

Real Estate M&A and Private Equity: Switzerland

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Bär & Karrer Ltd

By Rocco Rigozzi, Andrea Ziswiler, Hanna Brozzo, Thomas Rohde and Corrado Rampini



Introduction

Despite a slight decrease in the number of transactions, the Swiss M&A sector showed resilience in 2024. According to KPMG's market study, over 450 deals were completed, totalling nearly US\$115 billion, which registered an increase in the amounts committed compared to the previous year (2023: 484 transactions amounting to US\$72 billion).¹ Private equity continues to play an important role in the Swiss M&A market. As already registered in 2023, M&A transactions have become lengthier, more uncertain and more thoroughly negotiated compared to those in previous years. Streamlined company's structures have become even more attractive, particularly those involving carve-outs or spin-offs.

The industrial goods sector led the M&A activity. The telecommunications, media, and technology (TMT) segment and the pharmaceutical and life sciences sector also saw significant activity. Swiss companies are more active in acquiring foreign entities, accounting for nearly half of all transactions, as opposed to foreign investments in Swiss companies.² This dynamic landscape demonstrates Swiss companies' strong liquidity and robust financial positions, making them important players in the global M&A arena.

The Swiss real estate M&A market shows sustained confidence in Switzerland's role as a prime location for real estate investments in 2025.³ Current economic trends provide the Swiss National Bank (SNB) with the flexibility to implement further interest rate cuts, which are expected to positively impact the Swiss real estate

market. Despite promising initial study results, the Swiss real estate industry is still in the early stages of adopting AI, with a lack of reliable use cases.

Residential properties continue to lead as the top asset class. Prices for residential properties, particularly single-family homes, have been rising. Demographic trends remain a significant factor for the Swiss market, and affordable housing has become an urgent political issue. The Swiss office property market presents a mixed picture. Demand is particularly high in prime locations like Zurich and Geneva, leading to stable or rising rents. Conversely, many office spaces in peripheral locations remain vacant, exerting downward pressure on rents.⁴

Based on our direct experience, real estate transactions in Switzerland, whether for residential or commercial properties, have generally remained medium-sized. However, like the previous year, we are beginning to observe some large-scale transactions by foreign investors, particularly private equity funds. The stability of the Swiss real estate market compared to other countries in Europe has made it increasingly attractive to foreign investors. This despite some political voices attempting to strengthen the Swiss legislation known as Lex Koller, which limits the ability of foreign investors to directly and indirectly acquire residential real estate. These proposals aim to extend these restrictions to the acquisition of commercial property for (only) investment purposes.

A trend observed in 2023, where pension funds became less active in the Swiss real estate market, especially on the buy-side, has continued. Pension funds strategically disinvested their portfolios through selected sales transactions, leading to the entry of more private local investors and developers. This trend could be further enhanced by the introduction of a more flexible fund category in the Swiss fund market, the Limited Qualified Investor Fund (L-QIF). This particularly liberal category in the area of Swiss collective investment schemes is not subject to approval or authorisation by FINMA.

Mergers of funds, transactions in the hotel industry (including hotel management agreements), and data centres, particularly by foreign investors, remained topics of interest.

Year in review

First experiences with the L-QIF

On 1 March 2024, amendments to the Swiss Collective Investment Schemes legislation introduced the L-QIF, modelled after foreign examples such as Luxembourg's Reserved Alternative Investment Fund (RAIF). About one year after its introduction, the first practical experiences have been observed.

The L-QIF is a notably liberal category within Swiss collective investment schemes, designed exclusively for qualified investors. It is not subject to approval or authorisation by the Swiss Financial Market Supervisory Authority (FINMA), which significantly reduces the costs and time required to set up a fund.

The Federal Department of Finance (FDF) maintains a publicly accessible list of all L-QIFs. Currently, there are 21 reported L-QIFs,⁵ with some focusing specifically on real estate investments.

Mergers of real estate funds

Following an important year in 2023 and the first quarter of 2024, marked by the mergers of the new AXA Real Estate Fund Switzerland and the merger of sub-funds Swiss Commercial Fund and Swiss Commercial Fund II into Procimmo Real Estate SICAV, the Swiss real estate market continues to exhibit significant fund mergers.

