



Operating globally – compliant from a labor law and tax law perspective - Employer of Record & Co.

Introduction & Agenda

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Agenda

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II. Labor law perspective

1. *Direct hire abroad*
2. *Freelancers abroad*
3. *Employer of Record*

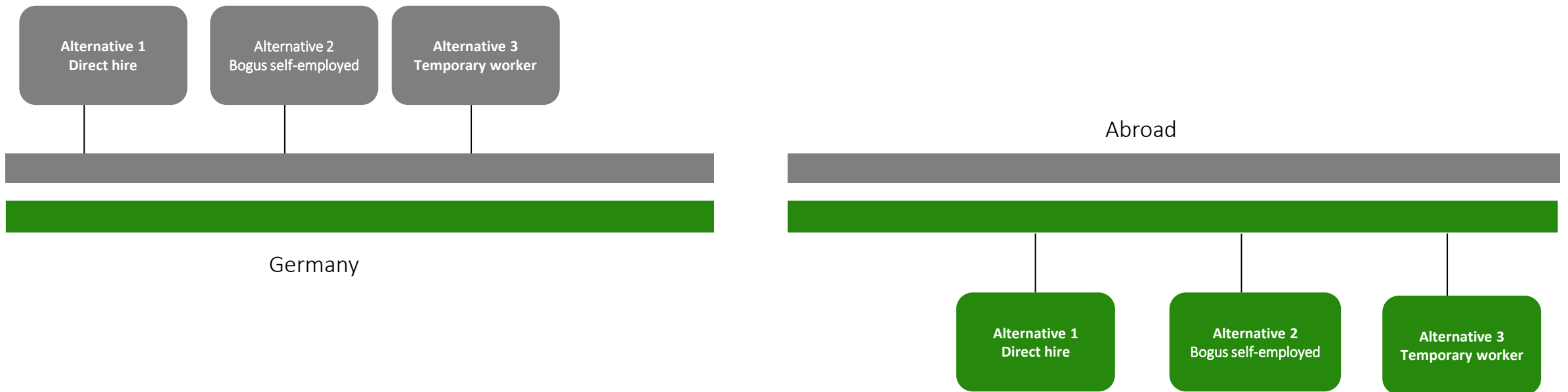
III. Tax perspective



I. Introduction

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- More and more frequently, workplaces are no longer physically provided in the form of furnished offices. Instead, employees are integrated into the operation virtually without being physically present in the operation
- Mobility and the fact that jobs are no longer tied to a specific location thanks to improved technical resources offer increasing opportunities for employing staff abroad - also against the background of a shortage of skilled labor
- Goal: Effective use of domestic and foreign human resources and mutual exchangeability of these resources
- Consequences of exchangeability in Germany and abroad:



1. Direct hire abroad

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Applicable law

Choice of law

Art. 8 para. 1 Rome I Regulation

If yes:

Principle of favorability

- Comparison between the chosen law and the law that would apply according to the objective connecting factors (in particular the usual place of work)
- Detailed assessment depending on the individual case

