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Real Estate - Switzerland



Latest developments in foreign real property investments

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July 11 2014

Latest developments

Lex Koller regime*Lex Koller* issues in practice

Comment

Foreign investments in Swiss real estate are governed by a federal law known as the '*Lex Koller*'⁽¹⁾ and additional cantonal rules. The law restricts the acquisition of certain real property by non-Swiss residents. This update summarises the relevant rules and deals with legal issues frequently seen in practice.

Latest developments

In 2005 the federal government proposed to repeal the *Lex Koller*. There were concerns that, as a result certain regions would suffer from the excessive construction of second homes and vacation properties. To avoid the negative effects thereof, the government proposed a number of accompanying measures in land-use planning, in particular limiting the number of second and vacation homes in certain regions.

While the repeal was not yet completed and the accompanying measures were still under discussion, the property market performed strongly, even with the *Lex Koller* in force and during the financial crisis. With regard to some hot spots, concerns of an overheated market were expressed. These concerns have been addressed by the government, which - at the request of the Swiss National Bank - in 2013 activated a 'countercyclical capital buffer'. The purpose of the capital buffer is to strengthen the resistance capabilities of Swiss banks and the whole Swiss economy against risks arising as a result of imbalances in the mortgage and real estate market.

On the *Lex Koller* side, during 2012 and 2013, and given the tendency of property markets to overheat, the prevailing view changed and the proposal to repeal the law was formally terminated. In addition, a parliamentary proposal was filed to tighten the regime. Both the federal government and the National Council approved the proposal. However, the Council of States rejected it in June 2014. Accordingly, the regime will continue and no substantial tightening is foreseeable.

As a response to this development, the government announced a revision of the *Lex Koller* in order to address certain enforcement problems and loopholes. The revision is unlikely to go as far as the rejected proposal. A popular initiative may follow to tighten the regime, but it would take several years before such changes to the law were legally effective.

Lex Koller regime

As a basic rule, the *Lex Koller* restricts the acquisition of residential real property by non-Swiss residents. Non-Swiss investors are free to invest in any type of business premises, including offices, retail properties, warehouses, hotels, restaurants and hospitals. With limited exceptions, they may not invest in residential real estate. The purpose of excluding foreign investors from the residential property market is primarily to avoid speculation with these properties, so that purchase and rental prices remain affordable.

To avoid the circumvention of these restrictions, the law sets out strict and detailed rules. The key elements include the following:

- Acquisition of real property – this covers not only direct investments, but also a broad range of

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transactions, including building leases, usufructuaries, shares in property companies and property funds, pre-emptive rights and the acquisition of any other right that results in a similar position to the owner of a property.

- Non-Swiss residents – this includes:
 - citizens of EU and European Free Trade Association (EFTA) member states without actual and legal Swiss residence;
 - citizens of other states without permanent Swiss residence permit;
 - companies that do not have their statutory and actual registered office in Switzerland;
 - Swiss domiciled companies dominated by a non-Swiss resident; and
 - Swiss residents who acquire a property for the account or benefit of a non-Swiss resident.
- Dominant position – a non-Swiss resident has a dominant position if it can influence the administration or management of a company based on its financial participation, voting rights or for other reasons. The law assumes such influence, among other cases, if one-third of the shares are owned or one-third of the voting rights are controlled, or if a certain amount of loans is granted.

Despite these strict rules, the *Lex Koller* provides for a number of exceptions, including the following:

- Main residence – a citizen of a state other than EU and EFTA member states without a permanent Swiss residence permit (which for *Lex Koller* purposes is a non-Swiss resident) may acquire a residential real property at the place of its actual and legal main residence in Switzerland. No size limit applies to the apartment or house, but the acquisition of only one residential unit is allowed. No *Lex Koller* approval is required for such purchases if the land area does not exceed 3,000 square metres. However, if the land area exceeds 3,000 square metres, the competent authority must approve the purchase. It may do so only if, in the particular case, the purchase is not a pure capital investment, as this is not allowed under the *Lex Koller*.
- Secondary residence – a citizen of an EU or EFTA member state who commutes cross-border to Switzerland may acquire a residential real property as secondary residence in the region of his or her place of work in Switzerland. No size limit applies to the apartment or house and the acquisition of one residential unit only is allowed. Regarding the land area, the competent authority must approve the purchase if it exceeds 1,000 square metres. If the land area is smaller, no *Lex Koller* approval is required.
- Vacation homes – a non-Swiss resident may acquire a vacation home in Switzerland. A *Lex Koller* approval is required for such purchases. It is issued if:
 - the vacation home is located in a community designated as a tourism area;
 - a quota is available (1,500 annual quotas are available in the entire country);
 - the size of the apartment or house does not exceed 200 square metres (in practice, 250 square metres is accepted on proof of increased need);
 - the land area does not exceed 1,000 square metres (in practice, 1,500 square metres is accepted on proof of increased need); and
 - the purchaser does not already own a vacation home in Switzerland.

