

## Comments on Draft on Law on Real Estate Business – Part 2

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In this post, we continue to discuss the Draft on Law on Real Estate Business, which was recently published for public comments. Part 1 of our discussion can be found [Here](#).

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### **1. New regulations on management of real estate consultancy activities**

1.1. Article 3.12 of the Draft Real Estate Business Law expressly defines “real estate consultancy” to mean the provision of assistance in matters regarding laws, investment, and doing real estate business. However, this definition appears to be inconsistent with the scope of the real estate consultancy services under Article 70.1. In particular, the Draft Real Estate Business Law provides the scope of doing real estate consultancy services to include (a) advice on real estate creation and trading, (b) advice on real estate finance, (c) advice on real estate price, (d) advice on real estate sale, transfer, lease, lease and purchase agreements. It is not clear which type of activities provided under Article 70.1 that the provision of advice on real estate regulations as mentioned in Article 3.12 should be classified into. The current Law on Real Estate Business 2014 expressly provides advice on real estate regulations as an activity fall within the scope of doing real estate consultancy services.

1.2. Regarding the conditions for doing real estate consultancy service, the Draft Real Estate Business Law requires:

1.2.1. consultants who directly provide advice must have a degree/ certificate in the field they directly advise. It is not clear what kind of degree/ certificate that is associated with the real estate consultancy services; and

1.2.2. the consulting entities, before doing real estate consultancy services, to notify its enterprise information to the local Department of Construction (DOC) so that such information will be made publicly available on the local DOC’s website. In light of the relevant regulations of the Draft Real Estate Business Law, it appears that a law firm which plans to advise on real estate business law will be considered as doing real estate business and will have to notify its business information to the local DOC. If this is the case, then this requirement is unreasonable given that the operation and management of law firms are already governed by the Law on Lawyers.

### **2. Separate sets of conditions for doing real estate business applicable to organization and individual**

2.1. Article 10 of the Draft Real Estate Business Law now separates the sets of conditions applicable to an organization and individual. In particular,

2.1.1. Article 10.1 provides various conditions that an organization must satisfy in order to *do real estate business*. Those conditions include, among others, setting up an enterprise having registered business lines in relation to doing real estate business; and

2.1.2. Article 10.2 provides two conditions that an individual must satisfy in order to *sell, transfer, lease, lease and purchase real estate*. The conditions include (a) having legal capacity when establishing and exercising civil rights and perform civil obligations, and (b) having lawful title or use right corresponding to his/her business form and type of real estate made available for trading.

2.2. The separation above appears to clarify that an individual, at his/her own capacity, may only conduct some limited activities of doing real estate business. In order to perform the full scope of real estate business permitted under law, he/she must first establish an enterprise doing real estate business, and such enterprise must, in turn, satisfy the conditions under Article 10.1. Under the current Decree 2/2022, the conditions for doing real estate are generally applicable to both organization and individual.

### **3. Potential unnecessary exceptions to the conditions for doing real estate business**

3.1. Article 5 of current Decree 2/2022 provides various cases where organizations and individuals may sell, transfer, lease, lease-purchase real estate on a small scale without being subject to the conditions for doing real estate business. These exceptions are now codified under Article 10.3 of the Draft Real Estate Business Law. This new regulation has the following issues:

3.1.1. The lead-in of Article 10.3 states that “*the cases where the sale, transfer, lease, lease and purchase of real estate which are not required to satisfy the conditions set forth in Article 10.1 and Article 10.2, but required to satisfy the conditions on real estate, real estate project made available for trading in accordance with this Law, include:*”. The actual intention of draftsman in this wording is not clear and quite odd. This is because the conditions set out under Article 10.2 (see 2.1.2) appear to be essential and in line with the basic principles of the Civil Code 2015. For example, it is not clear how an individual can enter into a contract for sale of his/her house if he/she does not have legal capacity given that under the Civil Code 2015, a civil transaction may only be effective if the participating parties have legal capacity in conformity with such transaction.

3.1.2. Among the exceptions, Article 10.3(dd) codifies the case under Article 5.5 of current Decree 2/2022 where “*organization, individual may sell, transfer, lease, lease and purchase house, construction works under his/her lawful ownership, transfer, lease, sub-lease land use right under his/her lawful use right.*” It is not clear what is different between this exception and the usual trading of house, construction works, or land use right

under real estate projects. Legally speaking, a real estate developer should also have lawful titles to house, construction and have lawful use right to the land use right in order to exercise the rights provided under Article 10.3(dd) of the Draft Real Estate Business Law. If the draftsman's intention is to exclude the real properties whose original purposes are not for commercial trade, then the exception provided under Article 10.3(e) should be revised to also cover this case.<sup>1</sup>

#### **4. Real estate eligible for transfer of a contract for purchase/lease purchase is not clear**

4.1. The regulations on transfer of contract for purchase/lease purchase of a house or construction works (generally, "**sale contracts**") of the Draft Real Estate Business Law appears to substantially be the same as those of the current law on real estate business. In particular,

4.1.1. According to Article 3.9 of the Draft Real Estate Business Law, transfer of sale contract means *"the purchaser/ leasing and purchasing party transfers all rights, responsibilities, and obligations under the real estate sale contract to another organization or individual via written agreement on transfer of real estate sale contract made in accordance with this Law"*. This definition is codified from Article 3.6 of Decree 2/2022; and

4.1.2. Under Article 51.1 of the Draft Real Estate Business Law, the transfer of sale contracts may only be conducted if, among other conditions, the application for the Certificate of land use right, ownership of house and other assets attached to land (LURC) has been not submitted to competent agencies. This condition is similar to that under Article 59.1 of the current Law on Real Estate Business 2014 and Article 7.2(b) of Decree 2/2022.

