National program for the Republic of Serbia IPA 2013
Financed by the European Union

Promotion and Protection of Property Rights of IDPs, Refugees and Returnees upon Readmission Agreements

Contract no. 48-00-133/2014-28

Thematic Report
"Implications of Pristina's regulations to property issues of IDPs"

Nemanja Ilić, Expert

This project is funded by the European Union

This project is inplemented by the European Consulting Group in cooperation with *Human Dynamics, IBC, and PDC Serbia.*

Contents

1. INTRODUCTION 3

1.1 PROCESS OF ADOPTION OF THE PROPOSED REGULATION 3

1.2 SUBJECT MATTER OF THE PROPOSED REGULATION 4

1.3 CURRENT SITUATION 4

2. NORMATIVE ANALYSIS OF THE PROPOSED REGULATION 5

2.1 RELATIONSHIP BETWEEN THE PROPOSED REGULATION AND TECHNICAL AGREEMENT ON CADASTRE 5

3. BASIC PRINCIPLES OF THE PROPOSED REGULATION 7

3.1 (DIS)PROPORTIONATE PARTICIPATION OF NON-ALBANIAN REPRESENTATIVE 7

3.2 COMPARISON AND DETERMINATION 9

3.3 SECOND INSTANCE PROCESS WITH FINAL AND ENFORCEMENT EFFECTS 10

3.4 ADMINISTRATIVE ENFORCEMENT 13

3.5 ENTRY/VERIFICATION 14

4. BASIC PROCEDURAL RULES OF THE PROPOSED REGULATION 15

4.1 “REASONABLE/POSSIBLE EFFORTS” 15

4.2 INFORMING ON THE INTENTION TO PARTICIPATE 17

5. THE BASIC CHALLENGES IN IMPLEMENTATION OF THE PROPOSED REGULATION 18

5.1 SPECIAL ASPECTS OF THE PROPOSED REGULATION 19

6. LEGAL AID AND PROPOSED REGULATION – CONCLUSION AND RECOMMENDATIONS 19

1. INTRODUCTION

1.1 PROCESS OF ADOPTION OF THE PROPOSED REGULATION

The Proposed Regulation was adopted by the Assembly of the Provisional Institutions of self-government in Priština (hereinafter referred to as: "PISG") on 9th of June 2016 and the same was proclaimed by the adoption of the Decree of the President of PISG on 28th of October 2016.[1]

Immediately upon adoption, the Proposed Regulation was the subject of the procedure before the Constitutional Court of PISG which was launched at the request of Serbian representatives in PISG parliament. On 25th of October 2016[2] the Constitutional Court rendered the Resolution on inadmissibility. It is important to point out that the Refferal for constitutional review of the Proposed Regulation has been submitted primarily for procedural reasons, more precisely, for the reason that PISG Constitution failed to comply with the legislative procedure for adoption of laws of vital interest for non-Albanian communities.

In July 2017 PISG Government adopted five bylaws necessary for the full implementation of the Proposed Regulation[3], namely:

- Regulation (GRK) no. 08/2017 on duties, responsibilities and procedures of Commissions of the Kosovo Property Comparison and Verification Agency – KPCVA;
- Regulation (GRK) no. 09/2017 on the work of the Supervisory Board of KPCVA;
- Regulation (GRK) no. 10/2017 on duties, responsibilities and organisation of the Executive Secretariat of KPCVA.

After that were also adopted two administrative instructions for the implementation of the Proposed Regulation and bylaws[4]:

- Administrative instruction no. 06/2017 on exemption of property/user right holder from public utilities arrears for occupied properties and properties under the administration of KPCVA;
- Administrative instruction no. 07/2017 on procedures, conditions and criteria for the end of administration of properties under administration and those included in the rental scheme of KPCVA.

[1] http://www.kuvendikosoves.org/?cid=3,191,1181
[2] http://www.gjk-ks.org/repository/docs/KO94-16_SRB.pdf
[3] http://kryeministri-ks.net/?page=3,148
[4] http://www.kryeministri-ks.net/?page=3,32

Hereinafter, the subject of the analysis will be the Proposed Regulation with bylaws and administrative instructions, while the Decision of the Constitutional Court of PISG will be addressed marginally to the extent in which certain positions taken *obiter dictum* in the Decision have significance for this analysis.

1.2 SUBJECT MATTER OF THE PROPOSED REGULATION

Proposed Regulation governs the work of the Kosovo Property Comparison and Verification Agency (hereinafter referred to as: "KPCVA"), its organisation, tasks and responsibilities and within them the process of resolving private property claims in the territory of the Autonomous Province of Kosovo and Metohija (hereinafter referred to as: AP Kosovo and Metohija). As the cadastral documentation was taken away by the republic and provincial authorities and cadastral registers relocated from the territory of AP Kosovo and Metohija, after the end of NATO aggression in 1999, and as PISG in the meantime has developed its own system of cadastral registry, KPCVA has a task to perform comparison of these two cadastral documentations.

