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Paper for House Committee

Report of the Subcommittee on Estate Agents (Licensing) (Amendment) (No. 2) Regulation 2009

Purpose

This paper reports on the deliberations of the Subcommittee on Estate Agents (Licensing) (Amendment) (No. 2) Regulation 2009 (the Amendment Regulation).

Background

2. Under Article 15 of the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), both sides are committed to encouraging mutual recognition of professional qualifications as part of the services liberalization measures under CEPA. In January 2009, the Estate Agents Authority (EAA)¹ and the China Institute of Real Estate Appraisers and Agents (CIREA) signed a Memorandum of Understanding to give mutual recognition to each other's professional estate agent qualifications. Supplement VI to the CEPA signed in May 2009 reassured that Hong Kong and the Mainland would take forward the work on mutual recognition of each other's professional estate agent qualifications.

3. A mutual recognition of qualifications scheme (the Scheme) is proposed to be entered between EAA and CIREA. Under the proposed scheme, EAA and CIREA may each nominate the same number of eligible estate agents to apply for each other's estate agent licences. As initially agreed between EAA and CIREA, the Scheme will have a validity period of five years, and may be renewed upon mutual consent. Subject to confirmation, each side may nominate up to 300 candidates for the first year. The nomination quota for the remaining four years is being finalized between EAA and CIREA. The nominees from each side will be required to attend a tailor-made course organized by the other side and be granted licences by the other side upon passing a tailor-made examination. Having obtained the licences, the nominees may engage in estate agency work on the other side, subject to fulfilling other relevant

¹ The EAA is an independent statutory body set up in November 1997 under the Estate Agents Ordinance (Cap. 511) (EAO). Its principal functions are to regulate the practice of estate agency trade, promote integrity and competence of estate agency practitioners, and facilitate training for estate agency practitioners to enhance their standards and status. EAA's core activities cover examinations, licensing, practice guidance, complaints investigation, compliance inspection, disciplinary sanctions, licensee training and community education.

regulations there (such as the requirements in the Estate Agents Ordinance (Cap. 511) (EAO) and its subsidiary legislation in Hong Kong).

The Amendment Regulation

4. Section 7 of the Estate Agents (Licensing) Regulation (Cap. 511 sub. leg. A) (the Principal Regulation) prescribes certain eligibility criteria for obtaining an estate agent's licence, which include completing an education level of Form 5 and passing the "Qualifying Examination for Estate Agents" specified by EAA.

5. The Estate Agents (Licensing) (Amendment) (No.2) Regulation 2009 (the Amendment Regulation) was tabled at the Legislative Council (LegCo) meeting on 14 October 2009 to empower EAA to grant estate agent licences to persons who hold the "certificate of registration for real estate agents" (the Certificate) issued by CIREA and are qualified to apply for EAA's estate agent licences through the Scheme.

6 The Amendment Regulation amends section 7 of the Principal Regulation to:

- (a) enable EAA to provide training courses and to set examinations for holders of CIREA certificates; and
- (b) empower EAA to issue a licence to a holder of a CIREA certificate who has completed the said training and passed the examination.

7. The Amendment Regulation will come into operation on 7 December 2009.

The Subcommittee

8. At the House Committee meeting held on 23 October 2009, Members agreed to form a Subcommittee to study the Amendment Regulation. To allow sufficient time for the Subcommittee to study the subsidiary legislation, a resolution was passed at the Council meeting on 11 November 2009 to extend the scrutiny period to 2 December 2009.

9. The membership list of the Subcommittee is in **Appendix I**. Under the chairmanship of Hon Miriam LAU, the Subcommittee has held three meetings.

Deliberations of the Subcommittee

10. The Subcommittee supports the Amendment Regulation which aims to provide the legal framework for implementing the Scheme. The Subcommittee has considered some policy and legal issues related to the Amendment Regulation, and its deliberations are summarized below.

Jurisdiction and licensing considerations of EAA

11. Some members have expressed concern about EAA's jurisdiction under the existing legislation and the future Amendment Regulation in regulating the conduct and behaviour of its licensed estate agents outside Hong Kong. In particular, Hon James TO has enquired whether there will be any change in the mode of regulation after the implementation of the Amendment Regulation.

