

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 of the Swiss National Council passed a committee initiative that intends to temporarily suspend the exemption for the acquisition of real estate properties used for commercial purposes, which applies under the Lex Koller. According to the committee, this initiative shall prevent Swiss businesses, 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 considered by the Legal Affairs Committee of the Swiss Council of States and could, if approved and if the legislative amendment is declared urgent, be passed by the Swiss parliament and put into force within a few months.

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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 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 applies to the acquisition of real estate properties used for commercial purposes (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 commercial real estate properties is therefore extremely important in practice, as 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 commercial real estate properties is now intended to be temporarily suspended. Specifically, the committee initiative provides that:

- the exemption shall no longer apply during a "special" or an "extraordinary" situation under articles 6 and 7, respectively, of the Epidemics Act; and
- for the two subsequent years following such special or extraordinary situation; and that
- the suspension shall apply also to transactions that have already been concluded but not yet completed, unless there is already a legally binding Lex Koller authorization – which, however, is unlikely to be the case in practice because the acquisition of commercial real estate properties 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 commercial real estate properties by persons abroad** for several years. Also in the case of M&A transactions that lead to an indirect acquisition of commercial real estate properties 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 commercial real estate properties) accounts for more than one third of the assets of the target company.

The proposed suspension of the exemption for commercial real estate properties 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 businesses and acquiring commercial 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 commercial real estate properties and is, thus, likely to further harm distressed businesses. At the same time, the restructuring and urgently needed liquidity injection for distressed Swiss businesses 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 Legal Affairs Committee of the Council of States and, if the initiative is adopted, the Swiss parliament will position themselves with regard to this matter.

Please do not hesitate to contact us in case of any questions.

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