

THE REAL ESTATE M&A
AND PRIVATE
EQUITY REVIEW

THIRD EDITION

Editors

Adam Emmerich and Robin Panovka

THE LAWREVIEWS

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POLAND

Izabela Zielińska-Barłózek, Łukasz Szegda, Michał Nowacki, Michał Wons, Maciej Szewczyk, Radosław Wasiak and Marcin Pietkiewicz¹

I OVERVIEW OF THE MARKET

The Polish real estate market continues to grow and, after several years of impressive and steady increase in the value of transactions, has maintained its reputation as the most important real estate market in Central Eastern Europe (CEE). In 2017, the total volume of investment transactions reached a record level of €5.1 billion compared to €4.6 billion a year earlier. This amount comprised 75 transactions covering a total of 150 properties, which also represents an increase on 2016. Thus, Poland maintained its leading position among six countries of the CEE, again accumulating 40 per cent of the market value.² The increase was felt in all segments of the real estate market, particularly the warehouse and hotel segment, for which 2017 was a record year.³ The overall improvement in the economic situation in Poland (increase in wages and the lowest unemployment rate in history - 4.4 per cent) was noted, together with record increases on the housing market.

The first market analyses conducted in 2018 allows us to optimistically view the market of the future. In the first quarter of 2018, the investment market remained in a phase of intense growth, which can be proven by another record in sales volume, most of which (68 per cent) accounted for purchases of large real estate portfolios.⁴

Foreign private equity and institutional investors dominate the Polish real estate M&A market. International investment platforms, strong funds investing social security premiums from Germany or the United Kingdom, as well as US-based private equity funds are, thus far, overly strong competitors for Polish private equity. The lack of legal regulations allowing the creation of REITs does not encourage Polish investors. According to various sources, the share of Polish funds in the investment market ranges from 3 to 11 per cent.⁵ This tendency, however, is reversing, which corresponds to the fact that local investors have managed to accumulate capital in the past decade to enter the market now.

Another significant feature of the Polish real estate M&A market is its growing maturity. In transactions, there is an upward trend of 'earn-out' structures, where the parties share

1 Izabela Zielińska-Barłózek and Łukasz Szegda, Michał Nowacki and Michał Wons are partners, and, Maciej Szewczyk, Radosław Wasiak and Marcin Pietkiewicz are senior associates at Wardyński & Partners.

2 www.colliers.com/pl-pl/poland/research/premium-reports/annual-report-2018.

3 Ibid.

4 <https://www.cbre.pl/pl-pl/raporty/Rynek-Inwestycyjny-w-Polsce-1kw--2018>.

5 *The City*, May 2016, p. 11.

the risk and link the final price of a company to enterprise income at the time of closing.⁶ Similarly, a fall can be seen in the liability level of sellers for a breach of representations and warranties, which is caused, *inter alia*, by market security and predictability.

To sum up, Poland is the first choice for private equity funds interested in investing in CEE.⁷ The country's major assets include not only a highly absorbent domestic market and a fast pace of economic growth, but also a mature real estate market.

Nevertheless, in the near future the real estate market in Poland may have to face threats that may result from an interest rate increase expected in 2019 (limiting the availability of loans), as well as new legal regulations that may affect individual market segments. An example of such regulations is the gradually introduced ban on Sunday trading that may affect the profitability of investments in the commercial real estate. Moreover, active involvement of the State Treasury in investment in the housing sector can be expected in the near future. Involvement of public funds may constitute competition for developers and entities investing in residential real estate for rent.

In 2017, the entire merger and acquisitions market remained in a stable growth phase that has been observed for some time, which experts say should also continue in 2018. Small-value transactions prevailed in the M&A market, with a further increase noted in medium-sized transactions. As in 2016, there were 11 transactions on the market with a value exceeding €100 million in 2017, including four with a value exceeding 1 billion zlotys. The largest market transaction was the sale of Żabka (of grocery store chain) to CVC Capital Partners for 4.3 billion zlotys.⁸

II RECENT MARKET ACTIVITY

Poland still lacks relevant legal regulations allowing entities in the form of REITs to operate on the Polish market, although some initiatives were undertaken, final outcome is still unknown. The year 2017 abounded in numerous real estate transactions in all its segments. The most active investors were CIC (China Investment Corporation), Union Investment, Globalworth, REICO, Invesco, EPP, Pradera, RREEF, Griffin Premium RE and Octava FIZAN.