Specifically, as a result of the integration of Credit Suisse Funds AG, UBS Fund Management is planning to merge additional products with similar investment strategies to enhance the diversification and resilience of the affected funds.⁶

Real estate capital markets transactions

Swiss real estate capital market transactions have been moderate. On 13 March 2024, Galderma Group AG, a leading dermatology company, announced the launch of its Initial Public Offering (IPO) on the SIX Swiss Exchange. Further, Helvetia Asset Management Ltd listed the Helvetia (CH) Swiss Property Fund on the SIX Swiss Exchange on 25 June 2024.

In addition, there have been occasional instances of listed real estate companies and funds raising additional capital.

Direct investment in single real estate assets and other M&A and private equity transactions

Direct investments in Swiss real estate assets, in both residential and commercial real estate, have remained quite active. Among others, it is worth mentioning the sale – in the third quarter of 2024 – of Hero Group's production facility to Ricola in Lenzburg. The buyer, Ricola, aims to expand its production capacity to satisfy the high global demand for its products. Ricola is taking over the entire plant while the landmark round office building will remain the property of Hero and serve as headquarters for the group and Swiss organisations. Noteworthy also is the transaction between MediaMarktSaturn and Migros, according to which MediaMarktSaturn will take over 20 melectronics stores.

Overall, M&A and private equity transactions in Switzerland – including in the real estate sector or involving operating companies with important real estate industrial, production and research facilities – continue to attract interest, even though most remain undisclosed. Among others, HAS Healthcare Advanced Synthesis SA, backed by 65 Equity Partners, has recently acquired Chemholding due SA and its subsidiaries, including its main operative company Cerbios-Pharma SA, thereby establishing a highly complementary and integrated leader in the contract development and manufacturing organisation industry.

Real estate companies and firms

Overview

Real estate investment trusts (REITs), as known in common law jurisdictions, have not yet been introduced in the Swiss regime, and foreign law governed REITs offered in Switzerland may be subject to regulatory requirements and restrictions. In Switzerland, the most common real estate investment vehicles are either privately held or listed.

Real estate investment funds

In accordance with the Swiss Collective Investment Schemes Act (CISA), regulated real estate investment funds (i.e., that are subject to FINMA approval and supervision) can invest their assets in:

- a. real estate property;
- b. real estate companies, provided that at least two-thirds of their capital and voting rights are incorporated in the real estate investment fund;
- c. units in other real estate investment funds and listed real estate investment companies amounting to no more than 25 per cent of the fund's total assets; or
- d. foreign real estate securities whose value can be adequately assessed.

Pursuant to the CISA, listed real estate funds can appear as a contractual fund⁷ or an investment company with variable capital (SICAV).⁸

Contractual funds are structured based on an investment contract instead of a legal entity. A fund management company involves investors in accordance with the number and type of units acquired by these investors and manages the assets of the contractual fund in accordance with the provision of the investment contract at its own discretion and for its own account. The investment contract is drawn up by the fund management company and must be approved by FINMA.

Investment companies with SICAV are established pursuant to the provisions of the Swiss Code of Obligations applicable to the establishment of Swiss corporations (with some exceptions) and are companies:

- a. whose capital and number of shares are not specified in advance;
- b. whose capital is divided into company shares and investor shares;
- c. whose liabilities are only covered by the company's assets; and
- d. whose sole purpose is collective capital investment.

An authorisation from FINMA is necessary for an investment company with SICAV to operate in Switzerland.

Limited Qualified Investor Fund

General remarks

On 1 March 2024, amendments to the Swiss Collective Investment Schemes legislation came into force, introducing the L-QIF into Swiss law⁹, modelled after foreign structures like Luxembourg's RAIF.

