OVERVIEW OF RECENT ACTIVITY IN SWITZERLAND
On 15 January 2015, the Swiss National Bank (SNB) removed the exchange rate floor of 1.20 Swiss francs to the euro. Negative interest rates, introduced shortly beforehand, are still in place today. According to a survey conducted by KOF Swiss Economic Institute (KOF) in partnership with the Neue Zürcher Zeitung at the end of 2019, only about 20 per cent of the surveyed economists believe that the base interest rate will be positive by 2025 (KOF bulletin, 7 February 2020). This is good news for the Swiss real estate markets which continue to be attractive – according to Ernst & Young’s 2020 Trendbarometer Real Estate Investment Market, 96 per cent of market participants consider the Swiss real estate markets attractive or very attractive.

However, the Swiss economy has been influenced by the slowdown in global economic activity and the weak level of growth in the eurozone – especially in Germany. KOF expects the Swiss gross domestic product (GDP) to grow about 0.9 per cent in 2019 and 1.8 per cent in 2020, down from 2.6 per cent in 2018 (KOF press release of 12 December 2019). Migration remained stable in 2019 compared to 2018 (increase of 0.3 per cent) resulting in a positive migration balance of about 55,000 persons (State Secretariat for Economic Affairs, press release of 30 January 2020).

The residential property market has been characterised by the rental decline for advertised apartments – a trend that has lasted for about five years now, with an average drop of 0.9 per cent in 2019 (Wüest Partner, Property Market Switzerland 1/2020). The overall vacancy rate was at 1.66 per cent on 1 June 2019, a 20-year high (Federal Statistical Office). The UBS Swiss Real Estate Bubble Index relating to owner-occupied homes is moving sideways and stood at 0.95 in the fourth quarter of 2019. However, falling rents caused the price-to-rent ratio to reach a new high. It now takes more than 31 annual rents to purchase an identical home.
The Swiss office market is developing in two general directions. Since office space in city-centre locations is in high demand and supply is short, there is evidence of rising rental prices. In contrast, there is ample vacant office space outside the central locations, resulting in price pressure and forcing lessors to develop innovative ideas such as co-working space. Due to the economic slowdown in general, it is expected that the gaps in price and vacancy between the urban centres and the periphery is likely to increase further (Credit Suisse, Swiss Office Property Market 2020).

The construction index prepared by Credit Suisse together with the Swiss Contractors’ Association is set at 142 points in the first quarter 2020, down from 151 points in the fourth quarter 2019 (-6.3%). The considerable slowdown at the beginning of 2020 can be seen in particular in the commercial and residential construction (down 13.3% and 6.2%, respectively, from the previous quarter). Certain trends, such as the general economic slowdown, the vacancies in the residential rental property markets or the decrease of granted construction permits during 2019, are finally reflected in the construction activities. However, it is expected that the construction sector will recover in 2020 due to the lack of other investment opportunities.
Switzerland is and will continue to be an attractive real estate market for investors in 2020. While the negative trend in certain asset classes (in particular retail spaces) and regions will continue, there will be opportunities in other markets such as microapartments, student accommodation, retirement homes, short-term tourist rentals, co-working, self-storage and logistics facilities, as outlined at the end of this article.

**OVERVIEW OF THE LEGAL AND REGULATORY FRAMEWORK**

The Swiss real estate regulatory framework is based on transaction law; rental law; planning and zoning law; and construction law. As of 1 January 2020, no particularly important changes have been introduced to this regulatory framework. Political discussions will continue to result in amendments to the regulatory framework, however. For example, the political decisions to be taken with respect to the Energy Strategy 2050 will continue to have a significant impact on the construction industry.

The initiative for more affordable apartments, which was heavily debated in 2019, has been dismissed by the Swiss people in the vote of 9 February 2020. However, this vote does not mean that the topic will not be discussed further (see also our contributions regarding affordable housing below). The abolition of the imputed rental income and the revision of the rental law are expected to cause further debate in Switzerland during 2020.

