



● Transfer Pricing Developments Poland Germany Austria Netherlands

July 1, 2021



Speakers



Artur Kłesk
Partner
+48 728 825 635
artur.klesk@enodo.pl



Jakub Beym
Senior Associate
+48 602 636 436
jakub.beym@enodo.pl



Klaus Dörner
Managing Director
+49 178 8772395
kd@klaus-dorner-consulting.de



Oliver Treidler
Managing Director
+49 30 5552 5555
ot@tp-and-c.de



Theo Elshof
Managing Director
+31 88 221 58 00
t.elshof@quanteraglobal.com



Index

Poland

- 2 years in new regime
- personal liability non-compliance
- tax havens rules

Germany and Austria

- changes
- administrative principles
- TP issues

Netherlands

- political landscape and take aways
-



Poland

Transfer pricing rules – 2 years in new regime	5
Personal liability (management board members) for non-compliance	8
New tax havens regulations – controversial approach	9





Two Years in new regime - summary of TP documentation obligations

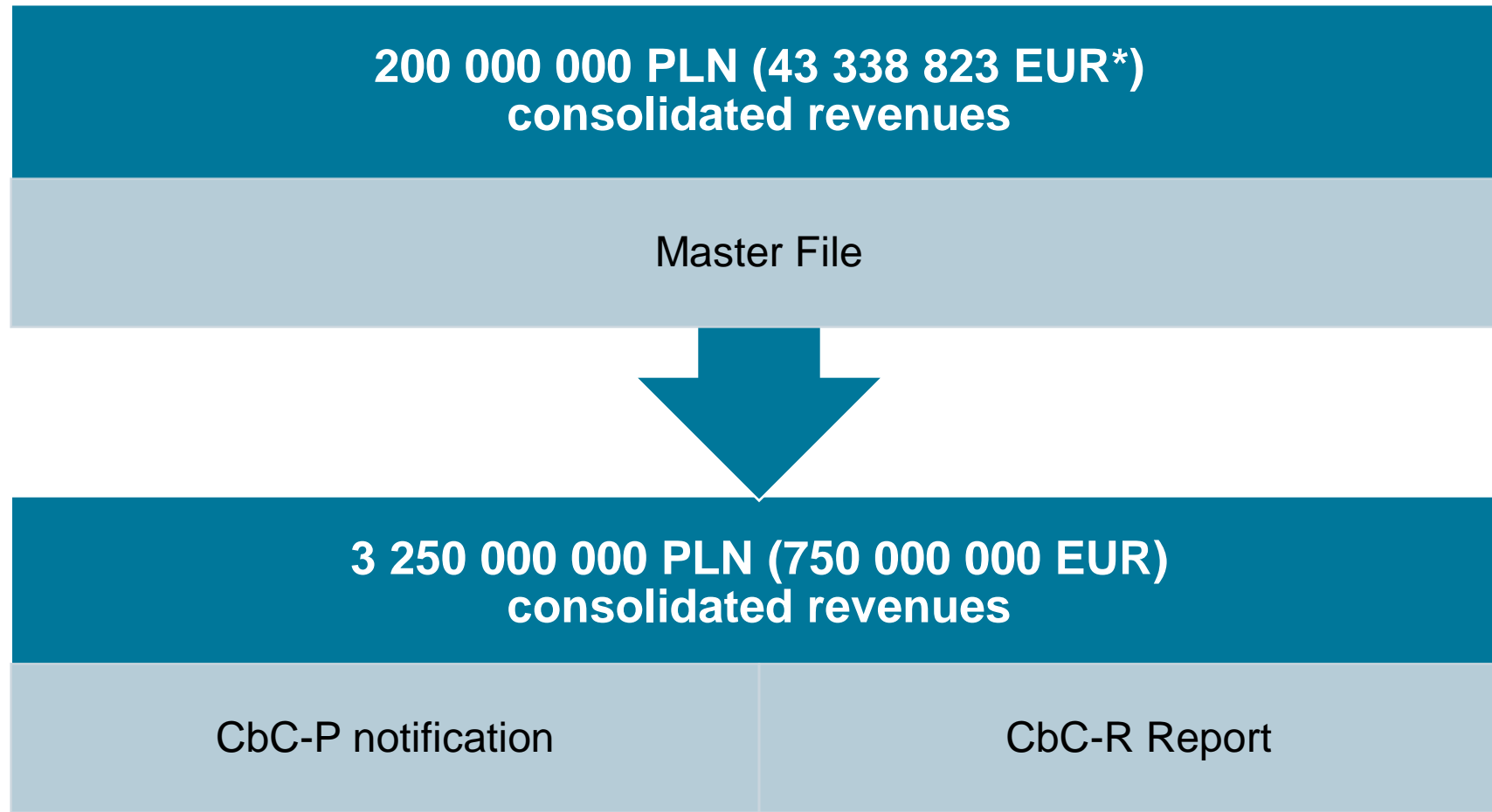
10 000 000 PLN (2 166 941 EUR*) – financial / goods transactions
2 000 000 PLN (433 388 EUR*) - services and other transactions