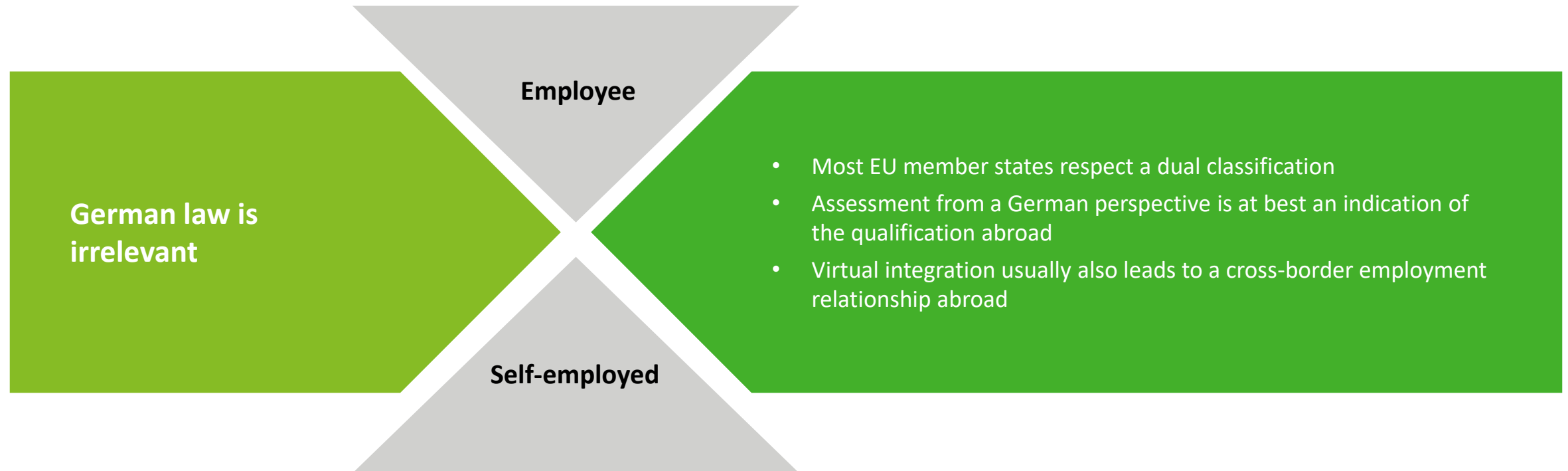
Payroll accounting of foreign employees

- If an employee is directly hired abroad, payroll accounting must be carried out in accordance with the laws and regulations of the respective country
- Supposed simplification: If the foreign employer does not have a branch in the Member State in which the employee is employed, he can agree with the employee that the latter will pay the social security contributions on his/her behalf in accordance with Art. 21 para. 2 of Regulation (EC) No. 987/2009
 - High risk: The employer remains liable for the payment of contributions vis-à-vis the social security institutions.

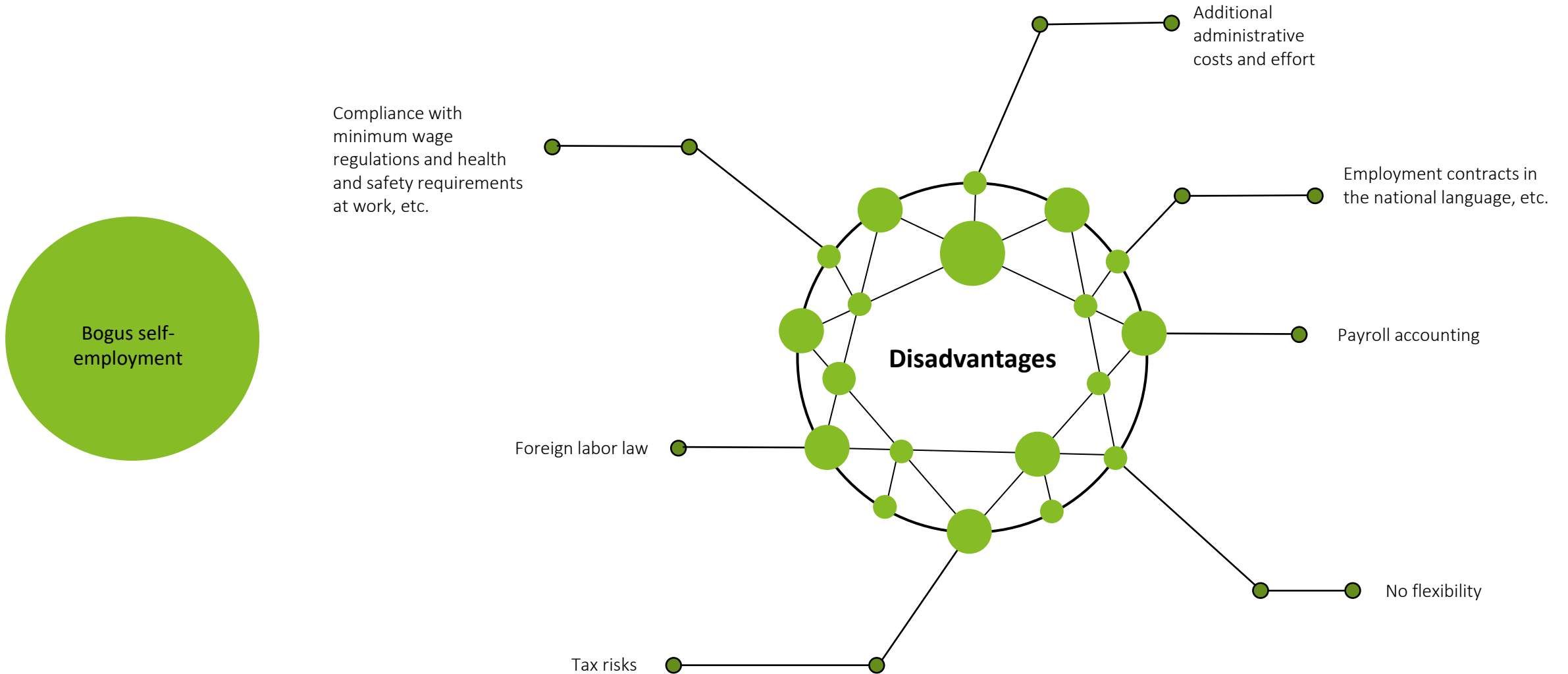
2. Freelancer abroad

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Differentiation from the employee



