

PURCHASE OF PROPERTY IN SWITZERLAND BY FOREIGNERS

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1 Preliminary remark

According to a new leading case of the Federal Supreme Court, the purchase of property by Swiss nationals may require authorization if it is substantially financed by foreigners. However, before giving an overview on this case, we will introduce the Swiss legislation regarding the purchase of property in general.

2 Overview on Swiss legislation regarding the purchase of property

2.1 General remark

The legislation regarding the purchase of property by persons abroad includes a number of restrictions of the purchase of property and similar rights to properties by persons abroad, i.e. by persons who do not have the right to settle in Switzerland, or by nationals of the European Community and European Free Trade Association who do not have their legal and actual place of residence in Switzerland.

2.2 General rule regarding permit requirement

As a **general rule**, the **purchase of properties in Switzerland by persons abroad** is subject to a **permit requirement**.

However, **no permit** is required for the purchase of a property if:

- the property serves as permanent business premises of a trading, manufacturing or another commercially managed business, of a handicraft business or of a free profession;
- the property serves the purchaser, as a natural entity, as principal domicile at the location of his/her legal and actual place of residence; or
- there is another exception.

2.3 Relevant types of properties and other rights

Purchase of a property refers to:

- the purchase of the property, of a building lease, of a right of residence or of the right of use of a property;
- the stake in a company capable of owning property without a legal character, whose actual purpose is the purchase of properties;
- the purchase of the property or of the right of use of a part of a real estate fund, whose share certificates are not regularly traded in the market, or of a similar asset;
- the purchase of the property or of the right of use of a share of a real estate SICAV, whose shares are not regularly traded in the market, or of a similar asset;
- the purchase of the property or of the right of use of a share of a legal entity, whose actual purpose is the purchase of properties, if the shares of this legal entity are not listed in a stock exchange in Switzerland;
- the justification and exercise of a right to purchase, pre-emptive right or right of repurchase of a property or a share;
- the purchase of other rights, which put the purchaser in a similar position as the owner of a property.



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Moreover, purchase of properties includes:

- the involvement in the establishment and, if the purchaser strengthens his/her position with this, in the capital increase of legal entities, whose actual purpose is the purchase of properties, which cannot be purchased without a permit;
- the acquisition of a property, which cannot be purchased without a permit, together with an asset or transaction or through merger, division, conversion or asset transfer, if this increases the rights of the purchaser to this property;
- the purchase of shares of a company, which owns an apartment, which serves to the purchaser of the shares as principal domicile, second home or holiday home.

Other rights, which put the purchaser in a similar position as that of the owner of a property, particularly include:

- the long-term lease or rental of a property, if the agreements go beyond the scope of the usual or commercial course of business and put the lessor or landlord into a special dependency on the lessee or tenant;
- the financing of the purchase or the building project of a property, if the agreements, the amount of the loans or the financial circumstances of the debtor put the buyer or builder into a special dependency on the creditor;
- the justification of construction bans and similar ownership restrictions with a tangible or obligatory effect, which concern an adjacent property.

2.4 Persons concerned

If “persons abroad” want to purchase real estate in Switzerland, a permit is required. Persons abroad within the meaning of the Swiss Authorisation Act include:

- Nationals of member countries of the European Community or the European Free Trade Association, whose legal and actual place of residence is not in Switzerland;
- nationals of other foreign countries, who do not have the right to settle in Switzerland;
- legal entities or companies capable of owning property without a legal character, which have their statutory or actual registered offices abroad;
- legal entities or companies capable of owning property without a legal character, which have their statutory and actual registered offices in Switzerland and in which persons abroad hold a commanding position;
- natural and legal entities as well as companies capable of owning property without a legal character, who/which are not persons abroad (...), if they purchase property on behalf of persons abroad.

No permit requirement is thus applicable for the purchase of property in Switzerland by:

- Swiss nationals and double citizens with a place of residence in Switzerland or abroad;
- nationals of European Community and European Free Trade Association member countries, who have their legal and also actual place of residence in Switzerland and have a valid residence permit, as well as;
- nationals of other foreign countries, who have a valid permanent residence permit C and also

actually have their place of residence in Switzerland.

3 Judgement of the Federal Supreme Court as of November 4th, 2016, 2C_1093/2015

3.1 Facts

A.a. A.X., of Swiss nationality, is currently domiciled in Dubai (United Arab Emirates). She was married in May of 2012 to B.X., an English citizen also domiciled in Dubai.

