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## **Purchase of immovable property by EU Citizens in Kosovo**

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<b>Purchase of immovable property by EU Citizens in Kosovo</b>	<b>1</b>
Executive Summary	3
I. Introduction	5
II. Right of Foreigners to Own Property in Kosovo	7
A. European standards in the field of property rights	7
i. Direct Applicability of International Agreements and Instruments with focus on the Effect of the European Convention on Human Rights within the Domestic Legal Order of Kosovo	8
B. The Constitution of the Republic of Kosovo	9
i. Other sources of law	10
C. The obligations deriving from the Stabilization and Association Agreement	12
III. The practice in the selected countries of the region	13
IV. Conclusions	16
Bibliography	17

## **Executive Summary**

Land has a very important role and is a vital resource of the nation state and it has always been in many countries' focus in legislation<sup>1</sup>.

As the modern state emerged, the non-nationals classified as foreigners, were not seen suitable for exercising rights on land ownership<sup>2</sup>. Because of its immense value, different countries have at different periods taken measures to restrict the possibility of foreigners' to acquire land within their territories. Traditionally speaking, foreigners who are classified as non-nationals of a state were not allowed to acquire land.<sup>3</sup> After a while, many countries began to desert this attitude and from 1995, started including foreign ownership of land in their national agenda<sup>4</sup>.

Many states in its constitutions allow a possibility of limiting rights to acquire property for foreign persons, whilst the European picture is slightly diverse when it comes to foreign ownership. In the majority, including England and Scotland, France, Germany, the Netherlands, Portugal, Finland Sweden etc restrictions have been abolished<sup>5</sup>.

There are some other countries, where even though there are no restrictions for foreigners as to the ability of purchasing real estate within their territories, foreigners deal with administrative and bureaucratic burden when purchasing land (Republic of Croatia). Some EU member states grant protection to agricultural land considering that it is scarce and an asset with a great value. Hence, they pursue restrictions and conditions when it comes to

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<sup>1</sup> Dennis Campbell, ed., *Legal Aspects of Doing Business in Western Europe* (Kluwer, 1990)

<sup>2</sup> R. Jennings and A. Watts, eds., *Oppenheim's International Law* (London, 1992)

<sup>3</sup> Peter Sparkes, *European Land Law*, 2007

<sup>4</sup> Stephen Hodgson, Cormac Cullinan, Karen Campbell, *A comparative analysis of regulatory approaches to the acquisition and use of land by foreigners*, 1999 (hereafter: Hodgson et al., 1999)

<sup>5</sup> European University Institute (EUI) Florence/European Private Law Forum Deutsches Notarinstitut (DNotI) Würzburg, *Real Property Law and Procedure in the European Union*, 2005

acquisition of agricultural land<sup>6</sup>. *“At the same time, EU law also recognizes the specific nature of agricultural land. The Treaties allow restrictions on foreign investments in farmland where they are proportionate to protect legitimate public interests such as preventing excessive land speculation, preserving agricultural communities or sustaining and developing viable agriculture”*<sup>7</sup>.

Considering Western Balkans countries aspiration towards EU membership, in achieving these goals, these countries are required to abolish restrictions on foreign ownership if they aspire to become EU members. One of the key requirements of the European Union for the accession of Central European countries to the EU is the establishment of free market economies and establishment of efficient land markets. Hence, since the opening of national property markets for foreigners is an EU requirement, all countries of the region have introduced foreign ownership over land in different ways. Although such obligation is required for Kosovo as well, the current legal infrastructure above all lacks clear definition on the access of foreigners to property.

Therefore, the focus of this paper will be on the foreign ownership and use of land. Accordingly, a number of important issues are presented in detail. In particular, this paper shows the acquisition of land by foreigners and how Kosovo is complying with its obligations deriving by different binding international agreements.

