STUDIA PRAWA PUBLICZNEGO
2021 • NR 2 (34) ISSN 2300-3936
DOI: 10.14746/spp.2021.2.34.6

II. KOMENTARZE, OPNIE I POLEMIKI

Piotr Szulc*

Critical comments to the bill on protection of the rights of purchasers of residential premises or single-family houses and on the Developer Guarantee Fund

(Uwagi krytyczne do projektu ustawy o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego oraz o Deweloperskim Funduszu Gwarancyjnym)

Introduction

The issues addressed by the bill have to date been governed by the Act of 16 September 2011 on the Protection of Rights of Purchasers of Residential Premises or Single-Family Houses (hereinafter referred to as "the Purchasers' Rights Act"). On 23 February 2021, a bill on the protection of the rights of a purchaser of residential premises or a single-family house and on the Developer Guarantee Fund, Parliamentary printed matter no. 985, was tabled. On 20 May 2021 the bill was passed by *Sejm* (hereinafter "the Act")

According to the Act drafter, the proposed changes are a response to "bankruptcies of property developer businesses and related financial losses of those who have purchased residential premises or

* Piotr Szulc, MA, Adam Mickiewicz University in Poznań, e-mail: piotr.szulc@amu.edu.pl, https://orcid.org/0000-0002-5443-1012.

SPP 2(34), 2021: [145–154].

houses through these businesses". It is also argued that the risk of purchasers losing funds paid into open housing escrow accounts is considerable. Consequently, the Act drafter believes that the statutory legislation in its current form has given rise to a situation which prevents purchasers from recovering full amounts directly from an open escrow account.

However, the arguments put forward in the explanatory memorandum to the Act are not convincing to consider that the proposed legislative amendments are necessary. The Act drafter offers no evidence of the empirical need to create such broadly defined protection for purchasers' rights.

The Act provides for one of the most stringent solutions in Europe (similar solutions are not known in the legislation of Germany, France, Austria, Belgium, Italy, Spain)[1]. Even the legislation applicable in the jurisdictions where purchasers of premises and houses under construction have been protected by specific legal instruments for decades is not as far-reaching as that conceived by the Polish legislator.

The Act carries a serious risk of undermining the condition of the real estate development industry and limiting competition in the market while putting in place excessive and unreasonable privileges for the purchaser at the expense of the seller. The proposed solution is a manifestation of emotional legislation responding to specific events publicized by the media. In particular, the explanatory memorandum to the Act does not address the questions whether the existing normative solutions within other branches of law do not provide sufficient protection where it is established that the legitimate interests of purchasers have been infringed or exposed to the risk of loss, and whether the existing legislation does not provide sufficient protection. Certainly, it is insufficient to merely argue that the existing civil law protection does not provide sufficient legal protection. Indeed, it should be stressed that in order to address these questions, the assessment should encompass not only the normative sphere, but also the way the existing legislation operates in practice. A number of provisions of the Act, the structure of which remains unclear, give rise to numerous interpretation disputes and significantly undermine the certainty of legal dealings.

[1] *Ochrona nabywcy przyszłych (powstających) lokali w świetle regulacji prawnych wybranych krajów europejskich i wnioski dla polskich rozwiązań prawnych*, „Zeszyt Hipoteczny" 2004, no. 19, pp. 9–11; E. Targońska-Helios, *Odpowiedzialność dewelopera za wady fizyczne lokalu mieszkalnego na podstawie ustawy deweloperskiej*, Warsaw 2020.

From the perspective of the several years during which the Purchasers' Rights Act has been in effect, it can now be concluded that the instruments provided for therein essentially meet the demand for purchaser's protection as discussed herein.

Competition law is related to regulatory issues, which renders competition law part of public law rather than simply in economic law or private market regulation. The legal nature of the protection of the rights of purchasers of residential premises may also apply to public law obligations, and in some cases even only to public law obligations. Its public law nature is shaped by the special legal status of the Developer Guarantee Fund and the implementation of the public interest by this entity, which is the protection of purchasers of residential premises. This entity will participate in mandatory courses with a limited group of users, and the share relationship between the Fund and its users is to be mandatory.

1. Assessment of the explanatory memorandum to the Act

"Bankruptcies of property developer businesses and related financial losses of those who have purchased residential premises or houses through these businesses" were identified as the main factors underlying the enactment of the Act. The legislator points to the fact that the risk of purchasers losing funds paid into open housing escrow accounts is considerable, particularly in the case of accounts with no additional security in the form of a bank or insurance guarantee. Since the legislator, both in the Purchasers' Rights Act and in the Act, maintained the possibility of operating a housing escrow account in the form of an open escrow account, then it must be inferred that the legislator accepts this solution. Moreover, the two types of escrow accounts have also been put in place in the Act.

