

Jean-Christophe Liebeskind

The PRC Exchange Control: Compliance and Circumvention

La Chine maintient un contrôle des changes strict. Elle a récemment intensifié sa lutte contre la fuite de capitaux. La question n'est pas théorique puisqu'on mentionne des trillions de yuans représentant un pourcentage à deux chiffres des réserves de devises chinoises. En Suisse, l'art. 47 du Code de diligence interdit aux banques de prêter une assistance active à la fuite de capitaux. Cet article discute les limites dans lesquelles des résidents en Chine (ou leurs intermédiaires) peuvent déposer des fonds dans les banques suisses en respectant la réglementation chinoise et suisse en ces matières.

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1. Introduction

[Rz 1] This paper addresses the limits within which PRC residents¹ (or their proxies) may deposit funds with Swiss banks² in compliance with the PRC exchange control regulations. In the following sections, we portray the context of this article (1), and define its scope (2) as well as its limits (3).

¹ The PRC FOREX regulations apply both to PRC nationals and to foreigners residing in the PRC, s. SAFE Notice on Residents Overseas Investment (n. 17), Art. 1 (3). On the Notice, s. below note 17. In this paper, whenever we mention PRC or Chinese depositors or investors, we actually refer, by simplification, to that definition, including foreigners.

² This article focuses on Swiss banks, i.e., banks and financial companies licensed in Switzerland or subsidiaries or branches of the same abroad, including in Hong Kong, Macau and Taiwan (but not on the Mainland). The scope of the PRC FOREX regulations is described below, s. Sect. 2.

2. Context

[Rz 2] Why would Chinese foreign exchange control be of any concern to a Swiss lawyer?

[Rz 3] In 2011, the Chinese Academy of Social Sciences estimated the amount of money illegally transferred abroad by officials only since the mid-nineties to up to CNY 800 billion (approx. CHF 120 billion)³.

[Rz 4] Four years later, according to a press release by the Guangdong Province authorities, in 2015 alone, underground banks had illegally transferred HKD 245 billion (approx. CHF 32 billion) out of the province to offshore, mainly to the neighbouring Hong Kong and Macao. Commentators regard this figure as the tip of the iceberg, and estimate that Guangdong may represent only half of it⁴. On the beginning of this year, the Chinese police announced that in 2016, it dismantled underground banks involving USD 131 billion.⁵

[Rz 5] The crackdown against underground banking is expected to intensify due to the PRC⁶ national anti-corruption campaign⁷.

[Rz 6] On 15 January 2015, on the occasion of the visit of his Swiss counterpart, Federal Councillor Didier Burkhalter, the Chinese Ministry of Foreign Affairs declared his country's intent to reinforce its cooperation with Switzerland for, among other things, the return of funds illegally deposited abroad and to promote a bilateral criminal assistance treaty⁸.

[Rz 7] The mainland's capital flight is not yet a major problem, but it is a risk that the PRC government monitors closely. If it were to increase and overwhelm capital inflows, it could destabilize the financial system and put significant downward pressure on the yuan. To prevent this, the PRC government is unlikely to open the capital account anytime soon⁹.

[Rz 8] Given Swiss banks' focus in the region, including on Mainland China, and the fact that exchange control remains mostly unnoticed¹⁰ while the private banking industry's attention seems monopolized by international assistance in tax matter, it may be worth to pay attention to the PRC exchange control regime, namely, its consequences for Swiss banks.

3. Scope

[Rz 9] The first part of this article describes the legal framework of the PRC foreign exchange (FOREX) control regime (I). The second part discusses compliance under Swiss law with respect

³ S. China Daily, Eight Ways to Transfer Money Overseas (16 June 2011).

⁴ S. South China Morning Post, Underground banks siphon HK\$ 245 billion out of Chinese province in a single year ... and that's just the tip of the iceberg, (12 January 2016).

⁵ S. South China Morning Post, Hundreds arrested in China crackdown on «underground banks» (27 February 2017).

⁶ In this paper, «China», «the Mainland» and their adjectives both refer to the People's Republic of China and do not include Hong Kong and Macau.

⁷ Id.

⁸ ATS, Didier Burkhalter évoque la lutte contre la corruption à Pékin (15 January 2016).

⁹ S. South China Morning Post, Capital flight a risk that must be monitored, (9 March 2015). More recently, s. China's forex erosion points to high outflows amid capital control loopholes (8 February 2017); s. also No sign of easing in capital controls even as China's overseas shopping spree continues, experts say (16 May 2017).

¹⁰ S. Le Temps, La course des banques suisses pour gagner les riches Chinois (16 October 2016), where exchange control is left into oblivion.

to the PRC exchange control regulations whenever Swiss banks accept deposits from PRC residents (II). The third part will close this article with an assessment and a conclusion (III).

4. Limits

[Rz 10] The PRC FOREX scheme is seamless. It applies to any movement of capital between the Mainland to overseas, whoever is the transferor, the transferee, and whatever the cause or the direction of the transfer. However different, restrictions may apply to different situations. This paper focuses on the scope defined in the preceding paragraph. It does not apply to the following situations:

- QDII (Qualified Domestic Institutional Investor). The QDII scheme allows PRC domestic banks, fund management companies, trust companies, insurers and securities firms to undertake offshore investment on behalf of their domestic private clients.
- RQDII (Renminbi Qualified Domestic Institutional Investor). The RQDII scheme is similar to the QFII, but allows investors to use renminbi¹¹ to invest in Chinese securities, while the QFII scheme only permits the use of foreign currencies. The law limits the circle of RQDII investors to PRC security brokers and PRC trusts established in Hong Kong, who dispose of renminbi legally invested by Mainlanders in Hong Kong under certain bilateral financial agreements between the Mainland and the Hong Kong SAR¹².
- Shanghai-Hong Kong Connection. The so-called Shanghai-Hong Kong Connection authorizes – under certain conditions – Mainlanders to invest in stocks listed on the Hong Kong stock exchange and Hong Kong residents on the Shanghai stock exchange.¹³
- Shenzhen-Hong Kong Connection. Same as above, for Shenzhen.
- China Interbank Bond Market scheme (CIBM). Gives foreign financial institutions access – under certain conditions – to certain fixed income instruments on the Mainland’s bond market.
- Corporate outbound investment. PRC companies may be permitted to invest overseas under certain regulations, typically for M&As. For the reinvestment of the same, see below, 3, Reinvestment of a licit overseas investment.
- FTZ. Same as above, but through a PRC free trade zone (FTZ).
- Outbound lending. PRC companies may be authorized to extend loans to certain related offshore companies under certain conditions (intercompany loans).
- Foreign residence permit. If a PRC individual has obtained a residence permit in another country, he/she may apply to SAFE¹⁴ for transferring his/her wealth to his/her country of residence. Hong Kong qualifies as another country in this context.

