

THE REAL ESTATE M&A  
AND PRIVATE  
EQUITY REVIEW

SIXTH EDITION

Editors

Adam Emmerich and Robin Panovka

THE LAWREVIEWS

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AND PRIVATE  
EQUITY REVIEW

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# PREFACE

For real estate investment trusts (REITs), the covid-19 pandemic has been a tale of two cities, of boom and bust, with the seismic changes in the world leading to strength in some sectors of commercial real estate and huge market dislocations and disruptions in others. In general, companies with assets that service the digital economy – cell towers, logistics and industrial properties, and data centres – benefited from the pandemic’s acceleration of the digital economy. However, several traditional sectors continued to confront difficult issues involving liquidity, rent collection, dividend payouts, disclosure and guidance, as well as navigating the uncertain and sometimes shifting guidance from regulatory authorities regarding the timeline of reopening. While the distribution of the vaccine to many individuals in the US and certain other countries has blunted the pandemic in some areas, inequitable distribution has yielded an uneven economic recovery internationally. Additionally, and for many traditional REITs most importantly, there are still many unknowns with respect to how soon and to what extent people will return to their offices and resume traditional offline shopping and travel, and which of the many other changes in real estate usage will become permanent or semi-permanent. The eventual ‘new normal’ that emerges from the pandemic will likely have rippling effects throughout the REIT industry for years to come. As always, strategic planning and risk management will be critical to adjust to changing times. Last year, we wrote of our hope of a clearer picture of our new normal in time for the publishing of this edition. While the vaccines and new year have brought hope for a path forward out of the pandemic, and certain jurisdictions have fully ‘reopened’ stores, offices and restaurants, we still have longer to wait to find out how many of the pandemic shifts (work from home, massive growth in online retail, shift away from 24/7 cities) are permanent, and which will fade with time.

Stepping back from the recent market dislocations, prior to covid-19, publicly traded real estate companies and REITs, with help from real estate private equity, have steadily transformed the global real estate markets over the past 25 years. Their principal innovation, and ‘secret sauce’, has been liquid real estate. Unlike traditional property ownership, equity in publicly traded real estate vehicles is highly liquid, and can be bought and sold in large volumes, literally in minutes, on numerous global exchanges. Indeed, during the pandemic, REITs have issued more than US\$10 billion in public equity, taking advantage of the massive amounts of liquidity washing over financial markets beginning in spring 2020.

Publicly traded real estate vehicles have an aggregate market capitalisation of approximately US\$1.5 trillion globally, including over US\$1 trillion in the United States and approximately US\$150 to US\$250 billion in each of Europe and Asia. As public REITs and

other vehicles have aggregated these properties and grown in scale and sophistication, so too have real estate-focused private equity funds, playing an important role catalysing hundreds of billions of dollars of REIT and real estate M&A transactions and IPOs.

However, despite that massive growth and despite the pandemic, potential growth is far larger both in long-standing REIT markets and in newer REIT jurisdictions, where the trend is more nascent. With increasing development and urbanisation, the world is producing more and more institutional-grade properties, and a growing percentage of this expanding pool – an estimated US\$5 trillion and counting, so far – will inevitably seek the advantages of liquidity by migrating to the publicly traded markets. The growth is expected to be both local and cross-border, with nearly 40 countries already boasting REIT regimes.

REITs and other publicly traded vehicles for liquid real estate have grown because they are often a superior vehicle for stabilised assets. Greater liquidity and transparency – and often superior governance – are attractive to investors, resulting in a lower cost of capital and superior access to vast amounts and varieties of capital in the public markets. In addition to cheaper capital, REITs and other public vehicles benefit from efficiencies of scale, sophisticated management and efficient deal structures, to name just a few advantages. With these advantages, the global march of real estate to the public markets seems unstoppable.

This publication is a multinational guide for understanding and navigating the increasingly complex and dynamic world of liquid real estate and the transactions that mostly produce it. The sea change in the markets, sometimes called the ‘REIT revolution’, has meant that major real estate transactions have migrated from ‘Main Street’ to ‘Wall Street’. They now often take the form of mergers, acquisitions, takeovers, spin-offs and other corporate transactions conducted in the public markets for both equity and debt. They have grown exponentially in complexity and sophistication, and increasingly represent cross-border multinational transactions fuelled by the now global real estate capital markets and M&A deal professionals. And they are often intermediated by international investment banks rather than local brokers, and financed with unsecured bonds or commercial mortgage-backed securities. In a fair number of cases, they are catalysed by private equity firms or similar actors, sometimes building portfolios to be taken public or sold to public real estate companies, and sometimes through buyouts of public real estate companies for repositioning or sale.