The largest deal on the warehouse market, finalised at the end of 2017, was the acquisition of the Logicor portfolio by China Investment Corporation from the Blackstone fund. The Polish part of the portfolio was worth €750 million and included 28 warehouse properties with a total area of approx. 925,000m². It was part of a European portfolio worth approx. €12.25 billion.⁹

Investors also continue to be active in this dynamically growing market segment in 2018. Among others, ELP Holdco (Poland) B.V. associated with Apollo Global Management acquired a warehouse centre in Grodzisk Mazowiecki near Warsaw from Panattoni and Marvipol. The estimated value of the recently completed complex with an area of 70,000m² exceeds €41 million. This is Apollo's first investment in Poland in this market segment.¹⁰

6 CMS European M&A Study 2016: www.cms-cmck.com/CMS-European-MA-Study-2016.

7 Private Equity in Poland – Facts and Opinions, report by KPMG: assets.kpmg.com/content/dam/kpmg/pdf/2016/06/pl-raport-kpmg-rynek-private-equity-w--polsce-2016.pdf.

8 <https://fordata.pl/blog/raport-ma-index-poland-2017>.

9 www.savills.pl/_news/article/112850/239122-0/3/2018/savills-zapewnia-wsparcie-chi%C5%84skim-inwestorom.

10 <http://eurobuildcee.com/?page=news&id=33857&link=nowy-inwestor-w-polskich-magazynach>.

Among transactions conducted on the commercial real estate market, attention should be paid to acquisition by Union Investment Real Estate of the Magnolia Shopping Centre in Wrocław from the Blackstone Group. The transaction value is approximately €380 million. The centre's total commercial space is 100,000m². Tenants include 250 stores, cafes, restaurants and service outlets.¹¹ This was the largest transaction on the commercial market for a single property.

The second largest non-portfolio transaction on the commercial real estate market in Poland in 2017 was the acquisition of Galeria Słoneczna in Radom by Reico. The value of this transaction was approximately €160 million.

Another transaction important for the market was the takeover by Echo Polska Properties, which is listed in Johannesburg, of a portfolio of 12 shopping centres operating under the name M1 with a total gross lease area of 446,500m² distributed among 620 stores. Assets being the subject of the transaction are covered by a master lease contract concluded with Metro AG and binding until 2024. In this case, the seller was a consortium with a 25 per cent share represented by Redefine Properties. The transaction value was €692 million. The asset acquisition process has been spread over time and will take place gradually until 2020. This transaction is part of a broader investment strategy pursued by EPP, which after finalising the transaction, will become the owner of 27 shopping centres with a total gross leasable area of almost 1 million square metres.¹²

Other examples of portfolio transactions on the commercial real estate market in Poland in 2017 include: acquisition by Predea of a portfolio of 25 retail parks from IKEA (transaction value – €900 million), purchase of the Fashion House outlet centre portfolio by RREEF and purchase by the PI Property Group of 11 shopping centres located in Poland, the Czech Republic, Romania and Hungary from two funds managed by CBRE Global Investors.

The market in the retail segment is also not losing pace in 2018. In the first two quarters, the Employees' Provident Fund of Malaysia acquired Galeria Katowicka from Meyer Bergman (the transaction value is estimated at approximately €300 million).¹³

In the office market segment, the largest transaction finalised in 2017 was sale of the Proximo I building in the centre of Warsaw by Hines to REICO for approximately €116 million.

The above transaction amount was most probably surpassed in 2018 when Madison International Realty acquired a 50 per cent share in the Warsaw Spire skyscraper (building A), thus becoming a Ghelamco partner in this prestigious investment. The value of the entire 220m building with an area of 64,500m² is estimated at €350 million.¹⁴

In 2018, the acquisition by Griffin Premium Real Estate of three office properties from Echo Polska Properties (West Gate in Wrocław, Tryton Business House in Gdańsk and the A4 Business Park in Katowice) for a total price of approximately €160 million was also finalised.

Among the important M&A transactions worth noting are the takeover of a majority share in Griffin Premium Real Estate by Globalworth (value of approximately €500 million).

Also noticeable is a revival of investments in the hotel sector, which had a record year. In 2017, the value of 11 transactions covering a total of 15 facilities amounted to €340 million.

