

BLACKLISTS AND RUSSIANS

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OVERVIEW

- ▶ Blacklists, Grey and Whitelists and how they work -with some SA observations
- ▶ Sanctions being imposed against Russian nationals by various countries impact on trust providers

THE FINANCIAL ACTION TASK FORCE (FATF)

- ▶ FAFT is the **global money laundering and terrorist financing watchdog**.
- ▶ The inter-governmental body sets **international standards** that aim to prevent these illegal activities and the harm they cause to society.
- ▶ **policy-making body**, the FATF works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.
- ▶ 37 member jurisdictions part of FATF - **includes South Africa**
- ▶ The FATF Recommendations set out a comprehensive and consistent framework of measures which countries should implement in order **to combat** :
 - ▶ money laundering(ML) - corruption, tax related crimes and fraud main domestic SA threats
 - ▶ and terrorist financing (TF), and
 - ▶ financing of proliferation of weapons of mass destruction
- ▶ There are **40 recommendations** to evaluate a countries` ML/TF legislation and implementation

FATF - RECOMMENDATIONS - MARCH 2022

- ▶ Countries evaluation by peer reviews.
- ▶ **7 October 2021 - South Africa's** evaluated via peer review - report available on FATF website. Some important comments are re SA:
 - ▶ ML - vulnerabilities
 - ▶ TF - risk identification measures are underdeveloped and not adequately addressed
 - ▶ State capture - key agencies was undermined to combat corruption
 - ▶ Financial Intelligence Centre (FIC) - effectively produces operational financial intelligence that LEA use to investigate predicate crimes and trace criminal assets - BUT
 - ▶ still **lack skill and resources** to proactively investigate ML and TF
 - ▶ **Cash via boarder transactions not reported**
 - ▶ **Low level reporting from Designated Non-Financial Businesses and Professions (DNFBP)-**
 - ▶ DNFBPs such as attorneys, other TCSPs, estate agents, and DPMS, are inherently **vulnerable to misuse**
 - ▶ **Insufficient corporate ownership transparency** also represents an acute vulnerability in South Africa;
 - ▶ **companies and trusts are** misused often for ML or to carry out predicate crimes and there is no comprehensive framework for accessing accurate and up-to-date BO information.

MORE COMMENTS... SA

- ▶ Larger banks are more developed at understanding their ML risks and implementing mitigating measures commensurate with those risks.
- ▶ Smaller Financial Institutions (FIs) and DNFBPs are focused on compliance, not on identifying and understanding risks.
- ▶ TF risk is understood by the private sector to some extent.
- ▶ Overall, the risk-based approach (RBA) is inadequately implemented.
- ▶ SA non compliant- **4 OUT OF THE 40 FTF RECOMMENDATIONS NOT COMPLIANT**
 - ▶ **TARGETED FINANCIAL SANCTIONS -TERRORISM /TERRORIST FINANCING (6)** South Africa has major shortcomings for this recommendation.
 - ▶ There are delays in the implementation of Targeted Financial Sanctions (TFS) for United Nations Security Council Resolutions (UNSCR) 1267, 1989 and 1998, and
 - ▶ No domestic process for making proposals nor identifying targets for designation under these resolutions. For UNSCR 1373, South Africa relies on a freezing mechanism that does not amount to proper designations for TFS as it focuses on identification of property rather than on designated entities
 - ▶ **Non profit organisations -(8)**
 - ▶ South Africa has not yet done an assessment of their broader NPO sector to identify those organizations, based on their characteristics or activities, that put them at risk of TF abuse.
 - ▶ South Africa also has no capacity to monitor or investigate NPOs identified to be at risk of TF abuse

MORE ...

► NEW TECHNOLOGIES (15)

Virtual asset service providers (VASP) **are not** required to take AML/CFT measures beyond the reporting obligation (which is addressed to all businesses), and **are not subject to licensing or registration, nor supervised**. These are major deficiencies.