To create this publication, we have invited leading practitioners from around the globe to offer practical insights into what is going on around the conference tables and in the markets in their jurisdiction, with an eye to cross-border trends and transactions. As will quickly become evident, the process of liquefying real estate and transactions involving public real estate companies requires a melding of the legal principles, deal structures, cultures and financial models of traditional real estate, public company M&A and private equity. None of this, of course, happens in a vacuum, and transactions often require expertise in tax, corporate and real estate law, not to mention securities laws and global capital markets. Each of our distinguished authors touches on these disciplines.

We hope this compilation of insight from our remarkable multinational authors produces clarity and transparency into this exciting world of liquid real estate and helps to further fuel the growth of the sector.

**Adam Emmerich and Robin Panovka**

Wachtell, Lipton, Rosen & Katz

New York

July 2021



# SWITZERLAND

*Beat Kühni, Cécile Berger Meyer and Fabiano Menghini<sup>1</sup>*

## I OVERVIEW OF THE MARKET

Compared with 2019, M&A activity in Switzerland moderately decreased over the course of 2020 with a nominal drop from 402 to 363 transactions reported over the course of the year. Meanwhile, the volume of transactions fell by 50 per cent from US\$127 billion to US\$63.1 billion. Particularly in Q2 2020, the M&A market suffered a considerable decline, as the effects of the covid-19 pandemic began to take hold.<sup>2</sup> The same pattern applies for private equity transactions, where, during the first half of 2020, private equity activity decreased by around 25 per cent compared with the same period in 2019. However, the private equity deal number had increased by 6 per cent by the end of 2020, whereas the total deal value was down by 15 per cent.<sup>3</sup>

Consistent with the past, the clearly prevailing majority of real estate transactions for both commercial and residential properties in Switzerland is still in the small to medium volume range and larger portfolio transactions are the exception to the rule in Switzerland.<sup>4</sup> Owing to the continuing low interest rates, real estate investments in Switzerland have generally remained attractive in recent years and no significant change for the near future is expected in this regard. However, while market prices for real estate investments are continuing to increase as a reflection of the continuing attractiveness of the asset class, rent levels have overall remained rather flat in Switzerland meaning that yield levels for institutional investors have come under some pressure compared with previous years.

The vast majority of real estate transactions still reflect traditional models and there is not a noticeable major shift towards corporate and Wall Street-oriented investment and transaction models.

## II RECENT MARKET ACTIVITY

### i M&A transactions

Below is a summary of four of the most significant real estate M&A transactions in the Swiss market of the past few years.<sup>5</sup>

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1 Beat Kühni and Cécile Berger Meyer are partners and Fabiano Menghini is a senior associate at Lenz & Staehelin.

2 KPMG, Clarity on Mergers & Acquisitions 2021.

3 Neeracher Christoph, Seiler Philippe, Annasohn Raphael, IFLR M&A Report 2021, Switzerland, pp. 63–67, 64.

4 EY, Trendbarometer Immobilien-Investmentmarkt 2018.

5 KPMG, Clarity on Mergers & Acquisitions 2018, 2019 and 2020.

***Acquisition by Central Real Estate Basel AG of a 160,000 square metres development from Novartis Pharma AG***

In Q2 2019, Central Real Estate Basel AG acquired a development site of around 160,000 square metres in Klybeck (Basel) from Novartis Pharma AG. Central Real Estate Basel AG belongs to a holding company in which only Swiss investors are represented. The parties have decided not to disclose the price of the transaction.

