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## **REGULATION ON THE PROTECTION OF THE RIGHTS OF BUYERS OF RESIDENTIAL PREMISES OR ONE-FAMILY HOUSING UNITS**

April 29, 2012 saw a new Regulation concerning the Protection of the Rights of Buyers of Residential Premises or One-family Housing Units enter into force (Regulation of September 16, 2011; Dz. U. 2011 no. 232). This Act constitutes an attempt to regulate the legal relationship between developers and buyers (natural persons) by introducing standard obligatory provisions that, in principle, aim to grant buyers improved rights and guarantees.

The Act clearly appears to be oriented towards the protection of consumers since, first of all, it secures buyers' advance payments. Providing such security may boost the confidence and interest of buyers in housing development projects. It may however lead to a rise in the costs of development, above all in the case of smaller developers who, until now, were able to finance housing development projects with the down payments of their customers. Now, however, they must seek additional sources of funding.

### **1. CONTENT OF THE ACT**

The Act sets out the measures to protect the payments made by a buyer under a development agreement, specifying the basic rights and obligations of the parties to the agreement, regulating the terms and conditions for the execution of development agreements and the pre-contractual obligations of developers, as well as setting in place the rules governing payments made by buyers in the event of a developer's bankruptcy.

### **2. SECURITY MEASURES REQUIRED OF DEVELOPERS**

Developers are obliged to provide buyers with at least one of the following measures to protect the payments made under the development agreement: (i) allowing payments to a closed residential escrow account, (ii) allowing payments to an open residential escrow account and providing the buyer with an insurance guarantee, (iii) allowing payments to an open residential escrow account and providing the buyer with a bank guarantee, or (iv) allowing payments to an open residential escrow account.

Residential escrow accounts should individually reflect all payments and disbursements made by each buyer. The difference between an open and a closed escrow account is that, from an open escrow account, developers are entitled to collect installments on completion of particular stage of construction work, as provided for in the development agreement. Alternatively, in the case of a closed escrow account, the entire payment may be collected once the definitive agreement transferring ownership to the buyer has been financed.

Moreover, developers can also provide buyers with bank or insurance guarantees enabling them to require the enforcement of such guarantees in the event of the announcement of the developer's bankruptcy or where the buyer withdraws from the development agreement as a result of a failure to transfer the ownership title within the agreed timeframe.

### **3. INFORMATION MEMORANDUM**

Given the fact that, generally speaking, a buyer is an end consumer while a developer is always a professional entity, buyers often lack sufficient information. With this in mind, according to the Act, developers are obliged to provide buyers with extensive information on the development project, in the form of an information memorandum. This memorandum must observe the standard format established in the Act, including, among other matters, information on the developer's professional and financial standing, alongside information on the specific development project.

### **4. DEVELOPMENT AGREEMENT**

In recent years, the content of development agreements has stirred up considerable controversy. In general terms, the term covered a range of agreements of a different nature, combining the various features of a preliminary agreement. As a result, the interpretation of such agreements posed certain difficulties.

The Act at last defines the content of development agreements, introducing a detailed catalogue of mandatory provisions to be included in such agreements. The most significant change regarding the provisions of development agreements consists of the introduction of a fixed set of scenarios in which a party may exercise its right to withdraw. It is also worth noting that any provisions of an agreement that are less favorable for buyers than those under the Act are null and void and will automatically be replaced by the relevant provisions of the Act.

### **5. PENAL SANCTIONS AND PROVISIONS**

The Act also introduces three penalty provisions applicable in the event of a breach of the provisions of the Act. Firstly, any developer, employee or third party obliged to draw up an information memorandum who, in breach of the provisions of the Act, fails to do so, may be subject to a fine. Second, any person responsible for the content of the information

memorandum disclosing untrue information or concealing true information may be a subject to a fine, a restriction of their freedom or imprisonment for up to 2 years. Lastly, any person who, in breach of the provisions of the Act, releases payments accumulated in the closed or open residential escrow account to the developer may be subject to a fine, a restriction of their freedom or imprisonment for up to 2 years.

## 6. BANKRUPTCY

A further new development is that, in the event of a bankruptcy announcement, any funds deposited in escrow accounts will constitute separate bankruptcy assets. Thus, the settlement of buyers' claims will take priority.

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