The potential inclusion of the Russian Federation in the 'FATF Blacklist' and the recognition of the Russian Federation as a state sponsoring terrorism by the Government of the United States of America

PART II
This is the second article devoted to the potential inclusion of the Russian Federation in the FATF Blacklist and recognition of Russia by the Government of the USA as a state sponsoring terrorism. Within this publication, we throw some light on the criteria and ground for the inclusion of a country in the FATF Blacklist, as well as the procedure and potential consequences of such countmeasure by FATF. To re-sync, the first article is available HERE and deals with more general aspects of the topic.

SECTION I
CRITERIA AND GROUNDS FOR INCLUSION OF A COUNTRY IN THE BLACKLIST

Subsection 1.1. General criteria for countries’ compliance with the FATF requirements and practices

The following are general requirements and expectations of the FATF for the countries wishing to avoid being blacklisted. These include:

01 Requirements for the legal system (such as criminalization of money laundering and financing of terrorism, etc.)

1. Criminalization of money laundering and financing of terrorism
2. Confiscation, freezing and seizure of proceeds of crime
3. Proper functioning of the financial control body and the law enforcement system

02 Measures aimed at preventing money laundering and financing of terrorism, which should be carried out by financial institutions, non-financial economic entities, as well as officials (such as proper customer and information storage control, etc.)

1. Proper customer and information storage control
2. Suspicious transaction and compliance reports
3. Designation of a body authorized to impose sanctions for money laundering or financing of terrorism
Sanctions should apply not only to legal entities and financial institutions, but also to their directors and members of the collective management bodies.

Sanctions should include the authority to impose disciplinary and financial penalties, the powers to suspend, revoke or cancel a license of the financial institution.

Requirements for the system of counteraction of money laundering and financing of terrorism

Availability of a competent authority with the necessary powers, as well as adequate funding for its activities

Access to information on beneficial ownership and relationships of control

International cooperation

Mutual legal assistance

Countries should be able to provide the widest possible range of mutual legal assistance in investigations, prosecutions and related proceedings. Mutual legal assistance should include assistance of the following nature: (a) preparation, retrieval and seizure of information, documents or evidence (including financial records) from financial institutions or other natural persons or legal entities; (b) receipt of evidence or statements from individuals; (c) provision of originals or copies of relevant documents and records, as well as any other information and evidence; (d) service of procedural documents; (e) facilitating the voluntary appearance of persons for the purpose of providing information or testimony to the requesting country; and (f) identifying, freezing, seizing or confiscating assets legalized or intended for money laundering, proceeds of money laundering and assets used or intended for financing of terrorism; as well as instruments of such crimes and assets of the relevant value.

Mutual legal assistance should not be prohibited or burdened by unreasonable, disproportionate or excessively restrictive conditions.\(^9\)

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\(^9\) Possible examples of such conditions (for which reasonableness, proportionality or limitation should be assessed) may include: general refusal to provide assistance on the grounds that legal proceedings have not been instituted in the requesting country; the possibility of requesting a formal conviction for the provision of legal assistance; excessively strict interpretation of the principles of reciprocity and double criminality.
Existence of appropriate laws and procedures to ensure efficient and timely response to the requests for mutual legal assistance related to the identification, freezing, seizure or confiscation of: (a) laundered property, (b) proceeds from, (c) instruments used for, or (d) instruments intended to be used for money laundering and/or financing of terrorism

Extradition

Providing responses to international inquiries about non-profit organizations

**07** Countries should sign and ratify or otherwise become parties to the Convention on the Financing of Terrorism and fully implement it. Countries must fully implement the UN Security Council resolutions on preventing and combating the financing of terrorism. These include the UN Security Council Resolutions S/RES/1267(1999) and S/RES/1373(2001). Relevant laws, regulations and measures must be adopted to comply with these Resolutions

**08** Control over the national non-profit sector

**09** Protection of the non-profit sector from its use for terrorist financing purposes through advocacy and effective oversight

**10** Detection and elimination of terrorist abuses of non-profit organizations through effective investigations and information gathering

**Subsection 1.2. Direct factual grounds for including a country in the Blacklist**

In the FATF practice, it is quite difficult to identify certain direct and clearly articulated factual circumstances in which it can be said with sufficient confidence that a country will be included in the Blacklist. Instead, the FATF’s practice shows some progress from the recommendations and increased attention to a particular country, its further inclusion in the Greylist, and then to the Blacklist (at each stage, provided that the country ignores the FATF’s recommendations or fails to address the FATF’s comments).
SECTION II
PROCEDURE AND CONSEQUENCES OF INCLUSION OF A COUNTRY IN THE BLACKLIST AND DIRECT LEGAL CONSEQUENCES OF SUCH INCLUSION

Subsection 2.1. Procedure for including a country in the FATF Blacklist: General Aspects

The Blacklist is a constantly changing document that is periodically updated in the official FATF reports. The lists are issued as part of the official FATF statements every two to three years\(^\text{10}\).

In general, there are two possible ways to include a country in the Blacklist.

1. Mutual evaluation

The first is based on the regular Mutual Evaluation, which results in a Mutual Evaluation Report (MER), which is then approved by the FATF plenary session (FATF plenary).