12. The Subcommittee has noted that according to section 19(1)(c) of EAO, licensees must meet the "fit and proper" requirement. On receiving complaints against EAA's licensees on misconduct, EAA may handle the complaints by virtue of the powers conferred by EAO. In considering whether a person is "fit and proper" to hold or continue to hold an estate agent's licence issued by it, EAA is required, pursuant to section 19(2)(d) of EAO, to have regard to, among others, "*any conviction, whether in Hong Kong or elsewhere, of the person for any offence (other than an offence under the EAO), being a conviction as regards which it was necessary to find that the person acted fraudulently, corruptly or dishonestly.*" The Administration and EAA are of the view that EAA has jurisdiction over the conduct and behaviour of its licensees outside Hong Kong and its licensing considerations will not be constrained by territorial boundaries.

13. To address members' concerns, EAA has provided the legal basis for its jurisdiction outside Hong Kong by highlighting the extra-territorial control exercised by professional regulatory bodies in "*Disciplinary and Regulatory Proceedings*" by Brian Harris QC (2009, Jordans) and in the Scottish case of *Swanney v Full Decision of the General Medical Council's Fitness to Practise Panel* [2006] CSIH 35. Details of these materials are given in **Appendix II**.

14. Despite the explanation provided by EAA and the Administration, Hon James TO is of the view that the deliberate reference to "*any conviction whether in Hong Kong or elsewhere*" in section 19(2)(d) of EAO reflects that EAO has in fact imposed territorial limit on the conduct and behaviour of EAA licensees which it may look into for determining whether a licensee is a fit and proper person to continue to hold a licence.

15. The Administration has further explained that EAA is empowered by EAO and its subsidiary legislation, in particular, the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation (Cap. 511, sub. leg. C) (the Practice Regulation) to, *inter alia*, regulate and control the practice of its estate agents in connection with Hong Kong residential properties, while it is assumed that CIREA will supervise the estate agency work of its licensee in connection with Mainland properties. However, EAA may encounter greater difficulty in collecting relevant information for cases taking place outside Hong Kong such as the Mainland, and it does not have the power to handle complaints the nature of which is beyond the ambit of EAA under EAO. According to the Administration and EAA, there will be no difference in the above regulatory framework after the implementation of the Scheme.

16. Hon Audrey EU has expressed concern whether EAA has agreed with CIREA on the principles of regulating the Scheme licensees, including the delineation of

respective jurisdictions (e.g. the location of properties, the place of transactions or the origin of the licensees) and the determination on the appropriate authority to conduct investigation and take disciplinary action, especially when there are conflicting views between EAA and CIREA on the case in question. She considers that apart from acting on complaints, EAA should conduct investigation for estate agency cases of wide public concern even if complaints are not lodged.

17. According to the Administration, EAA has reached an in-principle understanding with CIREA that a Mainland estate agent who obtains an EAA licence under the Scheme will have the same rights and obligations as any EAA licensee, and vice versa. The respective regulatory regimes as currently administered will apply. EAA considers that the jurisdictions of EAA and CIREA hinge on the place of the properties, i.e. EAA and CIERA will regulate the practice of their licensees in connection with Hong Kong properties and Mainland properties respectively, irrespective whether the service is provided by a Hong Kong or Mainland estate agent, and the place of transaction.

Jurisdiction and licensing considerations of CIREA

18. In the course of discussion, members have also asked about the jurisdiction and licensing considerations of CIREA in relation to the conduct and behaviour of its estate agents outside the Mainland.

19. The Subcommittee has noted that according to the 《房地產經紀人員職業資格制度暫行規定》 ("Temporary Implementing Rules on the Professional Qualification Regime for Real Estate Agents") promulgated by the Ministry of Personnel of the Central Government, "... *the organization responsible for registration shall revoke the registration of a real estate agent under any of the following circumstances –*

- (1) *he does not have full capacity for civil conduct;*
- (2) *he has been penalized for criminal conduct;*
- (3) *he has not been engaged in the position of a real estate agent for a continuous period of two or more years;*
- (4) *he works as an estate agent for two or more estate agencies concurrently; or*
- (5) *he has seriously breached the moral standard expected of and regulations governing the real estate agency trade."*²

