

## NEWS REVIEW

### EXTENSION OF THE EU LIST OF NON-COOPERATIVE TAX JURISDICTIONS: CONSEQUENCES FOR RUSSIAN BUSINESS

By decision of the EU member states, four new territories were added to the list of non-cooperative jurisdictions on 14 February 2023. Next to Russia, those were the British Virgin Islands, Costa Rica and the Marshall Islands. Being placed on that list means that business relations with the countries concerned will be subject to stricter VAT taxation rules, extend-ed withholding tax obligations, a ban on dividend exemption and deduction of operating expenses, expanded cooperation obligations and DAC 6 reporting obligations.

#### THE EU LIST AND PACKAGES OF TAX MEASURES

After the addition of the above four new territories, there are now 16 tax jurisdictions on the Council of the European Union's list of non-cooperative countries and territories (the EU list or the «Blacklist»):

- American Samoa,
- Anguilla,
- Bahamas,
- British Virgin Islands,
- Costa Rica,
- Fiji,
- Guam,
- Marshall Islands,
- Palau,
- Panama,
- Russia,
- Samoa,
- Trinidad and Tobago,
- Turks and Caicos Islands,
- American Virgin Islands,
- Vanuatu.

The Blacklist is updated on a regular basis and includes territories that do not facilitate sufficient exchange of information in tax matters and/or engage in unfair tax competition or do not meet the minimum standards of the OECD/G20 BEPS project. Blacklisting means that EU member states are encouraged to take tax countermeasures and thus influence the tax policies of the listed territories.

In Germany, these countermeasures are regulated by the Tax Havens Defence Act («StAbwG Act») and the Tax Havens Defence Ordinance («StAbwV Ordinance»). While those regulations have not been of particular interest to taxpayers up to now because the list used to mostly contain «exotic countries», they are likely to become of relevance especially due to the blacklisting of Russia.

## CORE SAFEGUARDS OF THE StAbwV

The StAbwG Act does not automatically apply to a state that has been newly blacklisted. An amendment must be made first to the StAbwV Ordinance to which the StAbwG Act makes a reference. If the StAbwV Ordinance is amended by the end of 2023, the first countermeasures will generally take effect as of 1 January 2024. In particular, the StAbwG Act specifies the following countermeasures (including possible first dates of application for newly blacklisted territories):

- Ban on the deduction of expenses resulting from business transactions to the blacklisted territories (Section 8 of the StAbwG Act; applicable beginning on 1 January 2027 at the earliest),
- Harsher withholding taxation regardless of the existence of passive income within the meaning of Section 8.1 of the German Foreign Tax Act (AStG), which is generated by a company resident in the affected territory and is subject to low taxation there (Section 9 of the StAbwG Act, applicable beginning on 1 January 2024 at the earliest),
- Tax of 15% also to be withheld at source on income from services and trade (Section 10 of the StAbwG Act, applicable beginning on 1 January 2024 at the earliest),
- Profit distributions and share transfers are no longer subject to Section 8b of the German Corporate Income Tax Act (KStG) and are thus fully taxable (Section 11 of the StAbwG Act, applicable beginning on 1 January 2026 at the earliest).

The scope of application of the StAbwG is thus broad and affects all business transactions or shareholdings relating to a non-cooperative territory (Section 7 of the StAbwG Act). Affected are also so-called «dealings» within the meaning of Section 1.4 of the German Tax Code (AO) between the parent company and the permanent establishment. The aim of the law is not merely to «bring up» profits earned abroad to the domestic tax rates. Economic relations with such territories are to be made generally unattractive, while the legislator tolerates the risk of double taxation of income.

## ANCILLARY MEASURES AND DAC 6 NOTIFICATION OBLIGATIONS

Anyone affected by the StAbwG is also subject to extensive duties to cooperate in tax proceedings (Section 12 of the StAbwG Act). Taxpayers must comply with numerous record-keeping obligations in respect to the affected business transactions and retain contracts and agreements on files.

It should also be pointed out that transactions where the payee is resident in a blacklisted territory fall under the C2 code of the DAC 6 reporting obligations. Regardless of the economic content of the transaction, it must in future always be reported to the German Federal Central Tax Office as a cross-border tax structuring arrangement.

## SUMMING UP

Taxpayers - in particular those who (still) maintain business relations with Russia or have investments there - should urgently consider the implications of Russia's blacklisting. It may still be possible to take timely measures on the basis of the application regulations before the severe regime of the StAbwG Act takes effect.