

Protection of the Weaker Party to a Property Development Contract under Polish Law. Implementation of the Model of the State's Protective Duties in Practice

Monika Florczak-Wątor

Dr Habil. Professor of the UJ
Jagiellonian University, Department of Constitutional Law
Bracka Street 12, 31-005 Krakow, Poland
E-mail: <m.florczak-wator@uj.edu.pl>

This study examines the mechanism of the protection of customers of property developers that was introduced into Polish legal system by the Property Development Act adopted on 16 September 2011. Those customers are the weaker party to a property development contract that should be protected by the State. The article presents the very concept of the Polish property development contract, its substance and legal forms as well as its practical aspects. This issue of the protection of customers of property developers is of a great importance not only in Poland but also in other European countries that have experienced a boom in the real estate market in the last decade. The article discusses also the issue of the compatibility of the Property Development Act with the model of the State's protective obligations in horizontal relations that has been established under the Constitution of the Republic of Poland of 2 April 1997. The paper concludes by presenting some postulates of amendments to the Property Development Act submitted by consumer organizations, industry representatives and entrepreneurs as well as a very comprehensive draft of the amendment presented in May 2018 by the President of the Office of Competition and Consumer Protection. This draft is currently at the stage of inter-ministerial consultations and it is difficult to foresee whether the new solutions will be adopted by Parliament in such a form.

Keywords: a property development contract, protective obligations of the State, consumers protections, Poland.

Received: 17/8/2018. Accepted: 6/12/2018

Copyright © 2019 Monika Florczak-Wątor. Published by Vilnius University Press

This is an Open Access article distributed under the terms of the [Creative Commons Attribution Licence](https://creativecommons.org/licenses/by/4.0/), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Introduction

Poland did not have a law protecting the customers of property developers until 2011¹. Therefore Polish consumers incurred a greater risk of the property development project as they undertook to pay the whole of the price (or its significant part) even before the property development project ended and before ownership of the flat or house was transferred to them. As a rule, contracts of this kind were concluded in writing, which meant that they were preliminary contracts giving the purchaser only the ability to seek claims for compensation from the developer. However, the home buyer did not acquire a claim to establish separate ownership of the flat or house. Therefore, in the event of the developer's bankruptcy before the end of the investment, the customer not only did not become the owner of the flat that he wanted to buy, but also lost his savings, which he had paid to the property developer for the construction of the flat. Moreover if the funds for the investment were from a mortgage loan, he was left with the obligation to repay the debt to the bank. Likewise, the conclusion of a property development contract, in the form of a notarial deed, and the disclosure of a claim for the establishment of separate ownership of a flat in the land and mortgage register, did not secure the buyer's interests because this claim could only be asserted in court if the investment project had been fully built and the property developer groundlessly evaded concluding a contract to transfer the ownership of the flat that had been built to the owner. However, if the investment project had not started or was interrupted, the observance of the form of the notarial deed and the disclosure of the claim in the land and mortgage register did not lead to the acquisition of ownership of the flat because the flat had not been built.

The above described difficult situation of the customers of property developers changed after the Act of 16 September 2011 on the protection of the rights of a buyer of a flat or house (hereinafter the Property Development Act)² came into force. In my paper I would like to track those new regulations in the light of the constitutional model of State protection obligations. My objective is to determine the extent to which the lawmakers have balanced the rights and duties of both parties to the property development contract and diversified the intensity of protection afforded to them while developing this law. I shall also present the directions of change to the existing regulations recently proposed by the government to strengthen the protection of buyers of flats and houses in their relations with property developers.

1. Obligation to protect the weaker party to a property development contract in the light of the Constitution

The Polish Constitution³ does not contain any provisions that directly apply to property development contracts, although it comprehensively governs the protective duties of the State, including those that apply to consumer protection. Its Article 76 imposes an obligation on the public authorities to protect consumers against unfair market practices, simultaneously providing that the scope of this protection will be specified by statute. In its case law, the Constitutional Tribunal emphasizes that this provision serves to protect every weaker party to a contract concluded with a stronger business trading partner⁴. It

¹ The writing of this paper was supported by the Polish National Science Centre (research project No DEC-2013/11/B/HS5/03711).

² Journal of Laws of 2017, item 1468.

³ The Constitution of the Republic of Poland adopted on 2 April 1997, Journal of Laws of 1997, No. 78, item 483.