The L-QIF is a new product/fund category based on existing legal forms of Swiss collective investment schemes and does not require approval or authorisation by FINMA. For open-end funds, legal forms include the contractual investment fund and the investment company with SICAV; for closed-end funds, the limited partnership for collective investment (LPCI) form applies. A L-QIF cannot be established as an investment company with fixed capital (SICAF), as such investment companies for qualified investors were already exempt from the scope of the Swiss Collective Investment Schemes legislation.

A L-QIF is only available to qualified investors (with an important tightening for L-QIFs with direct real estate investments – see below). The reason for this restriction on qualified investors – who are considered to have a lower need for protection – is the lack of authorisation, approval and (direct) supervision by FINMA as well as the more liberal investment regulations.

In order to ensure investor protection and quality in the Swiss fund market, the administration of an L-QIF must be taken over by FINMA-supervised institutions. An L-QIF in the form of a contractual investment fund or SICAV must be managed by a fund management company. In addition to the fund management company, a contractual investment fund and a SICAV also require a custodian bank. An L-QIF in the form of a LPCI must transfer the management to a manager of collective assets, unless the general partners are banks, insurance companies, securities firms, fund management companies or managers of collective assets.

The launch of an L-QIF must be reported to the FDF within 14 days. The FDF maintains a publicly accessible list of all L-QIFs.

Liberal investment rules

Due to its restriction on qualified investors, L-QIF is characterised by liberal investment rules. The law does not specify any requirements regarding possible investments or risk distribution; however, increased transparency obligations apply (particularly in the fund documentation).

The liberalisation of L-QIF in the legal form of a contractual investment fund or SICAV includes, among other things, flexibility in terms of pay-in and redemption requirements (e.g., through contributions in kind of real estate) as well as the possibility of temporarily deferring the redemption of units. Further, the fund contract or investment regulations may introduce restrictions such as that notice of termination can only be given on certain dates, but at least every five years, or a pro-rata reduction of redemption requests (gating) may be provided for.

Despite the extensive liberalisation, however, certain restrictions must be observed. Particularly noteworthy are the restrictions applicable to L-QIFs in the legal form of a contractual investment fund or SICAV: these include leverage limited to a maximum of 50 per cent of the net fund assets and the pledging or transfer by way of security of a maximum of 100 per cent of the net fund assets.

Restriction on direct real estate investments

In the case of direct real estate investments, the L-QIF is subject to a significant restriction regarding potential investors: such structures are open only to certain professional clients as defined in the Financial Services Act (FinSA). These include financial intermediaries, supervised insurance institutions, foreign clients under prudential supervision, central banks, public law entities, pension schemes and large companies. Consequently, no private individuals (high-net-worth individuals) may invest in L-QIFs that directly invest in real estate. This restriction was included for tax reasons.

Real estate companies

In Switzerland, listed real estate companies are non-regulated Swiss corporations (companies limited by shares in accordance with the Swiss Code of Obligations). These include real estate investment companies, which have the sole purpose of generating income from the collective investment of capital without any operational activity, and real estate operating companies that carry out entrepreneurial activities in the real estate sector. Pursuant to the listing rules of the SIX Swiss Exchange, real estate companies are companies that continually draw at least two-thirds of their revenues from their real estate-related activities.

In the context of real estate private equity or private investments in Switzerland, the most common real estate investment vehicles are privately held real estate companies, limited partnerships for collective investments¹⁰ and foreign investment vehicles of different kinds. Among these, real estate companies are likely the most popular choice for real estate private equity investors. Limited partnerships for collective investments, which are, in principle, the Swiss equivalent to Anglo Saxon limited liability partnerships, must obtain an authorisation from FINMA before becoming operative.

Transactions

Legal frameworks and deal structures

Generally, Swiss real estate deals are structured through:

- a. an asset deal transaction to buy one or more of the targeted real estate properties directly;
- b. a share deal transaction to purchase a real estate company or a special purpose vehicle that directly owns a real estate portfolio;
- c. a collective (real estate) investment fund;
- d. contribution in kind agreements (in the context of incorporation or capital increases for real estate companies); or
- e. distribution in kind involving real estate properties.