¹¹ Official currency of the PRC, of which the yuan is the basic unit. In this paper, we indifferently use Chinese yuan, CNY, renminbi and RMB.

¹² Special Administrative Region. Hong Kong’s jurisdiction is separate from the Mainland.

¹³ The Chinese government has been recently announcing a similar scheme for bonds, s. South China Morning Post, Beijing faces hurdles getting international investors on board with «bond connect» scheme (26 April 2017), and Mainland-Hong Kong bond connect is just the first step, says forex chief (26 March 2017).

¹⁴ S. below Sect. II.

[Rz 11] While the intricacies of international movements of capital barely allow for an exhaustive list, currently the channels above are regarded as the channels that Chinese investors typically resort to for investing abroad. Abuses occur of course. They will be discussed below (II).

I The PRC Foreign Exchange Control Regime

[Rz 12] This part identifies the legal basis of the PRC FOREX (1). It then outlines some typical techniques of circumventing FOREX regulations (2), with a special emphasis on the particular case of the reinvestment of a licit overseas investment (3)

[Rz 13] Although this part exclusively focuses on Chinese law, it is a necessary foundation for discussing, under Swiss law, the compliance duties of Swiss banks towards the PRC FOREX regime.

[Rz 14] Indeed in Switzerland, Art. 47 of the *Diligence Code* prohibits banks from actively assisting capital flight. Both the notions of capital flight (Art. 48) and that of active assistance (Art. 50) are elaborated.

[Rz 15] The PRC currently maintains a strict foreign exchange control, while it were the government's intent to gradually liberalize it. The supervisory authority is the PRC State Administration for Foreign Exchange (SAFE).

[Rz 16] We outline below the legal basis on which the PRC FOREX rests (1), the forms of foreign exchange (a)), the notions of current and of capital account (b) and c)), and the penalties faced by infringers (d)).

1. Legal Basis

[Rz 17] The PRC regulatory framework on foreign exchange is designed to the effect of seamlessly ensuring that Chinese companies and individuals¹⁵ trade foreign exchange under the supervision of the authorities.

[Rz 18] It is basically subject to two sets of regulations working in combination: those applying to foreign exchange under the supervision of SAFE, and those applying to overseas investment under the supervision of the Ministry of Commerce (MOFCOM).

[Rz 19] Although there is a multitude of secondary regulations, FOREX is primarily regulated by the 2008 State Council Regulations on Foreign Exchange Control¹⁶, further implemented by the 2014 SAFE Notice on the Administration of Foreign Exchange Involved in Overseas Investment, Financing and Return on Investment Conducted by Residents in China via Special-Purpose Companies¹⁷.

¹⁵ S. above note 2.

¹⁶ Regulations of the State Council on Foreign Exchange Control, promulgated on and effective as of 8 May 2008 («the State Council FOREX Regulations»).

¹⁷ Notice of the State Administration of Foreign Exchange on the Administration of Foreign Exchange Involved in Overseas Investment, Financing and Return on Investment Conducted by Residents in China via Special-Purpose Companies, promulgated on and effective as of 4 July 2014 («the SAFE Notice on Residents Overseas Investment»).

[Rz 20] Overseas investment is governed in the first place by the 2014 MOFCOM Administrative Measures for Outbound Investment¹⁸.

a) Forms of Foreign Exchange

[Rz 21] «Foreign exchange» is defined by the State Council FOREX Regulations as «payment instruments and assets denominated in foreign currencies which may be used in international settlement» and includes the following forms¹⁹:

- foreign currencies in cash, including paper currencies and coins;
- payment instruments denominated in foreign currencies or payment tools, including negotiable instruments, bank deposit certificates, bank cards, etc.;
- valuable securities denominated in foreign currencies, including bonds, stocks, etc.;
- special drawing rights;
- other assets denominated in foreign currencies.

[Rz 22] The Regulation introduced differentiated rules for the foreign exchange on current account and on capital account.

[Rz 23] Current accounts cover the payments that frequently take place during international transactions, including the payments for trade and services, payments against labor export and unilateral payments.

[Rz 24] Capital accounts cover the capital import and export that could result in the increase or decrease of the assets or liabilities accounts on a country's balance sheet for international revenues and expenses, including Foreign Direct Investment (FDI), loans and securities investments.

b) Current Accounts

[Rz 25] FOREX rules for individuals are primarily contained in the 2006 People's Bank of China (PBOC)²⁰ Administrative Measures for Personal Foreign Exchange²¹. Individuals are authorized to hold, deposit or sell their foreign exchange in the PRC to a foreign exchange licensed bank within the following limits:

- a PRC citizen is allowed to purchase up to USD 50'000 foreign exchange from the bank in a year and to remit them abroad;
- in case a PRC citizen plans to travel or has other private reasons and needs to purchase foreign exchange, he/she may freely purchase up to USD 50'000 in a year.

[Rz 26] The threshold referred to in the two cases above is the same; these amounts do not cumulate²². The law further foresees that amounts beyond the above mentioned threshold can be authorized upon justification in the form of documentary evidence to the bank. In practice, such

¹⁸ Administrative Measures of the Ministry of Commerce for Outbound Investment, promulgated on 6 September 2014 and effective as of 6 October 2014 («the MOFCOM Measures for Outbound Investment»).

¹⁹ State Council FOREX Regulations, Art. 3.

²⁰ The People's Bank of China is the PRC's central bank.

²¹ PBOC Administrative Measures for Personal Foreign Exchange of 25 December 2006 effective as of 1 February 2007 («the Measures for Individuals»).

²² SAFE Administrative Measures for Personal Foreign Exchange of 5 January 2007 effective as of 1 February 2007, Art. 2-4.

authorization is barely given and the threshold of USD 50'000 is not exceeded however. Pooling the quotas of several individuals to the benefit of one is forbidden.²³

[Rz 27] Rumor has it that, under a new scheme known as QDII2²⁴, the PRC government may relax the threshold of USD 50'000. The exemption would be launched as a test in certain cities and would be subject to strict eligibility conditions. However, for the time being, no formal policy has been issued.

c) Capital Accounts

[Rz 28] As a matter of fact, because the related regulations have not yet been implemented for individuals, for the time being, capital accounts are available to companies only. Individuals cannot take advantage of the related regime for transferring money abroad²⁵.

[Rz 29] Generally speaking, it should be added that, while the law principally foresees several other possibilities for Chinese individuals to transfer money abroad, apart of the ones mentioned above, none have been implemented as of yet.

d) Penalties

[Rz 30] In case of violation of the FOREX regulations, the State Council FOREX Regulations empowers SAFE with an extended range of penalties²⁶.