The concerned party wishes to acquire, as exclusive owner, the properties numbered *** and *** of the land register of the commune of C. (FR), which include an individual dwelling, a garage, a garden, a pavilion and a meadow. The selling price of the properties was first fixed at CHF 1'750'000. The purchase should have been financed in the following manner:

- CHF 1'155'000 by means of a loan from the bank D., granted to both spouses and based exclusively on the income of the husband;
- CHF 100'000 by means of funds from the wife;
- CHF 495'000 by means of funds from the husband.

Thereafter, the selling price was reduced to CHF 1'660'000. The amount of the loan granted by the bank remained the same (CHF 1'155'000), such that this fall in price led to a reduction in the respective investments of the wife and husband.

According to the draft contract of sale of 24 February 2015, the buyer committed to take over the secured debt by the mortgage notes encumbering the properties, the balance of the selling price being paid by bank transfer. It was specified in the contract that the investment of B.X. was in an ordinary matrimonial context and that no real or other right conferring on him a position analogous to that of the owner was granted to him.

A.b. Before proceeding to sign the contract of sale, A.X. wanted to ensure that the said sale presented no difficulty under the Federal Law of 16 December 1983 on the acquisition of real estate by persons abroad (...). By writing on 6 January 2015, completed on 24 February 2015, the concerned party sent to the Fribourg Commission for the acquisition of real estate by persons abroad (hereinafter: the Commission) an application to establish that the sale in question was not subject to the LFAIE.

B. In a decision of 11 May 2015, the Commission found that the acquisition, by A.X., of the properties numbered *** and *** of the land register of the commune of C. was not subject to the LFAIE.

Contrary to this decision, the Federal Office of Justice (hereinafter: the Federal Office) lodged an

appeal with the Cantonal Court of the Canton of Fribourg (hereinafter: the Cantonal Court). By judgement of 27 October 2015, the latter dismissed the appeal. The cantonal judges held, in essence, that A.X. was of Swiss nationality and wanted to acquire the properties in her own name, as exclusive owner, so that the purchase in question was not subject to the LFAIE. The financing of a part of the transaction by the husband of the concerned party was not sufficient to make this acquisition subject to the LFAIE, in the absence of the granting of any right of a real nature (usufruct, right of habitation, right of lean on the property, right of pre-emption, property easement) or contractual (loan of the properties, long-term lease) to B.X., intended to confer on the latter a position similar to that of an owner.

C. Acting on the right of appeal in terms of public law, the Federal Office requests that the Federal Court, on costs, set aside the decision of the Cantonal Court of 27 October 2015 and the Commission's decision of 11 May 2015.

The Cantonal Court contends that the request should be dismissed. The Commission refers to its decision of 11 May 2015 and to the decision of the Cantonal Court of 27 October 2015. A.X. did not make any comments.

The Second Public Law Court deliberated on this appeal in open session on 4 November 2016.



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3.2 Considering in law

(...) 3. The issue is whether the acquisition of the properties in C. by the concerned party is subject to the authorization regime of the LFAIE. According to the appellant, the financial participation of the interested party's (foreign) husband in the real estate transaction in question would be such as to confer on the latter a position similar to that of an owner with regard to the properties at issue, so that the purchase of them would be subject to authorization.

3.1. Art. 2 para. 1 LFAIE lays down the principle that the acquisition of real estate by persons abroad is subject to authorization by the competent cantonal authority. It is rightly not disputed that the simple purchase of real estate in Switzerland by a person abroad, domiciled abroad, but of Swiss nationality, is not in principle subject to the LFAIE (Article 5 LFAIE a contrario (...)).

3.2. According to Art. 4 para. 1 let. g LFAIE, the acquisition of real estate must be regarded as causing an acquisition of rights which confers on the holder a position similar to that of the owner of real estate. According to Art. 1 para. 2 let. (b) of the Ordinance of 1 October 1984 on the acquisition of real estate by persons abroad (...), these rights include in particular the financing of the purchase of a property or its construction, if with the agreements reached, the amount of the loans granted or the financial situation of the debtor put the purchaser or the developer in a relationship of particular dependence with regard to the lender.

3.3. According to jurisprudence, the financing of the acquisition of an interest in land by means of a foreign loan, guaranteed by real estate pledge, does not in principle fall within the scope of Art. 4 para. 1 let. g LFAIE, provided that the said loan remains within the usual limit of two-thirds of the market value of the property (...). When the burden clearly exceeds the measure of what is customary in trade and the property owner has not henceforth obtained a corresponding credit from an uninterested third party, the lender may be granted a position similar to that of the owner, particularly if the owner and debtor is economically weak or economically dependent on the lender (...). This is considered to be the case when foreign financing is 80% or more (...).