The mutual evaluation report is discussed at FATF meetings and working groups, and focuses on the most important and essential issues, which are mainly related to the efficiency of the FATF recommendations and standards evaluated by countries. If necessary, significant technical issues can be discussed. The President or the Chairperson of the meeting chairs the discussions. The time for discussion is limited to reasonable terms (ideally, three to four years).

The discussion procedure is as follows:

1. The evaluation team briefly presents the key issues and conclusions of the report at the general level. The team will have the opportunity to intervene or comment on any issue related to the Conclusion or the MER

2. The country being evaluated makes a brief introductory statement

3. The plenary discusses the key issues

4. If time permits, other issues may be proposed and discussed in plenary

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\(^\text{10}\) [https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/?hf=10&b=0&s=desc(fatf_releasedate)]
Monitoring by FATF’s International Co-operation Review Group

Notwithstanding the Mutual Evaluations (i.e., the procedure described above), since 2007 the FATF has been constantly reviewing and monitoring jurisdictions for compliance with its standards\(^\text{11}\). Verification and supervision are carried out by the FATF’s International Co-operation Review Group.

The grounds for such verification are as follows:

**01**
The country concerned does not participate in a regional FATF (FSRB) body or prevents the timely publication of mutual evaluation results

**02**
The country concerned is appointed by a member of the FATF or FSRB. The nomination is based on specific risks or threats of money laundering, terrorism financing or arms proliferation that come to the attention of the delegations

**03**
The country has shown poor results of mutual evaluation, namely:
- it has 20 or more non-conformity or partial conformity (PC) ratings for technical compliance; or
- it has a rating of non-compliance or partial compliance with three or more of the following recommendations: 3, 5, 6, 10, 11 and 20; or
- has a low or moderate efficiency level for 9 or more of the 11 immediate results, with at least two low scores; or
- the country has a low level of efficiency for 6 or more of the 11 immediate results.

Based on the results of the verification, the FATF Secretariat identifies high-risk jurisdictions, jurisdictions that refuse to cooperate, and jurisdictions with strategic deficiencies in their national regimes.

**NB!**
In any case, however, the final decision is made by the FATF plenary. Usually, three FATF plenary sessions are held during a year (June, February, October).

Delegates of all members, FATF-style regional bodies that are associate members of the FATF, and observers participate in the FATF plenary. Activities of the FATF plenary are the main proof of the technical nature of the FATF, where the final decision-making power belongs to this body. The FATF plenary is the body that adopts final decisions, and although decisions are made by consensus, this does not always mean unanimity; such decisions are very often directed by the responsible committee on the basis of priorities and traditions.

\(^{11}\) [https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html?hf=10&b=0&s=desc(fatf_releasedate)]
All decisions are passed by plenary by consensus, which means that members have a de facto veto over the FATF’s decision, making it entirely dependent on the will of the members. This suggests that the FATF remains a government network, rather than an international organization with its own international legal personality.

On 15 March 2022, the State Financial Monitoring Service of Ukraine approached the FATF with an initiative to include the RF in the Blacklist. In the alternative appeal of 6 March 2022, the Verkhovna Rada of Ukraine called for the entire exclusion of the RF from the FATF.

Subsection 2.2. Timeframe

Regarding the period of a country’s blacklisting, it is determined in the FATF practice at the discretion of the FATF depending on the actual circumstances of the case. For example, Iran, whose inclusion in the Blacklist was confirmed in 2020, will remain on the List until it implements the measures provided for in the FATF Action Plan on Iran.

Subsection 2.3. Direct actual legal consequences of including a country in the Blacklist

The FATF calls on all FATF members to apply enhanced verification mechanisms to blacklisted countries and, in more serious cases, to apply counter measures to protect the international financial system from the risks of money laundering, financing of terrorism and mass destruction weapons that originate from a blacklisted country.

That is, after a country is included in the Blacklist, the FATF determines the conditions under which the country may be excluded from the Blacklist (usually contained in the action plan) and recommends that the FATF member countries take additional (enhanced) measures of financial monitoring, control of banking and other transactions. Further implementation and enforcement of such measures by the FATF member countries is in fact at the discretion of such countries. It should be noted that the implementation of such implementing steps by the FATF member countries is in accordance with the rules of international law binding on such countries, as well as their domestic law. Obviously, this requires a necessary political and civic consensus and may largely depend on the current political and economic landscape in the country.

EXECUTIVE SUMMARY

The FATF has a slightly different toolkit, among which the Blacklist deserves special attention. From an organizational point of view, it can be noted that the procedure of including the RF in the Blacklist will take more time and, in certain circumstances, may be stopped or completely blocked by the RF or its satellites. In addition, the direct legal consequences of Russia's inclusion in the Blacklist are not as obvious as the US Government's recognition of Russia as a sponsor of terrorism, and will require further significant steps by the FATF members to implement them efficiently. At the same time, Russia's inclusion in the Blacklist may have a significant impact on the state of the RF's financial sector due to the expected reluctance of financial institutions to cooperate with the RF, monitor its transactions and help servicing the RF’s external debt.

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12 https://brill.com/view/book/edcoll/9789004424159/BP0000010.xml#FN000928
13 https://www.eprawler.com.ua/news/2022/03/15684102/
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