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Purchasing Real Estate in Switzerland A Guide for Foreign Nationals and Companies

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Cross-border real estate transactions are becoming increasingly important in today's global economy. The following overview addresses individual aspects that could be significant for purchases of Swiss real estate by foreign individuals or companies.

I. The Swiss Real Estate Market

Foreign investors have increasingly focused on the Swiss real estate market in recent years. Switzerland's unimpaired macroeconomic conditions, growing national income, political stability, very high quality of life, stable currency, healthy national finances, attractive tax environment, and flexible labor market with a sharp influx of highly qualified workers have all had a lasting positive effect on the real estate market. At the same time, continuing low interest rates and a global shortage of safe alternative capital investments has substantially driven up demand for real estate and led to a constant rise in prices.

In comparison with other countries, Switzerland has a low ratio of home ownership. Some 65% of the populace

rent their residences. The situation in business varies. A large number of business properties are leased. Industrial operations and large service companies, on the other hand, also frequently own their premises.

II. Procedures, Formalities, and Charges

Switzerland has extensive building regulations (regarding land use, building quality, distances to adjacent properties, etc.). Land is divided into different zones, such as agricultural, residential, commercial, and industrial. There are also many environmental regulations.

Each distinct piece of land has its own file in the land register and a potential buyer can obtain most of the required information about a particular tract of land from such file.

An inspection of the relevant register of polluted sites is also recommended in order to determine whether the land intended for purchase is contaminated and, in the worst case, there may be a



subsequent obligation to perform expensive remediation measures.

To be valid, contracts for the transfer of ownership of real estate must fulfill strict formal requirements. Such contracts must always be in writing and require public authentication. The classic Swiss real estate purchase agreement is generally based upon sample documents developed through notarial practice in the cantons. Public authentication can be performed only by notaries who have been so empowered under the law of the canton in which the relevant property is situated. The system of notaries varies from canton to canton. Contracts cannot be formed from abroad. If a party needs to be presented in absentia, identification documents (foreigners also require cantonal authorization, see section III. below) and a power of attorney, also formalized by a notary, are required. A power of attorney established abroad must have an apostille.

From the buyer's perspective, it is worth knowing that (with few exceptions) the majority of tax laws in the cantons and/or municipalities provide for a real estate transfer tax (Handänderungssteuer) when transferring ownership of real estate. The buyer generally pays this tax, although in some cases it is split equally between buyer and seller. The rates are usually between 1% and 3% of the assessment basis, i.e. the sale price, the market value, or the official value of the property. Other costs in-

clude the notary fees and land register fees, which can vary sharply from canton to canton and are generally split equally between the parties. In certain cantons, the buyer is furthermore jointly liable for the seller's real estate gains tax.

III. Special Rules for the Acquisition of Real Estate by Foreigners

1. Principles and Scope of Application of Lex Koller

The Federal Law on the Acquisition of Real Estate by Persons Abroad (currently known as the «Lex Koller») regulates and restricts the acquisition of real estate by foreigners. The law requires that the acquisition of real estate in Switzerland by persons abroad (hereinafter «Person(s) Abroad») be subject to a permit granted by the competent cantonal authority.

The Lex Koller defines natural persons as being Persons Abroad if they are either foreigners domiciled abroad or foreigners who are in fact domiciled in Switzerland, but are neither nationals of EU/EFTA member states nor holders of a valid settlement permit (C permit). This means that nationals of EU/EFTA member states domiciled in Switzerland, particularly EU/EFTA nationals with an EU/EFTA residence permit (B permit, settlement permit, or possibly a short residence permit), and nationals



of other foreign countries who are holders of a valid settlement permit (C permit) and actually domiciled in Switzerland are not subject to the Lex Koller. With respect to the acquisition of real estate, their position is equal to that of a Swiss citizen. In addition, the Lex Koller enumerates a number of exceptions to the permit requirement regime (e.g. for EU/EFTA cross-border workers).