Disadvantages of direct employment and the use of freelancers



3. Employer of Record

3. Employer of Record

- An "employer of record" (contractor, temporary work agency) is a service provider that acts as an employer abroad. Work is generally performed entirely abroad
- The employer's right to provide technical instructions is transferred to the German client (user undertaking)
- Intermediaries based in Germany are often commissioned to find a suitable contractor or to coordinate the deployment of various contractors
- This is a "classic" temporary work arrangement in which an employee is assigned to perform work on the basis of a leasing contract for the German user undertaking (client)



Applicability of German Temporary Employment Act (Arbeitnehmerüberlassungsgesetz, AÜG) and risks?

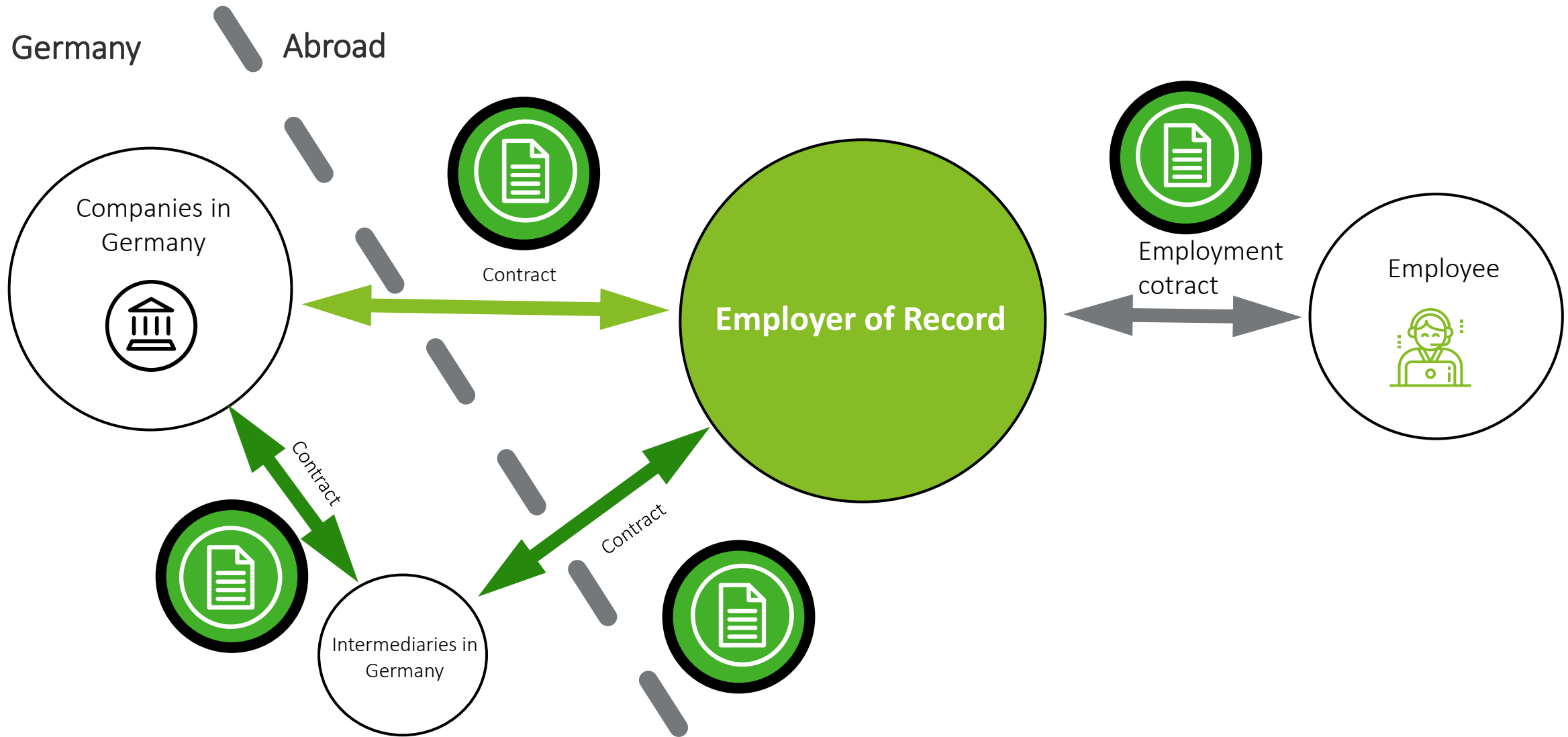
Legal implications of illegal temporary working:

- Administrative offence: fines for both the temporary agency work and the user undertaking
- Legally enforceable fine of over 200 euros is entered in the commercial central register
- Fiction of an employment relationship between the temporary worker and the user undertaking in accordance with Section 10 (1) AÜG
Exception (Federal Labour Court, 26 April 2022 - 9 AZR 228/21): "if the employment contract with the employee is clearly subject to foreign law, which should regularly be the case at the latest by means of a corresponding 'choice of law' clause"

Legal implications according to AÜG:

- Maximum leasing period of 18 months in accordance with Section 1 (1b) AÜG
- Contractual documentation requirements
- Equal pay and equal treatment requirements

3. Employer of Record



3. Employer of Record in an intra-group set-up



Temporary employment in matrix deployment?

The required **integration into an external work organization** is always difficult to determine if the employee continues to work in the operation of his/her contractual employer during the assignment. According to prevailing opinion, the **operational purpose of the temporary work agency is decisive**:

- Contractual employer (temporary work agency) must serve the operational purposes of the user undertaking by providing personnel
- If the temporary work agency (also) has its own business purposes, temporary work arrangements are ruled out
- Work efforts provided within the framework of the matrix structure serve the operational purposes of all participating companies
- Exercise of the right to issue instructions by the matrix manager is based on an authorisation and the instructions are attributed to the contractual employer (Sections 164 et seq. BGB)
- Exception: The operational purpose of the (classic) EoR is only to make personnel available to other group companies in return for payment.

Group privilege pursuant to Section 1 (3) No. 2 AÜG

"... this Act is not to be applied to temporary agency work between affiliate companies within the meaning of section 18 of the Stock Corporation Act (Aktiengesetz) if the employee is not hired and employed for the purpose of the assignment..."

- *Employees are usually recruited and employed by the EoR for the purpose of the assignment*
- *Additional risk: the Temporary Agency Work Directive does not contain any exceptions for intra-group employee assignment (according to the professional literature, which considers the regulations to be not in line with EU law)*

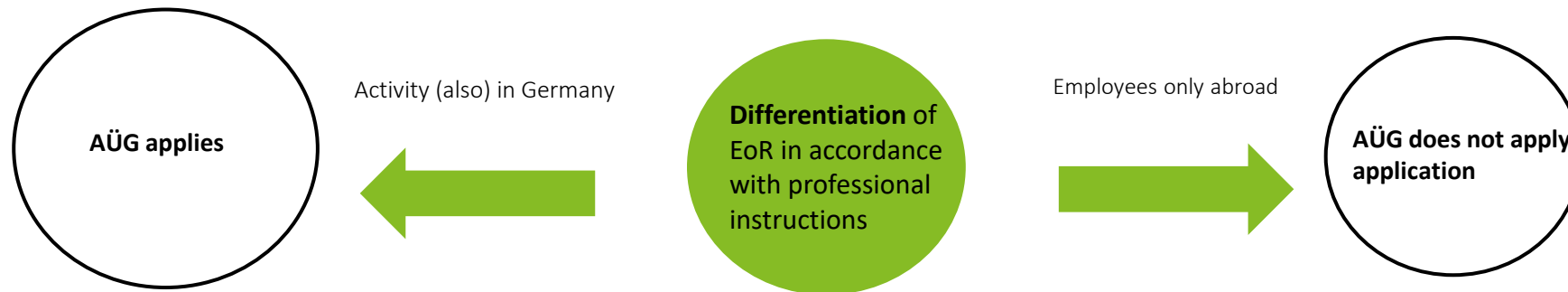
3. Employer of Record

The territoriality principle states that regulations of a public-law nature - such as the authorization requirement of the AÜG - are applicable if the **fact pattern has any connection to the state territory** (domestic connection).

Professional instructions in accordance with the AÜG of the Federal Employment Agency

"1.1.1 Scope of the authorization requirement under the AÜG

- (1) *In geographical terms, the scope of the authorization requirement under the AÜG is limited to the territoriality principle of the Federal Republic of Germany. (...)*
- (2) *Within Germany, the AÜG applies equally to the activities of domestic and foreign temporary work agencies. It therefore covers assignments in Germany, as well as assignments into and out of Germany. Not covered are assignments by a foreign temporary work agency to a domestic user undertaking if the temporary worker is deployed exclusively abroad."*



Business trip, short stay for training or mobile work in Germany

- The AÜG does not differentiate according to the scope or duration of the activity and the territoriality principle only provides for a spatial, but not a temporal restriction.