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<sup>6</sup> Commission Interpretative Communication on the Acquisition of Farmland and European Union Law available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XC1018\(01\)&from=MT](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XC1018(01)&from=MT)

<sup>7</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XC1018\(01\)&from=MT](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XC1018(01)&from=MT)

## **I. Introduction**

### **Sources of the property law in the Republic of Kosovo**

Legislation defining property rights must be sufficiently accessible, precise and foreseeable in its application in order to avoid any risk of arbitrariness<sup>8</sup>.

New legislation adopted following the Declaration of Independence did not improve legal situation in the Republic of Kosovo. When it comes to some of the rights and obligations deriving from some types of properties in Kosovo, there is room for legal uncertainty and ambiguity. These ambiguities can be capable of being understood in more ways than one, and may lead to various interpretations by different individuals.

Currently, three set of laws regulate the property rights in Republic of Kosovo: pre-1989 laws of the former Yugoslavia, UNMIK legislation and legislation adopted by the Republic of Kosovo.

### **Ownership**

Private property rights are defined in the Law on Property and other Real Rights, as well as addressed in a number of related laws, such as the Law on Obligational Relationships, the Law on Inheritance, the Law on Non-Contentious Procedure, the Law on Contentious Procedure, the Law on Establishing the Immovable Property Rights Register etc.

The Kosovo's legislation is vague and as a result of this vagueness fails to define the entitlements and the obligations deriving from different types of property rights.

As stipulated in Article 10 of the LAW NO.03/L-154 on Property and other Real Rights:

*“1. Immovable property is a part of the earth's surface that is or can be enclosed. Immovable property includes plants enrooted in the ground and buildings firmly connected to the ground, but do not include natural resources in the subsoil.”*

*2. Immovable Property includes: 2.1. A building that belongs to a person other than the owner of the immovable property on which it is built; 2.2. a building unit which is regulated*

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<sup>8</sup> Case law of the European Court of Human Rights; Novik v. Ukraine, No. 48068/06

*by Articles 57 -62; 2.3. a building right which is regulated by Articles 271-281; 2.4. a leasehold according to the relevant provisions on leaseholds.*

### **Acquisition of property**

The Law on Property and other Real Rights defines ownership as the most comprehensive property right on an asset authorizing the owner to freely use the asset, dispose of it and exclude others from any interference with it.

According to the law on property rights and other real rights, the transfer of ownership requires a valid contract and the registration of the change of ownership on the immovable property rights register. This contractual transfer must be done in written form and in the presence of both parties before a competent court or a notary public.

Nevertheless, the legislation fails in clear definition of property rights as to what are the requirements, obligations, which is entitled to what rights etc. Under the applicable laws there is also some notable confusion as to possibility of a foreign citizen acquiring rights to immovable property in Kosovo.

## **II. Right of foreigners to own property in Kosovo**

To regulate ownership of land by foreigners it is very important firstly to define which natural and legal persons (such as companies) are considered "foreigners"<sup>9</sup> under the Kosovo's legislation.

According to Article 2.1.3 in the Law 04/L-220 on Foreign Investment, a foreign natural person denotes from the legal point of view (i) any natural person who is a citizen of a foreign country, (ii) any natural person who is a citizen of the Republic of Kosovo, but has residence abroad, and (iii) a legal person established according to the Law of a foreign country.

Given the above, it can be concluded that foreign nationals and foreign companies are foreign persons under the applicable legislation. They are a foreign investor if they have made an investment in Kosovo, which includes, *inter alia*, ownership of immovable property.<sup>10</sup>

### **A. European standards in the field of property rights**

Any property law reform is to be framed within the guidelines of ECHR and relevant case law based on two rules (1. protection of property 2. deprivation of property) and three principles (1. lawfulness, 2. legitimate aim in the public interest, 3. fair balance 4. legitimate expectation).

Ever since the independence of Kosovo in 2008, the goal of Kosovo is EU membership. Kosovo must align national laws, regulations and procedures with EU legal framework including here also the European Convention on Human Rights (ECHR) and European best practices.