² 《房地產經紀人員職業資格制度暫行規定》第二十一條原文如下：

" 經註冊的房地產經紀人有下列情況之一的，由原註冊機構註銷註冊：

- (一) 不具有完全民事行為能力。
- (二) 受刑事處罰。
- (三) 脫離房地產經紀工作崗位連續2年(含2年)以上。
- (四) 同時在2個及以上房地產經紀機構進行房地產經紀活動。
- (五) 嚴重違反職業道德和經紀行業管理規定。"

20. EAA is seeking advice from the CIREA on whether it can regulate the conduct of CIREA-licensed estate agents outside the Mainland, and whether CIREA will take those conduct of its licensees which took place outside the Mainland into account when considering whether to re-grant or revoke the registration of an estate agent.

Notification mechanism under the Scheme

21. To strengthen supervision of estate agents licensed under the Scheme, EAA and CIREA will notify each other of the names of the Scheme licensees who have been disciplined by the other side. EAA and CIREA will decide individually on the appropriate follow-up actions on the licensees in question. For example, EAA will, pursuant to section 19(1)(c) of EAO, consider whether the licensee is still "fit and proper" to continue to hold a licence. If the licensee is not considered to be fit and proper, EAA will take appropriate disciplinary action pursuant to section 29(1)(b) of EAO, and impose sanction according to the nature of violation, which in the most serious case may result in revocation of licence. CIREA will be informed of the disciplinary action. Similarly, an EAA-licensed Mainland estate agent who misbehaves may run the risk of having his/her Mainland licence being revoked by CIREA. CIREA will also inform EAA of the relevant revocation. EAA will discuss with CIREA the details of the notification mechanism in due course.

22. As regards members' concern about the appropriateness for EAA to provide the disciplinary records of the Scheme licensee to CIREA, the Subcommittee has noted that EAA has to publish notice of decision to suspend or revoke an estate agent's licence in the Gazette. As the information will have already been made public, it is legitimate for EAA to provide the said records to CIREA. Upon Dr Hon Joseph LEE's request, EAA agrees to brief the Scheme participants about the notification mechanism and the implications of their extra-territorial conduct on their licences.

23. On the issue of double jeopardy, EAA has made reference to the Scottish case of *Swanney v Full Decision of the General Medical Council's Fitness to Practise Panel* [2006] CSIH 35. The court in that case said that a professional might be disciplined in the United Kingdom for misconduct overseas, even though another disciplinary body had inquired into the same conduct and imposed sanctions in respect of it because the purposes of the two inquiries were different. The court in that case observed that double jeopardy rule had no application save to other Courts of competent jurisdiction. EAA has advised that the same principle will apply to disciplinary proceedings under EAO in respect of conduct that may have been the subject of disciplinary inquiry elsewhere. Given that a licensee under the Scheme holds both the EAA licence and the CIREA licence, he/she may be subject to "investigations" and/or disciplinary sanctions, including the revocation of licences, from both EAA and the CIREA respectively for the same course of inappropriate conduct or practice not in compliance with the relevant legislation. Nevertheless, EAA will further confirm with CIREA on the above understanding to ensure a smooth interface.

24. In connection with revocation of licence, the Subcommittee has noted that if a Scheme licensee fails to make a representation to the Disciplinary Committee of EAA or fails to attend the inquiry hearing in respect of the complaint against him/her,

the Disciplinary Committee will decide, based on the information available at the time, whether to impose disciplinary sanction, such as revocation of his/her licence. The revocation of his/her licence will not be withheld due to the absence of the licensee.

Operation of the Scheme

Selection of candidates for nomination to CIREA

25. Hon James TO has expressed concern about the legal basis for EAA to select estate agents for nomination to CIREA under the Scheme, and opined that the selection criteria to be adopted for making the nomination should be objective, fair and reasonable. EAA has advised that section 5(b) of EAO, which stipulates that EAA may take such actions as it considers appropriate or necessary to enhance the status of local estate agents, has conferred upon EAA the statutory authority to enter the Scheme with CIREA.

26. The eligibility requirements and selection procedures for nomination to CIREA under the Scheme are provided in **Appendix III**. If the number of eligible applicants exceeds the quota for a particular year, EAA will adopt a points system whereby applicants will be shortlisted according to the number of points awarded to them. Priority for nomination will be given according to the points awarded. If the number of applicants in the same group exceeds the quota or remaining quota, ballot will be drawn to determine the successful applicants. An applicant can make a request for review, within the specified period after receiving the confirmation notice, for points not awarded to him/her.