Furthermore, the Swiss Merger Act enables a clear, simple and effective implementation of certain real estate (company) reorganisations, such as combining one or more Swiss real estate companies (mergers), carve-outs and demerger transactions (e.g., spin-offs of real estate portfolios or business units) or simplified transfers of real estate portfolios (including real estate located all over Switzerland, along with related assets and liabilities) within a single and unique transaction agreement.

The deal structure generally depends on tax aspects. Other factors that are taken into account are transaction costs (notary and land register fees), confidentiality (versus publicity), size of the transaction (including the kind of properties involved) and restrictions on a case-by-case basis (such as possible existing pre-emptive rights, restrictions arising from the Swiss Federal Act on the Acquisition of Immovable Property by Persons Abroad (Lex Koller) or the Swiss Federal Act on Rural Land, or specific lease transfers).

Complexities arise in the context of the takeover of listed Swiss real estate companies through public tender offers. These transactions must comply with specific regulations pursuant to the Swiss capital market legislation and are supervised by the Swiss Federal Takeover Board and FINMA. These transactions typically require the

issuance of an offer prospectus.

In addition to public tender offers and some specific (mainly procedural) aspects arising from the Swiss Merger Act, Swiss real estate transactions have the following common characteristics in terms of their execution.

Preliminary (deal preparation) phase

This initial phase involves deal structuring, including any preliminary tax analysis. At this stage, sellers usually need the guidance of real estate advisers to prepare an information memorandum that outlines the commercial aspects of the transaction and to organise a tender phase that involves initial outreach to possible investors. Selected potential investors are then invited to participate in the next non-binding offer phase based on process letters that outline the deal structure and the basic requirements that buyers need to meet (usually, a minimum offer price and proof of existing financing). Investors participating in the next phase will have to sign non-disclosure agreements.

Non-binding offer and limited due diligence phase

In this second phase, selected investors have the opportunity to inspect the real estate properties and conduct initial – limited – due diligence based on a few selected documents (in particular, land register excerpts and any plans) related to the specific property disclosed in due diligence virtual data rooms. These investors are then requested to submit a (first) non-binding offer based on the instructions contained in the process letter.

Binding offer and extended due diligence phase

Based on the non-binding offers, the seller – assisted by its advisers – will select a limited number of investors from those that took part in the non-binding offer phase and invite them to participate in a binding offer phase. At this stage, the selected investors sign letters of intent and (if needed) additional non-disclosure agreements to access additional documents on the properties (extended due diligence). For share deal transactions, further information on the target company, its ownership and related tax issues is provided. Discussions with tax authorities and the obtaining of tax rulings often occur during this phase. Additional inspections of the properties are regularly arranged as well. This phase ends with the submission of the binding offers by the investors, including – depending on the process letter – a (first) mark-up of the sale and purchase agreement.

Final negotiations and signing

Based on the binding offers, the seller will choose the final potential buyer from among the investors and begin final negotiations. The seller may negotiate simultaneously with two or three final investors and, ultimately, sign the sale and purchase agreement with the chosen buyer; if the deal is structured as an asset deal, the agreement must be notarised by a public notary. Pursuant to Swiss mandatory law, the direct sale of real estate properties (through asset deals) is not binding unless the sale and purchase agreement has been duly notarised, which means that all previous steps are generally not binding for the parties (potentially leading, in the case of any breaches, to pre-contractual claims).

Closing

Closing may take several months, depending on the transaction. Some of the most common reasons for a delayed closing in real estate are Lex Koller issues or specific approvals required by Swiss financial market legislation (especially for pension funds or collective investments funds). Moreover, closing may involve a public notary and registration in the cantonal land register (if the transaction is structured as an asset deal), typical closing steps for the transfer of shares (if the transaction is structured as a share deal) or registration in the cantonal register of commerce (in the case of a reorganisation under the Swiss Merger Act).

Post-closing execution activities

Post-closing activities vary on a case-by-case basis. Typical post-closing and integration activities consist of the handover of all original documents concerning the real estate properties, notification of tenants about the new ownership (including transfer of rent guarantees, by informing the involved banks), implementation of new real estate management agreements, filing of tax declarations (especially for real estate Swiss capital gain tax) and other accounting post-closing works.