3. Employer of Record

Dispute over the territoriality principle

Only the Federal Employment Agency ("BA") is bound by internal professional instructions

Minority opinion: With reference to an informal assessment by the BA: In the case of activities that enable digital integration into the user undertaking's work organization, e.g. in the IT sector, without physical work in Germany, the applicability of the AÜG is necessary

According to prevailing opinion (literature) no application of the AÜG

- Purely **virtual integration** and **processing of the work results in accordance with instructions** is not sufficient for domestic link
- **Meaning and purpose** of the authorization requirement pursuant to Section 1 (1) sentence 1 AÜG:
 - Lender removed from exercising effective control
 - Wording of **the explanatory memorandum to the law (AÜG)**: "*According to the principle of territoriality, the assignment of workers to perform work in Germany is covered. This does not depend on the location of the temporary work agency.*" Such work performance in Germany is simply missing in the present case.

Evaluating individual cases: Compared to the recognised variants, the facts of the case are less related to the national territory

Does the role of a intermediary based in Germany lead to a sufficient domestic link?

Arguments of the prevailing opinion against the applicability

➔ Domestic connection and illegal chain leasing within the meaning of Section 1 (1) sentence 3 AÜG (unlawful subletting of temporary workers) must be ruled out, as the intermediary acts neither contractually nor de facto as a temporary worker agency and only the contractual employer provides instruction rights to the German client.

Notes and criticism: This is likely to apply in any case if the intermediary does not exercise any rights to issue instructions to the employees provided and assumes a passive role in relation to the employees. Otherwise, there would be two potential addressees of the AÜG in Germany, the German client and the intermediary, which could establish a sufficient domestic link.

