

## “Prevention Against Housing Speculation” Draft Amendments

The Legislative Yuan passed *The Equalization of Land Rights Act*, *Land Administration Agent Act*, and *Real Estate Broking Management Act* draft amendments after three readings in 2020 with hopes—through measures such as fully integrating the disclosure and immediate declaration of house plates, plot numbers, and presale homes; increasing penalties; and regulating presale “red slip” contract transactions—to increase the transparency of real estate transaction information and curb price gouging and speculation so as to bolster market development (Taiwan, Ministry of the Interior). However, seeing as the effects were seemingly limited and that the residential price index of the whole country and its six special municipalities was continuously on the rise by the end of 2021 according to statistics of the Ministry of the Interior<sup>1</sup>, in December 2021, the Ministry of the Interior once again released *The Equalization of Land Rights Act* and *Real Estate Broking Management Act* draft amendments covering five main points: “Restrict presale contract transactions”, “prohibit speculative activity”, “register contract termination”, “regulate property purchases by private entities” and “establish a whistle-blower reward system.” Once the latest draft amendments were announced, there was immediate discussion from multiple parties, yet despite drawing backlash from many businesses, there was also no shortage of affirmation for the amendments. One of the aspects that was most called into question aside from whether it was possible to achieve the expected policy effect was, from a legal standpoint, whether the “restriction of presale contract transactions” and “regulation of property purchases by private entities” violated the rights to property and contract freedom protected in Constitutional Law; as well as if criminal liability penalties “prohibiting speculative activity” abided with the Principle of Clarity, Principle of Proportionality and other key principles. The following is a brief discussion and analysis pertaining to these concerns.

- I. Does “Restricting Presale Contract Transactions” and “Regulating Property Purchases by Private Entities” Breach Constitutional Law?

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<sup>1</sup> [https://www.moi.gov.tw/News\\_Content.aspx?n=4&s=256959](https://www.moi.gov.tw/News_Content.aspx?n=4&s=256959) (last accessed: February 22<sup>nd</sup> 2022)

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In reference to the Justices of the Constitutional Court's explanation (now the "Constitutional Court"), Article 15 of the Constitutional Law protecting people's "right to property" entails enabling the people to exercise their right to freely use, benefit from, and dispose of their property according to its state of perpetual existence to ensure that the people have the resources they depend on for maintaining their lives and freely developing their personality rights. As for the "freedom of contract" being the basis of private autonomy, the respective terms of the contract are protected and regulated by each basic right accordingly; for example, actions related to the disposal of property shall be protected by the right to property. Aside from this, the freedom of contract, serving as an important mechanism for autonomous development and self-realization, is also one of the other rights to freedom ensured by Article 22 of the Constitutional Law. From the above, if the government does wish to restrict the freedom to privately dispose of property or conclude a contract, it may indeed infringe on the rights guaranteed in the Constitutional Law.

However, **under certain circumstances within the country, for instance impeding on an individual's freedom, imminent danger, maintaining social order or public interest, etc., the law's fundamental rights can be used as a reasonable restriction.** Although whether or not the country recognizes the right to housing, right to adequate housing, etc., as fundamental (basic) rights protected by the Constitutional Law is subject to dispute, it is still evident that competent authorities have established restrictions to meet objectives concerning public interest such as maintaining the order of transactions in the real estate market as well as avoiding price gouging and speculation. As such, the focus is on whether restrictions are reasonable, and it should be observed whether this draft amendment can achieve its purpose, whether the measures taken bring about the least amount of harm, and whether the magnitudes of the infringement itself and of public interest conform to proportionality.

