

CFRED's 9th Tax Law Seminar:

PATENT BOXES UNDER THE NEW OECD NEXUS APPROACH

by

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Chaired by: **Prof. Xu Yan**, *Faculty of Law, CUHK*

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The CUHK Graduate Law Centre, 2/F Bank of America Tower, 12 Harcourt Road, Central

Within the EU, almost half of all Member States operate a so-called “patent box” or similar type of preferential IP regime. Many other countries globally have followed suit, including China. Such regimes were introduced and designed mainly as an instrument to attract profits resulting from the exploitation of IP to the national tax jurisdiction, or to keep them within its reach, in the context of international tax competition. As such, they have come under the scrutiny of the OECD BEPS project. Traditional patent boxes that would set a strong incentive to international profit shifting through the (re-)location of IP have been denounced as harmful tax practices under BEPS Action No. 5. Political agreement was reached that in the future, IP regimes should be acceptable only as a form of “back end” incentive for domestic R&D activities. To that effect, the so-called “nexus approach” has been officially endorsed in fall 2015 by the G20, the OECD and also by the EU as a framework standard to which all national IP regimes should now adhere. Its core underlying idea is that IP income should only benefit from lower tax rates to the extent that it has been developed by the taxpayer who claims such benefits herself, and within the ambits of national tax jurisdiction. We can indeed already observe that some national IP boxes have been remodeled to comply with this new standard.

The presentation will first offer a critical legal analysis of the new nexus approach, as it can be found in the final Deliverable on OECD BEPS Action 5. The main challenges for the legislator, businesses and tax administrations will be discussed, and conceptual flaws of the standard as well as design issues for national legislators will be pointed out. In this context, it will furthermore be demonstrated that EU Member State patent boxes that follow the nexus approach might be challenged under EU law. The presentation will also provide information on some interesting features of the IP regimes in Europe that have already been adapted in the light of the new OECD standard. Moreover, a tentative tax policy analysis about the likely implications of the nexus approach for the role and effectiveness of a patent box will be carried out, based on preliminary findings of an international research group. It will be shown that patent boxes have lost most, albeit not all of their appeal as an instrument to aggressively attract IP profits to a jurisdiction, but that they remain a useful defensive instrument in international tax competition over profits from intangibles. As regards the attraction or promotion of domestic R&D activities, it will be argued that the nexus approach has increased the effectiveness of IP regimes in this regard, as compared to traditional IP boxes without any local development requirements. The implications for front-end R&D incentives and for the delimitation of the substantial scope of an IP regime will be analysed, too.

About the Speaker:



Prof. Joachim Englisch

Dr Joachim Englisch has studied law at German and Spanish universities. In 2007, he was granted a tenured position as professor for tax law and public law at the University of Augsburg. In 2010, he moved to Muenster University to become the managing director of Germany's longest-standing institute for tax law. Dr Englisch serves as a visiting professor for LL.M. courses on international and European tax law at several European universities. He regularly supervises PhD candidates and he is also has been a member of more than a dozen international doctoral committees. His main research interests are European and international tax law covering both, direct and indirect taxation, as well as constitutional aspects of tax law. Dr Englisch has published and lectured extensively on a broad range of topics related to European and international taxation. He serves as appointed member of expert groups with the OECD and with the EU Commission, and advises national governments.

All are welcome!
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