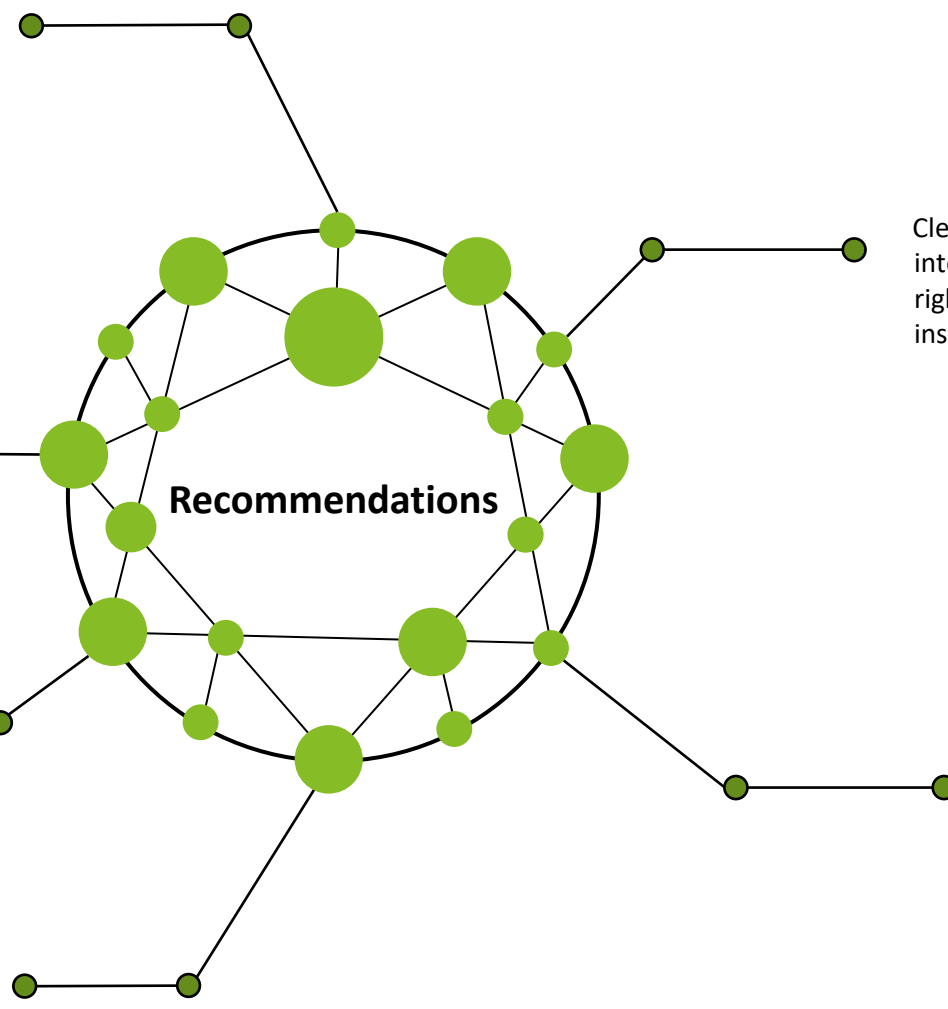
3. Employer of Record

No cross-border traveling and mobile working in Germany: compliance and liability arrangements with the (in particular third-party) EoR; training of own employees, especially project managers and HR managers

Risk-aware alignment with the professional instructions and prevailing opinion.

Review from a tax perspective

Check according to foreign law



Clear rules for intermediaries: no rights to provide instructions, etc.

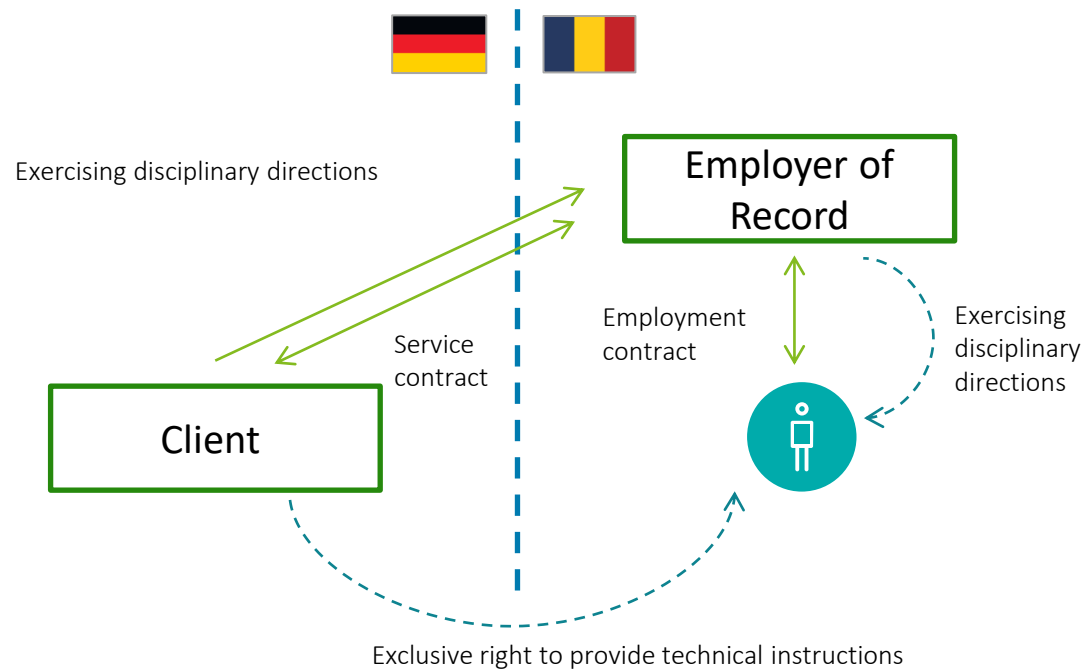
Agreements with EoR and intermediaries according to which future changes in the legal situation lead to specific contractual adjustments

III. Tax Perspective

III. Tax Perspective

Business activities and cross-border collaboration | Example: Exercising directions in a cross-border context

Overview



Description

- A German-based company (“Client”) involves a third party abroad (e.g., in Romania) to provide certain services, e.g. programming services (“Employer of Record” or “EoR”).
- The services are provided locally by employees of the EoR. The client provides only technical instructions to the employees. Only indirectly via the EoR, disciplinary directions (e.g. termination, vacation approval, promotions, evaluations) could be exercised to a certain degree vis-à-vis the employees.



The activities of own or third-party employees in a cross-border context can lead to local tax liabilities, if the local activities are attributable to the respective foreign company.

III. Tax Perspective

Typical implications resulting from local tax liabilities and consequences of non-compliance

Typical implications at the level of companies when triggering local tax liabilities (exemplary only, depending on the jurisdiction)



Implications for the company

Risk of effective double taxation of income

- (additional) tax burden at a local level;
- Ambiguous allocation of profits.

Additional administrative efforts

- Registration obligations, e.g., with local authorities;
- Reporting obligations, e.g., submission of annual financial statements;
- Filing obligations, e.g., of tax returns;
- Declaration and withholding tax filing obligations (e.g., for payroll and wage purposes), social security notifications, etc.