VASP - are subject to the same general obligation to report suspicious and unusual transactions to the FIC (**FIC Act, s.29**) and the same sanctions for failure to report or for tipping off as other businesses.

► RELIANCE ON THIRD PARTIES (17)

Major shortcomings are identified, particularly where there are no explicit requirements instructing the Accountable Institution - relying on a third party to obtain immediately the necessary information concerning outsourced Customer Due Diligence (CDD) measures, to satisfy itself that copies of relevant data will be made available upon request, to satisfy itself that the third party is regulated, supervised and has measures in place for compliance with CDD and record keeping requirements.

Furthermore, no reference is made to determining **in which countries the third party can be based**, considering information available on the **level of country risk**, beside more general reference to public warnings on FATF's call for countermeasures against countries with **strategic deficiencies**.

FAFT - EVALUATION OF RECOMMENDATIONS

- ▶ The FATF reviews jurisdictions based on **threats, vulnerabilities, or particular risks arising from the jurisdiction**. Specifically, a jurisdiction will be reviewed when:
 - ▶ It does **not participate in a FATF-style regional body (FSRB)** or does not allow mutual evaluation results to be published in a timely manner; or
 - ▶ It is **nominated by a FATF member or an FSRB**. The nomination is based on specific money laundering, terrorist financing, or proliferation financing risks or threats coming to the attention of delegations; or
 - ▶ It has achieved poor results on its mutual evaluation, specifically:
 - ▶ it has **20 or more non-Compliant (NC)** or Partially Compliance (PC) ratings for technical compliance; or
 - ▶ it is rated NC/PC on 3 or more of the following Recommendations: 3, 5, 6, 10, 11, and 20; or
 - ▶ it has a low or moderate level of effectiveness for 9 or more of the 11 Immediate Outcomes, with a minimum of two lows; or
 - ▶ it has a low level of effectiveness for 6 or more of the 11 Immediate Outcomes.

FATF : BLACKLISTED JURISDICTIONS

- ▶ The FATF identifies **jurisdictions** with weak measures to combat ML and CFT in two FATF public documents that are issued three times a year.

High-Risk Jurisdictions subject to a Call for Action"

- ▶ Jurisdiction has serious strategic deficiencies to counter money laundering, terrorist financing, and financing of proliferation.
- ▶ For all countries identified as **high-risk**, the FATF calls on all members and urges all jurisdictions to apply **enhanced due diligence**, and in the most serious cases, countries are called upon to **apply counter-measures to protect the international financial system from the ongoing money laundering, terrorist financing, and proliferation financing risks emanating from the country.**

FAFT BLACKLIST MARCH 2022

- ▶ Democratic People's Republic of Korea (DPRK)
- ▶ Iran

FATF GREY LISTED

- ▶ Grey Lists - FATF placed certain jurisdiction under increased monitoring
- ▶ Country has strategic deficiencies - reference to global standards
- ▶ ? country has committed to resolve swiftly the identified strategic deficiencies within agreed timeframes and is subject to increased monitoring.

FATF GREY LISTED COUNTRIES - MARCH 2022

- ▶ Albania
- ▶ Barbados
- ▶ Burkina Faso
- ▶ Cambodia
- ▶ Cayman Islands
- ▶ Haiti
- ▶ Jamaica
- ▶ Jordan
- ▶ Mali
- ▶ Malta
- ▶ Morocco
- ▶ Myanmar
- Nicaragua
- Pakistan
- Panama
- Philippines
- Senegal
- South Sudan
- Syria
- Turkey
- Uganda
- United Arab Emirates
- Yemen

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

- ▶ OECD - implement 15 Actions to tackle tax avoidance, improve coherence of international tax rules and insure transparent tax environment and address challenges from digitalization of the economies.
- ▶ **15 Action steps**
 - ▶ Tax challenges arising from Digitalization (1)
 - ▶ Neutralizing the effects of hybrid mismatch arrangements (2)
 - ▶ CFC (3)
 - ▶ Limitation on interest deductions (4)
 - ▶ Harmful tax practices - (5)
 - ▶ Prevent Tax treaty abuse - (6)
 - ▶ Permanent Establishment status (7)