Local File	Statement on the preparation of documentation and market level of settlements („Statement of the management board”)	TPR Form	Transfer pricing analysis (in the form of a benchmarking study or a compliance analysis)
------------	---	----------	--

*exchange rate on 31.12.2020

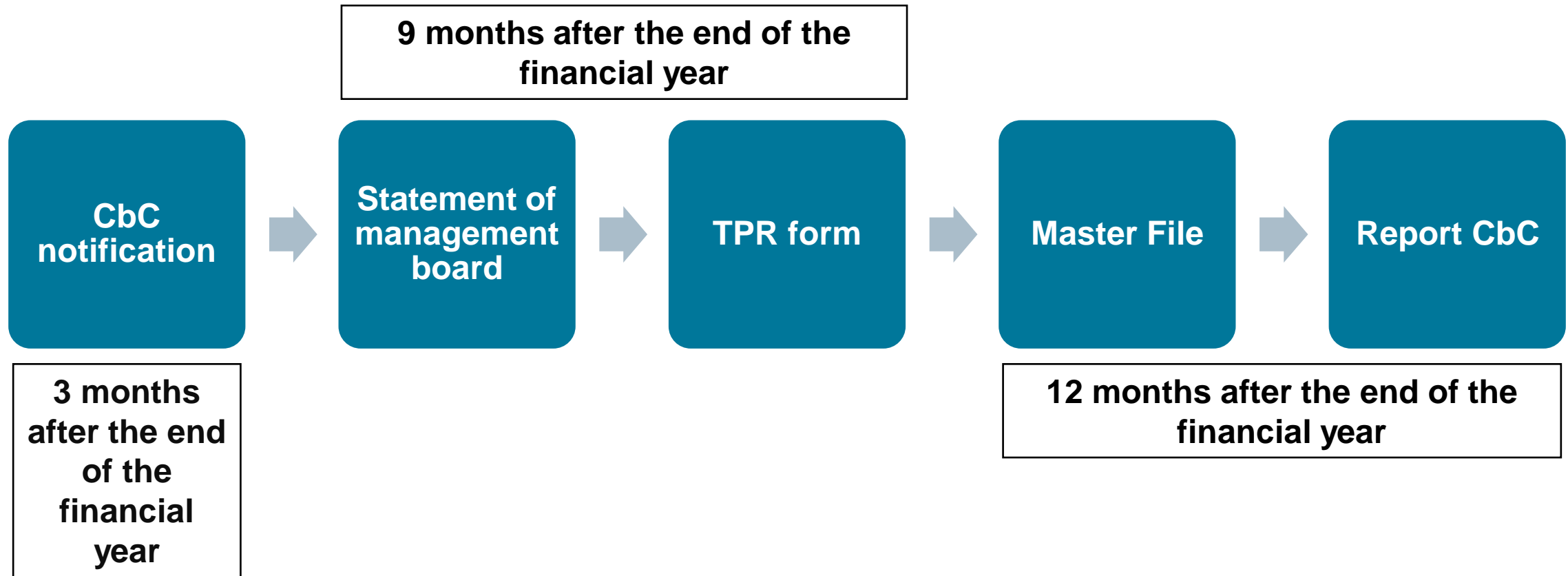


Two Years in new regime - summary of TP documentation obligations