These principles were laid down in cases where the loan was secured by a real estate pledge, although the latter does not give the lender a position similar to that of an owner on the encumbered property, since they cannot take the property upon non-payment (...). Jurisprudence has held that this practice must apply, particularly where the foreign lender does not benefit from a right of lien on the property, because in this case he does not acquire any real right in the property and it is for him even more difficult to exercise decisive influence and acquire a position similar to that of an owner (...).

Finally, contrary to that which could be implied from the contested decision, the subjunctive aspect is not relevant in the assessment of the conditions of Art. 4 para. 1 let. g LFAIE cum Art. 1 para. 2 let. b OAIE. It is not necessary for the parties to intend to evade the rules of the LFAIE. The determining factor is, objectively, the economic result that the established legal relations between the parties achieve (...).

3.4. In this case, the Respondent wishes to buy two properties located in C. (FR), for a total price of CHF 1,660,000. It is clear from the contested decision that this acquisition would be financed in the amount of CHF 1,155,000 by means of a loan from bank D. The remainder should be borne by the spouses. The decision under appeal is not clear on the exact amount of investments that should be provided by the spouses, in so far as it merely indicates that the Respondent initially planned to invest CHF 100,000 and her husband CHF 495,000 and that thereafter the reduction in the selling price (from CHF 1,750,000 to CHF 1,660,000) had an effect on the contributions of the spouses (decision under appeal, page 2), the amount of the loan granted by the bank D. having remained the same (decision under appeal, page 5).

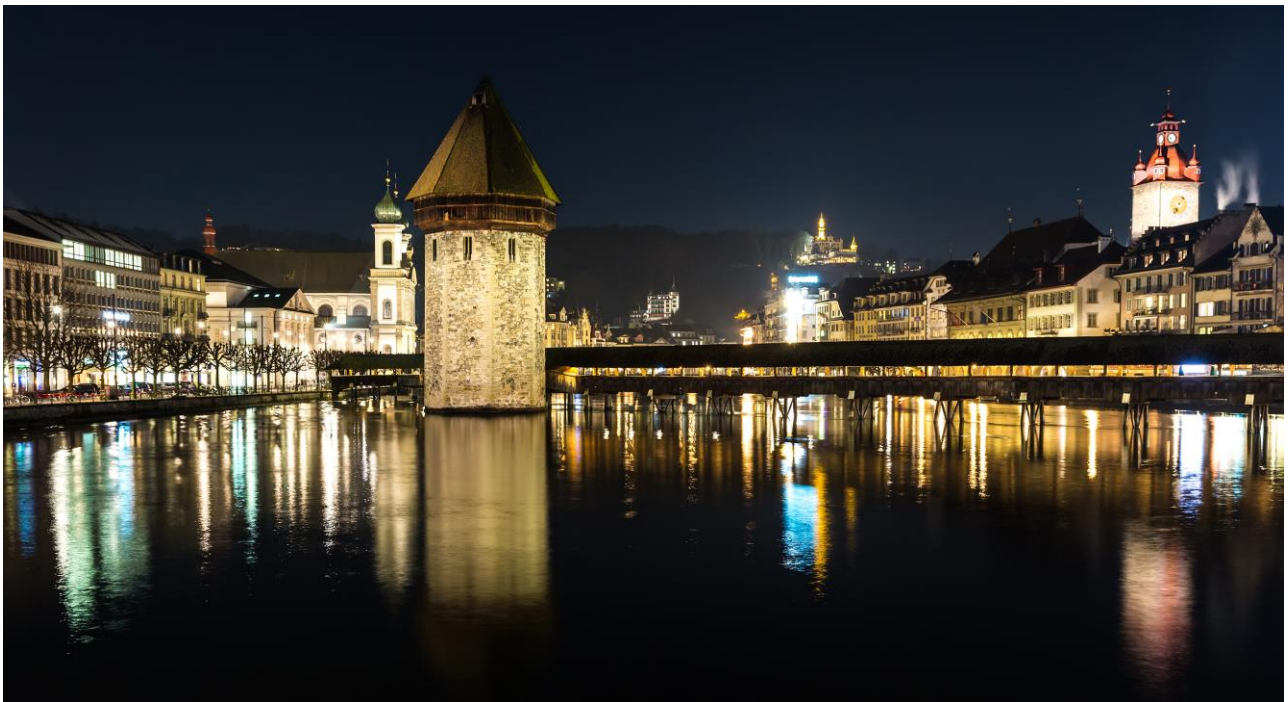


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In any event, that factor is not decisive in the present case, since the circumstances surrounding the purchase at issue are such as to make the purchase subject to the authorization scheme of the LFAIE. Indeed, even in the most favourable case to the Respondent, namely that the reduction of CHF 90'000 would result in reducing only the investment of the husband, the acquisition of the properties in C. at the price of CHF 1'660'000 would be financed as follows:

- CHF 100'000 by means of funds from the wife;
- CHF 405'000 by means of funds from the husband;
- CHF 1'155'000 by means of a loan from the bank D.

According to this hypothesis, the husband would participate in the purchase in the amount of CHF 405,000 (approximately 24% of the selling price). This factor, on its own, is not sufficient to establish a case of application of Art. 4 para. 1 let. g LFAIE cum Art. 1 para. 2 let. b OAIE, the

amount given by the husband not exceeding the usual limit of two-thirds, or even 80%, of the market value of the property (cf. supra consid. 3.3). However, it is clear from the decision under appeal that the loan of CHF 1,155,000 granted by the bank D. was based exclusively on the income of the husband. Consequently, the Respondent could not have obtained this credit alone without the participation of her husband. In other words, it is only on the basis of the latter's economic situation that the bank agreed to grant the couple the loan necessary for the acquisition at issue. Without the aid of the husband, both from the point of view of the money invested directly by him and from the point of view of his decisive participation in the contractual relationship with the bank D. that led to the allocation of the credit by the bank, the Respondent would not have had the possibility to acquire the properties in dispute. In such a situation it is justified to take into account the amount of the loan granted by the bank in calculating the proportion between the funds invested by the concerned party and the funds available to her through the participation of her husband in the real estate transaction. Consequently, even under the financing hypothesis - favourable to the concerned party - as set out above, the total funds invested by the husband (CHF 405,000 or about 24% of the selling price) plus those granted to the couple on the basis of the latter's income (CHF 1,155,000, or about 70% of the sale price), would represent 94% of the value of the properties of C., a proportion well beyond the limit of two thirds, or even 80%, held by the jurisprudence (see supra note 3.3).

In these circumstances, it must be concluded that the financing by the Respondent's (foreign) husband, relating to the acquisition of the C. properties, coupled with the fact that the mortgage loan which was granted to the couple was exclusively based on the income of the husband, is such as to confer on the latter a position analogous to that of an owner within the meaning of Art. 4 para. 1 let. g LFAIE cum Art. 1 para. 2 let. b OAIE.

3.5. It is clear from the foregoing that, in view of the fact that the acquisition of the properties by the Respondent was not subject to the LFAIE licensing scheme, the Cantonal Court violated Federal law.

3.6. The foregoing recitals lead to the acceptance of the appeal to the extent it is actionable. The decision under appeal will be cancelled and it will be recorded that the acquisition by the concerned party of the properties numbered *** and *** of the land register of the commune of C. is subject to the authorization regime.

4 Summary

As a general rule, the purchase of properties in Switzerland by persons abroad is subject to a permit requirement.

No permit is required for the purchase of a property if the property serves as permanent business premises of a trading, manufacturing or another commercially managed business, of a handicraft business or of a free profession, or the property serves the purchaser, as a natural entity, as principal domicile at the location of his/her legal and actual place of residence.

The purchase of real estate in Switzerland by a person abroad domiciled abroad, but of Swiss nationality, is not in principle subject to authorization regime.

Purchase of a property also refers to the purchase of other rights, which put the purchaser in a similar position to that of the owner of a property. According to Swiss Law, these other rights include in particular the financing of the purchase of a property or its construction, if with the agreements reached, the amount of the loans granted or the financial situation of the debtor put the purchaser or the developer in a relationship of particular dependence with regard to the lender.

According to jurisprudence, the financing of the acquisition of an interest in land by means of a foreign loan, guaranteed by real estate pledge, does not in principle require an authorization provided that the said loan remains within the usual limit of two-thirds of the market value of the property. When the burden clearly exceeds the measure of what is customary in trade and the property owner has not henceforth obtained a corresponding credit from an uninterested third party, the lender may be granted a position similar to that of the owner, particularly if the owner and debtor is economically weak or economically dependent on the lender. This is considered to be the case when foreign financing is 80% or more.

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