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## Liberalisation of the Federal Law Concerning the Acquisition of Residential Real Estate by Foreigners ("*Lex Koller*")



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**The Swiss real estate market has recently attracted many new interested investors and financial institutions from abroad that mainly invest in, or finance, commercial real estate and respective portfolios. The Federal Law Concerning the Acquisition of Real Estate by Foreigners, which also is known as the "*Lex Koller*", limits the ability of foreigners to purchase *residential* real estate in Switzerland. The scope of the permit requirement has been reduced step-by-step since its introduction in the 1960s.**

### Recent liberalisation

Since 1 April 2005, as a result of the most recent liberalisation of the *Lex Koller*, the purchase of shares in residential property investment corporations listed on a Swiss stock exchange by foreign persons no longer requires a permit. Furthermore, the Swiss Federal Council adopted a resolution on 1 November 2005 to ask the Swiss Parliament to repeal the *Lex Koller* in its entirety.

### Which transactions require a permit?

The obligation to obtain a permit for a transaction depends generally on the fulfilment of each of the following conditions: The purchaser is considered to be a "foreigner" and the transaction involves the acquisition of a real estate requiring a permit under the *Lex Koller*.

*Foreigners* are considered to be:

- Persons who are not Swiss citizens who have their residence outside Switzerland;
- Persons not having Swiss citizenship who have their residence in Switzerland, but who are neither citizens of the member states of the European Union ("EU") or the European Free Trade Association ("EFTA") nor holders of a valid "C" residence permit;
- Corporations with their legal domicile outside Switzerland (even if they are owned by Swiss citizens and therefore economically could be considered to be Swiss corporations);
- Legal entities and associations which have their

legal and factual domicile in Switzerland and which are capable of owning assets, but which nevertheless are controlled by foreigners (such control is assumed if foreigners own more than one-third of the capital or hold more than one-third of the voting rights of the entity or have granted a significant loan to the entity);

- Persons who would not be subject to *Lex Koller* purchase restrictions but who acquire a real estate for the benefit of a foreigner.

Real estate transactions which require a permit are the acquisition of single-family and multi-family residences, condominiums and land (or land reserves of more than one third of a particular property) on which residences of these types may be built. There are exceptions for the acquisition of (1) a primary residence by a foreign person, (2) apartments that are acquired along with the acquisition of a place of business and which are necessary for the operation of the business (e.g. for maintenance or technical workers, etc.) and (3) that are used for business purposes (so-called "place-of-business properties"). Further exemptions are available for heirs, co-owners and citizens of EU and EFTA member states who are cross-border workers if the relevant property is located in the geographic area where they work.

An economic analysis is applied for the classification of a purchase. As a result, the acquisition of ownership interests in a legal entity which owns residential real estate or a participation in a residential real

estate investment company is the legal equivalent of the acquisition of an ownership interest in real estate under the *Lex Koller*. Even the establishment of a security interest in real estate to secure the repayment of a loan, which is provided by a foreign lender or a domestic lender controlled by foreigners, may potentially lead to an obligation to acquire a permit for the acquisition of that interest in real estate if the value of the interest exceeds approximately 80% of the market value of the relevant real estate. However, such threshold can be exceeded if the security package granted by the purchaser goes beyond the security level usually required by Swiss banks.

#### **Exceptions under *Lex Koller* for the acquisition of shares in real estate investment companies listed on a Swiss stock exchange**

Since 1 April 2005, foreigners are no longer subject to a permit requirement for the acquisition of shares in real estate investment companies which are listed on a Swiss stock exchange. Prior thereto, only the acquisition of shares in publicly traded real estate investment funds by foreigners was exempt from the permit requirement. Generally, no permits were issued to foreigners for the acquisition of shares in residential real estate investment companies. As a result, real estate investment companies had to maintain low levels of investment in residential properties in order to avoid being classified as residential real estate investment companies. Real estate investment companies, which wanted permission to maintain a higher proportion of residential properties in their portfolios, had to prove to the authorities that they employed measures to prevent or limit investment by foreigners in their companies. Practically, Swiss shareholders of such real estate investment companies were asked to enter into a shareholders agreement securing the majority of Swiss shareholders. The amendments to the *Lex Koller* increase operating flexibility for real estate investment companies which are listed on a stock exchange (a "Qualifying Real Estate Company"), although some issues still remain unsolved and must be developed in practice by requesting respective rulings. For instance, the Federal Office of Justice seems to take the position that only the acquisition of shares in a Qualifying Real Estate Company is exempt under the new provisions whereas the acquisition of (new) residential real estate by a Qualifying Real Estate Company controlled by foreigners would remain subject to the old restrictions. Obviously, this view could seriously undermine the intended reform.

The acquisition of shares in a legal entity which has as its purpose the acquisition of residential real

estate, but which is not listed on a Swiss stock exchange, remains subject to the permit requirement.

#### **Outlook**

The Swiss Federal Council adopted a resolution in its session on 1 November 2005 to ask the Swiss Parliament for the complete repeal of the *Lex Koller* and to allow the acquisition of real estate by foreigners without any permits. If this comes to pass (probably it will be finally decided by the Swiss voters by means of a referendum), Switzerland will part with the last remnants of restrictions on the ownership of real property by foreigners. The Swiss Federal Council resolution calls for the use of protective zoning measures to avoid negative effects of a boom in the construction of vacation apartments in tourist areas. In order for the cantons to have sufficient time to implement such zoning measures, the repeal of the *Lex Koller* should not be proposed until after the lapse of approximately three years from the implementation of the amended zoning rules. Therefore, for the time being, the acquisition of residential real estate by foreigners still remains subject to the restrictions imposed by the *Lex Koller*. It has to be seen how far the already enacted reform for real estate companies listed on a Swiss stock exchange will actually reach.

The ww&p NewsLetter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

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