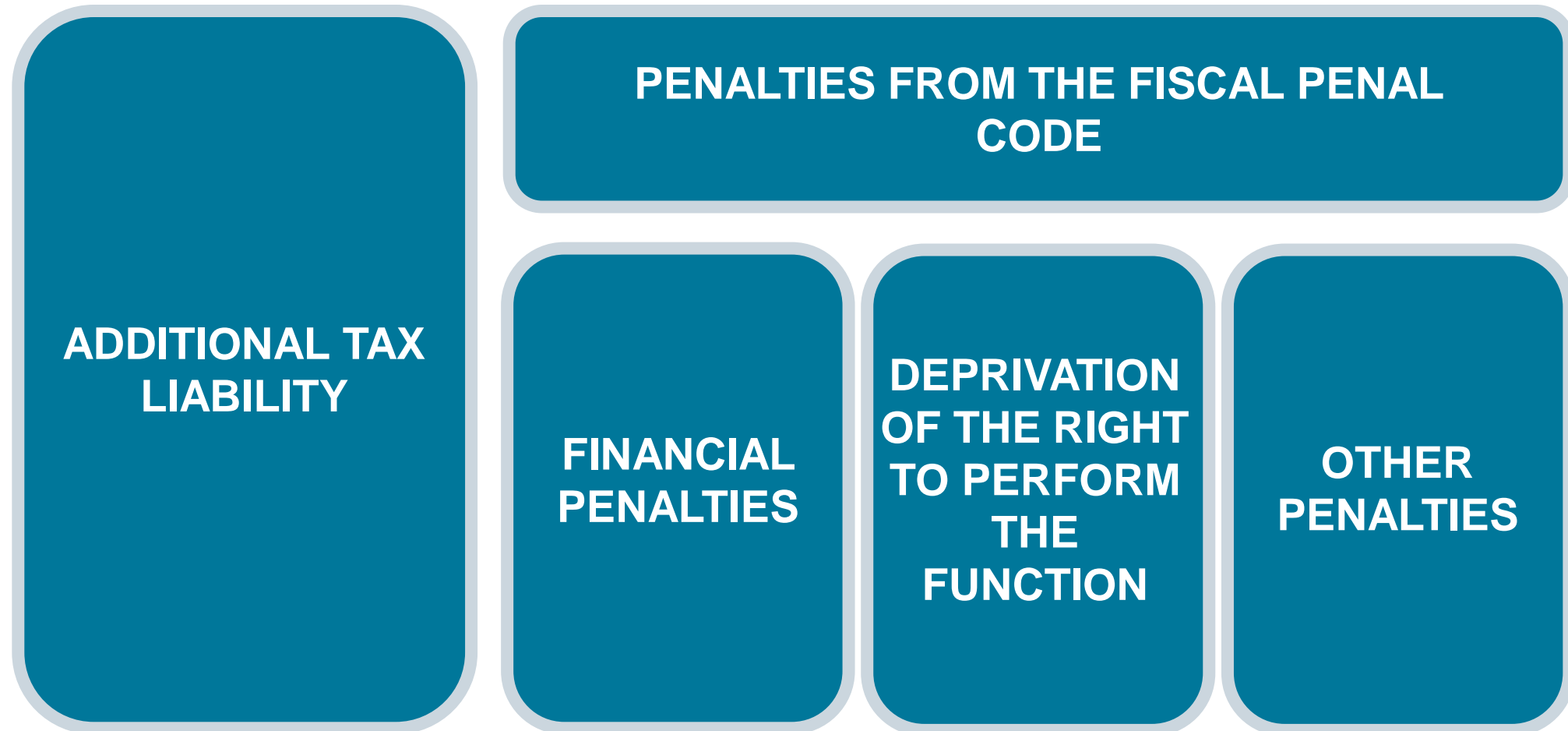


Documentation obligations - Timeline





Personal liability (management board members) for non-compliance





List of tax havens in Poland and EU

List adopted by the EU Council 22 February 2021

1. American Samoa
2. Anguilla
3. Dominica
4. Fiji
5. Guam
6. Palau
7. Panama
8. Samoa
9. Seychelles
10. Trynidad in Tobago
11. United States Virgin Islands
12. Vanuatu