27. The Subcommittee has exchanged views with the Administration and EAA on the scope of the eligibility requirement of "having no criminal conviction history". In particular, members are concerned whether the said requirement will exclude convictions classified as "spent" under the Rehabilitation of Offenders Ordinance (Cap. 297) (ROO) and minor convictions such as jay-walking.

28. According to EAA, the eligibility requirement of "having no criminal conviction history" for Hong Kong applicants is in line with the existing licensing requirement of CIREA for Mainland applicants. Under the existing arrangements, applicants for EAA's licence are required to disclose information on his/her history of convictions, if any, including convictions "spent" under ROO for EAA's consideration whether or not to grant or renew a licence. However, CIREA has already indicated that it will not give exemptions to convictions "spent" under ROO. The requirement has been noted by the working group of the Scheme comprising industry players and they have generally considered the requirements acceptable.

29. While acknowledging that the applicants should have "no criminal conviction history" in the Mainland, Hon James TO has urged EAA to liaise with CIREA for allowing local adjustment for conviction history in Hong Kong. Nevertheless, EAA has been requested to clarify with CIREA the scope of "having no criminal conviction history" to see whether it will include minor convictions.

Training course

30. To facilitate the implementation of the Scheme, a tailor-made course will be organized by EAA for the CIREA nominees before they attempt a tailor-made examination. The training course, which aims at bridging the possible knowledge gap arising from the difference in the legal systems and practice in the two places, will enable course members to gain a basic understanding of the essential elements in the Hong Kong system. As such, there will be no exemptions in the requirement of the training course. The training course will last for about three days, and the examination will be held once a year, and no supplementary examinations will be provided for those failing the examination. The frequency is deemed appropriate taking into account the administrative procedures involved, cost-effective deployment of EAA's resources, and travelling arrangements of the Mainland nominees to attend the training course and sit for the examination. Nominees failing the examination have to re-apply for nomination and if nominated, attend the training course and sit for the examination again. The Administration/EAA was requested to re-consider the duration of the training course as well as the frequency of holding the tailor-made examination, and to report to the Panel on Housing the detailed arrangement.

31. As the tailor-made course is restricted to Certificate holders nominated by CIREA, Dr Hon Joseph LEE has requested that this should be spelt out in the Amendment Regulation. The Administration has advised that the relevant provisions in the Amendment Regulation have empowered EAA to decide whether to provide the tailor-made course and if so, to which type of holders of the Certificate. Nevertheless, to dispel doubts, EAA will make clear to the relevant parties, through CIREA, the prerequisites for enrolling on the course when announcing the Scheme.

Publicity

32. Some members are concerned that the Scheme may generate undue expectation among the public that it will enhance consumer protection over Mainland property transactions if the Mainland estate agents who carry out the agency work are licensed by EAA. In this connection, EAA has advised that it will, upon the launching of the Scheme, step up consumer education and publicity to enable the public to understand the objective of the Scheme which is to encourage mutual recognition of professional qualifications of estate agents in the two places. The opportunity will be taken to make it clear that the Amendment Regulation will not empower EAA to regulate estate agency work for Mainland properties. The list of Mainland estate agents licensed by EAA under the Scheme will also be posted on its website.

Service of notice

33. Under EAA's Proceedings Rules on Inquiry Hearings (the Proceedings Rules), which are internal rules, the communications and notices sent by EAA to the address of a licensee shall be deemed to have been served on the fifth day after the date they are sent, unless there is evidence that they are not yet served. The Subcommittee considers that the service of notice should be made on a statutory basis as communications and notice may concern the conduct of inquiry hearings.

34. The Subcommittee has noted that according to section 41 of EAO,

"any notice which is required by this Ordinance to be given shall be properly given if

(a) in the case of an individual, it is –

(i) delivered to him; or

(ii) left at, or sent by post to, his registered address, ..."

which fulfils the "deemed service" requirements stated in section 8 of the Interpretation and General Clauses Ordinance (Cap. 1), i.e. "*..., such service or notice shall be deemed to have been effected at the time at which the document or notice would be delivered in the ordinary course of post*".