Consequences arising in case of non-compliance (exemplary only, depending on the jurisdiction)



Consequences for the company

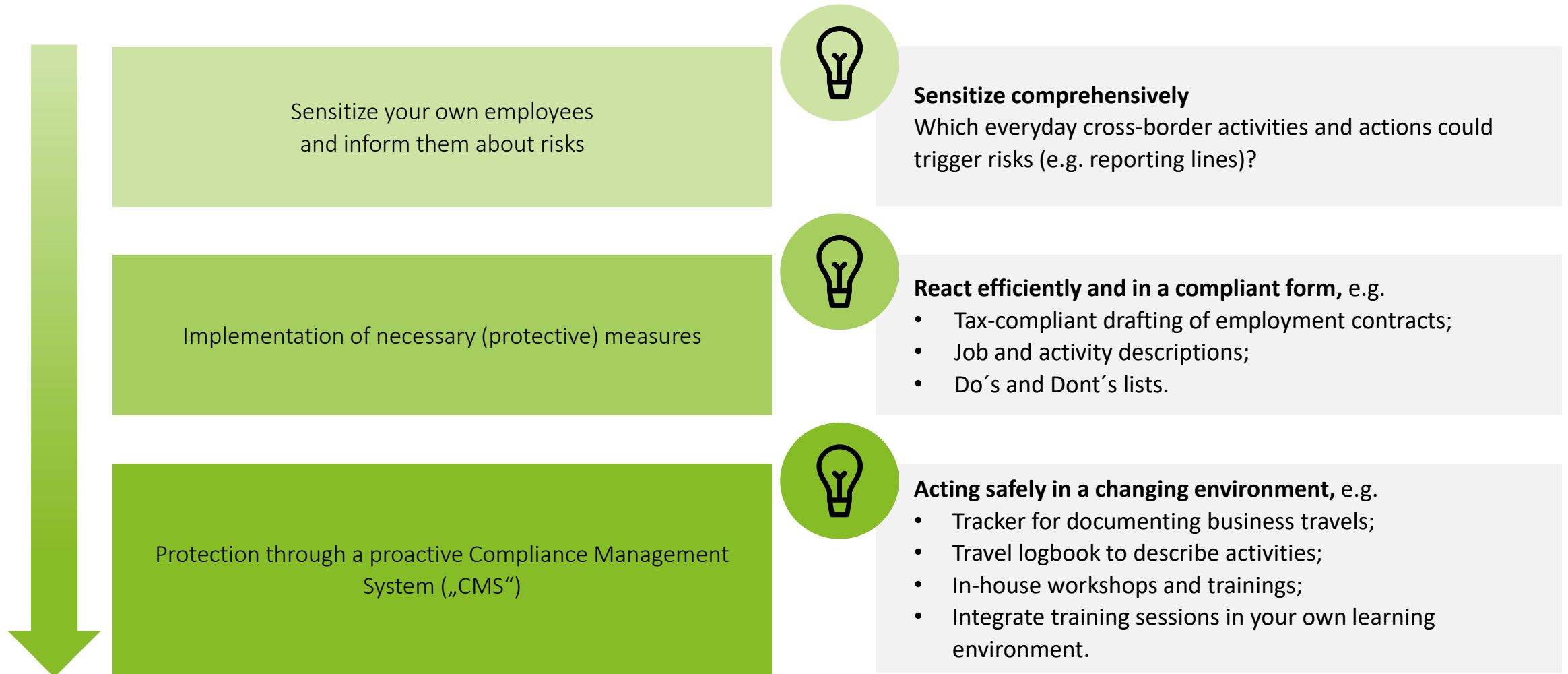
- Late payment fees and fines;
- Interest on taxes evaded and late payments;
- Penalties and fines (in some cases based on annual turnover);
- Reputational losses and blacklisting.



Consequences for management and involved staff

- Penalties and fines;
- Custodial sentences;
- Reputational losses on the labor market.