⁴ See, for example, judgements of the Polish Constitutional Tribunal of 2 December 2008, case ref. K 37/07; of 15 March 2011, case ref. K 7/09; and of 11 July 2011, case ref. P 1/10.

therefore applies to broadly understood consumer relations, the specificity of which involves, *inter alia*, the fact that both parties to this relationship are beneficiaries of constitutional rights and freedoms and therefore both should be subject to State protection, because the rights and freedoms of individuals correspond to the State's protective duties. However, the problem is that these rights and freedoms of consumers and entrepreneurs often conflict with each other and this, in turn, creates a conflict in the protective obligations of the State. While protecting consumers – as required by Article 76 of the Constitution – the State is also required to protect entrepreneurs. According to Article 20 of the Constitution, business activity freedom is an element of the social market economy constituting the basis of the economic system in Poland, while, according to Article 22 of the Constitution, its limitations are only admissible as a result of the valid public interest. It is worth noting here that the entity does not lose the status of a beneficiary of constitutional rights, even if it abuses these rights. For this reason, entrepreneurs applying unfair market practices within their business activities can count on State protection, although obviously not with respect to their application of these practices. The resolution of the conflict of the State's protection obligations cannot, therefore, involve the assurance of protection to one party of the contractual relationship, while not protecting the other. When establishing a protective regulation, the lawmakers are required to assure the protection of both parties to the contractual relationship to an appropriate extent and, therefore, to balance this protection. This is because it should be noted that the lawmakers may differentiate the intensity of this protection, although it should always be sufficient protection.

The more general provisions of the Constitution are also legal grounds for the State's protective obligations. Article 31, para. 3 of the Constitution allows the State to restrict the rights of some persons by statute where this is necessary to protect the rights of other persons. Under this provision, the State is not only authorized, but also obliged to restrict property developers in taking advantage of business activity freedom if this is required to protect the rights of buyers of flats and houses. The rights of the latter persons are also protected as so-called other property rights under Article 64, para. 1 of the Constitution. They constitute a part of the right to housing, understood as the right to dignified living conditions, which the Constitutional Tribunal argues from Article 30 of the Constitution. According to this provision, the public authorities are required to protect a person's dignity as a source of his rights and freedoms. Finally, the obligation to protect the rights of the individual and, therefore, also to protect consumer rights in his relationship with the property developer, is one of the tasks of the State, which is specified in Article 5 of the Constitution. According to this provision, "The Republic of Poland shall <...> ensure the freedoms and rights of persons and citizens".

The extensive protective regulation contained in the Constitution enables the reconstruction of a unique model of State protection obligations in horizontal relations on the basis of its provisions, which is applied in the line of rulings of the Constitutional Tribunal⁵. To a large extent, it is a model that corresponds to that applied by the European Court of Human Rights under the European Convention on Human Rights⁶. On the one hand, State defence obligations seem obvious, because the

⁵ The formation of this model in the line of rulings of the Constitutional Tribunal is described in my book submitted for publication. See FLORCZAK-WĄTOR, M. *Obowiązki ochronne państwa w świetle Konstytucji RP i Europejskiej Konwencji Praw Człowieka*, Cracow 2018.

⁶ For more on this subject, see XENOS D., *The Positive Obligations of the State under the European Convention of Human Rights*, London – New York 2012; LAVRYSEN, L., *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Cambridge – Antwerp – Portland 2016; MORAWSKA, E. H., *Zobowiązania pozytywne państw-stron Konwencji o ochronie praw człowieka i podstawowych wolności*, Warszawa 2016; AKANDJI-KOMBE, J.F. *Positive obligations under the European*

protection of individual rights is the first and most important task of the State justifying the sense of its existence. On the other hand, the State usually protects individual rights by limiting these rights, whereas excessive State protection can also be a serious threat to these rights. Therefore, the question arises as to the extent to which the State may impose certain solutions on parties to a contractual relationship in order to protect one of the parties to that relationship against the actions of the other “from above”. Such State intervention, which is of a preventive nature, because it takes place before the rights of either party to the contractual relationship have been breached, serves the purpose of guaranteeing a balance of the parties to that relationship, because, without the equal position of the parties, there is no autonomy of will and contractual freedom.

The above described model of the State’s protective obligations is based on the assumption that the State shall safeguard individual rights and freedoms, including those indicated in the Constitution, against any violations, including those by private parties. Protection is provided through interference with potential or existing horizontal relations to the advantage of the weaker party and, at the same time, to the disadvantage of the stronger one. However, the limits of State interference with relations between individuals must be set in such a way to meet both the requirement of respecting their rights and freedoms and that of protecting them⁷.