Acquisition agreement terms

Acquisition agreements and respective formalities

Taking the above-described most common ways to set up a real estate transaction in Switzerland into consideration, the following characteristics must feature in the terms of structure of the acquisition agreement and other relevant formalities.

Asset deals

The direct acquisition of real estate properties (including building rights) through an asset deal requires notarisation of a (land) purchase agreement (signing) and subsequent registration in the relevant cantonal land register (closing). Creation of rights *in rem* over real estate (such as mortgage notes) and transfer of ownership

therefore, in principle, requires constitutive registration in the competent land register.

As a general rule, sale and purchase agreements over real estate can only be established by notaries who operate in the same canton as the relevant property. As a result, separate land purchase agreements must be stipulated in each canton or region where the properties are located. An important exception exists when transferring entities registered in the register of commerce – these companies can choose to structure the transaction as a transfer of assets and liabilities according to the Swiss Merger Act, which, in essence, only requires the signing of one transfer agreement by the notary where the legal seat of the transferring entity is located. Further, contrary to a normal (land) sale and purchase agreement, ownership passes with the registration in the register of commerce; the subsequent registration in the land register has a purely declarative meaning.

Considering the above, the formalities of an asset deal agreement, such as boilerplate clauses and languages, strongly depend on the (cantonal) notary entrusted with its preparation. These agreements tend to remain quite simple in contrast with the US style of contracts.

Share deal (acquisition of companies owning real estate assets)

Agreements concerning the acquisition of real estate companies can be validly stipulated without observing any formality. Further, no registration in the land register is required, as the target company remains the formal owner of the real estate assets.

Under Swiss market practice, share deal agreements have aligned with US standards, with several lengthy provisions that are typically US-style.

Reorganisations pursuant to the Swiss Merger Act

Reorganisation of real estate companies pursuant to the Swiss Merger Act must comply with specific legal provisions, in particular with respect to preparation, transparency and information for the shareholders and corporate approvals.

Apart from the above-mentioned transfer of assets and liabilities, reorganisation transactions pursuant to the Swiss Merger Act (such as mergers, demergers, carve-outs and conversions) require a transaction agreement in simple written form. Depending on the size and features of the transaction, additional corporate approvals and corporate documentation, as well as specific creditors and employee protection mechanisms, are needed. Finally, the transaction must be recorded in the register of commerce.

Contrary to the direct sale of real estate, transfer of rights and liabilities (including ownership on indirectly transferred real estate properties) occurs with the registration of the transaction in the register of commerce. The subsequent land register registration has a purely declarative purpose.

Representation and warranties

Under Swiss law, the seller is responsible for providing assurance to the buyer that the transferred real estate property has neither legal nor physical defects and the seller remains, in principle, liable for any failure to meet the quality standards or for any issues that would significantly lower the property's value or its suitability for the intended use. The Swiss market standard for transferring real estate property with existing buildings is to transfer them 'as is/as seen' with a wide exclusion of seller's liability.

Typical representation and warranties contained in Swiss real estate sale and purchase agreements are:

- a. no legal liens for taxes, workers' liens or other statutory restrictions;
- b. absence of pending or threatened litigation;
- c. representations on environmental matters and absence of pollution;
- d. representations on compliance with public construction law;
- e. specific tax warranties; and
- f. representations on transferred leases, particularly:
 - correctness of net rental income as per the tenant list (although no effective rent payment warranty is usually given);
 - absence of material (oral or written) side agreements;
 - absence of termination notices;
 - absence of rent reduction requests;
 - absence of extraordinary payment arrears; and
 - valid existence of the rental guarantees to be transferred to the buyer.

Share deal agreements additionally contain the seller's representations and warranties regarding valid legal title over the shares in the target company, evidence of the correct organisational structure of the target company and confirmation of its ongoing existence, as well as the accuracy of any financial statements provided.

Other contractual contents

Other common contractual provisions can be summarised as follows.