11 <http://eurobuildcee.com/?page=news&id=29361&link=magnolia-przyzodobi-portfel-union-investment>.

12 www.propertyjournal.pl/najwieksza-transakcja-na-polskim-rynku-nieruchomosci-komercyjnych.

13 <http://eurobuildcee.com/?page=news&id=32777>.

14 <http://eurobuildcee.com/?page=news&id=33333&link=kupili-pol-wiezowca>.

III REAL ESTATE COMPANIES AND FIRMS

i Publicly traded REITs and REOCs – structure and role in the market

Unfortunately, despite market expectations in 2017, regulations governing REITs were not adopted. As well, a previously presented legislative proposal was withdrawn by the Ministry of Finance.

Work is under way on new regulations in this area. However, in relation to original assumptions, the concept of classic REITs, benefiting from tax preferences is to be significantly curtailed. REITs are to be replaced by companies that invest in rentals of real estate (FINN). Such entities are to take the form of joint-stock companies whose sole business will be to invest in residential properties for rent. Both FINNs and their subsidiaries and shareholders are to benefit from tax allowances on revenues to be generated by these investments. The final shape of the new regulations is not yet known. However, this is certainly not what investors were expecting as there is no rationale for limiting the use of such investment vehicles only to the residential sector.

ii Real estate PE firms – footprint and structure

The Polish real estate investment fund market is diffuse, and different-sized players can be found. At the top level are companies such as Griffin Real Estate managing funds with investments in all major Polish cities and having shopping centres, offices and a student hostel chain (Student Depot) in its portfolio, as well as undeveloped properties treated as a 'land bank'. At the other end of the scale are small investors, often individuals, who join forces through special purpose vehicles (SPVs) to acquire undeveloped property and sell it after its development (or redevelopment) and when the space is fully leased. It is worth noting that companies such as Griffin, apart from investing their own resources, also frequently provide management services for assets of global investment funds.

IV TRANSACTIONS

i Legal frameworks and deal structures

Poland is a civil law jurisdiction, and specific regulations that apply to M&A transactions (in general) and M&A real estate transactions (in particular) are stipulated in several legal acts. Although transactions encompassing shares and assets (specifically involving real property) are very broadly codified in Polish law, the Polish market is very much 'internationalised'. This is not only in terms of the parties involved in transactions, but also with respect to legal instruments and structures actually utilised. This internationalisation of the market means that numerous legal institutions commonly recognised in global transactions (whether originating from common law or continental legal systems) have been implemented in Polish transactional practice.

It is worth mentioning the general legal constraints that actually affect parties' flexibility in adjusting contracts to their individual needs and global market standards.

First, as regards transactions directly involving real property, Polish law requires a disposal contract to be concluded in the form of a notarial deed drawn up by a Polish notary public. Accordingly, in the case of share deals involving shareholdings in the most popular company type – the limited liability company – while less formalised, notary involvement, however much more limited, is also necessary.

Second, a disposal of real estate cannot be on a conditional basis (see below concerning acquisition agreements terms).

Third, in asset deals as well as share deals (where properties are only indirectly involved), certain legal constraints affect the transferability of a transaction object depending on, for example, the identity of a prospective buyer¹⁵ and the market effect of a transaction (including any competition aspects).

One essential issue that distinguishes the two transaction types is the scope of legal protection provided to the buyer by law. In asset deals, an acquirer of real estate, as part of an enterprise or organised part of an enterprise, enjoys protection of the warranty of public reliance on the land and mortgage register. This principle means (subject to certain limitations) that if there is a discrepancy between the legal status of real estate disclosed in a land and mortgage register and its actual legal status, the content of the land and mortgage register will decide in favour of a party that acquired ownership or another right to the property in a transaction with the party or entity disclosed in a land and mortgage register as the rightful holder. In other words, even if the seller was not the owner of the real property, but was entered in the land and mortgage register as its owner at the time of the transfer and there were no other entries or annotations in the register entries that could raise doubts about the purchaser, the acquisition will be valid. This naturally does not mean that buyer prudence at the pre-transactional stage should be limited, and verification of technical parameters should still be regarded as indispensable. However, with regard to the very essence of a transaction – that is, effective acquisition of the proper legal title to real estate – it functions as a far-reaching protective measure.