2. Signaling decision of the Polish Constitutional Tribunal

The direct impulse for passing the Property Development Act was the so-called signaling decision of the Constitutional Tribunal issued on 2 August 2010, case ref. S 3/10. In this decision, the Constitutional Tribunal pointed out to the Sejm and the Council of Ministers that there is a need to take up a legislative initiative regulating the relationship between the parties to the property development contract in order to ensure the protection of the rights of purchasers of flats. It emphasized that there is currently a typical gap in the law in this area, which must be filled “in order to implement the constitutional values expressed in Article 76 of the Constitution, granting consumers, users and tenants protection against the public authorities applying unfair market practices, as well as in Article 75, para. 1 of the Constitution, obligating the public authorities to pursue a policy which supports satisfying the housing needs of the citizens.” The Constitutional Tribunal noted that a special feature of the property development contract is that the buyer of the flat, the consumer, is one party, while the property developer, namely a professional participant of business trading, is the other. This disproportion in the positions of the parties determines the need to form the provisions of the property development contract, which will give maximum protection of the weaker party to this relationship.

3. Statutory solutions serving the purpose of protecting the buyer

3.1. Scope of regulations

The Property Development Act that was adopted on 16 September 2011 regulated the principles of protection of the buyer’s rights, for whom the property developer undertook to establish separate own-

Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights, *Human Rights Handbooks*, 2007, No. 7; FLORCZAK-WĄTOR, M. The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State, *International and Comparative Law Review*, 2017, No. 2.

⁷ FLORCZAK-WĄTOR, M. *Applying the Constitution of the Republic of Poland in horizontal relations*, Cracow 2015, p. 122–124.

ership of the flat and transfer the ownership of the flat, or to transfer the ownership of the land on which a house is built or the perpetual usufruct of land and ownership of the house built on it. The Property Development Act introduced into the Polish legal system a new type of a specified contract, namely the property development contract, that is a contract under which the property developer undertakes to establish or transfer the above mentioned right to the buyer upon completion of the property development project and the buyer undertakes to pay the monetary performance to the property developer towards the purchase price of that right⁸. The lawmakers also defined both parties to this contract, namely the buyer and the property developer. The buyer, in the meaning of the Property Development Act, is a natural person, to whom the property development contract authorizes the transfer of rights and obliges him to perform a monetary benefit to the property developer for the purchase price of that right. It can also be a natural person running a business and making purchases as part of his business. In turn, a property developer, in the meaning of the Property Development Act, is an entrepreneur in the meaning of the Polish Civil Code, which, within its business activities, undertakes to establish and transfer rights to the buyer under the property development contract.

3.2. Measures of protection of a buyer of a flat

In accordance with the provisions of the Property Development Act, the property developer was required to enter into an agreement with a bank for every property development project in order to keep an open or closed housing escrow account in which deposits and withdrawals are separately recorded for each buyer. The agreement on holding such an account can only be terminated by the bank and only for important reasons and if it is terminated, the property developer is required to set up a new trust account at another bank within 60 days. The bank which previously held the account then transfers the funds accumulated on the liquidated housing escrow account to an escrow account opened by the property developer at another bank. If the property developer does not submit transfer instructions for these funds to a housing escrow account at another bank within 60 days of the date of termination of this agreement, the funds accumulated on the account are returned to the buyers.

Both a closed and an open housing escrow account is used to collect cash paid by the buyer for the purposes specified in the property development contract and the settlements made with the property developer. The differences apply to these settlements and, specifically, the principles of paying these funds to the property developer. The funds deposited on the closed account are transferred once, after the ownership right to the flat or land developed with a house or perpetual usufruct of land and ownership of a house erected on it, constituting a separate property, is transferred to the buyer. The bank pays the funds from this closed account to the property developer only after receiving a copy of the notarial deed of the contract transferring the above ownership rights to the flat or house in a condition which is free of encumbrances, as well as third party rights and claims, except for the encumbrances to which the buyer agreed, to the purchaser.