As of 1 January 2020, the Financial Services Act and the Financial Institutions Act, including the respective ordinances, have come into force, revising the Swiss financial markets architecture. Such revision is particularly relevant for real estate companies aiming to raise funds by way of issuing shares or bonds and thus for investors holding real estate indirectly. Interesting legal questions arise, for example regarding the transitional provisions.

In this article we will summarise certain trends relating to affordable housing, blockchain, building information modelling (BIM), public procurement, tenancy and tax law.

**More affordable housing**

**Decision by the Federal Supreme Court of 14 November 2019**

In November 2019, the Federal Supreme Court (1C_441/2018) ruled on the legality of the amendment of Building Regulations of the City of Berne, in the context of the “Housing for All” initiative. This initiative, which was approved by the voters on 18 May 2014, proposed an amendment to the Building Regulations of the City of Berne that guarantees the planning and construction of reasonably priced, high-quality apartments in all city quarters. The new article 16b of the Building Regulations states that rezoning and new zoning programmes must ensure, among other things, that at least one-third of the housing built in residential zones must be affordable housing, as defined in the Federal Ordinance on Housing Promotion, and be permanently rented out at cost.

The complainants argued, among other things, that this article constitutes an inadmissible infringement of the fundamental rights of guarantee of ownership and economic freedom. The Federal Tribunal, however, did not agree and argued, among other things, that the disputed measures will only apply to rezoning and new zoning procedures, and would therefore only take effect when new housing is constructed or existing housing space is enlarged. As the provision therefore only applies to part of the new space allocated for residential use, it does not constitute a serious infringement of the guarantee of ownership and economic freedom, and the new measures are reasonable.

The complainants also raised the argument that the new article 16b of the Building Regulations constitutes a direct intervention in the relationship between landlords and tenants. As article 16b, paragraphs 1 and 2 of the Building Regulations must be seen as a measure against abusive rents, it is therefore a private law provision, rather than a provision of cantonal public law. As federal law exhaustively governs this...
subject, the cantons may not intervene directly in contracts between landlords and tenants. The Federal Tribunal stated, among other things, that cantonal and municipal measures that serve to maintain or increase the limited supply of affordable rental apartments pursue a course that is in opposition to the federal provisions against abusive rents. It is in the common interest to meet the public need for a sufficient supply of rental apartments in a specific price segment. This is definitively part of public law, and it is therefore correct that the Building Regulations incorporate the additional regulation, because this regulation only applies to changes to land-use plans, which are instruments under public law.

The Federal Tribunal therefore protected the amendment to the Building Regulations and rejected the appeal.

Comparisons with Berlin
This topic is not only a matter for debate in Berne, or even Switzerland in general (in the context of the current popular initiative “More affordable homes”) – it is also relevant in, for example, Berlin. To brake the rapid increase in rents, Berlin wants to introduce a rental price cap, under which the rents paid on 18 June 2019 should be frozen for five years. This should apply to all apartments in multi-family dwellings that are not rent-controlled throughout Berlin. When renting out apartments, only the most recent rent that was agreed with the previous tenant may be charged, provided that this rent does not exceed the rental cap (euros/m² of residential space).

Berlin is similarly confronted by jurisdictional issues: does the City of Berlin have legislative power in this matter, or has the subject been exhaustively regulated by German federal law? Berlin has also been discussing whether the cuts in rent, to be introduced by the planned measures, constitute impermissible interference with the freedom of contract principle, and if it does, whether this interference is reasonable. However, on 30 January 2020 the Berlin House of Representatives resolved the law on revising the legal regulations on rent price capping, which entered into force on 23 February 2020.

Blockchain
In 2019, the first blockchain real estate transaction concluded in Switzerland. This transaction pertained to a share of some 20 per cent in the property at Grabenstrasse 3 in Baar, which was purchased by four investors. Tokenisation, ie, the process of digitally representing the real-world asset (property) on the Ethereum blockchain in the form of a token, was routed through the Blockimmo platform. For the first time, therefore, shares in real estate were sold in the form of tokens.