- a. Definition of a fixed price, including an allocation for (hidden) tax burdens. Earn-out or purchase price adjustments are not at all common in Swiss real estate transactions. Down payments or

reservation fees are more typical in asset deal transactions and range from 10 per cent to 20 per cent of the overall purchase price; they are typically made without collateral and do not bear interest.

- b. Special arrangements for payment of the transaction fees: depending on the canton, these fees are usually paid by the buyer or equally split between the parties.
- c. Standard seller's covenants, such as payment of capital gain taxes and other real estate taxes, tenant notifications, transfer of rent securities and other mortgage notes.
- d. For building development projects, specific terms concerning obtaining all relevant building licences or permissions and organisation of the construction works.
- e. Adequate deal protection mechanisms, such as the buyer providing the seller at signing with written promissory notes or a bank payment ensuring that the funding is available and that there are funds in place for the subsequent payment of the purchase price.
- f. Specific closing conditions, such as Lex Koller pre-clearance or waiver of pre-emptive rights. Break fees are not common in Swiss real estate transactions.
- g. In many cantons, there is a statutory lien on the property for real estate gains taxes triggered by a transaction. To secure payment of these taxes by the seller and to avoid a situation – in the worst case – where the buyer could end up with the choice between the acquired property being used for debt recovery or paying the real estate gains taxes on behalf of the seller, part of the purchase price is often paid to a deposit account with the tax authority or a public notary and used for the payment of the real estate gains taxes once the tax assessment is complete.

Hostile transactions

To our knowledge, the Swiss real estate market is not affected by hostile transactions.

Financing considerations

In Switzerland, real estate transactions are often financed by a mix of own funds and third-party funds, with external funds often obtained under secured term loans and revolving credit facilities. Specific players (namely institutional investors such as pension funds and insurers) can nonetheless acquire important real estate portfolios by using their funds only.

Real estate financing is usually secured by a security interest in the form of a transfer for security purposes of a mortgage note. Mortgage notes can be created as register or physical (bearer or registered) mortgage notes. The trend for large players (such as major Swiss banks) is to require register mortgage notes to avoid custody costs of the securities and risks of loss. Furthermore, for mortgage notes in paper form, the original document must be handed over to the relevant lender together with an endorsement on the mortgage note in favour of the lender, to create a valid security. The issuance of a (register or physical) mortgage note provides the beneficiary

with an independent claim, secured by the underlying real estate property, covering the amount of the note, which is distinct from the claim under the loan itself. This specific structure allows a creditor to transfer its mortgage note, as a transferable financing security, to another creditor for refinancing purposes.

Additional collateral is often requested in real estate transactions involving commercial investors, particularly within share deal transactions, such as security interests over rent payments and other receivables (such as insurance or bank account receivables) by means of an assignment for security purposes. Pledges over shares in the borrower may also have to be granted. The granting of guarantees and security by a Swiss entity for obligations of its (direct or indirect) shareholders and other affiliates (other than subsidiaries of the Swiss entity) (up-stream and cross-stream obligations) is subject to certain restrictions under Swiss corporate law. The granting may trigger Swiss withholding tax and other tax consequences in the case of enforcement of the relevant guarantees and security or if the granting of the guarantees and security were not on arm's-length terms. Before granting the relevant guarantee and security, certain action must be taken:

- a. ensure that the Swiss entity has an appropriate financial assistance clause in its articles of association;
- b. obtain prior approval or approvals of the general shareholders' meeting; and
- c. include appropriate limitation language in the loan documentation and security agreements, limiting the guarantee or security to the freely distributable equity of the Swiss entity at the time of enforcement of the guarantee or security (less any applicable Swiss withholding tax).

When foreign investors or financial institutions finance Swiss residential property acquisitions, Lex Koller restrictions may also be relevant and need to be assessed carefully. If the loan and security are on arm's-length terms and the transaction is not structured to circumvent Lex Koller, the granting of the security over a mortgage note in favour of foreign lenders should not be an issue under Lex Koller. If, however, the ratio between the loan and the value of the residential property is disproportionate (e.g., loans exceeding 80 per cent of the value of the residential property), foreign lenders are recommended to obtain a pre-clearance from the competent Lex Koller authority.