Legal entities are considered Persons Abroad if they are either domiciled abroad or dominated by Persons Abroad. Domination by Persons Abroad is presumed in particular when more than one-third of a company's capital or more than one-third of the voting rights are in the hands of Persons Abroad, or if they have granted substantial loans to the company. Persons who are not subject to the Lex Koller in principle are nevertheless considered as Persons Abroad if they acquire real estate on behalf of Persons Abroad («fiduciary transactions»).

In addition to the direct purchase of real estate registered in the land register, any transaction (the acquisition of property rights, title, or usufructs in shares, the constitution and exercise of a right of purchase, pre-emption or redemption, etc.), which from a commer-

cial perspective confers a position analogous to ownership, is deemed an acquisition under the Lex Koller.

Some grounds for approval and rejection are established or defined by the laws of the individual cantons, and some are derived directly from the Lex Koller. The Lex Koller lists a number of absolute grounds for refusal. A permit must be denied, for example, if the real estate serves as a capital investment that is unlawful pursuant the Lex Koller, or if a buyer has attempted to circumvent the provisions of the Lex Koller.

2. Private Residential Purposes

The acquisition of real estate for private residential purposes by an individual Person Abroad does not require authorization, provided that such property serves the buyer as their main residence at the place of their rightful and actual residence, and that the buyer actually lives there.

Such a person must therefore have an adequate permit to stay. Where building land is acquired, construction work must start within one year. In addition, the surface area of the purchased lot may not be larger than required for its purpose. The competent cantonal authorities will decide on the admissibility of lots larger than 3,000 m².



As mentioned above, nationals from EU/EFTA member states domiciled in Switzerland and holders of a settlement permit (C permit) are not subject to the Lex Koller. The above considerations are therefore relevant only for nationals of other foreign countries residing in Switzerland based upon a residence permit (B permit).

Nationals of EU/EFTA member states working as cross-border commuters in Switzerland may acquire a secondary residence in the area of their place of work without authorization. Buyers must occupy such residences themselves for as long as they continue working in the area as cross-border commuters. A foreigner domiciled abroad who is not a cross-border commuter requires an authorization to acquire a secondary residence. A few cantons have special provisions, however, under which such a person abroad may be authorized to acquire a secondary residence in a place to which the person has an exceptionally close link meriting protection.

3. Commercial Purposes

Real estate used for permanent business establishments, such as manufacturing facilities, warehouses, offices, shopping centers, retail premises, hotels, restaurants, etc., can be acquired without authorization. In this case, it is immaterial whether the real estate is used for the buyer's business or was rented/leased by a third party in order to pursue a commercial activity. Such real estate properties may also be purchased solely as an investment.

The acquisition of real estate for the purpose of building, renting, or leasing accommodation, or for the purpose of trading in such accommodation is not a permanent business activity within the meaning of the Lex Koller. In principle, such purpose requires prior authorization which however, will generally not be granted since grounds therefor are

lacking. Living accommodation operated on a hotel basis, conversely, is considered as a permanent business establishment and may therefore be acquired or built without authorization.