III. Tax Perspective Measures



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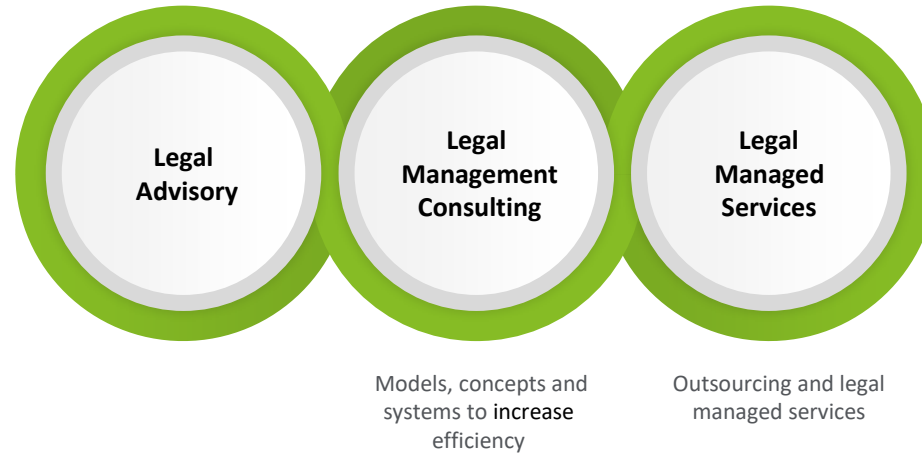
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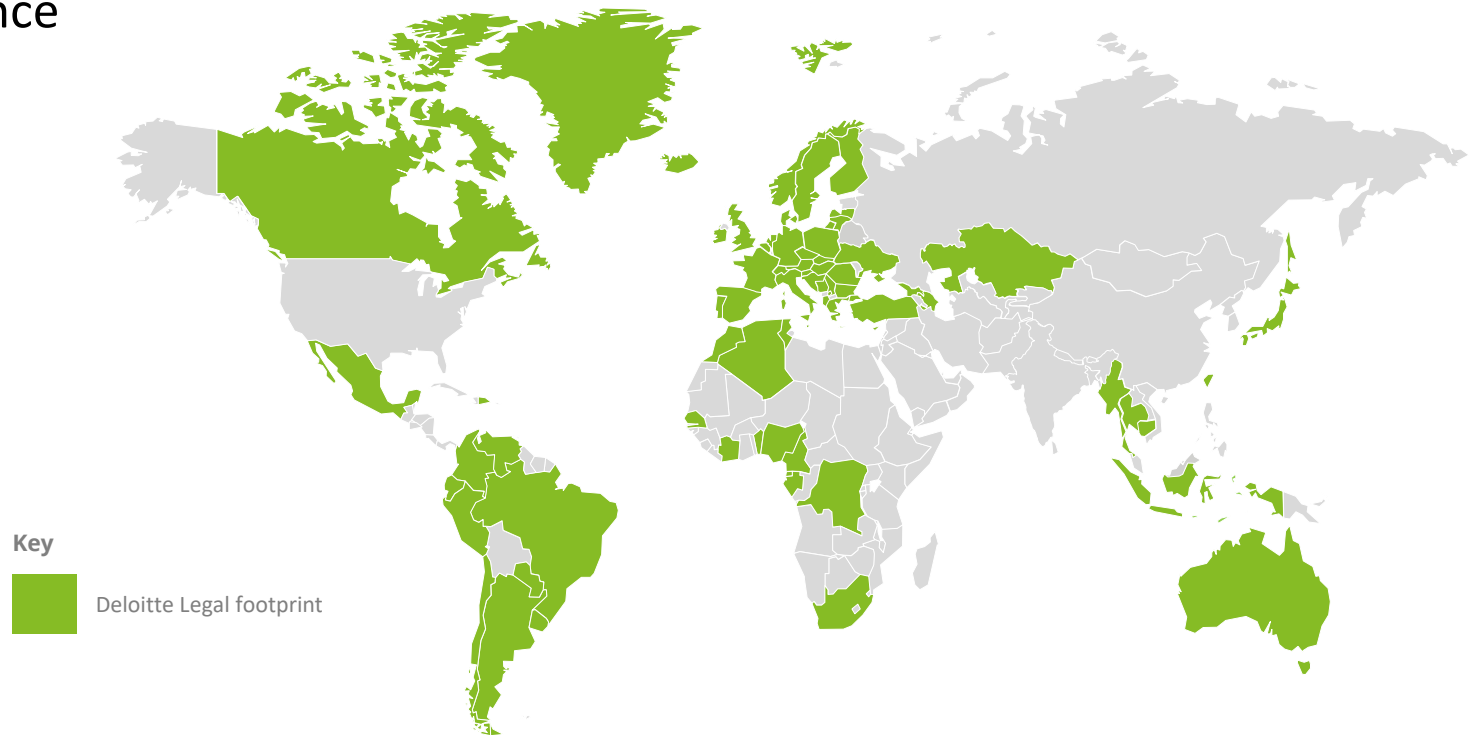


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