***Acquisition of a 93 per cent stake in SSN GROUP AG by CONSUS Real Estate AG***

In Q4 2018, the German-based and listed real estate company CONSUS Real Estate AG acquired a 93 per cent stake in Switzerland-based SSN GROUP AG against cash as well as newly issued shares of CONSENSUS Real Estate AG for a total purchase price of €470 million. The transaction increased CONSUS Real Estate AG's real estate development volume from €6.2 to €9.6 billion and the number of projects from 53 to 65.<sup>6</sup>

***Acquisition of a 100 per cent stake in Immobiliengesellschaft Fadmatt AG by Mobimo Holding AG***

In Q3 2018, the Switzerland-based and listed Mobimo Holding AG acquired a 100 per cent stake in Immobiliengesellschaft Fadmatt AG by way of a friendly takeover offer to all shareholders of Immobiliengesellschaft Fadmatt AG. The purchase price of 183 million Swiss francs was paid in cash (almost 50 per cent) as well as in 383,377 newly created shares. The real estate portfolio of Immobiliengesellschaft Fadmatt AG contained 503 apartments spread over seven locations in the cantons of Zurich and Schaffhausen<sup>7</sup> and had a total value of around 289 million Swiss francs. After consummation of the transaction, the portfolio was fully integrated into the Mobimo Group.<sup>8</sup>

***Acquisition of a majority stake in PAX-Anlage AG by Basler Leben AG***

In Q1 2017, Switzerland-based Basler Leben AG, a 100 per cent subsidiary of the listed Bâloise Holding AG, published a takeover offer to buy all shares in listed PAX Anlage AG (now ARTIRES AG) for a purchase price of 1,600 Swiss francs per share (i.e., a maximum purchase price of 288 million Swiss francs). After consummation of the transaction, Basler Leben AG has held a total of 84.14 per cent in PAX Anlage AG.

**ii Private equity transactions**

Although publicly available information about real estate PE transactions in Switzerland continues to be limited, below are two real estate transactions that are representative of corporate real estate investments in recent years.

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6 <https://www.immobilienmanager.de/consus-schluckt-ssn-group/150/64423/>.

7 <https://www.nzz.ch/wirtschaft/mobimo-einigt-sich-mit-fadmatt-auf-einvernehmliche-uebernahme-ld.1395685>.

8 <https://www.mobimo.ch/de/medien/medienmitteilungen/1752683>.

### ***Acquisition of a portfolio from StenProp by Helvetica Property Investors***

In Q3 2018, Helvetica Property Investors bought a portfolio consisting of seven properties from StenProp for a purchase price of US\$103.8 million.<sup>9</sup> Two properties were sold as part of a share deal, while the remaining five were sold as asset deals.<sup>10</sup>

### ***Acquisition of a single asset from an unidentified seller by Rockspring Property Investment Managers***

In Q1 2016, Rockspring Property Investment Managers bought l'Atelier, a ground-up office development project in Geneva, from a local private investor for a purchase price of US\$89.24 million.<sup>11</sup> Details on the deal terms are unknown.

## **III REAL ESTATE COMPANIES AND FIRMS**

### **i Publicly traded real estate investment trusts and real estate operating companies: structure and role in the market**

The main types of publicly traded real estate investment vehicles in Switzerland are listed real estate funds and listed real estate companies. The structure of real estate investment trusts (REITs) has so far not been introduced to Swiss law. However, the contractual real estate fund (see below), whose shares can be listed on a stock exchange, constitutes a form similar to REITs. Furthermore, the distribution of foreign REITs in Switzerland may be subject to restrictions and regulatory requirements.

#### ***Real estate funds***

Listed real estate funds are becoming increasingly popular in Switzerland and appear either in the form of a contractual investment fund (Article 25 Collective Investment Schemes Act (CISA)) or an investment company with variable capital (SICAV, Article 36 et seq. CISA). They most often acquire their properties by way of asset deals, as opposed to acquiring shares of real estate companies.<sup>12</sup> According to information published by the Swiss Financial Market Supervisory Authority (FINMA),<sup>13</sup> there are currently 73 real estate funds authorised by FINMA, of which 12 are structured in the form of a SICAV and 61 in the form of a contractual investment fund.

Contractual investment funds do not constitute legal entities but are structured based on a collective investment agreement (fund contract). Under such fund contract, a fund management company (which must be a company limited by shares with a registered office and main administrative office in Switzerland) commits itself to involving investors in accordance with the number and type of units that they have acquired in the fund and managing the fund's assets in accordance with the provisions of the fund contract. The fund management company manages the fund at its own discretion and in its own name but on account of the investors. However, SICAVs are, in principle, established pursuant to the

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9 Preqin RE deal information.

10 <https://www.cbre.ch/de-ch/uber-cbre/media-centre/stenprop>.