The Constitution of the Republic of Kosovo refers to the application of the standards established by the ECHR and the case law of the European Court of Human Rights. So,

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<sup>9</sup> Hodgson et al. 1999

<sup>10</sup> Kosovo National Strategy on Property Rights, December 2017 (hereafter: Kosovo National Strategy on Property Rights)

according to Art 22 and 53 of the Constitution of the Republic of Kosovo, the provisions of the ECHR are applicable and prevail over domestic laws.

**i. Direct Applicability of International Agreements and Instruments with focus on the Effect of the European Convention on Human Rights within the Domestic Legal Order of Kosovo**

According to article 22<sup>11</sup> and 53<sup>12</sup> of the Constitution, human rights and fundamental rights which are guaranteed by international agreements are safeguarded in Kosovo and prevail over domestic laws. The international agreements which prevail over domestic legislation are:

1. Universal Declaration of Human Rights;
2. European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
3. International Covenant on Civil and Political Rights and its Protocols;
4. Council of Europe Framework Convention for the Protection of National Minorities;
5. Convention on the Elimination of All Forms of Racial Discrimination;
6. Convention on the Elimination of All Forms of Discrimination Against Women;
7. Convention on the Rights of the Child;
8. Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;

The Strasbourg case law is constitutionalized by virtue of Article 53 which has direct and has implication in Kosovo as a source of law. This article stipulates that human rights must be interpreted in harmony with the EU case law.

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<sup>11</sup> Constitution of the Republic of Kosovo, Article 22 Direct Applicability of International Agreements and Instruments: *Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:...* (2) *European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;*

<sup>12</sup> Constitution of the Republic of Kosovo, Article 53 Interpretation of Human Rights Provisions: *Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.*



## **The provisions of ECHR on property rights:**

### **Article 1 of Protocol No. 1 guarantees the right to property:**

**Article 1** (Protocol 1) (1) *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.* (2) *The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

The same logic was also followed on the Kosovo's constitution embodied in Article 46 that *use of property is regulated by law in accordance with the public interest.*

## **B. The Constitution of the Republic of Kosovo**

The rule of law standards in Kosovo are set by the Constitution of the Republic of Kosovo which follows the European Convention on Human Rights and Fundamental Freedoms and its Protocols.

The constitution of the Republic of Kosovo gives a special consideration and foresees sound basis with regards to the property and other real rights. In this sense, the constitution foresees some relevant provisions, even though not in the technical legal sense.

The "ownership" right is categorized with other fundamental rights, embodied in Article 46 of the constitution. The right to own property is guaranteed and enjoys constitutional protection. The property rights are defined on the basis of equality and impartiality, regardless of the national background, meaning that also the foreigners qualify for the right of acquiring immovable properties in Kosovo.

As far as the Constitution is concerned, under article 121, point 2<sup>13</sup> foreign natural persons and foreign organizations may acquire ownership rights over immovable property in accordance with such reasonable conditions as may be established by law or international agreement. In this respect, this may be interpreted that the foreigners are entitled to acquire ownership on properties in Kosovo as long as this is regulated by law or international agreement. Furthermore no such conditions may be imposed if they would be contrary to the Constitution.

While Article 121.2 of the Constitution states foreign nationals and organizations may acquire ownership rights over immovable property in accordance with the conditions established by laws or international agreements, Kosovo has no specific legislation establishing relevant conditions. In addition, this provision implies also that foreigners must not be discriminated acquiring property only because they are foreign. Eventual discrimination can be determined by other market conditions, and shall not be imposed on administrative grounds<sup>14</sup>.

#### **i. Other sources of law**

In addition to the Constitution, access of foreigners to property is ensured by the Law 04/L-220 on Foreign Investment Article 4, Point 1 and 2 which sets equal rights for national and foreign investors including also for acquiring immovable property and prohibits any kind of discrimination whatsoever<sup>15</sup>.

