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Real Estate

**Schellenberg
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Quo Vadis Lex Koller?

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Key Take-aways

- 1.** The history of the Lex Koller is marked by recurring attempts to either relax or tighten its provisions.
- 2.** The acquisition of certain properties in Switzerland by persons abroad requires authorisation, which is generally denied unless a specific exception applies.
- 3.** The primary exceptions to the Lex Koller are commercial properties, including offices, retail spaces, commerce, industrial facilities, and hotels.

1 Introduction

The Federal Act on the Acquisition of Real Estate by Persons Abroad (**BewG**) aims to prevent the excessive transfer of domestic land to foreign ownership. Its purpose is to ensure that real estate remains primarily reserved for Swiss residents, maintaining foreign land ownership at a stable and acceptable level. Informally known as **the Lex Koller**, the act takes its name from Federal Council Arnold Koller, who led the most recent major revision in 1997.

The history of the Lex Koller is marked by ongoing attempts to either relax or tighten its provisions. In recent years, a key argument in favour of tightening the law has been the concern that a relaxation of restrictions could drive up property prices and therefore rental prices due to increased demand from foreign investors, thereby exacerbating the housing shortage. Notably, there are **no comparable concerns of scarcity of excessive rents regarding the commercial property sector** (offices, retail, commerce, manufacturing, hotels), which is not subject to the restrictions of the Lex Koller and appears unaffected by any perceived “emergency”.

Currently, there are renewed **efforts to tighten the Lex Koller**. In September 2024, as part of discussions on the introduction of controls on foreign investments in Switzerland, the National Council supported a parliamentary initiative by Jacqueline Badran to subject **strategic infrastructure in the energy industry** (Swissgrid, power plants) to the Lex Koller. This would effectively prohibit full or partial acquisitions by foreign investors in these areas. Also in September 2024, Thomas Aeschi submitted a motion to further tighten the Lex Koller by **reversing various relaxations introduced over the past 40 years**. Specifically, under this motion, non-EU nationals would once again be fully subject to Lex Koller restrictions, preventing them from purchasing residential property in Switzerland even if they reside in Switzerland (current regulations allow certain exceptions). Additionally, EU citizens living in Switzerland, who are currently exempt from the Lex Koller, would be required to **sell their property within a certain period** if they leave Switzerland.

In light of the recent attempts to tighten legislation and media reports on cases of circumvention, **the practice of the land registries** and the supervisory authorities responsible for enforcing the Lex Koller appears to **have tightened considerably** in recent years, at least in certain cantons. However, this trend is not necessarily reflected in case law. Over the past decade, **the number of federal court judgements related to the Lex Koller has remained stable at a low level**, with fewer than 20 relevant rulings issued during this period.

2 Principle

The acquisition of **certain properties** in Switzerland by **persons abroad requires authorisation**, which is typically not granted unless a specific exception applies. There

are certain cases that fall outside the scope of the Lex Koller, as well as exceptions under which approval may be granted (possibly with conditions). The **determination** of whether an acquisition is subject to the Lex Koller occurs **at the time of acquisition**, meaning there is no ongoing review afterward. However, if subsequent developments suggest that the requirements were not met at the time of acquisition, indicating a potential intent to circumvent the law, the authorities may initiate a further review.

There are currently renewed attempts to tighten the Lex Koller

If it is unclear whether an acquisition is subject to the Lex Koller and therefore, as a rule, no acquisition would be possible, the land registries require the parties to obtain an order from the supervisory authorities to determine whether the acquisition is exempt from the Lex Koller. The time frame for issuing this ruling can take several weeks. A higher cantonal authority has the right to appeal the supervisory authority’s decision within 30 days. If the higher cantonal authority does not file an appeal, the Federal Office of Justice may file an appeal (also with a 30-day deadline). However, the cantonal authorities or the Federal Office of Justice often waive the right to appeal early. Nonetheless, under certain circumstances, the procedure can take several months before a decision becomes legally binding.

3 Persons Abroad

Swiss nationals, both in Switzerland and abroad, as well as EU/EFTA nationals residing in Switzerland (B permit) and non-EU/EFTA nationals domiciled in Switzerland (C permit), are not subject to the Lex Koller and can acquire property in Switzerland without restriction. Individuals who legally acquire property are not required to sell it, **even if they later leave Switzerland**. Any foreign company and **Swiss companies controlled by persons abroad** are also classified as persons abroad under the law.

The Lex Koller also does not apply to (foreign) **legal heirs** (according to the Federal Supreme Court, even if they are only appointed as legatees) or (foreign) relatives of the transferor in ascending and descending line, as well as the transferor’s spouse or registered partner in the case of gifts.

Foreign **insurance companies** are not classified as persons abroad and are exempt from the Lex Koller, provided that the properties serve as capital investments, comply with the generally recognised investment principles, and that the total value of all properties does not exceed the provisions deemed technically necessary by the insurance supervisory authority for the Swiss business.