11 Preqin RE deal information.

12 Berger Meyer, C, Rötheli, A, 'Switzerland', in *The Real Estate Law Review*, 5th edition, London 2016, 404–15.

13 <https://www.finma.ch/en/finma-public/authorised-institutions-individuals-and-products/>.

provisions of the Swiss Code of Obligations (CO) for the formation of companies limited by shares (with certain exceptions). Their capital is divided into company shares and investor shares. Unless the law and articles of association provide otherwise, a SICAV may at any time issue new shares at the net asset value and must, if requested by a shareholder, at any time redeem issued shares at the net asset value (open-ended structure). SICAVs are only allowed to operate in the Swiss market once an authorisation has been obtained by FINMA.

### ***Real estate companies***

Listed real estate companies in Switzerland are non-regulated companies limited by shares (according to the CO) and can be classified into real estate investment companies and real estate operating companies (REOCs). Real estate investment companies' sole purpose is the collective investment of capital with the purpose of generating income or capital gains, or both, and without any entrepreneurial activity. Listed REOCs, however, qualify as such if at least two-thirds of their sustainable income comes from real estate activities, such as rental income, valuation or sales success and other real estate services (e.g., property valuation, property management and property development).<sup>14</sup> Listed real estate companies are excluded from the scope and regulatory requirements of the CISA due to their stock exchange listing.

The largest listed real estate companies in Switzerland hold between 50 and 190 real properties. Owing to falling prices for retail spaces, they have recently focused their investments on the office and residential sectors.

### **ii Real estate PE firms – footprint and structure**

National and international investors typically use one of the following investment vehicles for real estate private equity investments in Switzerland:<sup>15</sup>

- a* foreign investment vehicles in any form, often a Luxembourg fund structure, for example in the form of corporations, specialised investment funds or investment companies in risk capital;
- b* real estate companies, usually in the form of a stock corporation; or
- c* limited partnerships for collective investments (KGKs) pursuant to CISA (which can be described as the Swiss version of the limited liability partnership known in Anglo-Saxon countries).

Real estate companies are probably the most frequently chosen investment vehicles for real estate private equity investments. Since its establishment in 2007, the KGK as a Swiss alternative to a foreign limited liability partnership has only had moderate success. According to information published by FINMA, there are currently 17 approved KGKs, of which only six are focusing on real estate investments.<sup>16</sup> Furthermore, most such KGKs seem to be single asset real estate funds.

The two open-ended collective investment schemes provided by the CISA, the contractual investment fund and the SICAV (see above), are less suitable for private equity real estate investments. In particular, they are inappropriate because of their open-ended

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14 SIX Exchange regulations.

15 Alexander Wyss, Mario Kumschick, 'Private Equity Real Estate und die KGK', in Dieter Gericke, *Private Equity III*, pp. 211–79, 216.

16 <https://www.finma.ch/en/finma-public/authorised-institutions-individuals-and-products/>.

structures (i.e., the investors' right to redeem their units or shares at the net asset value and at the expense of the collective assets), which is contrary to a typical private equity investment, where funds are invested over a longer period in an illiquid real estate project.

## IV TRANSACTIONS

### i Legal frameworks and deal structures

Real estate investments are mainly made via collective investment funds or standard special purpose vehicles (SPVs). Tax considerations usually determine the structure of foreign investment funds, depending on which double taxation treaty with Switzerland applies. Local investors usually acquire real estate directly in their own name, or in a business capacity via SPVs commonly known as real estate companies. The choice between acquiring property through a share deal or an asset deal largely depends on the type of property and the projects contemplated for the property.<sup>17</sup>

The main stages of a real estate transaction are similar irrespective of whether the structure of a share deal, an asset deal or a transfer of assets and liabilities pursuant to the Swiss Merger Act (see below) is chosen by the parties. Typically, a real estate transaction consists of the following:

- a* a preliminary phase (includes preparation, tender phase, due diligence, negotiation phase);
- b* signing;
- c* closing; and
- d* an integration phase.<sup>18</sup>

The preliminary phase usually starts with preparations, which include first meetings between a seller and potential buyers. Sometimes, confidentiality agreements (NDAs) are signed at this stage. The result of the entering into contact will be the handing-in of non-binding indicative offers (NBOs) by the potential acquirers.<sup>19</sup> On the basis of the NBOs, the seller will usually identify several parties, with which letters of intent may be concluded, and which will be given access to comprehensive information on the real properties (often by means of a virtual data room) to conduct a due diligence of the objects of sale. After the due diligence, the potential acquirers will hand in a binding offer.<sup>20</sup> In the case of a share deal, the due diligence will further cover the company, that is, the object of sale and the owner of the real property to be acquired indirectly through the shares.