In turn, funds deposited on an open housing escrow account are paid in accordance with the schedule of the property development project, after concluding that a given stage of the property development

⁸ The legal doctrine emphasizes that the property development contract is a contract that requires the transfer of ownership of premises. Therefore, it does not automatically transfer ownership, while such a transfer may only be made by means of a separate contract of a purely disposing nature concluded in the form of a notarial deed in the performance of the property development contract. See STRZELCZYK, R Charakter prawny i tytuł umowy rozporządzającej zawieranej w wykonaniu umowy deweloperskiej, *Nowy Przegląd Notarialny* 2012, No. 2, p. 18; CZECH, T. 'Umowa deweloperska w systemie polskiego prawa cywilnego', *Temidium. Prawo i Praktyka* 2013, No. 2 p. 44.

project is completed, whereby the property developer has the right to use these funds only to fulfil this property development project. It should be added that the Property Development Act specifies what the schedule of a property development project should look like in great detail. It should specify at least four stages of the implementation of this project, as well as the percentage, estimated breakdown of the costs of the individual stages to the total costs of the property development project. The cost of each stage of the project cannot be higher than 25% or lower than 10% of the total amount of the property development project's costs arising from the schedule. The bank is required to monitor the completion of each stage of the property development project specified in the schedule before making a payment from the open housing escrow account to the property developer, on the basis of an entry into the construction log, which is confirmed by a person nominated by the bank who holds construction qualifications. As part of this audit, the bank has the right to inspect the property developer's bank accounts and monitor the documents. The costs of this monitoring are borne by the property developer.

The above principle of staged financing of the project by the buyer has the objective of preventing the property developer from being charged with the full investment cost at the stage of its construction. Such a method of financing the project takes place if the property developer chooses an open housing escrow account as the form of protection of the buyer's interests. The applicability of this principle arises from the requirement imposed on the property developer to present a schedule of the development project with which the property developer's right to receive an appropriate part of the price deposited on the open escrow account and indirectly the buyer's obligation to pay the appropriate part of the price are correlated. The existence of this principle is also confirmed by the wording of the property development contract, the necessary element of which is the definition of the amount and dates or terms of payment of subsequent parts of the price by the buyer. This mechanism also takes into account the need to ensure strict reciprocity of benefits for both parties, because the property developer acquires the right to demand payment of part of the price only after the partial fulfilment of its performance, whereby it is important that part of the price and part of the property developer's performance correspond to each other. Therefore, it is only after the partial fulfilment of his performance that the property developer can expect the appropriate part of the reciprocal performance from the buyer. In turn, this solution avoids previously the encountered situations, where the buyer had to pay the property developer an amount at a certain time regardless of the actual progress in the investment project that the property developer had made.

A separate means of protection is an open housing escrow account combined with a bank or insurance guarantee. These guarantees are based on the fact that, in the event of the declaration of bankruptcy of the property developer or the buyer withdrawing from the property development contract because the property developer has not transferred the right to the flat or house, the bank or insurance company is required to pay the funds at the amount paid by the buyer to the property developer at the buyer's demand. Both guarantees only expire on the date of signature of the notarial deed of the contract transferring the said rights to the flat or house to the buyer, being free of encumbrances, third party rights and claims, except for the encumbrances agreed to by the buyer.

The regulations that require the property developer to provide information to the buyer before concluding the property development contract, the objective of which is to enable a decision to be made to be bound by the contract, also have the nature of protecting the buyer of the flat or house. This obligation is fulfilled by providing a prospectus to the purchaser, which later constitutes the basis of the property development contract. Information contained in the contract that differs from that contained in the prospectus is not binding on the buyer, unless he agrees to the change, while the differences

contained in the two documents can constitute the grounds for the buyer's failure to enter into the property development contract.

3.3. Notarial form of the property development contract

The Property Development Act regulates the provisions of the property development contract concluded in the form of a notarial deed between the property developer and the buyer of the flat in very great detail. It should be pointed out that this was a kind of novelty, because before this Act became effective, the law did not regulate the *essentialia negotii* of the property development contract, which constituted a so-called unnamed contract⁹. The necessary provisions of this contract include provisions regarding the property being purchased and its price, the previously mentioned measures of protection established by the property developer for the buyer, as well as the deadlines for transferring the right to the buyer for starting and ending construction work of the given property development project and the notification of the buyer about the handover of the flat or house for occupancy. A part of the property development contract is also information on the bank's or another creditor's consent secured by a mortgage for the separation of a flat without encumbrances and the transfer of its ownership after the buyer pays the full price, if such an encumbrance exists.