Tax considerations

In the context of real estate transactions, the following specific tax issues should be assessed.

Real estate transfer tax

The acquisition of Swiss real estate through assets deals or (in certain cases) share deals may be subject to real estate transfer taxes. Whether these taxes apply depends on the relevant canton and the type of transaction. Most cantons (with some exceptions (e.g., the cantons of Zurich and Zug)) have implemented real estate transfer taxes ranging between 1 per cent and 3 per cent. Real estate transfer tax is, in principle, due by the buyer, but the parties often agree to split it equally. Certain cantonal tax regimes impose first ranking legal liens on real estate properties to secure the payment of real estate transfer taxes; in the context of real estate due diligence, potential legal lien for tax claims should be duly assessed.

Income or corporate tax

Real estate gains realised through a real estate asset deal are subject to individual or corporate income taxes. The gain is either taxed with a special real estate gains tax or as part of the ordinary income. The kind of tax applicable depends on the seller (individual private seller or professional seller or company) and the canton in which the real estate property is located. The tax consequences of real estate transactions in connection with real estate companies or real estate funds are complex and depend on many factors, including the parties and cantons involved and the transaction structure. A careful analysis of the situation and resulting tax consequences is essential. As a basic rule, subject to exemptions, in share deals involving real estate companies or fund units deals, there are, in principle, no Swiss income or corporate tax consequences at the level of the real estate company or real estate fund. Rather ordinary Swiss income or profit tax consequences, if any, occur at the level of the Swiss shareholders and investors. For foreign shareholders and investors, the disposal of shares in a real estate company or units in a real estate fund is generally not subject to Swiss income or corporate tax but may trigger real estate capital gains taxes in certain cantons.

Real estate gains taxes strongly depend on the location of the property and the period of ownership. Cantons are obliged to levy higher real estate gains taxes in cases involving short holding periods; long-term possession of property in most cantons reduces real estate gains tax.

VAT

Transfers of Swiss real estate through asset deals are generally exempt from VAT obligations. Under certain conditions, a seller may waive the exemption and elect to levy VAT (currently 8.1 per cent) on the sale price or to apply a notification procedure, provided that the real estate is not exclusively used for private purposes. Each of the three VAT transfer modalities (exemption, option or the notification procedure) has advantages and disadvantages, and the best option must be assessed depending on the individual case.

Swiss withholding tax

Swiss withholding tax (currently 35 per cent) applies to distributions to investors from Swiss real estate funds and Swiss real estate companies. If the distribution is made by a Swiss real estate fund on profits resulting from asset deals (i.e., direct investments), a Swiss withholding tax exemption may apply under certain conditions. Investors may request reimbursement of Swiss withholding tax levied in accordance with the Swiss withholding tax act (Swiss resident investors) or the relevant double tax treaties (the Swiss withholding tax is typically reduced to 15 per cent and in certain cases to zero per cent). For investor resident in a non-treaty state, the withholding tax is final.

Other fees and tax-related considerations

Depending on the structure of the transaction (asset deal, share deal or restructuring under the Swiss Merger Act), other taxes or fees may apply, such as cantonal or federal stamp duty taxes, notary fees, or land register or commercial register fees.

Under certain conditions, real estate transactions under the Swiss Merger Act might be structured as tax-neutral reorganisations profiting from reduced tax levies.

Cross-border complications and solutions

Lex Koller prohibits the acquisition by non-Swiss persons of (1) residential real estate or (2) commercial real estate with 'considerable' land reserves (i.e., undeveloped surfaces where the unbuilt surface equals or exceeds one-third of the total plot area). As non-Swiss persons qualify, in principle, (1) non-Swiss nationals who do not have their actual and legal residence in Switzerland, (2) companies with their legal seat in Switzerland but predominately controlled or financed by non-Swiss persons and (3) companies with their legal seat abroad (regardless of whether ultimately controlled by Swiss persons).