The argument that the Act drafter puts forward is not justified for several reasons. If the escrow account accumulates the amounts paid by purchasers, then in the event of a developer going bankrupt, the purchaser may recover the amounts paid which have not yet been disbursed to the developer. For this reason, the legislator introduced Articles 11 and 12 of the Purchasers' Rights Act, pursuant to which the bank disburses to the developer the funds accumulated on the open housing escrow account upon finding that a given stage of the property

development project has been completed, in order to protect the funds by disbursing them in instalments – at intervals – as the project progresses. The bank maintaining an open housing account is required to carry out a substantive and financial review of the completed stages of the property development project. The review is carried out on an *ex ante* basis, before the funds accumulated in the open account are made available to the developer.[2] The bank refuses to comply with the developer's instruction, i.e. to disburse funds from the open account if the conditions set out in Article 8 and Articles 11 to 12 and in the provisions of the housing account agreement are not met jointly.

Furthermore, the purchaser may recover the balance from the distribution of property liquidation proceeds. If the bank has agreed to residential premises being separated free from any encumbrance, the purchaser enjoys priority over the bank in the distribution of such proceeds to the extent that he or she made payments under the agreement.

Moreover, the Act drafter seems to contradict itself by noting that the good standing of the property development industry and high margins of developers justify the increase in financial burdens on the part of the property developer businesses. It should first be noted that drawing conclusions from media reports (without identifying the source) rather than from thorough calculations is devoid of any methodological reasons. The legislator indicates that "the development industry boasts a margin exceeding 20%"; however, the calculation for this amount suggested in the explanatory memorandum to the Act is based on the data from 2017.

2. Establishment of the Developer Guarantee Fund

The central change resulting from the Act which would have the most significant consequences for the property development market is the establishment of a developer guarantee fund and introduction of an obligation for the developer to pay a contribution to the fund from each payment made by the purchaser to the housing escrow account.

The terms of the Act confer a significant and unjustified preference on the purchaser of residential premises or a single-family house with regard to other depositors. The refund limit from the Bank Guarantee Fund is the equivalent of EUR 100,000. No amounts exceeding this limit

[2] T. Czech, *Komentarz do art. 12*, in: *Ustawa deweloperska. Komentarz*, ed. 2, Warsaw 2018, pp. 249–263.

are refunded to depositors. In the current legal situation, a depositor may seek to recover the outstanding amount from the bank's bankruptcy estate on general terms. However, the Act provides that in such a case the developer guarantee fund will disburse to the purchasers the amounts corresponding to their share in the amount accumulated on the escrow account in connection with the performance of the property developer agreement.

The vision of economic downturn conceived by the Act drafter is purely hypothetical. Although the economy indeed experiences ups and downs, legislation should be enacted on the basis of specific, legitimate considerations. The applicable legislation, which provides for the purchaser's priority in seeking satisfaction from the collateral (real properties) with regard to other unsecured creditors, is very beneficial for purchasers, and sufficient to secure their interests. As the law now stands, even if a developer goes bankrupt, losses that a purchaser may potentially incur when using an open escrow account are limited only to a portion of the instalment paid for premises (which reflects a fraction of the value of residential premises). Thus, the proposed amendment was based on a certain prediction from the legislator as to the deterioration of the situation on the property development market. It should be noted that a signalling decision of the Constitutional Court dated 2 August 2010, S 3/10, provided a direct impetus for the enactment of the provisions of the applicable property developer act.[3] In said decision, the Constitutional Court found that there exists a legal loophole in the relations between the parties to a property developer agreement and that the rights of purchasers of residential premises are not sufficiently protected. It was brought to the attention of the *Sejm* [Lower House of Parliament of the Republic of Poland] and to the Council of Ministers that there is a need to take the legislative initiative with a view to eliminating the loophole and to ensuring that the Polish legal system is coherent[4], which has been done in the Purchasers' Rights Act.

It should be noted that the Act is altogether devoid of any mechanisms which would enable the review of validity and correctness of disbursements from the developer guarantee fund. There is no regulation regarding the supervision of the developer guarantee fund and its legal status. The regulation regarding the developer guarantee fund

[3] Signalling decision of the Constitutional Court dated 2 August 2010, S 3/10 (OTK-B 2010, no. 6, item 407).

[4] T. Czech, *Article 1*, in: *Ustawa deweloperska*…, pp. 15–21.

is scarce compared to that of the Bank Guarantee Fund, thus leaving significant room for abuse.

The Act is significantly defective in its lacking any method for calculating the contribution depending on the level of risk of a given developer going bankrupt. All entities are to be subject to the same contribution. However, this solution completely disregards the phases of the business cycle.