Ordinance of the MF of 28 March 2019

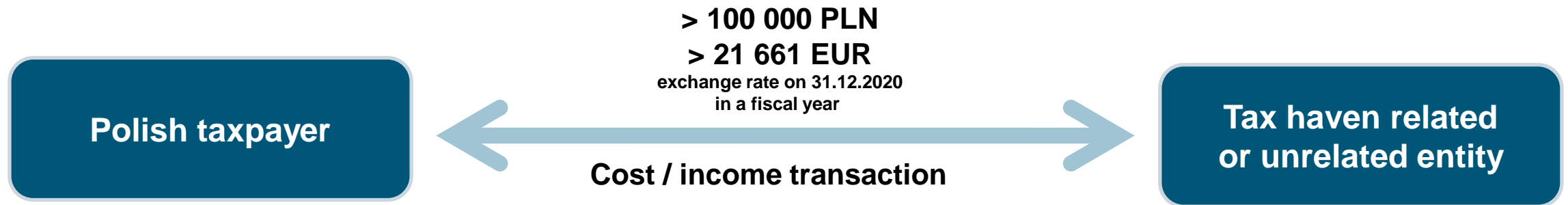
- | | |
|-----------------------------|----------------------------------|
| 1. Andora | 14. Maldives |
| 2. Anguilla | 15. Marshall Islands |
| 3. Antigua and Barbuda | 16. Mauritius |
| 4. Sint Maarten and Curaçao | 17. Monaco |
| 5. Bahrain | 18. Nauru |
| 6. British Virgin Islands | 19. Niue |
| 7. Cook Islands | 20. Panama |
| 8. Dominica | 21. Samoa |
| 9. Grenada | 22. Seychelles |
| 10. Sark | 23. Saint Lucia |
| 11. Hong Kong | 24. Tonga |
| 12. Liberia | 25. United States Virgin Islands |
| 13. Macao | 26. Vanuatu |





Tax haven compliance approach controversy

Direct transactions with tax havens



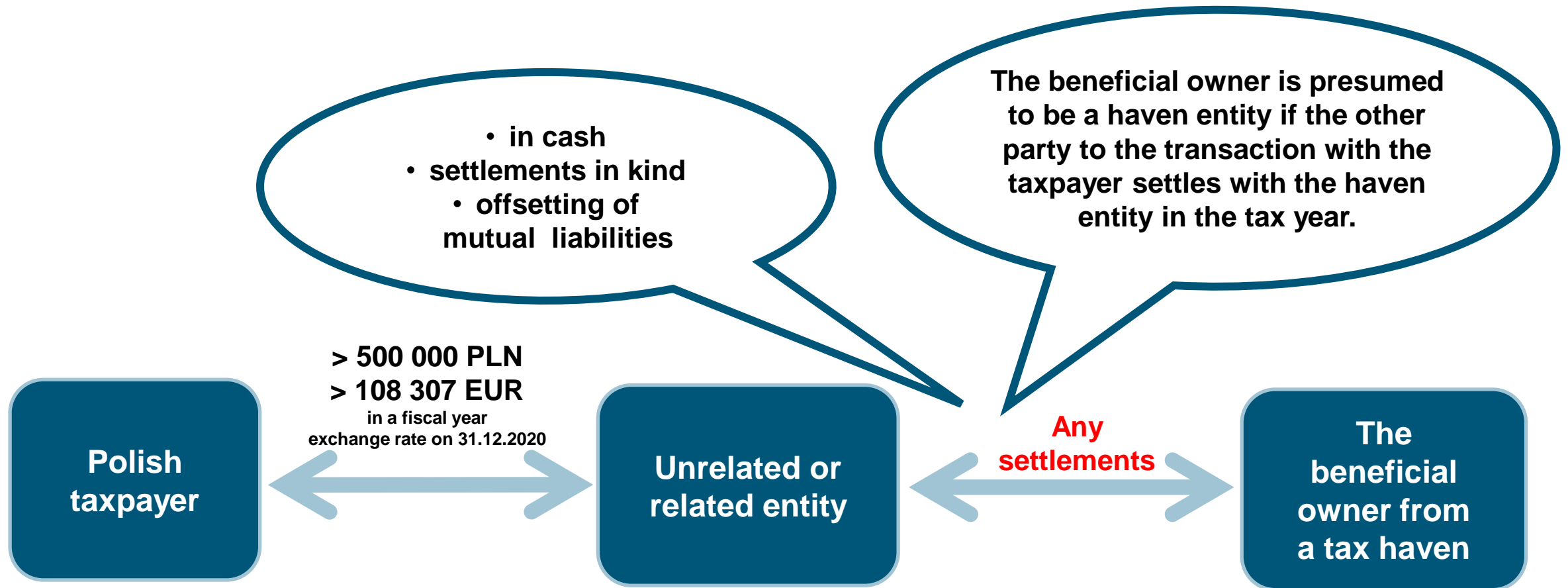
According to the legal definition, a beneficial owner is an entity that meets all of the following conditions:

- receives the receivable for its own benefit, including deciding independently on its use and bearing the economic risk of losing the receivable or part of it,
- it is not an intermediary, representative, trustee or other entity that is legally or actually obliged to transfer all or part of the claim to another entity,
- has a real economic activity in the country of establishment if the receivable is received in connection with a business activity.