After due diligence and the handing in of the binding offers, the seller will often select a small number of parties and enter into contractual negotiations with these. Eventually, if all stages are successful, there will be the signing of a contract, the closing and the subsequent integration of the transaction.<sup>21</sup> Sometimes, depending on the volume of the transaction and its complexity, and especially if investments are made for the account of indirect investors (e.g., through collective investment funds), transactions are planned in detail and transaction

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17 Berger Meyer, C, Rötheli, A, 'Switzerland', in *The Real Estate Law Review*, 5th edition, London 2016, 404–15.

18 Abegglen Sandro, 'Bianchi Lucas, Regulierung indirekter Immobilienanlagen', in *GesKR 2/2017*, p. 157.

19 id.

20 Abegglen Sandro, Bianchi Lucas, 'Regulierung indirekter Immobilienanlagen', in *GesKR 2/2017*, p. 157.

21 id.

manuals are established. Such manuals will also take into account regulatory requirements, which may significantly impact the timing of a transaction, such as permit requirements pursuant to Lex Koller<sup>22</sup> or other restrictions.<sup>23</sup>

The process deviates from the above in the case of a public tender offer; that is, if an acquirer wishes to take over a public (listed) real estate company. In such a case, provided the takeover is friendly (supported by the board of directors of the target company), the potential acquirer and the target real estate company usually enter into a transaction agreement and subsequently a public tender offer is launched.<sup>24</sup> The public tender offer must include an offer prospectus, which has to contain all information necessary for the target company's shareholder to be in a position to take an informed decision about the offer.<sup>25</sup> The information in the offer prospectus has to be in line with the minimum content specified by the regulations of the Swiss Takeover Board and must include:

- a the involved persons (particularly the offeror and persons acting in concert with the offeror);
- b the financing of the offer;
- c conditions to the offer; and
- d an abstract of the future business plans of the offeror with the target company.<sup>26</sup>

The Takeover Board and FINMA supervise public tender offers.

## ii Acquisition agreement terms

A basic legal principle of Swiss real estate law is that the creation of rights *in rem* requires the registration of such in the land registry. Every piece of land has its own file in the land register, which contains various types of information, particularly the identity of the current owner. Therefore, in asset deals, the transfer of title only occurs with the registration of the acquirer as new owner in the respective file of the land registry. In addition, any rights of third parties pertaining to a plot of land must be registered in the land registry to be valid against a third-party acquirer. Good faith in the information registered in the land registry is protected, which is why acquirers usually require legalised excerpts from the land registry of the plot or plots of land to be acquired dating from immediately before the acquisition to gain a full picture of the existing third-party rights or other encumbrances (e.g., easements and mortgages).<sup>27</sup> The registration of a transfer of title in the land registry requires the filing of a public deed at the land registry. Such public deed will have to be established before a notary public, who is only entitled to notarise public deeds in the canton or, depending on the cantonal law applicable, district, where he or she is competent to do so. Thus, an asset deal regarding several plots of land in different cantons requires the establishment of a public deed in every canton, where a plot is located.<sup>28</sup>

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22 Federal Law on Acquisition of Real Estate by Persons Abroad (SR 211.412.41).

23 Abegglen Sandro, Bianchi Lucas, 'Regulierung indirekter Immobilienanlagen', in *GesKR* 2/2017, p. 157.

24 Wolfgang Müller, Sieber Andrea, Läubli Denise, *Real Estate M&A – Switzerland*, p. 76, accessed at <https://gettingthedealthrough.com/area/103/jurisdiction/29/real-estate-m-a-switzerland/> on 30 April 2019.

25 *ibid.*, p. 76.

26 *id.*

27 Berger Meyer Cécile, Rötheli Andreas, *The Real Estate Law Review* 2016 – Switzerland, 5th edition, London 2016, p. 404–15.