It is also seriously defective in its lacking any verification as to whether it is reasonable to withdraw from the agreement. Funds due to the purchaser will be refunded subject to the bank receiving a statement from one of the contracting parties on withdrawal from a property developer agreement. As the Act now reads, the bank is required to disburse to the purchaser the funds upon his or her request without verifying the grounds for such a request. Such a solution deprives the property developer of any certainty as to the funds held, in view of the possibility of them being immediately withdrawn by the purchaser, even if there is no good cause for doing so. According to the legislator, it is a notary who is responsible for verifying both the identity of the purchaser and the grounds for exercising the statutory right to withdraw from the agreement. The disbursement of funds is therefore dependent on other-than-legal grounds, since the withdrawal from the agreement will take effect irrespective of the existence of substantive-law grounds and will have a legally constitutive effect. The lack of verification of the grounds for withdrawal from the agreement seems to be even more surprising, as the act in question extends a set of grounds authorising the purchaser to withdraw from the property developer agreement.

3. Extension of the objective scope of the Act

The Purchasers' Rights Act was applicable only to cases where the property developer's obligation related to residential premises or single-family houses. In practice, a purchaser buying residential premises with a garage would enter into two separate agreements: one for the residential premises and the other one for the garage. The Act would extend protection to commercial premises.

The legislator reasoned that the amount of the purchaser's funds earmarked for the purchase of, for example, a parking space may amount to tens of thousands of zlotys, and that it is difficult to find an argument

for the absence of adequate protection for such funds. However, this solution seems to run counter to the *ratio legis* of the Act. Special protection afforded to a property developer agreement should concern an asset which is residential (and not commercial) premises.

A property developer agreement is the result of a specific combination of legal transactions undertaken as part of the construction investment process whereby the basis and cause of the property developer's action is the ultimate intention to hand over the project to the user. As such, the full performance of the property developer's obligation requires a later conclusion of an agreement with a dispositive effect, whereby the property developer transfers the ownership of the separated premises to the purchaser. Another distinctive aspect of this agreement is that on one side there is the purchaser of premises – a consumer – and on the other, the property developer, i.e. a professional participant of legal dealings.[5] It was the aforementioned signalling ruling that emphasized that it is the duty of the public authorities to undertake measures aimed at fulfilling the task of satisfying the housing needs of citizens, while the specification of the scope of forms and methods of these measures has been left to the legislator's discretion. In particular, the public authorities have a duty to support citizens in their efforts to acquire their own premises and, consequently, to shape the legal system in such a way that it both supports and protects the individuals who wish to do so. The scope of such duties also extends to the need to create regulations protecting the property developers' customers. As such, the *ratio legis* of the Act is therefore to protect the rights of purchasers of residential premises and not to protect the rights of purchasers of other types of premises.

4. Potential consequences of the amendment

The Act drafter's conclusion is incorrect in that the mandatory application of a deduction to the developer guarantee fund in property developer agreements does not essentially affect the price of the property paid by purchasers. It is reasonable to conclude that its impact on the level of property prices offered by property developers and, as such, on the costs incurred by their customers will be considerable. The act of

[5] Judgment of the Court of Appeal in Szczecin of 11 IX 2014, sign. I ACa 331/14, LEX no. 1563602.

putting in place the institution of a developer guarantee fund is very likely to result in further increase in prices of residential premises, as developers will not give up on their margin and the cost will be passed on to the customer purchasing the premises. It needs to be emphasized that Poland faces a serious problem in access to residential premises (according to the data of Statistics Poland, there are approximately 386 residential premises per 1,000 inhabitants in Poland, compared to 509 residential premises per 1,000 inhabitants in Germany, 456 in Hungary and 455 in the Czech Republic). Further increases in housing prices will even deepen the housing deficit. According to the current National Housing Programme[6], the state's priority is to enhance access to housing, which will be significantly impeded by the passage of the Act as proposed.

From the purchasers' perspective, an important expectation with respect to the security instrument would be that its implementation and application should not significantly affect the course of the transaction with the property developer, in particular, that it should not put on the purchaser a burden associated with additional formalities or change the existing contracting practice. In other words, the benefits of its use by purchasers should not give rise to additional obligations being imposed on purchasers.[7] Although an escrow account fully satisfies this demand, the putting in place of the developer guarantee fund changes the current contracting practice and will affect the course of transactions with the property developer.

The purpose of the Act, pursued by introducing the obligation to provide purchasers with a remedy in the form of deductions towards the developer guarantee fund, will not be achieved without a consistent, direct impact on the level of residential real estate prices on the primary market. The implementation of the protection of purchasers' interests through the requirement to pay a contribution to the developer guarantee fund will probably have the side effect of increasing the costs incurred by purchasers. The obligation to pay the contribution to the developer guarantee fund will also have an impact on entrepreneurs

[6] Resolution of the Council of Ministers of 27 IX 2016 on the adoption of the National Housing Programme, www.gov.pl/web/rozwoj-praca-technologia/narodowy-program-mieszkaniowy (accessed: 1 III 2021).