As for direct real estate acquisitions, a significant restriction must be considered, namely the statutory right of pre-emption with respect to real estate under which certain public entities are provided a right of priority to acquire real estate. If a statutory pre-emption right exists, it is necessary for the parties to first conclude an agreement promising to sell the property on the condition that the holder of a pre-emption right does not exercise the right.

In share deals and generally in transactions involving the merger, division or transformation of companies, an acquisition of real estate will not be protected by the warranty of public reliance on the land and mortgage register. This is because the subject of a transaction is the shares in a company, and not its assets, including real estate. In the case of a merger, division or transformation of companies, the warranty of reliance does not function, because the transaction involves the acquisition of assets as an entirety of rights through universal succession. Therefore, in such transactions, due diligence should include an assessment of the correctness of the real estate acquisition.

On the other hand, restrictions arising from the statutory right of pre-emption discussed above will not, in general, apply in such transactions with one exemption when a company being the subject of a transaction owns agricultural properties.

Finally, since real estate transactions often do not relate to land alone, but often to certain projects designed or contemplated for a given property or partially performed event, it is worth noting a practical and remarkable difference between share and asset deals. In the case of share deals, a buyer practically steps into the shoes of the seller, with the acquired company not only holding the real estate in question but also all applicable administrative decisions concerning real estate development and construction (e.g., a decision on construction terms

15 For example, nationality or country of registered office and, pursuant to a new recent law, occupation, with regard to agricultural land.

or a building permit). On the contrary, in asset deals, a buyer only purchases property and the rights and decisions that are directly attributable to the property. All other rights and decisions must be separately transferred to the buyer or otherwise be reobtained.

ii Acquisition agreement terms

As already outlined, a transfer of title to real estate under Polish law cannot be conditional, and accordingly all prerequisites, conditions precedent and the like must be met by the time of the conclusion of a final contract that effectively transfers legal title to real estate. However, this does not preclude parties' right to structure relevant deals in a manner assuring that any applicable conditions to a successful transaction or other covenants are, in fact, fulfilled at the time of title transfer.

In the Polish legal framework, such conditions encompass not only purely business matters (such as furnishing a property in an agreed-upon manner) or acquiring any necessary contractors' consents (e.g., for a transfer of contracts related to the property, which is of specific importance if the property is a shopping or office centre), but specifically all relevant administrative consents and approvals. The latter group particularly relates to the receipt of a merger clearance (if a transaction itself affects or may affect competition) and acquisition permits for the acquisition of real property by foreigners within the meaning of a relevant Polish law. Such investors (deemed foreigners), as a rule, must obtain an acquisition permit issued by the Ministry of Internal Affairs and Administration. There are numerous exceptions to this rule, in particular for foreigners from the EEA or Switzerland. However, if a permit must be obtained, it affects the structure of a transaction, as the transfer of a title to real property without a permit is invalid. Usually, the parties conclude a preliminary conditional sale agreement in which a condition precedent for closing is the receipt of an acquisition permit.

There are also specific far-reaching restrictions related to the sale of agricultural land. Generally, since 30 April 2016, only an individual farmer can purchase agricultural land barring the exceptions set out in the relevant law. The agricultural property market is also protected in the case of a sale of shares in a company being an owner or perpetual usufructuary of agricultural property – in such cases, a state agency has a statutory pre-emption right to the shares. These regulations apply to agricultural properties exceeding an area of 0.3 hectares.

The aforesaid legal constraints pertaining to the conditional transfer of real property practically mean that as long as parties to a contract wish to make it conditional on something, they must divide a transaction into two parts. First, a preliminary or obliging contract is signed. Each of the two legal types of such contracts, although having different practical consequences, generally creates the parties' firm obligation to finalise a transaction by signing, respectively, a final or transfer contract once relevant conditions are met.