One of the elements of a property development contract is the reservation of contractual penalties for both parties, whereby the buyer only has claims for contractual penalties for the period of default when he withdraws from the contract because of the property developer's failure to perform the contract on time, while the amount of the reserved penalties for the buyer cannot exceed the interest reserved for the property developer¹⁰. In the judgement of 10 August 2017, case ref. I CSK 10/17¹¹, the Supreme Court announced that a clause ruling out contractual penalties in the property development contract is not permitted by law. In justifying its decision, the Supreme Court held that the assessment of the admissibility to introduce a clause of this type into a property development contract requires consideration of the subject matter of non-cash performances in that contract, their significance in the legal relationship and the probability of the failure to perform. As the Supreme Court emphasized, "The significance of the pressure and the simplification of evidence created by the reservation of the contractual penalty for the buyer in the event of late, improper performance or the failure to perform the basic non-monetary obligation by the property developer is incomparable with the possible threats that the buyer is avoiding by the fact that the property developer is waiving the reservation of contractual penalties for the failure to perform or the improper performance of non-monetary obligations by the buyer". It is precisely because of this incomparability of the significance of the said clause for both parties to the property development contract that the Supreme Court held that depriving the buyer of the ability to assert contractual penalties from the property developer would be in conflict with good practices and would constitute a breach of his interests by leaving a more difficult and usually much longer road for asserting claims for compensation in such a case on general terms.

⁹ The property development contract was then an unnamed contract; its content was not legally determined, but it was specified in practice, as a rule, unilaterally by property developers. See OSAJDA, K. Umowy nienazwane w najnowszym orzecznictwie Sądu Najwyższego, *Glosa*, 2006, No. 4, p. 5; MODRZEJEWSKA, M. Regulacja ustawowa umowy deweloperskiej, *Przegląd Prawa Handlowego*, 2012, No. 5, p. 20; PYTLEWSKA-SMÓŁKA, M. Proces inwestycyjny – wybrane zagadnienia, *Nowy Przegląd Notarialny*, 2012, No. 3, p. 47.

¹⁰ Article 25 of the Property Development Act introduces the principle of equivalence of contractual sanctions, which does not allow for any disproportions in the level of contractual sanctions, except for one which would be beneficial for the buyer and would provide for higher sanctions for the property developer.

¹¹ LEX No. 2337957.

The provisions of the property development contract described above, which have been established by the lawmakers to protect the weaker party to this contract, cannot be omitted from its content. They establish a specific minimum standard of protection for the weaker party to the property development contract, to which the only modification can be their increase. All provisions of the property development contract, which would be less beneficial to buyers than the provisions of the Property Development Act would be invalid and the relevant provisions of the Act should be applied in their place.

A property development contract designed in this way constitutes grounds for entering the buyer's claims for the construction of the building, the separation of the flat and the transfer of ownership of the flat and the rights required to use the premises to the buyer, or to transfer ownership of the land to the buyer, together with a house or the perpetual usufruct of the land and ownership of the house constituting a separate property or the transfer of a share of ownership of the property, including the right of exclusive use of the part of the property serving the purpose of satisfying housing needs into the land and mortgage register.

3.4. Principles of rescinding the contract

The Property Development Act has also regulated the principles of the buyer rescinding the property development contract. This can take place if the contract does not contain all the elements required by the Act, the information contained in it is inconsistent with the information contained in the prospectus or the appendices (unless the buyer agreed to the changes in this respect), the property developer has not provided the prospectus to the buyer with its appendices, the information contained in the documents on the basis of which the property development contract was concluded is inconsistent with the current and legal situation as at the date of signature of the property development contract and if such a prospectus, on the basis of which the property development contract was concluded, does not contain the information specified in the prospectus constituting an appendix to the Act and if the right to the flat or a house is not transferred to the buyer at the time specified in the property development contract. In turn, the property developer has the right to rescind the property development contract if the purchaser fails to make payment at the time or the amount specified in the property development contract, as well as in the event of the buyer failing to accept the flat or house or if he signs the notarial deed, despite serving the demand in writing twice at an interval of at least 60 days, unless the buyer's failure to appear is caused by force majeure.

If the buyer exercises the right of rescindment, the contract is considered void and the buyer does not bear any costs related to the rescindment of the contract. A declaration of the buyer's will to rescind the property development contract is effective if it contains consent to cancel the claim to transfer ownership of real property and is submitted in writing with notarized signatures, if an application has been made to enter such a claim in the land and mortgage register.