In other words, KPCVA is the last in the series of PISG bodies to solve the problem of legal dualism in the territory of AP Kosovo and Metohija, such as Property Agency of PISG. Bearing in mind the current work practice of these bodies, it is justified to ask how KPCVA will respond to the basic challenge in its work – which is, to solve the problem of legal dualism in proprietary rights in the territory of AP Kosovo and Metohija in a fair manner in accordance with international standards.

1.3 CURRENT SITUATION

Publicly available data on the work of KPCVA are very limited at the moment and mostly reduced to poor press releases on the web site of Property Agency of PISG,[5] which legal successor is KPCVA, as well as occasional headlines in provincial press. Based on such limited information, it can be concluded that KPCVA started operating but is not currently functioning at full capacity.

This conclusion can be reached by insight in the KPCVA business plan for 2017 which is publicly available.[6]

For example, in KPCVA business plan for 2017 it is stated that it is necessary to employ at least 16 more experts in charge of monitoring of cadastre while at the same time is it pointed out that there are not enough funds available for this purpose.

[5] http://www.kpaonline.org/
[6] http://www.kpaonline.org/PDFs/KPCVA%20-%20Action%20Plan%202017.pdf

Also, the business plan itself points out that the great difficulty is the lack of financial resources for the most basic purposes, and it will be a great challenge for KPCVA to engage and retain the numerous experts in the field of geodesy who should be engaged in the identification and verification procedures. In this sense, KPCVA itself expects as much assistance as possible in the form of donations for its work; otherwise there would be a great suspicion regarding the possibility that the Agency will respond to the tasks it has undertaken.

Furthermore, in KPCVA business plan for 2017 is stated that the procedure for obtaining cadastral data from the Republic of Serbia has not yet started, but that prior to that KPCVA will take all other actions for technical and organisational preparations for its effective work especially having in mind significant number of cases that are expected to be taken into the procedure.

2. NORMATIVE ANALYSIS OF THE PROPOSED REGULATION

2.1 RELATIONSHIP BETWEEN THE PROPOSED REGULATION AND TECHNICAL AGREEMENT ON CADASTRE

Technical Agreement on Cadastre (hereinafter referred to as: TAC)[7] signed in September 2011 between the representatives of the Republic of Serbia (hereinafter referred to as: RS) and PISG is the basis for the adoption of the Proposed Regulation. TAC in one in a series of technical agreements signed at the very beginning of the process of so-called normalisation of the relations between the RS and PISG which culminated in the first agreement on principles governing the normalisation of relations between Belgrade and Priština.

The TAC predicts that, in order to protect the rights of the persons with "legitimate property claims" the signatories will jointly make every effort to establish a reliable cadastre in the territory of AP Kosovo and Metohija. To that end, it was agreed to establish expert agency whose work will be monitored by tripartite implementation group consisting of cadastral experts from both sides and chaired by EU (hereinafter referred to as: Tripartite group) whose role will be to determine gaps in the original cadastral records from the period before 1999.

As a first step in the process of determining these gaps, it was planned to submit scanned copies of the entire original cadastral records "taken away" from the territory of AP Kosovo and Metohija to the EU Special Representative for AP Kosovo and Metohija (hereinafter referred to as: EU Special Representative) from the period before 1999.

After that, the expert agency should compare all copies of the original cadastral records of private property from the period prior to 1999 (which according to TAC include "private

[7] http://www.kim.gov.rs/p07.php

property, private commercial property and private church property") with "reconstructed" PISG cadastre. The Tripartite group will then transfer to the dispute settlement mechanism those cases where, based on the comparison, it is determined that the records are not identical. This mechanism will make the final decision which cadastral record is correct.

In this regard, TAC predicts that the first instance mechanism will be the Commission composed of international experts as well as cadastre and property experts from the territory of AP Kosovo and Metohija. Most of the experts will be appointed by the EU Special representative taking into account the interest of "all interested communities".

Finally, the Supreme Court of PISG will act as the second instance, appellate body of this mechanism. The decisions of the Supreme Court of PISG will be adopted by the judicial panel in which international judges will have majority and that decisions will be final, executive and cannot be contested.
After resolving possible disputes, "all interested factors" will be informed on the decision of the aforementioned mechanism. PISG Cadastral agency will implement final decisions of the dispute resolving mechanism by introducing the necessary changes into the cadastre.

For its part, the RS, for the reasons of the adoption of the Proposed Regulation has currently suspended implementation of the TAC. According to the latest RS Progress Report on the Dialogue between Belgrade and Priština for the period October 2016 – April 2017[8] there was no progress in the implementation of the TAC.