Although Polish law includes a rather complex regulation regarding seller liability and the corresponding rights of a buyer, these matters are always an issue of the utmost importance when negotiating contracts. Polish law contracts – specifically contracts concluded between entrepreneurs (who by nature usually are parties to real estate transactions that are of interest for this publication) – may stipulate certain deviations from statutory terms. Such deviations mainly refer to the issue of seller liability, its scope and the time within which a buyer may raise claims under a contract. Therefore, it is common market practice to exclude the application of a statutory warranty in full or in part, and to contractually agree on the liability mechanics applicable to the transaction parties. Such contractual structuring of liability usually signifies its limitation; for example, to circumstances covered by relevant

representations and warranties or specific indemnities, and with an exclusion of respectively disclosed matters. Furthermore, transactional contracts usually provide for liability thresholds and limit the time during which the parties may effectively raise claims under contracts. It is worth noting that while contractual freedom in the discussed area is quite extensive, it is anyhow subject to certain limitations that generally encompass fraudulent actions or other forms of wilful misconduct that cannot serve to exclude or limit a given party's (usually the seller's) liability.

iii Hostile transactions

The Polish capital market does not provide many examples of companies listed on the Warsaw Stock Exchange that have fallen victim to a successful hostile takeover. It is also difficult to indicate any hostile takeover transactions with regard to real estate companies.

The specific situation in the real estate transactions market means that experts do not perceive it as being particularly exposed in terms of hostile takeovers. It is possible that more investors will seek opportunities for such acquisitions in Poland in coming years because of improved prospects and higher profit margins than those found in western Europe or the United States, but this will most probably affect other businesses (e.g., natural resources mining, pharmaceutical or IT sectors) where it is easier to underestimate the price of shares than in a publicly traded real estate companies. It should also be borne in mind that there have been just a few attempted hostile takeovers in Poland so far, and that the majority of them were unsuccessful.

Hostile takeovers of listed companies fall within the general rules relating to acquisitions of companies listed on the stock exchange in Poland, which implement the EU Takeovers Directive.¹⁶

A very important aspect of hostile takeovers is the measures made available to the management board in a takeover attempt, as well as ways to protect a company against such takeovers. In Polish legal reality, preventive defence measures come to the fore and are quite commonly used by Polish listed companies. They are designed to deter a purchaser from attempting to acquire control by making a company less attractive legally or economically, or by significantly impeding or preventing its takeover against the will of the management board. These measures stem from the organisational structure of a company formed in statutes by its shareholders. Most are introduced well in advance, even at the stage where a company is only planning its initial public offering. Most popular among these measures are restrictions on disposals of shares, the introduction of voting preference shares, restrictions on voting rights on a specific holding (e.g., 10 per cent) and rights personally granted to a shareholder to, for example, appoint management or supervisory board members.

Polish legislation does not provide for an automatic exclusion or limitation of the effectiveness of preventive measures to defend against takeovers (i.e., the breakthrough principle) and does not restrict defensive actions that may be taken by a management board in the face of an attempted hostile takeover (i.e., the neutrality principle) by putting these decisions into the hands of shareholders. That said, companies themselves may introduce such principles by including relevant provisions in their statutes and making the management board responsible for compliance towards shareholders. However, companies very rarely decide to adopt these solutions in their statutes.

16 2004/25/EC.

The lack of automatic application of the breakthrough principle causes a situation where the means of defence provided in company statutes may, in practice, prevent the takeover of a listed company. This is particularly important for those shareholders whose holding of approximately 30 per cent of share capital secures *de facto* control over a company through relevant statutory provisions.

iv Financing considerations

Typical sources of financing for real estate transactions in Poland, in addition to sponsor equity, include bank loans, non-banking financing, leasing and bond issuance. Regulatory pressure on banks limit their appetite for more risky assets, thus giving room for alternative sources of financing in this segment. Asset class and investor reputation on the market are key factors for credit committees.

A larger volume of acquisitions are financed or co-financed by international funds (for instance, Globalworth's acquisition of a majority stake in Griffin Premium Real Estate – the largest CEE private equity investment manager and Globalworth Poland RE's subsequent acquisitions on the Polish market, or the acquisition by Madison International Realty of a stake in Warsaw Spire, Central Europe's tallest office tower, only to name a few).

Mezzanine and other junior debt financing sources are also increasingly popular on the market.

A number of real estate companies benefit from the status of a listed company to collect funds on the public market. The introduction of a REIT regime in Poland was expected to create a new promising source of financing in the future, although discussions on a draft law introducing REITs are extensively prolonged and a new proposal to exclude commercial properties from the REIT regime is a radical departure from initial legislative proposals.