[Rz 31] Thus, direct authors may be subjected to:

- the repatriation of the foreign exchange involved within a specified time limit;
- a fine up to 30% of the amount involved;
- in serious cases, a fine of between 30 and 100% of the amount involved;
- the confiscation of their illegal gains;
- criminal liability if their act constitutes a criminal offence.

[Rz 32] Violations include:

- FOREX evasion, such as the unauthorized transfer, out of China, of renminbi or foreign currencies;
- the unauthorized purchase of FOREX;
- the unauthorized remittance of FOREX in China;
- to illegally carry FOREX on entering or exiting China²⁷;
- issuing debts titles (e.g., loans, bonds or guarantees) abroad without authorization;
- the unauthorized change of the designated use of FOREX;

²³ S. South China Morning Post, Revealed: the sneaky ways Chinese are moving money across the border (29 May 2017).

²⁴ QDII2 stands for Qualified Domestic *Individual* Investor, not to be mixed with QDII, Qualified Domestic *Institutional* Investor mentioned above (3), hence the «2».

²⁵ Individuals can, however, open capital accounts to the effect of receiving payments from abroad, e.g., in case of sale of PRC equity or assets to a foreign investor.

²⁶ State Council FOREX Regulations, Chap. 7.

²⁷ In such case the fine is limited to maximum 20% of the amount involved. If the PRC Customs handle the case, PRC customs regulations shall prevail though.

- the private trading, etc. of FOREX.²⁸

[Rz 33] Underground FOREX «banks» are subject to more severe penalties: their illegal gains shall be confiscated and they shall be subjected to a fine of one to five times their gains below gains of half a million renminbi and to a fine of up to two million renminbi above gains of half a million renminbi. They also risk the suspension of their business and criminal liability.

[Rz 34] Indirect authors, i.e., supervisory auxiliaries such as banks and other financial institutions, are accountable and if they failed their duties, they may have to pay a fine ranging between CNY 200'000 and one million. If they do not comply, they may be ordered to suspend their operations. In minor cases, the banks may be fined up to CNY 300'000 and their employees up to CNY 50'000. In domestic banks, employees directly in charge may be fined up to CNY 500'000. Disciplinary sanctions may also apply. Favoritism, abuse of authority or dereliction of duties are specifically sanctioned.

[Rz 35] However, current practice suggests that, even though the upper limit of these penalties have been raised from 30% to 100% with the State Council FOREX Regulations' revision of 2008, they still are unevenly if not seldom applied, that, whenever they are, they are subject to negotiation within the authorities' discretion, and that their amount is generally too low for acting as a deterrent.

[Rz 36] Yet banks have been reported to prove much stricter recently when it comes to FOREX approval procedures, which implies that bank officers' awareness in that respect may, under the pressure of SAFE, have grown more acute than that of their customers.²⁹

2. Main Techniques of Illegal Overseas Transfer of Assets

[Rz 37] Any attempt to educate Swiss banks' compliance officers or in-house lawyers would soon prove being futile if it were to be limited to compliance with PRC FOREX and fall short to explore the vast, seemingly unlimited indeed, world of noncompliance.

[Rz 38] As a start point, the Report on the Overseas Transfer of the Proceeds of Corruption issued by PBOC in June 2008³⁰ («the PBOC Report») usefully lists typical techniques of illegally transferring assets overseas.

[Rz 39] While – as its title makes clear – the Report focuses on corruption, its findings apply to other types of illegal operations. Likewise, it is not, does not pretend, and could hardly be exhaustive. Nevertheless, it provides a valuable insight.³¹

[Rz 40] The techniques thus identified cover transfers by cash smuggling, illegal overseas remittance systems, forged transactions, overseas investments, credit card instruments, offshore financial centers, direct transfers abroad and certain overseas residents. We briefly outline them below as described by PBOC.

²⁸ For recent examples of penalties, s. above n. 23, and South China Morning Post, Staff of fugitive tycoon Guo Wengui jailed, punished for fraud (16 June 2017).

²⁹ S. South China Morning Post, Banks assume the «burden of proof» in China's crackdown on capital flight (6 December 2016).

³⁰ This report was only made available to the general public on 13 June 2011.

³¹ For recent examples, s. South China Morning Post, Revealed: the sneaky ways Chinese are moving money across the border (29 May 2017), which illustrates many of the techniques outlined by the PBOC Report.

a) By Cash Smuggling

[Rz 41] Cash smuggling is generally realized in two ways: the first is simply to carry it in a bag to overseas. The second is to hire an agency (generally an illegal or underground financial institution) to transport the cash through border ports. That way implies a much more complicated process and costs more, but it is less risky. The sheer size of the Chinese cash smuggling industry attests of its success.³²

b) By Compensation

[Rz 42] The PBOC report literally refers to «illegal overseas remittance systems», i.e., to the underground banking, namely, specializing in foreign exchange trade and of cross-border remittance. Such technique can be commonly described as compensation.

[Rz 43] For example, the underground financial institutions³³ trade foreign exchange between CNY and other currencies by indirect means, in which case CNY do not have to be remitted outbound, and foreign exchange does not have to be remitted inbound. The underground financial institutions control asset circulation separately on the Mainland and abroad.

[Rz 44] The individuals involved in such systems form a complex network which includes overseas workers and students, enterprises attempting to avoid taxes, organized crime and money laundering.

c) By Forged Transactions

[Rz 45] While there are many ways to forge transactions, the most widespread include advance payment of import goods and/or postponed receivables of export goods, forged commissions and other service transactions, related transactions among enterprises, forged import contracts and underreporting of export price and/or overstating of import price.

aa) Advance Payment of Import Goods and/or Postponed Receivables of Export Goods

[Rz 46] The PRC adopts a verification and write-off system on import-export foreign exchange remittance. Yet infringers succeed in depositing the assets abroad in the long-term by taking advantage of advance payment of imported goods, of postponed receivables of export goods and of other loopholes in the write-off system.

[Rz 47] The individuals who use this way for transferring assets are mainly corporate executives having influence on both sides of international trade, sometimes by establishing an overseas shell company related to the domestic enterprise.

³² S. above n. 5.

³³ S. above n. 4 and 5.

bb) Forged Commission and Other Service Transactions

[Rz 48] This often resorted to technique consists in remitting foreign exchange by forging or inflating commission fees, consulting fees, patent fees, advertising fees and other service fees. The examination of evidentiary documents for this type of transactions is typically difficult.

cc) Related Transactions Among Enterprises

[Rz 49] Domestic enterprises buy raw materials or products from, or distribute dividends to related foreign enterprises at a high price, or forge business transactions in order to remit the assets outbound.