According to the Report, PISG and EU are still of the opinion that all bodies foreseen in the TAC, except Tripartite group, must be functional within the legal system of PISG and that the TAC must be implemented through Proposed Regulation. Belgrade has repeatedly presented to EU representatives the reasons why the Proposed Regulation is in conflict with the TAC and in that sense represents unacceptable solution for its implementation. Several times has been stressed out that deciding on the property rights of citizens of the Republic of Serbia and the Serbian Orthodox Church cannot be entrusted to the bodies established by the Proposed Regulation, in which there will be no representatives of the Serbs, since this would enable the legalisation of property that was taken away from Serbs in the territory of the AP Kosovo and Metohija[9], which is completely in contradiction with the conditions of the TAC.

Eventually, the Report states that at the beginning of 2017 KPSVA announced the beginning of its work on its website, although the Serbian side is determined that the implementation of the Agreement should be carried out solely in the manner previously agreed upon.

[8] http://www.kim.gov.rs/doc/pregovaracki-proces/Izvestaj%20oktobar%20april%202017%20pdf.pdf

[9] The last meeting on the implementation of the Agreement on Cadastre was held on 26th of May 2016 in Brussels. At that meeting, Belgrade outlined detailed proposals regarding the methodology and the method of work, establishment and functioning, structures and headquarters of all the bodies envisaged in the Agreement. Although it has been agreed to continue the dialogue in this regard, the same have not occurred up to the present.

Therefore, the RS argues that while all three parties fail to reach agreement, they will not hand over scanned cadastral documents to the EU Special Representative in Priština, as foreseen by the TAC, and insists before EU on continuation of dialogue on the consistent implementation of the Agreement.

Given the political situation, where each of the parties, the RS and PISG interpret the TAC differently, more precisely, where the measure for implementation of the Agreement or Proposed Regulation by PISG are interpreted diametrically opposite, it can be concluded that there is a actual risk of unilateral implementation of the Proposed Regulation by PISG in this regard, this Report aims to examine this additional challenge of applying the proposed PISG regulation but it will not as a primary issue, analyse the differences between the TAC and Proposed Regulation, since the implementation of the Proposed Regulation has unilaterally and formally started as well as the fact that each difference can be overcome only by amendments of the proposed regulation to which apparently PISG is not ready to agree. Contrariwise, this Report will, as primary issue, consider the possibility of such implementation of the Proposed Regulation which primary purpose is to mitigate the consequences of its unilateral adoption by PISG, which can also include appropriate changes, irrespective of its incompatibility with the TAC. The question of political justification of this attitude is not the subject of this Report.

In addition, the aforementioned risk is particularly expressed given that the implementation of the TAC is not specifically mentioned in the common position for negotiation chapter 35[10], and in that sense it cannot reasonably be expected that the implementation of the Agreement or acceptance of the Proposed Regulation by the RS will be in any way monitored by EU.

3. BASIC PRINCIPLES OF THE PROPOSED REGULATION

3.1 (DIS) PROPORTIONATE PARTICIPATION OF NON-ALBANIAN REPRESENTATIVE

Starting from the TAC, the Proposed Regulation foresees that the so-called non-majority (non-Albanian) communities will be involved in the work of KPCVA in the manner that is common in PISG legal system or through prescribed mandatory participation in the work of certain bodies or authorities.

10 http://mei.gov.rs/upload/documents/pristupni_pregovori/pregovaracke_pozicije/ch35_common_position_eu.pdf

In particular, according to the Proposed Regulation the first instance body (or the second instance, depending on how it is viewed – see below) or Property Verification and Adjudication Commission (hereinafter referred to as: PVAC) consists of five (5) members. Two (2) members of PVAC are appointed by PISG Assembly upon of nomination of the President of the PISG Supreme Court, while three (3) out of five (5) members of PVAC including one (1) representative of the so-called non-majority communities are appointed by EU Special Representative.

In addition, Regulation no. 09/2017 on the work of the Supervisory Board of KPCVA envisages that the Supervisory Board consists of five (5) members. Two (2) members of PVAC are appointed by PISG Parliament based on the proposal of the Prime Minister while three (3) members of PVAC are appointed by EU Special Representative including one (1) representative of the so-called non-majority communities.

At first glance, this solution represents progress in relation to, for example, work of the PISG Privatisation Agency in which case legally defined obligation of participation of non-Albanian representative only exists at the level of Agency`s management bodies not at the level of the bodies resolving cases. With KPCVA this obligations exists both at the management level or supervision and at the level of first instance body, although only those latter have been defined by the law. However, despite the above stated, it should be noted that, as explained below in the text, KPCVA Secretariat makes a decision when there is no difference between the cadastral records, so there is one level of work at which this obligations have not been determined.

One of the main objections regarding the procedure of election of PVAC Supervisory Board and KPCVA concerns the election mechanism for three members appointed by EU Special Representative so that the envisaged mechanisms are not fully elaborated and specified leaving the room for arbitrariness. In this respect, the question is, in particular, what are the criteria for the election of the members that are representatives of the non-major communities?