[7] B. Gliniecki, *Pożądane cechy instrumentu zabezpieczającego roszczenie nabywcy wynikające z umowy deweloperskiej*, in: idem, *Mieszkaniowy rachunek powierniczy. Analiza cywilnoprawna*, Gdańsk 2018, pp. 56–61.

engaged in property development business in Poland, in particular by limiting competition.

An additional risk that the Act carries is the probability of avoiding strict and high deductions towards the developer guarantee fund by placing residential premises on the market after the entire development project has been completed. If the developer decides, after putting the building into use (completion of construction), to enter into standard sale agreements having a binding and dispositive effect, the Act will apply to such agreements only to a very limited extent. Such a structure of the provisions allows the developer to decide what agreements it will enter into after obtaining an occupancy permit, and thus which statutory provisions will be applicable.

Conclusions

The Act completely omits the possibility of the developer guarantee fund providing refundable financial assistance to entities at risk of insolvency. The existing Bank Guarantee Fund is competent to provide entities that are at risk of insolvency with financial assistance in the form of loans, guarantees and sureties. The developer guarantee fund should have a stabilizing, guarantee and analytical-controlling function in the system. However, it does not pursue one in the proposed form.

Of course, one should agree that the Act grants purchasers a very high level of protection in the event of a developer's bankruptcy, and thus is very pro-consumer. The regulation of reservation agreements, which have far caused many practical difficulties, should be considered a positive change.

In conclusion, it may be argued that the solution adopted by the legislator to protect the purchasers' interests is, as a rule, exclusively one-sided in nature. Although it has the elements desirable from the perspective of the purchasers that are primarily targeted by the solutions introduced by the provisions of the act, it is still lacking the elements which would, at least in part, meet the interests of property developers and somehow compensate them for the adverse change in the legal situation associated with the entry into force of the sectoral regulations protecting purchasers in property developer agreements. It should be noted that possession by a security instrument of both elements desired by its beneficiaries (purchasers) and beneficial to those bearing

its burden (property developers) is not entirely mutually exclusive. It seems possible that without placing purchasers in a worse situation, the legislator may provide developers with greater access to and a wider choice of security instruments, which ultimately could also translate into a reduction of costs incurred by developers in connection with the obligation to satisfy the obligation to secure the purchaser's interests.

CRITICAL COMMENTS TO THE BILL ON PROTECTION OF THE RIGHTS OF PURCHASERS OF RESIDENTIAL PREMISES OR SINGLE-FAMILY HOUSES AND ON THE DEVELOPER GUARANTEE FUND

Summary

The article presents reflections on the bill on the protection of the rights of a purchaser of residential premises or a single-family house and on the Developer Guarantee Fund, Parliamentary printed matter no. 985. According to the bill drafter, the proposed changes are a response to "bankruptcies of property developer businesses and related financial losses of those who have purchased residential premises or houses through these businesses". A number of provisions of the Act, the structure of which remains unclear, give rise to numerous interpretation disputes and significantly undermine the certainty of legal dealings.

Firstly, there is no regulation regarding the supervision of the developer guarantee fund and its legal status. The regulation regarding the developer guarantee fund is scarce compared to that of the Bank Guarantee Fund, thus leaving significant room for abuse.

Secondly, the bill is significantly defective in its lacking any method for calculating the contribution depending on the level of risk of a given developer going bankrupt. All entities are to be subject to the same contribution.

Keywords: rights of purchasers – Developer Guarantee Fund – residential premises

LITERATURE

Czech T., *Komentarz do art. 1*, in: *Ustawa deweloperska. Komentarz*, ed. 2, Warsaw 2018.

Czech T., *Komentarz do art. 12*, in: *Ustawa deweloperska. Komentarz*, ed. 2, Warsaw 2018.

Gliniecki B., *Pożądane cechy instrumentu zabezpieczającego roszczenie nabywcy wynikające z umowy deweloperskiej*, in: idem, *Mieszkaniowy rachunek powierniczy. Analiza cywilnoprawna*, Gdańsk 2018.

Ochrona nabywcy przyszłych (powstających) lokali w świetle regulacji prawnych wybranych krajów europejskich i wnioski dla polskich rozwiązań prawnych, „Zeszyt Hipoteczny" 2004, no. 19.

Targońska-Helios E., *Odpowiedzialność dewelopera za wady fizyczne lokalu mieszkalnego na podstawie ustawy deweloperskiej*, Warsaw 2020.