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

- ▶ Transfer Pricing (8-10)
- ▶ Base Erosion Profit Shifting data analysis (11)- Pillar 1 and II (BEPS 2.0)
 - ▶ PI applies to large multinationals, **purpose** reallocate certain amounts of taxable income to market jurisdictions, resulting in a change in effective tax rate and cash tax obligations & TP
 - ▶ PII aims to ensure that income is taxed at an appropriate rate and has a few complicated mechanisms to ensure this tax is paid - 15%.
- ▶ Mandatory Disclosure Rules (12)
- ▶ **Country by country reporting (13)**
- ▶ **Mutual Agreement Procedure (14)**
- ▶ Multilateral Instrument (15) - instrument to apply over venerable existing treaties -SA signed but not yet in force

OECD - LISTS OF UNCO-OPERATIVE TAX HAVENS

- ▶ In connection with its work on **harmful tax practices** - 31 jurisdictions have made commitments to transparency and effective exchange of information and are considered co-operative jurisdictions by the OECD's Committee on Fiscal Affairs.
- ▶ **Issue:** is specific jurisdiction harmful to the tax base of other jurisdictions?
- ▶ **BLACK, GREY AND WHITE**
- ▶ **OECD Grey list 5 October 2021 -.**
 - ▶ Anguilla
 - ▶ Dominica
 - ▶ Seychelles

OECD - LISTS OF UNCO-OPERATIVE TAX HAVENS

▶ OECD blacklist 5 October 2021

- ▶ American Samoa,
- ▶ Fiji,
- ▶ Guam,
- ▶ Palau,
- ▶ Panama,
- ▶ Samoa,
- ▶ Trinidad and Tobago,
- ▶ US Virgin Islands, and
- ▶ Vanuatu

RELATIONSHIP AML AND RUSSIAN SANCTIONS

- ▶ Not the same rules - one policy influence the other money laundering purpose
- ▶ **Beneficial owner -**
 - ▶ Who is the real beneficial owner?
 - ▶ Conceal - fraud?
 - ▶ Movements prior to sanction coming into by change of trust deed beneficiary classes, sham directors, sham ownership
- ▶ **Source of wealth - ?**
- ▶ **Some similarity :**
 - ▶ Ownership threshold -50%
 - ▶ Reporting regimes.

PERSONS TO BE CONCERNED ABOUT ...LISTED RUSSIANS

- ▶ Countries implement different Sanction with respect to Russians in general or specific lists of Russians - ongoing sections list all the time
 - ▶ **EU** - each country free to impose sanctions on persons, companies and trusts
 - ▶ EU prohibited any Management trustee services to any Russian except dual citizenship and not residing in Russia
 - ▶ **UK** (including crown dependencies) - post Brexit independent sanction policy
 - ▶ Passed mirror regulations like EU
 - ▶ Company
 - ▶ 50% share and voting rights in company
 - ▶ Right to remove majority
 - ▶ Reasonable to expect that person`s affairs are conducted in accordance person wishes
 - ▶ **US** - executive order by President US treasury
 - ▶ Company prohibited by any company which is held by 50% or more Russian held
 - ▶ **Switzerland** - historically neutral but imposed sanctions re Russians -EU guidance
 - ▶ **Hongkong** - follow UN sanction regime - carefully as part of China which has a friendship with Russia. Possible secondary sanctions - exclude from US financial system.
 - ▶ **SA** - ?