In the final instance, however, what sounds like a totally novel and innovative form of real estate transaction really isn’t all that new: the property is owned by a fund that is entered into the Land Register. Each property is transferred to a separate sub-fund. Investors can invest in the fund by way of a security token, and in this way acquire a share in the property. A limited number of tokens are issued per fund, and the token price depends on the price of the property.

Although the first hurdle has been cleared to make it possible to transfer every property offered to the investors to a fund (both the Swiss Financial Market Supervisory Authority and the Financial Market Authority Liechtenstein have licensed the Blockimmo platform), the goal has not been reached completely. Aside from a high level of liquidity, blockchain technology should also ensure a high degree of flexibility for investors. According to prevailing law, however, all property owners have to be entered into the Land Register (the principle that all rights in rem have to be registered applies – ie, real property rights only arise and exist if they have been registered in the Land Register). The Land Register is the register of real estate, and the real property rights and liens on these properties, such as easements or charges on property. The principle of good faith applies – anybody who relies in good faith on a Land Register entry and subsequently acquires property or other rights in rem is protected with regard to this purchase. It is therefore important that the Land Register is always updated correctly, hence also all formal requirements (eg, Land Register transactions have to be certified in the form of a public deed) pertaining to a Land Register entry have to be observed. This means it is currently impossible to provide the intended high degree of flexibility, or the option to quickly and easily acquire a property or a share in a property by way of a token, except by detouring via a fund.

Other countries have already made more progress in this regard; Estonia, for example, offers a blockchain-based public notary service. Georgia has already converted its land register to blockchain, and Sweden has also taken its first steps in this direction.

In general, however, it should be remembered that with every purchase of a property, obligations and debts pass to the buyer, and these must be investigated and understood by the buyer before the transaction is concluded. Rapid or rash purchases are generally not desirable.

BIM – new working technology for the construction industry
BIM is the geometric representation in 3D of a building on a computer in order to analyse, steer and simulate specific patterns of behaviour. With this method, the data and information provided by the parties involved in planning a construction project (architects, engineers, technicians, etc) are captured digitally in order to create a single virtual 3D model. BIM is therefore a structured collection of information about an existing or planned building. This establishes a system of data management that offers a high degree of transparency, efficiency and quality, as well as cost and time control across the entire life cycle of a building, until demolition and reuse, recycling, or energy retrieval from its components.

Two versions of this new working technology are available. The first is closed BIM, where the participants work with software developed by a single provider. The second, open BIM, combines software developed by several software providers. The participants develop a model using a software program that has been developed for their specific subject area. Cooperation is then routed through reference models exchanged via an open data model, usually Standard Industry Foundation Classes, which allows standard prioritisation and structuring of virtual data and objects. Using this free and independent data format guarantees the implementation of the method by all planners. Closed BIM is an interesting tool for smaller projects with a limited number of subject areas and construction partners, but open BIM is preferable for bigger projects.

The digitisation of the construction industry is giving rise to many challenges, however. This method is not very well established in Switzerland yet, and there is no specific legal framework for this
field. There is still much confusion and uncertainty about what BIM is, what it can do and how tasks are allocated in a BIM project. Using a BIM model thus brings considerable implementation costs. The participants in a planning project also have to work together more closely, which means additional input with regard to project organisation and management. And finally, the use of BIM requires particular care in the preparation of contract documentation regarding the provision of this service and the management of the related data. As the BIM model enables service providers to offer a very wide spectrum of services, it will always be necessary to precisely define the scope of the service to be performed and the duration of the process, in order to avoid the risk of disputes as much as possible.

It therefore comes as no surprise that the legal basis is still mostly absent. The builder-owner therefore cannot insist on using BIM models instead of traditional application documents when applying for a building permit. The authorities also do not have the power to force unwilling builder-owners to submit BIM models. In addition, a lack of technical equipment and/or training on the part of the authorities often hampers the use of BIM models.