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<sup>13</sup> Constitution of Kosovo, Article 121 on Property, Point 2: *Foreign natural persons and foreign organizations may acquire ownership rights over immovable property in accordance with such reasonable conditions as may be established by law or international agreement.*

<sup>14</sup> Enver Hasani and Ivan Ćukalović, *Commentary on the Constitution of the Republic of Kosovo*, (Pristina, 2013)

<sup>15</sup> Law 04/L-220 on Foreign Investment, Article 4, Point 1 and 2: 1. *Republic of Kosovo shall provide the foreign investments the same treatment, regardless of their citizenship, origin, residency, place of establishment of business or control.* 2. *Foreign investors and their investments shall comply with, and have the rights and obligations established by, the law applicable in Kosovo to the same extent as domestic investors and their investments.*

According to the Law No.04/L-061 on sale of apartments in which there is a tenure right, namely Article 6 point 2<sup>16</sup>, foreign nationals can buy an apartment under the existence of reciprocity between Kosovo and the respective foreign country.

Furthermore, foreigners are as equal as Kosovo citizens regarding inheritance, subject to reciprocity. Reciprocity is presumed<sup>17</sup>.

Worth mentioning is that in 2017, the Government of Kosovo launched the National Strategy on Land and Property Rights reform which includes a provision to clarify and codify regulations regarding property ownership by foreign and/or non-resident investors.<sup>18</sup>

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<sup>16</sup> Law No.04/L-061 on sale of apartments in which there is tenure right, Article 6, point 2: *“Foreign nationals can buy an apartment under the conditions stipulated by this Law only if it is possible that the citizens of Kosovo to buy an apartment with the same conditions in the respective country”*.

<sup>17</sup> Law No.2004/26 law on inheritance in Kosovo, Article 3, point 4: *“Foreigners are as equal as Kosovo people regarding inheritance, subject to reciprocity. Reciprocity is presumed”*

<sup>18</sup> U.S Country Commercial Guides, Kosovo 2017 available at: <https://xk.usembassy.gov/wp-content/uploads/sites/133/KosovoCCG2017.pdf>

### **C. The obligations deriving from the Stabilization and Association Agreement**

The process of accessing the European Union family engendered the issue of the foreigners' ability to acquire immovable property in many countries aspiring for the future EU membership<sup>19</sup>.

Ever since the declaration of independence in 2008, the EU integration took a special place in Kosovo's foreign policy agenda. The Republic of Kosovo and European Union signed the Stabilization and Association Agreement (*hereafter as: SAA*) on 27 October 2015, in Strasbourg. It was subsequently adopted by the Government of the Republic of Kosovo on 30 October 2015.

This agreement is considered as a very important milestone for Kosovo and has put relations on a comprehensive contractual basis for the first time. Thus, Republic of Kosovo, by signing the SAA with the EU, assumed the responsibility to equate the option of EU nationals to acquire real estate within 5 years from the date when SAA enters into force<sup>20</sup>.

Nevertheless, the practice shows that the foreigners encounter resistance when they attempt to register the properties in the cadastral office. The cadastral legislation lacks on the clear definition of the registration rights as to who can register these rights, and the documents and other requirements for registration<sup>21</sup>. Such practices seriously violate the obligations deriving from the SAA.

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<sup>19</sup> Hodgson et al. 1999

<sup>20</sup> Article 65, Article 65, point 3 of the SAA: *Kosovo shall, within five years from the entry into force of this Agreement, grant national treatment to EU nationals acquiring real estate on its territory.*

<sup>21</sup> Kosovo National Strategy on Property Rights

### **III. The practice in the selected countries of the region**

This section focuses on the current status of acquisition of land in transition economies of the Balkans. Different practices are followed by different countries when it comes to the foreign ownership. Some countries allow foreigners to acquire real estate and grant them national treatment, while some other countries restrict ownership in some types of lands. Notwithstanding that some countries where foreigners are equally treated as nationals, state poses some bureaucratic and administrative burden when it comes to land transactions.

#### **Serbia**

Foreign persons in accordance with international agreements have all the rights guaranteed by the Constitution and laws in Serbia (except rights reserved by the Constitution and laws only for citizens of Serbia)<sup>22</sup>. Nevertheless, the Constitution proclaims that “*foreign natural and legal person may acquire property over realties, in accordance with the law or an international agreement*”<sup>23</sup>.

