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Hurdles and opportunities for foreign investors in Swiss real estate under the «Lex Koller» – no change in sight

The Federal Law of 16 December 1983 on the Acquisition of Real Estate by Persons Abroad («FL», better known as the «Lex Koller») restricts foreign investments in Swiss real estate. All political efforts in recent years to loosen or tighten these restrictions have failed. Foreign investors in Swiss real estate will therefore, at least in the medium-term, have to live with the existing legal hurdles, but will also be able to take advantage of existing legal opportunities. A brief overview.

1. Introduction

1.1 Review of the origin and revisions of the Lex Koller

Swiss lawmakers have been restricting the acquisition of land by foreigners since the 1960s. While this was initially performed via temporary federal decrees, FL, enacted in 1983, served from then on as the legal basis for restricting the acquisition of land by foreigners in Switzerland.

Since its enactment, the FL has undergone two major and several minor revisions. The first revision in 1997 resulted in a considerable easing; as from then on properties serving a commercial purpose (so-called permanent establishments) were no longer covered by the FL. In the course of the conclusion of the Agreement on the Free Movement of Persons between the Swiss Confederation and the European Community («EC») and its member states, the FL underwent a further revision. Thereby nationals of member states of the EC with residence in Switzerland were placed on an equal footing with Swiss citizens in the acquisition of Swiss real estate. What was true for nationals of member states of the EC had, of course, to apply to nationals of member states of the European Free Trade Association («EFTA») of which Switzerland has been a member since 1960, as well. In 2002 and 2005 there were some minor further relaxations of the restrictions.

Due to the significant increase in interest in investments in Swiss real estate from 2008 onwards as a result of the financial crisis, the Federal Council then abandoned in 2013 its efforts since 2007 to repeal the Lex Koller.

1.2 Failure of the latest revision of the Lex Koller and outlook

In 2017, the Federal Council (partly in fulfilment of a parliamentary postulate) adopted a draft proposal with commentary on the revision of the FL and submitted it to the Cantons, associations and organizations for consultation. It contained on the one hand relaxations (e.g. the newly granted access of citizens of non-European countries to so-called housing cooperatives), but on the other hand also numerous new restrictions (e.g. the extension of the authorization requirement for permanent establishments and the acquisition of shares in real estate companies). The majority of the participants in the consultation process then decidedly opposed the revision, especially on the grounds that it would lead to a considerable increase in administrative work and would harm Switzerland as a business location. Subsequently, the Federal Council decided in June 2018 to abandon the revision.

If there had not been another parliamentary initiative submitted at the end of 2016 and supported by the preparatory commissions of the two federal chambers of parliament, which would place strategic infrastructures of the energy industry such as electricity and gas networks or hydropower under the control of Lex Koller, the discussions surrounding Lex Koller would probably be off the table for a while. Nevertheless, it is unlikely that the provisions of the Lex Koller will be changed in the medium term. Therefore, it is important to give a brief overview of the provisions in force.

2. The provisions of Lex Koller in force

2.1 Principles

According to the FL (and the accompanying federal ordinance («OFL»)) in force the acquisition of real estate in Switzerland by persons abroad, requires the obtaining of an authorization from the appropriate authority of the Canton in which the real estate is situated. It is the Cantons' primary responsibility to enforce the FL, and, therefore, up to the authority designated by them to decide whether such authorization may be granted, as long as the granting is provided by the FL and, if applicable, by Cantonal law.

It is important to know that, in terms of the authorization requirement and with regard to the granting of such authorization, it is, in principal, immaterial whether the real estate has already been in foreign hands or what the legal basis of the real estate acquisition is.

2.2 Conditions for a transaction subject to the authorization requirement

2.2.1 Overview

A legal transaction requires authorization under the FL if (cumulatively, and always within the special meaning of this law):

- the subject acquiring is a **person abroad** (s. section 2.2.2 below),
- the acquisition object is **real estate** (s. section 2.2.3 below),
- the legal right the subject acquires to the object is considered an **acquisition** (s. section 2.2.4 below) and
- **no exemptions** to the authorization requirements apply (s. section 2.2.5 below).

2.2.2 A Person abroad

«Persons abroad» in the meaning of the FL are:

- Foreign natural persons residing outside of Switzerland,
- Foreign natural persons domiciled in Switzerland who are citizens of neither an EC nor an EFTA country **and** who do not hold a valid settlement permit («C permit»). Thereby indicating that EC or EFTA member state nationals may acquire real estate in Switzerland without authorization if they are legally and effectively domiciled in Switzerland with at least a B EC/EFTA or short term L EC/EFTA permit. Non-EC or non-EFTA country nationals may as well acquire real estate if they however are legally and effectively domiciled in Switzerland with a C permit,
- Legal entities (joint stock companies, partnerships limited by shares, limited liability companies, or cooperatives), including associations and foundations as well as companies without legal personality, which have their registered office abroad, regardless of whether they are Swiss-owned,
- Legal entities and companies domiciled in Switzerland, which are controlled by persons abroad, unless they are listed on the Swiss stock exchange or are funds regularly traded on off-exchange markets. A foreign control is given under the FL, if more than one third of a company's capital or more than one third of the voting rights are controlled by persons abroad or if a person abroad has granted substantial loans to the company,
- Trusts or fiduciaries who acquire real estate on behalf of persons abroad. A trust is considered as a person abroad, if any of the trustees or any of the beneficiaries qualify as persons abroad. However, many issues with regard to trusts have not yet been clearly settled by the courts and therefore the acquisition of real estate can suffer delays.

