

Federal Supreme Court stops property sale between foreigners

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[Introduction](#)

[Legal framework](#)

[Past practice and cantonal court decision](#)

[Supreme Court decision](#)

[Comment](#)

Introduction

Foreign investments in Swiss real estate are governed by a federal law known as the '*Lex Koller*' and a related ordinance,⁽¹⁾ as well as additional cantonal rules. The law restricts the acquisition of residential real property by non-Swiss residents.⁽²⁾⁽³⁾

In a recent decision,⁽⁴⁾ the Federal Supreme Court decided for the first time that the sale of a vacation home between two non-Swiss residents is allowed only in designated communities. The decision stops a long-standing practice of the cantonal authorities.

Legal framework

Subject to limited exceptions, non-Swiss residents require a permit in order to acquire residential real property. The federal law provides for a number of general reasons to grant such permits.

Moreover, within a specific framework the federal law allows the cantons to provide for certain additional reasons to grant permits. In particular, cantonal law may allow non-Swiss residents to acquire vacation homes or residential units in aparthotels within the cantonal quota (ie, the quota limitation). The cantons must determine the communities that need the acquisition of vacation homes and residential units in aparthotels by non-Swiss residents to promote tourism (ie, the geographical permit requirement).

If the former acquisition by a seller has already been authorised under the *Lex Koller*, then the sale of the concerned property to another non-Swiss resident does not require a cantonal quota.

The cantonal law relevant in this case⁽⁵⁾ allows non-Swiss residents to acquire vacation homes and residential units in aparthotels. In addition, it provides that the state council by regulation determines the communities that need to promote tourism by such acquisitions.

The cantonal regulation⁽⁶⁾ does not list the community of Zermatt, where the vacation home concerned was located.

Past practice and cantonal court decision

Pursuant to the long-standing practice of the Valais cantonal *Lex Koller* authority, permits for the sale of vacation homes between two non-Swiss residents were granted in the entire canton and not only in the communities that need to promote tourism, provided that the former acquisition by the seller had been authorised under the *Lex Koller*.

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The main argument of the cantonal authority was that such transactions do not increase the share of Swiss residential real estate owned by non-Swiss residents. Also, it held that its practice does not undermine the quota limitation as an instrument to control foreign acquisitions.

The Valais Cantonal Court protected the position of the *Lex Koller* authority. It held that the relevant sale did not promote tourism and that the limitation to communities that need to promote tourism did not therefore apply.

Supreme Court decision

The Federal Office of Justice appealed the cantonal court decision.

It argued that permits for the acquisition of vacation homes and residential units in aparthotels by non-Swiss residents may be granted only in communities that require the promotion of tourism and that separating the quota limitation from the geographical permit requirement (ie, disregarding the limitation of permits to communities that need to promote tourism) violates the law.

Referring to the wording and structure of the law, as well as its history and legislative materials, the Federal Supreme Court approved the appeal and set aside the cantonal court decision.

The Supreme Court held that exempting certain acquisitions from the quota limitation (ie, if the former acquisition by a seller had already been authorised under the *Lex Koller*) does not allow disregarding the geographical permit requirement. Rather, a real property is connected with its location. Granting a *Lex Koller* permit for a vacation home requires the concerned property to be located in a community that, pursuant to cantonal law, needs to promote tourism.

There is no legal basis to allow the sale of a vacation home between two non-Swiss residents outside communities that need to promote tourism. Such a sale would require another permit reason or a specific exemption from the permit requirement, neither of which was given in this case. Accordingly, the Supreme Court explicitly declared the contrary cantonal practice to be unlawful.

Comment

Pursuant to the cantonal *Lex Koller* authority, there have been previous occasions where the known and long-standing cantonal practice could have been challenged – which, before this case, never happened. Nonetheless, the Supreme Court ruled that obtaining a *Lex Koller* permit for acquiring a vacation home does not give the right to sell the property to another non-Swiss resident at a later stage. Accordingly, it may happen that a later sale is subject to stricter limitations than the original acquisition.

The decision relates to a property in the community of Zermatt, but affects all destinations that are not considered to require the promotion of tourism. In these communities, the sale of vacation homes between non-Swiss residents is no longer allowed.

The cantonal lists of communities that need to promote tourism are updated from time to time. A non-Swiss owner of a vacation home or a residential unit in an aparthotel may not expect that his or her community will still be on the list once the property is put up for sale, which may affect the achieved selling price.

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Endnotes

(1) The Federal Law on the Acquisition of Real Property by Non-Swiss Residents, SR 211.412.41; and the Federal Ordinance on the Acquisition of Real Property by Non-Swiss Residents, SR 211.412.411.

(2) For further details please see:

- "Stricter rules for foreign investments in Swiss real property?"
- "Latest developments in foreign real property investments"
- "Non-Swiss residents can own several holiday homes in exceptional cases" and
- "Brexit vote: time to buy Swiss real estate?"

(3) 'Non-Swiss residents' as defined in Article 5 of the federal law and Article 2 of the federal ordinance.

(4) Federal Supreme Court, 2C_1082/2016, June 2 2017.

(5) The Law of the Canton of Valais on the Application of the Federal Act on the Acquisition of Real Property by Non-Swiss Residents, SGS/VS 211.41.

(6) The Regulation of the Canton of Valais on the Acquisition of Real Property by Non-Swiss Residents, SGS/VS 211.410.

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