28 *ibid.*

A simplification to this exists for entities, which are registered in the commercial register. Such entities can transfer real property by way of a transfer of assets and liabilities pursuant to the Swiss Merger Act. In a transfer of assets and liabilities, it is sufficient for the parties to establish only one transfer deed before a notary public at the domicile of the transferor, which will then be filed with the commercial register. Apart from bearing significant procedural simplifications, by relieving the parties from having to travel from canton to canton to have public deeds established and filed with a notary, a transfer of assets and liabilities may also result in cost savings, as notary fees can be significant in some cantons.<sup>29</sup> Share deals are not subject to these form requirements.

A result of the requirement of a public deed is that the contract in the case of an asset deal is still strongly influenced by the drafting of the notaries. In other words, the contractual standard and its clauses have not converged with international standards as opposed to share deals, where Swiss law share purchase agreements regarding the acquisition of companies owning real estate have over the years become similar to contracts of similar deals in other countries.

As regards representations and warranties, Swiss law provides by default that the seller is liable to the acquirer to ensure that the object of sale has no physical or legal defects that eliminate or substantially reduce its value or fitness for use. However, in asset as well as in share deals relating to real property with existing buildings, the parties often exclude the liability of the seller for physical defects and the real property is usually sold 'as seen'.

An important warranty relates to the tenant list, which is usually included as a schedule to the contract<sup>30</sup> (under Swiss law, the leases transfer to the acquirer and the acquirer has only limited possibilities to terminate the leases at the transfer of ownership). The warranty usually relates to the accuracy of the information in the tenant list. Further warranties typically found in contracts regarding the transfer of real property relate to the absence of the following:

- a pending or threatened litigation involving tenants, neighbours or authorities;
- b environmental issues (pollution, hazardous substances, etc.) regarding the buildings or the soil; or
- c specific tax warranties.

In the case of share deals, acquirers further typically ask for a representation regarding the correct organisation of the company and its valid existence, the correct presentation of the financial statements and the title to shares of the target company holding the real property.<sup>31</sup>

The purchase price in real estate transactions is usually fixed. Purchase price adjustment or earn out clauses are rare.<sup>32</sup> A down payment of 10 per cent of the purchase price is common for asset deals, whereas there is typically no down payment in share deals.

Common conditions precedent to closing for real estate transactions are a Lex Koller ruling (see below) on the one hand and waivers of rights of first refusal on the other.<sup>33</sup>

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29 Furrer Martin, Wyss Alexander, Kumschick Mario, *Real Estate Transactions in Switzerland*, 3rd edition, Zurich 2012, p. 10 f.

30 Vögeli Andreas F, Häusermann Marco, Frick Thomas A, 'Abegglen Sandro, Switzerland – Law and Practice', in *Chambers Global Practice Guides – Real Estate 2018*, p. 8.

31 Vögeli Andreas F, Häusermann Marco, Frick Thomas A, 'Abegglen Sandro, Switzerland – Law and Practice', in *Chambers Global Practice Guides – Real Estate 2018*, p. 8.

32 Furrer Martin, Wyss Alexander, Kumschick Mario, *Real Estate Transactions in Switzerland*, 3rd edition, Zurich 2012, p. 16.

33 *ibid.*, p. 17.

### iii Hostile transactions

To date, no hostile transactions relating to listed real estate companies have occurred in Switzerland.

### iv Financing considerations

In the context of asset deals, real estate transactions are mainly secured by the assignment of mortgage certificates for security purposes and the assignment of rental income claims for security purposes. Security interests by way of transfer of ownership on mortgage certificates for security purposes are extremely frequent in practice. Fund management companies and SICAVs may also use this financing structure. However, regulatory requirements provide that the financing may not exceed on average one-third of the market value of all real estate assets. Mortgage financings are further limited by the Lex Koller restrictions (see subsection vi) if granted by foreign investors or banks. Foreign mortgage financings are usually limited to 80 per cent of the value of the underlying residential real estate assets; however, the financing of commercial real estate assets is not limited as, since 2002, this type of real estate is no longer encompassed by the Lex Koller restrictions.<sup>34</sup> The assignment of rental claims, insurance claims and bank account claims usually completes the assignment of mortgages for security purposes.<sup>35</sup>

In the context of share deals, financing does not significantly differ from other business transactions. Financing thus occurs by means of equity or debt. Furthermore, a buyer sometimes aims to (partly) finance the purchase price from a target's assets.<sup>36</sup>

### v Tax considerations

The sale of directly held real estate property located in Switzerland (asset deal) generally triggers similar Swiss income tax consequences for both real estate funds and real estate companies. Applicable tax rates may, however, vary depending on whether a real estate fund or a real estate company is selling the property as funds are generally taxed at a lower Swiss income tax rate.