4. Monitoring the functioning of the buyer's protection in practice

The Property Development Act imposed the obligation on the Council of Ministers to review the functioning of the above protective solutions over 2 years from the time they become effective, namely until 29 April 2014, and to provide information to the Sejm on the results of their implementation, together with proposals of amendments. In order to prepare this information, in the period from April to December 2013, the President of the Office of Competition and Consumer Protection conducted a national survey of model contracts and practices applied by property developers in consumer

trading¹², as well as surveys on the functioning of the Property Development Act among property developers, housing cooperatives and banks¹³. The review also included written consultations with the representatives of the insurance, banking and real property sectors, as well as notaries public and organizations representing consumer interests. The results of all these activities were presented to the Sejm by the Council of Ministers in the Information on the effects of the Property Development Act in May 2014¹⁴.

A generally positive assessment of the functioning of the new solutions arises from the content of this document, as these solutions contributed to the strengthening of the protection of the flat or house buyer. The Council of Ministers noted that the scope of duties which the Property Development Act imposed on the bank meant that it had become “one of the institutions of the buyer protection system”. This is because the bank has become obliged to keep escrow accounts, to monitor the property development project before making any payments from these accounts and to check the documentation presented by the property developer, including the prospectus and the property development contract. At the same time, the Council of Ministers stated that “the introduction of provisions assuring greater protection of consumers did not translate into a deterioration of the situation of entrepreneurs measured by the increase in the number of bankruptcies of property development companies”. Over the period of the functioning of the Property Development Act, the number of complaints about property developers submitted by consumers to the Office of Competition and Consumer Protection and the number of investigations and proceedings conducted by the President of this Office on the application of practices breaching collective consumer interests in this sector declined.

5. Proposals of amendments to the Property Development Act

Information on the effects of the Property Development Act presented by the Council of Ministers in May 2014 included some postulates of amendments to the Property Development Act submitted by consumer organizations, industry representatives and entrepreneurs. Based on these postulates and its own findings, the Council of Ministers also presented its own proposals for legislative changes regarding, *inter alia*, the clarification of the subjective scope of the Act, the specification of the property developer’s pre-contractual obligations, the clarification of the content of the property development contract and the matter of attachments, the award to the buyer of the right to refuse to accept the subject matter of the contract if it has material defects, the introduction of financial sanctions for the failure of property developers to apply measures of protection, as well as the settlement of reservation contracts.

The above mentioned Information included a proposal that a possible decision regarding changes to the Property Development Act are made after an additional year of its functioning, namely after 29 April 2015 because a 2-year validity of the Act is too short to obtain exhaustive data enabling the full assessment of the effects of this Act. In this way, additional proposals of changes were presented after that date, which were then subjected to public and inter-ministerial consultations over the following

¹² The survey encompassed 93 enterprises operating throughout the country. 1162 model contracts for the sale of a flat or house on the primary market, 565 prospectuses and 1239 signed contracts were analysed.

¹³ The survey was addressed to approx. 1000 entities – property developers, housing co-operatives and banks.

¹⁴ See Information of the Council of Ministers to the Sejm on the effects of the validity of the Act on the protection of the rights of a buyer of a flat or house of 16 September 2011 (Journal of Laws No. 232, item 1377), together with proposed amendments, Warsaw, May 2014 (form No. 2454/VII term of office of the Sejm). The document is available at: <<http://orka.sejm.gov.pl/Druki7ka.nsf/0/C7076B19DA40D2A7C1257CEE002E19BE/%24File/2454.pdf>> (last visited 6 November 2018).

three years. The result of the review has become a very comprehensive draft of the amendment to the Property Development Act prepared in May 2018 by the President of the Office of Competition and Consumer Protection, which was posted on the website of the Government Legislation Centre and is currently at the stage of inter-ministerial consultations¹⁵.

The review of several years of the functioning of the Property Development Act has shown that there are serious interpretational doubts regarding the provisions defining its subjective scope. In practice, these doubts have contributed to the narrowing of the application of this Act exclusively to contracts for which no occupancy permit has been issued or, respectively, in the case of houses – no notification has been submitted on the completion of construction. Such an interpretation resulted in the deprivation of the buyer of protection regarding contracts concluded with the property developer at the end of the construction namely after obtaining the occupancy permit. In practice, after obtaining the permit, the property developer can still enter into contracts in which the scope of his obligation differs from that specified in the property development contract, because it no longer encompasses the “construction” stage, but purely the obligation to, for instance, establish the right of separate ownership and transfer that ownership, or just the obligation to transfer ownership. Therefore, the bill anticipates extending the subjective scope of the Property Development Act by making all the contracts mentioned subject to the provisions of this Act.