[Rz 50] The authors of this type of transfers are mostly corporate executives of related enterprises or those who have special relations with them, e.g. the governmental regulatory or bank personnel who has frequent contacts with the enterprise.

dd) Forged Import Contracts

[Rz 51] Infringers get SAFE's approval for foreign exchange remittance by forging import contracts without genuine transactions. The authors often enjoy a privileged access to import-export enterprises, e.g., corporate executives or people who have special relations with them.

ee) Underreporting of Export Price and/or Overstating of Import Price

[Rz 52] Many enterprises running an import-export business overstate the price of raw material imported and/or underreport the price of commodities exported in order to get the balance amount of foreign exchange deposited abroad.

d) By Overseas Investment

[Rz 53] The assets might be transferred overseas in a legal form while later embezzled for illegal purposes or appropriated by the infringers. For example, in case of round-trip investment, the Chinese investor would not report the sale of (his shares in) the Special Purpose Vehicle (SPV). Authors using this type of technique are mostly corporate executives or individuals in charge of a particular business.³⁴

[Rz 54] We elaborate this point below (3).

e) By Credit Card

[Rz 55] Infringers transfer the assets by using credit cards abroad. Until recently, the PRC did not have strict SAFE regulations on individual payments of this type. As for the credit card issuer

³⁴ Typically, the purchase by Chinese individuals of private houses overseas can hardly be explained otherwise than by a circumvention of the PRC exchange control, s. South China Morning Post, How China's overseas property dream turned into a nightmare (20 March 2017). S. also The New York Times, Why Did China Detain Anbang's Chairman? He Tested a Lot of Limits (14 June 2017).

institutions, they usually do not have restrictions on the total payment amount as long as the payment does not exceed the line of credit and the card holder pays back the money in time.

[Rz 56] Since most credit cards allow to exchange foreign currencies instantaneously, Chinese individuals can use credit cards abroad to make payments or to withdraw cash and then pay back in CNY on the Mainland³⁵. However, under a new regulation due to become effective this year, Chinese banks will have to report all credit card overseas transactions exceeding CNY 1'000 (USD 147).³⁶

f) Through Offshore Financial Centers

[Rz 57] Infringers often establish shell companies in offshore financial centers which lack strict regulations. The executives of PRC state-owned companies and listed companies typically take two steps to transfer the state-owned assets:

- The first step consists in transferring the corporate assets of the PRC company by buying goods at a price extremely higher than the market price from, or by selling goods at a price extremely lower than the market price to an offshore company which is often co-started by a domestic company with the complicity of the foreign company. Transferring assets by «receivables» means that the domestic company sells exported goods to the offshore company without cashing the money, but only by recording it as «receivable» in its books.
- The second step consists in destroying the evidence by deliberately making the PRC company collapse, thus allowing the offshore company to buy it with little assets. The foreign company is a good disguise to escape anti-money laundering regulations during the acquisition process.

g) By Direct Transfer Abroad

[Rz 58] The infringers directly give and receive money abroad without transferring assets from the Mainland to overseas.³⁷

h) By Certain Overseas Residents

[Rz 59] To transfer assets to the relatives or other closely related acquaintances living abroad who have shared interests with civil servants is becoming the new trend among these techniques. These overseas residents can make direct investments abroad or on the Mainland, or conduct related transactions.

³⁵ Gambling and luxury shopping in Macau immediately followed by a refund in cash are typical examples. For gambling, s. PBOC Report, Chap. 3, Sect. 2(4). Even though such recount could not be verified, Mainlanders have even been rumored to pay real estate in Hong Kong with debit cards, s. Financial Times Asia, Capital Flight of China's Wealthy Gets Ready for Take-Off (3 February 2012). Gambling is now reined in as part of the Chinese government's tightening of exchange control, s. South China Morning Post, Watch out Macau and Vegas: Beijing's global gambling crackdown revealed (29 March 2017).

³⁶ SAFE Regulation of 2 June 2017, effective as of 2 September 2017. S. also South China Morning Post, Chinese banks told to report overseas cash withdrawals plus transactions over US\$147 (2 June 2017).

³⁷ S. above N 5.

[Rz 60] Although the PBOC report emphasizes corruption while not every FOREX infringer is a serious crime offender, the patterns described above offer a valuable assistance in identifying potential FOREX infringements and possibly other, namely predicate offenses.

3. Reinvestment of a Licit Overseas Investment

[Rz 61] The case of the disinvestment of a Chinese investment overseas followed by its reinvestment, briefly addressed by the PBOC report outlined above (d)), deserves some elaboration.

[Rz 62] The fact that a Chinese investment has been originally authorized by the PRC authorities is often invoked as a proof of legitimacy, PRC FOREX wise, for the reinvestment of the proceeds generated by the original investment. That is typically the case after the sale of a PRC-invested company abroad. That notion is simplistic.

[Rz 63] Likewise, there has been some regulatory changes since the PBOC report outlined above³⁸. Both deserve to be developed.

[Rz 64] Chinese investors must seek MOFCOM's clearance before they may invest overseas. Such clearance is only granted provided the investor qualifies as a PRC company which:

«through new establishment, merger and acquisition, etc., holds the ownership, controlling power, rights of operation and management and other rights and interests of a non-financial enterprise overseas, or acquires the ownership, controlling power, rights of operation and management and other rights and interests of an existing non-financial enterprise overseas.»³⁹

[Rz 65] Whenever clearance is granted, the bank must seek SAFE's clearance for the related remittance abroad.

[Rz 66] Furthermore, if, subsequently, there is any change in the nature of the investment as approved, the investor must re-seek approval from MOFCOM⁴⁰.

[Rz 67] So is it, a fortiori, in case of reinvestment⁴¹?

[Rz 68] Under MOFCOM's current policies, such approval is not granted whenever the purpose of the investment does not match either of the purposes listed above.

[Rz 69] Even though those policies are discretionary and there is no legal basis positively prohibiting other purposes, it is believed that a reinvestment in the form of a deposit with a foreign bank to the effect of assets management would fail getting approval, especially since such policies have recently hardened.

[Rz 70] Until 2011, SAFE regulations required the investor, in case he would not legally reinvest abroad, to repatriate the monies within 180 days from the disinvestment⁴². This rule has been abrogated however.

³⁸ S. above, d).

³⁹ MOFCOM Measures for Outbound Investment (n. 18), Art. 2.

⁴⁰ Id., Art. 15.

⁴¹ Id., Art. 25.

⁴² This provision was still in force at the time of the comment of PBOC above (d)), which it partly explains.

[Rz 71] Therefore, while investors do not have to comply with any duty to repatriate within a certain deadline, they are supposed to reapply to MOFCOM in case they reallocate the money to another purpose.⁴³

II Compliance under Swiss Law

[Rz 72] This part assesses the compliance duties Swiss banks and financial intermediaries⁴⁴ may have, under Swiss law, towards the PRC FOREX, i.e., specifically, under the four core legal and regulatory basis that are Art. 305^{bis} and Art. 305^{ter} of the Swiss Criminal Code⁴⁵ (1), the Federal Law on Combating Money Laundering and Terrorist Financing (LBA)⁴⁶ (2), the Diligence Code⁴⁷ (3), and the Money Laundering Ordinance of the Swiss Financial Markets Surveillance Authority (FINMA) («the OBA-FINMA»)⁴⁸ (4).