***Lex Koller* issues in practice**

In connection with business transactions, the following *Lex Koller*-related issues may arise:

- Business premises with residential parts – the acquisition of residential properties is allowed together with business premises to the extent that zone planning provides for a residential ratio. In addition, such properties may be acquired if they are essential to the related business premises – for example, the apartment of a technician whose presence is necessary for the business. In practice, the acquisition of residential properties is also approved if their separation from the business premises is not reasonably possible. Pursuant to the practice of at least some cantons, business premises with a residential ratio of up to 20% still qualify as business premises.
- Land reserve – business premises may include an appropriate amount of land reserve of up to one-third of the entire property area, and in particular cases up to half of the property area. Accordingly, two thirds of the entire area must be overbuilt by, among other things, buildings, car parks and access roads within approximately one year of the acquisition. The remaining part may serve for expansions in the medium and long term.
- Granting loans – the law assumes a dominant position of a non-Swiss resident if the latter provides a company with repayable funds exceeding half of the difference between the company's assets and its debt towards Swiss residents. This applies regardless of whether such loans are secured by mortgages.

Mortgage-backed loans – in general, the creation of a real estate mortgage does not qualify as an acquisition of real estate in the sense of the *Lex Koller*. Thus, no *Lex Koller* authorisation is required for the creation of a mortgage security for a non-Swiss creditor. However, under particular circumstances the creation of such a mortgage is subject to *Lex Koller* authorisation or clearance by the competent *Lex Koller* authority. This applies in particular in the case of unusual loan terms or an unusually high loan amount that brings the debtor into a special dependency to the lender. This is the case if a third-party lender would not grant a loan at the same terms.

- Realisation of mortgages – if a mortgage is realised in the course of a foreclosure or liquidation settlement, the lender may enter into an ownership position only on receipt of *Lex Koller* authorisation or if the property is not subject to the *Lex Koller* (business premises). A *Lex Koller* authorisation may be issued only to non-Swiss lenders which are banks or insurers with a permit to operate in Switzerland. If the foreign lender does not fulfil this requirement, it may not purchase the real property. To realise its security, it must then sell the property to a third party which is entitled to acquire it.
- Property companies – the acquisition of shares in real estate companies – even the acquisition of a single share – is subject to the *Lex Koller* restrictions, unless the company is listed on a Swiss stock exchange. From a *Lex Koller* perspective, a company is a real estate company if its main actual purpose is acquiring or trading with Swiss residential real properties. The company's real purpose, and not just its statutory purpose, is relevant. A secondary purpose itself (may also acquire real properties) does not trigger *Lex Koller* issues and does not, during formation of the company, oblige the registrar of commerce to involve the *Lex Koller* authority.
- Emigration abroad – if a company transfers its registered or actual office abroad and retains rights in Swiss real property that is subject to the *Lex Koller*, the company becomes, from a *Lex Koller* perspective, a non-Swiss resident and the transfer qualifies as an acquisition of real property. Accordingly, the registrar of commerce must in any event refer the company, before its deletion from the Commercial Register, to the competent cantonal *Lex Koller* authority. The company must obtain either a confirmation that no such authorisation is required or, if possible, a *Lex Koller* approval.

Comment

The federal parliament recently rejected a proposal to considerably tighten the existing *Lex Koller* regime. A soft revision addressing certain enforcement problems and loopholes may be expected in the medium term.

In practice, business transactions frequently lead to *Lex Koller*-related uncertainties, in which case the competent cantonal *Lex Koller* authority should be contacted. This applies, for instance, if:

- a business premises contains a residential part;
- a business premises includes a substantial amount of land reserve; or
- a vacation home exceeds a certain size.

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Endnotes

(1) Federal Act on the Acquisition of Real Property by non-Swiss Residents, SR 211.412.41.

Comment or question for author

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