The following issues will have to be regulated before the process of applying for a building permit can be aligned to BIM models:

- subject, quality and format of BIM data and submission options;
- software to check building requirements;
- public disclosure of specific BIM documents or the BIM model (whether in read-only format or with an analysis tool);
- archiving of BIM data;
- protection of BIM data;
- updating the BIM model upon completion of the construction project to reflect the actual state of the finished building;
- identifying the parts of the BIM model that are binding, in terms of the building permit;
- forwarding BIM data to other authorities; and
- use of BIM data by these other authorities.

Revision of public procurement law

In terms of the revision of public procurement law at federal and cantonal levels in Switzerland, 2019 was a key year.

The revision was made necessary by the adoption on 30 March 2012 of the revised WTO Agreement on Government Procurement (GPA), which entered into force on 6 April 2014. As a party to the GPA, Switzerland – which joined the GPA on 1 January 1996 – is obliged to implement the GPA amendments in its national law in order to ratify the revised GPA (GPA 2012).

The objectives of the Swiss revision project were therefore to implement the GPA 2012; to harmonise federal and cantonal public procurement law as much as possible; and, where necessary, take account of the division of powers between the Confederation and the cantons. The business sector has been demanding this harmonisation for many years.

After a long legislative procedure, the National Council and the Council of States unanimously approved the total revision of the Federal Act on Public Procurement (BöB) on 21 June 2019. The GPA 2012 was adopted unanimously at the same time. With this move, Parliament wanted to introduce a paradigm shift towards a more sustainable system of public procurement and quality-centric competition.

Landlords have been warned: it is permissible to enter into fixed-term rental contracts, but these may not under any circumstances weaken the legal protection granted to tenants

Based on the decision of the Federal Council of 12 February 2020, the new BöB and its ordinance (VöB) will enter into force on 1 January 2021.

The Federal parliament sent a clear signal for the need to harmonise the BöB and the Intercantonal Agreement on Public Procurement (IVöB), which has been in revision by a working group consisting of an equal number of federal and cantonal representatives since 2012.

The revised IVöB was subsequently unanimously adopted by the Intercantonal Body for Public Procurement at a meeting on 15 November 2019. It will enter into force as soon as two cantons have joined the concordat. The first accessions are expected at the end of 2020.

The few differences between the IVöB and the BöB mainly arise from the superordinate legal provisions that have to be observed by the cantons and the Confederation. The cantons have to apply the place-of-origin principle prescribed by the Federal Act on the Domestic Market, while the place-of-performance principle applies for the Confederation.

Finally, on 19 November 2019, Federal Councillor Parmelin signed the Ordinance of the Federal Department of Economic Affairs, Education and Research, concerning the adjustment of the public procurement threshold values for 2020 and 2021, which, however, remained the same as the previous threshold values.

Tenancy law: Basic principles applying to the calculation of rents in Geneva

Evasion of the law with regard to fixed-term contracts

On 12 April 2019, the Federal Supreme Court ruled on whether the conclusion of a single fixed-term rental contract can qualify as an evasion of the law.

In the present case, the real estate management company concluded fixed-term rental contracts for four or five years, whereby the rent for the first three years equalled the highest rent allowed by the law on the demolition, conversion and renovation of residential properties (LDTR). This rent was increased for the subsequent years. After entering into such a rental contract, a tenant asked the court to define the practice of the real estate management company as abusive, as the tenant believed the primary objective of the management company to be to substantially increase the rent upon expiry of the state control period, and to prevent the tenant from opposing the increase in steps for fear that the contract would not be renewed.

As the law does not prohibit the conclusion of fixed-term rental contracts, the Federal Supreme Court had to examine whether the circumstances of the case at hand justified the conclusion that the landlord had set up a system that aimed to evade the imperative rules protecting the tenant. The Federal Tribunal pointed out that the tenant never wanted to or was interested in concluding a fixed-term contract. After considering all relevant factors, including the housing shortage in the city of Geneva and the practice of the government, the Federal Supreme Court held that the landlord was evading the law.