Also, starting from the expected number of cases that will be discussed before KPCVA and in which cases representatives of non-Albanian communities will have active or passive legal capacity, it is also justified to question whether this number of representatives is sufficient. In other words, it is very important whether the representatives of non-Albanian communities should participate at the level of KPCVA Secretariat (including Director or the Deputy Director of the Secretariat) as well as whether such a question can be fully defined at the general level rather than by bylaws that can easily be subjectively changed.

De lege ferenda, the recommendation would be to advocate changes of the Proposed Regulation to define the stated obligations at all three levels. This is particularly true for the KPCVA Secretariat for which there is currently no explicit obligation for the participation of non-Albanian representatives and where it should be insisted that the Director or the Deputy

Director be a representative of non-Albanian communities. Also in order to establish fair mechanism it is necessary to establish the obligation of proportional participation of the representatives of a particular community according to the percentage of cases that affects that community in comparison with the total number of cases.

3.2 COMPARISON AND DETERMINATION

Comparison, as the basic mechanism envisaged by the TAC, has been elaborated in detail by the Proposed Regulation. Comparison can be defined as the process in which the situation of the two existing cadastral records is compared in order to overcome the problem of legal dualism; determination is the process where based on the conducted comparison is determined the only valid situation in PISG legal system from any of the records. If, on the basis of the conducted comparison, it is determined that the situation in both records is identical the same will be considered as the only valid in PISG legal system.

As a first step, the Proposed Regulation foresees that KPCVA will have free and full access to the cadastral data kept in PISG cadastral records; after the receipt of the relevant cadastral data, KPCVA Secretariat will compare the same with cadastral data from the period before 1999 in order to identify the gaps in cadastral data, either in the name of the owner, the size and shape of the property or any other discrepancy in documentation which could affect the ownership issue as well as registration of the property.

In case when there are no differences or discrepancies between the two groups of cadastral data, KPCVA Secretariat will enter these findings into the case file and submit them to PISG Cadastral agency together with the decision of the Secretariat. Therefore, although it was not the intention, the Proposed Regulation enables a large number of cases to be resolved at the level of KPCVA Secretariat and based on its decision (for example, no discrepancies in cadastral data) to register data into the appropriate registers with imposed assumption of the accuracy of thus “determined data”.

On the other hand, in cases when the difference of discrepancy has been determined between the two groups of cadastral data, the Secretariat will compare the documents with all available public archives and in addition will make “all possible effort” including public notification in order to contact the person stated in the documents, his/her heirs or members of the family. Also, it was proclaimed the obligation of the Secretariat to contact each institution in AP Kosovo and Metohija (but not outside of AP Kosovo and Metohija or in the Serbia proper) which may have available information on the stated property, in order to obtain evidence and determine how “discrepancies” occurred. As already stated, the Secretariat is not obliged to contact or to obtain necessary data from the territory of Serbia proper, where the largest number of the internally displaced persons are located (hereinafter referred to as: IDPs) which as a rule will be interested in properly conducted procedure of

determination and verification. After analysing and verification documents with differences or discrepancies will be handed over by the Secretariat to the PVAC for resolving.

Based on the documents attached in the case files, responses of the clients or other interested parties and on the recommendation of the Secretariat, PVAC will determine which registered cadastral data are "legitimate". In cases when it turns out that PISG cadastral data are not correct, PVAC will determine "legitimate" data to be entered into the registers. When deciding, PVAC should take into account "final and binding decisions of the authorised judicial and administrative institutions". It can reasonably be assumed, given the provisions of the agreement between PISG and the RS on judiciary[11], that these are bodies within PISG legal system. In this regard, the question of priority in acting is being raised, or the manner in which PVAC will treat the previous PISG court decision in practice and whether it will give priority to the judicial discussion of the property issues.

It is important to underline that, regardless of the fact that in certain circumstances decisions are adopted in two instances namely by the KPCVA Secretariat and by PVAC, there is no major difference in the scope of work of KPCVA bodies which additionally confirms the need for proportional participation of non-Albanians at all levels. For example, in larger environments in AP Kosovo and Metohija with predominantly Serbs it can be expected that the situation in both cadastral records is the same if there were no transaction of the property after 1999 and the role of Secretariat will be primary in such cases – as it is assumed that Secretariat will make decisions if there are no discrepancies (unless there are misuses in this procedure). Unless an even participation of non-Albanians in the Secretariat is achieved, a situation can arise analogue to the one with the public notaries when, for example, in the north Kosovo there were not a single Serbian notary (because no proportional participation requirements have been prescribed) in which manner, as well as in the stated examples, Serbs would again be prevented from participating in decision- making on their rights. Such actions are contrary not only to the relevant provisions in PISG Constitution[12] but also to a number of international documents directly implemented based on PISG Constitution, such as Framework Convention on the Protection of National Minorities[13].

Additionally, as the starting point of KPCVA work is disposal of data from both cadastres, it is necessary to stress out that regardless of the implementation of the TAC it is possible to conduct the Proposed Regulation if the Secretariat in any way obtains "the relevant cadastral data". In other words, this syntagma implies the possibility that KPCVA Secretariat obtains the cadastral data from the period before 1999 by alternative means instead by official means, by representatives of the RS.

