

Tightening of Lex Koller? Turning point on 2 June

The second chamber of the Swiss Parliament, the Council of States, decides on 2 June 2014 on two pending motions for a tightening of the Lex Koller. These motions request that the acquisition of commercial properties, the acquisition of shares in listed real estate companies and of shares in regularly traded real estate funds shall again be subject to the Lex Koller.

In April, the Committee for Legal Affairs of the Council of States decided with a small margin to recommend to reject the motions. If the Council of States rejects the motions on 2 June, the tightening will be off the table. If the Council of States approves the motions, the Federal Council will have to prepare a bill within two years.

Background

On 27 September 2013, a left-wing National Councilor filed two motions requesting a tightening of Lex Koller, the federal law limiting the acquisition of non-commercial real estate in Switzerland by non-residents. The Government proposed to approve the motions in a virtually unnoticed decision and the National Council, the first chamber of the Swiss Parliament, approved them without any debate on 13 December 2013.

The Committee for Legal Affairs of the Council of States recommends to reject the motions.

Next Steps

The Council of States will decide on the motions on 2 June 2014 in the course of its summer session. Should the Council of State dismiss the motions, the changes would definitely be dismissed.

Should the Council of States approve the motions, the Federal Council would have to present a bill within two years. The legislative procedure would follow the normal rules:

- The Federal Council prepares a preliminary draft that goes into consultation with different stakeholders ("*Vernehmlassung*").
- Based on the results of the consultation, the Federal Council publishes a draft legislative text with an explanatory message.
- If both chambers of the Swiss Parliament accept to discuss the matter, the draft is discussed in turns in both chambers in different sessions. If, after three sessions in each chamber, there are still differences, a procedure for reconciling the versions ("*Differenzbereinigungsverfahren*") will apply.
- The final draft is subject to a facultative referendum. If 50,000 signatures are collected within the deadline of 100 days, a popular vote will take place.

A recent amendment of the environmental legislation providing that the sale of plots listed in the register of polluted sites shall be subject to authorization may give an idea of the timing. This parliamentary initiative was filed in September 2009; the amendment became effective as per 1 November 2013 (with some parts coming into force on 1 July 2014).

Content

Many questions remain open. An approval of the motions would lead to a substantial uncertainty that would have the potential to negatively impact the Swiss real estate market, even if the legislative amendment should ultimately fail.

Commercial Properties

The first motion requests that the acquisition of commercial properties ("*Betriebsstättegrundstücke*") shall again be subject to an approval requirement. With this amendment, an exemption dating from 1997 according to which commercial properties are not subject to approval would be rescinded.

- If this exemption is deleted, it would make sense to reintroduce a ground for authorizations that existed at the time providing that an authorization may be granted for the acquisition of commercial properties that are self-used by the purchaser. Even better would be to generally exempt the acquisition of self-used commercial properties from the authorization requirement in order to avoid unnecessary authorization procedures.
- Whether further exemptions will be introduced remains an open question. The motion suggests merely that exemptions for investments in hotels shall be examined.

The consequences of an amendment would in any case be far-reaching. Not only would the acquisition of properties by foreigners for investment purposes be impossible, but also the acquisition of shares in Swiss companies (incl. SME) holding material not self-used real estate would be complicated and, in some cases, even impossible. Therefore, the legislation would hinder the raising of capital by Swiss industrial companies, a consequence that was certainly not intended.

According to the rationale of the legislation, at least today's holdings in real estate should not be affected by the amendment, as only the *acquisition* is subject to a statutory authorization requirement. It is therefore unlikely that foreign investors would have to sell their properties. New acquisitions (incl. via share deal) and even reorganizations would however become impossible.

Listed Shares and Real Estate Funds

The second motion requests that the exemptions for the acquisition of shares in listed companies and of shares in regularly traded real estate investment funds (both of which are currently not subject to Lex Koller) shall be rescinded. The first exemption was introduced in 2005, the second concerning real estate funds back in 1974. Therefore, foreigners would be barred from purchasing shares in listed real estate companies and/or shares in real estate funds. This would *nota bene* apply not only to companies and funds significantly invested in residential property but – in case commercial properties would again be subject to Lex Koller – to all real estate companies and funds.

The consequences for the Swiss real estate market and fund industry would be serious.

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