As for traditional bank lending, this source of funding is very easily accessible in high volumes, mostly owing to low borrowing costs and solid fundamentals. According to Cushman & Wakefield, the level of bank financing for properties in Poland is stable, averaging approximately 60 per cent of each property's value. In addition to Polish general and mortgage banks, foreign banks are also very active on the Polish market, especially German and Austrian ones. This is particularly visible in the investment loan segment.

There is a broad selection of banks competing against each other in the cost-of-financing, available leverage and tenor, and other specific conditions (e.g., the required pre-let level or scope of required sponsor support). Bank financing is widely available not only in the Polish currency, but also in foreign currencies (in particular, the euro).

Banks are also extending the range of assets they are willing to finance. In addition to core segments such as office, retail and industrial, alternative investments, including hotels, apartments for rent, student housing or nursing operators, are increasingly popular.

Bonds may be issued either as listed securities or within a private offer. The advantage of bond financing is that it is very often covenant-loose and is less frequently secured with underlying assets.

As regards cross-border financing, its structuring is heavily affected by tax considerations.

On the documentation side, the Loan Market Association form of finance documents (adjusted to Polish law) is commonly used by Polish banks. Banking documentation is typically very detailed in listing various types of covenants, including financial, general and information covenants.

As for collateral, banks typically require a mortgage on real estate, security assignment of receivables under lease agreements, insurance policies and, in the case of projects at

a development stage, also through key project agreements (such as contracts with a general contractor and architect) as well as a pledge of shares or other equivalent rights of a borrower. All bank accounts are pledged for the benefit of the lender, and all equity injected into a project is subordinated. To secure continuity of debt service in the case of incidental problems with debt service, security deposits are often required.

Although a mortgage in Poland is effective only upon its registration (which may take several weeks to several months, depending on the court), it is a market standard that banks accept only a filing for such registration as a sufficient condition precedent for utilisation of a loan without a need to wait.

The financing structure and typical timetable may differ depending on whether a financed transaction is a share or asset deal. In the case of an asset deal, because of the noted prohibition on conditionality of real estate acquisition transactions, escrow accounts are often set up to secure the safe transfer of the purchase price. Funds are released from the escrow once the property is transferred and a mortgage is established for the benefit of the lenders financing a transaction.

v Tax considerations

Among the different transaction structures outlined above, asset deals have prevailed in practice in the case of real estate transactions, mainly for tax reasons. Currently, we see more and more share deals concerning real estate companies for various reasons, including tax considerations.

As regards income tax, in the case of an asset deal a step-up of the tax value of real estate can be achieved. From the seller's perspective, income tax of 19 per cent applies (in the case of small taxpayers, a 15 per cent income tax may apply).

As for transactional taxes, in the case of an asset deal the parties usually opt for VAT taxation. In such cases, VAT is paid by the seller and is recovered by the buyer. Opting for VAT taxation excludes a transaction from 2 per cent transfer tax (civil law transaction tax), which is less favourable because it constitutes an additional transaction cost for the buyer. Opting for VAT taxation is also often important to the seller because it does not raise the issue of correction of input VAT deductions made by the seller when buying or developing real estate. An asset deal is beyond the scope of VAT and is subject to transfer tax (2 per cent for real estate) if the object of a transaction is classified as a going concern. On occasion, tax authorities tend to claim that in the case of a commercial real estate transaction (e.g., shopping centre, office building already leased to tenants), it is more proper to classify the transaction object as a going concern.

In the case of share deals, a capital gains tax of 19 per cent applies, unless the seller is protected by a double taxation treaty without a real estate clause (a clause under which capital gains from a disposal of shares in real estate companies can be taxed in Poland).

As a rule, a share deal is not subject to VAT, but instead to transfer tax of 1 per cent due from the buyer (a transfer tax exemption can apply if a company has the form of a joint stock company).

To manage tax risks related to a transaction (e.g., the right to opt for VAT or the classification of a transaction object as not constituting a going concern), each party can apply for a tax ruling or both parties can file a joint application for a tax ruling (recommended option).

On 15 July 2016, a general anti-avoidance rule was introduced into the Polish tax system: this should be taken into account when tax structuring a real estate transaction.

