

COVID-19 Update

Real Estate

25 January 2021

Lex Koller: Temporary ban on foreign investors acquiring commercial real estate in Switzerland?

With a surprisingly clear vote of 22:0, with two abstentions, the Legal Affairs Committee (*Kommission für Rechtsfragen NR*) of the Swiss National Council (*Nationalrat*) passed a committee initiative (*Kommissionsinitiative*) that intends to temporarily suspend the exemption for the acquisition of real estate properties used for commercial purposes (*Betriebsstätte-Grundstücke*), which applies under the Lex Koller. According to the committee, this initiative shall prevent Swiss companies, which have come under pressure as a result of the COVID-19 crisis, from being forced to sell their business premises at favorable prices to foreign companies. The initiative is now being examined by the Committee of the Swiss Council of States (*Ständerat*) and could, if approved and if the legislative amendment is declared urgent, be passed by the parliament and put into force within a few months.

The Federal Act on the Acquisition of Real Estate by Persons Abroad, also known as Lex Koller, subjects the acquisition of real estate by persons abroad (*Personen im Ausland*) to a general authorization requirement. Persons abroad are, in particular, natural persons domiciled abroad and legal entities that either have their registered office abroad or are controlled by a person abroad.

In practice, an important exemption from the authorization requirement is the acquisition of so-called real estate properties used for commercial purposes (*Betriebsstätte-Grundstücke*) (article 2 para. 2 lit. a Lex Koller). In simple

terms, real estate properties used for commercial purposes are real estate which is used for business and not for residential purposes. The exemption from the authorization requirement for real estate properties used for commercial purposes is therefore extremely important in practice, since it covers a large number of economically significant real estate properties – such as manufacturing buildings, warehouses, offices, shopping centers, craft businesses or also hotels and restaurants.

The exemption from the authorization requirement for the acquisition of real estate properties used for commercial purposes is now intended to

be temporarily suspended. Specifically, the committee initiative provides that the exemption shall no longer apply:

- › during a "special" (*besondere Lage*) or an "extraordinary" situation (*ausserordentliche Lage*) under articles 6 and 7, respectively, of the Epidemics Act (*Empidemiengesetz*); and
- › for the two subsequent years following such a situation; and
- › to transactions that have already been concluded but not yet completed, unless there is already a legally binding Lex Koller ruling – which, however, is unlikely to be the case in practice because the acquisition of real estate properties used for commercial purposes does not require a Lex Koller authorization under the current law in the first place.

In Switzerland, a special situation according to article 6 of the Epidemics Act has been in effect since June 2020. As a consequence, the amendment of the Lex Koller demanded by the committee initiative would, therefore, **prohibit the direct acquisition of real estate properties used for commercial purposes by persons abroad** for several years. Also in the case of M&A transactions that lead to an indirect acquisition of real estate properties used for commercial purposes through the purchase of corresponding company shares, the applicability of the Lex Koller would have to be closely examined in any case, especially where real estate property subject to approval (i.e. now also

real estate properties used for commercial purposes) accounts for more than one third of the assets of the target company.

The proposed suspension of the exemption for real estate properties used for commercial purposes comes very surprisingly. It also seems questionable whether the goal envisaged by the Legal Affairs Committee of the Swiss National Council – namely "to prevent financially strong foreign investors from taking advantage of the financial distress of Swiss companies and acquiring company real estate at low prices" – can in fact be achieved with the suspension. The temporary loss of foreign investors will tend to lead to lower purchase price proceeds for real estate properties used for commercial purposes and is, thus, likely to further harm distressed companies. At the same time, the restructuring and urgently needed liquidity injection for distressed Swiss companies will be made more difficult with this suspension. Finally, the suspension in its current form would also apply to transactions that have a completely different motivation – i.e. those outside of any financial distress on the seller's side – and furthermore would also complicate ongoing and future M&A transactions.

It now remains to be seen how the Committee of the Council of States and, if the initiative is adopted, the two councils will position themselves with regard to this matter.

If you have any further questions on this subject, please do not hesitate to contact us.

Legal Note: The information contained in this COVID-19 Update is of general nature and does not constitute legal advice. In case of particular queries regarding the legal situation relevant to you, please do not hesitate to contact us.

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