The Lex Koller restrictions also apply to (indirect) acquisitions of non-listed companies (i.e., share deals) owning real estate in Switzerland if they are qualified as 'real estate companies', which is normally the case if the value of the company's real estate compared to the value of its consolidated assets exceeds a certain threshold; the assessment largely depends on the specific circumstances. Further, depending on their structure, other transactions might be subject to these Lex Koller restrictions, such as excessive financing of real estate acquisitions or reorganisations under the Swiss Merger Act.

Executing a transaction in violation of Lex Koller may render the respective acquisition or financing agreement null and void from a Swiss perspective. Additionally, violations may be subject to criminal and administrative sanctions.

Lex Koller remains the main restriction for Swiss real estate transactions and its applicability must be examined well in advance before signing, particularly in the context of any deal structuring and due diligence assessment. Adequate protection should form part of any acquisition or financing agreement.

The Lex Koller is frequently subject to political debate. Recently, some politicians have proposed strengthening this Swiss legislation. These new proposals aim, inter alia, to extend these restrictions to the acquisition of commercial property for (only) investment purposes.

Corporate real estate

Certain Swiss real estate companies, particularly construction conglomerates or listed real estate groups, have a corporate structure that splits their property ownership from their business operations (operating company/property company separations). However, in our view, this separation is mainly driven by tax or financing reasons. To our knowledge, there is therefore no specific move towards this type of (corporate) structure in Switzerland.

Outlook and conclusions

Switzerland's real estate market, predominated by rental properties, will continue to thrive with significant demands for lease objects, particularly in the residential sector. The focus on affordable housing and student housing accommodation is expected to gain prominence, driving political discourse towards increasing viable options for the population. On a political level, the discussion will also be driven by attempts to further limit the acquisition of real estate by foreigners through the strengthening of Lex Koller.

The real estate sector will also face mounting challenges related to environmental, social, and governance issues alongside sustainable building practices. These factors will not only influence project development and construction phases but will also heighten the demand for modern, state-of-the-art buildings (in particular, to comply with the Swiss Sustainable Building Standard and other ESG-standards). Consequently, environmental due diligence assessments will become crucial during acquisitions, necessitating real estate transaction lawyers to adeptly navigate these intricate technical requirements.

The complexity and technical nature of real estate transactions are poised to escalate, leading to lengthier and more detailed negotiations.

Despite these challenges, the Swiss real estate market remains interesting and stable for investors, especially when compared to other European countries. The diminishing activity of Swiss pension funds, which have traditionally dominated the market, opens up new opportunities for private investors and developers, including foreign investors, to explore real estate investment in Switzerland.

This is also supported by the boost that the new L-QIF may provide to the Swiss financial market. After a year since its introduction, certain players appear to be showing interest in implementing this type of fund in the real estate sector. In particular, these investors seem to appreciate the significantly reduced costs and time required to set up such a fund and its liberal investment rules in comparison to regulated funds (especially in leverage restrictions). However, it is important to highlight that the restriction of the circle of investors for L-QIFs that invest directly in real estate could reduce the attractiveness of this instrument. Additionally, some competitive disadvantages compared to other foreign financial markets persist, including the applicability of the withholding tax.

In summary, the Swiss real estate market offers a blend of stability and growth potential, underpinned by evolving demands and regulatory frameworks, making it a suitable destination for both local and international investors.

Footnotes

1. ^ See KPMG research (Press Release: Swiss M&A market with a larger volume) and publication on the Swiss SME Portal for small and medium-sized enterprises (The industry boosts Swiss mergers and acquisitions).
2. ^ id.
3. ^ See EY research (Investors in Switzerland view real estate as the preferred asset class and continue to focus on residential properties | EY - Switzerland).
4. ^ id.
5. ^ Here accessible: Limited Qualified Investor Funds (L-QIF).
6. ^ See Immobilien Business publication (UBS legt Immobilienfonds zusammen - IMMOBILIEN Business).
7. ^ Article 25 et seq., Swiss Collective Investment Schemes Act.
8. ^ id., article 36 et seq.
9. ^ id., article 118a et seq.
10. ^ id., article 98 et seq.