EU in establishing an internal market may benefit market integration in other parts of the world, such as the regions covered by ASEAN or the East Africa Community.

Research theme 4

The influence of taxpayers rights on tax Sovereignty

Member States increasingly exchange automatically bulk data, particularly financial data in order to identify tax avoidance and tax evasion, both within the EU and with third States.

Examples of large-scale legal tax avoidance by multinationals and of excessive policy competition between States (harmful tax competition) as evidenced by the Luxleaks affair, as well as tax fraud scandals such as the KB Lux and UBS affairs have led to automatic inter-State exchange of, inter alia, bank account and income information and tax rulings and advance pricing agreements (APA's) for companies. Other examples of the increasing exchange of tax information are the mandatory country-by-country reporting of their tax position by multinationals, the unilateral US FATCA (Foreign account tax compliance Act), the CRS (common reporting standard on financial information) of the OESO, the conclusion of many TIEA's (tax information exchange agreements), the recent revision and almost yearly extension of the EU DAC (EU Directive on administrative cooperation), the obligation to set up UBO (ultimate beneficial owner)-registers, whether or not accessible to the public, access for tax administrations to the information exchanged under the EU anti-money laundering Directive and rules which prescribe the advance disclosure of tax planning structures.

These developments give rise to the question whether the legal protection of the taxpayers has been adequately regulated, also in light of the EU legislation concerning data protection, the right to due process and the right to privacy.

Methodology

The research of the ACTL, in principle follows the traditional methods of legal research (such as comparative legal analysis, analysis of the law and case law).

Objectives / strategy / societal relevance

The objective of this research programme is to meet the highest international standard of academic excellence.

To achieve its aim, the ACTL concentrates on academic top quality research. This research is reflected in the publication of books, articles and dissertations that are intended for academic peers. Furthermore, the ACTL has developed a number of outreach activities. Research products for target groups outside academia (tax lawyers, tax administration, accountants, judges, students, tax managers of companies) are created with articles in professional journals, contributions for blogs, annotations, Winter Courses and a LLM in International taxation.

The objective is also achieved by organizing conferences at home and abroad. These events reach not only peers but also societal target groups. The ACTL makes every effort possible to see to it that individuals from various sectors of society participate in the conferences (as speakers/panel members or as keynote speakers) and that the audience is made up of as varied a public as possible. The aim here is to give all branches of society access to ACTL's research and explain the research that is conducted by the ACTL to them, so as to make meaningful contributions to the public debate. Also important in this framework is that everyone is capable of entering into debate with the researchers at the ACTL, and thus avoid academics from ending up in ivory towers. To achieve this, the admission fees for ACTL conferences are always as low as possible (and often free for students). Attention is also devoted to seeing to it that the ACTL members are alert to the sensitivities and discussions alive in society.

Passing on the research results to society can be accomplished by means of publications and public debate (conferences), as well as through education. The ACTL satisfies this need by organizing winter-courses and by offering an LLM degree in international taxation, whereby a new generation of tax professionals is trained.