Tax haven compliance approach controversy

Indirect transactions with tax havens





New legislation examples of difficulties

Lack of legal instruments to obtain a declaration from the counterparty

Any settlement of a Polish taxpayer's counterparty may be treated as shifting income to a tax haven

Greater obligations imposed on taxpayers who transact with a counterparty than on those who transact directly with a tax haven entity



New legislation examples of difficulties

No obligation to submit to a Polish company a statement on transactions with an entity from a tax haven!



Should every transaction be seen as shifting income to a tax haven?



Germany

Changes to § 1 AStG	15
Other changes	22





Changes to § 1 AStG - Overview

- Intention: Implementation of OECD BEPS Project
 - Assure consistency with international standards, and
 - Define German position where no clear international rules exist
- Main Changes
 - Sec. 2 (“Related Party Concept”) with wider scope (ATAD-UmsG)
 - Sec. 3 (Application of Arm’s Length Principle **ALP**) redrafted (AbzStEntModG)
- Other Aspects
 - Now Legal Basis for APAs (89a GTC)
 - Changes applicable for FY 2022 (§21 sec. 25 FTC)
 - Some planned changes not implemented => should yet be observed!





Changes to § 1 AStG – “Relatedness” (sec. 2)

- Definition of “Relatedness”
 - (Direct/Indirect) Shareholding of $\geq 25\%$ or “dominant” influence on the other party
 - A person is shareholder ($\geq 25\%$) of both parties or “dominant” influence on both
 - Influence on other party’s decisions for reasons other than the transaction itself
 - Person has own interest in the other party’s income (common interest)
 - **New: Entitlement to at least 25% of profit (or liquidation income)**
 - Intention: cover structures where shareholding quota \neq profit entitlement quota
- Comment:
 - Observe whether you have such structures
 - Suggested/not implemented: “Common Interest” for Network Organizations
 - (Third Party) Network entities and their organizations (cf. 319b HGB)



Changes to § 1 AStG – Application of ALP (sec. 3)

- § 1 sec. 3 AStG (new)
 - Prevalence of factual circumstances: factual F&R profile basis for comparability analysis (contracts only starting point)
 - Time of contract conclusion relevant (ex-ante perspective)
 - TP Determination based on “Best Method”
 - Comparability Adjustments if possible & and reasonable
 - if NO Comparables, hypothetical ALT (economically accepted valuation methods)
- Comment:
 - Increased scrutiny on deviation of actual conduct from contract
 - Timely documentation required for analysis of ex-ante situation
 - Reasonably comprehensive discussion of method selection
 - Comparability adjustments not only an option anymore



Changes to § 1 AStG – Application of ALP (sec. 3)

- § 1 sec. 3a AStG (new)
 - Arm's Length Test generally gives "Range", narrowed if (after adj.) still differences
 - IQR required range concept (if narrowing cannot be based on values themselves)
 - Adjustment to Median if outside the (narrowed) range
 - Exception: taxpayer substantiates other value to be arm's length
 - Midpoint of range for Hypothetical ALT
 - Exception: taxpayer substantiates other value **within the range**
- Comment
 - No general conceptual changes but IQR now legally required
 - "Escape Clause" for adjustment to median => how to be applied in practice?
 - Nothing on Hornbach decision that NON-Arm's Length dealing shall be justifiable!