2.2.3 Real estate

«Real estate» in the very broad meaning of the FL entails all kinds of property held directly or indirectly, in sole ownership, joint or co-ownership, condominium ownership, and usufruct, such as single family dwellings or apartment houses, owner-occupied flats or building land. Even a leasehold or any other right to real estate is considered as «real estate» if the entitled person (for instance the lessee) holds a position similar to that of a property owner. Unless the real estate property covers more than 3,000 m², its size is basically of no importance.

It is highly relevant to know, however, that the acquisition of real estate does not require authorization, if it is used for commercial purposes («business property»), i.e. for **permanent business establishments**, such as factories, ware-house facilities, retail premises or shopping malls, offices, hotels, restaurants, workshops, doctor's practices. Such business property may also be purchased solely as an investment, and the investor may also acquire other rights to such property, for instance building rights, a right of first refusal, a repurchase right, a mortgage note or financing rights. However, the construction, rental or leasing of housing is not recognized as a permanent business activity in the above sense and the acquisition of real estate for such purposes is prohibited, as there are no grounds for granting authorization. Hotel based accommodation, on the other hand, is considered as a commercial purpose, so such property can be acquired or built without approval under the FL. Under certain exceptional circumstances, living space may be acquired by persons abroad in connection with their permanent business establishment in Switzerland.

It must however be mentioned that in this context prior authorization is principally required for the acquisition of **undeveloped land** in residential, industrial or commercial zones, unless the construction of a building for which no such authorization is required, such as a main residence or a permanent business establishment, is commenced within approximately one year, or it is otherwise used as a permanent establishment property (e.g. storage space, car park, access road), or it can be regarded as a permissible land reserve. Vacant buildings which no longer serve the purpose of exercising any economic activity are regarded as undeveloped land. The hoarding of land, even if it is not located in a residential zone but in an industrial or commercial zone, is also considered an impermissible capital investment.

2.2.4 Acquisition

An «acquisition» as broadly defined by the FL entails any transaction, regardless of its legal ground, which transmits actual financial control of real estate. This may be through a purchase, a call or put option, a pre-emption right, or a right of repurchase. This does, however, not only comprise of Land Register entries, but also includes the purchase of shares (even just one share or non-voting shares) in a legal entity or the participation in a company without legal personality, whose purpose it is to acquire and/or to own real estate. Even the financing of a purchase or construction of real estate, where the agreements, the size of the loans or the financial circumstances of the debtor, puts the purchaser or the contractor in a special dependency to the creditor, is considered an acquisition.

2.2.5 No further exemptions apply

Regardless of the aforementioned, certain persons are exempt from the requirements mentioned under sections 2.2.2 to 2.2.4 to obtain authorization. This includes legal heirs under Swiss law (by legal succession or by will), persons acquiring real estate as part of an estate, relatives in line of ascent or descent from the person disposing of the property, and their spouse or registered partner, purchasers who already hold an interest in the property (by joint ownership, co-ownership, or other condominium owners), in certain particular cases, real estate owners from abroad for smaller units, and cross-border EC and EFTA commuters for a secondary residence in the area of their workplace.

2.3 Procedures

2.3.1 Procedure for establishing authorization

If the authority involved in the transaction, e.g. the Land registry (in case of direct land transactions), the Commercial Registry (for the acquisition of company shares) or the Auctioneers' Office (for debt collection and bankruptcy auctions of land or shares) cannot immediately rule out the possibility of a transaction requiring prior authorization, they will refer the acquirer to another authority where he must apply for authorization or for a declaration that no such authorization is required. The authorization body then takes a decision which can be appealed before a Cantonal appeals body whose ruling thereon can be appealed before the Swiss Federal Supreme Court.

2.3.2 Grounds for authorization

The grounds for authorization provided in the Lex Koller and, as appropriate, in Cantonal legislation, are very **limited**. For example banks and insurance companies with a permit to operate in Switzerland may, under certain circumstances, acquire real estate as a result of foreclosing a mortgage. Furthermore, authorization may also be granted if the acquisition of real estate is used by a Swiss business for pension scheme operations benefiting personnel employed in Switzerland. last but not least, authorization for the acquisition of apartments in holiday resorts may be granted due to Cantonal provisions permitting an annual quota.

2.3.3 Legal consequences of violating the Lex Koller

In terms of civil law, transactions requiring authorization are **invalid** until authorization is obtained. The violation of the FL may also have criminal consequences, which are **punishable** with a prison sentence or fine.

3. Conclusions on current and outlook on future opportunities for the foreign investor in Swiss real estate

In the light of the current legal situation described above, the scope for an investor, considered by FL, as a person abroad (s. section 2.2.2 above) and willing to invest in real estate in Switzerland is still fairly limited. For such an investor the acquisition of real estate for residential purposes is

currently practically impossible. On the basis of the applicable law, he would have to continue to focus on investments in the area of commercial real estate, where almost the entire spectrum is open to him.

In view of the demographic development of the Swiss population, the steadily growing importance of the healthcare market and the associated investment potential, it will be necessary to discover what additional opportunities might be available to a foreign investor in the future. For example, the trend towards «assisted living» shows that in the health care market there are interesting intersections between residential and commercial properties, which need to be examined more closely, and which could possibly result in new opportunities for the foreign investor.

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