1. The Diligence Code

[Rz 73] The Diligence Code is an auto-regulatory instrument, the primary purpose of which is to regulate the opening of bank accounts to the effect of identifying its holder, its economic beneficiary and the economic background of the transaction.⁴⁹ It complements the OBA-FINMA, which applies whenever enhanced clarification duties are called for⁵⁰. Because from this narrow perspective the OBA-FINMA is a development of the Diligence Code and even though the latter is, as a norm, hierarchically inferior to the former, we will depart from the classical, topdown approach and analyze the OBA-FINMA after the Diligence Code.

[Rz 74] The Diligence Code applies to all banks in Switzerland, whether they have accepted it or not.⁵¹

[Rz 75] Art. 47 of the Diligence Code prohibits banks from actively assisting capital flight. Both the notions of capital flight (Art. 48) and that of active assistance (Art. 50) are elaborated. (Art. 49 addresses the transfer of funds from Switzerland abroad, which is neither prohibited nor our concern.)

⁴³ For typical examples, s. above N 29.

⁴⁴ By Swiss banks and/or financial companies, this paper refers to all the individuals and entities subject to the regulations discussed. S. also below n. 66.

⁴⁵ Swiss Criminal Code of 21 December 1937 (RS 311.0).

⁴⁶ Fr. Loi fédérale concernant la lutte contre le blanchiment d'argent et le financement du terrorisme du 10 octobre 1997 (Loi sur le blanchiment d'argent, LBA ; RS 955.0).

⁴⁷ Agreement Between the Swiss Bankers Association (SBA) and the Signatory Banks on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (1 June 2015), CDB 16 («The Diligence Code»). The SBA also uses the trade name of SwissBanking.

⁴⁸ Short title in French: Ordonnance de l'Autorité fédérale de surveillance des marchés financiers sur la lutte contre le blanchiment d'argent et le financement du terrorisme dans le secteur financier du 3 juin 2015 (Ordonnance de la FINMA sur le blanchiment d'argent, OBA-FINMA ; RS 955.033.0).

⁴⁹ The author recalls that while such restatements may be obvious for Swiss readers, this article is also meant for Chinese readers who may not be familiar with the Swiss regulatory framework.

⁵⁰ OBA-FINMA, Art. 35. S. also CDB 16, Art. 2 Al. 2, and SwissBanking, Commentary on the Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB 16) 2016/2nd ed., ad Art. 2, para. 1.

⁵¹ S. CARLO LOMBARDINI, Banques et blanchiment d'argent, Schulthess, 3rd ed., Zurich 2016, N 54 and ref.

[Rz 76] In this section we discuss the notion of capital flight under the Diligence Code (1), and the penalties resulting from related infringements (2).

a) Capital Flight

[Rz 77] Other than the identification of the holder and of the economic beneficiary, other notable rules of the Diligence Code contain the prohibition to actively assist capital flight (Fr. «fuite de capitaux») (Chap. 6, namely Art. 47).

[Rz 78] Given that China maintains a strict foreign exchange control regime, these provisions deserve further comments.

1. The foundation of the prohibition to assist capital flight is questionable. Indeed, as we have seen, there is no FOREX in Switzerland, hence no such crime as capital flight or, a fortiori, assistance thereto.⁵² One can, however, find a broader justification in the prudential duties of the banks discussed below.⁵³

2. Art. 47 Diligence Code rules that «banks may not provide any active assistance in transferring capital from countries whose legislation restricts the investment of funds abroad».

Such activity is thus implicitly referred to as «flight of capital», as per the provision's title.

3. Art. 48 Al. 1 Diligence Code further defines the notion of flight of capital as «the unauthorized transfer of capital in the form of foreign exchange, banknotes or securities from a country that forbids or restricts such transfers abroad by its residents».

Commentators consider, and we regard as unambiguous, that this provision does apply to exchange control.⁵⁴

It is further useful to note that this definition broadly matches that given by PRC law in this respect.⁵⁵

4. Flight of capital and/or the assistance thereto is negatively defined under Art. 48 Al. 2 Diligence Code which adds that «the mere duty to report cross-border currency transfers is not deemed a restriction of capital movement».⁵⁶

The drafting of this provision deserves further qualification. We understand that the duty to report is the depositor's, and that if he fails to, the bank is not deemed to have restricted capital movement by the mere fact of accepting the deposit while the depositor failed to report the movement to his home authorities.

In other words, we believe that, if the deposit by a PRC resident does not exceed USD 50'000 per person per year, the bank does not have to check whether the depositor announced such export (which PRC residents must). On the contrary, if the deposit does exceed the threshold,

⁵² S. above Sect. II.1, Art. 305^{bis} and 305^{ter} of the Swiss Criminal Code and N 49. For tax related offenses, s. below, item 10.

⁵³ S. below, Sect. 4, The OBA-FINMA, item 2.

⁵⁴ LOMBARDINI, 3rd ed. (n. 51), N 129, and ref., citing *Georg Friedli*, Praxis der Aufsichtskommission zur Sorgfaltspflicht der Banken 2005–2010, SwissBanking, http://www.swissbanking.org/fr/themes/actualite/lutte-contre-le-blanchiment-dargent/20110110-3610-all-taetikeitsbericht_2005_2010_fr.pdf/view (13.3.16). der Banken 2005–2010, 258 N 5.5.

⁵⁵ S. above Sect. I.1.a) and ref.

⁵⁶ Art. 49 Diligence Code further makes clear that the transfer of Swiss funds abroad does not fall under Art. 47 Diligence Code.

the bank should not accept it in the first place unless presented with the appropriate clearance from PRC's SAFE, which under the current PRC SAFE policy can be anticipated as unlikely.⁵⁷

5. Art. 50 Diligence Code defines «forms of active assistance».⁵⁸ The relationship between Art. 47⁵⁹ and 50 Diligence Code raises a number of issues.

First, the Diligence Code does not say whether Art. 50 is exhaustive, i.e., whether active assistance not listed under this provision is also prohibited.

Second, it does not say whether passive assistance is tolerated.

Third, two provisions request some degree of fault⁶⁰: Art. 50 Litt. b, and Art. 50 Litt. c (iii) Diligence Code. Art. 47–50 Diligence Code are otherwise silent about fault. Whether a fault is required and, if so, of which degree, is unclear.