Changes to § 1 AStG – Application of ALP (sec. 3)

- § 1 sec. 3b AStG (new)
 - Rules on Restructurings and Transfer Package largely unchanged, **but:**
 - Small but significant: Functions/Chances/Risks + Assets **OR (not AND!)** other advantages
 - Legal definition of Transfer Package: “Function as a whole”
 - Two escape clauses abandoned & another restricted
- Comment
 - Concept scope widened (or/and as well as escape clauses)
 - Improvement insofar as specific German (Tax) valuation rules are abandoned for “economically well-accepted valuation methods” (cf. Sec.3)



Changes to § 1 AStG – Application of ALP (sec. 3)

- § 1 sec. 3c AStG
 - IP Definition: wide concept of “intangible values” (not asset!)
 - not material/financial/shareholding asset
 - Can be part of a business transaction (but not necessarily separately tradable)
 - Can solicit factual or legal position to a person
 - DEMPE Concept: Allocation of IP related profit based on DEMPE functions
 - financing of DEMPE does not entitle to IP profits (but only financing profit)
- Comment
 - Very wide IP definition (what is indeed not included?)
 - No guidance on how to apply DEMPE concept (e.g. for Matrix-Organization)
 - General intention to restrict profit of financing entities (see also – not-implemented – rules on I/C financing)





Changes to § 1 AStG – Application of ALP (sec. 3)

- § 1a AStG: Price Adjustment Clause for all IP Transactions
 - **Significant deviation** of actual from expected profit (basis for price setting)
=> rebuttable assumption: uncertainties, which third parties would cover through adjustment clause
 - “Significant Deviation” = new TP (actual profit) **more than 20%** away from old TP (expected profit), Calculation of new TP based on same principles as old TP
 - If no adjustment clause and deviation within **7 years** => adjustment in year 8
 - Adjustment = Amount of Deviation
 - Escape Clause: 1) unforeseeable developments, 2) proof that uncertainties properly considered, 3) sales or profit based license
- Comment
 - 20% rule can be very restrictive for many real world cases
 - Distinction between Uncertainty vs risk vs ignorance
=> shift of burden of proof for correct/unmanipulated valuation technique





Other Changes

- §1 sec. 6 FTC: Decree on application details (not for new §1a AStG!)
- § 89a GTC on APAs
 - Introduction of legal basis for APAs
 - APA fee of 30k Euros (instead of 20k Euros) + discounts for small companies
 - Discounts for APAs that are related/linked to a “joint audit”
- Planned Changes - Not implemented
 - 50 Mio (instead of 100 Mio) Euro turnover threshold for MF/LF TP documentation
 - (Third Party) Network Organizations as Related Parties
 - Specific (aggressive) rules on I/C financing (asymmetrical, not treaty conform!)





Austria



Administrative Principles in Germany and Austria	24
TP issues to have in mind	25
Supplemental information	26



Administrative Principles in Germany and Austria

- “Beyond” alignment with the post-BEPS OECD Guidelines
 - TP methods – hierarchy, “choice” and guidance [DE Rn 44-49] // AT Rz 23 and 25ff]
 - LVAISG and safe harbor for routine services [AT Rz. 88 – 98]
- Importance of administrative principles for day-to-day transfer pricing and tax audits
- Burden of proof and burden compliance
 - [DE Rn 13] Additional “evidence” of business contents with a relevant tax context – independent of applied TP method
 - [DE Rn 14] ensuring the procurement of relevant data (from related parties) to comply with “enhance cooperation” requirements – includes contractual provisions
- Structure and clarity – viva la Austria?!
 - DE => VWG 2005, VWG 2020, FTC (AbzStEntModG)
 - AT => VWG “2020”





Germany and Austria – TP issues to have in mind

- Functional and risk analysis
 - Economic substance [DE Rn 41 - 42 // AT Rz 23 und 62ff. plus 366ff.]
 - Value chain analysis and “control of risk” [AT Rz 64]
- Price-setting vs. Outcome-testing
 - Ex ante “matters” (much) [DE Rn 49 – 50 // AT Rz 73 - 74]
 - Year-End Adjustments
- Intercompany agreements
- Benchmarking and “target margins”
 - IQR



Supplemental information

- Germany's Ministry of Finance

<https://www.bundesfinanzministerium.de/Web/EN/Issues/Taxation/External-Tax-Relations/External-Tax-Relations.html>

- AbzStEntlModG

https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze/Gesetzesvorhaben/Abteilungen/Abteilung_IV/19_Legislaturperiode/Gesetze/Verordnungen/2020-11-20-AbzStEntModG/0-Gesetz.html

- German Administrative Principle Procedures 2020

<https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Taxation/Articles/2020-Administrative-Principles.html>

- Austrian Ministry of Finance – Transfer Pricing

<https://www.bmf.gv.at/themen/steuern/internationales-steuerrecht/Verrechnungspreise.html>

- Austrian Administrative Principle Procedures 2020

<https://www.bmf.gv.at/dam/jcr:b76aa787-3348-4fa3-8949-bc8ba6b4ca34/Verrechnungspreisrichtlinien%202020.pdf>



External Tax Relations



Source: Fotolia.de, Foto: Milton Oswald

General Information

General Information

The documents on this website provide information about German legislation relating to external tax relations, especially transfer pricing. For a comprehensive overview of the German tax system, please refer to the Finance Ministry brochure An ABC of Taxes .