THE EUROPEAN UNION (EU) RE: TRUST

- EU Council Regulation (EU) 2022/576 - Article 5m
- Bans the following services- to register, provide a registered office, business or administrative address as well as management services to a trust or similar arrangement having as a trustee or a beneficiary :
 - Russian nationals or natural persons residing in Russia;
 - legal persons, entities or bodies established in Russia;
 - legal persons, entities or bodies whose proprietary rights are directly or indirectly owned more than 50 per cent by such a person or entity;
 - legal persons, entities or bodies controlled by a Russian national or natural person residing in Russia; and
 - any natural or legal person acting on behalf or at the direction of such a person or entity.
- *Should also cover ... protector....*
- 10 May 2022 - cannot act as Trustee, nominee shareholder, director, secretary or similar position..
- **Does not apply where the trustor or beneficiary is a national of a Member State or a natural person having a temporary or permanent residence permit in a Member State.**
- Also - reference to sanction list

TRUSTEES

▶ Trustees and Financial Advisors

- ▶ Persons on sanction list - policy decision of each country must be considered
 - ▶ **SETTLOR?** Must consider powers
 - ▶ **PROTECTOR ?** Must consider powers - *power to hire and fire trustee - control?*
 - ▶ **BENEFICIARY ?** *Fiduciary duty of Trustees vs Law?*
 - ▶ **TRUSTEE ?** - power in the deed to retire? But you can't leave the trust without a Trustee? Reality if trust fund is sanctioned how can you transfer the trust fund. Fiduciary breach of duties? Moving trusteeship may also be seen as dealing?
- ▶ **Assets freeze** - preserve the assets in question via freezing order preserve value by holding it belong to designated persons - no change of ownership is not confiscated
- ▶ **Assets confiscating** - Banks have venture in the manner change of ownership, understanding that Banks are struggling to sell these assets

TAINTED TRUST - EXAMPLE

- ▶ Founder - Russian listed person (UK designated persons).
- ▶ UBO - Russian family of designation list - many removed themselves before sanctions,
- ▶ Trustee (subject UK law) - reasonable subjective test apply?
- ▶ Cayman Trust with yacht (trust property).
- ▶ Nature of the Trust? Discretionary with no reservation powers?
- ▶ **Actions**
 - ▶ Freeze assets?
 - ▶ Not allow to deal with them *except a license from regulator (routine maintenance - VERY DIFFICULT TO OBTAIN)*
 - ▶ *Fees - can't just take them except if you have license - financially disastrous*
 - ▶ Report to applicable authority regulator

UK AND CROWN DEPENDENCIES

- ▶ Comprehensive list of Sanction invoked by UK-on-UK Government website.
- ▶ Section 43 of the Sanctions and Anti-Money Laundering Act 2018 (the Sanctions Act) and provide for the freezing of funds and economic resources of certain persons, entities or bodies involved in destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine, or obtaining a benefit from or supporting the Government of Russia
- ▶ The UK government also announced plans to prohibit the export of accountancy, management consultancy and public relations services to Russia
- ▶ Prohibition on the provision of fiduciary services (10May 2022).
- ▶ Legal services appear not to be included in the ban - reputation risk ?
- ▶ The UK has also announced asset freezes and travel bans against Russian news media providers and individuals, including journalists, associated with them. There are now 1,600 individuals and entities subject to UK sanctions.
- ▶ 63 entities on UK list

SWITZERLAND

- ▶ Switzerland has also broken from its tradition of staying outside the international sanctions regime and has agreed to adopt the EU sanctions against Russia.
- ▶ It will examine each further package of sanctions imposed by the EU on a case-by-case basis.

UNITED STATES OF AMERICA

- ▶ 8 May 2022 - Prohibitions for US persons on against delivering accounting, **trust and corporate formation**, and management consulting services.

<https://home.treasury.gov/news/press-releases/jy0771>

Madeleine Schubert -



- ▶ **International and Domestic Tax and Fiduciary Attorney.**
- ▶ Professional qualifications, BProc (cum laude), HdipTax, MCom, Qualified Attorney, designation TEP and Qualified Transformational Business Coach.
- ▶ Member of the Legal Society of South Africa, Member of the German-South African Lawyers Association, Member of STEP and FISA.
- ▶ Financial Services RE1 and RE5 Key Individual.

Questions

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the right side of the frame, with some extending towards the center. The overall aesthetic is clean and modern.