As to the first question, we believe that the acts listed under Art. 50 Diligence Code are examples and that any active assistance, whether listed under Art. 50 Diligence Code or not, is, therefore, in the spirit of the Diligence Code, prohibited.

As to the second question, we understand that any assistance, however arguably passive, listed under Art. 50 Diligence Code shall qualify as active, and hence be prohibited. Conversely, passive assistance not listed under Art. 50 Diligence Code were arguably tolerable.⁶¹

The third question is discussed below about penalties (b).

6. Foreign banks have frequently been accused to test the limits when it comes to circumvent the PRC exchange control. It is therefore useful to recall that, in Switzerland, Art. 50 Diligence Code defines the following acts as deemed to constitute active assistance:

- (a) «organizing⁶² meetings with clients abroad outside the bank's premises for the purpose of accepting funds;
- (b) participation abroad in the setting up of offsetting transactions if the bank knows or, based on the totality of the circumstances, must reasonably know that the offsetting is aimed at furthering the flight of capital;
- (c) active collaboration with individuals and companies that arrange for the flight of capital on behalf of third parties or provide assistance in this respect:
 - i. by issuing orders;⁶³
 - ii. by promising commissions;⁶⁴
 - iii. by maintaining their accounts if the bank is aware that such individuals and companies are using their accounts for business purposes to assist in the flight of capital;
- (d) by referring the contracting partner to individuals and companies listed in letter c.»

⁵⁷ S. above Sect. I.1.b) and ref.

⁵⁸ S. below 5.

⁵⁹ S. above 1.

⁶⁰ S. below, b), Penalties, and n. 82.

⁶¹ For passive compensation, s. below, item 7.

⁶² The translation in English of the Convention literally reads «*organised [sic] meetings...*» (our emphasis), which is not entirely clear. The original version in French reads «l'organisation de l'accueil de clients à l'étranger en dehors des propres locaux de la banque dans le but d'accepter des fonds.» We believe that our translation («organizing» or «the organization of») is adequate.

⁶³ To the intermediary, compare with French version. By «order», we understand «instructions».

⁶⁴ Id.

7. Compensation (referred to by the Code as «offsetting transactions») is also regarded as one of the forms of assistance (Art. 50 Litt. b Diligence Code).⁶⁵
8. Assistance to capital flight through agents is covered by Art. 50 Litt. b and c Diligence Code.
9. Art. 51 Diligence Code expressly provides that visits to clients abroad are permitted provided the officer acting on behalf of the bank does not accept any funds that may not be legally transferred, give advice to assist in the illegal transfer of capital or participate in any offsetting transactions. However, as far as visits in China are concerned, this provision is mostly moot, since such officers' activity would very likely amount, under PRC law, to illegal marketing to the benefit of unlicensed foreign banks.⁶⁶
10. The Diligence Code specifically prohibits active assistance in tax evasion and similar acts (Chap. 7). Tax offences are not discussed in this paper. However, from the point of view of exchange control, suffices it to say that a circumvention of FOREX, although not necessarily, often implies that the funds have not been declared, hence the related taxes not paid. If so, the Diligence Code would be disregarded not only under Chap. 6 but also Chap. 7.
11. These rules are not contained in the OBA-FINMA, which is discussed below (2).

b) Penalties

[Rz 79] The Diligence Code provides that the bank that is at fault can be obliged to pay a penalty (Art. 64 Al. 1). Willfulness is not a condition. The seriousness of the situation, the degree of culpability and the bank's financial situation are considered for fixing the level of the penalty.

[Rz 80] One may further note that, while misconduct has been qualified with respect to compensation within the special provisions of Art. 50 Litt. b (active compensation) and Litt. c (iii) Diligence Code (maintaining the accounts of third parties aiding capital flight) which both require the bank's awareness, it has not for the other behaviors described under Art. 47, 48 and 50 Diligence Code, which are subject to the general provision of Art. 64 Al. 1 Diligence Code.⁶⁷

[Rz 81] Be as it may, recklessness (Fr. «dol éventuel»)⁶⁸ is regarded as sufficient to the effect of being liable under the Diligence Code.⁶⁹ In the current environment, we do not believe that a bank suspected of compensation could, under Art. 50 Litt. b or Litt. c (iii) Diligence Code, successfully raise as a defense that it was not familiar with the PRC FOREX threshold and only acted by negligence.

[Rz 82] In case of violation, the SBA is empowered to inflict a penalty to the bank of up to ten million Swiss francs.

⁶⁵ For a detailed discussion, s. LOMBARDINI, 3rd ed. (n. 50), N 130–135.

⁶⁶ S., generally, PRC Law on Commercial Banks, promulgated on 29 August 2015 and effective as of 1 October 2015, Art. 11.

⁶⁷ S. LOMBARDINI, 3rd ed. (n. 51), N 174.

⁶⁸ As translated by F.H.S. BRIDGE, The Council of Europe French-English Legal Dictionary, Council of Europe Publishing, Strasbourg 1994, 87. Translation may vary from one jurisdiction to another. In Swiss law, «dol éventuel» is regarded as a form of the criminal intent under Art. 12 Swiss Criminal Code. Is guilty of willful misconduct the one which seriously anticipates that the criminal result could occur and consent in advance to such result in case it were to occur (s., e.g., ATF 109 147)?

⁶⁹ LOMBARDINI, 3rd ed. (n. 51), N 128 and ref.

2. The OBA-FINMA

[Rz 83] Financial services markets in Switzerland are supervised by, the Swiss Financial Markets Supervisory Authority (FINMA).

[Rz 84] One of FINMA's most compelling regulations is the Federal Order on the Prevention of Money Laundering and the Financing of Terrorism, known as OBA-FINMA.

[Rz 85] To jump to the conclusion, the OBA-FINMA does not, in our opinion, apply to capital flight as such. Indeed for the Order to apply, there must be a predicate offense, which must qualify as a crime.⁷⁰ As we have seen, capital flight alone does not.⁷¹ As a result, the OBA-FINMA cannot apply to the acceptance, in Switzerland, of funds in breach of the PRC FOREX.

[Rz 86] Yet the OBA-FINMA is not irrelevant altogether and calls for a certain amount of discussion in the context of this paper, for the following reasons.