Likewise, the Property Development Act has not regulated the matter of reservation contracts between the property developer and the buyer. Based on these contracts, the property developer frequently collects very high so-called reservation fees from the buyer, which the buyer often loses in the event of the property developer’s bankruptcy. The proposed changes also included one that involved the removal of the open housing account offered without additional security in the form of a bank or insurance guarantee from the list of measures protecting buyers’ rights. The clarification and supplementation of the provisions on the ways of exercising buyers’ rights and the performance of the obligations of property developers related to the housing escrow account was also proposed. The bill also envisages strengthening the protection of the buyer in the event of the bankruptcy of the bank that holds the housing escrow account. The list of premises authorizing the buyer to withdraw from the property development contract and other contracts concluded with the buyer, the objective of which is the transfer of ownership, is to be extended. It is currently difficult to foresee whether the new solutions will be adopted by Parliament in such a form.

Conclusions

The State’s main obligation, as mentioned earlier, is to protect the individual against any activities that can pose a threat to his rights and freedoms, including against threats from private parties. Not only is the State required to react when the rights of one party to the horizontal relations are infringed by the other party, but it also has the obligation to prevent such infringements. The latter aim is served by preventive statutory provisions, which for instance oblige the property developers to provide their customers with reliable information about their rights or obligations. The State is also required to monitor the effects of the protective regulations it has set and to possibly react if it transpires that the protection provided by these regulations is ineffective.

¹⁵ See letter from the President of the Office of Competition and Consumer Protection of 30 May 2018, reference DOIK-071-60/18/MSo/JTB, at: <<http://legislacja.rcl.gov.pl/docs//2/12312251/12513195/12513197/dokument343891.pdf>> (last visited 6 November 2018).

The Property Development Act adopted by the Polish parliament largely interferes with the relationship between the property developer and his customer, but the protective mechanisms adopted in it are generally approved and positively assessed by both parties to the property development contract. Importantly, another private entity, namely the bank, has been placed on guard of the proper functioning of this Act. However, this does not mean that the State has transferred its obligations of protection that are generally the State's responsibility to private entities. On the contrary, it has involved various private entities in the functioning of the protective mechanisms, leaving itself constant monitoring, enabling it to react if it transpires that these mechanisms require correction.

Bibliography

1. AKANDJI-KOMBE, J. F. Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights. *Human Rights Handbooks*, 2007, No. 7.
2. CZECH, T. Umowa deweloperska w systemie polskiego prawa cywilnego. *Temidium. Prawo i Praktyka* 2013, No. 2
3. FLORCZAK-WĄTOR, M. The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State. *International and Comparative Law Review*, 2017, No. 2.
4. FLORCZAK-WĄTOR, M. *Applying the Constitution of the Republic of Poland in horizontal relations*. Krakow, 2015.
5. FLORCZAK-WĄTOR, M., *Obowiązki ochronne państwa w świetle Konstytucji RP i Europejskiej Konwencji Praw Człowieka*. Krakow 2018 (in print).
6. LAVRYSEN, L. *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*. Cambridge–Antwerp–Portland, 2016. <https://doi.org/10.1017/9781780685311>
7. MODRZEJEWSKA, M. Regulacja ustawowa umowy deweloperskiej. *Przegląd Prawa Handlowego*, 2012, No. 5.
8. MORAWSKA, E.H., *Zobowiązania pozytywne państw-stron Konwencji o ochronie praw człowieka i podstawowych wolności*. Warszawa 2016.
9. OSAJDA, K. Umowy nienazwane w najnowszym orzecznictwie Sądu Najwyższego. *Glosa*, 2006, No. 4.
10. PYTLEWSKA-SMÓLKA, M. Proces inwestycyjny – wybrane zagadnienia. *Nowy Przegląd Notarialny*, 2012, No. 3.
11. STRZELCZYK, R. Charakter prawny i tytuł umowy rozporządzającej zawieranej w wykonaniu umowy deweloperskiej. *Nowy Przegląd Notarialny* 2012, No. 2.
12. XENOS D., *The Positive Obligations of the State under the European Convention of Human Rights*, London–New York, 2012.