As this judgment was not published, its impact was small. It seems that the Federal Supreme Court’s decision was mostly dictated by the specific circumstances of an individual case. However, landlords have been warned: it is permissible to enter into fixed-term rental contracts, but these may not under any circumstances weaken the legal protection granted to tenants.
Even though not explicitly required by Switzerland’s Code of Obligations, owners are therefore well advised to document their interest when entering into a fixed-term rental contract. If not, the courts could convert a fixed-term lease into an indefinite one.

**Limited approval of an application to establish the initial rent**

The Rental Chamber of the Geneva High Court was recently asked to rule on the limitation period applying to an application to the court to establish the initial rent (the tenant was not sent the official form for establishing the initial rent), and an action for the repayment of excess monies (decision no. ACJC/1170/2018 of 3 September 2018).

The Rental Chamber ruled that there is a joinder of actions if the tenant files motions about the establishment of the initial rent and the reclaiming of unfairly charged amounts in the same action. After ruling that these two claims are subject to different limitation periods (the claim about initial rent is not subject to expiry, while the expiry for the claim based on unjust enrichment is governed by article 67 paragraph 1 of the Swiss Code of Obligations (SCO)), and after considering the positions taken by legal doctrine, the court confirmed that the claim arising from unjust enrichment should qualify as a single claim rather than successive claims. The statute of limitations under article 67 paragraph 1 SCO, which starts running when the contract begins, therefore has to be applied to the total claim arising from unjust enrichment. In the present case this means that the claim to repayment of the excess amounts paid had expired, as the claim was filed more than 10 years after the conclusion of the rental contract.

The Rental Chamber thus followed the ruling of the Federal Supreme Court in its decision 140 III 583 of 2017, which concluded that, given the lengthy period that had elapsed, the tenant no longer had any interest in having the rent established by the court. No legal remedies were filed against the judgment of the Geneva High Court.

This ruling is positive for Geneva’s landlords, as it limits the risk, to a period of 10 years, that the court will establish the initial rent if the official form regarding the establishment of the initial rent pursuant to article 269d paragraph 1 SCO was not delivered to the tenant.

**Tenancy law and short-term rentals (Airbnb)**

Approval of an amendment to the administrative and usage regulations of a condominium owners' association introducing a ban on short-term rentals

In an unpublished judgment (SA_436/2018), the Federal Supreme Court ruled on the permissibility of a clause concerning the advertising of apartments on a rental platform such as Airbnb.

The relevant case referred to a an apartment block (ie, a condominium unit) consisting of 26 properties, all of which were designated for residential or “quiet activity” purposes. The property, located in the canton of Nidwalden, was luxuriously equipped with a swimming pool, sauna, gym and roof terrace. The administrative and usage regulations of the condominium owners’ association were amended as follows in 2015, with the approval of a majority of the condominium owners who were present: “Irregular rental on a daily, weekly or monthly basis is also not permitted. Only permanent rental is permitted.”

When a condominium owner who wanted to continue advertising his apartment on Airbnb filed a complaint, both the Cantonal Court and the High Court of the Canton of Nidwalden rejected his claims and ruled that the amendment to the regulations was permissible.

By judgment of 4 April 2019, the Federal Supreme Court has now also rejected the complaint. In its ruling it stated the principles that apply to the permissibility of such clauses prohibiting the advertising of condominium units on Airbnb. It added that such cases must be judged in consideration of the actual circumstances. The Federal Supreme Court
explained that renting out residential space via rental platforms is a para-hotel hospitality activity, defined as the provision of a room, dwelling, house or chalet with limited services associated with the rental, rather than a regular rental, for which the process of concluding a contract is considerably more complex.