In 2018, a minimum income tax for taxpayers with commercial property (including shopping malls and office buildings) was introduced. It applies to companies owning real estate with a value exceeding 10 million zlotys. The tax rate is set at 0.035 per cent per month of the initial tax book value of real estate (above 10 million zlotys). Minimum income tax can be credited toward 'regular' income tax. The scope of this minimum income tax will change in 2019. Under new rules, minimum tax will apply to all taxpayers holding real estate that is used, wholly or partially, to generate revenue from lease or similar activities (including housing properties). The tax rate and tax base will be the same, however, in the case of related companies, the tax-free amount (10 million zlotys) will have to be shared between these companies.

The government is still working on the concept of a Polish REIT. Under a very recent concept, a REIT would provide tax incentives only for investment in housing properties. Given how this concept has changed in recent years, the final outcome is difficult to predict.

vi Cross-border complications and solutions

Transactions between European real estate investment funds increasingly comprise multi-jurisdictional acquisitions of entire portfolios scattered across several countries.

If such a deal is based on an 'all or nothing' arrangement, it is sometimes very difficult to coordinate the timing of simultaneous transfers of title of all real property. If there are conditions precedent for closing, it is not possible in some jurisdictions (including Poland) to transfer ownership or perpetual usufruct (a proprietary right close to ownership) to a property on this condition, thus another notarial deed transferring title will have to be drawn up upon fulfilment of the final condition. Such transactions are, therefore, structured with rights to withdraw from a contract to enable a party step back from a deal in some jurisdictions if there is a deal breaker in another jurisdiction. Such a mechanism requires complex unwinding procedures and strict discipline between the parties and other involved entities (legal advisers, notaries public and financing institutions). Another instrument that can make such a transaction easier to coordinate is a master agreement providing a substantial mechanism for the sequence of events and general payment terms applicable to all jurisdictions, while all individual purchase agreements in a form specific for a transfer of real property in each jurisdiction are complementary and are governed by the master agreement to the extent possible under the relevant jurisdiction.

If the acquiring party is deemed a foreigner within the meaning of a relevant law and does not originate from the EEA or Switzerland, the transaction must then include a two-step agreement in which the purchaser will have to obtain an acquisition permit from the state authorities during the period between signing and closing (conclusion of a final sale agreement). As a rule, the acquisition permits must first be obtained even if the purchaser is a company founded under Polish law but is controlled by a foreigner (within the meaning of the relevant law), or if a foreigner intends to purchase a Polish company holding title to real estate and, as a result of the acquisition of shares, the company becomes controlled by a foreigner.

V CORPORATE REAL ESTATE

In terms of the corporate structure of real estate investment funds investing in Poland (funds purchasing already developed office, retail or warehouse premises), there is usually an SPV for

each property or at least for each location. Such an approach facilitates the management of projects, distribution of cash flow, control of costs and liquidation of an SPV once a property is again sold on the market.

An 'opco/propco' structure is also used in a holding structure, albeit not exactly for the purpose of REIT spin-offs, but rather for having a clear division of know-how and management services within a group and allocation of assets to specific property companies, apart from cost optimisation.

VI OUTLOOK

The forecast for the Polish market in the near future remains optimistic. The same economic factors will stimulate growth and strengthen its position in the CEE region: the low cost of credit, higher return rates than in western Europe, a stable and mature market, uninterrupted GDP growth and the development of transport infrastructure. Most investment funds will likely focus more in the next few years on properties in regional cities (Krakow, Lodz, Poznan and Wroclaw, as well as the Tri-city area or even cities in the eastern part of Poland such as Lublin or Rzeszow). The Polish market follows global or European tendencies where the volume of real estate transactions increases. A specific segment of the market that will be of special interest in the near future is logistic and warehouse properties, as a result of recent legal regulations significantly hindering trade in agricultural land as well as high demand for warehouses (owing to the dynamic growth of e-commerce). In fact, the highest yields in 2017 were noted in logistic and warehouse properties. As a consequence, the value of non-agricultural land within municipal boundaries should increase.

The introduction of REITs is still postponed for the future. However, when it finally takes place it will change the manner of fund activity in Poland and will no doubt be the most significant anticipated change in legal instruments encouraging investment in real estate. Recent years have been dominated by European (in particular, German) funds. Now, there is an increasing presence of capital from more distant countries such as the United States, South Africa and Arab oil-financed economies. It is also possible that after Brexit, some funds concentrated until now in the saturated but very stable UK market will turn their eyes to Poland and other countries in the region.

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