It should in this respect be noted that real estate funds are treated as non-transparent for Swiss income tax purposes with respect to any profits from direct real estate investments in Switzerland (such profit for example includes rental income as well as capital gains). In respect of these profits, the real estate fund as such is subject to Swiss income taxation. At the same time, these profits are generally exempt from Swiss income taxation at the level of the fund investors. Conversely, other income of the real estate fund is generally not taxed at the level of the real estate fund but directly allocated to the investors from a Swiss income tax point of view (tax transparency).

Real estate companies are generally treated as opaque for Swiss income tax purposes. Hence, in the same manner as seen for real estate funds, a real estate company is generally subject to Swiss income taxation with respect to profits arising from an asset deal. Such profits may also be subject to income taxation upon distribution at the level of the shareholders.

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34 Berger Meyer, C, Rötheli, A, 'Switzerland', in *The Real Estate Law Review*, 5th edition, London 2016, pp. 404–15.

35 id.

36 Wolfgang Müller, Andrea Sieber, Denise Läubli, *GTDT, Real Estate M&A 2019 – Switzerland*.



As previously mentioned, an asset deal is therefore, in principle, taxed at the level of the real estate fund or the real estate company for Swiss income tax purposes, but typically not at the level of the fund investors or shareholders. Capital gains are generally subject to corporate income tax at the federal level. At the cantonal level, capital gains from an asset deal are taxed differently depending on the location of the Swiss property. In dualistic cantons (e.g., Geneva), capital gains from asset deals are generally subject to corporate income taxes only. In monistic cantons (e.g., Zurich), however, the part of capital gains corresponding to recaptured depreciations is subject to corporate income tax (i.e., the difference between the investment costs and the book value), whereas the remaining part of the capital gains is subject to a special real estate capital gains tax (i.e., the difference between the sale price and the investment costs). The subject of the special real estate capital gains tax is typically the seller, whereby the tax would generally be secured by a legal lien on the Swiss property.

An asset deal is usually subject to real estate transfer taxes, notary fees and land register fees. Furthermore, an asset deal of real estate is generally considered as a VAT-exempt turnover with no right to input a VAT deduction. However, under certain conditions, a seller may elect to levy VAT on the sale price or to apply a notification procedure. An election for VAT may allow the owner of a plot to recoup input VAT paid on construction costs (input tax deduction).

Distributions by Swiss real estate funds to their investors are generally subject to Swiss withholding tax of 35 per cent. However, distributions of profits resulting from asset deals (i.e. resulting from direct real estate investments in Switzerland) are exempt from such Swiss withholding tax upon distribution by a Swiss real estate fund provided that they are carried out as separate distributions. Distributions by Swiss real estate companies are generally subject to Swiss withholding tax of 35 per cent as well, whereby no exemption similar to Swiss real estate funds exists with respect to distributions of profits resulting from asset deals. However, investors may (partially) reclaim Swiss withholding taxes based on Swiss tax law or applicable double tax treaties.

In the case of a sale of shares of a real estate company respectively the units of a real estate fund with direct real estate property investments in Switzerland (share deal respectively fund unit deal), generally no Swiss income tax consequences arise at the level of the real estate company or the real estate fund. Generally, Swiss private investors and shareholders achieve an income tax-free capital gain in a share as well as a fund unit deal. A share deal as well as a fund unit deal generally triggers Swiss income tax consequences for Swiss corporate investors and shareholders whereby participation relief may apply, enabling a (significant) reduction of the Swiss income tax burden. Foreign investors do generally not become subject to Swiss income tax solely as a result of disposing of shares or fund units in a share deal or a fund unit deal (however, see below our comments with respect to potential real estate capital gains tax consequences).

In certain cantons (typically in monistic cantons), a share deal may trigger the special real estate capital gains tax at the level of the shareholders as well as the real estate transfer tax, usually at the level of the buyer (economic transfer of ownership of the property). However, typically (but not necessarily), 50 per cent or more of the shares of a real estate company need to be disposed of in order to fall into the scope of such economic transfer of ownership of property. Similar tax consequences may potentially apply at the level of fund investors in the case of a fund unit deal. To the extent the special real estate capital gains tax applies, such tax would generally be secured by a legal lien on the Swiss property in the same way as an asset deal.