35. The Subcommittee has also noted that pursuant to section 8(5) of EAO which states that "*a committee may regulate its own procedure and business*", EAA's Disciplinary Committee made the Proceedings Rules, including the "deemed service" provision.

36. Since some EAA-licensed Mainland estate agents may station in the Mainland, Hon James TO has suggested that EAA's licensees practising outside Hong Kong should be requested to provide a registered address other than that in Hong Kong to which all communications and notices may be served. EAA has advised that according to section 14 of EAO, every licensee shall have an address in Hong Kong to which all communications and all notices may be sent. EAA will give each licensee a copy of the Proceedings Rules so that the rules, including deemed service and other relevant matters, are brought to their attention upon granting of the licence. At members' request, EAA has undertaken to send communications and notices in relation to complaint or disciplinary matters to the Mainland address of its Mainland licensees if provided.

Follow-up actions to be taken by the Administration/EAA

37. Upon the commencement of the Amendment Regulation, EAA will discuss with CIREA the drafting of the formal agreement and related issues. It has undertaken to report to the Panel on Housing all the details of the operation of the Scheme before issuing any licence under the Scheme, including

- (a) tabling the agreement between EAA and CIREA, which will be signed after the Amendment Regulation has been passed;
- (b) the details of the notification mechanism;
- (c) confirmation with CIREA that licensees under the Scheme may be subject to "investigations" and/or disciplinary sanctions from both EAA and the CIREA respectively;
- (d) outcome of the clarification with CIREA on whether the scope of

"having no criminal conviction history", which is one of the requirements for a Hong Kong applicant to be eligible to apply to EAA for nomination under the Scheme, will include minor convictions such as minor traffic offences;

- (e) detailed arrangement of the tailor-made course and examination to be organized by EAA for estate agents nominated by CIREA under the Scheme; and
- (f) arrangements on sending communications and notices in relation to complaint or disciplinary matters against a Mainland licensees to his/her address in the Mainland, if provided, in addition to the registered address in Hong Kong.

Proposed amendments

38. The Administration has not proposed any amendments to the Amendment Regulation and the Subcommittee will not move any amendments in its name. Hon James TO has indicated that he may move a motion to repeal the Amendment Regulation.

Advice sought

39. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 1
Legislative Council Secretariat
24 November 2009

**Subcommittee on Estate Agents (Licensing) (Amendment)
(No. 2) Regulation 2009**

Membership List

Chairman	Hon Miriam LAU Kin-yee, GBS, JP
Members	Hon James TO Kun-sun Hon CHAN Kam-lam, SBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon LEE Wing-tat Dr Hon Joseph LEE Kok-long, SBS, JP Hon Tanya CHAN (Total : 7 members)
Clerk	Ms Debbie YAU
Legal Adviser	Mr Kelvin LEE
Date	2 November 2009

Appendix II

The legal basis for the Estate Agents Authority (EAA) to exercise jurisdiction over the conduct and behaviour of EAA licensees outside Hong Kong

For the reasons set out below, EAA has jurisdiction over the conduct and behaviour of EAA licensees outside Hong Kong, and make reference to it when considering whether the licensee is still "fit and proper to hold a licence":

- (a) In "*Disciplinary and Regulatory Proceedings*" by Brian Harris QC (2009, Jordans), the author considered the application of statutes regulating professional conduct and said: "*Where no territorial limit is imposed and the purpose of the jurisdiction is the protection of the public[,] jurisdiction may be presumed to extend outside the UK (see R (on the application of the Health Professions Council) v Disciplinary Committee of the Chiropractors Board [2002] EWHC 2662 (Admin). "*
- (b) In the Scottish case of *Swanney v Full Decision of the General Medical Council's Fitness to Practise Panel* [2006] CSIH 35:

[17] ...It appears to us to be inconceivable that the legislation would not permit inquiry into the conduct of a registered person, with a view to seeing whether serious professional misconduct had occurred, simply because that conduct had occurred in some other state. If the contrary view were accepted it would mean that a practitioner whose conduct could be regarded as serious professional misconduct in some other jurisdiction could come to the United Kingdom and practice medicine here with impunity, it might be to the danger of the public. Such a result would undermine the objective of the respondents, enshrined in [section 1(1A) Medical Act 1983], which provides that the main objective of the respondents is to "protect, promote and maintain the health and safety of the public".