3.3 SECOND INSTANCE PROCESS WITH FINAL AND ENFORCEMENT EFFECTS

[11] http://www.kim.gov.rs/p06.php
[12] http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf
[13] https://rm.coe.int/16800c10cf

Although it can be argued that there are actually three instances in decision-making process namely that first instance body, KPCVA Secretariat which acts and adopts decision if there are no discrepancies between cadastral data, in this text we will analyse the second instance process in terms of ruling of PISG Supreme Court on appeal, as the body within the other branch of government.

The Proposed Regulation stipulates that each party may within thirty (30) days from the date of notification of PVAC decision, appeal to PISG Supreme Court, through KPCVA Secretariat, for the following reasons:

- In case that the first instance decision "involves a fundamental error or serious misapplication of the applicable material or procedural law" (i.e. incorrect implementation of material laws or breach of the proceedings); or
- In case that the decision is based on "incomplete facts or an erroneous assessment of facts" (i.e. incomplete fact finding).

An appeal has a suspense effect after the party files an appeal to PISG Supreme Court, PVAC decision cannot be executed as long as the case is "pending resolution" (which is obvious normative omission, since in other provisions of the Proposed Regulation this effect is in connection with the completion of the proceedings before the court).

PISG Supreme Court decides on appeals in a judge panel composed of three (3) judges, two (2) of which are appointed in accordance with the agreement between PISG and EULEX[14] and may request from PVAC to review or further explain the appealed decision, or may request assistance of the Secretary to verify the additional documents sent by the Appellant. PISG Supreme Court may request and consider other written submissions of the parties as well as to hold "oral hearing".

As a rule PISG Supreme Court decides on the appeal based on the facts submitted and considered by the relevant Commission. PISG Supreme Court New fails to accept and consider new facts and material evidence submitted by any party in connection with the appeal; unless it is proved that the party referring to the same was reasonably familiar with such facts and evidence. If the new facts and material evidence are accepted for consideration, PISG Supreme Court may request the assessment and remarks by PVAC.

The said regulation raises the question of the justification and legitimacy of such involvement of the first instance body in the court proceedings. Namely, only upon the appeal of the interested person, the review procedure is relocated from the jurisdiction of the administrative authorities and independent and objective judicial protection is enabled. However, can it be considered that the basic guarantees of "independent and objective" judicial protection have been fulfilled if the involvement of the first instance body which

[14] https://www.kuvendikosoves.org/common/docs/ligjet/04-L-274%20s.pdf

decision is challenged is permitted in the work and decision-making process of the Court deciding on the appeal? If such way of considering the disputable situation is only an option, there is no doubt that this approach fails to provide internationally acceptable procedural guarantees.

According to the Proposed Regulation PISG Supreme Court by hearing of appeal may adopt the following decision:

- To accept the appeal and rule make a new decision with any modifiactions that may be required in the decision of the respective Commission;
- To "reject" (i.e. dismiss) the appeal as inadmissible on procedural grounds; or
- To reject the appeal as unfounded and confirms the decision of the Respective Commissions.

Finally, the decisions of PISG Supreme Court are final and "lawful" and cannot be contested through "regular or extraordinary legal remedies".

In relation to the above stated it is also important to point out the justification of the amendments to the Proposed Regulation regarding the possibility of lodging appeal also against the decision of the Secretariat since it is possible that the party is affected by the same (for example, if the Secretariat considers that based on the forged factual conditions is determined that there is no difference between the two cadastral records and based on situation determined in such way it renders the decision which is later entered in the register). Inability to file an appeal against such decision is contrary to the provisions of the PISG Constitution as well as European Convention on Human Rights and Fundamental Freedoms implemented in the territory of AP Kosovo and Metohija.[15] The mentioned solution, or more precisely lack of the legal mechanism for controlling the work of PVAC Secretariat can open the possibility of abuse.

In addition, also disputable is "the additional" verification by the Secretariat or PVAC regarding the new documents, more precisely new facts and material evidence. By definition, the second instance body should decide on its own, that is, without relying on the position of the first instance body, regarding the acceptance/non-acceptance of the new facts presented, especially having in mind that the parties are addressing the second instance body because they are not satisfied with the decision of the first instance body. In this regard, without amendments to the law, support can be found in general rules of the Law on Contested Procedure[16] which rules are applied according to the Proposed Regulation.

Furthermore, in terms of the composition of the judicial panel, it can but doesn't have to contribute to the greater protection of the rights of the affected persons, having in mind the current practice of the judicial panel appointed in accordance with the agreement with

[15] http://www.echr.coe.int/Documents/Convention_ENG.pdf
[16] http://www.kuvendikosoves.org/common/docs/ligjet/2008_03-L006_sr.pdf

EULEX. This is especially true if we start from the fact that numerous decision of PISG Supreme Court which had negative impact on the rights of IDPs have been adopted by the panels in which a considerable number were Albanian judges.