With respect to foreign private and corporate investors or shareholders of real estate companies and real estate funds, the specific cantonal tax laws and particularly the applicable double taxation agreements determine whether Switzerland is indeed entitled to levy any real estate capital gains tax (or potentially income tax) in the case of a share or a fund unit deal.

A share deal as well as a fund unit deal may be subject to Swiss transfer stamp taxes if a Swiss or Liechtenstein securities dealer, for the purposes of Swiss securities transfer stamp tax, is involved as party or an intermediary to the transaction and no exemption applies.

## **vi Cross-border complications and solutions**

According to Lex Koller, the acquisition of real property in Switzerland by a person abroad (inter alia, EU or EFTA citizens who are not resident in Switzerland, non-EU or EFTA citizens not holding a C permit, or any legal entity that is domiciled abroad or controlled by persons abroad) is restricted as a matter of principle. While commercial properties (e.g., offices, restaurants, retail) can be acquired with no (or few) restrictions, residential properties can only be acquired if an authorisation is issued. In practice, authorisations to acquire residential properties are granted on very limited grounds. Restrictions affecting real estate assets used for commercial purposes concern commercial premises that are empty, that contain residential parts or areas, or that are acquired in anticipation of a company's expansion in the short or medium term (but with no concrete plans to build at the time of the acquisition).<sup>37</sup>

An acquisition within the meaning of the Lex Koller can be both an acquisition of a plot of land (asset deal) and the acquisition of an interest in a real estate company (share deal), provided that the shares in the relevant legal entity are not listed on a Swiss stock exchange. Shares in a real estate company listed on a Swiss stock exchange can thus be purchased without an authorisation. In practice, (non-listed) holding companies often face a situation in which a company owns, as part of its assets, one or two residential buildings. Some cantons allow a company whose purpose is an operational one (e.g., to run an industrial plant or a hotel) to own, among its assets, up to 30 per cent of non-commercial (residential) real estate assets. The reference value for calculating this 30 per cent threshold is the market value of the real estate asset. Applied to holding companies, the 30 per cent threshold is calculated on a consolidated basis; that is, on all real estate assets owned by the holding company's subsidiaries. Because cantons are entrusted with the responsibility and power to apply and ensure compliance with the Lex Koller, the local practice must be checked prior to every transaction.

## **V CORPORATE REAL ESTATE**

While there are numerous transactions in Switzerland resulting in a separation of corporate real estate from operating companies (opco/propco), there is no indication that this could become a general trend in Switzerland.

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37 Berger Meyer, C, Rötheli, A, 'Switzerland', in *The Real Estate Law Review*, 5th edition, London 2016, pp 404–15.

## VI OUTLOOK

With Swiss interest rates resisting the upward trend in the US and EU, real estate continues to be an attractive investment proposition. Owing to the persistently high price level for acquisitions, it can be assumed that investments in a company's own portfolio (development) will become more important than acquisitions.

The covid-19 pandemic has not affected real estate transactions. An unsuccessful protectionist attempt to restrict foreigners investing in Swiss real estate assets took place in March 2021. This demonstrates the confirmed attractiveness of the Swiss real estate market. More generally, Switzerland has gone through the covid-19 sanitary crisis solidly, and tenants have generally been on time on rent payments, although some high retail rents remain challenged to date as a result of closure pronounced by Swiss authorities.

M&A deals have rather been delayed than cancelled. Despite the continuing uncertainty in the market, a moderate development in and a recovery of the M&A market is to be expected. As the uncertainties in the market decline, particularly due to the ongoing vaccination campaign, M&A activity will increase accordingly.<sup>38</sup>

It remains to be seen whether blockchain technology will have a lasting impact on the real estate market. There have been some blockchain-based real estate transactions, such as the acquisition of a prestigious property in Zurich by BrickMark AG for the equivalent of 120 million Swiss francs.<sup>39</sup> However, there is a great interest in blockchain-based real estate transactions and we expect to see increased activity in the next years.

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38 <https://home.kpmg/ch/de/home/media/press-releases/2021/01/coronavirus-crisis-leaves-mark-on-market.html>.

39 <https://www.greterzuricharea.com/de/news/brickmark-realisiert-groessten-immobilienkauf-mit-token>.

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