Subject to reciprocity, foreign natural person or legal entity that is engaged in business activities in Serbia can purchase construction land and buildings in the Republic of Serbia necessary for its business operations, while foreign natural and legal persons not conducting activities in the Republic of Serbia may also acquire ownership rights over apartment in residential building as the other citizens of the Republic of Serbia.

#### **Croatia**

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<sup>22</sup> RS Constitution, provisions for property rights regarding foreigners are included in Art. 17 (position of foreigners nationals)

<sup>23</sup> See also Art. 85 (foreigners' property rights), paragraph 1

EU citizens and legal entities from EU Member States can acquire immovable property rights in Croatia pursuant to the national treatment principle.

Foreign natural persons and legal entities (foreigners who are not EU citizens or legal entities of EU Member States) may acquire immovable property if the reciprocity principle is met and if the Croatian Minister of Legal Affairs approval gives his approval.

Inheritance is also subject to reciprocity, and whether foreigners can inherit property in Croatia depends on reciprocity established between the Republic of Croatia and the respective country.

Even though EU citizens freely acquire real estate in the Republic of Croatia, there are some expectations. The main restrictions relate to ownership of agricultural land and the secured parts of nature, when EU citizens are given the same treatment as foreigners. Hence foreign investment in agricultural land is limited in this country.

## **Bulgaria**

In Bulgaria, foreigners can acquire the right of ownership in buildings and limited real rights over immovable property in the country, unless otherwise provided by law, limited real rights over agricultural land by terms and procedures as provided by law, and acquire ownership of land under the conditions arising from the accession of Bulgaria to the European Union, on the basis of a treaty ratified, promulgated and entered into force for the Republic of Bulgaria and through inheritance ex lege.

## **Slovenia**

Article 68 of the Slovenian Constitution<sup>24</sup> states: (Property Rights of Foreigners) “*Aliens may acquire ownership rights to real estate under conditions provided by law or if so provided by a treaty ratified by the National Assembly, under the condition of reciprocity. Such law and treaty from the preceding paragraph shall be adopted by the National Assembly by a two-thirds majority vote of all deputies*”.

This means that foreigners may acquire real-estate under conditions defined by law or international treaties adopted by the National Assembly. Generally, for foreigners the reciprocity rule applies.

EU nationals may acquire land under the same conditions as Slovenian citizens. This rule is applicable to both natural and legal entities. Natural and legal entities, citizens of EU candidate countries and other countries are subject to the principle of reciprocity.

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<sup>24</sup> Slovenian Constitution, Article 68, (Property Rights of Foreigners)

#### **IV. Conclusions**

Land is seen as immense value of a country thus disparate range of practices is pursued with regards to the foreign land ownership. Efficient land transactions play an important role towards the economic development and growth. Usually, legal restrictions applied from some countries are compatible to the circumstances of each state and in most scenarios contain also unrevealed motives.

The Kosovan legal framework guarantees the protection of fundamental and human rights in accordance with European standards found in the Convention for the protection of various human rights in Article 22 of the Constitution of Kosovo. Stepping up efforts in relation to the protection of fundamental rights the right to property should also be ensured. Hence, is necessary to eliminate inconsistencies and to provide suggestions for a uniform use and application of the developed definitions in the Law on Property Rights and other real Rights.

Land policy should aim for elimination of restrictions on land transactions including foreign land ownership, which persists in some CEE countries and lowering of fiscal and administrative barriers (taxes, fees, bureaucratic requirements) when it comes to such transactions.

Having reviewed the legislative reform with regards to property rights in Republic of Kosovo, it can be concluded that Kosovo as a state aspiring for EU membership needs to serve a more concrete language and introduce the acquisition of the immovable property in line with the EU acquis.



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Constitution of the Republic of Kosovo

Law No. 03/L-154 on Property and other Real Rights

Law 04/L-220 on Foreign Investment

Law No.04/L-061 on sale of apartments

Law No.2004/26 law on inheritance in Kosovo

Constitution of the Republic of Serbia

Constitution of the Republic of Slovenia

Constitution of the Republic of Bulgaria