Finally, although Article 47 of the Law on Constitutional Court[17] stipulates that against the decisions of PISG Supreme Court and the decision of the Secretariat can be lodged constitutional appeal which would partly correct the above identified shortcoming of the Proposed Regulation, it is necessary to point out that this, on the other hand, deepens its procedural inconsistency.

3.4 ADMINISTRATIVE ENFORCEMENT

At this point it is necessary first to point to the Administrative instruction no. 07/2017 dated 24th of July 2017 on procedures, conditions and criteria for the end of administration of properties under administration and those included in the rental scheme of KPCVA, which stipulates that KPCVA administrates property and carries out rental scheme no later than eighteen (18) months from the entry into force of the Proposed Regulation. Since the Proposed Regulation came into force on 3rd November 2016 it can be concluded that the rental scheme expires in June 2018.

Starting from the fact that KPCVA has not even started with effective work at this moment, it is justified to fear that the current administration of the property which at least to some extent provides certainty to the affected persons (primarily IDPs) may end in June 2018. In the light of the continuing lack of the security for Serbs and other non-Albanians in communities with Albanian majority in the territory of AP Kosovo and Metohija, constant attacks on the returnees and generally IDPs not returning to the territory of AP Kosovo and Metohija, it is our opinion that there is a great need for the continuation of the rental scheme since majority of the displaced persons will still be unable to return, dispose of and protect their property located in the territory of AP Kosovo and Metohija. If the planned administration of the property of the displaced persons by the Agency is suspended in that way, only further usurpation of that property can be expected because the usurpers will have no fear of consequences – since the Proposed Regulation fails to foresee what is happening with the property under administration from the moment when the obligatory administration is suspended until the "meritorious" decision of KPCVA or until eventual administrative enforcement in accordance with the Proposed Regulation. Due to lack of clear sanction or protection of the property over which the provisional administration is suspended, re-usurpations will inevitably occur.

Also, there is reasonable risk that KPCVA will determine that the certain property under the administration is "abandoned" property or that there are indication that it is municipal/public property, in terms of Administrative instruction no. 07/2017 dated 24th of July 2017 on

[17] http://www.kuvendikosoves.org/common/docs/ligjet/2008_03-L-121_en.pdf

procedures, conditions and criteria for the end of administration of properties under administration and those included in the rental scheme of KPCVA. In the above case it is stipulated that KPCVA will inform the authorities concerned and if they provide evidence of ownership it can initiate the procedure of reposession of the authority. This risk is particularly expressed in respect of the land owned by IDPs where objects destroyed after 1999 were located. The stated land is, on the field, recorded in the registers as municipal/public property although in the practice it is a private property, and there may arise pretensions of PISG local self-government to the same.

The Proposed Regulation stipulates the administrative enforcement of the final decisions. According to the law, legal means for enforcement of the decisions may include, without limitations, eviction, administration of the property, rent agreement, confiscation or demolition of the illegal objects, bid and application for entry into register of rights to immovable property.

The Proposed Regulation specifically regulates the eviction and in addition to the usual procedural provisions it stipulates that eviction is carried out by the responsible officer of KPCVA assisted by "the law enforcement authority" based on the order signed by the Director of the Secretariat.

Also, bearing in mind current practice of usurpation of the non-Albanian property in the territory of AP Kosovo and Metohija, the Proposed Regulation envisages that if the evicted property is re-usurped within seventy two (72) hours after the execution of the eviction order, and after the notification of applicant on the new illegal usurpation of the property, it will carry out removal of the usurper from the property once again based on the newly issued order after which it will issue the Repossession Certificate.

Although these provisions seem sufficient they should be viewed in a wider context of the manners in which KPCVA will treat IDPs who are not in the territory of AP Kosovo and Metohija. On the other hand, it seems that the term of seventy two (72) hours is not set as limiting, more precisely the Proposed Regulation fails to limit the number of re-evictions and the risk of discriminatory implementation is somewhat diminished.

3.5 ENTRY/VERIFICATION

Finally, the procedure based on the Proposed Regulation ends with the entry into PISG cadastral register and determined situation is the only valid upon the finalisation of comparison procedure and determination i.e. it becomes verified in PISG legal system.

The Proposed Regulation specifically stipulates that the "final" decision of PVAC or decision on the appeal of the PISG Supreme Court, Executive Secretariat will submit to the parties and

the PISG Cadastral Agency which will update cadastral books in AP Kosovo and Metohija. With this, figuratively speaking, the circle closes and enables the appearance of the legality of the conducted procedure.

Namely, the proposed solution creates actual risk that through allegedly legitimate process the pretensions of the usurper on IDPs property are entered into the cadastral registers. This can certainly result in far-reaching consequences on the property rights of IDPs in the territory of AP Kosovo and Metohija.