In the relevant case, the Federal Supreme Court acknowledged the luxurious quality of the building and decided that the units were intended for private use, as most of the apartments were primarily inhabited by their owners. The Federal Supreme Court also recognised the condominium owners’ need for peace and quiet, which is incompatible with the more flexible schedules applied by customers of the Airbnb platform.

The Federal Supreme Court thus ruled that the advertising of a condominium unit on Airbnb is contrary to the residential purpose of the building. The amendment to the administrative and usage regulations was therefore permissible as it did not violate the exclusive usage right of the condominium owner, nor did it invalidate the material content of this right.

Time restrictions on residential property rental in Geneva
Following the decision by the Geneva State Council of 7 March 2018 restricting the rental of apartments via an online platform to 60 days per year, the Cantonal Constitution Department was asked to investigate whether such a restriction is permissible. It decided by judgment of 15 August 2018 (ACST/19/2018) that 60 days is too short. It amended article 4A of the implementing provisions to the LDTR (RDTR) by extending the permitted period to 90 days per year.

After receiving an appeal against this judgment, the Federal Supreme Court confirmed the decision of the Cantonal Constitution Department of the Geneva High Court on 25 March 2019 (1C_472/2018). The appellant’s arguments, to the extent they were taken up, were rejected by the Federal Supreme Court.

The Federal Supreme Court confirmed that article 4A RDTR is a secondary norm and that the State Council is competent to adopt such a norm. In checking compliance with the principle of proportionality of the restriction imposed by this provision, the Federal Supreme Court argued that the restriction on the annual number of rental days was proportional. Taking into account the public interest, restricting the period of rental via online platforms does not constitute an inappropriate violation of the landlord’s rights.

Recent developments in tax law and abolition of imputed rental income
The abolition of the so-called imputed rental income has been discussed several times over the past twenty years. However, the respective motions did not succeed. Should the actual initiative be successful, the change of the current system is not expected to enter into force before 2021.

Under the imputed rental income system, residential property owners have to tax an assumed rental income on self-used space. In turn, property owners are entitled to deduct from their taxable income any costs relating to the property, such as maintenance costs.

Active clients in the real estate sector
In 2019, the landmark transactions in Switzerland were two sales transactions by two different owners relating to properties in the Klybeck area, near the city centre of Basle, each with a transaction value of several hundred million Swiss francs. The plan is to develop a new city district over the coming decades.

The negative trend in the retail sector continued in 2019. Clients were increasingly aiming to reduce or even completely abandon the rented retail space; it seems that traditional retail business will no longer pay off.

Forthcoming developments in the Swiss real estate market
As a consequence of continued negative interest rates in 2019, a disproportionate amount of capital was again invested in real estate markets, enforcing the trend for a significant decrease of attainable yields over the past few years. Nevertheless, there are still opportunities for investments – for example, investments that involve greater risks or involve special real estate.

According to the 2020 UBS Real Estate Focus, there are seven key real estate trends that investors are focusing on at the moment:
- microapartments;
- student accommodation;
- retirement homes;
- short-term tourist rentals;
- co-working spaces;
- self-storage; and
- logistics facilities.

Investment in each of these property types involves risks, of course; as the number of co-working spaces, for instance, has steadily increased over the past few years, the risk of oversupply must be taken into consideration. It is generally known that with short-term rentals in popular tourist cities, for example through platforms as Airbnb, the rental income generated is considerably higher than with long-term rentals; this has recently resulted in government interventions in trying to regulate the market.

Taking into account the risks of such niche investments, it has to be seen whether those investments will ultimately result in the expected yield.

Taking into account the risks of such niche investments, it has to be seen whether those investments will ultimately result in the expected yield – it definitely also depends on whether and to what extent the negative interest rates remain in force.

Another trend we have recently observed in Switzerland is the development of digitalisation, in terms of using interlinked technologies for smart asset management. Starting with recoding all financial, market and technical data of the properties owned, a more efficient, faster and more cost-effective management of the properties can be attained. This is illustrated, as an example, by the increasing influence of proptech companies in the Swiss real estate industry (see also www.swissproptech.ch).