(Source: Paper provided by Transport and Housing Bureau & EAA (CB(1)343/09-10(02))

**Proposed Selection Criteria for nomination
under the Mutual Recognition of Professional Qualifications of Estate Agents
between the Estate Agents Authority (EAA) and the
China Institute of Real Estate Appraisers and Agents (CIREA)**

1. As agreed with CIREA, Hong Kong applicants fulfilling the following requirements are eligible to apply to the EAA for nomination:
 - be 18 years of age or above;
 - be a holder of a valid estate agent's licence (individual) issued by the EAA¹;
 - have at least a total of 5 years of estate agency work or related experience² after obtaining an estate agent's licence (individual) issued by the EAA;
 - have no criminal conviction history; and
 - be in good health³.
2. Hong Kong applicants who are nominated for recognition will be required to attend a tailor-made Course (the Course) organized by CIREA to bridge the possible knowledge gap arising from the differences in legal systems and practice, and pass a tailor-made examination (the Examination) organized by CIREA.
3. Since the Scheme is subject to an annual quota⁴, in the event that the number of eligible applicants for a given year exceeds the quota for that year, a point system is introduced and higher priority will be given to applicants who can demonstrate, with acceptable documentary evidence, that
 - i. they have a recognized university degree⁵ (1 point);
 - ii. they have 6 to 10 years of estate agency work or related experience (1 point) **or** they have over 10 years of such experience (2 points); and
 - iii. they have obtained 12 points or above from courses in the EAA's "Continuing Professional Development Scheme" in the 12 months prior to the application (1 point).
4. These additional factors are relevant for consideration as they are indicators of the applicants' competence and experience.

¹ The licence should not be obtained pursuant to any form of mutual recognition of qualifications between the EAA and authorities of any other country or region.

² The 5-year experience does not need to be continuous.

³ CIREA will consider that this requirement is satisfied if applicants declare that they are in good health.

⁴ The first year's quota is 300.

⁵ Degrees awarded by the 12 degree-awarding higher education institutions in Hong Kong are recognized degrees. Degrees obtained elsewhere are recognized if the awarding institutions are accredited (such as some of those in the U.S.) or listed in a formal register (such as those in the registers of the Australian Qualifications Framework) or authorized to do so under the laws of the relevant countries (such as those in the UK) or by the governments of the relevant countries (such as those in the PRC). Other degrees are considered on a case by case basis. Associate degrees or similar degrees (such as a "foundation degree" in the UK) are not considered as a university degree for this purpose.

Selection procedures

5. If the number of eligible applicants does not exceed the quota for that year, all eligible applicants will be nominated to attend the tailor-made Course and sit for the tailor-made Examination.
6. If the number of eligible applicants exceeds the quota for that year, the point system mentioned in paragraph 3 above will be engaged and applicants will be assigned to one of the following groups:
 - Group A – those having been awarded a total of 4 points;
 - Group B – those having been awarded a total of 3 points;
 - Group C – those having been awarded a total of 2 points;
 - Group D – those having been awarded a total of 1 point;
 - Group E – those having been awarded with no point.
7. Priority for nomination will be given to those in Group A and, if the quota has not been exceeded, then those in Group B and so on. If the number of applicants in a given group exceeds the quota or remaining quota, ballot will be drawn among applicants in that group to determine the successful applicants.
8. A confirmation will be sent to each applicant stating the point(s) having been awarded to him/her. Any points not awarded will be specified in the confirmation with a reason. An applicant can make a request for review within the period specified in the confirmation (such request must be supported by reason(s) and / or further supporting documents and an administrative fee which is refundable in the event of a reversal of decisions upon review). The applicant seeking review will be notified of the result within a stipulated period. The review result is final. Ballot, where required as set out in paragraph 7, will be drawn only after the review result, if any, is released.
9. Full details of the Scheme, including the details of the above-mentioned selection criteria and procedure, will be attached to the application forms for nomination as well as announced in the EAA website.

(Source: Annex of paper provided by Transport and Housing Bureau &EAA (CB(1)343/09-10(02))