4. BASIC PROCEDURAL RULES OF THE PROPOSED REGULATION

In addition to the implementation of PISG procedural regulations (Law on Administrative Procedure, Law on Contested Procedure and Law on Enforcement Procedure), the Proposed Regulation contains also its own procedural rules and standards which deserve the separate analysis.

4.1 "REASONABLE/POSSIBLE EFFORTS"

At several points in the Proposed Regulation the actions of KPCVA bodies are qualified by requiring "reasonable/possible" efforts. This is also common practice for PISG legal system especially in the situations related to solving the problems of legal dualism or legal traffic of legal entities or natural persons leaving in the territory of Serbia proper or outside AP Kosovo and Metohija.

Such provisions are particularly in use in those parts of Proposed Regulation which regulate notification or communication between the Proposed Regulation and the persons with a particular legal interest.

The Proposed Regulation contains a provision that the Secretariat notifies and submits a copy of the claim to any person but the applicant who currently holds or believes that he has the right to the property which is the subject of the claim and makes possible efforts, including public notification to any other person that may have legal interest in that property. In adequate situations, such reasonable efforts will be in the form of notification in an official publication of the Secretariat.

Similarly, the Proposed Regulation stipulates that, in cases where a difference or discrepancy between cadastral data from before 1999 and cadastral data obtained from PISG Cadastral agency has been determined, the Secretariat will perform a complete comparison of documents with all available public archives and in addition it will make "all possible efforts" including public notice in order to contact the person stated in the documents, his/her heirs or members of the family as well as any institution in AP Kosovo and Metohija which could

have available information on stated property, in order to obtain evidence and determine how this "discrepancy" has occurred.

Finally, the Proposed Regulation also prescribes that in order to inform any other person currently exercising the right to property subject of the claim or person who believes to have the right to property subject of the claim, the Secretariat will make "all possible efforts" including public notice in order to identify such persons. The methodology of identifying such interested persons may include physical identification of the property or notice in a public media by the Secretariat. These interested parties will have the possibility to inform the Secretariat within thirty (30) calendar days on their intention to participate in the administrative procedure regarding a specific case.

Regarding the enforcement, during the implementation of eviction order the Proposed Regulation prescribes that "law enforcement authorities" may remove all persons who fail to comply with the instruction of the responsible eviction officer. If the enforcement of the eviction order involves immovable property, KPCVA shall make all "reasonable efforts" to reduce the risk of damage or loss of this property.

Ultimately, regarding the power of KPCVA to administrate certain property, the Proposed Regulation provides that KPCVA should make "reasonable efforts" to minimise risk of damage of any property under its administration, provided that KPCVA is not responsible for any damage or loss of property under its administration.

At this point should be noted that the obligations regarding the administration of the property are deposited for 18 months from the entry into force of the Proposed Regulation as well as that the Administrative instruction no. 07/2017 dated 24th of July 2017 on procedures, conditions and criteria for the end of administration of properties under administration and those included in the rental scheme of KPCVA stipulates that after the expiry of this term the administration will be suspended regardless of whether the return is required, and in the case of abandoned property with indications that the same is public or municipal property KPCVA will inform the competent authorities and if they present the evidence of ownership, the procedure of returning the property will be initiated. Therefore, as we previously stated, there is a reasonable risk that the municipalities will request the return into possession of the subject property.

In practice, it can be expected that the provisions on notice will result in appropriate publication on the notice board of KPCVA having in mind current work of PISG bodies in similar situations. In addition, legal communication between PISG and RS is in difficult position and due to lack of appropriate mechanisms to regulate that issue it is not possible to serve notices because there is no postal traffic between AP Kosovo and Metohija and other parts of the Republic of Serbia. All this will result in unfavourable implementation of the Proposed Regulation for the persons affected by the legal dualism in this area or IDPs whose property has been usurped.

Regarding the provisions on enforcement and administration of the property, it can be expected that their implementation will be negligible, since KPCVA is not responsible in case it fails to meet the legal standard of reasonable efforts, and that the obligations expires relatively quickly unless the term of 18 months is extended. Namely, at this moment almost 7 months has passed out of 18 months as the Proposed Regulation prescribes in which period KPCVA practically did not start the effective work. Since that term has not be extended, it can be expected that the abandoned property will be taken over by the municipalities or PISG Privatisation agency having in mind current practice regarding the exercise of property-legal powers by these authorities. In the worst case scenario, that property can simply be usurped by third parties. Also in addition to extension of the term of 18 months it should also be considered modalities in order to permanently protect the administrated property, since it is evident that current model fails to provide legal certainty in terms of right to peaceful possession of property.

4.2 INFORMING ON THE INTENTION TO PARTICIPATE

The Proposed Regulation further prescribes very specific mechanism for informing in other direction, more precisely communication from interested persons to KPCVA.

In this respect, the Proposed Regulation envisages that any person but the applicant who at the moment exercises the right or believes to have the right over the property in question, or any other person with possible legitimate interest on the property for which the claim was filed is the party in this claim and in similar procedures, provided that the person informs Secretariat on his/her intention to participate in the administrative procedure within thirty (30) days from the notification on the claim sent by the Secretariat. This provision sounds correct at first glance, but we point out that the Secretariat is not obliged to personally inform the interested persons on filed claims.