1. As noted, capital flight may frequently be linked to another offence such as a tax or another fraud. It is not necessarily so though. If so, such other offense may amount to the predicate offense forming the prerequisite to money laundering. If not, as noted too, capital flight alone does not.
2. The fact that the OBA-FINMA does not apply to capital flight alone does not mean that FINMA tolerates the latter. Indeed, FINMA may nevertheless consider that the bank's behavior is contrary to the general duties whose supervision falls within FINMA's mandate.⁷² Such general duties include the observance of foreign regulations, or at least the prohibition to deliberately infringe them.⁷³ Therefore capital flight is not immune to FINMA's intervention and, in serious cases, penalties.
3. The OBA-FINMA makes clear that the Swiss parent bank is liable both for its subsidiaries and branches of the observance of these principles.⁷⁴ However not directly applicable, we believe that FINMA could apply this extended scope all the same to capital flight. In other words, Swiss banks should be liable for the observance of the PRC FOREX by both their Hong Kong or Singapore, subsidiaries and branches etc.
4. Should FINMA uncover capital flight to a significant scale, we also believe that, even though once again, the OBA-FINMA may not apply directly, such findings may result in threatening

⁷⁰ The offense must qualify as a crime under Swiss law. A crime may also qualify as predicate offense to money laundering when it was committed abroad if such crime also qualifies as such in the jurisdiction where it was committed, Art. 305^{bis} No. 1 and 3 Swiss Criminal Code. S. also Art. 7 Al. 1. OBA-FINMA, S. also LOMBARDINI, 3rd ed. (n. 51), N 276–280.

⁷¹ S. above Sect. II.1, Art. 305^{bis} and 305^{ter} Swiss Criminal Code.

⁷² S. Federal Act on the Swiss Financial Market Supervisory Authority of 22 June 2007 (Financial Market Supervision Act, FINMASA; RS 956.1), Art. 5. Such behavior would also amount to an incorrect risks assessment, compare with Art. 5 Al. 1 Litt d. OBA-FINMA, S. also LOMBARDINI, 3rd ed. (n. 51), N 155, citing a ruling of the Sanctions Commission of the Prudential Control Authority in a UBS (France) case (25 June 2013).

⁷³ This requirement is set by the Swiss Law on Banks, Fr. Loi fédérale sur les banques et les caisses d'épargne of 8 November 1934 (Loi sur les banques, LB; RS 952.0), stand as of 1 January 2016, Art. 3 Al. 2 Litt. c, which requires the banks to guarantee an irreproachable activity. S. also its implementation regulation (Fr. Ordonnance sur les banques et les caisses d'épargne of 30 April 2014, [Ordonnance sur les banques, OB; RS 952.02], stand as of 1 July 2016), Art. 12 Al. 2, which requires the banks to manage their legal risks. S. also the discussion by LOMBARDINI, 3rd ed. (n. 51), N 35 ff. et ref. S. also *ibid.*, N 144, 150. S. also below N 89.

⁷⁴ OBA-FINMA, Art. 5 Al 1. S. LOMBARDINI, 3rd ed. (n. 51), N 162 ff. Among these principles, Art. 5 Litt. d OBA-FINMA refers to the risk-based approach and Litt. e to special due diligence in case of accrued risks. We believe that FINMA could consider that assistance to capital flight infringes these provisions and that, in the current environment, it would.

the guarantee of an irreproachable activity requested from financial intermediaries, in the sense of Art. 7 Al. 2 and Art. 9 OBA-FINMA.

5. In order to apply, this latter provision requires the bank to have been negligent. Again, and even though this provision does not apply directly, we believe that, speaking of capital flight, FINMA could consider that mere negligence suffices, and that, in the current environment, a bank will fail in exonerating itself by pretending that it did not know.
6. While occasional capital flight should not fall under the OBA-FINMA, it may in case of opening of a business relationship with an agent belonging to a capital flight network,⁷⁵ since that would be forbidden under Art. 8 Litt. a OBA-FINMA, even in absence of a predicate offense other than capital flight, because such network would qualify as a criminal organization. The bank must know or have known that it was such an organization, but obviously such qualification shall be regarded as increasingly objective with the amount at stake.
7. Politically correct or not, the question of whether China qualifies as a country of origin calling for enhanced diligence duties under Art. 12 Litt. g OBA-FINMA needs not being asked from the point of view of capital flight. Indeed, the threshold is an objective one: either the deposit is below or equal to USD 50'000, or it is above. Whether China is to be regarded as qualifying for enhanced diligence makes no difference.
8. It does make a difference for other crimes possibly amounting to a predicate offense, though. There is no list of such countries. However, considering the overall circumstances, let alone the cultural gap, banks would be well inspired to apply a certain level of extra caution, if not enhanced diligence.

That is especially true since Art. 5 Al. 2 OBA-FINMA emphasizes the Swiss parent bank's liability for its subsidiaries and branches «in countries deemed to present special risks at the international level».⁷⁶ Exactly what this statement implies from the point of view of such parent bank's liability is unclear, but one can gather that, if such bank's liability were to be challenged in connection with China, that circumstance could be regarded as an aggravating factor.

3. Art. 305^{bis} and 305^{ter} of the Swiss Criminal Code

[Rz 87] Art. 305^{bis} of the Swiss Criminal Code punishes money laundering. Art. 305^{ter} reprimands negligence in due diligence related to financial matters.

[Rz 88] The first provision requires a predicate offense. There is no FOREX in Switzerland, hence no such crime as capital flight or, a fortiori, assistance thereto.⁷⁷ Therefore, Art. 305^{bis} Swiss Criminal Code does not apply to capital flight if the latter is the only predicate offense.

⁷⁵ S. above Sect. I.2.b).

⁷⁶ The original French version of this provision reads: «Cette disposition vaut aussi en particulier pour les filiales et les succursales établies dans des pays réputés présenter des risques accrus au niveau international»; the German one: «Dies gilt insbesondere auch für Tochtergesellschaften und Zweigniederlassungen, die sich in Ländern befinden, die auf internationaler Ebene als mit erhöhten Risiken verbunden gelten.» The comparison between the two wordings suggests that whether the bank has enhanced duties in that respect is a matter of appreciation by FINMA, rather than one of objective liability that would rest on a list of countries.

⁷⁷ As confirmed by the Diligence Code, s. CDB 16, Art. 49, which expressly states that the prohibition to assist capital flight contained in Art. 47 does not apply to the transfer of capital from Switzerland.

[Rz 89] The second provision does apply even absent any predicate offense, i.e., even if the origin of the funds is licit.⁷⁸ However it focuses entirely on the failure to identify the economic beneficiary. Namely, the inobservance of the Diligence Code despite the fact that the identification of the economic beneficiary was performed correctly does not amount to a violation of Art. 305^{ter} Swiss Criminal Code.⁷⁹

[Rz 90] Therefore, Art. 305^{ter} Swiss Criminal Code does not apply in case of capital flight only either.

[Rz 91] Of course, as noted, either or both provisions may apply if, in addition to capital flight, there is a predicate offense qualifying under Art. 305^{bis} Swiss Criminal Code, or the bank has failed to identify the economic beneficiary under Art. 305^{ter} Swiss Criminal Code.

