

Briefing March 2017

Acquisition of Real Estate by Foreigners: Additional Restrictions Proposed

On 10 March 2017, the Federal Council of Switzerland has opened a hearing procedure for an amendment of the Lex Koller, the law restricting the acquisition of real estate by persons abroad. The Federal Council proposes more and in part very severe restrictions for discussion. In particular, commercial properties shall be subject to the Lex Koller again and the acquisition of shares in listed real estate companies shall again be restricted.

The proposals by the Federal Council are very controversial. In fact, the two most far reaching proposals have already been rejected by the parliament in 2014. For this reason, it remains unclear whether and what changes will be enacted in approximately two to three years after the completion of the legislative procedure.

Commercial Properties

The most far reaching proposal relates to commercial properties, i.e. properties used for commercial or business purposes (office, production, logistics, retail, hotel, etc.). Such commercial properties shall again be subject to the Lex Koller. Persons abroad would thus be excluded from acquiring commercial properties in Switzerland in the future. Only if an owner uses the property for his own business activities and does not lease the property to third parties, a permit would be available as an exception.

This fundamental change would repeal a liberalisation of the Lex Koller that was enacted in 1997. As a consequence, foreigners would be almost completely excluded from the acquisition of real estate properties in Switzerland for investment purposes. The acquisition of non-commercial properties, in particular residential properties, is already today inadmissible.

If these changes are enacted, negative consequences on the Swiss economy will be likely. A report commissioned by the Federal Council concluded that it would be preferable from an economic perspective not to enact the proposals. For this reason, the Federal Council does not formally propose this change, but rather puts it up for discussion only.

Conversion

Already under the present law, it is inadmissible that foreigners can acquire commercial properties and convert them into residential properties after the acquisition. The Federal Council now proposes to expressly subject such conversions to a permit requirement. The local building permit authorities would thus have to examine in the future whether the owner of the property is Swiss or foreign. If a foreign ownership cannot be excluded without doubt, the

building permit authorities would have to defer the question to the competent Lex Koller authority who would have to decide in a Lex Koller proceeding before a building permit is issued. As such Lex Koller proceedings easily take four to six months, substantial delays in the building permit procedure could be expected.

Mixed-use Properties

Under the present law, foreigners may acquire mixed-use properties if the local zoning regulations require a minimum quote of residential use. The present law does not stipulate an explicit maximum for the residential part of a mixed-use property that may be acquired in reliance on this rule, however, in practice no more than a residential quota of 50% is accepted. Now, the Federal Council proposes to expressly limit the residential quota to one third.

Listed Real Estate Companies

Since 2005, foreigners are permitted to acquire shares in listed real estate companies even if they invest in residential properties. The Federal Council puts this again up for discussion. Persons abroad would thus not be permitted to acquire shares or other equity securities in listed real estate companies anymore. As stock exchange trading does not allow to determine the nationality of a buyer, this change could lead to the consequence that listed real estate companies would have to delist their shares from the stock exchange – with all the corresponding negative consequences for shareholders.

Real Estate Investment Funds

Under the current law, foreigners may acquire shares in Swiss real estate investment funds if the shares are regularly traded on the market. In its current bill, the Federal Council proposes to limit the acquisition of shares in real estate investment funds to shares listed on a Swiss stock exchange. As many of the Swiss real estate investment funds are not listed on a stock exchange, the new rule could have the consequence that residential real estate funds would have to list in order to remain open for foreigners as investors.

Foreclosure by Foreign Banks and Insurance Companies

Foreign banks and insurance companies do not face any Lex Koller restrictions when financing Swiss real estate if the financing follows usual commercial terms. The law even allows that foreign banks and insurance companies acquire the real estate property they financed in a foreclosure proceedings. The Federal Council now proposes that the right to acquire the property in a foreclosure shall only apply to foreign controlled banks and insurance companies which have their head office (corporate seat) in Switzerland, but not to foreign banks and insurance companies that are based abroad. In the future, real estate financings by foreign banks and insurance companies would thus have to be carried out by a Swiss subsidiary, should banks or insurances want to retain the right to acquire the financed property in foreclosure proceedings.

Primary Residence

EU-national resident in Switzerland are treated like Swiss citizens under the current law and therefore are not subject to any restrictions when acquiring Swiss real estate. Nothing will change in this respect.

Nationals from third states, i.e. nationals from other countries than the EU or Switzerland, are only treated like Swiss citizens if they hold a Swiss resident permit C.

Prior to acquiring a resident permit C, however, such third state nationals may acquire an apartment or house at their place of domicile as their primary residence. Today, no permit is required for such an acquisition. The Federal Council now proposes to subject the acquisition of a primary residence again to a permit requirement, which complicates the acquisition process.

In addition, the Federal Council proposes that third state nationals must sell their primary residence within two years after they left Switzerland or stopped using the property as primary residence. There is no such resale obligation under the current law.

Housing Cooperatives

According to today's law, third state nationals without resident permit C may not acquire shares in housing cooperatives. As the acquisition of such shares is usually a condition for renting an apartment in a housing cooperative, third party nationals without resident permit C are nowadays often excluded from renting such apartments.

Part of the Federal Council's proposal is to adjust this. This proposal suggested by left parties is the only liberalization in the draft revision of the Lex Koller besides many in part drastic new restrictions.

Foreign Control of Legal Entities

Under the present Lex Koller, the foreign control of a Swiss corporation or other Swiss legal entity is presumed by the law if persons abroad hold more than a third of the capital or the voting rights in the corporation. The Federal Council now proposes an additional presumption of law. In the future, legal entities shall also be presumed to be foreign controlled if their governing board is composed by a majority of foreigners.

Further Changes

The Federal Council further proposes changes in the organization of the Lex Koller authorities as well as certain changes to the proceedings in case of breaches of the law.

In addition, the holding of certain leading cases shall be incorporated in the law. Amongst other, the Federal Council proposes a provision excluding the acquisition of a property for a trust, if any of the trustees or beneficiaries of the trust is a person abroad.

Transitional Law

According to the proposal by the Federal Council, the new rules shall apply to all transactions that are signed or closed after the new law will have entered into force. The new rules will therefore not apply retroactively. In particular, owners will not have to sell properties that they legally acquired prior to the enactment of the revision.

Legislative Procedure

The hearing proceedings started on 10 March 2017 and will end on 30 June 2017. Interested parties may submit comments to the Federal Office of Justice until that date. Opposition against the revision is already forming. In particular, the Association of Real Estate Investors (VII), the Alliance Lex Koller: For a Modern Law as well as the Swiss Homeowners Association (HEV Schweiz) have already announced their opposition against the revision.

Based on the results of the hearing proceedings, the Federal Council will decide whether and what changes to propose to the parliament. Should the Federal Council decide so, both chambers of the parliament will have to decide on the bill in the ordinary legislative proceeding. Should the parliament approve to change the law, a referendum could still be taken.

Consequently, we do not expect any amendments to enter into force within the next two to three years.

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