4 Real Estate within the Meaning of the Lex Koller

Commercial properties (offices, retail, commerce, manufacturing, hotels, etc.) are the main exceptions to the Lex Koller. However, two Federal Supreme Court rulings have clarified that staff accommodations for hotels are classified as residential properties rather than as commercial properties. As a result, foreign nationals are prohibited from acquiring staff houses, even if they own and operate a hotel in Switzerland. Therefore, as a general rule, foreign individuals **cannot** acquire **residential property or land reserves** (although certain exceptions do exist).

Land reserves can also be classified as commercial properties if the purchaser can show its intention to timely realize a specific project. In one case, the Federal Supreme Court upheld the authorities' view that there was insufficient evidence of a concrete intention, emphasizing that the burden of proof for such intent is significant. Additionally, land reserves are considered commercial properties if they are part of a development and generally do not account for more than 50% of the area of the existing commercial properties.

**Whether an acquisition falls under the Lex Koller is examined at the time of acquisition.
A foreign company qualifies in any case as person abroad.**

5 Acquisition of Properties

The acquisition of real estate encompasses any legal transaction that grants a foreign individual control over a property within the meaning of the Lex Koller. This includes not only the direct acquisition of real estate but also the granting of purchase and pre-emptive rights, the acquisition of real estate companies, and fiduciary transactions. A real estate company is a company whose actual purpose is the acquisition and holding of real estate that is subject to the Lex Koller. In such cases, the acquisition of shares - including minority shares regardless of their number - is prohibited. Whether the company pursues such a purpose is determined by the authorities at their discretion. This is contrary to doctrine, which has long proposed an asset test assessing the proportion of

Lex Koller properties in relation to the total assets of a company.

A long-term lease (ten years or more), the granting of residential rights through easements or **exceptional financing** can also be considered an acquisition. Financing is considered exceptional if it does not correspond to the financing principles of Swiss banks or if a company received excessive funding from abroad. Federal court rulings indicate that a mortgage exceeding 80% of the property value, collateralization significantly above the loan amount, or financing by a Swiss bank that is only granted due to the financial situation of a foreign spouse qualifies exceptional. The tightening of the official practice is evident in this context. For example, one cantonal authority required a company acquiring a property to report every two years on the financing of the acquisition and the associated construction project, in order to ensure that no exceptional foreign financing was provided. This was despite the fact that the acquisition of the property was not subject to the Lex Koller. However, the Federal Supreme Court ultimately rejected the need for such reporting.

Exceptional financing can also be considered an acquisition.

The acquisition of shares in real estate companies within the meaning of the Lex Koller or shares in funds that hold real estate within the meaning of the Lex Koller are exempt from the Lex Koller if they are listed on a stock exchange. In such cases, there are no restrictions, allowing foreign individuals to theoretically acquire a majority stake in these property companies. However, listed property companies may no longer acquire properties within the meaning of Lex Koller if they cannot prove that they are under Swiss control. Listed real estate companies, therefore, often take measures to prevent majority foreign ownership (e.g. by means of shareholders' agreements).

6 Exceptions

The main option for obtaining a permit under the Lex Koller is for persons abroad to purchase **holiday homes**, provided the relevant canton provides for such a possibility. Essentially, only the primary holiday cantons, e.g., Graubünden and Valais, have introduced this exception (in some cases only for certain municipalities in the canton). The cantons of Zurich and Geneva have not introduced this exception. Holiday homes can only be purchased within the quota determined annually by the federal government. In 2024, the quota is set at 1,500 apartments. The federal government distributes the total quota to the cantons as required. Each canton establishes its own procedure for

allocating the permits. The plot area of a holiday apartment or home may not exceed 1,000 square metres and the net living space may not exceed 200 square metres. A recent federal court ruling clarified that internal staircases are included in the calculation of the area. In exceptional cases, a net living area of up to 250 square metres can be approved if a corresponding additional need is proven. However, according to a recent Federal Supreme Court ruling, the mere assertion that the holiday home shall be used in the future with family and friends is not sufficient.

As an exception, **flats within a commercial property** may be acquired without authorisation if immediate resident availability is essential for the business (e.g. for a caretaker), or if it would be practically impossible and disproportionate to separate them from the part used for business purposes.

7 Violation of the Lex Koller

Violations of the Lex Koller are subject to **criminal prosecution**. Anyone who wilfully executes a legal transaction that is void due to lack of authorisation may face a custodial sentence of up to three years or a fine. If the offence is committed for commercial gain, the penalty is a custodial sentence of between six months and three years. In case of negligence, the penalty is a fine of up to CHF 50,000. Legal transactions that violate the Lex Koller are **null and void and must be reversed**. Legal entities are **dissolved and the assets go to the canton** in question. If it proves impossible or impractical to return the property to its original owner, the judge orders the public **auction of the property**. The purchaser can only claim his expenses; any additional proceeds go to the canton.



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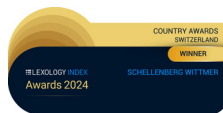
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