4.2. The above regulations do not make clear whether the subject matters of transferred sale contracts must be (a) off-plan properties, (b) ready-built properties, or (c) both properties mentioned at (a) and (b). That said, Article 50 of the Draft Real Estate Business Law expressly specifies the sale contracts eligible for transfer to only include (i) contract for sale and purchase of off-plan residential house, (ii) contract for lease and purchase of off-plan residential house, and (iii) contract for lease and purchase of ready-built construction works. This regulation has the following legal issues:

4.2.2. Regarding contracts having subject matter of residential houses, the Draft Real Estate Business Law follows the approach of the current law where the transfer of sale contracts only applies to off-plan residential houses. In our view, the concept of transfer of sale contracts should be expanded to also cover the contract for sale/lease and purchase of ready-built residential houses. This is because the subject

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<sup>1</sup> Article 10.2(e) provides an exception where *"Organizations, households, and individuals that sell, lease, lease-purchase or transfer real estate that is invested and constructed by themselves and this real estate is not under real estate project for trading in accordance with the law"*.

matter of transfer of the sale contracts is the rights and obligations under the relevant sale contracts, but not the real property itself. Accordingly, as long as the purchaser under the sale contract has not yet been issued with a LURC (see 4.1.2) and the sale contract satisfies other requisite conditions, such sale contracts should be eligible for transfer;

4.2.3. Regarding contracts having subject matter of construction works,

- (a) it is not clear why Article 50 of the Draft Real Estate Business Law allows transfer of contract for lease and purchase of ready-built construction works but not allows transfer of contract for sale of ready-built construction works. Hopefully, this is just a drafting mistake; and
- (b) it is also not clear why the Draft Real Estate Business Law does not allow transfer of sale contract having subject matter of off-plan construction works. Logically, if the sale contract having subject matter of off-plan residential house is eligible for transfer, then the contract having subject matter of off-plan construction works should have the same treatment.

## **5. New regulations on trading of land use right having ready-developed infrastructure in real estate project**

5.1. According to the Draft Real Estate Business Law, it appears that the new law will only focus on trading of land use right having ready-developed infrastructure in real estate project (generally, “**project land**”). This amendment is welcome given that the transactions relating to land other than project land are already covered by the land law and civil code.

5.2. Article 30 of the Draft Real Estate Business Law sets out following forms for trading of project land:

5.2.1. transfer of project land to individual so that he/she can build residential house;

5.2.2. transfer of project land to organization so that it can invest to construct residential house and construction works; and

5.2.3. lease, sublease project land to individual or organization so that they can duly use the project land pursuant to the use purpose and investment project approved by the competent authority.

5.3. Regarding the first case, it is not clear why Article 30 only allows individuals to receive the transfer of project land to build residential houses, but not develop other construction works like organization under the second case. For example, if the project land having use purpose of land for commerce and service, then based on Article 30, an individual is not entitled to buy such project land. The Draft Real Estate Business Law’s approach seems to be not in line with the land law. Under the

Land Law 2013, household, individual may lease land for commercial and service purposes from the State.

5.4. The Draft Real Estate Business Law also introduces various strict conditions applicable to the trading of the project land. For example, before signing the contract for transfer of project land with individual customers, the developer must obtain local authority's confirmation that the project land is eligible for transfer.

## **6. Unclear rule for determining effective date of contracts for trading real estate**

6.1. Under Article 17.3 of the current Law on Real Estate Business 2014, the effective date of the agreement on real estate trading will be agreed and stated in the agreement by contracting parties. If the contracting parties have not agreed or the agreement has not been notarized or authenticated, the effective date is the date on which the agreement is signed.

6.2. According to Article 45.4 of the Draft Real Estate Business Law, the effective date of the agreement will be the date that the last party signs the contract or by another form of acceptance shown in the contract. This amended rule may give rise to the following issues:

6.2.1. Under Article 401.1 of the Civil Code 2015, a contract legally entered into shall take effect from the time when it is entered into, *"unless otherwise agreed or otherwise provided by law"*. It appears that the new rule for determining the effective date of the contract is based on the exception under Article 401.1 of the Civil Code 2015. In our view, the exception of Article 401.1 of the Civil Code 2015 should only be deployed to regulate the cases where the contracts require notarization or registration with authorities in order to take effect. In many cases where the real estate contracts do not require any further formality, the effective date should be the date stated in the contract, or a date agreed by the parties;

6.2.2. In light of this new rules, technically, an agreement on the effective date of the contract will not be valid if the date stated in the contract is not the one that the last party sign the contract. Accordingly, to avoid this risk, the contract should expressly provide that the date stated in the contract is the date the last party signed the contract; and

6.2.3. It is not clear what are "other forms of acceptance shown in the contract". It is not clear if the draftsman's intention is to refer to electronic signature or fingerprints?

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