According to the above, it is unfortunately difficult to assess whether this draft amendment violates the Constitutional Law, however, it can be said that there exists a possibility that these regulations do in fact infringe on basic rights, therefore, the legislation should be more prudent. For example, the purpose of "restricting presale contract transactions" is to prevent investors from taking advantage of collective contracting by "exchanging or swapping" the contract which consequently creates the illusion of completed transactions. As such, constituent elements formulated in the

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Articles should be more specific, or should exclude special circumstances, to preclude the possibility of certain consumers who may need to transfer their contract due to a major change in their life planning or career development or other reasonable justifications subject to the restrictions of these Articles. As for the “regulation property purchases by private entities,” if the so-called property purchase is limited to properties “for residential use” and excludes the following three cases in which the property is used as an employee dormitory, used for long-term leasing or city planning, or when old and dangerous buildings are reconstructed and property rights are subsequently acquired, then the regulation seems rational.

## II. Does “Prohibiting Speculative Activity” Conform to the Principle of Clarity or Principle of Proportionality?

The draft amendment also states that—for any person who has the intent to influence trade prices, create an illusion of a sales surge, monopolize resale profits or engage in other speculative activity in real estate—violators will be fined NT\$1,000,000 to NT\$5,000,000. Actions that induce public panic and market transaction apprehension detrimental to the public or others may be punishable by up to three years in prison along with a fine of anywhere between NT\$1,000,000 to NT\$50,000,000. There is also a lot of discussion regarding these Articles involving criminal liability in which some bring up the fact that utilizing “criminal” sanctions to control activities such as house price gouging and speculation is not a legal institution created by Taiwan; for example, the “Economic Crime Laws” in Germany also impose large fines, or even a maximum sentence of 3 years in prison, for improper house pricing.

However, special attention must be paid to the fact that, based on the Principles of Clarity and Proportionality, the elements for criminal penalties must be specific, clear, disclosed to the public beforehand, subject to being acknowledged or considered through judicial review, and should be used as a last resort. If the above principles are considered when reviewing these draft amendments, then it is indeed inevitable to have questions such as what constitutes “inducing public panic and market transaction apprehension?” If referring to Germany’s “Economic Crime Laws,” by which setting the house price to exceed 50% of the reasonable appraised value constitutes a “house profiteering” criminal offense and within which a legislative model with an

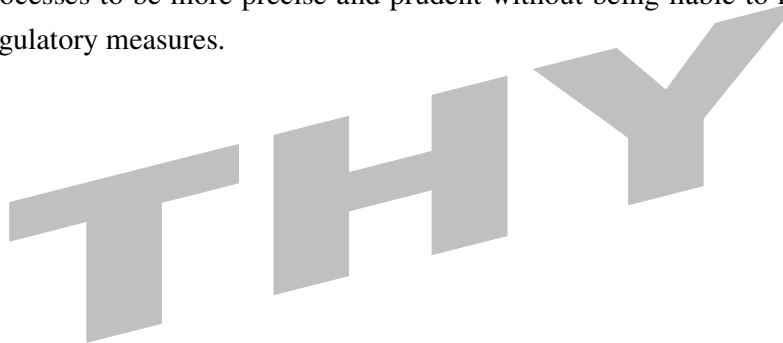
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independent appraisal system has already been established, then the stipulated elements of crime in Taiwan are indeed comparatively ambiguous. The Executive Yuan seems to also be aware of this fact and have therefore instructed the competent authority (Ministry of the Interior) to further clarify the definition of what constitutes speculative activity in the Articles albeit pending the upcoming announcement of specific Articles.

Additionally, whether criminal penalty is the current last resort with the least amount of harm has also been called into question. To solve the dilemma of persistent high housing prices, with there being many factors that influence housing prices to consider and foreign policies to refer to, there are methods such as increasing taxation, revising construction regulations, expanding social housing, etc., that balance supply and demand. Furthermore, from a “right to adequate housing” perspective, starting with the strengthening of the rental housing market is also a viable approach. According to the summary provided, this draft amendment, though it can demonstrate Taiwan’s commitment to maintaining order in the housing market, needs its legislative processes to be more precise and prudent without being liable to hastily criminalizing regulatory measures.



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