Therefore, it is provided that in order to inform any other person currently exercising or who believes to have the right over the property in question the Secretariat will make all possible efforts including public notice in order to identify these persons. The methodology of identifying such interested persons may include physical identification of the property or notice in a public media by the Secretariat. After that, these interested parties will have the opportunity to inform the Secretariat within thirty (30) calendar days on their intention to participate in the administrative procedure regarding a specific case. Therefore, in practice it will inevitably happen that thirty days term starts after the public notice of KPCVA (on website, notice boards, notice in electronic or print media) which certainly is not sufficient guarantee for the protection of the property rights of the interested persons.

Although these persons have the right to participate in the procedure before KPCVA given the provision that a person with legitimate interest in the claim but who failed to receive notice

on the same may be a party in any time during the course of the procedure that is before PISG Supreme Court (if the Secretariat has not been informed) the question is how will the interested persons be informed on this issue or in which manner will they find out about the on-going property procedure if there is no obligation of personal notice?

Taking into account the proposed procedural rules, it can be concluded that basic risks in this regard are arising in the form of the following challenges:

- The problem of informing and serving of notices to the affected persons;
- Unreasonably short terms for actions of the affected persons;
- Unspecified evidence;
- Substantive discretion of KPCVA bodies, Secretariat and PVAC in the process of evaluating evidence and decision making;
- Lack of responsibility of KPCVA bodies for their work;
- Ultimate risk of usurpation or appropriation of the property by the municipalities/PISG Privatisation agency.

5. THE BASIC CHALLENGES IN IMPLEMENTATION OF THE PROPOSED REGULATION

Based on the above stated, the basic challenges in implementation of the Proposed Regulation are the following:

- Limited access to IDPs bodies foreseen by the Proposed Regulation without functional legal aid mechanism;
- (non) admissibility of evidence;
- Limited effect of extraordinary legal remedies in the territory of AP Kosovo and Metohija or lack of those legal remedies outside the territory of AP Kosovo and Metohija;
- Questionable success of the enforcements in favour of non-Albanians;
- (impossibility) possibility to contest the entered data;

In the absence of adequate response to the Proposed Regulation, ultimately the battle for the private property in the territory of AP Kosovo and Metohija can be lost due to the fact that protection against PISG decisions before the adequate international mechanisms such as European Court of Human Rights cannot be sought and it will not be possible to adequately protect property rights of the affected persons.

5.1 SPECIAL ASPECTS OF THE PROPOSED REGULATION

In addition to the legal aid, it is advisable to also consider appropriate special mechanisms for protecting the rights of the affected persons:

- Greater participation of Serbs in the work of KPCVA i.e. proportional participation of their representatives in the bodies as well as in the management of that bodies;
- Mobilisation of IDPs and other affected persons at the municipal level in Serbia proper and in the territory of AP Kosovo and Metohija;
- Prevention of exercising the property powers of municipalities and PISG Privatisation agency regarding the abandoned properties to the detriment of the affected persons;
- Informed communication with the representatives of international community, especially bearing in mind the necessity of the support of the donor community.

Finally, it is necessary to recognise the need to notify the expert and scientific public, given the unique practice developed in this regard in the territory of AP Kosovo and Metohija, in order to point out the essential discrepancy with international documents.

6. LEGAL AID AND PROPOSED REGULATION – CONCLUSION AND RECOMMENDATIONS

Having in mind all the above stated, we find it necessary to establish the functional legal aid mechanism which would include:

- Timely notification of the affected persons based on the existing cadastral records and data base in AP Kosovo and Metohija;
- Providing adequate protection of rights of the affected persons before PISG, from obtaining evidence to representation in first and second instance procedures until the enforcement and registration;
- Comprehensive coordination with the relevant political actors in the territory of AP Kosovo and Metohija and international community.

One of the ways in achieving that is the extension of the current legal aid project to adequately respond to the logistical challenges set by the Proposed Regulation, given the presumed number of cases/claims. For such approach is necessary the support of the Office for Kosovo and Metohija (hereinafter: Office) as well as the Delegation of the European Commission or the donor community.

In addition, it is possible, with the support of the donor community to prepare special legal aid project which would be implemented in the RS and which user would also be the Office.

Surely, it is possible that the implementation of this mechanism is relocated in the territory of AP Kosovo and Metohija and that the same is conducted within PISG by Serb representatives, whether at the local or higher level. It could be done in two ways:

- Through a technical assistance project to KPCVA which would be supported by the donors, with the presumption of enabling the proportional participation of Serbs in its bodies; or
- Through the establishment of the special legal aid service within the future Community of Serbian Municipalities, financed by the donors.

In both cases, besides donors, significant political work is needed as well as the adjustment of the PISG legal and subordinate solutions.