Please note that this is not an exhaustive list. These working translations are provided as a courtesy by the Federal Ministry of Finance's Language Service and are merely for informational purposes. Only the German-language versions are authoritative for the application of the law. Please note that the translations have not been coordinated with other government bodies in Germany.

Fiscal Code

The most recent English translation of the German Fiscal Code (*Abgabenordnung*) is available [↗](#) Fiscal Code (*Abgabenordnung*) [pdf, 1MB] .

The German version is available [↗](#) here.

External Tax Relations Act

The most recent English translation of the External Tax Relations Act (*Außensteuergesetz*) is available [↗](#) External Tax Relations Act [pdf, 187KB] .

The German version is available [↗](#) here.

[+](#) Ordinances related to the External Tax Relations Act

[+](#) The Finance Ministry circulars

Transfer Pricing

The glossary on [↗](#) Verrechnungspreise provides an overview of the German terminology related to transfer pricing (*only available in German*).





The Netherlands

From merchant to pastor	28
TP Documentation	29
TP risk management more complex	30
APA request	31
Take aways	32



From merchant to pastor

- Political landscape is more focused on international acceptance!
 - From merchant to pastor
 - More aggressive audits/penalties
 - Certainty in advance even more centralized and have to be formally approved by a college of 7 (IFZ)
- Growing compliance / formal procedures
- However Dutch Tax Authorities are highly experienced in TP with whom you can discuss on the content and realize solutions.



TP documentation

- Tax Law on TP documentation requirements since 2002
Current TP documentation requirements
 - > 50 mio Eur - MNE has to fulfill the OECD requirements (MF/LF)
 - >750 mio Eur - CbCr filing is required
- Netherlands always more focused on relevant facts/circumstances.
However growing demand/focus on compliance burden and formal procedures
- Penalties on non-compliance (revolution for TP in the Netherlands)





TP risk management (even) more complex

- APAs more aligned with OECD/EU on:
 - Economic nexus
 - Low tax / non cooperation countries
- APAs still possible, but more complex
 - First Corona APA concluded by QG Netherlands.
 - Recently a highly complex APA concluded
- Growing bi- and multilateral audits.
- More focus on robust TP documentation



APA Request

- There are several criteria to fulfil in order to request an APA
 - Sufficient *economic nexus* in the Netherlands
 - The principal objective or one of its principal objectives should not be a Dutch or foreign tax advantage
 - Transactions in the APA should be not be concluded with parties based in jurisdictions that are on the list of low-taxed jurisdictions and non-cooperative jurisdictions for tax purposes:
 - American Virgin Islands, American Samoa, Anguilla, Bahamas, Bahrein, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Fiji, Guam, Guernsey, Isle of Man, Jersey, Palau, Panama, Samoa, Seychelles, Turkmenistan, Turks and Caicos Islands, Trinidad and Tobago, UAE and Vanuatu



Take aways

- Dutch Tax Authorities more aggressive in audits.
- Growing awareness of international political pressure and frontrunner in BEPS 2.0
- Growing interest in bi- multilateral audits.
- Robust TP documentation even more important
- However DTA is still highly professional and supportive in the avoidance of international double taxation (APA's even more valuable in your TP risk management)



Speakers



Artur Kłesk
Partner
+48 728 825 635
artur.klesk@enodo.pl



Jakub Beym
Senior Associate
+48 602 636 436
jakub.beym@enodo.pl



Klaus Dörner
Managing Director
+49 178 8772395
kd@klaus-dorner-consulting.de



Oliver Treidler
Managing Director
+49 30 5552 5555
ot@tp-and-c.de



Theo Elshof
Managing Director
+31 88 221 58 00
t.elshof@quanteraglobal.com

