New attempt to tighten rules on foreign real property investments

05.03.2021

In January 2021 the Legal Affairs Committee of the National Council submitted an initiative that intends to temporarily prohibit the acquisition of business premises by persons abroad (Parliamentary Initiative 21.400). The proposal claims that it will mitigate the negative impact of the COVID-19 crisis on potential sales of Swiss businesses. In particular, it aims to prevent foreign investors from taking advantage of Swiss companies which are in financial distress by acquiring them at low prices.

Current rules and exemption for business premises

As a basic rule, the Federal Act on the Acquisition of Real Estate by Persons Abroad (the so-called 'Lex Koller') restricts the acquisition of residential real property by non-Swiss residents (Federal Act on the Acquisition of Real Property by Non-Swiss Residents, SR 211.412.41). The purpose of excluding foreign investors from the residential property market is to avoid speculation involving residential real properties so that purchase and rental prices remain affordable.

However, the Lex Koller provides for an important exemption: persons abroad are free to acquire any type of real property used for commercial purposes (ie, business premises such as manufacturing buildings, warehouses and logistics buildings, offices, retail properties, hotels, restaurants and hospitals).

The exemption allows foreign investors to acquire business premises in Switzerland for the purposes of their own business activities or as a mere capital investment. In addition, foreign investors may acquire an appropriate amount of a land reserve (up to one-third of the entire property) for expansion in the medium to long term.

Acquisitions of Swiss business premises by persons abroad are a key driver of the Swiss economy in various sectors, such as industrial production, hospitality in general and resorts in particular. As a result, such investments create and preserve numerous jobs and have considerable added value.

Proposed tightening

The governmental COVID-19 measures and restrictions have had a major impact on many Swiss businesses. In particular, retail, gastronomic and hospitality businesses, as well as recreational and entertainment facilities, have been severely affected by the two lockdowns which have been implemented to date, each of which lasted several weeks.

The initiative proposes to temporarily prohibit the acquisition of business premises by persons abroad. The initiative claims that it will prevent Swiss businesses which have been financially affected by the COVID-19 crisis from being pressured to sell their business or certain assets to foreign buyers at unfavourable terms and low land prices.

The initiative proposes that persons abroad may not acquire business premises during a 'special' or 'extraordinary' situation according to Articles 6 and 7 of the Epidemics Act and for two years following such a situation (Federal Act on the Combating of Communicable Diseases of the Human (Epidemics Act), SR 818.101). In particular, the temporary ban would apply:

- to any transaction concluded after the proposed new rule enters into effect;
- retroactively to any contract signed before the proposed new rule enters into effect, if such contract has yet to be completed by that date; and
- to transactions that require a formal Lex Koller decision, if such decision has yet to enter into legal effect by the date on which the proposed new rule enters into effect.

According to the Epidemics Act, an 'extraordinary situation' was in effect between 16 March 2020 and 19 June 2020. Thereafter, the Federal Council declared a 'special situation', which has been in effect since 20 June 2020. The end of the 'special situation' and the return to a normal situation is not yet foreseeable. The COVID-19 infection rate is still high, with approximately 1,000 infections per day.

The proposed temporary ban would prevent persons abroad from acquiring business premises for several years. It is not possible at this stage to assess when the proposed temporary prohibition would end. In addition, the proposed retroactive effect would lead to significant legal uncertainty with respect to numerous ongoing transactions.

The currently discussed proposal would affect all transactions that are not closed (transfer of title) when the new rule enters into effect. Previously closed transactions would not be affected, nor would business premises already owned by persons abroad.

Status of current discussions

In January 2021 the Legal Affairs Committee of the National Council passed the initiative. However, on 22 February 2021 the Legal Affairs Committee of the State Council rejected the initiative.

On 26 February 2021 the Economic Affairs and Taxation Committee of the National Council surprisingly decided to include the proposed temporary ban on the acquisition of business premises by persons abroad in the upcoming amendment of the COVID-19 Act, apparently with the goal of accelerating the legislative process.

The COVID-19 Act is being debated in the current parliamentary session which will end on 19 March 2021. If this latest proposal passes and Parliament declares the amended COVID-19 Act urgent, it may enter into force in March 2021. Even if a referendum is successfully taken against the urgent COVID-19 Act, it would not have a suspensive effect.

Comment

It is understandable that the Legal Affairs Committee of the State Council rejected the initiative based on the argument that there is no indication that foreign companies or investors are benefiting from the COVID-19 crisis by acquiring financially weak Swiss companies at low prices.

Further, foreign investors have by no means exacerbated the difficult situation in which Swiss businesses find themselves due to the COVID-19 crisis. The proposed amendment would actually be counterproductive because foreign investors improve the sales conditions for such companies by creating greater demand, which leads to higher sales prices. Excluding foreign investors would have the exact result which the initiative aims to prevent - namely, worse sales conditions.

In addition, although it is only temporary, the proposed amendment would severely harm important sectors of the Swiss economy and endanger numerous jobs.

It is evident that under the disguise of a COVID-19 measure, the initiative simply aims to tighten the Lex Koller regime. This is surprising, as Parliament rejected a proposal to tighten the Lex Koller not so long ago (for further details please see "Stricter rules for foreign investments in Swiss real property?" and "Federal government drops plan to tighten rules on foreign real property investments"). Further, Parliament recently rejected a federal act on rent reductions during the first COVID-19 lockdown (for further details please see "Federal act on rent reductions during COVID-19 lockdown fails in Parliament"). Against this background, there remains hope that the initiative will be unmasked and its dangerous consequences will be recognised.

Recommendation

Since the initiative has been pushed strongly in recent days and because it is proposed that the temporary ban on persons abroad acquiring Swiss business premises be included in the COVID-19 Act, it is possible that the new rule will come into force in March 2021.

Against this background and until the initiative is formally rejected or dropped, it seems advisable to accelerate ongoing transactions with the goal of keeping them outside the scope of a potential tightening of the law. To achieve this, the relevant contracts must be signed and completed (transfer of title) before the new rule comes into force.

This article has been published by Michael Lips (Partner) and Larissa Rickenbacher (Associate) on 5 March 2021 at International Law Office (ILO), London.

No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this legal update.

© 2021 Pestalozzi Attorneys at Law Ltd. All rights reserved.

Michael Lips

Partner
Attorney at Law, Dr. iur., LL.M., Certified Specialist SBA Construction & Real Estate Law
Head Real Estate & Environment

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 67
michael.lips@pestalozzilaw.com



Larissa Rickenbacher

Senior Associate
Attorney at law, Dr. iur.

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 33
larissa.rickenbacher@pestalozzilaw.com