4. The Law on Money Laundering

[Rz 92] The Federal Law on Combating Money Laundering and Terrorist Financing (LBA)⁸⁰ purports at defining how workers in the financial sector must check financial transactions to the effect of detecting and combatting money laundering. In this context, the notion of money laundering used by the LBA coincides exactly with that of Art. 305^{bis} Swiss Criminal Code. The legislator expressly ruled out overlaps⁸¹.

[Rz 93] Given that, as we have seen, Art. 305^{bis} Swiss Criminal Code does not apply to capital flight per se, one could conclude that the latter does not fall under the LBA. Yet the same reservations like for Art. 305^{bis} Swiss Criminal Code apply: the LBA may be infringed if, in addition to capital flight, there is a predicate offense qualifying under Art. 305^{bis} Swiss Criminal Code, or if the bank has failed to identify the economic beneficiary under Art. 305^{ter} Swiss Criminal Code.

[Rz 94] Be as it may, the LBA applies to the deposit of a PRC resident in a Swiss bank anyway, for the following reasons.

[Rz 95] First, the LBA mandates the verification of the identity of the person who opens the account (i.e., the contracting partner), irrespective of the amount to be deposited. Whether such amount lies below the threshold of CHF 25'000 above which Swiss banks must check certain transactions⁸² or complies with the PRC FOREX threshold of USD 50'000 per person per year is, therefore, irrelevant.

[Rz 96] Second, banks must check the object and the purpose of the contemplated business relationship⁸³. The depth of such check depends on the risk at stake⁸⁴. Namely, the background of the transaction or of such relationship must be checked when it looks unusual⁸⁵ or when the risk

⁷⁸ Arrêt du Tribunal fédéral 6S.264/2002 of 10 October 2003, cons. 1.3. S. also LOMBARDINI, (n. 51), N 253.

⁷⁹ LOMBARDINI, 3rd ed. (n. 51), N 326.

⁸⁰ S. above n. 47.

⁸¹ S. Message relatif à la loi fédérale concernant la lutte contre le blanchissage d'argent dans le secteur financier (Loi sur le blanchissage d'argent, LBA) du 17 juin 1996, 96.055, FF 1996 III 1057, 1071.

⁸² Art. 4 Al. 2 Litt. f and g LBA dispense the bank of such verification for certain transactions when their amount does not exceed CHF 25'000.

⁸³ Art. 6 Al. 1 LBA.

⁸⁴ Ibid.

⁸⁵ Art. 6 Al. 2 Litt. a LBA.

looks serious^{86,87}. Namely, hints that the money might result from a predicate offense, including a qualified tax offense, or that a criminal organization controls it, qualify as such risks.⁸⁸

[Rz 97] In the current environment, the mere fact that a deposit is subject to the PRC FOREX and exceeds USD 50'000 per person per year should qualify as «unusual» or as a «serious risk». Indeed, as noted, however not qualifying as money laundering per se, a violation of the PRC FOREX is likely to hide a qualifying predicate offense, including a qualified tax one, which enhances such risk. Namely, the Chinese underground banking, closely associated to capital flight, indisputably qualifies as a criminal organization under Art. 6 Al. 2 Litt. b LBA and Art. 260^{ter} Ch. 1 Swiss Criminal Code.⁸⁹

[Rz 98] To conclude, Swiss banks should treat any attempt by a PRC resident to open a bank account and deposit an amount exceeding USD 50'000 per person per year as a serious risk and comply with the LBA accordingly. They must, therefore, take adequate measure to identify⁹⁰ and clear such risks or, on the contrary, signal them to the Swiss authorities according to their duties under the LBA⁹¹, and face the consequences if they do not. Deposits up to USD 50'000 fall under the ordinary duties of the bank in case of account opening.

III Assessment and Conclusion

[Rz 99] Exchange control is definitely caught in the net of the Diligence Code as well as, at least potentially, of that of the LBA. In this respect, banks would be well advised to broadly interpret the related provisions rather than attempting to play with their legal intricacies.

[Rz 100] Even though the OBA-FINMA is not directly applicable, banks choosing to ignore exchange control would face several serious risks related to their duty to fulfill general duties, their liability for their subsidiaries and branches, and their clean record, to cite the main ones. FINMA is unlikely to look kindly at their negligence. Indeed, if funds originating from China are involved, banks can expect their liability to be rated as akin to objective.

[Rz 101] Art. 305^{bis} and Art. 305^{ter} Swiss Criminal Code do not apply directly, but again, like for the OBA-FINMA, chances are that a predicate offense, such as tax fraud, not to say money laundering, will seldom prove being far away from capital flight, thus triggering the direct application of the OBA-FINMA and of Art. 305^{bis} and Art. 305^{ter}. For this reason, the LBA should be strictly complied with too.

[Rz 102] If some still consider the Chinese penalties as a remote and moderate threat, we believe that it is unwise to underestimate them. At any rate, the Swiss ones, under the Diligence Code, and even more so the LBA, are serious, given the strict approach of the Swiss authorities, their amount, their enforceability, and the collateral risks of damage to the banks' reputation, hence

⁸⁶ Art. 6 Al. 2 Litt. c LBA, Fr. «risque accru».

⁸⁷ In particular, the LBA expressly mandates such checks in case of pooled transactions (Art. 3 Al. 2 LBA). So does the Diligence Code (so-called «smurfing», CDB 16, Art. 6 Al. 1). Pooling or smurfing are typical techniques for circumventing the PRC FOREX threshold of USD 50'000 per person per year. PRC law prohibits it, even within the permitted threshold, s. above n. 23.

⁸⁸ Art. 6 Al. 2 Litt. b LBA.

⁸⁹ S. above Sect. I.2.b).

⁹⁰ Art. 8 LBA.

⁹¹ S. Art. 9 LBA ff.

their license. Indeed, the Chinese exchange control will increasingly have to be complied with, as have U.S. and EU taxes.

[Rz 103] To this effect, Swiss banks' compliance officers and in-house lawyers need to grasp the basic concepts of the PRC FOREX. Namely, they need to identify the scheme under which the deposit at stake falls together with the related FOREX requirements, especially if such deposit is above USD 50'000, and to be aware of the typical techniques of illegal transfer of assets from China.

JEAN-CHRISTOPHE (JOHN) LIEBESKIND is a Swiss Attorney-at-Law. He is Partner and Head of the Chinese Desk at Meyerlustenberger Lachenal, a Swiss law firm, and Counsel at Global Law Office, a PRC law firm. His e-mail addresses are john.liebeskind@mll-legal.com and jlieskind@glo.com.cn. The author wishes to thank Ben Zhong, PRC Attorney-at-Law at Global Law Office Shanghai, Philippe Mantel and Christophe Rapin, Swiss Attorney-at-Law at Meyerlustenberger Lachenal Geneva/Lausanne for their contribution. Because it is primarily intended both for French- and German-speaking Swiss readers and for Chinese readers, this article is drafted in English.