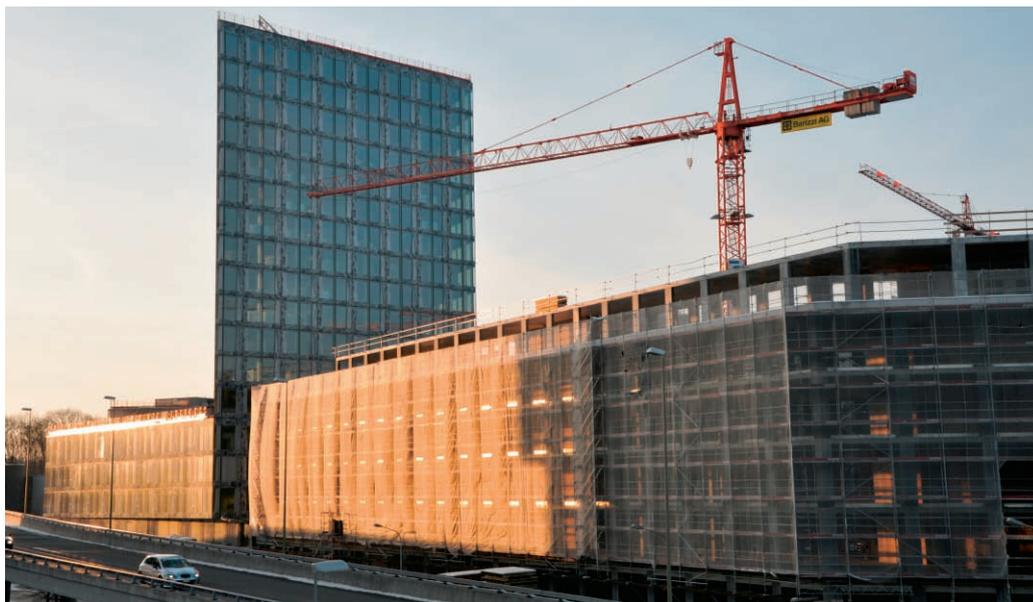
4. Legal Development

In 2007, the Federal Council (Bundesrat) requested the Parliament to repeal the Lex Koller. Given the current political situation, however, the Parliament and the Federal Council will now presumably refrain from repealing this law, and thus the Lex Koller is expected to remain in effect for the time being.



IV. New Constitutional Article for the Restriction of Second Residences

The so-called Second Residence Initiative, a ballot initiative passed by the Swiss electorate on 11 March 2012, is particularly significant for the purchase of vacation residences. The constitutional article adopted through this initiative restricts the share of second residences in proportion of the total residential units within a municipality to a maximum of 20%, and thus severely restricts the construction of vacation residences in tourist areas. This regulation gives rise to a number of questions, and it is particularly unclear how implementation will occur at the statutory level.



V. Development and Redevelopment of Real Estate

The construction of a new building or refurbishment of an existing building following the acquisition of a property involves a number of other aspects, depending upon the specific construction project. These aspects cannot be comprehensively covered in this article, but a few points worth noting are presented briefly below.

Construction, refurbishment to a certain extent, and under certain circumstances even a simple change in use of an existing property require a building permit from the appropriate authorities. Third parties (e.g. neighbors) may take legal action against these permits, which could significantly delay the construction project.

In principle, existing lease agreements may be terminated in order to refurbish or remediate a property. Caution is advised here, however, because under certain circumstances, such a proceeding may be deemed an inadmissible «preventive notice of termination» (Voratskündigung) and therefore contested. This could be the case, for example, if the construction project is insufficiently defined and developed at the time of the notice of termination, or if the refurbishment is not a sufficient obstacle for the tenant to remain in the property. Problems with tenants

may arise even in the case of a valid termination, however: under certain conditions, tenants also have the right to have the lease arrangement extended by the court.

Contracts for work and services negotiated with contractors should take the interests of the building principals appropriately into account. Swiss law stipulates very strict obligations on the part of building principals, particularly with regard to the assertion of rights arising from defects (specifically notification of defects). These obligations must be contractually corrected if possible (e.g. especially for larger construction projects through the inclusion in the contract of SIA Norm 118, which is widely applied in Switzerland).

If foreign companies (posted firms) perform construction work, then they must also take into account that the applicable Swiss minimum working conditions (particularly minimum wage regulations) must be met for the posted workers.

This article makes no claim to completeness. The information contained here is general in nature, is not related to specific transactions, real estate, or individual persons or legal entities, and therefore does not constitute legal advice. Should you wish to receive advice based upon your personal circumstances, please contact the author of this article or your representative at HMP Hartmann Müller Partners.